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)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

January 30, 2019

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, we would like to thank you for agreeing to serve on the Panel in this proceeding. We also would like to thank the Secretariat staff for the hard work they are doing to support the Panel.

2. The Dispute Settlement Body ("DSB") recommendations in this dispute did not result from findings concerning the ultimate question of whether India was engaging in subsidization in its steel industry, thereby causing widespread harm to U.S. businesses and workers. Rather, the DSB adopted panel and Appellate Body reports finding that the U.S. Department of Commerce ("USDOC") and U.S. International Trade Commission ("USITC") had not adequately explained their determinations in certain respects.

3. Accordingly, to implement the DSB's recommendation, the USDOC and the USITC conducted proceedings pursuant to section 129 of the *Uruguay Round Agreements Act*. Based on their analysis of the evidence and arguments on the records of the section 129 proceedings, as well as information from the original proceedings, the USDOC made and published revised determinations. India's arguments that the United States has not brought its measures into compliance do not reflect the actual contents of the revised determinations, the obligations set out in the text of the SCM Agreement, or the DSB recommendations in this dispute. India is in error. These new determinations contain detailed analyses with respect to the findings addressed by the DSB that bring the United States into compliance with its WTO obligations.

4. Proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") are meant to address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. A panel composed under Article 21.5 of the DSU,

therefore, begins with the reports adopted by the DSB to understand what it is the responding party has to bring into compliance and what were the findings of the DSB on the matter examined.

5. In this dispute, the United States has carefully reviewed the DSB recommendations and the findings in the panel and Appellate Body reports; has proceeded with compliance proceedings that were fully transparent and consistent with all domestic and WTO procedural rules; and has brought its measures into compliance. As detailed in our submissions, *seven of the fourteen claims* listed in paragraph 9 of India's panel request fall squarely outside the scope of this compliance proceeding. These claims amount to improper attempts to raise issues that India either failed to raise, or raised unsuccessfully, in the original proceeding. India's attempts to expand this compliance proceeding beyond the measures that were taken to comply is particularly unfortunate given the number and scope of disputes that at the present time are putting serious stress on the WTO dispute settlement system.

6. As the United States has explained in its submissions, the following claims made by India are outside the scope of these compliance proceedings:

- Article 14(b): India cannot challenge the USDOC's calculation of benefit conferred by the SDF program because the DSB did not make a finding of inconsistency, and thus there were no recommendations by the DSB for the USDOC to implement.[1]
- Articles 21.1 and 21.2: India cannot raise claims against the new subsidy programs from the 2004, 2006, 2007, and 2008 administrative reviews alleging that the USDOC failed to establish a sufficient link or nexus because these aspects of the USDOC's determination were

[1] United States' First Written Submission, para. 325.

not found to be WTO-inconsistent in the original proceedings, and remain unchanged.[2] In the original proceeding, India failed to make out its claims that the USDOC acted inconsistently with Articles 21.1 and 21.2, and it cannot relitigate these claims in this compliance proceeding.

- Article 2.1(c): India cannot claim that the USDOC failed to *identify* the relevant subsidy program for the sale of high grade iron ore by the NMDC because it was not found to be WTO-inconsistent in the original proceedings and this aspect of the USDOC's determination is unchanged. India could have pursued this claim during the original proceedings, but opted not to do so.
- Article 14(d): In the original proceedings, India made claims concerning certain *changes* that the USDOC made to the Australia prices in the Tex Report to reflect an "as delivered" price.[3] The Appellate Body found that this aspect of USDOC's determination was inconsistent,[4] and the USDOC remedied this deficiency in its Section 129 Determination.[5] Notably, India has not challenged that portion of the determination in this compliance proceeding. Rather, India now claims that the mere fact that USDOC used the Australian prices in the Tex Report as the benchmarking source is inconsistent with Article 14(d).[6] However, this aspect of the USDOC's determination remains unchanged, and India did not challenge it in the original

[2] United States' First Written Submission, para. 335 (citing *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210).
[3] *US – Carbon Steel (India) (Panel)*, paras. 7.172-7.174.
[4] *US – Carbon Steel (India) (AB)*, para. 4.317.
[5] Section 129 Other Issues Preliminary Determination, pp. 14-15 (Exhibit IND-55); Section 129 Final Determination, pp. 3-6 (Exhibit IND-60).
[6] India's Second Written Submission, para. 143.

proceeding. Therefore, India cannot now claim in this compliance proceeding that the Australian prices relied upon by the USDOC are inconsistent with Article 14(d).

