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UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS436/R.

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WORKING PROCEDURES FOR THE PANEL

ANNEX A-1

UNITED STATES – COUNTERVAILING MEASURES ON
CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA
(DS436)

WORKING PROCEDURES FOR THE PANEL

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information (Annex 1).

4. The Panel shall meet in closed session. The parties and third parties shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If India requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, India shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel

shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by India could be numbered IND-1, IND-2, etc. If the last exhibit in connection with the first submission was numbered IND-5, the first exhibit of the next submission thus would be numbered IND-6. The United States' exhibits could be numbered USA-1, USA-2, etc.

Questions

10. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

11. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.30 p.m. the previous working day.

12. The first substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall invite India to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. on the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with India presenting its statement first.

13. The second substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by India. If the respondent chooses not to avail itself of that right, the Panel shall invite India to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. of the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.30 p.m. the previous working day.

16. The third-party session shall be conducted as follows:

(a) All third parties may be present during the entirety of this session.

(b) The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.30 p.m. of the first working day following the session.

(c) After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

(d) The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

17. The parties and third parties shall provide the Panel with executive summaries of the facts and arguments as presented to the Panel in each of their written submissions, other than answers to written questions, and in their oral presentations, within one week following the delivery to the Panel of the written version of the submission or oral statement concerned. Each executive summary of the parties shall be limited to no more than ten (10) pages. The executive summaries shall not serve in any way as a substitute for the submissions of the parties in the Panel's examination of the case. Third parties are requested to provide the Panel with executive

summaries of their written submissions and oral statements of no more than five (5) pages each, within one week following the delivery to the Panel of the written version of the relevant submission. Paragraph 22 shall apply to the service of executive summaries.

18. The descriptive part of the Panel's report will include the procedural and factual background to the present dispute. Description of the main arguments of the parties and third parties will consist of the executive summaries referred to in paragraph 17, and these will be annexed as addenda to the report.

Interim review

19. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

20. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

21. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

22. The following procedures regarding service of documents shall apply:

(a) Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

(b) Each party and third party shall file 8 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 5 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

(c) Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to XXXXXX; XXXXXX; and XXXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

(d) Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Service may take place in electronic format (CD-ROM, DVD, or e-mail attachment), if the party receiving service consents to such format. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

(e) Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

(f) The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

UNITED STATES – COUNTERVAILING MEASURES ON
CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA
(DS436)

ADDITIONAL WORKING PROCEDURES FOR THE PANEL CONCERNING
BUSINESS CONFIDENTIAL INFORMATION

1. The following procedures apply to business confidential information (BCI) submitted in the course of the Panel proceedings. These procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any such BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. For the purposes of these proceedings, business confidential information (BCI) means information previously submitted to the U.S. Department of Commerce as confidential information protected by Administrative Protective Order ("APO") in the course of the countervailing duty investigation and administrative reviews (Investigation No.C-533-821) that is submitted to the Panel by the United States or by India.

3. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in one of the proceedings at issue, the party shall also provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and India to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those proceedings.

4. No person shall have access to BCI except a member of the WTO Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the proceedings cited in paragraph 2. Where an outside advisor has received BCI under the relevant APO, nothing in these procedures alters that outside advisor's obligations under the APO.

5. A party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. A party or third party submitting or referring to BCI in any written submission (including in any exhibits) shall mark the cover and the first page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]] and the notation "Contains Business Confidential Information" shall be marked at the top of each page containing the BCI. A non-confidential version, clearly marked as such, of any written submission (including any exhibits) containing BCI shall be submitted pursuant to paragraph 22 of the Working Procedures within three working days after the submission of the confidential version containing the BCI.

7. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. A written non-confidential version of an oral statement containing BCI shall be submitted no later than the working day following the meeting where the statement was made. Non-confidential versions of both oral and written statements shall be

redacted in such a manner as to convey a reasonable understanding of the substance of the BCI deleted therefrom.

8. Any BCI information that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. The Panel shall not disclose in its report or in any other way, any information designated as BCI under these procedures. The Panel may, however, make statements of conclusion based on such information.

10. Submissions containing information designated as BCI under these procedures will be included in the record forwarded to the Appellate Body in the event of any appeal of the Panel's report.

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ANNEX B

ARGUMENTS OF INDIA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF INDIA

I. INTRODUCTION

1. This dispute presents fundamental issues regarding the proper interpretation and application of the SCM Agreement, the GATT 1994 and the WTO Agreement. The dispute covers certain 'as such' claims and 'as applied' claims as stated in India's request for establishment of the Panel.[1] The dispute emanates from the countervailing duties imposed by the United States against imports of Certain Hot Rolled Carbon Steel Flat Products from India ("subject goods") in Case No. C-533-821. The United States levied countervailing duties on the subject goods pursuant to the original investigation concluded in 2002. The United States also conducted various administrative reviews (ARs) for the years 2002, 2004, 2006, 2007 and 2008 as well as a sunset reviews in 2007. The second sunset review is ongoing. In each of these proceedings, the United States made findings and conclusions that are inconsistent with the above agreements.

2. In this document, section II covers 'as such' claims and section III covers 'as applied' claims.

II. 'AS SUCH' CLAIMS

A. The United States law contained in 19 CFR § 351.511(a)(2)(i) to (iii) is 'as such' inconsistent with Article 14(d) of the SCM Agreement.

3. The United States follows a three-tiered benchmark approach under 19 CFR § 351.511(a)(2)(i) to (iii), while determining the adequacy of remuneration for the provision of goods or services by the Government. Under Tier-I, the United States considers market determined price resulting from actual transactions in the country in question (referred to as 'in-country' prices) as the benchmark. If a Tier-I price is unavailable, the United States considers a world market price under Tier-II, provided it is reasonable to conclude that such price would be available to purchasers in the country in question. If a Tier-II price is also unavailable, the United States will apply Tier III and measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

4. The ordinary language of the first sentence of Article 14(d) suggests that a determination of 'benefit' cannot be made by way of comparison approach without first ascertaining whether the government remuneration received by the provider is adequate to the provider itself. The hierarchical and comparison based approach in the United States law does not allow for determining whether in every case, the remuneration is adequate to the provider of the goods as required under first sentence of Article 14(d). It directly seeks to measure the extent of benefit to the recipient of the goods by comparing the government price with the benchmark price without assessing the adequacy of the impugned government price.

5. Notwithstanding the above, 19 CFR § 351.511(a)(2)(i)-(iii) is inconsistent with the second sentence of Article 14(d). The provision of goods *cannot* be considered as conferring a 'benefit' merely because it is priced at less than a benchmark price within or outside the country. It may be observed that Article 14(d) is distinctly worded as compared to clause (a), (b) and (c). The hierarchical nature of United States' law would result even a remuneration that is adequate under Article 14(d) (by applying Tier-III method), become inadequate simply because it is less than a certain benchmark price (Tier-I or Tier-II method). The price difference may otherwise be justified by market or commercial considerations and the United States' law precludes such an analysis. The United States' approach causes undue prejudice to the exporting member country as it results in determination of benefit even though the remuneration is 'adequate' under Tier III approach, which on stand-alone basis, is consistent with Article 14(d) of the SCM Agreement. The United States law defeats the object and purpose of SCM Agreement by disturbing the delicate

[1] WT/DS436/3, dated July 13, 2012

balance in SCM Agreement between the rights of those that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures.

6. Also, the comparison approach excludes the government price itself out of the benefit determination, which is contrary to Article 14(d) since the prevailing market conditions includes such government transactions.

7. Further, notwithstanding the above, use of a 'world benchmark price' (Tier II) is permitted only as a matter of last resort, in situations where the market of the exporting country is distorted because of the predominant role of the government in the market as a provider of the same or similar goods. 19 CFR § 351.511(a)(2)(ii) requires the use of a world benchmark price even when this requirement is not satisfied. In addition, the Tier II approach neither requires an assessment as to the market conditions in the country of provision or the country from which the benchmark price has been used nor does the provision contemplate adjustments that would ensure that the benchmark is in relation to the market conditions in the country in question. At the very least, Tier II method cannot be granted preference over the approach that is 'in relation to the prevailing market condition in the country of provision' (Tier III). Accordingly, preference given to 19 CFR § 351.511(a)(2)(ii) over 19 CFR § 351.511(a)(2)(iii) is inconsistent with Article 14(d).

B. The United States law contained in 19 CFR § 351.511(a)(2)(iv) is 'as such' inconsistent with Article 14(d), 19.3 and 19.4 of the SCM Agreement.

8. Under 19 CFR § 351.511(a)(2)(iv), the benchmark price determined under 19 CFR § 351.511(a)(2) (i) or (ii) is required to be adjusted to reflect the price that a firm actually paid or would pay if it imported the product which includes delivery charges and import duties. However, mandatory use of 'delivered prices' eliminates the possibility of determining the adequacy of remuneration after adjusting the benchmark price *in accordance with prevailing market conditions in the country of provision i.e. the terms and conditions of sale and transportation prevailing in the country of provision* as mandated under Article 14(d) of the SCM Agreement.

9. Further, mandatory use of delivered prices artificially inflates the quantum of benefit and countervails the comparative advantage of the country of provision. Moreover, mandatory use of 'delivered price' prevents the application of the countervailing duty in 'appropriate amount' 'in each case' and results in imposition of countervailing duty 'in excess of the amount of subsidy' in violation of Articles 19.3 and 19.4 of the SCM Agreement.

C. The United States laws contained in 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) and 19 USC § 1677b(e)(2) are 'as such' inconsistent with Article 15 of the SCM Agreement.

10. 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) and 19 USC § 1677b(e)(2) provides for the cumulative assessment of volume and effects of subsidized and dumped imports when determining material injury during the original investigation, sunset review investigation and other investigations, respectively. Cumulation is permitted, if any of the following conditions is satisfied: (i) petitions seeking countervailing duty or anti-dumping duty investigations are filed on the same day; (ii) countervailing duty or anti-dumping duty investigations are initiated on the same day; or (iii) both (i) and (ii) are satisfied.

11. Article 15 delineates the requirement for determination of injury in the SCM Agreement. Articles 15.1, 15.2 and 15.4 require the examination of positive evidence and injury based on the volume and effect of *subsidized imports* on the domestic producers. Article 15.3 is the only provision dealing with cumulative assessment of injury that permits cumulation only of imports from countries that are simultaneously subjected to *countervailing duty investigations* and not cross-code cumulation. Article 15.3 also prescribes certain additional conditions – the rate of subsidization in *each* country must be greater than *de minimis* and the volume from *each* country must not be negligible. 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) and 19 USC § 1677b(e)(2) provide for cumulative assessment even if these conditions are not satisfied.

12. Article 15.5 requires that there should be a causal link between the *subsidized imports* and injury caused. Thus, this provision also requires injury assessment with reference to subsidized imports only.

13. As the United States' provisions under challenge provide for cumulation of non-subsidized imports also, the said provisions are inconsistent with Articles 15.1-15.5 of the SCM Agreement.

D. The United States law contained in 19 USC § 1677e(b) and 19 CFR § 351.308(a), (b) and (c) are 'as such' inconsistent with Article 12.7 of the SCM Agreement.

14. Article 12.7 permits the reliance on 'facts available' when an interested party or member does not co-operate. Various Panel and Appellate Body reports have consistently held that Article 12.7 only permits application of facts that are considered *most fitting and appropriate after engaging in an evaluative and comparative assessment of all available evidence*. Article 12.7 is neither meant to punish non-cooperation nor permit determinations based purely on speculation.

15. In direct contrast to the above requirement, in the event of non-cooperation, the United States' law permits an inference that is adverse to the interests of a party in *selecting from among the facts available* (AFA standard). The United States' law does not require the *evaluative and comparative assessment* of all the evidence available and is not directed to determine the best available fact. Rather, the purpose behind the provision is to penalize non-cooperating parties. In any case, the consistent application of the said provision shows that it is a requirement on the investigating authority to draw the worst possible inference by imposing the highest possible margin against a non-cooperating party without examining all evidence or engaging in a comparative assessment to determine if it was the most fitting and appropriate information. Therefore, the 19 USC § 1677e(b) and 19 CFR § 351.308(a), (b) and (c) are 'as such' inconsistent with Article 12.7 of the SCM Agreement.

E. The United States, as a consequence, has acted inconsistently with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

16. As explained above, the United States has failed to ensure consistency of its laws, regulations and administrative procedures with the provisions of the SCM Agreement and has thereby acted inconsistently with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

III. 'AS APPLIED' CLAIMS

F. Imposition of countervailing duty in respect of 'Sale of High Grade Iron Ore by NMDC' is inconsistent with Articles 1.1, 1.2, 2 and 14 of the SCM Agreement.

17. The United States has determined that sale of high grade iron ore by National Mineral Development Corporation (NMDC) amounts to a financial contribution under Article 1.1(a)(1)(iii). Firstly, the United States determined NMDC to be a 'public body' solely on the basis of governmental shareholding of NMDC. Neither the facts nor the reasoning provided by the United States clarify how this resulted in the Government of India (GOI) exercising meaningful control over NMDC. In any case, there was no determination that NMDC was vested with governmental authority to perform governmental functions or that it was capable of directing or entrusting a private body. Therefore, the United States acted contrary to Article 1.1(a)(1)(iii).

18. Secondly, the United States wrongly determined that sale of iron ore by NMDC was *de facto* specific on the ground that it was limited to users of iron ore. The United States has failed to appreciate that Article 2.1 is only intended to cover *discriminatory* governmental action that provides a benefit to certain enterprises over those that are otherwise capable of receiving it. The United States, however, determined specificity based on the inherent characteristics of the goods in question, a concept alien to Article 2.1. The United States' approach renders the requirement of specificity redundant in respect of Article 1.1(a)(1)(iii).

19. Thirdly, under Article 2.1(c), the phrase 'use of a subsidy program by a limited number *of* certain enterprises' applies only when subsidies are being used by a limited number of those enterprises that are otherwise capable of benefitting from the subsidy in question. The

United States has failed to make such a finding. Further, the United States has also failed to analyze mandatory factors listed in Article 2.1(c) while making a determination of 'de facto' specificity. Furthermore, the United States has not based its determination of specificity on positive evidence as required under Article 2.4.

20. Moreover, in determining that the sale of iron ore by NMDC was for less than adequate remuneration, the United States applied 19 CFR § 351.511(a)(2)(i) to (iv) - provisions that are 'as such' inconsistent with Article 14(d). The United States did not assess whether the remuneration received by NMDC was adequate for NMDC itself. The United States ignored that NMDC operated on 'commercial considerations' and did not distinguish between domestic and foreign buyers.

21. Also, the United States conveniently ignored 'in-country' benchmarks available on record without recording any reasons for the same. Instead, the United States resorted to world market price and failed to make the necessary adjustments to such world market price in order to reflect the prevailing market conditions in India. Further, by including ocean freight and import duties to the benchmark price, the United States countervailed India's comparative advantage of being able to locally source iron ore for its industries. The methodology of the United States would always result in an excess subsidy margin in breach of its obligation to apply Article 14(d) in good faith.

22. Further, the United States rejection of NMDC export prices from Tex Report while adopting a world benchmark price was also inconsistent with Article 14. Article 14(d) does not allow rejection of price charged by government players while determining prevailing market conditions, particularly in the instant case where NMDC was not even a predominant supplier of iron ore and was acting in accordance with market principles. Such a determination is also against the chapeau of Article 14 because the United States acted arbitrarily by accepting the NMDC export prices in one AR and rejecting in another AR.

G. Imposition of countervailing duty on grant of captive mining rights for iron ore and coal is inconsistent with Articles 12.5, 1.1, 1.2, 2 and 14 of the SCM Agreement.

23. Firstly, the United States' identification of the program as '*captive* mining rights for iron ore' is inconsistent with Article 12.5 inasmuch as the GOI does not have distinct frameworks of *captive* mining rights of iron ore as distinguished from mining rights for iron ore or mining rights for minerals in general. The United States did not satisfy itself as to the accuracy of the information provided to them.

24. Secondly, the United States wrongly determined the grant of 'mining rights for coal and iron ore' as amounting to provision of iron ore and coal itself. There is no *reasonable proximate nexus* between the grant of the mining rights and the ultimate mined iron ore or coal. Therefore, the grant of mining rights cannot amount to the 'provision' of the extracted mineral itself.

25. Thirdly, the evidence on record also indicates that no 'captive mining rights for coal' were *granted* 'by' GOI to Tata under the provision of Mines and Minerals (Development & Regulation) Act, 1957 (MMDR Act) or any other legislation.

26. Further, the United States' determination of specificity was entirely based on incorrect facts. The United States found that 'captive mining rights of iron ore' was subject to its own governing regulation. This was contrary to the evidence on record. Similarly, the United States found that captive coal mining was open only to 3 industry sectors, whereas coal mining was, in fact, fully open to any public sector undertaking. Thus, the determinations as to specificity are contrary to Articles 1.2 and 2.

27. Moreover, for the calculation of benefit, for the both the programs, the United States failed to determine whether the remuneration actually received by the GOI was adequate. Instead, the United States added the cost of extraction and profit to the royalty charged by the government (which by no stretch of imagination can be termed as remuneration) and compared it with the benchmark price for the extracted mineral. The United States' methodology of calculating *notional remuneration* ensures positive benefit determination in every case and fails to implement its obligation in good faith. Also, the United States applied benchmarks in the manner highlighted above in relation to provision of iron ore by NMDC. Such an assessment of benefit is inconsistent with Article 1.1(b) and Article 14(d) of the SCM Agreement.

H. The United States has acted inconsistently with the Articles 1.1(a)(1), 1.1(b) and Article 14 of the SCM Agreement in relation to the SDF Program.

28. The United States determined that loans granted under SDF program amounted to financial contribution and conferred a benefit. The determination rests on the premise that the Joint Plant Committee (JPC), the governing body for the SDF program, is under the control of GOI. The United States failed to recognize that JPC is not a 'public body' under Article 1.1(a)(1) since majority of the members of JPC are from the industry and mere presence of government officials cannot change the nature of the body.

29. Similarly, the determination that SDF managing committee was a public body also rests on the incorrect understanding of the term 'public body'. The United States never determined that SDF managing committee was given governmental authority to perform governmental functions.

30. Further, the price increase on steel products used for creating the SDF was not in the nature of tax but amounted to producer levies, i.e. voluntary contribution made by the producers, the transfer of which cannot amount to a *direct transfer* of funds under Article 1.1(a)(1)(i). There was neither *a charg*e on the public account nor did the GOI have title to these funds.

31. The United States' subsequent determination that loans granted under SDF program amounted to *potential* direct transfer of funds under Article 1.1(a)(1)(i) is bereft of any evidence or logic and contrary to the ordinary meaning of Article 1.1(a)(1)(i).

32. The United States also acted contrary to the chapeau to Article 14 and Article 14(b), in relation to the SDF program. The United States applied the Prime Lending Rate (PLR) as the benchmark rate, but failed to explain how such a rate could be considered as a 'comparable commercial loan' under Article 14(b) as it only reflected the overall reference rate for the banks taking into account their cost structure. The United States further failed to consider the overall cost incurred by the exporters to participate in the SDF program. The fact that overall impact of the SDF program reduced the income of the steel producers and did not place them in a *better off* position was also ignored by the United States, resulting in an inconsistency with Article 1.1(b).

I. Injury determination by the United States is inconsistent with Article 15 of the SCM Agreement.

33. The injury determination by the United States during the original investigation and the sunset review were inconsistent with Article 15 of the SCM Agreement. In the original investigation, the United States cumulated imports from eleven countries out of which only five countries were subjected to simultaneous countervailing duty investigations. While doing so, the United States did not assess whether the volume of imports from each of the countries was not negligible and whether the subsidization rate was above *de minimis*. Such a determination was inconsistent with Articles 15.3. The United States cumulatively assessed the volume and effects of both subsidized and non-subsidized imports in violation of Articles 15.1, 15.2 and 15.4. Effectively, the United States attributed injury caused by non-subsidized imports to subsidized imports, in breach of its obligations under Article 15.5. Further, the United States also failed to assess certain mandatory injury parameters such as growth, return on investment and ability to raise capital during the original investigation and therefore, failed to fulfill its obligations under Article 15.4.

34. In the first sunset review also, the United States cumulated the imports from countries against which no countervailing duty measures had been imposed. This was inconsistent with its obligations under Articles 15.1 to 15.5.

J. The application of AFA standard by The United States is inconsistent with Article 12.7 of the SCM Agreement.

35. During the ARs, when employing the AFA standard contained in its domestic law, the United States consistently applied the highest above *de minimis* rate of subsidy as determined for identical or similar program, or in absence of it, the highest above *de minimis* rate for any other program involving the same country. Such a rule punishes non-cooperation and hence, is inconsistent with Article 12.7.

36. In addition, the United States acted inconsistently with Article 12.7 of the SCM Agreement by applying AFA standard in the particular instances listed below:

- In the 2006 AR, the United States assumed that NMDC sold iron ore for free to Jindal Steel Works (JSW), which was contrary to the facts available on record.

- In the 2006 AR, the United States determined that the State Government of Karnataka (SGOK) through Mysore Minerals Ltd (MML), provided subsidies attributable to JSW, without any factual foundation.

- In the 2006 AR, the United States determined that JSW, through Vijayanagar Minerals Pvt Ltd (VMPL), received certain benefits from programs administered by the SGOK, without any factual foundation.

- In the 2008 AR, the United States assumed that Tata benefitted from eleven programs administered by the State Government of Jharkhand (SGOJ), even though this was contrary to the 'facts available' and the determination made by the United States in the 2006 AR.

- In the 2008 AR, the United States assumed that Tata benefitted from a total of 55 programs administered by State Governments of Gujarat, Maharashtra, Karnataka, Andhra Pradesh and Chhattisgarh without any factual foundation.

- In the 2008 AR, the United States assumed that Tata benefitted from the Sale of High Grade Iron Ore by NMDC for LTAR, Market Development Assistance Program, Market Access Initiative Program and the Special Economic Zones Act, which was contradictory to the information made available by the GOI.

K. Other inconsistencies.

37. During each AR, except for 2008 AR, the United States included several new subsidies without formally initiating an investigation under Article 11.1, 11.2 of the SCM Agreement and without fulfilling the requirement of public notice under Articles 22.1-22.2 of the SCM Agreement. The United States failed to follow the procedure, which is required for initiation of investigation under its own law and thereby failed to follow the required *customary procedural action, which is essential to formally initiate* an investigation into such new subsidies.

38. The United States also failed to invite India for consultations prior to initiation of investigation into any of these new subsidies. This is inconsistent with Article 13.1 of the SCM Agreement.

39. Notwithstanding the above, amongst the new subsidies, which were included in the administrative review, the United States investigated the 'Sale of High Grade Iron Ore by NMDC for less than adequate remuneration' and 'Target Plus Scheme' even though no such allegations were filed by the petitioner. This is inconsistent with Articles 11.1, 11.2 and 11.9.

40. Further, ARs are conducted under Articles 21.1 - 21.2 of the SCM Agreement. Under Articles 21.1 - 21.2, the United States is only permitted to conduct a '*review*' of previously made determinations and not initiate new investigations into subsidy programs for which no earlier determinations were made. Therefore, the United States has acted inconsistently with Article 21 by expanding the scope of a *review* proceeding.

L. Consequent violation of Articles 19.3 - 19.4 of the SCM Agreement.

41. Consequent to the inconsistencies mentioned above, the United States has violated Articles 19.3 - 19.4 by imposing countervailing duties in excess of the amount of subsidy and in inappropriate amounts, by incorrectly calculating the amount of alleged benefit.

M. Inconsistencies with Article 22.5 of the SCM Agreement.

42. Article 22.5 requires that the investigating country shall provide all relevant information of fact, law and reasons which have lead to the imposition of the final measure and the reasons for acceptance or rejection of the relevant arguments or claims made by interested parties or members. Such instances are listed below:

- The United States failed to record the relevant facts that led to its determination to distinguish between the SDF program and the European Coal and Steel Community (ECSC) program. The United States rejected the argument made by the exporter in this regard by stating that SDF was similar to taxation and was compulsory. In fact, the SDF program and the ECSC program were similar in all aspects except that ECSC was created by way of a treaty whereas the SDF was created by way of a government notification.

- In case of 'Captive Mining Rights for Iron ore and Coal', the United States, in the 2006 AR, failed to note the existence of in-country benchmark prices and also the fact that there was no separate regulation governing 'Captive Mining Rights of Iron Ore'. In relation to 'Captive Mining Rights of Coal', the United States failed to note and rebut the historical fact that mining rights were never granted to Tata by the GOI.

- The United States also did not publish adequate reasons to reject the argument that NMDC's export prices to Japan could be considered as a relevant benchmark, when calculating the alleged benefit from the 'Sale of High Grade Iron Ore by NMDC'. The United States' rejection of the same was not adequately explained.

N. The United States consequently violated Article VI of GATT 1994 and Articles 10, 32.1 of the SCM Agreement.

43. To the extent the imposition of countervailing duties on the subject goods by the United States is not in accordance with the SCM Agreement, such imposition is consequently inconsistent with Article VI of GATT 1994 and Articles 10 and 32.1 of the SCM Agreement.

IV. CONCLUSION

44. India considers that the United States has failed to frame laws, regulations and requirements that are consistent with its obligations under the above referred agreements. Further, the imposition of countervailing duties on the subject goods by the United States is inconsistent with its obligations under the above referred agreements. India requests the panel to recommend that the United States withdraw the countervailing duties and amend its laws to bring them into conformity with the above referred agreements.

ANNEX B-2

EXECUTIVE SUMMARY OF INDIA'S SUBMISSION AGAINST REQUESTS FOR PRELIMINARY RULINGS BY THE UNITED STATES

I. PRELIMINARY SUBMISSION

1. At the outset, India submits that the scope of the request for preliminary ruling sought by the United States is not entirely clear. On one hand, the United States has only asserted that the claims raised by India under Sections XII.C.1 and XII.C.2 of its First Written Submissions (FWS) fall outside the panel's terms of reference.[1] However, at another location in its FWS, the United States appears to have argued that the claim raised by India at Section XII.C.4 of its written submissions is also outside the panel's terms of reference.[2] India submits that the alleged request for preliminary ruling in relation to India's claim at Section XII.C.4 of its FWS has not been properly raised by the United States. Accordingly, India does not respond to the issues raised by the United States with regard to Section XII.C.4 in the instant reply. While clarifying its belief that the submissions presented below anyway address the said preliminary objection, India reserves its right to file an additional reply in this respect, in the event the panel considers the said issue to have been properly raised.

II. REPLY TO THE REQUESTS FOR PRELIMINARY RULINGS

A. Preliminary objections raised by the United States in respect of India's claim in Section XII.C.1 and XII.C.2 of the FWS.

2. Article 6.2 of the DSU prescribes three separate requirements in relation to the contents of a panel request:

- Indicate whether consultations were held;
- Identify the specific measures at issue; and
- Provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

3. The United States does not state that India's request under challenge fails to fulfill conditions (1) and (2), above. Rather, the United States has only claimed that India's request for establishment of the panel was insufficient to present the problem clearly, with reference to the claims made by India in Section XII.C.1 and Section XII.C.2 of India's FWS. For the sake of convenience, the request under challenge is reproduced herein below:

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

4. For the sake of convenience, the claims referred to in Sections XII.C.1 and XII.C.2 of its FWS are reproduced below:

- The United States violated Articles 11.1-11.2 by initiating investigation into NMDC and TPS programs in the 2004 AR even when the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of such subsidies.

- The United States violated Article 11.9 by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies.

[1] See, United States' FWS, paras. 3 and 23.
[2] Ibid, para.22.

5. As identified by the United States, the following disconnect allegedly exists between the panel request and the claims made in Section XII.C.1 and XII.C.2 of India's FWS:

- With reference to both claims raised by India, the United States alleges that

> In its panel request, India not only fails to identify the relevant subparagraph(s) to which its claim might refer, but includes a description of the claim which also fails to identify or reference, even by implication, a specific obligation within Article 11.[3]

- Once again, with respect to both claims raised by India, the United States alleges that

> ...[T]hese claims are nowhere referenced in India's panel request, nor does the panel request list the specific provisions cited in India's FWS. Accordingly these claims are outside the panel's terms of reference - India's panel request failed to reference them or "present the problem clearly".[4]

- Specifically, with reference to the claim raised in Section XII.C.1, the United States alleges that

> ...The description included India's panel request was not only insufficient to clearly present a problem which India now raises its FWS, the description in the panel request would affirmatively lead the reader to believe that the panel request does not include the additional claims raised in its FWS. That is, India's panel request alleges that "no investigation was initiated or conducted" whereas the additional claims raised allege that the United States erred "*by initiating an investigation* into the NMDC program and the TPS program in 2004" despite an insufficient written application. The sufficiency of evidence in an application is a distinct issue and claim than the issue of whether an investigation was initiated. The distinct nature of the sufficiency of the evidence in an application is demonstrated by the fact that it is the topic of a distinct provision of Article 11 from the provision cited by India as the basis for its claim concerning the failure to initiate an investigation.[5]

6. India submits that the aforesaid objections of the United States are misguided, stemming from its overly narrow and hyper-technical interpretation of India's panel request and its failure to appreciate the established legal position on interpretation of panel requests.

1. Contrary to the United States' assertion, the panel request need not be identically worded as the claims raised in the FWS.

7. In paragraph 18 of its FWS, the United States has raised the objection that the identically worded claims were absent in India's panel and therefore, such claims are outside the panel's terms of reference. India fails to understand the source of such a proposition as has been raised by the United States. Not only does the United States fail to support this proposition by the plain words of Article 6.2, but it also fails to support this proposition with any jurisprudence. India submits that this is an incorrect and incomplete understanding of the requirements of Article 6.2.

8. Article 6.2 of the DSU only requires that India provide a "brief summary of the legal basis of the complaint" such that it is "sufficient to present the problem clearly". The latter requirement has been interpreted to mean that it "*plainly connects the challenged measure(s) with the provisions of the covered agreements claimed to have been infringed*".[6] This only requires India to identify the *claims* as opposed to the *arguments supporting those claims.*[7] Further while

[3] United States' FWS, para. 17.
[4] Ibid, para. 18.
[5] See also, United States' FWS, para. 20.
[6] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.
[7] Appellate Body Report, *EC – Bananas III*, para. 141; See also, Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

attempting to determine whether the panel request satisfies this requirement, one is required to examine the request as a whole and in the light of "attendant circumstances".[8] Therefore, if a proper reading of India's panel request covers the challenged claims raised by India, the said claims are within the panel's terms of reference.

2. United States has misconstrued the term 'initiating', as used in the panel request.

9. It is the understanding of the United States that the problem presented by the relevant claim in India's panel request relates to the issue of whether or not an investigation was initiated or conducted *at all* for new subsidy programs.[9] India submits that this is an extremely narrow and acontextual meaning attributed to India's panel request. The United States fails to appreciate that the term 'initiated' has a specific meaning prescribed under footnote 37 of the SCM Agreement. Footnote 37 of the SCM agreement reads as follows:

> The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

10. The use of the phrase "*as provided in Article 11*" in footnote 37, clearly suggests that an investigation should commence in a manner provided in Article 11. Considering that the present dispute has been raised by India under the SCM Agreement, the reference to the term 'initiated' in its panel request is to be construed in light of footnote 37 to the SCM Agreement. As a matter of necessary implication, India's panel request is directed to the manner in which investigations into new subsidy programs were initiated and conducted. The United States admits that the panel request must be interpreted as a whole.[10] Therefore, the claims in the request for establishment of panel must be read in their context, wherein the accompanying narrative in the request and the provisions of the relevant covered agreement play a material role in interpreting a panel request.[11] The SCM Agreement pervades through the entire panel request and therefore, the phrases used in the SCM Agreement and the meanings associated therewith provide a relevant context in which India's panel request is to be interpreted. Contrary to the accepted proposition of law, the United States appears to be reading one phrase or sentence in the panel request in isolation[12], rather than paying attention to the context of the entire panel request.

11. Therefore, when India claimed a breach of Article 11 by stating that "*no investigation was initiated or conducted*" in respect of new subsidy programs, India's claim relates to such investigations not being initiated, commenced and performed in a manner "*provided in Article 11*" of the SCM Agreement. This understanding and meaning as employed by India is further confirmed by its FWS inasmuch as the raised claims only focus on the investigations against new subsidies not being initiated, commenced and conducted in a manner as provided in Article 11 of the SCM Agreement.[13]

3. There is no dispute as to the specific measures at issue.

12. As per the panel request, the specific measures at issue are investigations into new subsidy programs. All the relevant determinations covering the instant investigation are identified in India's panel request.[14] Among these, investigations into new subsidies were commenced and conducted in all the ARs, except the 2005 and 2008 AR. Being its own determinations and investigations, the United States is intimately aware of the various new subsidy programs

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[8] Appellate Body Report, *US-Carbon Steel*, para. 127.

[9] This understanding of the United States' claims flows directly from its FWS. See, United States' FWS, para. 17.

> That is, the description of the claim raised by India states that Article 11 was breached "because no investigation was initiated or conducted", suggesting that the United States failed to initiate or conduct an investigation at all with respect to new subsidies programs. Article 11 governs the way in which an investigation must be initiated and performed. But article 11 does not contain an obligation that an *investigation be initiated*.

[10] See, United States' FWS para. 5 citing the Appellate Body Report, *US – Carbon Steel*, para. 127.

[11] See, Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.31.

[12] Panel Report, *US – Poultry (China)*, para. 7.39.

[13] See, Appellate Body Report, *Australia – Apples*, paras. 423-425 (confirming that subsequent submissions of a party can be used to confirm the meaning of the words used in the panel request)

[14] See, India's request for the establishment of the panel, para. 3 and Annex 1.

investigated by them and India's panel request directs itself to all such new subsidy programs. It is not in dispute that the NMDC program and the TPS program are two such new subsidy programs, and investigations against them were commenced and conducted in the 2004 AR. It is noteworthy that the United States has not raised an objection in this respect.

4. The panel request clearly connects the challenged measures with the relevant obligations under Article 11.

13. India submits that contrary to the submissions of the United States, there is a clear identification of the obligations that have been violated by the United States. The United States asserts that where a treaty Article contains several distinct legal obligations, each capable of being breached, a cursory reference to such an article does not reveal which one, or more, all those obligations is at issue.[15] The United States' suggests that failing to identify the relevant subparagraphs of Article 11 is fatal to the request filed by India. This is a complete misunderstanding of the relevant legal principles consistently applied by various Panels and Appellate Body Reports.

14. As was noted by the Appellate Body in *Korea – Dairy*[16]:

> There may be situations where the simple listing of the articles of the agreement or agreements involved *may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint....* (Emphasis Supplied)

15. The Appellate Body in *Korea – Dairy*[17] found that questions of this nature need to be examined on a case-by-case basis. The Panel in *EC – Approval and Marketing of Biotech Products* emphasized that there cannot be a general requirement to identify specific clauses or sub-clauses within an article, paragraph or sub-paragraph and that each case ought to be analyzed by its own peculiar facts.[18] In fact, as a factual matter, in *US – Lamb*[19], in *EC – Approval and Marketing of Biotech Products*[20] and in *Korea – Dairy*[21], it was ultimately found that the panel request had sufficient clarity in light of the attendant circumstances, even though the request merely listed only the main Article of the relevant treaty.

16. This is where the United States has significantly erred since it has failed to undertake a detailed factual analysis on India's panel request. The United States has failed to appreciate the true scope of India's panel request. India's panel request covers violations of *all* obligations in Article 11, barring those that are obviously and logically inapplicable to the case at hand and therefore, the United States' objection simply relates to India's discretion to only claim a sub-set of violations in its FWS.

17. The wordings of India's panel request delineate that the violations are with reference to Article 11 and that the violations relate only to those obligations dealing with the *initiation and conduct of the investigations.* As a further limitation, the panel request clarifies that among the various measures at issue identified in India's panel request[22], only those relating to the investigations into *new subsidy programs* are the specific measures at issue. India submits that these limitations are plainly present in the panel request and result in the following logical conclusions:

- *First*, since none of the measures at issue as identified in India's panel request[23] relate to products imported through an intermediate country, Article 11.8 of the SCM Agreement is obviously inapplicable and not covered within the scope of India's panel request.

[15] See, United States' FWS, para. 16.
[16] Appellate Body, *Korea – Dairy*, para. 124.
[17] Ibid.
[18] Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, paras. 78-79.
[19] Panel Report, *US – Lamb*, paras. 5.18-5.31.
[20] Panel Report, *EC – Approval and Marketing of Biotech Products*, Preliminary Ruling, paras. 78-79.
[21] Appellate Body, *Korea – Dairy*, paras. 129-131.
[22] See, India's request for the establishment of the panel, para. 3.
[23] See, Ibid, para. 1 and Annex 1.

- *Second*, since none of the measures at issue as identified in India's panel request[24] involve the United States initiating a *suo moto* investigation, Article 11.6 of the SCM Agreement is obviously inapplicable and not covered within the scope of India's panel request.

- *Third*, the violations relate only to those obligations governing the initiation and conduct of such specified investigations. Therefore, the panel request excludes Articles 11.10 and 11.11 of the SCM agreement since they do not relate to the initiation and conduct of the investigation.

18. India submits that even if not expressly disclaimed, the above exclusions are not *ex post facto* argumentative constructs; rather, they flow necessarily and directly from the words used in the panel request as a matter of common sense. Barring the above obvious exclusions that flow as a matter of necessary implication, the panel request is intended to cover the violation of all the other sub-paragraphs under Article 11. While in its FWS[25] India chose to elaborate upon only three specific provisions contained in Article 11, i.e. Articles 11.1-11.2, 11.9 of the SCM agreement, the remaining subparagraphs of Article 11, i.e. sub-paragraphs (3), (4), (5), (7) of the SCM agreement have also been breached in the following manner:

- In the 2004 AR, the application of the domestic industry contained no allegation or evidence that NMDC sold iron ore for less than adequate remuneration or that the GOI was granting a subsidy in the form of the TPS program. Yet, the United States initiated investigations in respect of these two programs in its 2004 AR. Consequently, the United States did not review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation into whether NMDC sold iron ore for less than adequate remuneration or whether the GOI was granting a subsidy in the form of the TPS program. This is in breach of Article 11.3 the SCM agreement.

- By the plain words of article 11.4 of the SCM agreement, the United States had an obligation to examine and verify whether the application for investigating into the new subsidy programs was filed "by or on behalf of the domestic industry". In all the ARs, except those conducted in 2005 and 2008, where the United States initiated investigations into new subsidies, it could have done so only if the application was filed by domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. Investigation into new subsidy programs could not have been initiated by the United States if the domestic producers expressly supporting the application account for less than 25 percent of total production of the like product produced by the domestic industry. However, the United States never undertook to make a determination on this requirement before initiating and conducting investigations into new subsidy programs. This is in breach of Article 11.4 of the SCM agreement.

- At the time when investigations were initiated against new subsidies during the administrative reviews, United States did not consider the effects of such new subsidies the alleged injury arising from such subsidies, if any. On the other hand, Article 11.7 of the SCM Agreement mandates that evidence as to subsidy and injury shall be *simultaneously* considered in determining whether or not to initiate an investigation. However, the procedure adopted by the United States as regards new subsidy allegations does not involve the *simultaneous* consideration of both subsidy and injury. This is in breach of Article 11.7 of the SCM Agreement.

- In the procedure followed by the United States as regards new subsidy allegations filed by the domestic industry, said application filed by the domestic industry is made available as part of the public records even before the United States makes a determination as to whether investigations are to be conducted for such new subsidies as well. This is breach of Article 11.5 of the SCM Agreement.

[24] Ibid.
[25] See, India's FWS, Sections XII.C.1 and XII.C.2.

19. Therefore, India submits that in addition to the claims raised in Sections XII.C.1 and XII.C.2 of its FWS, all the aforesaid violations are also covered within the scope of India's panel request. It is again expressly clarified that India chose not to press all these violations in its FWS. The reference to Article 11 in the panel request, duly limited by the phrases 'initiation and conduct of investigation' and 'new subsidy programs', was merely a short hand reference to all the aforesaid obligations. All that Article 6.2 requires is for India to identify all the obligations that have been breached by the United States; this cannot be translated into a semantic requirement of having to refer to specific subparagraphs, if the sum and substance of India's claim in the aforesaid panel request covers all the subparagraphs and the obligations contained therein. The fact that India chose to claim a sub-set of violations as opposed to entire super-set, cannot reasonably be considered as being fatal to the claim itself.

20. Furthermore, as was found by the panel in *EC – Trademarks and Geographical Indications (Australia)*[26]:

> ...However, where the multiple obligations are closely related and interlinked, a reference to a common obligation in the specific listed provisions may be sufficient to meet the standard of Article 6.2 of the DSU under certain circumstances in a particular case.

21. Article 11 is titled 'Initiation and Subsequent Investigation' and all the sub-paragraphs of Article 11 are closely-related and interlinked. For instance, by the plain words used in the SCM Agreement, sub-paragraphs (1), (2) and (6) are interlinked. Similarly, Article 11.3 and 11.9 of the SCM Agreement are interlinked inasmuch as both relate to the sufficiency of the evidence present in the written application. In fact, both Articles 11.3 and 11.9 relate back to Article 11.2 since Article 11.2 mandates that the written application of the domestic industry must contain "sufficient evidence" on certain aspects. Similarly, Article 11.4 of the SCM Agreement once again makes express reference to Article 11.1 of the SCM Agreement and deals with the *locus standi* of the person(s) filing the written application under Article 11.2 of the SCM Agreement. Article 11.5 of the SCM Agreement mandates Members to not publish the written application filed under Article 11.2 of the SCM Agreement, until a decision is made on whether an investigation has been initiated. India admits that all the aforesaid sub-paragraphs of Article 11 may be independent inasmuch as it is possible to be in breach of one of them even when complying with others. However, by no stretch of imagination could anyone dispute that these obligations are closely inter-linked and inter-related and together govern the manner in which investigations are to be initiated and conducted. This is not disputed even by the United States.

22. As clarified in the earlier section of this reply, India's panel request claims that all the sub-paragraphs of Article 11 in relation to initiation and conduct of investigation have been breached when the United States initiated and conducted investigations into new subsidy programs. All the above-identified sub-paragraphs of Article 11 are closely related to one another and determine the manner in which investigations are to be initiated and conducted. Therefore, India's panel request objectively provides sufficient clarity even if it refers only to Article 11 since there is an explicit reference to obligations concerning 'initiating and conduct of investigation'. Admittedly, India chose to claim only a subset of these violations in its FWS. However, neither Article 6.2 nor any other provision in any of the covered agreements can restrict India's right to do so.

23. Therefore, contrary to the United States' preliminary objections, the claims in Sections XII.C.1 and XII.C.2 of India's FWS are fully within the scope of the panel's terms of reference.

5. In addition, the due process rights of United States have not been prejudiced.

24. Moreover, as was noted by the Appellate Body in *Korea – Dairy*, the question as to whether the requirements of Article 6.2 of the DSU have been met, is to be determined taking into account whether the ability of the respondent to defend itself was actually prejudiced.[27] However, the burden of proving that it has actually been prejudiced as a result of an alleged incomplete panel

[26] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.2.35.
[27] Appellate Body Report, *Korea – Dairy*, para. 127.

request is upon the United States.[28] The United States has failed to substantiate the manner in which it has been prejudiced apart from making conclusory statements. In fact, a perusal of United States' FWS shows that it has been in a position to file detailed responses to the said claims. The claims covered by India in Sections XII.C.1 and XII.C.2 of its FWS only refer to determinations already made by the United States and only refers to documents made publicly available by the United States. Therefore, India is surprised that United States even raises a preliminary objection that its due process rights have been violated.

25. Further, the law is indeed settled that compliance with the requirements of Article 6.2 must be determined on the merits of each case, after considering the panel request as a whole, and in the light of 'attendant circumstances'.[29] The Panel in *US – Lamb* has expressly recognized the consultations held between the parties, including the written questions circulated at that stage, as one of the materially relevant 'attendant circumstances'.[30] After referring to these, the panel in *US – Lamb* was of the view that "*the questions contained in the above lists are quite detailed and thus provide considerable insight into complainants' allegations concerning specific obligations under specific paragraphs and subparagraphs of SG Articles 2, 3 and 4*"[31] and accordingly, dismissed the objection that the panel request in that case failed to fulfill the requirements under Article 6.2. Similarly, a reference to the consultations request filed by India on the instant dispute would show that India was concerned with the manner in which investigations initiated and conducted by the United States, against new subsidies. A reference to the list of questions filed by India during consultations, particularly, questions 148 and 152, would show that India was concerned with whether the written application by the domestic industry contained sufficient evidence for the United States to have initiated and commenced investigation into such new subsidies. Clearly, these events show that the claims raised in Section XII.C.1 and XII.C.2 of India's FWS have always been part of what was covered within India' claims in relation to Article 11. Therefore, it is not the case that the United States was completely unaware that India would raise claims in relation to sufficiency of evidence for commencing investigations into new subsidies.

26. In view of the above, consistent with WTO jurisprudence in this respect, to the extent the United States has actually not suffered any prejudice in terms of its due process rights and its ability to defend itself, the United States' preliminary objection under Article 6.2 ought to be dismissed.

B. Preliminary objections raised by the United States in respect of India's claim in Section XI.A.9 of the FWS

27. The United States argues that the claims regarding 2013 Sunset Review are outside the terms of reference for panel because they were not included in the India's request for consultations or India's request for establishment of panel. India submits that the objections by the United States stem from the failure of United States to appreciate the established jurisprudence in this regard.

28. India submits that its panel request has clearly pre-empted the preliminary objection raised by the United States. Paragraph 5 of India's panel request is unambiguous and states that the panel request *"covers all the amendments, implementing acts, or any other related measure in connection with the measures referred herein".* The measures referred in Paragraph 3 and 4 read with Annex 1 covers not only the provisions of United State's law but also all the determinations and orders issued by the United States. The 2013 Sunset Review determination is clearly a determination by the United States, which amend the determinations expressly under challenge in the panel request.

29. The Panel's attention is invited to *EC – Selected Customs Matters*, wherein the European Communities challenged the Panel's interpretation in respect of "steps and acts of administration that predate or post-date the establishment of a panel".[32] The Appellate Body in the same dispute made the following observations while discussing the exceptions to the general rule that the

[28] Ibid, para. 131.
[29] Appellate Body Reports, *US – Carbon Steel*, paras.125-127 and *Korea-Dairy*, para. 124.
[30] Panel Report, *US - Lamb*, paras. 5.32 - 5.34.
[31] Ibid.
[32] Panel Report, *EC – Selected Customs Matters,* para. 7.37.

measures in a panel's terms of reference must be measures in existence at the time of the establishment of the panel:

> "We begin our analysis by recalling the Appellate Body's statement in *EC – Chicken Cuts:*
>
> The term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. (footnote omitted)
>
> This general rule, however, is qualified by at least two exceptions. First, in *Chile – Price Band System*, the Appellate Body held that a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure.
>
> …….

30. In *Chile – Price Band System*, the Appellate Body addressed the issue raised by United States in the present dispute, i.e. whether the amendment of a measure enacted after the Panel had been established may be considered as within the Panel's terms of reference. The Appellate Body determined that "the amendment at issue should be considered as part of the measure at issue since it clarified the legislation that established the measure at issue and did not change the original measure into something different than what was in force before the amendment".[33] The Appellate Body explained as follows[34]:

> [I]f the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measures *as amended* in coming to a decision in a dispute.

31. In *Colombia – Ports of Entry*, the Panel agreed with the Appellate Body's rationale in *Chile – Price Band System* and stated as follows[35]:

> The Panel agrees with the Appellate Body's rationale. In the dispute before the Panel, Colombia enacted the aforementioned Resolutions 11414, 11412 and 11415 after the Panel was established. In the Panel's view, the terms of the Panama's request for establishment include the relevant amendments and replacements. The Panel therefore finds that Resolutions 11414, 11412 and 11415 are properly part of the measure at issue and within the Panel's terms of reference. In the Panel's view, a failure to consider these additional resolutions would inhibit the Panel from securing a positive solution to the dispute.

32. Further, the Panel in *EC – IT Products*, addressed the issue of using the phrase *"any amendments, or extensions and any related or implementing measures"* in a panel request. In addressing this issue, the Panel noted that while the mere incantation of the phrase "any amendments, or extensions and any related or implementing measures" in a panel request does not permit Members to bring in measures that were clearly not contemplated in the panel request, the phrase is a useful tool to include certain amendments and prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. The Panel stated as follows[36]:

> We note that the complainants incorporated the phrase 'any amendments, or extensions and any related or implementing measures' into their joint Panel request. We recall that the complainants, in the joint Panel request, identifies as the specific measure at issue Council Regulation No. 2658/87, *'as amended'* (emphasis added).