- Article 15.2: India cannot challenge the data and methodology used by the USITC for its price effects analysis,[7] or the USITC's decision not to rely on the results of the COMPAS model,[8] because the relevant methodologies and factual findings are unchanged from the original determination and were not challenged by India in the original proceedings.
- Article 15.4: India cannot pursue any of its claims under Article 15.4 because the facts and findings relevant to those claims did not change in the Section 129 determination. India had an opportunity to challenge those findings in the original proceedings, but chose not to.
- Article 15.5: India cannot challenge the USITC's consideration of factory closures in its non-attribution analysis because the facts pertaining to those closures and relevant Commission findings concerning the closures were not challenged by India in the original proceedings and are unchanged from the original determination.

7. With respect to the claims properly before this compliance Panel, the U.S. first and second written submissions respond in detail to India's arguments, and demonstrate that the United States has brought its measures into conformity with the SCM Agreement. This morning, we would like to highlight certain key issues that are critical to the Panel's resolution of this dispute.

8. Specifically, we will address India's challenges related to: 1) the U.S. statute concerning cumulation, 2) injury, 3) public body, 4) benchmarks, 5) *de facto* specificity, and 6) Article 19.3.

[7] India's First Written Submission, paras. 40-42.
[8] India's First Written Submission, paras. 45-48.

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

9. Contrary to India's claims, the United States was not required to revoke or amend 19 U.S.C. § 1677(7)(G)(i)(III) (what we will refer to as "Subpart III") in order to implement the DSB recommendation in this dispute. This is so for at least three reasons. First, the Appellate Body "finding" in respect of Subpart III was not a case that India put forward, and therefore could not form the basis for a valid finding or DSB recommendation. Second, Subpart III does not require the United States to take WTO-inconsistent action, and consequently there is no measure that the United States must undertake in order to implement the DSB recommendation.

10. And third, despite all this, the United States did take action. Through a letter exchange in June of 2016, the United States confirmed its commitment to exercise its discretion concerning when to self-initiate an investigation in a manner so as not to lead to results that are inconsistent with U.S. WTO obligations. The fact that the United States has confirmed its intention not to take such action, both through this letter exchange and its statements at the DSB, only reinforces that the USDOC has the authority to decide when and whether to self-initiate an investigation – and accordingly, when and whether Subpart III will ever be triggered.

11. No further action by the United States is necessary, because Subpart III does not require the United States to take WTO-inconsistent action and therefore cannot be considered WTO-inconsistent "as such." Rather, the statute's conditions will only be triggered if the USDOC *exercises its discretion* to *self*-initiate a countervailing duty investigation on the same day a petitioner files an anti-dumping petition, or vice versa. 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.

12. A WTO-inconsistency could arise only if the USDOC chose to act in a WTO-inconsistent manner in exercising its authority under the statute in a particular proceeding. As just indicated, the USDOC has confirmed its commitment not to do so. In fact, the USDOC has never taken action to self-initiate an investigation such that Subpart III was triggered – not in the underlying investigation or in *any* investigation.

13. Had the Appellate Body correctly interpreted Subpart III, the Appellate Body by necessity would have needed to account for the investigating authority's discretion to decide if, and more importantly, *when* to self-initiate. This Panel should not make the same mistake. Under Article 11 of the DSU, this Panel should make an objective assessment of the matter before it, including those factual findings necessary to evaluate whether the U.S. statute requires the United States to take any action that would necessarily be action inconsistent with the SCM Agreement.

14. The Panel is not compelled to apply the reasoning of the Appellate Body in reviewing India's claim regarding Subpart III, because the Appellate Body's findings do not constitute a valid basis for a DSB recommendation. Article 17.6 states that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." India did not raise any claim or arguments before the original panel pertaining to Subpart III, and the original panel accordingly did not address this specific provision at all in its report. The original panel's analysis was limited to the general assertion that "Section 1677(7)(G) requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped,

non-subsidized imports."[9] The panel did not make any substantive findings as to what each subpart of the statute "requires" or in which "certain situations."

15. In response to the United States' appeal under Article 11, India discussed Subparts I and II of Section 1677(7)(G)(i), but again made no arguments or references to Subpart III.[10] Therefore, without any evidence or argumentation having been raised by either party, the Appellate Body unexpectedly and erroneously made a finding that this third, unraised subpart requires cross-cumulation "as such."