[33] Appellate Body Report, *Chile – Price Band System,* paras. 137 and 138.
[34] Ibid.
[35] Panel Reports, *Colombia – Ports of Entry,* paras. 7.53-7.54 and *EC – Fasteners (China),* para. 7.34.
[36] Panel Report, *EC – IT Products,* para. 7.140.

> While we do not consider that the mere incantation of the phrase 'any amendments, or extensions and any related or implementing measures' in a panel request will permit Members to bring in measures that were clearly not contemplated in the Panel request, it may be used to refer to measures not yet in force or concluded on the date of the panel request, or measures that the complainants were not yet aware of, such as government procedures not yet published that have the same essential effect as the measures that were specifically identified. This is to prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade review. This is especially true with the type of measures we have before us, which are amended annually. (Footnotes omitted)

33. The instant case squarely fits the scenario where the sunset review determination is merely a measure that amends the determinations already under challenge in India's panel request. Countervailing duties are reviewed annually by the United States and the SCM Agreement mandates a sunset review every five years and the 2013 Sunset Review is one such review contemplated under the SCM Agreement. The 2013 Sunset Review Determination does not change the nature of the measure under challenge – the imposition of countervailing duties on the subject products from India. Second, it is also not the case that India has raised different violations or claims in relation to the 2013 Sunset Review. Rather, only subsets of the violations alleged against the measures identified in the panel request are reiterated in respect of the 2013 Sunset Review as well. Further, agreeing to the United States' preliminary objection would permit the United States to actively evade review and not allow a positive resolution of the dispute on a purely technical point. This is because even if all the expressly identified determinations imposing countervailing duties in the subject investigation are declared inconsistent by the WTO dispute settlement system, the United States would continue applying these duties through similar annual and sunset reviews. The requirements of Article 6.2 of the DSU cannot be interpreted in such a manner where one can lose sight of the object of the DSU itself, i.e. efficient settlement of disputes.

34. In view of the above, the request for preliminary ruling by the United States is not tenable and liable to be rejected.

35. In addition, India also submits that the Panel is not bound to rule on the preliminary objections raised by the United States at this juncture. The past Panels and Appellate Body have recognized that the "DSU does not expressly envision preliminary rulings by panels, it has become an occurrence in the past few years".[37] However, as the Panel in *Canada – Aircraft* observed, "*there are numerous panel reports where rulings on preliminary issues have been reserved until the final report*" and there "*may be cases where the panel wishes to seek further clarification from the parties before providing a preliminary ruling*".[38] As highlighted above in paragraph 1 of these submissions, the United States' request for preliminary ruling is unclear at certain places, hyper-technical at other places and plainly incorrect with respect to 2013 Sunset Review claims. Further, none of the preliminary objections raised by the United States require any immediate disposal since its due process rights in being able to defend itself has not been prejudiced in anyway. In view of the above, United States has failed to provide substantial justification for seeking an immediate disposal of its objections and India requests the Panel to reserve its findings with respect to preliminary objections raised by the United States until the final report.

[37] Panel Report, *Colombia – Ports of Entry*, para. 7.13.
[38] Panel Report, *Canada – Aircraft,* para. 9.15.

ANNEX B-3

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF INDIA - FIRST MEETING

Mr. Chairman and distinguished members of the Panel

1. The present dispute raises certain serious issues of interpretation of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), the GATT 1994 and the WTO Agreement, having systemic underpinnings. India considers that the manner in which the United States conducts countervailing duty investigations undermine the basic foundation of the SCM Agreement. In India's view, the imposition of WTO inconsistent countervailing duty ("CVD") measures since 2001, have had a significant adverse effect on India's exports of Hot Rolled Carbon Steel Flat Products to United States. The value of exports of the products subjected to CVD measures has drastically come down after imposition of the measures.

2. In this opening statement, I would like to highlight only some of our claims due to paucity of time.

Let me start with the first 'as such' claim: "The hierarchical structure of determining 'adequacy of remuneration"

3. The United States follows a three-tiered benchmark approach under 19 CFR § 351.511(a)(2)(i) to (iii), while determining the adequacy of remuneration for provision of goods or services by the Government. India is of the view that the ordinary language of Article 14(d) suggests that 'adequacy of remuneration' must first be determined in relation to the provider of goods and only when the remuneration is found to be inadequate to the provider of goods, the question of calculating the amount of benefit to the recipient arises. The hierarchical and comparison based approach in the United States law ignores this two-step approach in-built in Article 14(d) and instead, directly seeks to measure the extent of benefit to the recipient of the goods by comparing the government price with the benchmark price, without assessing the adequacy of the impugned price to the provider of the goods.

4. Further, India maintains that the provision of goods *cannot* be considered as conferring a 'benefit' merely because it is priced at less than a benchmark price within or outside the country. The United States' law fails to consider whether such price differences are justified by 'commercial considerations'. The fact that the identical set of factors have been included in Article XVII of the GATT to define 'commercial considerations' and 'prevailing market conditions' in Article 14(d) of the SCM Agreement, cannot be a mere co-incidence having no significance whatsoever.

5. The United States, in its submissions, however, completely misses the point, by mischaracterizing India's claim as simply a reference to the 'cost to government' approach – an approach rejected by the Appellate Body earlier. India maintains that whereas the *benefit* is to be calculated in relation to the recipient, the *adequacy of remuneration* must be determined in relation to the provider of the goods. The United States argues that India's interpretation will result in Article 14(d) not having any method of calculating benefit.[1] The United States appears to assume that Article 14(d) must prescribe a specific method to calculate benefit. A comparison of Article 14(d) with Articles 14(a)-(c) does not support such an assumption. Articles 14(b) and (c) clearly state that the method to calculate benefit is to take a 'comparable' and the difference between the rate in question and the 'comparable' is determined to be the amount of benefit. The last sentence of both Articles 14(b) and (c) ensure this precise calculation method. This is not the case with Article 14(d) or Article 14(a). In fact, even in the context of Article 14(a), the Panel has already ruled that it does not prescribe any specific method to calculate benefit[2], unlike Articles 14(b)-(c).

[1] United States FWS, at para. 47.
[2] Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.177, 7.211.

6. Even the United States admits that the term 'remuneration' means something different from 'benefit'.[3] Yet, apart from generally disagreeing with India's submissions, the United States has failed to give the meaning and implications of the term 'remuneration'. The United States has only made a vague statement that the terms 'remuneration' and 'benefit' are related. The United States neglects the fact that the Appellate Body, in *US – Softwood Lumber IV* has explicitly held that "a benefit is conferred when a *government* provides goods to a recipient and, *in return, receives insufficient payment or compensation for those goods*".[4]

7. Second, the United States, incorrectly, one may add, has placed reliance on the findings of the Appellate Body in *US – Softwood Lumber IV*, where in-country prices were considered as benchmarks to calculate benefit under Article 14(d).[5] India clarifies that the present claim raised by India, i.e. the distinction between calculating *benefit* and determining *adequacy of remuneration*, however, was never before the Appellate Body in that case and accordingly, the Panel is being requested to decide upon an argument that has so far not been argued before, or rejected by, the Panel or the Appellate Body. Even if the Panel in this case were to consider the Appellate Body's findings to reflect a proposition of law that applies beyond the issue presented therein, India believes that the Appellate Body merely hinted at the use of in-country private prices as a starting point.

8. In addition, the United States' law permitting the use of world market price as a benchmark in the absence of Tier-I price or in-country price also violates the requirement that the adequacy of remuneration be measured in relation to the market conditions in the *country of provision*. The United States appears to be under the impression that the phrase "*…in the country of provision*" in Article 14(d) can be twisted or ignored.[6] However, the use of the word 'shall' in the chapeau of Article 14 clearly denotes that the United States does not have the freedom to ignore Article 14(d) and this limitation is clearly recognized by the Appellate Body as well.[7]

9. India believes that the United States' rebuttal on the issue of Tier-II prices misquotes the findings of the Appellate Body in *US – Softwood Lumber IV*. First, the Appellate Body has ruled that use of out-of-country prices is permissible *only* in very limited cases where the in-country prices are all influenced by predominant government presence.[8] The Appellate Body did not provide for any other circumstance where out of country benchmarks can be used. The United States' law completely ignores this limitation prescribed by the Appellate Body. The United States' rebuttal seems to be that "world market price reflect prevailing market conditions because world market prices are generally available in any country, particularly when the input at issue is a commodity product like iron ore or coal".[9] This obviously ignores the very fact that use of out-of-country prices is permitted only in the rarest of rare cases. To this extent, the Tier-II pricing followed by the United States violates Article 14(d).

10. Second, the United States has the obligation to make adjustments to reflect prevailing market conditions because there is no presumption that out of country benchmarks reflect prevailing market conditions[10] in the country of provision. The Appellate Body has also ruled that, at a minimum, these adjustments should account for the difference in the market conditions relating to the factors listed in Article 14(d).[11]

11. Worse yet, the United States gives preference to such world market prices over its Tier-III method, which is admittedly grounded on the market conditions prevailing in the country of provision. Even in its FWS, the United States has completely failed to explain why Tier-II has to be placed before Tier-III. On the one hand, the United States admits that Tier-III method is compliant with Article 14(d)[12] and for obvious reasons, the Tier-III method, as explained in detail in the United States' internal domestic documents[13], relates to the market conditions prevailing in the

[3] United States FWS, at paras. 44-45.
[4] Appellate Body Report, *US – Softwood Lumber IV*, para. 84.
[5] United States FWS, at para. 40.
[6] See, United States FWS, para. 38.
[7] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[8] Ibid. paras. 90, 101-102.
[9] United States FWS, para. 34.
[10] Appellate Body Report, *US – Softwood Lumber IV*, paras. 108-109.
[11] Appellate Body Report, *US – Softwood Lumber IV*, paras. 106, 108.
[12] United States FWS, paras. 64-65.
[13] See, India's FWS, paras. 30-32.

country of provision. Yet, on the other hand, the United States' law prefers Tier-II over the Tier-III approach. India is of the view that such an approach is unjustified in terms of Article 14(d) of the SCM agreement.

12. Therefore, the United States law contained in 19 CFR § 351.511(a)(2)(i) to (iii) is inconsistent with Article 14(d) of the SCM Agreement.

Let me now move on to the second 'as such' claim: "Mandating comparison with benchmark at 'delivered prices' level".

13. Under 19 CFR § 351.511(a)(2)(iv), the benchmark price determined under Tier I or Tier II is required to be adjusted to reflect the price that a firm actually paid or would pay if it imported the product. The adjustment will include delivery charges and import duties. This mandate applies even if the government price in question does not include such delivery charges. India observes and the United States acknowledges that this 'adjustment' is a mandatory requirement on the investigating authority to add, where the price under challenge is *ex works* price, all associated delivery charges to the price to such *ex works* price.[14] In order to effectuate an 'apples-to-apples' comparison, the United States also adds, where absent, all delivery charges to the benchmark price as well. United States applies this approach even for private in-country benchmarks and this is not disputed by the United States.

14. Such mandatory use of 'delivered prices' violates the United States' obligation to consider the 'prevailing market conditions' in the country of provision. Even where the prevailing 'conditions of sale' for the transaction of the goods in question do not include transportation or other delivery charges, such as when goods are being transacted on an *ex-works* basis, the United States law mandates its investigating authority to ignore these market conditions. India believes that this method allows the United States to consider something more than the actual *remuneration* received by the provider of the goods, which disregards the plain words of Article 14(d).

15. India further submits that this approach also results in the artificial inflation of the quantum of 'benefit' where the benchmark relates to imported or out-of-country prices, wherein the United States includes ocean freight, local freight and import duties to the benchmark price, while including only domestic freight and local duties to the price under challenge. In effect, the United States ends up finding a 'benefit' to the extent of ocean freight. The 'comparative advantage' of India in using locally available goods without having to bear the risk and expense of international transactions are countervailed in this process. The United States' law is clearly not in good faith compliance with Article 14(d).

16. The United States defends the provision that this approach ensures that the comparison is being made at the same level of the distribution chain.[15] India fails to understand why accurate comparisons cannot be made at *ex works* level itself. The United States also claims that delivered prices reflect the true cost to the producer in obtaining the goods in question.[16] However, the United States cannot choose to engage in a comparison at a delivered prices level in all cases, irrespective of the conditions of sale prevailing in the country of provision.

17. Therefore, the United States' provision in question violates Articles 14(d) and 19.3-19.4.

The third 'as such' claim relates to the "Cumulation of subsidized and non-subsidized imports to determine injury in CVD proceedings".

18. The United States law under challenge provides for the cumulative assessment of volume and effects of imports of the products in question from all countries in the original investigation, sunset reviews and other reviews. India wishes to make it abundantly clear that the cumulation of imports from countries that are subjected to countervailing duty and also antidumping duty investigations simultaneously is not under challenge. India is only challenging cumulation of such imports with imports from countries not subjected to simultaneous countervailing duty investigations.

[14] United States FWS, para. 80.
[15] United States FWS, para. 80.
[16] United States FWS, para. 78.

19. Article 15 of the SCM Agreement governs determination of injury in CVD proceedings and Articles 15.1, 15.2 and 15.4 require the examination of positive evidence and injury based on the volume and effect of *subsidized imports* on the domestic producers. Article 15.3 is the only provision dealing with cumulative assessment of injury, limiting the right of an investigating authority to do so only for imports from countries *simultaneously* subjected to *countervailing duty investigations.* Article 15.3 also prescribes certain additional conditions – the rate of subsidization in *each* country must be greater than *de minimis* and the volume from *each* country must not be negligible.

20. Contrary to this limitation in Article 15.3, the United States law requires that while assessing injury in a CVD investigation, imports even from countries not subject to CVD investigations would be cumulated. In addition, this cumulative assessment is undertaken even if the conditions prescribed under Article 15.3 are not satisfied. This cumulated set of imports is then utilized by the United States in assessing the causal link, which obviously results in the attribution of injury caused from *non-subsidized imports* to subsidized imports.

21. The United States also offers no textual support to substantiate its arguments. *Per contra,* Article 15.1 to 15.5 expressly provides that all injury related determinations are made only in relation to '*subsidized imports*' and nothing more. Therefore, the United States' provisions relating to cumulation of non-subsidized with subsidized imports violate Articles 15.1-15.5 of the SCM Agreement.

The last of the 'as such' claims deals with the US law pertaining to 'Adverse Facts Available'

22. The United States' law permits an inference that is adverse to the interests of a party in *selecting from among the facts available* (AFA standard). The United States' law does not require the *evaluative and comparative assessment* of all the evidence available and is not directed to determine the best available fact. Rather, the purpose behind the provision is to penalize non-cooperating parties which is against the findings of the Appellate Body in *Mexico – Antidumping measures on Rice*. The United States' attempts to take safe harbor in the fact that their provision is worded in a manner that grants discretion in drawing adverse inferences and that such discretionary laws cannot be challenged 'as such'.[17] What the United States fails to realize is that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*[18], has expressly rejected such an argument. India believes that the very grant of discretion with the purpose of penalizing non-cooperation is in violation of Article 12.7 of the SCM Agreement.

23. Further, the United States argues, at one instance, that India may have apparently challenged the *approach* of the United States in applying its AFA provisions[19] and at another instance, that India may be challenging an alleged "practice"[20] of the United States. India wishes to clarify that it is challenging the United States' AFA provisions as such and not the United States' approach or practice. While the United States is correct in referring to the Appellate Body findings in *US – Zeroing (EC)*, which stands for the proposition that a rule or norm having general and prospective application may be challenged 'as such'[21], the United States fails to realize that in the very same case, the Appellate Body has held that evidence to prove the existence of such rule or norm may include proof of the *systematic application of the challenged rule or norm.*[22] The Appellate Body, in other cases, has accepted the use of systematic application of the challenged rule or norm as well. In its FWS, India referred to the systematic application of AFA standard by the United States in every case. In its FWS, the United States affirmatively states that its investigating authority does not follow a consistent practice in the manner asserted by India.[23] This is contrary to the facts. In the 34 other cases in which countervailing duty measures are currently in force in the United States, it made at least 83 determinations that interested parties did not act to the best of their abilities. In every one of those 83 determinations, the United States

[17] United States FWS, paras. 163-166.
[18] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 87-89.
[19] United States FWS, para. 196.
[20] Ibid. paras. 208-211.
[21] Ibid. paras. 200-201.
[22] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[23] United States FWS, para. 206.

applied the AFA Standard.[24] Further, in its FWS, the United States quotes 3 instances in which AFA standard was not applied by it. A perusal of those 3 cases indicates to the contrary.

24. Thus, the AFA provisions contained in the United States' law exceed what is permissible under Article 12.7 of the SCM Agreement.

Let me move on to the 'as applied' claims at this stage. The first 'as applied' claim relates to the imposition of countervailing duty in respect of 'Sale of High Grade Iron Ore by NMDC.

25. The United States has determined that sale of high-grade iron ore by National Mineral Development Corporation (NMDC) amounts to a financial contribution. The United States also determined NMDC to be a 'public body' solely on the basis of governmental shareholding of NMDC. Neither the facts nor the reasoning provided by the United States clarify how this resulted in the Government of India (GOI) exercising meaningful control over NMDC. There was also no determination that NMDC was vested with governmental authority to perform governmental functions or that it was capable of directing or entrusting a private body.

26. India is of the view that the Appellate Body's interpretation of the term 'public body' in *US – Anti-Dumping and Countervailing Duties (China)* is indeed dispositive to the case at hand. While cursorily stating that its submissions are in line with the principles enunciated in *US – Anti-Dumping and Countervailing Duties (China)*, it is the United States that has attempted to re-agitate the exact same points rejected by the Appellate Body in that case.

27. The United States' approach in determining 'public body' fundamentally ignores the idea that governments can, and consistently do, operate in realms that are private apart from the public realm or realms that may be a mix of both.[25] The GATT and the SCM Agreement are intended to govern only those governing the public realm and the Appellate Body has evolved the test of 'governmental functions' as a method to determine areas that do not concern the 'public realm'. India believes that setting-up commercial enterprises like NMDC involve the government operating in the private realm and such commercial enterprises are not intended to be 'public bodies'.

28. Secondly, the United States wrongly determined that sale of iron ore by NMDC was *de facto* specific to the steel industry on the ground that it was limited to users of iron ore, including the steel industry. The United States mistakenly believes that this single sentence determination is sufficient to fulfill its obligations under Articles 1.2 and 2.1 of the SCM Agreement. India believes that Article 2.1 is only intended to cover *discriminatory* governmental action that provides a benefit to certain enterprises over a comparative set consisting of entities that are otherwise capable of receiving it. The United States' approach makes it impossible to find the provisions of any good or service (which are not general infrastructure) to be non-specific and to that extent, Articles 2.1 and 1.2 are rendered redundant in context of financial contributions in the form of provision of goods. Therefore, the interpretation given by the United States is incorrect.

29. Finally and most critically, the manner in which the United States determined and calculated the benefit in this case highlights the absurd results flowing from the application of 19 CFR § 351.511(a)(2)(i) to (iv) – provisions that India considers are 'as such' inconsistent with Article 14(d). Starting with the premise that the NMDC prices were anyway tainted, the United States ignored uncontroverted facts on record showing that NMDC operated on 'commercial considerations' offering iron ore at the same price (subject to exchange rate fluctuations) to both domestic and foreign buyers. Evidence also suggested that NMDC was operating at profit levels greater than other private players, clearly proving that NMDC prices were more than adequate to NMDC itself. Yet, the tiered approach forces the United States to turn a blind eye to all of this. Adding further to this incorrect approach, the United States concluded that there were no in-country benchmarks available for Tier-I method to be applicable, even though 'in-country' benchmarks were actually made available on record. It may be noted that the United States has attempted to improve upon its findings in its FWS by citing reasons for not using the available

[24] See, USDOC's determinations in CVD cases C-489-502, C-507-501, C-507-601, C-533-844, C-533-849, C-552-813, C-560-824, C-570-911, C-570-913, C-570-915, C-570-917, C-570-921, C-570-923, C-570-926, C-570-931, C-570-936, C-570-938, C-570-940, C-570-942, C-570-944, C-570-946, C-570-948, C-570-953, C-570-955, C-570-957, C-570-963, C-570-966, C-570-968, C-570-971, C-570-978, C-570-980, C-570-982, C-570-984, C-580-869.

[25] See, Appellate Body Report, *Canada – Feed-In Tariff Program*, para. 5.61.

'in-country' benchmarks, though such reasons were not found in the relevant findings. It may be added that the reasons given at this stage are also flimsy, to say the least.

30. Instead, the United States resorted to world market price, i.e. Tier-II approach, and failed to make necessary adjustments to such world market price in order to reflect the prevailing market conditions in India. In view of their mandate under their domestic law to make the comparison at the delivered price level, the United States also included ocean freight and import duties to the benchmark price (while adding only domestic freight and local taxes to the local domestic price). The methodology of the United States would always result in an excess subsidy margin, in breach of its obligation to apply Article 14(d) in good faith.

31. Since the United States methodology assumes that a government price can never be 'adequate', it even rejected NMDC prices reported in the Tex Report. Article 14(d) does not allow rejection of price charged by government players while determining prevailing market conditions, particularly in the instant case where NMDC was not even a predominant supplier of iron ore and was acting in accordance with market principles. Such a determination is also against the chapeau of Article 14 because the United States acted arbitrarily by accepting the NMDC export prices in one AR and rejecting in another AR.

Let me briefly touch upon the second 'as applied' claim. This claim relates to the imposition of countervailing duty on the alleged grant of captive mining rights for iron ore is inconsistent with Articles 12.5, 1.1, 1.2, 2 and 14 of the SCM Agreement.

32. Firstly, the United States' identification of the program as '*captive* mining rights for iron ore' is inconsistent with Article 12.5 inasmuch as India does not have a distinct framework for *captive* mining rights of iron ore as distinguished from that governing mining rights for iron ore or mining rights for minerals in general. India believes that no reasonable and objective investigating authority could have satisfied itself as to the accuracy of the *ex facie* incorrect allegations made by the United States' domestic industry in this case. India believes that the United States failed to consider the entire information on record and conveniently ignored the conclusions cited in the very reports on which the United States relied upon.[26]

33. The United States' entire determination of 'specificity' is premised on this incorrect fact that '*captive* mining rights of iron ore' was subject to its own governing regulation. Thus, the determination as to specificity is contrary to Articles 1.2, 2.1 and 2.4.

34. Secondly, the United States wrongly determined the grant of 'mining rights for coal and iron ore' amounts to provision of iron ore and coal itself. The United States believes that this issue has been foreclosed by the Panel and the Appellate Body in *US – Softwood Lumber (IV)*. The United States has deliberately misinterpreted footnote 99 of the Panel's findings in *US – Softwood Lumber (IV)* by limiting its application only to the 'right to explore a particular site and the chance of finding something'.[27] Further, the Appellate Body in the very same case held that governmental actions can amount to 'provision of goods' only when there is no *reasonable proximate nexus* between the governmental action, and use or enjoyment of the alleged good. The 'nexus' in this case is too remote because mining does not involve an *ex ante* certainty as to the quantity and quality of the ultimate good, and mining is an inherently risky and expensive affair involving substantial investment of time, effort and resources.

35. Moreover, for the calculation of benefit, the United States took a notional price by adding the royalty paid by the exporter, cost of extraction and delivery charges incurred by the exporter from mine to the factory and a reasonable profit margin to the exporter. This notional price was taken as hypothetical remuneration paid to the government and it was compared with the benchmark price based on Tier-I or Tier-II. Such a hypothetical price was not contemplated either in the SCM Agreement or in the municipal laws of the United States. Undoubtedly, the hypothetical price is not the remuneration received by the government. India further believes that royalty rates for the extraction of natural resources has been practiced from times immemorial and was never intended to be countervailed under the SCM Agreement. Such royalty rates cannot be subject to the disciplines underlying the SCM Agreement.

[26] India FWS, para. 354.
[27] United States' FWS, para. 497.

The next 'as applied' claim relates to the injury determination by the United States contrary to Article 15 of the SCM Agreement.

36. In the original investigation, the United States cumulated imports from eleven countries out of which only five countries were subjected to simultaneous countervailing duty investigations. While doing so, the United States did not assess whether the volume of imports from each of the countries was not negligible and whether the subsidization rate was above *de minimis*. Such a determination is inconsistent with Articles 15.3.

37. India is of the view that irrespective of the data, what is germane to the issue is that the United States cumulated subsidized imports from countries subjected to CVD investigation and non-subsidized imports from countries not subjected to CVD investigations.