16. The Appellate Body did so despite having no evidence or argumentation from the parties regarding the meaning of Subpart III or the U.S. laws cited in that provision, Sections 1671a(b) or 1673a(b), which refer to investigations initiated by the investigating authority. Instead, the Appellate Body made its own factual findings with respect to the meaning of the U.S. law based on its reading of the text only.

17. This "finding" by the Appellate Body cannot form a valid basis for a DSB recommendation. The Panel should consider: if the Panel had made a finding as to the meaning of Subpart III, and then made a finding of WTO-inconsistency, all without India having brought forward any evidence or arguments to support that claim, the Appellate Body would not hesitate to reverse such a conclusion.[11] This is because it is not for an adjudicator to make out a case for

[9] *US – Carbon Steel (India) (Panel)*, para. 7.340.
[10] *See* India's Appellee Submission, para. 70.
[11] As has been found by the Appellate Body in previous reports, "[a] *prima facie* case must be based on evidence *and* legal argument *put forward by the complaining party* in relation to *each* of the elements of the claim." *US – Gambling (AB)*, para. 140.

a party (complaining or responding).[12] And in this very dispute, the Appellate Body did reverse the Panel's finding on the statute on essentially these grounds.

18. But the Appellate Body has no more authority under the DSU to make out a case for a WTO Member than a panel does. In fact, had the Appellate Body respected its role as a reviewer of *legal* conclusions,[13] as opposed to the Panel's role as trier of fact *and* law, then the Appellate Body would not have made factual findings on the meaning and operation of Subpart III, and its inquiry would have ended there. As a result, no DSB recommendation could follow from the alleged "finding" by the Appellate Body that overstepped its role under the DSU.

19. As we have explained, the consequences of it having done so are apparent: the Appellate Body failed to understand that Subpart III can be triggered only where the USDOC exercises its discretion to self-initiate an investigation on a particular day, and therefore erroneously found this provision to be inconsistent with the United States' obligations under the SCM Agreement. These findings having been made without authority under Article 17.6 of the DSU, this Panel must find, consistent with its function under Article 11, that Subpart III of the U.S. statute is not inconsistent with the SCM Agreement, and that therefore no action is necessary to bring the United States into compliance with its obligations.

II. THE USITC'S SECTION 129 DETERMINATION IS CONSISTENT WITH U.S. WTO OBLIGATIONS

20. With respect to USITC's section 129 determination, many of India's injury claims are based on a selective and incomplete reading of the USITC's Section 129 Determination, which

[12] Where a party has failed to set forth arguments in its submissions before a panel sufficient to substantiate its claims, it would be an error for a panel to make the party's case for it. *EC – Fasteners (China) (AB)*, para. 566; *US – Continued Zeroing (AB)*, para. 343; *Japan – Agricultural Products II (AB)*, para. 129.

[13] DSU Article 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").

provides a detailed analysis of the conditions of competition relevant to the hot-rolled steel market. This all underscores a central error in India's claims related to injury: a lack of recognition that this compliance Panel is not tasked with conducting a *de novo* evidentiary review, but rather that the Panel must consider whether the conclusions reached by the investigating authority are reasoned and adequate in light of the record evidence. As the panel in *US – Coated Paper* noted, "[i]f the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."[14]

21. India fails to make a *prima facie* case that USITC's underselling analysis is inconsistent with Articles 15.1 and 15.2 of the SCM Agreement. The USITC objectively found, based on positive evidence, that underselling by subject subsidized imports was significant. The USITC relied on positive evidence in the form of direct quarterly price comparison data for specific representative categories of hot-rolled steel products, based on sales at similar levels of trade. In light of the USITC's findings regarding the importance of price for purchasing and inventory decisions and the interchangeability of hot-rolled steel products, the USITC found that price underselling provided the impetus for the significant growth in the volumes, market share, and inventories of subsidized imports in 1999 and 2000. This explained the restrained price increases for the domestic like product in late 1999 and early 2000, followed by price decreases for the domestic like product in late 2000 and 2001 during a period of substantial end-of-year inventories of subsidized imports.[15] The USITC showed that low priced subject import prices

[14] *US – Coated Paper (Indonesia)*, para. 7.4.
[15] United States First Written Submission, paras. 99-126; USITC Section 129 Consistency Determination, pp. 23-25 (Exhibit IND-58).

have "explanatory force" for changes in domestic prices and support the USITC's findings of significant underselling and price effects. India fails to meaningfully address or challenge these arguments.