38. The United States cumulatively assessed the volume and effects of both subsidized and non-subsidized imports in violation of Articles 15.1, 15.2 and 15.4. Effectively, the United States attributed injury caused by non-subsidized imports to subsidized imports, in breach of its obligations under Article 15.5.

39. In the first sunset review also, the United States cumulated the imports from countries against which no countervailing duty measures had been imposed. This is inconsistent with its obligations under Articles 15.1 to 15.5.

Let me now move on to the application of AFA standard and a few miscellaneous issues.

40. During the 2006-2008 ARs, when employing the AFA standard contained in its domestic law, the United States consistently applied the highest above *de minimis* rate of subsidy as determined for an identical or similar program, or in absence of it, the highest above *de minimis* rate for any other program involving the same country. Such a rule punishes non-cooperation by assuming the worst possible consequence against the non-cooperating party and is inconsistent with Article 12.7. In its FWS, India has also provided detailed arguments on several instances of illegal application of the facts available standard permissible under Article 12.7, which are not repeated herein.[28] These effectively cover 18 findings in the 2006 AR, 18 programs in the 2007 AR, 92 findings in 2008 AR and 92 findings in the 2013 sunset review.

41. India observes that in its FWS, the United States has not even attempted to defend the application of the highest above *de minimis* rate. Even in its FWS, the United States has not adequately clarified the manner in which the findings challenged by India are based on facts actually available. For instance, while India's claim covered findings relating to 66 different state programs (and sub-programs) against one of the exporters in the 2008 AR[29], the United States attempts to rebut only one of the said findings and without further explanation, conclusorily states all the other findings are justified in a similar manner.[30] This is representative of the apathetic manner in which findings are made by the United States when applying its domestic AFA standard.

42. The United States has further undermined the due process safeguards crafted into the SCM Agreement in the process of initiating investigations into new subsidies in the course of review proceedings. India believes that the safeguards under Articles 11.2, 11.6, 13 and 22 of the SCM Agreement have to be complied for *every single subsidy* that is to be countervailed. The United States, however, conducts an *investigation* under the garb of a *review* proceeding and this is impermissible.

Conclusion

43. India considers that the United States has failed to frame laws, regulations and requirements that are consistent with its obligations under the above referred agreements.

44. Mr. Chairman and Members of the Panel, thank you for the opportunity to present India's views on this dispute. India would be pleased to provide responses to any questions that the Panel may have.

[28] India's FWS, section XI.A.2-9.
[29] India's FWS, section XI.A.5-6.
[30] United States FWS, paras. 235-246.

ANNEX B-4

ORAL CLOSING STATEMENT OF INDIA – FIRST MEETING

Mr. Chairman and distinguished members of the Panel.

1. India is grateful to the Panel for providing an opportunity to present its views in the present dispute. The proceedings and the submissions thus far highlight that the parties are acutely aware that the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") constitute a delicate balance between two sets of stake-holders. Yet, both parties have taken contrary views on many issues of interpretation. India does not envy the complex task before the Panel in attempting to consider these views in their entirety.

2. India's claims, both 'as such' and 'as applied', are directed to ensure that the SCM Agreement does not become an instrument to bring upon unreasonable hardships on the exporting countries. India sincerely believes that the 'delicate balance' admitted by both the parties in the SCM Agreement is inherent in the text of the Agreement itself. India places the text of the SCM Agreement at a high pedestal in accordance with the customary rules of interpretation and has made a sincere effort in appreciating the meaning and scope of every word used in the SCM Agreement. Illustratively, this may be said of India's interpretation of the term '*remuneration*' in Article 14(d) and the use of the phrase '*subsidized imports*' throughout the scheme of Article 15.

3. It is unfortunate, however, that the United States has actually attempted to transpose the aspirations prevalent in its domestic law as the alleged intention behind various provisions of the SCM Agreement, fundamentally ignoring the text of the SCM Agreement. Illustratively, the United States argues that there is absolutely no restriction in the SCM Agreement to cross-cumulate *non-subsidized* imports with *subsidized* imports. Even in its opening statement, the United States has referred to a hypothetical illustration to substantiate the argument that cumulation of *non-subsidized* imports with *subsidized* imports is permissible simply because both cause injury to its domestic industry. In this process the United States has rendered Article 15.3 completely redundant and desecrated the non-attribution requirement in Article 15.5.

4. The United States disregard for the text of the SCM Agreement is apparent in the context of Article 14(d) of the SCM Agreement on two specific counts: (1) The United States agrees that even though 'remuneration' is a different term from 'benefit' and yet, it proceeds on the basis that the use of these two different words is inconsequential; and (2) By mandating that calculation of 'benefit' be done at the delivered price level in all cases, the United States disregards the mandate to account for the prevailing 'conditions of sale'.

5. What is also rather unfortunate is the United States' attempt to undermine the 'security and predictability' in the dispute settlement system, by consistently disregarding the prior rulings of the Appellate Body. To illustrate, although there is a substantial discussion in *US – Anti-Dumping and Countervailing Duties (China)* on the need to prove the existence of "governmental authority" to perform "governmental function" in order to assess whether an entity is a 'public body', the United States' determinations under challenge as also its submissions, pay no attention to this requirement. It may also be noteworthy that in its opening statement, the United States even claims that the Appellate Body in the said case upheld United States' determination that "*state-owned banks were public bodies based on evidence demonstrating the government's meaningful control over them*". On the contrary, as paragraph 355 of the said Appellate Body decision would highlight, the evidence presented in that case was considered as being sufficient for the United States to justify that "*SOCBs are meaningfully controlled by the government in the exercise of their functions*" and more importantly, that "*SOCBs exercise governmental functions on behalf of the Chinese Government*".

6. Similarly, in its opening statement, the United States also places reliance on the Panel's decision in *Canada – Renewable energy* to argue that just "meaningful control" is sufficient to satisfy the 'public body' requirement. Here again, a reference to paragraph 7.234 of the said decision would highlight that the body in question was admitted to be "*a provincial government organization … to which the government has assigned or delegated authority and responsibility, or*

which otherwise has statutory authority and responsibility to perform a public function or service". As the Panel very clearly notes, this specific factor was particularly dispositive in that case. The concluding remark in paragraph 7.239 of the Panel Report also confirms India's submissions that mere "meaningful control" is *insufficient* to make determinations as to 'public body'. India strongly objects to the dismissive manner in which the United States treats the statements and findings in prior decisions.

7. The United States further undermines the "delicate balance" intended under the SCM Agreement, by choosing to ignore the obligations placed upon it as an investigating authority when making its determinations. The United States never '*initiates*' any investigation into new subsidies, does not fulfil the publication requirement under Article 22 for such new subsidies and completely circumvents the obligation to invite India to consult on the existence, amount and nature of these new subsidies. Instead, the United States takes the flawed stand that all of these requirements can be conveniently circumvented by camouflaging *investigations* into new subsidies as part of the proceedings covering the *review* of prior findings relating to other subsidies.

8. The United States has attempted, through this dispute, to overcome its failings in the determinations under challenge. As an illustration, the United States did not even bother to acknowledge the non-confidential in-country benchmarks supplied by interested parties in its determinations under challenge. Yet, before this Panel, the United States makes an unacceptable attempt to cure this defect by attempting to justify the rejection of such prices. The determination relating to NMDC being a public body is also another such instance. The United States has affirmatively admitted before the Panel in *US – Anti-Dumping and Countervailing Duties (China)* that the findings against NMDC in the subject investigation are solely based on government shareholding. For two years, i.e. the original determination and the 2004 AR, the United States only relied on government shareholding. The 2007 AR is the only instance where a reference has been made to the board of directors of NMDC, and even there, the United States categorically states that this is anyway irrelevant according to its domestic law. None of the determinations even remotely refer to 'governmental authority' or 'governmental functions'. Despite all this, the United States has made an attempt before this Panel to argue as if all of this has been considered by the United States in its determinations. This applies even in the context of the mandatory parameters in the third sentence of Article 2.1(c) and three of the mandatory injury parameters in Article 15.4 of the SCM Agreement.

9. It is India's submission that the dispute settlement system of the WTO cannot be used as a forum by the United States to cure inadequacies and illegalities in its determinations under challenge.

10. Mr. Chairman and Members of the Panel, this concludes India's closing statement. We thank you for your patient listening and the most efficient manner in which the proceedings have been conducted. We are also grateful for accepting India' request to provide an advance copy of the Panel's question. India would be pleased to provide responses to any further questions that the Panel may have.

ANNEX B-5

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF INDIA

I. INTRODUCTION

1. India notes that during the First Substantive Meeting as well as in its responses to the Panel's questions, India has provided a number of factual and legal rebuttals to the United States' assertions. While reiterating all of them as well as the claims made in its FWS without repeating the same, India takes this opportunity to clarify some important aspects of the claims raised by India in the instant dispute as well the defects in the United States' arguments.

II. REQUEST FOR PRELIMINARY RULING BY THE UNITED STATES

2. With regard to India's claim under Section XII.C.4 of India's FWS, the United States' request for preliminary ruling is deficient and is not in compliance with para. 6 of the Working Procedures. Even if the Panel were to find that the request complies with para. 6, it is no different from those raised with respect to Sections XII.C.1-XII.C.2. Therefore, the same response will apply *mutatis mutandis* in respect of the claim covered in Section XII.C.4 of India's FWS.

III. THE 3 TIER HIERARCHY CONTAINED IN 19 CFR § 351.511(a)(2)(i) TO (iii)

3. India's claim in this respect is based on the words used in the first sentence of Article 14(d). The structure of the first sentence of Article 14(d) clearly suggests that determining whether the *remuneration* is adequate is a threshold question that needs to be answered prior to going into the question of calculating *benefit*. Even the United States in its FWS concedes that the term 'remuneration' is different from 'benefit', though they are related. However, the United States' FWS as well as third party submissions of the European Union remains noticeably vague on what the term *remuneration* actually means.

4. The United States argues that India's approach contravenes the text of Article 14(d) and results in Article 14(d) not containing any language on how to calculate benefit to the recipient. The United States' argument ignores the structure and context of Article 14 as a whole. The last sentence of both Articles 14(b) and (c) ensures a precise calculation method using an external benchmark, which is not the case with Article 14(d). The lack of a specific method to calculate benefit is seen in Article 14(a), which has also been acknowledged by an earlier Panel. The United States offers no textual basis to rebut India's interpretation of the first sentence of Article 14(d) and instead mischaracterized India's claim as an assertion of the cost-to-government approach. As clarified by India in its Opening Statement as well, India only provides meaning and effect to the term *remuneration* and the structure of the first sentence of Article 14(d), without disturbing the meaning to be attributed to the term *benefit*.

5. The tiered approach under the United States' law fails to consider whether the price differences could otherwise be commercially justified such that an alleged lower price of the government as compared to a benchmark can be attributed to the government player behaving as a competitor in the relevant market. Price differences in competitive markets are well known and lower prices of one player can also be commercially justified. The United States fails to provide an adequate justification to ignore the conscious choice of the drafters to include a set of identical factors that are also used to assess whether a price is in accordance with "commercial considerations" under Article XVII, GATT. This very clearly indicates the intent that prices set in accordance with "commercial considerations" would be prices "*reflective of the supply and demand of both sellers and buyers in that market*", which is what is required under Article 14(d).

6. The hierarchical approach of the United States precludes the application of the Tier-III approach under which the government prices that may otherwise be considered as 'adequate remuneration' may still be considered as conferring a benefit under the Tier-I or Tier-II models. The United States submits that India's argument amounts to mandating the use of multiple methods for determining benefit. The United States fails to appreciate the drafters remained very

clear that in no circumstance can an investigating authority determine the existence of a benefit when the remuneration in question is adequate.

7. Not only had India challenged the hierarchy between Tier-I to Tier-III, but also Tier-II *per se* as well as the hierarchy between Tier-II and Tier-III. The United States has failed to address the latter claim in any manner in its FWS. Even as regards the former claim, a feeble attempt has been made to argue that if the United States were not allowed to apply Tier-II prices in the absence of a Tier-I benchmark, it would frustrate the object and purpose of the SCM Agreement. However, the United States fails to answer why it would choose Tier-II prices, i.e. world market prices over Tier-III methodology. The Appellate Body has considered the need for the benchmark to reflect the prevailing market conditions to be more critical than the type of benchmark itself and has also directed investigating authorities to make adjustments necessary to account for differences in "market conditions" and ensure that the method used does not countervail comparative advantages of the country in question. India submits that nothing in the words of the provision under challenge even remotely allows for the possibility of such adjustments. Therefore, contrary to the United States' assertion, the tiered approach prescribed under the United States' law undermines the very text and spirit of Article 14(d).

IV. THE DELIVERED PRICES ARRIVED AT IN ACCORDANCE WITH 19 CFR § 351.511(a)(2)(iv)

8. India had submitted that 19 CFR § 351.511(a)(2)(iv) is 'as such' inconsistent with Articles 14(d), 19.3 and 19.4 of the SCM Agreement because the United States' law by mandatory inclusion of delivery charges and import duties, eliminates the possibility of adjustments for the terms and condition of sale prevailing in the country of provision.

9. The United States appears to focus its submissions solely on the issue of whether "import duties" are added in every case. The United States assumes that the term "delivery charges" covers only import duties. The crucial portion of India's claim is that the law under challenge mandates benefit analysis to be done at a delivered level in all cases, even where the prevailing conditions of sale in the country of provision for the goods provided is only ex-works. In its FWS, the United States defends its law by stating numerous times that it ensures an apples-to-apples comparison. As previously submitted, an alleged apples-to-apples comparison could very well be completed even at the ex-works level, which is usually the case under the AD Agreement also. The critical issue in Article 14(d) is to make an assessment in relation to the prevailing conditions of sale in the market, i.e. whether goods are being transacted on an ex-works basis or delivered basis ought to be considered by the investigating authority.

10. Moreover, as India submitted in India's FWS, wherever the benchmark relates to goods from outside India, the addition of international freight and import duties to the benchmark price while only adding local freight and local taxes to the government price under challenge makes the affirmative determination of 'benefit' a foregone conclusion. This is exactly what the United States law under challenge requires.

11. The United States also argues that its method ensures a proper assessment of the cost to the purchase of the goods. The language of Article 14(d) does not make cost to the purchase a relevant element. Rather, the focus is on the "prevailing market conditions" and India submits that an adjustment on account of transportation (which is also a condition of sale) could only be made if such condition of sale is the prevailing market condition in the country of provision. However, the mandatory nature of the United States' law forecloses such an examination and presumes the delivery charges as a condition of sale *dehors* the actual facts of a case.

V. THE CUMULATION PROVISIONS CONTAINED IN 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) AND 19 USC § 1677b(e)(2)

12. India's challenge in the present dispute is confined to the cumulation of subsidized imports with dumped imports, where all the dumped imports are not subsidized. India notes that the other types of cumulation are not covered in the present dispute and India does not express any opinion on the consistency of such cumulation.

13. The primary argument made by the United States is that Article 15.3 does not expressly prohibit cumulation of dumped and subsidized imports. The United States construes this to imply that Article 15 is silent on subsidized imports being cumulated with dumped (but non-subsidized imports), apparently giving the investigating authority absolute freedom to do so. The United States has analogized this case with *US – Oil Country Tubular Goods Sunset Reviews*, where a similar finding was issued in respect of Article 21. Per *contra* Article 15.3 specifically addresses the issue of cumulation inasmuch as the first sentence restricts cumulation of imports of products only from countries *simultaneously subject to countervailing duty investigations* and the second sentence merely refers to *such* imports. Article 15, therefore, is not silent on the issue of cumulation as was the case with Article 21. The interpretative exercise, therefore, is completely different from that of *US – Oil Country Tubular Goods Sunset Reviews* on which the United States relies on. India reiterates that the text and context of Article 15 as a whole do not permit the United States to cumulatively assess subsidized and dumped (not not-subsidized imports) in a CVD investigation.

14. To the extent the United States argues that Article 15.3 does not prohibit such cumulation, India asserts that the submissions of the United are inherently contradictory. If the United States' interpretation of Article 15.3 of the SCM Agreement is applied in the context of Article VI.6.a, then nothing in the text of Article VI.6.a actually prohibits the United States from cumulating even fairly traded goods. Yet, the United States, quickly realizing the absurdity of this consequence, draws an implied prohibition to cumulate even fairly traded goods. India submits that a more express and stronger prohibition exists in Article 15 to cumulate subsidized with dumped (but not subsidized) imports.

15. The United States also justifies its provision under challenge by relying on the AD Agreement as a relevant context. Even a conjoint reading of both AD and SCM Agreements only suggests that just like subsidized imports are cumulated in a CVD proceeding, dumped imports may be cumulated in an AD proceeding. The AD Agreement does not address the issue of cumulation in a CVD proceeding. India submits that this is a self-inflicted confusion arising only because the United States does a unified injury finding for both AD and CVD and therefore, has misplaced the "non-attribution" obligations mentioned in both agreements.

16. On sunset reviews, the United States primarily submits that Article 15.3 only applies in an original investigation, which requirements are inapplicable in sunset review determinations. India submits that if cumulation in original investigations is limited to only subsidized imports, this limitation should equally apply to sunset reviews as well. The United States further submits that the use of the word 'may' in section 1675a(a)(7) makes cumulation discretionary and therefore, grants a safe harbor to the provision in question. India asserts that it is an established principle that the description of an instrument under domestic law is not determinative under WTO law. As submitted in India's first written submission a careful analysis would show that the discretion not to cumulate has in fact never been exercised.

17. The relevant question before the Panel is whether the United States does not cumulate subsidized imports and dumped (but non-subsidized) imports in sunset reviews even where the imports compete with each other *inter se* and with the domestic like products? The United States does not provide for any instances of sunset review determination in its written submission where the discretion has in fact been exercised. On the other hand, India has studied the sunset reviews of the United States involving CVD proceedings and AD proceedings initiated on the same day and concluded that in every instance where the conditions of competition are met, cumulation is done. The alleged discretion not to cumulate is exercised only to the extent that the conditions of competition are not met. Therefore, the totality of evidence on record shows that even in sunset reviews, where the conditions of competition are met, cumulation is practiced as a rule / norm of general application and hence, is a measure that can be challenged 'as such' before this Panel.

VI. THE AFA PROVISIONS CONTAINED IN 19 USC § 1677e(b) AND 19 CFR § 351.308(a)-(c)

18. Contrary to the United States' assertion India has made it clear both in its FWS and during the First Substantive Meeting that India challenges the AFA provisions, i.e. 19 USC § 1677e(b) and 19 CFR § 351.308 'as such' and not the 'practice' or the 'approach' of the DOC in applying these provisions. India submits that as a matter of rule / norm, the United States applies the AFA provisions to the worst possible inferences in all cases of non-cooperation. India has referred to

the consistent practice as evidence to prove such a rule / norm. The use of such systematic application in order to prove the existence of a rule or norm is consistent with the findings of the Appellate Body in *US – Zeroing (EC)*. It is crucial to note that the Appellate Body in the said case made a definitive distinction between the standards to be applied for an alleged rule or norm that is *written / codified* versus a rule of norm that is *unwritten.* What was before the Appellate Body in the said case was as an *unwritten* rule or norm whereas the case at hand involves the codified AFA provisions. Therefore, India believes that the application of the aforesaid general principle to the facts of the case in *US – Zeroing (EC)* may not be relevant to the instant dispute. Nevertheless, even on facts, India submits that the evidence on record is akin to what was available in *US – Zeroing (EC)* and therefore, satisfies the threshold placed by the Appellate Body in *US – Zeroing (EC)*.

19. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* required the Panel to engage in a proper *qualitative assessment* of the instances where the alleged 'rule' was applied consistently. India has provided similar data on consistent application and seeks the indulgence of the Panel to engage in such *qualitative assessment*. India also invites the Panel's attention to the binding decisions rendered by the Federal Circuit and the Court of International Trade. Based on all the above, India submits that the AFA provisions are a 'measure' that can be "as such" challenged before this Panel and are inconsistent with Article 12.7 of the SCM Agreement.

20. In section VII.A of its FWS, the United States has placed significant emphasis on the fact that the AFA provisions under challenge do not 'require' the use of adverse inferences and instead grants its investigating authority the discretion to apply adverse inferences. The United States argues that such discretionary laws cannot be challenged 'as such' as per well-established GATT and WTO jurisprudence. India finds it surprising that the United States relies on the decision rendered by the Appellate Body Report in *US – Zeroing (EC)* in this respect. In reality, the findings in both *US – Zeroing (EC)* as well as *US – Oil Country Tubular Goods Sunset Reviews* show that even an apparently unwritten or discretionary rule can be considered otherwise through the qualitative assessment of its systematic application. Moreover, this argument of the United States falls flat in the light of the express finding by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Reviews* where the Appellate Body expressly ruled that there is no general principle that only mandatory rules can be challenged 'as such'.

21. India does acknowledge that the provision in question uses discretionary language. However, this grants no safe harbor to the United States. India presents two alternative and without prejudice arguments in this respect. First, India submits that even if the words used in the AFA provisions appear to provide discretion, the very grant of the discretion is inconsistent with Article 12.7 of the SCM Agreement. In this respect, India has provided detailed submissions in its FWS on the Panel ruling in *US – Section 301 Trade Act*, where a legislation that very clearly provided discretion to the investigating authority was still inconsistent with a WTO provision. Second, in the alternative and without prejudice to the aforesaid argument, the United States cannot simply point to the use of the word 'may' in its AFA provisions and India urges the Panel to not end its analysis there. Prior Panel and Appellate Body Report direct otherwise. The Panel Reports in *US – 1916 Act (EC)* and *US – Countervailing Measures on Certain EC Products*, as well as the Appellate Body Reports in *US – Corrosion-Resistant Steel Sunset Reviews*, *US – Zeroing (EC)* and in *US – Oil Country Tubular Goods Sunset Reviews* require this Panel to go beyond the mere text of the provision under challenge, analyze other related domestic instruments, legislative history, domestic judicial decisions and even evidence of systematic application of the provisions. This is exactly what India has done in its FWS and the SWS.

VII. SALE OF HIGH GRADE IRON ORE BY NMDC

22. The United States determined NMDC to be a 'public body' solely on the basis of governmental shareholding of NMDC. From a perusal of the determinations under challenge, it is evident that the sole reason in the 2004 and 2006 AR for holding the NMDC to be a public body was government shareholding. In the 2007 AR, the exporter argued that NMDC is not a government authority because of the composition of the Board. The United States categorically rejected the submissions and held that "*majority ownership of an input supplier qualifies it as a government authority within the meaning of [19 USC § 1677(5)(D)(i))]*" and that "*[a]nalyzing additional factors is not necessary absent information that calls into question whether government ownership does not mean government control*.". Further, the United States has previously admitted before the Panel in *US – Anti-Dumping and Countervailing Duties (China)* that in

Hot-Rolled Carbon Steel Flat Products from India, the USDOC found that a 98 per cent government-owned mining company governed by the Ministry of Steel was a public body, without reference to any more factors. Government shareholding in itself cannot result in the entity becoming a public body and India submits the Appellate Body's ruling on this issue in *US – Anti-Dumping and Countervailing Duties (China)* is dispositive to the case at hand. This ruling forms part of the *acquis* of the WTO and is binding on this Panel. Apart from re-agitating the same issue and arguments already considered by the Appellate Body, the United States fails to provide any 'cogent' reasons for having to differ from this prior adopted Appellate Body Report.

23. Before this Panel, however, the United States attempts to read other factors and evidence that may otherwise justify its finding that NMDC is a public body. None of these other factors and evidence, including the significant reliance placed on the Board composition of NMDC finds place in the measures under challenge. The Panel, under Article 11 is not permitted to consider such *ex-post facto rationalizations* from the United States. Nonetheless, in its SWS, as a matter of abundant caution India, has replied to each such *ex-post facto rationalization.*

24. On the issue of specificity, India had examined the manner in which Articles 2.1(a)-(b) have to be read and understood, in its FWS. The Appellate Body has already ruled that Articles 2.1(a)-(b) are provisions that deal with *discriminatory conduct*, which definitely indicates that *specificity* under the principles of Articles 2.1(a)-(b) is about governmental action that treats similar situated entities in a dissimilar fashion. India also emphasizes that the concept of discriminatory conduct is necessarily implied in the text of Article 2.1(a)-(b) itself. The United States does not dispute any of India's conclusions as it relates to Articles 2.1(a)-(b) and only appears to disagree with this conclusion being applied to Article 2.1(c). India disagrees and submits that contextually, even when making a determination of specificity under Article 2.1(c), the investigating authority is required to engage in a comparative exercise, i.e. examine whether the subsidy / benefit is discriminatorily enjoyed / used by certain similarly placed enterprises over others. Such a comparative exercise would inherently involve comparing like with like.

25. On the issue of determining existence of benefit and calculating the amount of benefit, the submissions on the 'as such' claim covering the tiered approach and 'delivered prices' of the United States law would *mutatis mutandis* apply herein. On the specific issue of availability of in-country benchmarks, India submits that all objections raised by the United States in its FWS against the use of certain in-country benchmarks are to be rejected *in limine* because they amount to *ex-post facto rationalizations*. Even if these objections are relevant, it is equally surprising that the United States did not even attempt to seek further clarification in these respects when they had the opportunity to do so. This failure is quite telling and undermines the due process obligation of the United States. Nonetheless, in its SWS, as a matter of abundant caution India, has replied to each such *ex-post facto rationalization.*

VIII. THE 'CAPTIVE MINING RIGHTS FOR IRON ORE & COAL'

26. India, in its FWS, has explained the features of India's mining rights program all of which remain un-rebutted by the United States. The United States only submits that the record evidence indicated that India has a captive mining program for iron ore. The essence of the claim has been correctly captured by the Panel in Question No. 29 to India. The fact remains that India only grants 'mining leases' for iron-ore. The fact that some of the lessees, in their commercial wisdom, choose to be vertically integrated is inconsequential to grant of the rights by the GOI under the relevant legal regime. There is no separate policy, law or regulation for captive mining and all the lessees pay the same amount of royalty fees and are granted concessions on the same terms and conditions.

27. The United States mischaracterized the program as '*captive* mining rights for *iron ore*' and has not identified any separate regulation or guidelines governing mining rights of iron ore as distinguished from other minerals. This is a fundamental error of fact by the United States, which also vitiates its specificity determination as regards *captive* mining rights for iron-ore.

28. India's submits that granting "mining right for iron-ore and coal" cannot amount to *provision* of iron-ore and coal. India only provides the mining rights against royalty, which constitutes roughly 9.03% of the total cost of extracting iron ore in the relevant period, the other 90.97% being the cost of extraction incurred by the lessee of the mining rights). There is no reasonable

proximate connection between the grant of rights and enjoyment of the mined mineral by the miners. The United States fails to appreciate the need to prove the existence of such reasonable proximate connection as was laid down by the Appellate Body in *US – Softwood Lumber IV*.

29. To the extent the benefit finding for the NMDC programs and the law under which those findings were arrived at are inconsistent with Article 14(d), the benefit findings for mining rights program of iron-ore and coal would also automatically fall. Further, to assume a notional price of the extracted mineral (that includes cost of extraction, royalty rate and a notional reasonable profit) as the remuneration received by the GOI is also erroneous.

IX. THE SDF PROGRAM

30. As was correctly noted even by the Panel, the United States, in its FWS, has not even attempted to respond to India's submissions that the JPC, by no stretch of imagination, could be considered as a public body. The uncontroverted fact remains that JPC was established under a separate legal instrument, has a separate identity and its functions are distinct from that of SDF Managing Committee. It is the JPC and not the SDF Managing Committee, which executes the loan documents, disburses the funds and receives the funds and all of this is not disputed by the United States. India also, reiterates that the SDF Program was nothing but a mechanism for the participating steel plants to specifically channelize their own funds for specified purposes, such as modernization and R&D. Since, the United States has not challenged the assertion that JPC is not a public body, the claim must be decided in India's favor.

31. Even as regards the SDF Managing Committee, the United States determined it to be a public body on the sole basis of governmental control due to composition of the committee. This fails to satisfy the test laid down in *US – Anti-Dumping and Countervailing Duties (China)*. While the United States argues at this stage that the SDF Managing Committee performs a 'governmental function', such a finding is absent in the determination under challenge. Such arguments are merely *ex-post facto* rationalizations that are to be rejected by the Panel.

32. India also reiterates that the domestic notifications issued pertaining to the SDF clearly pointed that the authority to operate the fund vested only with the JPC, which anyway cannot be a public body. The United States' attempt in the determination under challenge as well its FWS to color the SDF levy as tax is also not substantiated by facts since it is the JPC which was empowered to charge the SDF levy and JPC itself is not a public body.

33. India further submits that even if SDF Managing Committee is a public body, in section IX.C.2 of its FWS, India has argued that SDF cannot amount to a 'direct' transfer of funds for the purposes of Article 1.1(a)(1)(iii) since the funds do not *directly* move from the SDF Managing Committee to the alleged beneficiaries. Instead, if at all, it moves indirectly through JPC, which is majority controlled by participating steel plants only. Moreover, as submitted in section IX.C.3 of India's FWS, the SDF is not a direct 'transfer' of funds for the purposes of Article 1.1(a)(1)(i) since the GOI or the SDF Managing Committee (or for that matter, even the JPC) do not own title to the SDF funds. The SDF funds are producer levies and the SDF loans do not involve a charge on the public account. The SDF levy never became part of the consolidated fund of India and therefore, can never be equated to tax revenues.

34. When calculating benefit, the United States also acted contrary to the chapeau to Article 14 and Article 14(b), in relation to the SDF program. The United States applied the Prime Lending Rate (PLR) as the benchmark rate, but failed to explain how such a rate could be considered as a 'comparable commercial loan' under Article 14(b) as it only *reflected* the overall reference rate for the banks taking into account their cost structure. As was highlighted in India's FWS, the SDF loans were conditioned on a number of costs being borne by the participating steel members, including that of having to first deposit amounts into the SDF. Further, the comparability analysis under Article 14(b) necessarily requires the United States to look into the credits or adjustments since from a commercial perspective, such factors would affect the rates at which the loan is granted. The United States argues that benefit is all about how the beneficiary has been made "better off" than the market place and yet, on the other, argues that the costs borne by the participating steel producers need not be accounted for.

X. INJURY INVESTIGATION

35. The United States raises several additional arguments in defense of its original injury determination. India submits that all such analysis never formed part of the injury determination made by the United States. Table V-13 highlights no segregation of data of dumped imports vis-à-vis subsidized imports; it merely tabulates the data for each country without further examination of the data. The narrative portion of the injury determination does not even make the effort to segregate the data based on the dumped imports and subsidized imports.

36. In relation to causal link analysis under Article 15.5 of the SCM Agreement, while it is not in dispute that all subsidized imports were found to be dumped, it is equally undisputed that all dumped imports were not found to be subsidized. It is the cumulation of these unsubsidized imports, which has distorted the injury determination and is inconsistent with Article 15 of the SCM Agreement and especially, Articles 15.3-15.5 of the SCM Agreement.

37. In relation to the evaluation of mandatory injury parameters, the United States observes that even though there is no written record, it has indeed evaluated the mandatory parameters as required under Article 15.4 of the SCM Agreement as interpreted by the Appellate Body in *EC – Pipe and Tube Fittings.* In *EC – Pipe and Tube Fittings*, factually, the Appellate Body found that there was considerable analysis regarding the mandatory parameter in question, which satisfied the requirement under Article 15.4. However, this is not so in the present case.

XI. THE APPLICATION OF AFA PROVISIONS

38. One of the primary arguments in respect of this issue rests on the fact that the United States consistently applies the highest possible rate against non-cooperating parties.[1] India notes that the United States has not even attempted to defend such a stand in its FWS. Applying the highest possible margin in all cases of non-cooperation is contrary to Article 12.7 of the SCM Agreement.

39. In its FWS, India had also raised a number of instances where the AFA provisions "as applied", are inconsistent with Article 12.7 of the SCM Agreement. The United States fails to justify its finding in all the instances and instead, attempts to rebut only one instance and asserts that every other instance falls in the same category. In its SWS, India has established beyond doubt that in all instances identified in the FWS, the determinations were based on speculations / assumptions meant to result in adverse consequences, rather than being based on actual facts.

XII. INCONSISTENCIES WITH ARTICLE 11, 13, 21 AND 22 OF THE SCM AGREEMENT

40. India submits that the United States has failed to rebut India's submission of inconsistency of the measures under challenge with Articles 11, 13, 21 and 22 of the SCM Agreement. The United States' response to India's allegation is basically centered on the understanding that the Articles 11 and 13 are not applicable in a review exercise under Article 21 of the SCM Agreement.[2] The United States' submission, in effect, is that because the exercise of inclusion of new subsidies is carried out in a review under its domestic procedure, the entire consolidated proceeding amounts to a *review* under Article 21 of the SCM Agreement.

41. India submits that when a new subsidy is alleged in an AR, findings that are made qua this new subsidy are findings made for the first time. Qua such new subsidies, it is for the first time that an exercise in the nature of determining the '*existence, degree*' of such new subsidies is being conducted. Such an exercise is clearly an *investigation* contemplated under Article 11 and not a *review*. The United States cannot be allowed to conveniently circumvent the obligations under Articles 11, 13 and 22 by simply conducting such *investigations* within a proceeding that is termed as a '*review*' under its domestic laws.

42. Contrary to the United States' assertion, this does not render Article 21 redundant. What the United States fails to appreciate is that the issue concerns a *newly* alleged subsidy and not the continuation of the already existing program after some modification. India's claim does not

[1] India's FWS, paras. 526-527.
[2] The United States' FWS, Section XII.C.1.

concern the latter case. Secondly, Article 21 is meant to review the existing subsidization. After a newly alleged subsidy is investigated in accordance with Articles 11, 13, and 22 for the first time, subsequent ARs can be performed on such subsidies under Article 21 (without having to fulfill Articles 11, 13 and 22 in such subsequent reviews).

43. The United States submits that India has a disagreement with the substance of the decision itself in relation to the SDF program and not about the adequacy of explanation by Commerce. India's claim under Article 22.5 lies in the United States' failure to account for the factual similarities between the ECSC program and SDF program.

44. With regard to provision of high grade of iron ore by NMDC, the United States submits that the information on domestic prices was not reliable as there was no information on record to show that those were actual transaction between private parties and the data provided did not identify the entities selling the iron ore. Be that as it may, the fact remains that the aforesaid justification occurs for the first time in the present submission and therefore, only proves the violation of Article 22.5 of the SCM Agreement.

45. Similarly with regard to the captive mining rights of iron ore and coal, the United States provides a bare assertion that it has complied with Article 22. India reiterates all its submissions from its FWS.

XIII. REQUEST FOR FINDINGS AND RECOMMENDATIONS

46. In view of the above, India requests the panel to recommend that the United States withdraw the countervailing duties and amend its laws to bring them into conformity with the above referred agreements.

ANNEX B-6

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF INDIA - SECOND MEETING

Mr. Chairman and distinguished members of the Panel

1. India has made extensive factual and legal submissions on the various claims raised in this dispute. In response, the United States has turned to rhetoric rather than refute the claims on a substantive basis. In this second substantive meeting of the Panel, India would like to highlight the substance of its claims and how the United States has failed to refute any of India's claims.

2. India's claims are strongly grounded on the terms used in the SCM Agreement and the United States cannot request this Panel to ignore textually and contextually supported interpretations or arguments simply because the United States may perceive them to be radical. It has been and it continues to be India's submission that India's approach to many of the issues arising in this case is fundamentally supported by the language as well as the spirit of the treaty and mere fact that some of the views expressed by India may not have been raised before a Panel or the Appellate Body on earlier occasions does not make India's approach radical.

3. The United States has resorted to 'confidentiality of information' as an excuse for not addressing India's claims regarding availability of an in-country benchmark. India affirms it has not violated any confidentiality obligations while producing any documents before this Panel. India will cover this in detail, during the later course of its opening statement.

4. I will first deal with the four 'as such' claims and then cover the 'as applied' claims.

Let me start with the first 'as such' claim: "The hierarchical structure of determining 'adequacy of remuneration'".

5. India believes that the United States law under challenge, i.e. 19 CFR 351.511(a)(2), is 'as such' inconsistent with Article 14(d) of the SCM Agreement. India does not wish to repeat the detailed arguments already laid out in its submissions and instead only wishes to highlight certain fallacies in the submissions of the United States.

6. Under Article 14(d), what is being assessed is the adequacy of the 'remuneration', which, India submits, refers to the actual compensation received by the government provider of the goods. The Appellate Body, in *US – Softwood Lumber IV* has explicitly held that "a benefit is conferred when a *government* provides goods to a recipient and, *in return, receives insufficient payment or compensation for those goods*".[1] There is a very clear suggestion by the Appellate Body that the term 'remuneration' covers the payment or compensation actually *received* by the provider of the goods. While the remuneration refers to what is received by the provider of the goods, the conferral of benefit, if any, is on the purchaser of the goods.

7. The United States admits in paragraph 11 of its Second Written Submissions that the language in Article 14(d) "establishes a structure under which an investigating authority, upon the existence of a particular condition, may find that a benefit has been conferred". It is India's claim that the "particular condition" referred to by the United States is the existence of 'less than adequate remuneration' to the provider of the goods. If and when the 'remuneration' is considered as inadequate, the investigating authority may proceed to calculate the amount of benefit. This two-step process is built into Article 14(d) by virtue of its first sentence.

8. The requirement of determining whether the remuneration was adequate to the provider of the goods cannot be termed as applying the "cost to government" approach. The United States has spent considerable time in highlighting prior jurisprudence rejecting the "cost to government" approach in calculating benefit. However, it has never been India's submission that the benefit is

[1] Appellate Body Report, *US – Softwood Lumber IV*, para. 84.

to be determined based on the cost to the government. It is India's submission that whether the goods have been provided by the government for less than adequate remuneration shall be determined taking into account, inter alia, costs, profits and all other relevant market conditions. Once this threshold is crossed, i.e. the remuneration to the provider is determined to be 'less than adequate', the investigating authority may proceed to calculate *benefit to the recipient* in accordance with the relevant provisions of the SCM Agreement.

9. India has pointed out the differences in the text of sub-paragraphs (b) and (c) of Article 14 with the text of sub-paragraphs (a) and (d). It is more than evident that in sub-paragraphs (b) and (c) of Article 14, the difference with reference to a certain benchmark price is deemed to be the amount of benefit. The United States has not explained why the drafters' would choose not to insert a similar sentence in sub-paragraph (d) of Article 14. Rather, in paragraph 14 of its Second Written Submissions, the United States argues that the first sentence of Article 14(d) refers to 'less than', 'more than' and that this envisages a comparative exercise similar to that of sub-paragraphs (b) and (c). The United States also argues that the different manner in which the second sentence of Article 14(d) is drafted suggests a "more involved comparison" compared to the other subparagraphs, without any textual basis. There is nothing in the language of the second sentence that is similar to the other sub-paragraphs of Article 14 and the difference in language must be given due weight. Tier-I and Tier II methodologies of the United States prescribe a mechanical approach and not a 'more involved' approach.

10. The mechanistic application is borne out by the fact that under the Tier-I and Tier-II methodologies, every time the government price is lower than a given benchmark price, a finding of benefit is arrived at. Had the United States really intended to engage in a 'more involved' analysis, it would have explored the reasons behind any such price differences. The prevailing market conditions may permit different competitors in selling similar products at different prices and price differentials could easily be justified by 'commercial considerations'. India submits that this is exactly why the second sentence of Article 14(d) has been structured differently from Article 14 (b) and 14(c). The United States responds to this by arguing that the cross-reference to the term 'commercial considerations' in Article XVII of the GATT is not contextually justified and that this is a disguised attempt by India to substitute the term 'commercial considerations' for 'market conditions' in Article 14(d). India reiterates that the presence of identical factors in Article 14(d) of the SCM Agreement and Article XVII of the SCM Agreement to identify 'market conditions' and 'commercial considerations', respectively, cannot be ignored.

11. India has claimed that the Tier-II method *per se* as well as the hierarchy between Tier-II and Tier-III are inconsistent with Article 14 of the SCM Agreement. There is an inherent presumption in the United States' Tier-II method that world price benchmarks can be applied to assess the adequacy of remuneration irrespective of the prevailing market conditions in the country of provision. The obligations on the investigating authority as noted by the Appellate Body in *US – Softwood Lumber (IV)* are simply ignored by the United States. India believes that the Tier-II method is exactly what the Appellate Body in *US – Softwood Lumber (IV)* directed investigating authorities to avoid. Further, the United States' failure to justify the *inter se* hierarchy between Tier-II and Tier-III methods is apparent on the face of the record and nothing can logically justify the United States' choice of world price benchmarks over a qualitative assessment of the pricing policy under Tier-III.

India's second 'as such' claim is the "mandatory comparison" of the Government prices with the benchmark at the 'delivered prices' level".

12. Under 19 CFR § 351.511(a)(2)(iv), the benchmark price determined under Tier I or Tier II is required to be adjusted to reflect the price that a firm actually paid or would pay if it imported the product. The adjustment will include delivery charges and import duties. This mandate applies even if the government price in question does not include such delivery charges. Such mandatory use of 'delivered prices' violates the United States' obligation to consider the 'prevailing market conditions' in the country of provision. Even where the prevailing 'conditions of sale' for the transaction of the goods in question do not include transportation or other delivery charges, such as when goods are being transacted on an *ex-works* basis, the United States law mandates its investigating authority to ignore these market conditions.

13. The United States argues that the term 'transportation' is mentioned in Article 14(d) and therefore, in every case, transportation will be added to the prices being used. India cannot

imagine a more acontextual and absurd implication of this word. The Panel may observe that 'transportation' is considered as just another 'condition of sale' within the meaning of Article 14(d). Otherwise, the presence of the word 'other' is reduced to redundancy. Further, such 'conditions of sale' need to be accounted for in order to assess the 'prevailing market conditions'. The use of the term 'transportation' does not mean that in every case transportation costs shall be included irrespective of whether the prevailing market conditions for sale of the goods in question include an element towards 'transportation'.

14. A second fundamental error in the United States' approach is that its assumption that measuring adequacy of 'remuneration' involves assessing the cost to the recipient of the goods. The language of Article 14(d) does not make cost to the purchaser a relevant element. In fact, in *EC and Certain Member States – Large Civil Aircraft*, the Appellate Body has expressly ruled that one should not focus solely on the demand side or the supply side of the equation for the purposes of Article 14(d) and the United States' position is contrary to this. Rather, the focus is on the "prevailing market conditions" and India submits that an adjustment on account of transportation (which is also a condition of sale) could only be made if such condition of sale reflects the prevailing market condition in the country of provision. However, the mandatory nature of the United States' law forecloses such an examination and presumes the delivery charges as a condition of sale *dehors* the actual facts of a case.

15. Moreover, as India submitted in India's First Written Submissions, wherever the benchmark relates to goods from outside India, the addition of international freight and import duties to the benchmark price while only adding local freight and local taxes to the government price under challenge makes the affirmative determination of 'benefit' a foregone conclusion.

The third 'as such' claim relates to the "Cumulation of subsidized and non-subsidized imports to determine injury in CVD proceedings".

16. India would like to reiterate that the real issue is whether Article 15.3 of the SCM Agreement contemplates cumulation of imports from countries not subject to 'simultaneous countervailing duty investigations'. The said article does not cover cumulation of 'dumped' and 'subsidized' imports. Article 15.3 only permits cumulation of 'subsidized' imports from more than one country that are subjected to simultaneous countervailing duty investigation.

17. The primary argument of the United States to defend the provision under challenge seems to be that 'disentanglement of dumped and subsidized' injury is not possible. However, the United States while adopting this myopic approach omits the unequivocal requirements of Article 15.5 that injury caused by other known factors must not be attributed to the subsidized imports.

The last of the 'as such' claims deals with the US law pertaining to 'Adverse Facts Available'.

18. Contrary to the United States' assertion, India has made it clear that it is challenging the AFA provisions, i.e. 19 USC § 1677e(b) and 19 CFR § 351.308 'as such' and not the 'practice' or the 'approach' of the DOC in applying these provisions. India submits that as a matter of rule or norm, the United States applies the AFA provisions to draw the worst possible inferences in all cases where the parties have allegedly not cooperated to the best of their abilities. India has referred to the consistent practice as evidence to prove such a rule or norm. The use of such systematic application in order to prove the existence of a rule or norm is consistent with the findings of the Appellate Body in *US – Zeroing (EC)*. Even on facts, India submits that the evidence on record is akin to what was available in *US – Zeroing (EC)* and therefore, satisfies the threshold placed by the Appellate Body in *US – Zeroing (EC)*.

19. The United States' principal objection again is that their legislation is discretionary and India has already acknowledged that fact. However, the United States appears to be under the misunderstanding that this grants a safe harbor to its law. The United States cannot circumvent an actual prohibition under the SCM Agreement merely by couching its provision in discretionary terms. While it is true that India has used the consistent and systematic practice of the investigations to substantiate that the allegedly discretionary norm is actually applied as if it were a mandatory one, the United States has misconceived this to be the only evidence on record.

Rather, India has also referred to binding domestic precedents as well as the policy background behind the AFA provision, which consistently highlight that punishing non-cooperation was the intent behind the AFA provision. These additional evidences have not been rebutted by the United States. Instead, the United States attempts to take the Panel on a tangential course by referring to *US – Export Restraints* and *US – Measures on Steel Plate in India*, where attempts to challenge 'practice' as a measure were dismissed.

20. The United States has completely failed to appreciate the findings from the two Panel reports in *US – 1916 Act (EC)* and *US – Countervailing Measures on Certain EC Products*, as well as the Appellate Body Reports in *US – Corrosion-Resistant Steel Sunset Reviews*, *US – Zeroing (EC)* and in *US – Oil Country Tubular Goods Sunset Reviews*, which direct this Panel to not stop its examination with the plain text of the provision. Qualitative assessment of consistent practice as one evidence to demonstrate the existence of a norm is a mandate from the Appellate Body. India seeks such an assessment from this Panel.

21. Further, India highlights that even if the Panel were to consider the provision to actually provide discretion in a real sense, a discretionary legislation has been held to be inconsistent earlier by the Panel in *US – Section 301 Trade Act*. India submits that the very grant of the discretion to apply the facts available standard to punish non-cooperation is inconsistent with Article 12.7 of the SCM Agreement. The United States fails to provide any rebuttal in this regard.

22. The United States also takes the misconceived argument that since its law refers to the requirement of corroboration it fulfills the obligation of obtaining the best or most fitting information as per the mandate given by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. India believes that the United States has misunderstood the findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. What the Appellate Body was referring to was the need to engage in a qualitative assessment of the entire universe of evidence available on record. It is a comparative and evaluative approach where all possible facts that are otherwise available are considered and an objective determination is to be made as to which among them best fits the gap in the record. The fact that secondary information is to be corroborated to the extent practicable does not ensure that all available facts have been evaluated. Furthermore, admittedly, this provision only applies for 'secondary evidence' and not in all cases. If the requirement to corroborate allegedly ensures obtaining the best or most fitting information the mere fact that this is being done only in selective circumstances and not always in itself results in incompatibility with Article 12.7. Moreover, in terms of the United States' law, corroboration as a requirement comes into play only when the decision to apply adverse facts has been reached, whereas the Appellate Body requires the evaluative exercise *prior* to determining which facts are to be applied under Article 12.7. Therefore, the defense raised by the United States is without merit.

Let me now move on to the 'as applied' claims raised by India.

23. Before briefing the Panel on a claim-by-claim basis, India wishes to note one recurring theme in the defense raised by the United States. The United States has attempted to provide *ex-post facto rationalizations* to justify many of their 'as applied' findings before the Panel. Irrespective of what the actual and explicit determinations made upon conclusion of the investigations in question, the United States has claimed in their written submissions that the evidence on record may otherwise justify its determinations. India would refer to such glaring instances appropriately in the following section.

Let me now move on to each of the 'as applied' claims raised by India, starting first with the sale of iron ore by NMDC.

24. In paragraph 104 of Second Written Submissions, the United States asserts that NMDC is a public body for three different reasons-(a) the Government of India owned 98% of NMDC's shares; (b) the Government of India was heavily involved in the selection of the Board of Directors; and (c) NMDC was under the administrative control of the Government of India. The United States even argues in its submissions that NMDC is a governmental authority performing governmental functions. The sale of iron ore by NMDC was countervailed for the first time in 2004 AR and the relevant determination did not refer to anything other than government shareholding as the reason for treating NMDC to be a public body. For the first time, a reference was made to the

composition of the board of NMDC in the determination of 2007 AR. Even in the said determination, the investigating authority stated that as a matter of law where there was significant government ownership of shares, further evidence was unnecessary. It was stated that mere governmental ownership would be sufficient to justify its finding and that in such cases, the burden shifted onto the interested parties to demonstrate that the government did not exercise control despite such significant ownership of shares.