22. India fails to demonstrate that USITC's non-attribution analysis is inconsistent with Articles 15.1 and 15.5 of the SCM Agreement. Article 15.5 requires investigating authorities to "examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports[,]" and lists factors that could be relevant. Notably, Article 15.5 does not require authorities to use any particular methodology to examine other known causal factors, and ensure that any injurious effects caused by those factors are not attributed to the dumped or subsidized imports.

23. India asserts that the USITC failed to take into account three injury-causing factors other than subsidized imports, but those arguments are meritless. First, the USITC fully examined *demand trends* and explained why they could not explain the injury caused by subsidized imports, given that the domestic industry indicators during the relevant period did not correspond with declines in demand. Second, the USITC closely examined *nonsubject imports* and found that while they had a significant presence in the U.S. market during the relevant period, their import volume and market share had declined substantially, even while the volume and market share of subsidized imports increased. The USITC further found that nonsubject imports were priced higher than subject, subsidized imports in over half of the 453 quarterly price comparisons.[16] Additionally, the USITC explained why nonsubject, dumped imports from

[16] USITC Section 129 Consistency Determination, p. 32 (Exhibit IND-58).

Brazil, Japan, and Russia were not injuring the domestic industry at the same time as the subject subsidized imports. Third, and contrary to India's assertion, evidence of *plant closures* did not undermine the USITC's determination. Plant closures were not an other "known" factor, because no party raised the issue during the administrative proceedings, and accordingly they did not necessitate an examination under Article 15.5.

24. Further, the USITC did not find, nor did any party suggest, that plant closures were injurious to the domestic industry. Rather, India suggested that factory closures may have precipitated a decline in the domestic industry's productivity that caused injury, an issue that the USITC addressed by explaining why it was factually incorrect: the domestic industry's productivity *increased* overall during the period.[17]

25. For all of these reasons, the USITC's Section 129 Determination sets out a reasoned and adequate explanation, supported by positive record evidence, such that an objective and unbiased investigating authority could have reached. The Panel should accordingly reject India's claims that the USITC's injury determination was inconsistent with Article 15.5 of the SCM Agreement.

III. INDIA'S CLAIMS AGAINST THE USDOC'S PUBLIC BODY DETERMINATION LACK MERIT

26. India's claim under Article 1.1(a)(1) of the SCM Agreement must fail because it is based on an improper understanding of the term "public body," and because India has failed to establish that the USDOC's public body determination concerning the National Minerals Development Corporation (NMDC) was not supported by the record evidence. In addition, India

[17] USITC Section 129 Consistency Determination, pp. 27-28 (Exhibit IND-58) & 2001 USITC Determination at III-1 n.1 (Exhibit IND-6) (noting closures only to explain why some domestic producers had not provided responses to Commission questionnaires).

has failed to demonstrate that the USDOC had an obligation under Article 12.1 to seek out additional information regarding the status of the NMDC as a miniratna company.

27. Consistent with the Appellate Body's findings in this dispute, in the Section 129 Determination, the USDOC evaluated "the relationship between the NMDC and the GOI within the Indian legal order, and the extent to which the GOI in fact 'exercised' meaningful control over the NMDC and over its conduct." Based on the totality of the evidence before it, the USDOC found the NMDC to be a public body.[18] This evidence was substantial, and included: (1) the GOI's majority ownership of the NMDC; (2) the GOI's power to appoint or nominate the NMDC's directors;[19] (3) the NMDC's website indicating that the company was "established as a fully owned [GOI] Corporation . . . under the administrative control of the Ministry of Steel & Mines, Department of Steel, [and] [GOI];"[20] (4) the NMDC's status as a strategic company, which was monitored and reviewed by the government;[21] (5) the GOI's involvement in the NMDC's day-to-day operations; and (6) the GOI's export restrictions and control over the supply and demand of high grade iron ore sold by the NMDC.[22]

28. In its second written submission, India states 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."[23] However, the ***realm*** in which an entity operates is not, and should not be, the focus of a public body inquiry.[24] Nor does Article 1.1(a)(1) suggest