25. In any case, the United States has admitted that it is making *ex post facto rationalization* before this Panel. In its response to the Panel's query 42(b), the United States agreed that it chose to apply a 'simple control test' in its determinations. In fact, their admission that no other factor was considered could be traced back to an entirely different dispute, i.e. *US – Antidumping and Countervailing Duties (China)* wherein the United States admitted before the Panel that in *Hot-Rolled Carbon Steel Flat Products from India*, the USDOC found that a 98 per cent government-owned mining company governed by the Ministry of Steel was a public body, without reference to any more factors. It would be anomalous today for the United States to say anything to the contrary.

26. Even the composition of the board of directors needs a closer look. As the Panel may observe from India's Second Written Submissions, apart from 2 directors appointed by the Government of India, majority of the directors were all 'independent' and India has placed on record evidence explaining the completely uninfluenced and independent role played by such independent directors. In other words, government involvement is extremely minimal in the appointment of the board of directors. There is no government involvement in the functioning of the board of directors. It is also noteworthy that the grant of 'miniratna' and 'navaratna' status to NMDC is acknowledged by the United States and India has placed the relevant executive notifications on record showing that the Government of India has granted significantly higher degree of autonomy to NMDC. Surprisingly, while the United States so vehemently argues that it has *discussed* other evidence on record, none of these points has been explored or even discussed in the determinations under challenge. Therefore, even the *ex post facto rationalizations* fail on merit.

27. As to the aspect of NMDC being a governmental authority performing governmental functions, India finds the United States' approach startling. Effectively, the United States seeks a ruling that the activity of mining is a "governmental function" simply because mineral resources are owned by the Government of India and it is the Government of India that grants mining rights. This would mean that every mining company is potentially a 'public body'. What the United States fails to appreciate is that there is a close link between the requirement of the entity possessing governmental authority and this entity performing governmental functions. It is clear from the Appellate Body's ruling in *US – Antidumping and Countervailing Duties (China)* that what was intended to be covered were only those entities vested with the authority to perform the function of regulating, restraining, supervising or controlling the conduct of others. It is not as if NMDC issues mining licenses or regulates the mining activities of other.

28. A second significant instance where the United States has placed reliance on such *ex-post facto rationalization* is their defense to the failure to apply certain in-country benchmarks made available by the interested parties in this case. In its First Written Submissions and the Second Written Submissions, a number of objections have been taken by the United States that these prices did not reflect any private party transactions and that the price quotes seem otherwise unreliable. Once again, none of these objections is recorded anywhere in the determinations under challenge and such additional assertions ought not to be considered by the Panel. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* has very clearly laid down that Article 12 represents a due process system of investigation and there is a requirement to at least consider all the evidence placed on record by the interested parties.

29. Apart from the aforesaid, the United States also claims that the above prices did not reflect Tier-I benchmarks as they were not prices in actual transactions but only price lists. However, the United States adopted the price quotes given in the TEX Reports as reflective of Tier-II benchmark and this hypocritical application of Article 14(d) cannot be permitted.

30. An important issue that India would like to comment upon at this stage is the United States' assertion that some of the Exhibits filed by India before this Panel were confidential material. The Panel may observe that none of the Exhibits filed by India carry an endorsement on the top of the

page stating "Proprietary Treatment Requested" and no information or data in the said Exhibits has been bracketed. It seems to be the position of the United States that merely because one of the exporters (e.g. Tata) had filed certain confidential information anything and everything filed by said exporter shall be considered confidential. The Panel may appreciate the absurdity of this stand. If the United States' suggestion were to be accepted, the other documents filed by this exporter, including copies of Indian Law (Customs Tariff Notification No. 21/2002), the Hoda Report extract and the Expert group Report would also become confidential, whereas even the United States cannot dispute that these are all public documents.

31. At issue is Exhibit IND-70, which allegedly contains confidential data. In this respect, India provides the following clarifications:

(i) No. of Licenses Granted by Government of India - The list of all mining concessions granted by Government of India is publicly available at www.mines.nic.in. One can obtain the entire list for all years (state-wise). From that data, the Government of India as well as Tata consolidated the state lists, segregated the data for 2005-06 and provided it to the United States. This was demonstrated to the investigating officer during the verification visit to Tata. The same list is also part of the Government of India Verification Exhibits, which is entirely a public document.

(ii) Sesa Goa & Kudremukh Financial Information - The financials were obtained from the Internet. The new reports are available at their respective websites. Although past reports have now been removed (which were very much available at the time of the investigation), the past reports can be accessed from http://www.mca.gov.in/MCA21/. The above mentioned website (for filings by Listed Companies) can be accessed by anybody after depositing a nominal fee of less than USD 1 (INR 50) per company.

(iii) The third information is a quotation letter from Essel Mining. There is neither bracketing on the information nor a header requesting treatment as Business Confidential Information. It is public for the purposes of law. Even if presumed to be proprietary, the Authorization from Tata is on record and predates India's First Written Submissions. In any event, even if this information is considered proprietary, it must have at least been used for Tata while calculating benefit.

(iv) The fourth information is a price list from Goa Mineral Ore's Exporters Association. The same information is also part of the questionnaire response of the Government of India, filed as Exhibit IND-61 before this Panel. At a minimum, it is non-confidential in the Government of India questionnaire response and therefore, could be filed even without authorization from Tata.

32. To briefly mention about the specificity issue, India submits that before making a 'specificity' determination under sub-paragraph (c) of Article 2, the United States did not examine whether the alleged captive mining policy was non-specific under sub-paragraphs (a) and (b) of Article 2. The plain language of Article 2.1(c) makes it evident that the United States could not have proceeded to an examination of *de facto* specificity without examining specificity under Article 2.1(a) and (b). Even while making the determination under Article 2.1(c), specific conditions mentioned therein i.e. extent of diversification of economic activities and the length of time during which the program in question has been in operation were not examined.

I would now like to address the claims pertaining to alleged 'Captive Mining Rights for Iron Ore & Coal' programs.

33. In its First Written Submissions, India has explained the features of India's mining rights program all of which remain un-rebutted by the United States. The essence of the claim has been correctly captured by the Panel in Question No. 29 to India. The fact remains that India only grants 'mining leases' for iron-ore. The fact that some of the lessees, in their commercial wisdom, choose to be vertically integrated is inconsequential to the grant of rights by the Government of India under the relevant legal regime. There is no separate policy, law or regulation for captive mining and all the lessees pay the same amount of royalty fees and are granted concessions on the same terms and conditions.

34. The United States in its Second Written Submissions also draws the Panel's attention to pages 217-18 of the *Hoda Report.* However, there is not even an iota of evidence on record that the Government of India is facilitating captive mining over stand-alone mining. India reiterates that under Article 11, panels must also examine if the competent authority has assessed all relevant factors, pertinent facts and given adequate explanation to support their determination.[2] India submits that for determining specificity under Article 2 of the SCM Agreement, a panel must examine the broader legal framework pursuant to which a subsidy is granted.[3]

35. Not only has the United States has mischaracterized the program as '*captive* mining rights for *iron ore*', it has also not identified any separate regulation or guidelines governing mining rights of iron ore as distinguished from other minerals. This is a fundamental error of fact by the United States, which also vitiates its specificity determination as regards *captive* mining rights for iron-ore.

36. India submits that granting "mining right for iron-ore and coal" cannot amount to *provision* of iron-ore and coal. India only provides the mining rights against royalty, which constitutes roughly 9.03% of the total cost of extracting iron ore in the relevant period, the other 90.97% being the cost of extraction incurred by the lessee of the mining rights. There is no reasonable proximate connection between the grant of rights and enjoyment of the mined mineral by the miners. The United States fails to appreciate the need to prove the existence of such reasonable proximate connection as has been laid down by the Appellate Body in *US – Softwood Lumber IV*.

37. It is worthwhile to note that the United States adopted a notional price for the extracted mineral that included cost of extraction, royalty paid and a notional reasonable profit as the remuneration received by the Government of India. There is no legal basis for adopting such a price as the government price under the programs.

38. Further, to the extent the benchmarks adopted for these programs are similar to the one for the sale of high grade iron ore by NMDC, the arguments made in respect of the NMDC program would apply *mutatis mutandis* to these two programs also.

Next, I would like to deal with the SDF program.

39. As has already been observed by this panel, the United States does not appear to dispute that the JPC is not a public body. The uncontroverted fact remains that JPC was established under a separate legal instrument, has a separate identity and its functions are distinct from that of the SDF Managing Committee. Once again, referring to the findings in *US – Anti-Dumping and Countervailing Duties (China)*, there is no finding that the JPC has been vested with governmental authority to perform governmental functions. It is the JPC and not the SDF Managing Committee, which executes the loan documents, disburses the funds and receives the funds.

40. At this stage, in paragraph 111 of the Second Written Submissions, the United States has suggested to this Panel that "*under the direction of the SDF Managing Committee, the JPC determined the amounts to be levied*". A case has been made out by the United States as if it is the SDF Managing Committee that acted as the nodal agency for the SDF program and the JPC as a subordinate agency. It will be a futile attempt to trace any determination that even remotely suggests this. In fact, in the original findings in the year 2000 when the SDF program was first countervailed, the United States made a distinction between collection of funds on the one hand and its disbursement on the other.

41. The United States consistently claims that the SDF levy was 'mandatory'. India requests the Panel to reflect on this point a little further. It is admitted that the JPC directed the SDF levy and it is not in dispute now before this Panel that the JPC is a private body, being majority controlled by the participating steel enterprises. There is also *no finding* that the JPC was directed by the SDF Managing Committee when levying the SDF amounts. Therefore, participating steel enterprises together determined a price hike in their products. Therefore, from the consumer's perspective, the increased price is now the price at which the products are made available in the market and anyone choosing to purchase from these participating steel enterprises could only buy at this increased price. Merely because market players choose to charge a certain price from the

[2] Appellate Body Report, *US – Cotton Yarn*, para. 74.
[3] Appellate Body Report, *US – Large Civil Aircraft (Second Complaint),* para. 757.

consumers does not make the increase in price equivalent to the taxation function of the government in any sense.

42. Since the JPC was involved in the funds collection and JPC was controlled by the steel industry only, the SDF funds were producer levies and the SDF loans did not involve a charge on the public account. The SDF levy never became part of the consolidated fund of India and therefore, can never be equated to tax revenues.

43. India also wishes to submit that the United States cannot, at this stage, dispute facts on record. In paragraph 114 of its Second Written Submissions, the United States impliedly questions the undisputed functioning of the SDF mechanism. The United States seems to believe that competitors cannot cooperate and pool-in money in order to create a common development corpus. India takes strong objection to the United States' stand that this is absurd. The economic and other conditions existing in each country varies and market players are free to choose their best mode of operations. The conditions prevailing in India back in the 1970s may have been such that there was a need for creating such a common corpus and it is not for the United States to comment on the merits of the approach. In any case, the function of the SDF mechanism was never questioned during the investigation phase and India submits that this cannot be questioned at this stage.

44. Even as regards the SDF Managing Committee, the United States determined it to be a public body on the sole basis of governmental control due to composition of the committee. This fails to satisfy the test laid down in *US – Anti-Dumping and Countervailing Duties (China)*. While the United States argues at this stage that the SDF Managing Committee performs a 'governmental function', such a finding is absent in the determination under challenge. Such arguments are merely *ex-post facto rationalizations* that are to be rejected by the Panel. India also reiterates that the domestic notifications issued pertaining to the SDF clearly point out that the authority to operate the fund vested only with the JPC, which is not a public body.

I would briefly address India's claim regarding the injury examination conducted by the United States.

45. The United States raises several additional arguments in defense of its original injury determination. India submits that all such analysis never formed part of the injury determination made by the United States. Table V-13 highlights no segregation of data of dumped imports vis-à-vis subsidized imports; it merely tabulates the data for each country without further examination of the data. The narrative portion of the injury determination does not even make the effort to segregate the data based on the dumped imports and subsidized imports.

46. In relation to the evaluation of mandatory injury parameters, the United States observes that even though there is no written record, it has indeed evaluated the mandatory parameters as required under Article 15.4 of the SCM Agreement as interpreted by the Appellate Body in *EC – Pipe and Tube Fittings.* In *EC – Pipe and Tube Fittings,* the Appellate Body found that there was considerable analysis regarding the mandatory parameters in question, which satisfied the requirement under Article 15.4. However, this is not so in the present case.

Let me now address the claims regarding application of AFA provisions.

47. One of the primary arguments in respect of this issue rests on the fact that the United States consistently applies the highest possible rate against non-cooperating parties.[4] Applying the highest possible margin in all cases of non-cooperation is contrary to Article 12.7 of the SCM Agreement. India notes that the United States does not defend this approach before this Panel.

48. In its First Written Submissions, India had also raised a number of instances where the AFA provisions "as applied", are inconsistent with Article 12.7 of the SCM Agreement. The United States, in its First Written Submissions, fails to justify its finding in all the instances and instead, attempts to rebut only one instance and asserts that every other instance falls in the same category.

[4] India's First Written Submissions, paras. 526-527.

Finally, India would like to deal with the aspect of investigating new subsidies as part of an administrative review.

49. In relation to the requirement to comply with Articles 11, 13 and 22 of the SCM Agreement qua new subsidies in a review proceeding, all that the United States seems to rely upon is that none of these provisions are cross-referred in Article 21. Yet, it fails to realize that Article 21 is for a 'review' proceeding and does not relate to findings being made for the first time. Rather, according to the United States so long as the products in issue are the same and the exporting Member is the same, new subsidies can be added anytime in a review proceeding. To justify this argument, the United States asserts that otherwise, Members could change subsidy programs and circumvent imposition of duties. What the United States fails to appreciate is that there is a distinction between asserting an entirely *newly* alleged subsidy and asserting that there is a continuation of an already existing program after some modification. India's claim does not concern the latter case. The mere fact that this may, because of domestic practice, becomes inconvenient to the United States cannot be an excuse to not comply with the requirements of the SCM Agreement.

50. The plain words of Article 11 direct an examination of *any* alleged subsidy and Article 13 also states that the consultations are to cover each and every such alleged subsidy. It would be evident to the Panel from the plain words that the Articles 11, 13 and 22 would independently apply to each subsidy program and the United States cannot choose to ignore fulfilling these obligations for newly alleged subsidy programs. India's claim is only that Articles 11-13 and 22 represent the due process for investigating into any given subsidy program and in particular, the consultation process under Article 13 may provide crucial facts that may lead to the investigating authority not proceeding with the investigation against any given subsidy.

51. India reiterates its position with regard to all the other claims that are not addressed in this opening statement. Mr. Chairman and Members of the Panel, this concludes our opening statement. India thanks the Panel for the opportunity to present it's views in this dispute. India would be pleased to provide responses to any questions that the Panel may have.

ANNEX B-7

ORAL CLOSING STATEMENT OF INDIA – SECOND MEETING

Mr. Chairman and distinguished members of the Panel

1. We are now at the completion of the second substantive meeting of the panel in this dispute and the Panel has before it, the written submissions of the parties and clarifications provided in response to questions from the Panel. India, therefore, does not feel any need to re-agitate the various arguments already forming part of the record. India believes that it has made out a very strong case in respect of all its claims and all that the United States has to offer in rebuttal are hollow words and repeated efforts to choose convenience over giving effect to the terms of the treaty.

2. One of the major issues contested between the parties is the interpretation and understanding of the terms used in Article 14(d). While India maintains that Article 14(d) envisages a two-step process i.e. determining inadequacy of remuneration first prior to calculating benefit, as India explains below, the United States has taken self-contradictory views on this issue. In paragraph 11 of its Second Written Submissions, the United States acknowledges that benefit may be calculated under Article 14(d) only upon the existence of a "particular condition", which condition could only be a reference to the "remuneration" being "less than adequate". Nonetheless, the United States still prefers to state that calculating benefit and examining whether the "remuneration" is "less than adequate" is one and the same thing. The Panel may observe, upon further reflection, that all of this arises from the failure on the part of the United States to understand the meaning of the term "remuneration". On this aspect, all that the United States has been able to offer the Panel is a vague statement that even though 'remuneration' is a different term from 'benefit', they are related.

3. India submits that the term "remuneration" can only mean actual compensation received by the provider of the goods. The United States rejects this approach and provides no alternative. In paragraph 6 of their opening statement in the second substantive meeting, the United States denies that the term "remuneration" is equal to "cost to beneficiary". Effectively, according to the United States the term "remuneration" means nothing because the United States asserts that it is neither the "cost to beneficiary" nor the compensation received by the government provider. Adding to the confusion further, while denying that "remuneration" is equal to "cost to beneficiary", the United States simultaneously asserts in paragraphs 21, 25 of its opening statement that assessing the "cost to beneficiary" is reflective of the prevailing market conditions for that good. As per the second sentence of Article 14(d), it is the adequacy of the "remuneration" that is to be assessed "in relation to the prevailing market conditions" and hence, the assertion of the United States in paragraph 21 of its opening statement appears to be that "remuneration" is equal to "cost to beneficiary". These mutually contradictory stands only highlight the fact that India's approach is in line with the text and spirit of Article 14(d) and any attempt to deviate from this approach would only result in incorrect result as is seen with the submissions of the United States. Rather than provide meaning to the actual terms used in the treaty, the United States simply chooses to incorrectly hide itself in statements made by the Appellate Body decisions that did not address the meaning of the term 'remuneration' at all. This inability of the United States to interpret and give meaning to the terms used in the treaty is carried forward to the second 'as such' claim as well. The United States argues in paragraph 24 of its opening statement in the second substantive meeting that the term "conditions of sale", as it appears in Article 14(d), does not refer to contractual conditions of sale. The analysis ends there and the United States never explains what else the phrase "conditions of sale" could mean.

4. On most of the other issues, the United States violates fundamental notions of treaty interpretation by creating redundancies in the SCM Agreement. For instance, on the requirement of the assessing 'negligibility' for the purposes of Article 15.3, the United States fails to account for the use of the word 'each' as it appears therein and argues that it is permitted to assess negligibility in any manner it may choose, including by an aggregate analysis. Similarly, Article 1.1(a)(1)(i) relates only to 'direct' transfer of funds and in their ordinary sense, do not cover *indirect* transfer of funds. However, in relation to the SDF program, even though the SDF Managing Committee but momentarily assuming otherwise was not a 'public body', it is

admitted that the actual loan transfer was effectuated by the JPC and this indirect transfer is not covered under Article 1.1(a)(1). A more startling instance is the United States' argument that Article 15 does not prohibit cumulation of subsidized and non-subsidized (but dumped) imports when determining injury in a countervailing duty investigation even though there is an express non-attribution obligation under Article 15.5 of the SCM Agreement.

5. On the other extreme, the United States has gone to the extent of inserting or modifying words into the treaty where it suits its convenience. While defending its AFA provision, the United States has effectively requested this Panel to insert the sentence "the provisions of Annex II of the AD Agreement shall be observed in the application of this paragraph" into Article 12.7 of the SCM Agreement. The United States completely fails to appreciate the subtle difference between using Annex II of the AD Agreement as a contextual reference to interpret Article 12.7 and adding words to the SCM Agreement. Even where Annex II to the AD Agreement refers to the fact that non-cooperation ***could*** lead to inferences that are less favorable to the party concerned, the United States modifies this language to assert that non-cooperation ***would*** lead to inferences that are less favorable to the party concerned. Yet, in defending against India's first "as such" claim, despite the fact that list of factors governing "commercial considerations" in Article XVII GATT and "market conditions" in Article 14(d) of the SCM Agreement are identical, surprisingly the United States requests the Panel to ignore the same.

6. Even on the 'as applied' claims, the United States would have the Panel to allow members to take extremely unreasonable positions. For instance, the United States sought information from the interested parties about prices prevailing in India for iron ore and even where the parties did produce this information, the United States did not consider them at all in its determinations and when questioned, the United States informs the Panel in paragraphs 35 and 37 of its opening statement at the second substantive meeting that this failure is to be attributed to interested parties not requesting the United States to use the said prices. The United States also asserts that such price lists are not good benchmarks because they are not actual transaction prices and yet, the United States was willing to use negotiation prices, that are not actual transaction prices, reflected in the Tex Reports as benchmarks.

7. The determinations under challenge before this Panel reflect several more glaring instances of unreasonable application of the provisions of the SCM Agreement, including those relating to the calculation of benefit and the application of the facts available standard. Particularly on the aspect of calculating benefit, since 2006, the United States has applied prices of iron ore or coal exported from outside India as benchmarks and the comparison of the United States involved adding international ocean freight to the benchmark while domestic freight to the prices under challenge. This would mean that countervailing duty is effectively imposed on ocean freight since international freight could often be more expensive than domestic freight. In other words, the United States countervailed a service which is not even provided by Government of India under the garb of investigating subsidies provided for goods. An even more alarming example is the United States' approach when determining the amount of benefit in the case of mining programs. The United States subtracted the cost of extraction of the ore (including reasonable profits) from the benchmark price of the ore to calculate benefit. If, therefore, the benchmark price is the same for two miners, an inefficient miner would have a lower benefit amount than an efficient miner. Rather than countervailing subsidy, the United States has adopted a method that has countervailed 'efficiency', which, by no stretch of imagination could have been the intent behind Article 14(d).

8. Therefore, India reiterates that irrespective of how the United States may perceive them, India's claims, both 'as such' and 'as applied', are grounded on the text and spirit of the SCM Agreement. India believes that the delicate balance envisaged in the treaty is reflected in its text and India seeks the indulgence of this Panel to interpret and apply the text of the SCM Agreement in accordance with customary rules of interpretation of the international law.

9. Mr. Chairman and Members of the Panel, this brings us to the end of India's closing statement. We once again thank you for your patient listening and the most efficient manner in which the proceedings have been conducted. We are also grateful for accepting India's request to provide an advance copy of the Panel's questions. We also thank the Secretariat for their hard work, and meticulous and effective assistance to the Panel. India would be pleased to provide responses to any further questions that the Panel may have.

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ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

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

II. PRELIMINARY RULING REQUESTS

3. India raises claims in its First Written Submission that are outside the Panel's terms of reference. Specifically, India raises claims under Article 11 of the SCM Agreement that were not included in its panel request pursuant to Article 6.2 of the DSU and which failed to present the problem clearly, and which are therefore outside the Panel's terms of reference. India also raises claims regarding a Sunset Review determination issued by the Department of Commerce on March 14, 2013, which also was not included in India's panel request as required by Article 6.2. Accordingly, the United States respectfully requests that the Panel find that these claims are outside the Panel's terms of reference.

III. THE U.S. REGULATION FOR DETERMINING THE BENEFIT WHEN GOODS ARE PROVIDED BY A GOVERNMENT FOR LESS THAN ADEQUATE REMUNERATION IS CONSISTENT WITH ARTICLE 14(d) OF THE SCM AGREEMENT

4. First, India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation is inconsistent "as such" with the first sentence of Article 14(d). India argues for a methodology of calculating benefit based on "cost to government." India's interpretation contravenes the text, particularly the title and *chapeau* of Article 14. The title of Article 14 states that the provision concerns "calculation of the amount of a subsidy in terms of the benefit to the recipient." The *chapeau* of Article 14 makes clear that an investigating authority must provide for a methodology in law or regulation that allows it to calculate "the benefit to the recipient." Moreover, Article 1.1 states that "a subsidy shall be deemed to exist" where there is "a financial contribution by a government or any public body" and "a benefit is thereby conferred;" no additional analysis focused on cost to government is required. Finally, the "cost to government" standard was already considered and rejected by the Appellate Body in *Canada – Aircraft*. In contrast to India's interpretation, Section 351.511(a)(2)(i)-(ii) of the U.S. regulation calculates the benefit from the provision of goods by a government by determining adequacy of remuneration with respect to the recipient.

5. Second, India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation is inconsistent "as such" with the second sentence of Article 14(d). Rather than basing its argument on the actual text of Article 14(d), India argues that the U.S. regulation is inconsistent with text taken from Article XVII:1(b) of the GATT 1994. Such an approach should be rejected.

6. Third, India argues that Article 14(d) establishes a right of Members to provide goods for adequate remuneration without facing CVD measures. India misinterprets the text. Article 14 establishes procedural guidelines for Members' investigating authorities to follow when calculating the amount of subsidy in terms of benefit; to the extent the methodology or methodologies employed by an investigating authority are consistent with Article 14, this obligation has been satisfied.

7. Fourth, India argues that the U.S. regulation, by excluding government prices from the benchmark in some circumstances, is inconsistent "as such" with Article 14(d). The calculation of "benefit" requires that the financial contribution at issue must be excluded from the benchmark, and the prices of similar goods sold by private suppliers in the country of provision are to be the primary benchmark for calculating benefit.