[18] United States' First Written Submission, paras. 168-176. S*ee also US – Carbon Steel (India) (AB)*, paras. 4.52, 4.54.
[19] United States' First Written Submission, para. 168
[20] United States' First Written Submission, para. 168.
[21] United States' First Written Submission, para. 173.
[22] United States' First Written Submission, para. 175.
[23] India's Second Written Submission, para. 90.
[24] United States' Second Written Submission, paras. 89-94.

that the existence of commercial behavior would be conclusive as to whether a government exercises meaningful control over an entity and its conduct. Indeed, it is not the case that a government, or a government-controlled entity, cannot act in a commercial manner or operate in the private realm. 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."[25]

29. Instead, based on a proper interpretation of Article 1.1(a)(1), a public body inquiry focuses on the entity itself. This logic also accords with the Appellate Body's approach, which places emphasis on the "core features of *the entity* concerned, and *its* relationship with the government in the narrow sense".[26] This approach makes sense, given that government intervention in the private realm is precisely what the SCM Agreement seeks to discipline. Therefore, rather than shielding the NMDC from these disciplines, India's view of the NMDC is consistent with the USDOC's view, and is the reason why the NMDC can and should be considered a public body under Article 1.1(a)(1) – because it involves, in India's own words, "*the government operating* in the private realm". [27]

30. With respect to India's arguments that the USDOC's review of evidence related to the NMDC's miniratna status failed to comport with the DSB's recommendations and rulings, a closer look at the Appellate Body report reveals otherwise. The Appellate Body found that the USDOC did not discuss in its determinations evidence on record regarding the NMDC's status as

[25] *Korea – Commercial Vessels (Panel)*, para. 7.48.
[26] *US – Carbon Steel (India) (AB)*, para. 4.24 (emphasis added). *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 317, 345.
[27] India's Second Written Submission, para. 90 (italics added).

a Miniratna or Navratna company that could have been relevant to the question of whether the USDOC's determinations contained a sufficient and adequate evaluation of the relationship between the GOI and the NMDC.[28] As discussed in the U.S. submissions,[29] the USDOC reviewed the information on the record and determined that the existing record evidence concerning the NMDC's *miniratna* status demonstrated sufficiently that the GOI exercised meaningful control over the NMDC. Specifically, the record evidence contained the NMDC website, which stated that the NMDC was accorded the status of a "Public Sector Company by the GOI 'Mini Ratna' in 'A' category in its categorization of Public Enterprises."[30] The same website also explicitly stated that the NMDC was under the administrative control of the GOI.[31]

31. Therefore, India's complaint is not really that the USDOC did not adequately react to the DSB recommendation related to these findings of the Appellate Body. Rather, India's complaint is that the USDOC did not reconduct its investigation altogether, accepting whatever new evidence and argumentation the GOI or other interested parties chose to submit. This is not what the DSU requires, however. Rather, the USDOC's task was to re-evaluate the record evidence in light of the Appellate Body's findings. It did so.

32. Similarly, the USDOC was not under an obligation to seek additional information concerning the NMDC's *miniratna* status in the context of the Section 129 proceeding. The text of Article 12.1 does not require an investigating authority to seek out *additional* information after fulfilling the obligation to provide notice of the information required and ample opportunity

[28] *US – Carbon Steel (India) (AB)*, para. 4.54.
[29] United States' First Written Submission, para. 90; United States' Second Written Submission, para. 98.
[30] United States' First Written Submission, para. 190.
[31] United States' First Written Submission, para. 168.

to Members to present evidence, as the USDOC did in the underlying investigation.[32] Nor, despite India's claims to the contrary, did the Appellate Body in the original dispute proceeding somehow require the USDOC to seek further information.[33]

33. Therefore, India has failed to show that the USDOC's public body determination under Article 1.1(a)(1) was not one that an objective and unbiased investigating authority could have reached based on the record evidence.[34]

IV. INDIA'S CLAIMS AGAINST THE USDOC'S BENCHMARKS DETERMINATIONS ARE WITHOUT MERIT

34. In the Section 129 Determination, to measure the adequacy of remuneration for iron ore, the USDOC had four potential benchmarking sources available: an association chart and a price quote submitted by Tata as in-country benchmarks, and, NMDC export prices to Japan and Australian prices in the Tex Report as alternative, out-of-country benchmarks.[35] The USDOC ultimately determined that the association chart, price quote and NMDC export prices were not viable benchmark sources because they did not contain market determined prices.[36]

35. India contends, however, that: (1) the USDOC erroneously rejected the association chart and the Tata price quote as Tier I, in-country benchmarks; and (2) having determined to use a Tier II, out-of-country benchmark, the USDOC improperly rejected the NMDC's export prices to Japan as a suitable benchmark. India also makes a belated attempt in its second written submission to challenge the USDOC's use of the Australian prices in the Tex Report as the

[32] United States' First Written Submission, paras. 372-375.
[33] United States' First Written Submission, para. 378.
[34] *US – Coated Paper (Indonesia)* (*Panel)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[35] United States' First Written Submission, para. 266.
[36] United States' First Written Submission, para. 266.

benchmarking source. As we explained in our submissions, all of India's arguments are without merit.

36. First, the USDOC was unable to rely on prices within the association chart and price quote as an in-country benchmark because of several issues concerning the data. With respect to the association chart, India, in its opening statement this morning, has continued to make unsupported assertions concerning the chart. In its determination, the USDOC explained that the record demonstrated that the prices: (1) were provisional, and not actual transaction prices; and (2) did not identify the basic terms of sale.[37] These were reasons an unbiased and objective investigating authority could have relied upon to not use the association chart as an in-country benchmarking source.

37. With respect to the price quote, the USDOC also properly determined to not rely upon it as an in-country benchmarking source because it: (1) was unclear whether the prices were provisional or actual transactions; and (2) was proprietary.[38] India, on the other hand, disregards the proprietary concerns, and argues that the USDOC could have used the price in a way that would not have revealed the proprietary data.[39] However, the USDOC clearly explained that it would not have been able to use the price quote without revealing the proprietary data.[40] Nor

[37] United States' First Written Submission, para. 276.
[38] United States' First Written Submission, para. 280.
[39] India's Second Written Submission, paras. 158-159.
[40] United States' Second Written Submission, para. 148.

was the USDOC under an obligation to seek out additional information concerning the price quote, as India claims under Article 12.1.[41]

38. With respect to the out-of-country prices, the USDOC determined to not rely upon the NMDC export prices because they were from the same government entity whose prices were being examined, and because the record demonstrated that the prices were not market determined. Specifically, the USDOC explained that the NMDC export prices were distorted by the fact that the GOI controlled the price, through: (1) controlling government ownership of both the NMDC and its exporter, Minerals & Metals Trading Corporation (MMTC); (2) the domination of the two entities by government-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 the NMDC and the MMTC by the Ministry of Steel as "strategic companies."[42] Consistent with the Appellate Body's report, the USDOC also noted that the NMDC export prices were from the public body that was providing iron ore for less than adequate remuneration, the subsidy that was under examination.[43] As the USDOC stated in its Section 129 Final Determination, "[t]he *AB Report* makes clear that the prices charged by the government-related entity under examination may not serve as a viable benchmark."[44] Therefore, contrary to India's claim, the USDOC appropriately determined to

[41] United States' First Written Submission, paras. 375-377.
[42] United States' First Written Submission, para. 304.
[43] United States' First Written Submission, paras. 302-303.
[44] United States' First Written Submission, para. 302.

reject the NMDC export prices as a benchmark, consistent with Article 14(d) of the SCM Agreement.

39. India also raises a claim under Article 12.8, alleging that the USDOC failed to disclose the essential facts under consideration with respect to the issue of whether the NMDC export prices were a suitable out-of-country benchmark. However, the USDOC disclosed the facts in the original administrative review, and parties had already had an opportunity to comment on them.[45] The USDOC was not under an obligation to disclose this information a second time in the context of the Section 129 proceeding – where its benchmark determination involved a reevaluation of the same record evidence.[46] In the Section 129 proceeding, interested parties likewise had the opportunity to submit case briefs and again comment on the potential benchmark sources contained on the record.[47] Therefore, India's claim under Article 12.8 must fail.

40. Accordingly, India has failed to demonstrate that the USDOC's Section 129 benchmark determination was not supported by positive record evidence, or that an objective and unbiased investigating authority could not have come to the same conclusion. The Panel should thus reject each of India's claims that the USDOC's benchmark determination failed to bring the United States into compliance with its obligations under Articles 12.1, 12.8, the chapeau of Article 14 and Article 14(d) of the SCM Agreement.

V. INDIA'S CHALLENGES TO USDOC'S *DE FACTO* SPECIFICITY DETERMINATION IS WITHOUT MERIT

[45] United States' First Written Submission, para. 390.
[46] United States' First Written Submission, paras. 388-393.
[47] United States' First Written Submission, para. 390.