8. Fifth, India asserts that Article 14(d) precludes out of country benchmarks. The text of Article 14(d) allows, and the Appellate Body has confirmed, where in-country private prices are not useable, an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision.

9. Finally, India argues that the U.S. regulation requires the countervailing of "comparative advantages." The United States understands India to mean that there may be factors for which a particular out-of-country benchmark needs to be adjusted before determining adequacy of remuneration in a particular market. The U.S. regulation allows for such adjustments and therefore is not inconsistent with Article 14(d).

IV. SECTION 351.511(a)(2)(iv) OF THE U.S. REGULATION PROVIDES FOR ADJUSTMENTS WHEN DETERMINING THE ADEQUACY OF REMUNERATION CONSISTENT WITH ARTICLES 14(d), 19.3, AND 19.4 OF THE SCM AGREEMENT

10. India claims that, by including delivery costs in the benchmark price, the U.S. regulation is inconsistent with Article 14(d), and consequently with Article 19.3 and 19.4. Commerce makes price adjustments for delivery charges for both the benchmark price and the government price. The U.S. regulation therefore ensures that the benchmark and the government prices are compared at the same point in the distribution chain, and is consistent with the adjustments for "transportation" set out in the second sentence of Article 14(d). The U.S. regulation is therefore not inconsistent with Article 19.3 and 19.4.

V. THE CUMULATION PROVISIONS OF THE U.S. STATUTE ARE NOT INCONSISTENT, AS SUCH, WITH ARTICLE 15 OF THE SCM AGREEMENT

11. Despite India's claims to the contrary, the cumulation provisions of the U.S. antidumping and countervailing duty statutes are not inconsistent, as such, with Article 15 of the SCM Agreement. These provisions of the U.S. statute, which permit the Commission to cumulate subsidized and dumped imports in original investigations and sunset reviews, are fully consistent with the text, object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries being injured by unfairly traded imports from a variety of sources. Although India claims that Article 15.3 of the SCM Agreement prohibits such an approach, nothing in the text of Article 15.3 prohibits, explicitly or implicitly, the cumulation of subsidized and dumped imports. Instead, the article only addresses the conditions under which an authority may cumulate imports from multiple countries that are subject to simultaneous countervailing duty investigations.

12. Additionally, with respect to the statutory provisions governing cumulation in sunset reviews, India's claims of inconsistency with Article 15 are premised on the mistaken belief that Article 15 is applicable to an authority's likely injury determination in sunset reviews. The Appellate Body has consistently rejected the view that the injury provisions of Article 15 of the SCM Agreement and Article 3 of the AD Agreement are directly applicable to an authority's likely injury determination in sunset reviews. Furthermore, India's as such challenge to the sunset provisions of the statute necessarily fails because the U.S. statute does not mandate cumulation in sunset reviews. Instead, the statute explicitly gives the Commission discretion not to cumulate any subject imports, whether dumped or subsidized, in a sunset review, even if the statutory

standards are met. As a result, India cannot establish that, in the sunset context, the U.S. statute mandates that action by the Commission that is inconsistent with the SCM Agreement.

VI. THE COMMISSION'S CUMULATION DETERMINATIONS FOR HOT-ROLLED STEEL IMPORTS FROM INDIA ARE NOT INCONSISTENT, AS APPLIED, WITH ARTICLE 15 OF THE SCM AGREEMENT

13. India also has no basis for the argument that the Commission's cumulation of subsidized imports of hot-rolled steel from India with dumped hot-rolled steel imports in its injury and sunset determinations was inconsistent, as applied, with Article 15 of the SCM Agreement. The SCM Agreement does not prohibit the cumulation of subsidized and dumped imports in original investigations or sunset reviews, as India claims. Again, cumulating all unfairly traded imports, whether dumped or subsidized, is consistent with the object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries that are being injured by simultaneous unfairly traded imports from a variety of sources.

14. Furthermore, in its injury determination, the Commission did not fail to "evaluate" three factors (that is, growth, return on investment, and ability to raise capital), as contemplated by Article 15.4 of the SCM Agreement, as India claims. The Appellate Body has made clear that an authority is not required to make specific findings for each specified impact factor as part of its overall injury analysis. Instead, the Commission's report shows that it obtained and evaluated the data pertaining to the industry's condition, including the factors of growth, return on investment, and ability to raise capital, in the manner contemplated by Article 15.4.

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

15. The United States submits that nothing in the U.S. statute or regulations regarding the use of facts available is inconsistent with the SCM Agreement. First, the U.S. statute and regulations at issue do not require the use of adverse inferences in selecting among the facts available. It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member's WTO obligations only if the legislation mandates action that is inconsistent with those obligations or precludes action that is consistent with those obligations. The text of the U.S. laws makes clear through use of the term "may" that Commerce has the discretion either to employ or not employ the use of an adverse inference in selecting from among the facts available. Because these provisions do not mandate the administering authority to take the actions challenged by India, India's "as such" claims must fail at the outset.

16. Notwithstanding the discretionary nature of the U.S. laws, the U.S. measures are consistent with Article 12.7. Article 12.7 enables investigating authorities to make determinations based on the facts otherwise available when interested parties and Members have failed to provide necessary information. India argues that Article 12.7 does not include an express provision concerning "adverse" facts available and therefore prohibits this practice. It further argues that authorities are bound to use the "best" information available, based on the context provided by Annex II to the AD Agreement. India's interpretation of Article 12.7 is wrong. Given the limited investigative powers of an investigating authority, Article 12.7 provides authorities with an essential tool for dealing with uncooperative parties, and ensures that an interested party may not evade the application of countervailing duties, or obtain a more favorable duty margin, through non-cooperation. Nothing in Article 12.7 limits the application of facts available to those facts that are most favorable to the interested party who fails to supply information, nor does the ordinary meaning of the term "facts available" speak to which facts should be selected. Annex II of the AD Agreement does provide context regarding the use of facts available, but specifically allows that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

17. The U.S. measures allow Commerce to "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" if it determines that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information". If Commerce relies on secondary information in making its determination, that information must be corroborated to the extent practicable. Other WTO Members have similar laws. Therefore, the

U.S. measures are not inconsistent with a proper interpretation of Article 12.7 of the SCM Agreement.

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

18. India also challenges the program-specific subsidy rates that Commerce applied in the 2006, 2007, and 2008 administrative reviews, and claims that Commerce applied the U.S. measures in a punitive manner and made determinations without a factual foundation. In each of the challenged administrative reviews, it is undisputed that necessary information was not provided, as requested, and therefore Commerce properly resorted to the application of facts available under Article 12.7. In each case, Commerce examined the available evidence and, where there was no information to the contrary, Commerce reasonably inferred that the refusing party benefitted from the subsidy program in question, and benefitted at the same rate as a cooperating party was found to benefit in this proceeding, or, if necessary, another proceeding pertaining to India. These determinations were thus based on facts available on the record in the proceeding, and the refusal of these companies to provide *any* necessary information with respect to the benefits they received was properly taken into account in selecting from among the facts available. Therefore, India has failed to demonstrate the Commerce acted inconsistently with Article 12.7 of the SCM Agreement in making its determinations based on facts available.

IX. COMMERCE ACTED CONSISTENTLY WITH ARTICLES 1.1, 1.2, AND 14 WITH RESPECT TO THE PROVISION OF HIGH GRADE IRON ORE BY NMDC

19. First, India claims that Commerce's public body determinations in the challenged investigation are inconsistent with Article 1.1(a)(1) of the SCM Agreement because Commerce based its determinations on "[m]ere majority shareholding by government" or "solely" on "alleged control by a government." India fails to provide the Panel with arguments necessary to support its claims, because India relies on an erroneous interpretation of Article 1.1(a)(1). When interpreted according to the customary rules of treaty interpretation of public international law pursuant to Article 3.2 of the DSU, the term "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own. India has not presented any legal argument demonstrating that Commerce's determinations are based on an understanding of the term "public body" contrary to Article 1.1(a)(1) of the SCM Agreement, when properly interpreted.

20. Even if the Panel finds that India's interpretation of Article 1.1(a)(1)(iv) is appropriate, and that Commerce should have applied the test set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, the United States respectfully requests the Panel to further find that the record evidence available during the investigation would support a finding that NMDC is a "public body." Specifically, the record evidence indicates that the NMDC is a public body because it is over 98% owned by India and has the authority to perform Indian governmental functions.

21. Second, India claims that Commerce's determination that India's provision of iron ore for less than adequate remuneration was specific to certain enterprises was inconsistent with Article 2. India argues that Commerce failed to establish that the provision of iron ore for less than adequate remuneration was used by a "limited number of certain enterprises." Article 2.1(c) specifically provides that *de facto* specificity may be found in light of the use of a subsidy program by a limited number of certain enterprises, and the *chapeau* of Article 2.1 clarifies that "certain enterprises" includes an "industry" or "group of industries." Therefore, where the recipients of a subsidy constitute an industry, only comparing producers of a similar product would be circular. Rather, under Article 2.1(c), a panel or investigating authority is to decide whether the recipients of the subsidy constitute a discrete segment of the economy and are therefore "certain enterprises." Commerce's determinations demonstrate that Indian users of iron ore constitute a discrete segment of the Indian economy.

22. India also argues that Article 2.1(c) of the SCM Agreement does not permit a *de facto* specificity finding where the inherent characteristics of the product, rather than the program itself, make the product useful only to certain enterprises. There is no basis in the text of Article 2.1(c) for such an assertion, and a WTO panel has already considered and rejected it.

23. India claims that Commerce failed to consider the extent of economic diversification in India, as well as the length of time high-grade iron ore has been sold in India, as required by the third sentence of Article 2.1(c). Commerce did account for the fact that India's economy is highly diverse and that only a limited number of enterprises use iron ore. Commerce also stated that the only industries that could receive the subsidy over time would be defined as part of the original, limited group of beneficiaries – those that use iron ore – and therefore further consideration of the duration of the subsidy was not necessary.

24. Additionally, contrary to India's assertions, Commerce's specificity determination concerning the GOI's provision of iron ore at less than adequate remuneration is substantiated by positive evidence and is consistent with Article 2.4 of the SCM Agreement.

25. Third, India claims that Commerce's benchmarks for determining whether the NMDC's sales of high grade iron ore were for less than adequate remuneration are inconsistent with Article 14. First, India argues that Commerce should have determined whether a benefit was conferred by using a "cost to government" standard. For the same reasons as discussed with respect to India's "as such" claim made on that basis, the argument should be rejected.

26. India also argues that Commerce improperly relied on out-of-country benchmarks because in-country price information was available. Commerce could not rely on this information because it was incomplete and would reveal proprietary data of an Indian respondent.

27. Finally, India argues that the world market prices used by Commerce were improper because they were not identical to the market conditions in the country of provision, that Commerce improperly countervailed India's "comparative advantage, and that including ocean freight and import duties is inconsistent with prevailing market conditions in India. Article 14 requires that world market prices relate or refer to, or is connected with, prevailing market conditions in the country of provision, not that the prices be identical. Second, for the reasons explained above, Commerce can and does make adjustments appropriate for factors India describes as "comparative advantage." Third, India's position that prices must be compared on an ex-mine basis would mean the price comparison would not reflect prevailing market conditions.

X. COMMERCE'S DETERMINATIONS THAT THE PROVISION OF CAPTIVE MINING RIGHTS FOR IRON ORE AND COAL CONSTITUTES A FINANCIAL CONTRIBUTIONS, ARE SPECIFIC TO CERTAIN ENTERPRISES, AND PROVIDE BENEFITS TO THE RECIPIENTS ARE NOT INCONSISTENT WITH ARTICLES 12.5, 1.1, 1.2, 2, AND 14 OF THE SCM AGREEMENT

28. India claims there is no "captive" mining rights program for iron ore in India and that Commerce's findings of such a program are contrary to Article 12.5 of the SCM Agreement. The record evidence demonstrates that India has a captive mining programs for iron ore and coal, and by relying on that evidence, Commerce met its obligations under Article 12.5.

29. India also argues that the GOI's granting of mineral rights does not constitute the provision of goods within the meaning of Article 1.1(a)(1)(iii). As the Appellate Body has found, when a government provides a right to a good, the government "makes available" the good itself. As determined by Commerce, India provided the rights to iron ore and coal to steel producers, and therefore made a financial contribution within the meaning of Article 1.1(a)(1)(iii).

30. India claims that Commerce's specificity determination with regard to the provision of mining rights for iron ore and coal are inconsistent with Article 2 of the SCM Agreement. Record evidence demonstrates that India maintains captive iron ore mining programs that are *de facto* specific to the steel industry, and captive coal mining programs that are *de jure* specific to certain enterprises. As such, Commerce's determination of specificity was consistent with Article 2.

31. Finally, India argues that Commerce's calculation of the benefit for India's leasing of captive mining rights for iron ore and coal are inconsistent with Article 14(d) of the SCM Agreement. For the same reasons as above, India's argument that the calculation of benefit should be determined by reference to the cost to the government of the financial contribution should be rejected. India's argument that Commerce was required to compare the mining rights at issue to a benchmark based on mining rights values sourced in other countries is also incorrect. Commerce properly

relied on the cost of mining rights in the country of provision, comparing recipients' actual mining and delivery costs and profit, and comparing that result to a market benchmark.

XI. THE UNITED STATES COMPLIED WITH ARTICLES 1, 14, AND 22 OF THE SCM AGREEMENT WITH REGARD TO ITS FINDINGS RELATING TO THE SDF PROGRAM IN THE CHALLENGED DETERMINATIONS

32. First, India claims that Commerce's finding with respect to the SDF Managing Committee was inconsistent with Article 1.1(a)(1) of the SCM Agreement because neither the SDF Managing Committee nor the JPC was properly determined to be a public body in accordance with Article 1.1(a)(1). However, based on the record evidence, Commerce found that the SDF Managing Committee made all final decisions on loans, including setting the terms and approving waivers of SDF loans. Because this committee decided whether or not to provide loans to Indian steel companies at advantageous rates, and because this committee was comprised exclusively of GOI senior officials, it is clear that, at a minimum, the GOI controlled the SDF Managing Committee for purposes of Article 1.1(a)(1), such that it could, and did, use its resources as its own. In the alternative, even under the interpretation of "public body" set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, Commerce's determination is consistent with Article 1.1(a)(1), because the SDF Managing Committee performed governmental functions, and because the GOI exercised meaningful control over the SDF Managing Committee. Having made this determination, Commerce did not need to make an additional determination regarding entrustment or direction pursuant to Article 1.1(a)(1)(iv).

33. India also contends that the SDF loans cannot be considered "a direct transfer of funds" within the meaning of Article 1.1(a)(1)(i), because "the SDF levy was not [the GOI's] own fund and is not tax revenue." To the contrary, however, the facts demonstrate that Commerce reasonably concluded that the SDF levy operated as a tax imposed on consumers, over which the GOI, through the SDF Managing Committee, had complete control. Consequently, the loans provided using these funds were "made available" to steel producers by the GOI, and therefore constituted a "direct transfer" within the meaning of Article 1.1(a)(1)(i).

34. India also claims that Commerce's benefit calculation in the challenged determinations were inconsistent with Article 14(b). India first challenges Commerce's benchmark calculation as comparing the amount paid for the SDF loans with the amount that Tata would have paid on a "comparable commercial loan" in accordance with Article 14(b) of the SCM Agreement. India's claim is without merit. Commerce properly used as a commercial benchmark interest rate an average of certain Prime Lending Rates, compiled and published by the Reserve Bank of India, for loans similar to the SDF loans in currency, structure and maturity, and this rate was comparable within the meaning of Article 14(b) of the SCM Agreement.

35. India also challenges Commerce's benefit calculation overall, in the challenged proceedings, as not accounting for Indian steel producers allegedly contributing their own funds and incurring certain costs to participate in the SDF program. Commerce acted consistently with Article 14 in not providing a "credit" in its benefit calculations for the funds that were levied on consumers and remitted by steel producers to the SDF fund, or any administrative fees incurred to obtain the SDF loans.

XII. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH ARTICLES 11, 13, 21 AND 22 OF THE SCM AGREEMENT WITH REGARD TO NEW SUBSIDY ALLEGATIONS EXAMINED IN ADMINISTRATIVE REVIEWS

36. India claims that the United States acted inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement with respect to its review of new subsidies programs within the context of administrative reviews. India premises these claims on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. In India's view, then, the United States was required to examine new subsidies programs only upon receipt of a complete written application complying with Articles 11.1, 11.2 and 11.9; that it was required to initiate a new investigation into these programs pursuant to Article 11.1; that it was required to invite India for consultations regarding its examination of these new programs pursuant to Article 13.1 as a result of its initiation of a new investigation; and

that it was similarly required to issue a public notice upon "initiation" of a new investigation in compliance with Articles 22.1 and 22.2. As a result of its having examined these subsidies programs instead in the context of administrative reviews, under Article 21, India claims that the United States has additionally violated Articles 21.1 and 21.2 of the SCM Agreement.

37. Because they are all premised on the same erroneous interpretation, each of India's claims under Articles 11, 13, 21 and 22 of the SCM Agreement must fail. Given the language and structure of the SCM Agreement, and the similar language and structure of the AD Agreement, findings of panels and the Appellate Body have confirmed that requirements found in provisions applicable to a countervailing duty or anti-dumping *investigation* will not automatically be read into those provisions expressly applying to proceedings that take place after the conclusion of an original investigation, such as administrative or sunset *reviews*. The terms of Articles 11.1, 11.2, 11.9, 13.1, 22.1 and 22.2 indicate that their requirements apply to events occurring early on in an "investigation", and the provisions do not contain any reference that would broaden their scope to events or proceedings occurring after the completion of such an investigation. Furthermore, Article 21, which does apply to subsequent "review" proceedings, does not contain a reference incorporating these provisions of Article 11, 13 and 22. Therefore, India's claims regarding to Articles 11, 13 and 22 cannot succeed with respect to actions taken by Commerce in the context of administrative review proceedings. On the other hand, the purpose of subsequent reviews under Article 21 is to "examine whether the continued imposition of a duty is necessary to offset subsidization." By including in its reviews of this countervailing duty order allegations of additional subsidization programs with respect to the same product and the same companies at issue in the original investigation, Commerce acted consistently with that provision. For these reasons, the Panel should reject India's claims under Articles 21.1 and 21.2 of the SCM Agreement.

XIII. COMMERCE'S DETERMINATIONS WERE NOT INCONSISTENT WITH ARTICLE 22.5 OF THE SCM AGREEMENT

38. India argues that Commerce did not adequately explain its rejection of a few specific arguments put forth by the respondents with respect to the SDF program, captive mining rights for iron ore and coal, and the sale of high grade iron ore by the NMDC. Article 22.5 requires that an investigating authority must provide public notice of its determinations, including explanations of the legal and factual bases of the determination, and reasons for the acceptance and rejection of parties' relevant arguments. For each of the parties' arguments cited by India in its submission, Commerce explained the reasons for rejection, as explained in the portions of the U.S. submission corresponding to each of these subsidy programs. Thus, while India may disagree with the reasons provided in Commerce's determinations, the fact remains that Commerce did provide the information required under Article 22.5, and therefore did not act inconsistently with its obligations under that provision.

XIV. CONCLUSION

39. For the foregoing reasons, the United States respectfully requests that the Panel reject India's claims.

ANNEX C-2

ORAL OPENING STATEMENT OF THE UNITED STATES – FIRST MEETING

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat, for your work in this dispute. As can be seen from the length of the written submissions thus far, this dispute contains numerous claims and deals with often complex issues. Ultimately, however, this dispute concerns the "delicate balance" attained in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") "between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures."[1]

2. Throughout its first written submission, India has sought to dismantle the rights of Members to address the injurious effects of unfair trading practices, particularly those caused by subsidization, one of the most significant challenges faced by Members today. India has repeatedly asked the Panel to adopt novel – sometimes even radical – and unworkable interpretations of the SCM Agreement. In taking this approach, India seeks to impose restrictions on the application of measures to countervail subsidies in a manner that goes far beyond the agreement.

3. In contrast, the United States asks the Panel, consistent with its mandate from the DSB under Articles 11 and 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), to interpret the SCM Agreement in accordance with the customary rules of interpretation reflected in the Vienna Convention on the Law of Treaties so as to protect and maintain the balance of rights and obligations it contains. The United States appreciates well the balance struck in the SCM Agreement between Members that seek to impose more disciplines on the use of subsidies versus Members that seek to impose more disciplines on the application of countervailing measures. For example, while the United States appears before this Panel as a responding party, over the past year the United States has been a complainant in three disputes involving the imposition of countervailing duties, as well as both a complaining party and a responding party in disputes involving claims of WTO-inconsistent subsidies. The United States, therefore, seeks to maintain the integrity of the SCM Agreement and the balance established by that agreement.

4. We will not repeat here all the points made in the U.S. First Written Submission. Rather, today, we will address five issues, beginning with India's response to the U.S. preliminary ruling request.

I. PRELIMINARY RULING REQUEST

5. As the Panel is aware, the first U.S. submission included a request for a preliminary ruling, which addressed several claims in India's submission that were not contained in its panel request.

6. First, India has raised specific claims under multiple paragraphs of Article 11 of the SCM Agreement that reflect alleged "problems" not identified in India's panel request. As we discuss in our request for a preliminary ruling on this matter, in its request – under the very general heading "[i]n connection with other issues" – India stated that the United States has acted inconsistently with:

> Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.[2]

7. This very general summary – which does not even refer to a specific paragraph of Article 11, much less a specific obligation contained in one of those paragraphs – is not sufficient to present

[1] *US – DRAMS CVD (AB)*, para. 115.

[2] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*: Request for the Establishment of a Panel by India, WT/DS436/3 (13 July 2012).

clearly the claims India went on to raise in its first written submission. Those claims state that the United States breached Articles 11.1 and 11.2, as well as 11.9, "by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies". India's claims refer to specific subsidy programs, a specific administrative review, specific paragraphs of Article 11, and specific obligations contained within those paragraphs.

8. India attempts to argue in its response to the U.S. request for a preliminary ruling that the United States confuses a complainant's obligation under Article 6.2 to clearly present its claims with an obligation for the complainant to present its arguments. But it is India that misinterprets the requirements of Article 6.2. As the Appellate Body has found, where an article of a covered agreement contains several distinct legal obligations, each capable of being breached, a cursory reference to that article in a panel request may not reveal which of those obligations is at issue.[3] Such is the case here.

9. Article 11 of the SCM Agreement deals with "Initiation and Subsequent Investigation." This is a very broad category covering many disparate obligations contained within 11 paragraphs and spread over several pages of the SCM Agreement. Given the variety of claims that may be raised under this Article, India's cursory reference to Article 11 and the brief statement included in its panel request fall far short of India's requirement to "present the problem clearly."[4]

10. India also attempts to shield itself from any failure to meet the requirements of Article 6.2 of the DSU by claiming that the United States was not prejudiced in the preparation of its defense by India's deficient panel request. However, it is not necessary for a panel to find that a party has been prejudiced in order to find that a panel request fails to satisfy Article 6.2 of the DSU. Article 6.2 does not include any qualification or exception indicating that its obligations will only apply under certain circumstances. In particular, Article 6.2 does not provide for an exception in cases where it is not demonstrated that a party or third party has suffered prejudice. Rather, Article 6.2 applies to all panel requests.

11. And while some past panel and Appellate Body reports considered prejudice to be a relevant issue in assessing whether a panel request satisfied Article 6.2, more recently the Appellate Body has been clear: "the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing," and "a party's submissions during panel proceedings cannot cure a defect in a panel request."[5]

12. Second, the U.S. preliminary ruling request addresses the claims in India's first written submission respecting a "2013 sunset review determination." India does not include in its submission any citation or more specific reference to a U.S. measure. We surmise that India may be referring to the Department of Commerce's ("Commerce") final results in the most recent sunset review for *Certain Hot-Rolled Carbon Steel Flat Products from India, Indonesia, and Thailand*. These results were issued by Commerce on March 14, 2013 – nearly a year after India requested consultations in this dispute, eight months after India submitted its request for the establishment of a panel, and one month after the composition of this Panel.