41. With respect to specificity, India has not shown that the USDOC failed to take account of the diversification and length of time factors as to the sale of high grade iron ore by the NMDC, the mining rights of iron ore, or the mining of coal programs. As the United States explained in its submissions, the USDOC issued CVD questionnaires to the participants and gathered information concerning the length of time the subsidy programs have been in operation.[48] The USDOC also discussed in its Section 129 Determination relevant record evidence pertaining to the length of time, including information from the NMDC's own website and information pertaining to how the ownership of mining rights and leases changed over time.[49] As to the diversification of the Indian economy, the USDOC provided such analysis, by referring to information contained in annual reports from the Reserve Bank of India, which were contemporaneous with the periods of review.[50] Therefore, India cannot show that, in light of the analysis in the Section 129 Determination, the USDOC failed to *take account of* the diversification of the Indian economy and the length of time the subsidy programs have been in operation. In addition, as detailed in our submissions, India's claim fails under Article 12.8 with respect to the disclosing of information on the diversification and length of time factors because the relevant facts were disclosed in the administrative records of the underlying proceedings.[51]

42. In addition, India's assertions that the mining rights of iron ore program is generally available and not *de facto* specific are meritless. As the United States explained in its submissions, the USDOC relied on substantial record evidence that India had a mining rights of

[48] *See* United States' First Written Submission, paras. 221-222.
[49] *See* United States' First Written Submission, paras. 222-223, 253.
[50] *See* USDOC Section 129 Final Determination, pp. 31-32 (Exhibit IND-60). *See also* United States' First Written Submission, paras. 251-252.
[51] United States' First Written Submission, paras. 394-397.

iron ore program under which mining rights were granted to Indian steel and mining companies through leases, and that those steel companies represented limited users of the iron ore.[52] India's sole argument in response to the U.S. showing is to criticize the USDOC's discussion of the *Hoda* and *Dang* reports, claiming that they cannot be relied on as positive evidence because the panel rejected them in the original proceedings. India's argument misrepresents the Panel's report, which found that these reports did not support the USDOC's finding of "captive" mining programs – a different issue, comprising a different analysis and conclusion. Accordingly, India's arguments should be rejected.

43. For these reasons, India has not demonstrated that the USDOC failed to take account of the length of time and diversification factors in Article 2.1(c). Accordingly, the Panel also should reject India's claims that the United States has not come into compliance with its obligations under 2.4 of the SCM Agreement.

VI. INDIA'S CLAIM THAT THE UNITED STATES ACTED INCONSISTENTLY WITH ARTICLE 19.3 OF THE SCM AGREEMENT HAS NO MERIT

44. India asserts that, under Article 19.3 of the SCM Agreement, the USDOC was required to compare the Amended Final Results CVD rates, which resulted from domestic litigation settlements reached prior to the initiation of this WTO dispute, with the CVD rates determined through the USDOC's Section 129 proceeding that implemented the DSB's recommendations and rulings in this dispute, to determine which was the "appropriate amount." India's claim has

[52] United States' First Written Submission, para. 256.

no merit, because the Amended Final Results have no relevance to the Panel's evaluation of U.S. compliance in this dispute.

45. The plain text of Article 19.3 reflects an intent to ensure that every party that receives a subsidy gets the same treatment in terms of application of a countervailing duty.[53] Article 19.3 is not intended to provide an independent basis to challenge whether CVD rates determined by an investigating authority constitute "appropriate amounts," independent of whether they were calculated and determined consistent with the substantive provisions of the SCM Agreement. The amount of the countervailing duty to be imposed and collected will vary from one source to another depending on the amount of the subsidies involved, which explains the reference to "the appropriate amounts in each case." Therefore, Article 19.3 is concerned with the primarily ministerial function of imposing and collecting countervailing duties on a non-discriminatory

[53] *See* Cartland, Michael, Depayre, Gérard & Woznowski, Jan. 'Is Something Going Wrong in the WTO Dispute Settlement?' Journal of World Trade 46, no. 5 (2012), pp. 979-1015, at 993 ("This word ["appropriate"] appears in a long sentence which specifies that CVDs are to be levied in appropriate amounts in each case, on a non-discriminatory basis except as regards imports from sources having renounced subsidies or entered into an undertaking. The panel found that this provision is linked to Article 19.4, that is, that 'appropriate amounts in each case' means not more than the amount of subsidization found to exist for each exporter. The AB, however, reads 'appropriate' much more broadly – and calls its second sentence, about exporters not actually investigated, an 'example' of when it is permissible not to differentiate among individual exporters. This sentence is not presented as an 'example' in the provision itself (Article 19.3), however, but as the specific situation where exporters can be lumped together. In other words, *Article 19.3 is about making sure that everyone who receives a subsidy gets the same treatment in terms of application of a CVD* – not to exceed the subsidization he has actually received, but the provision acknowledges that not every exporter needs to be investigated individually in the first instance. The AB says the panel's interpretation, based on Article 19.4, would render Article 19.3's 'appropriateness' requirement redundant. However, this is not true. To say that the CVDs levied should not exceed the amount of subsidization found to exist does not speak to how that general principle is to be applied to individual exporters.") (italics added).

basis in each instance and occurrence *once those duties are already calculated and determined* in accordance with the obligations imposed by the preceding articles of the SCM Agreement.[54]

46. India's argument to the contrary rests entirely on the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*. As we have explained in our submissions, the rights and obligations of the Members flow, not from adoption by the DSB of panel or Appellate Body reports, but from the text of the covered agreements.[55] The proper interpretation of Article 19.3 is an interpretation based on the text of that provision, in context, and in light of the object and purpose of the WTO Agreement.

47. Moreover, the Appellate Body's findings in this report relate specifically to the factual circumstances of that dispute concerning double remedies – the simultaneous application of anti-dumping and countervailing duties on the same imports and examined the "offsetting of the same subsidization twice."[56] The present dispute, by contrast, involves two sets of rates applied *consecutively* pursuant to the *same* countervailing duty order.[57] Therefore, there is no double remedy at issue. The settlement rates determined pursuant to the judicial proceeding did not

[54] *See* Cartland, Michael, Depayre, Gérard & Woznowski, Jan. 'Is Something Going Wrong in the WTO Dispute Settlement?' Journal of World Trade 46, no. 5 (2012), pp. 979-1015, at 994 ("Article VI introduced a principle that the levied duty must not exceed the margin of dumping or the amount of a subsidy as determined by whom? Of course, as determined by the relevant domestic authority. Articles 9.3 of the ADA and Article 19.4 of the SCMA just reflect this Article VI principle. If the amount or margin is wrongly established, then that matter must be taken care of under other relevant provisions. But as long as the levied duty is not higher than what was determined by the investigating authority, even if wrongly, Articles 9.3 and 19.4, as the case may be, have not been violated.").
[55] 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."
[56] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 541.
[57] *See* United States' Second Written Submission, para. 256.

offset, or affect in any way, the amount of the duties imposed pursuant to the Section 129 proceeding, or vice versa.

48. The fact is, although the Amended Final Results contained the settlement deposit rates then applicable to JSW and Tata, India did not challenge those rates when it requested establishment of the original panel in July 2012. Instead, India chose to challenge the specific findings and calculations made with respect to JSW and Tata *in the underlying CVD determinations*. India did so successfully. In order to implement the DSB recommendations and rulings in this dispute, the USDOC through its Section 129 proceeding 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 CVD determinations.

49. Yet India, in presenting its claim under Article 19.3 to this compliance Panel, appears to favor the situation of its companies prior to this WTO litigation. India in essence argues before this same Panel, now sitting as a compliance Panel, that the United States should *not* have complied with its findings. India asks this Panel to find that the United States, *by implementing the DSB recommendations and rulings in this dispute*, has acted inconsistently with Article 19.3.

50. India cannot have it both ways. India chose to challenge the *underlying CVD determinations* through this WTO dispute. The United States implemented the DSB recommendations, which resulted in revisions to those CVD determinations. The United States had no WTO obligation to enter into a settlement agreement with JSW and Tata, and certainly has no WTO obligation to continue with that agreement now. To assert that Article 19.3 required the United States to take into account CVD rates determined through domestic

settlements entirely unrelated to the United States' compliance obligations in this dispute ignores the findings of this Panel and the Appellate Body, and has no basis in the SCM Agreement.

51. Therefore, India has not shown that the USDOC, through its Section 129 Determination, acted inconsistently with Article 19.3 of the SCM Agreement, and this Panel should reject India's claims to the contrary.

VII. CONCLUSION

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