13. India claims in its response to the U.S. request for a preliminary determination that its panel request extends to this subsequent review, because it has included a reference to "amendments, implementing acts, or any other related measure" in its panel request. The inclusion of such a phrase is not sufficient to cover sunset reviews not included in the consultation or panel request. India's approach is contrary to the requirement in the DSU for requesting consultations on a measure before being able to request the establishment of a panel with respect to that measure. Furthermore, the Appellate Body has specifically found that "successive administrative, changed circumstances, and sunset review determinations… constitute separate and distinct measures, which therefore cannot be properly characterized as mere 'amendments' to those measures."[6]

[3] *Korea – Dairy (AB)*, para. 128.
[4] DSU, Art. 11.
[5] *EC – LCA (AB)*, para. 642; *citing EC – Bananas III (AB)*, para. 143; *US – Carbon Steel (AB)*, para. 127.
[6] *US – Zeroing (EC) (21.5) (AB)*, para. 192.

II. "AS SUCH" CHALLENGE TO THE U.S. BENEFIT REGULATION

14. Next, we turn to India's "as such" claims under Article 14(d) of the SCM Agreement. In particular, we will discuss India's efforts to avoid the result of calculating the amount of the subsidy in terms of the benefit to its steel producers in favor of a cost-to-government standard tailored to exclude India's subsidies programs. As discussed in the U.S. First Written Submission, India's arguments are without basis in the text of the SCM Agreement. India's argument has also been considered by, and rejected by panels and the Appellate Body in prior disputes – and the reasoning in these reports is persuasive.[7] This alone is more than sufficient to require a finding that India's argument must be rejected. Nonetheless, at today's meeting, the United States will add the point that the implications of India's arguments would be to undermine the disciplines on subsidies as set out in the SCM Agreement. Each argument India makes seeks to turn the Panel's attention away from the production inputs Indian steel producers have actually received and the remuneration they have provided for those inputs, in favor of a series of inquiries directed at the provider of the good. If accepted, India's arguments would mean that in situations where a government or public body has unique control over production inputs – in this case iron ore and coal, including mining rights – that government or public body would be able to provide those inputs to domestic producers at less than market value without a finding of "benefit" to the recipient.

15. India argues that benefit should not be determined with respect to the recipient, but rather with respect to whether the government or public body provided the good on the basis of "commercial considerations."[8] This appears to mean, in India's view, that so long as a government or public body is providing a good at cost or higher[9] – or perhaps just that the government entity or public body is profitable overall[10] – there can be no benefit to the recipient.

16. The United States recalls that the preferred benchmark for a benefit analysis is one based on the price for which a good is sold by private suppliers in an arm's-length transaction.[11] The reason for that preference is that a private, profit-maximizing seller will sell its good at the market-clearing price. As the Appellate Body has noted, "the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of *both* buyers and sellers in that market."[12] In contrast, India seeks a standard that ignores the preferred benchmark of a private price in favor of a standard based simply on some minimal level of profit.

17. In making such an argument, India implicitly acknowledges that a government or public body will not necessarily seek to maximize profit, but may be willing to provide the good in question for less than market value. In attempting to reinterpret "adequate remuneration" to constitute only a question of minimal profit, India attempts to carve out an exception from the SCM Agreement and allow its government and public bodies to provide inputs to its steel producers at less than market value.

18. Moreover, the logical conclusion of using a benchmark based on cost to or profit of the provider is that the more the government or public body makes transactions free of market discipline, the less likely a finding of benefit would be. For example, where a government or public body enjoys unique access to a good – such as control over mining rights of iron ore and coal – the result will be that the government or public body would also enjoy lower costs for acquiring those goods. A standard that simply considers whether the government or public body subsequently provides those goods to its producers at or above that artificially lowered cost will necessarily be unlikely to find that the recipient has received a benefit from that transaction, even when the recipient pays less for the goods than it would on the market.

19. In short, India first seeks to carve out a "cost-to-government" loophole in the SCM Agreement, a theory already rejected by the Appellate Body.[13] India then seeks to expand

[7] *See* U.S. First Written Submission, paras. 28-72.
[8] India First Written Submissions, paras. 23-32, 58-63.
[9] India First Written Submission, paras. 59.
[10] India First Written Submission, paras. 282.
[11] *US – Softwood Lumber IV (AB)*, para. 90.
[12] *EC – LCA (AB)*, para. 981 (emphasis added).
[13] *Canada – Aircraft (AB)*, paras. 154-156.

that loophole to allow a government to place goods under government control and, by virtue of that control, pass those goods to favored producers at a lower price without that transaction being considered a subsidy. To do so, India has recycled arguments that have been considered and rejected by panels and the Appellate Body as having no basis in the text of the SCM Agreement. India has gone so far as to attempt to invent a new benefit standard based on the text of an article of the GATT 1994 (namely, Article XVII) which is directed at state trading enterprises. The fact that India must look for support not to the SCM Agreement but to a different agreement demonstrates that India is seeking to alter Members' rights and obligations under the SCM Agreement in order to allow India to subsidize its steel producers by providing goods at less than adequate remuneration. India's efforts to do so should be rejected.

III. CUMULATION

20. India has also challenged U.S. measures permitting the International Trade Commission ("ITC") to cumulate the effects of dumping and subsidization for imports subject to simultaneous trade remedies investigations. As the United States explained in its first submission, however, the provisions of the U.S. statute governing cumulation in injury and sunset proceedings are fully consistent with the text of the SCM Agreement, when read in context and in light of the object and purpose of the Agreement. The text of Article 15.3 of the SCM Agreement does not discuss, let alone prohibit, the cumulation of dumped and subsidized imports, as India asserts. Rather, a full interpretive exercise that considers the context of Article 15.3, including Article 3.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), as well as the object and purpose of the SCM Agreement, demonstrates that the agreement permits the cumulation of dumped and subsidized imports.

21. Both the SCM and the AD Agreement permit investigating authorities to cumulate imports for the purpose of assessing injury. And the Appellate Body has been clear that the availability of cumulation is meant "to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account."[14] Given the aims of the cumulation provisions in both the SCM and AD Agreements, India's claim that Article 15.3 of the SCM Agreement prohibits the cumulation of both dumped and subsidized imports leads to an anomalous result whereby the same injury may be countervailed in some circumstances but not in others.

22. A simple example using some of the facts of these investigations will help to demonstrate this point. Assume that an injury investigation involves imports from five countries that are found to be subsidized. In this investigation, assume one Member, Country A, has a small volume of subsidized imports. Due to the small volume of imports, imports from this country might not themselves be causing material injury to the industry in a manner that would warrant the imposition of countervailing duties under the SCM Agreement. Under Article 15.3, however, an authority may cumulate imports from this country with the subsidized imports from the other four countries. In this circumstance, if the subsidized imports from all five countries are found to be materially injuring the industry, countervailing duties may be applied to each country, including those from Country A.

23. Now let's change the scenario slightly. Assume that the injury investigation involves imports from five countries that are each *dumping* their exports of the product, but only one of which (again, Country A) is found to be *subsidizing* its imports. In this scenario, assume the domestic industry is competing with the exact same volume of unfairly traded imports, and the imports are having the same volume and price effects on the domestic industry. Under this scenario, according to India's interpretation, the imports from Country A may be cumulated with the other dumped imports and made subject to antidumping duties but may not be cumulated with them and subjected to countervailing duties, even though imports from all five countries are unfairly traded and injuring the industry in exactly the same manner outlined in our first scenario.

24. The United States submits that there is no reasonable or logical rationale that can account for the difference in this outcome. A harmonious reading of Article 15.3 must lead the Panel to find against India on its claims with respect to cumulation.

[14] *US – OCTG from Argentina (AB)*, para. 297.

IV. PUBLIC BODY

25. India also claims that Commerce erred in applying Article 1.1(a)(1) of the SCM Agreement when it found subsidies to exist based on the activities of the National Mineral Development Company ("NMDC") and the Steel Development Fund ("SDF") Managing Committee. We have responded to India's arguments fully in our first written submission. In particular, we have explained that the proper interpretation of Article 1.1(a)(1) requires that a public body be an entity controlled by the government such that the government can use that entity's resources as its own. Despite our disagreement with the Appellate Body's interpretation of public body in *US – AD/CVD*, however, we think it bears repeating that India has not presented the findings in that case accurately.

26. India attempts to reframe the Appellate Body's findings in *US – AD/CVD* to mean that public bodies must not only exist within a "government framework," but that "there has to be the *express delegation* of the power to regulate, control, or supervise individuals, or otherwise restrain conduct."[15] The basis for India's position appears to be that, because the Appellate Body relied on the definition of government in *Canada – Dairy*, and because the Appellate Body likened the role of a public body to that of a government, the definition of "public body" must therefore be limited to only those entities sharing the characteristics of the Dairy Boards at issue in *Canada – Dairy*.

27. India has misinterpreted the findings of the Appellate Body in *US – AD/CVD* in a way that results in a far more limited definition of public body. We recall that in *US – AD/CVD*, the Appellate Body was clear that "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case."[16] Therefore, the Appellate Body itself did not intend to create an all-purpose, bright-line test. India's interpretation on the other hand would lead to a highly formulaic application of the SCM Agreement, and would allow Members to circumvent their obligations merely by foregoing an "express delegation" of governmental authority to an entity that would otherwise constitute a "public body."

28. In fact, the Appellate Body's findings in *US – AD/CVD*, with respect to state-owned commercial banks, directly refute India's proposed interpretation. With respect to China's state-owned banks, the Appellate Body found neither an "express delegation" of governmental authority, nor any evidence demonstrating that the banks had "the power to regulate, control, or supervise individuals, or otherwise restrain conduct." Rather, the Appellate Body upheld Commerce's finding that the state-owned banks were public bodies based on evidence demonstrating the government's *meaningful control* over them. The Appellate Body's interpretation was applied in a similar way in *Canada – Renewable Energy*, where the panel found that "the Government of Ontario has 'meaningful control' over Hydro One's activities in a way that confirms it is a 'public body.'"[17]

29. Therefore, while the Appellate Body did discuss "governmental authority" and the ways in which this authority may manifest itself, it did not, as India has argued, find that "there has to be the *express delegation* of the power to regulate, control, or supervise individuals, or otherwise restrain conduct."[18] Rather, the Appellate Body focused on the meaningful control exercised by the government over state-owned banks. The United States urges this Panel also to focus its review in this case on the issue of control, and to find that an entity can be considered a public body where the government's control over the entity is such that it can use the entity's resources as its own.

V. USE OF FACTS AVAILABLE

30. India also challenges U.S. measures governing the use of facts available in countervailing duties investigations. In doing so, however, India not only misinterprets and misrepresents U.S. law, but wholly misunderstands the obligations of the SCM Agreement with respect to the application of facts available.

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[15] India First Written Submission, para. 225.
[16] *US – AD/CVD (AB)*, para. 317.
[17] *Canada – Renewable Energy (Panel)*, para. 7.235.
[18] India First Written Submission, para. 225.

31. India argues that the U.S. measures "authorize using certain information simply because it may be adverse to the allegedly non-cooperating party."[19] This contention, however, is not supported by the text of the U.S. measures. To the contrary, as discussed in the U.S. First Written Submission, the U.S. measures set out specific requirements for and limitations on the use of facts available.[20] It is not the case that Commerce may use information "simply because it may be adverse"[21] to the interests of a responding party.

32. India also ignores other provisions, specifically within Annex II of the AD Agreement, that provide relevant context for understanding the meaning of the term "facts available." Most notably, Paragraph 7 of Annex II states, in relevant part, that "[i]t is clear … that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate." Given that the respondent's non-cooperation has made *un*available the precise facts sought by the authority, inferences are a necessary and unavoidable element in selecting from, and applying, the *available* facts. In such a situation, Annex II confirms that the inferences drawn in such cases can lead to results less favorable to a party than if the party did cooperate. Such inferences are no different in the context of the SCM Agreement than they are in the context of the AD Agreement as confirmed by Annex II.

33. India also seems to understand Article 12.7 of the SCM Agreement, as well as Annex II to the AD Agreement, to require that when a responding party refuses to cooperate in a countervailing duty investigation, the responding party must in fact *benefit* from the *best* information available – from the responding party's perspective.

34. However, India takes the term "best information available" out of context. In doing so, India seeks to turn the right given to an investigating authority to rely on facts available into an obligation to put a responding party into a better position than they might have been in had they cooperated fully with the investigation.

35. In context, the term "best" facts available in Annex II refers to the most probative, relevant and verifiable facts which are timely submitted in the proceedings, and not to those facts which are most favorable to the respondent. This interpretation is supported by the substantive provisions of the Annex. Those provisions require an authority to take into account all information submitted that is verifiable and timely, and that can be used in the investigation without undue difficulty. It also prevents an authority from disregarding information that "may not be ideal in all respects", "provided the interested party has acted to the best of its ability".[22]

36. Therefore, the title of Annex II of the AD Agreement must be interpreted in light of all the safeguards contained in the Annex itself. In other words, the best information available is obtained through the application of the provisions of Annex II. India would turn these provisions on their head, and require an investigating authority to use certain information even if it cannot be verified, and even if has not been submitted at all. For example, as can be seen from India's "as applied" claims, India believes that the SCM Agreement would allow a responding party to submit responses to questionnaires during an initial proceeding, and then require the same information serve as the basis for all subsequent reviews. Commerce would therefore be required to *assume* that a party's circumstances have not and will not change, rather than to verify that such is the case.

37. Such an interpretation is clearly unworkable and would tie the hands of investigating authorities to the point of undermining countervailing duty investigations altogether. India's interpretation would further provide an incentive to producers and exporters to withhold unfavorable information to achieve more favorable countervailing duty rates, and simultaneously frustrate the efforts of the investigating authority to calculate the amount of subsidy accurately. We therefore urge the Panel to examine the U.S. measures *on their face*, and to apply to them a proper interpretation of the SCM Agreement, based on its text, in context, and in light of the object and purpose of the SCM Agreement.

[19] India First Written Submission, para. 178.
[20] U.S. First Written Submission, paras. 171-175.
[21] India First Written Submission, para. 178.
[22] AD Agreement, Annex II, para. 5.

VI. CONCLUSION

38. 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.

ANNEX C-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. As has been found by panels and the Appellate Body on numerous occasions, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") represents a "delicate balance" between disciplining the use of subsidies and countervailing measures while, at the same time, enabling Members whose domestic industries are harmed by subsidized imports to use such remedies. India's claims, and its submissions throughout this proceeding, have revealed India's intention to skew this delicate balance in its own favor, by asking the Panel to adopt novel - sometimes even radical – interpretations of the SCM Agreement. Consistent with its obligations under Articles 11 and 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the United States asks the Panel to deny India's claims, and to protect and maintain the balance of rights and obligations attained by the negotiators of the SCM Agreement.

II. INDIA HAS NO BASIS FOR ITS CLAIMS THAT SECTION 351.511(a)(2) OF THE U.S. REGULATION IS INCONSISTENT "AS SUCH" WITH ARTICLE 14(d) OF THE SCM AGREEMENT

2. In this dispute, India makes several claims with respect to the consistency of Section 351.511(a)(2) – the U.S. regulation for determining the benefit when goods or services are provided by a government for less than adequate remuneration – with the guidelines contained in Article 14(d) of the SCM Agreement.

3. The text of Article 14 does not support calculating the benefit based on a cost-to-government analysis. India offers several flawed textual interpretations to advance its argument that Section 351.511(a)(2) is "as such" inconsistent with the Article 14(d) guidelines. In its responses to the Panel's first set of written questions, for example, India remains steadfast in advancing – incorrectly – a cost-to-government test in determining whether a government provides a good or service at less than adequate remuneration within the meaning of Article 14(d); an argument which is clearly incorrect based on the text of the Agreement as well as prior panel and Appellate Body reports. In response to Panel Question 4, India further provides a matrix – purporting to divide the benefit calculation for goods or services into a two-step process – in an attempt to support its argument.

4. These claims are premised on its misinterpretation of the text of Article 14(d). For example, in response to Panel Question 4 India claims that, in some instances, an investigating authority may not be entitled to find a benefit even where remuneration is determined to be inadequate. Under a proper interpretation of the Article 14(d) guidelines, however, where an investigating authority determines that a financial contribution by a government has been conferred and that the adequacy of remuneration is insufficient, an investigating authority *may* find that the amount by which the private, arm's-length benchmark price exceeds the government price is a benefit under the SCM Agreement.

5. India also attempts to support its interpretation of Article 14(d) through a flawed textual distinction between Articles 14(b)-(c) and 14(d), by erroneously arguing that the term "in relation to" contained in Article 14(d) means that the benchmark analysis under Article 14(d) is somehow fundamentally different from that under Articles 14(b) or (c). In making this argument, India ignores the parallel structure of paragraphs 14(b), (c) and (d). India also argues that while under paragraphs 14(b) and (c) the investigating authority will find the existence of a benefit "the moment there is a difference in the amounts being compared," Article 14(d), on the other hand, employs a "much broader and more comprehensive framework." Contrary to India's assertions, in a manner equivalent to 14(b) and (c), the text of the Article 14(d) guidelines provided that where the government price is more favorable than the benchmark, a benefit has been conferred.

6. There is furthermore no support for equating the phrase "commercial considerations" in Article XVII of the GATT 1994 with "prevailing market conditions" in Article 14(d). India's position that the phrase "in relation to prevailing market conditions" – the terms actually contained in Article 14(d) – really means "in accordance with commercial considerations" reflects India's mistaken theory that the terms used in Article XVII of GATT 1994 may be substituted for those in Article 14(d) of the SCM Agreement. In particular, India again incorrectly asserts that the Panel's findings in *Canada – Wheat* support the substitution of these terms.

7. In the United States view, Section 351.511(a)(2) is consistent with Article 14's preference for using private prices for the benchmark when determining whether a good is provided at less than adequate remuneration. India has no basis for challenging the hierarchical structure of Section 351.511(a)(2). With respect to India's arguments that an import price actually paid by a producer in the Indian market is an out-of-country price, and that the inclusion of delivery charges is somehow improper, India argues that "prices emanating from countries other than the country in question represent 'out of country' prices." Prices for imported goods, which are paid by domestic purchasers, however, are in fact in-country prices; it is for this reason that under the U.S. regulation an actual import price is considered a Tier I price – a price, which emanates in the "country in question." India's contention that import prices automatically are Tier II or out-of-country prices (referring to the language in *US – Softwood Lumber IV (AB)*) is both factually incorrect and inconsistent with the realities of domestic markets.

8. Moreover, India's objection to adjustments for delivery costs is based on its flawed position that the adequacy of remuneration under Article 14(d) of the SCM Agreement should be a determination with respect to the provider of the goods, using a cost-to-government analysis. Under the SCM Agreement, the adequacy of remuneration is assessed with respect to the *recipient,* and the Article 14(d) guidelines contemplate adjustments for prevailing market conditions, conditions which explicitly include transportation. India likewise argues that if the government price is an ex-mine price, any charges associated with the delivery of goods should not be considered in the benefit calculation. However, this argument fails because an ex-works price does not include the cost incurred by the purchaser for getting a purchased input to its factory door; an ex-works price therefore is not reflective of the prevailing market conditions from the perspective of the recipient. Prevailing market conditions are such that a private purchaser (in making a purchasing decision) and a private seller (in setting a price at which to sell the good) would consider all of the costs associated with getting the good to the factory in setting the market negotiated price. India's interpretation would not be in accordance with the purpose of the Article 14(d) benchmark comparison – which is to assess whether the recipient is better off than it would have been absent that financial contribution. Commerce's benefit regulation is consistent with the guidelines contained in Article 14(d) of the SCM Agreement.

III. INDIA'S ARGUMENTS REGARDING COMPARATIVE ADVANTAGE HAVE NO MERIT

9. In its response to Panel Question 13, India continues to assert an alleged "comparative advantage" that must be accounted for in both the use of a Tier II analysis under Section 351.511(a)(2)(ii) and the use of "delivered prices" under Section 351.511(a)(2)(iv). India, however, does not provide any evidence of an alleged comparative advantage, misuses the term "comparative advantage", and inappropriately relies on the Appellate Body report in *US – Softwood Lumber IV* throughout its first written submission and in response to question 13 of the Panel's first set of written questions.

IV. COMMERCE DID NOT ERR IN FINDING THAT NMDC PROVIDES IRON ORE FOR LESS THAN ADEQUATE REMUNERATION

10. In addition to its "as such" challenges to the U.S. regulation, India has made multiple "as applied" claims, including those with respect to: Commerce's determination that NMDC's sales of high grade iron ore conferred a benefit, Commerce's determination that the provision of captive mining rights for iron ore and coal was for less than adequate remuneration, and Commerce's benefit calculations in the challenged proceedings. As discussed in the U.S. first written submission, many of these claims echo the flawed arguments put forward by India in its "as such" challenge.

11. With respect to India's claims that the NMDC's sale of high grade iron ore did not confer a benefit consistent with Article 14(d) of the SCM Agreement, India's objections lack basis. Commerce appropriately calculated the benefit for the NMDC's provision of iron ore at less than adequate remuneration in the 2004, 2006, 2007 and 2008 administrative reviews. In each of these reviews, there were no private, arm's-length prices ("Tier I" prices) for high grade iron ore and lumps in the Indian market in the record evidence submitted to Commerce. With respect to the DR-CLO ore benchmarks, on the other hand, private arm's-length prices were available and on record, which meant that Commerce was able to use such actual "Tier I" BCI prices. For all of the above, Commerce compared the respective private benchmark prices to the NMDC prices on an apples-to-apples basis in order determine whether and to what extent NMDC prices were less than adequate remuneration.

12. The United States did not, as India argues in its response to questions 17 and 19, artificially inflate the benchmark by adding in unnecessary delivery costs or, as India argues in response to question 20, by ignoring evidence on the record of private arm's-lengths transactions. In response to question 20, India further argues that the explanations offered by the United States in its first written submission are "ex-post facto rationalizations". But it is India and not the United States that is trying to add new arguments to the matters considered during the administrative proceeding. During the administrative proceedings at issue, none of the parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks. India raises this argument only now. With regard to the price quote from Tata, the second piece of evidence cited by India, the United States notes that 22 of the 24 pages of the exhibit relied on by India – Exhibit IND-70 – are not, as India asserts, public documents. Rather, they are business confidential documents subject to administrative protective order (APO). Accordingly, the pricing data in the document was confidential and could not be used as a benchmark for any other party's transactions.

13. Further, not only is the data confidential but the data cannot be used as benchmarks because they do not reflect actual private, arm's-length transactions. Instead, these documents merely contain a price quote and not a completed transaction. Therefore their contents have no bearing, as India would purport, on the availability of a public in-country arm's length private price in India with respect to the challenged determinations.

14. Finally, with respect to the application of Section 351.511(2)(a)(iv), the U.S. provision which adjusts for delivered prices, the guidelines contained in Article 14(d) contemplate an apples-to-apples comparison by directing Members to account for prevailing market conditions - including transportation – in assessing the adequacy of remuneration. These charges are an integral and inseparable part of determining a benchmark price that reflects prevailing market conditions in the country of provision.

V. COMMERCE'S FINDINGS WITH RESPECT TO SPECIFICITY WERE CONSISTENT WITH THE SCM AGREEMENT

15. India makes a series of challenges under Articles 2.1 and 2.4 of the SCM Agreement to Commerce's specificity determinations with respect to the GOI's sale of iron ore and captive mining programs. With respect to Commerce's finding that the NMDC iron ore program was used by a limited number of certain enterprises, the record evidence demonstrates that almost all of the iron ore consumed in India is used for the production of steel, by steel and pig and sponge iron producers. Article 2.1 provides that specificity may be found if a subsidy program is "use[d] by a limited number of certain enterprises." The question before an investigating authority is whether the enterprises or industries are "a sufficiently discrete segment" of the "economy in order to qualify as 'specific' within the meaning of Article 2 of the SCM Agreement." In the 2004, 2006, 2007, and 2008 administrative reviews, Commerce found that the GOI's provision of iron ore was *de facto* specific to the Indian steel industry because only a limited number of enterprises use iron ore. Further, the record evidence showed that 76 percent of the iron ore was used by steel producers. Therefore, positive evidence demonstrates that a limited number of certain enterprises, when compared to the diverse economy of India, use the NMDC iron ore program.

16. India also incorrectly argues that if the "inherent characteristics" of a good limit its use to a limited number of certain enterprises, the provision of that good cannot be found to be specific. Yet there simply is no basis in the text of Article 2 for prohibiting findings of specificity based on the good's "inherent characteristics." Rather, as previous panels have correctly found, when the

good provided by the government is of limited utility, it is more likely that a subsidy is conferred on certain enterprises. Finally, with respect to India's arguments that the last sentence of Article 2.1(c) required Commerce to specifically address the diversification of the Indian economy and the duration of the program, India's assertions are incorrect and contrary to the findings of previous panels with respect to this provision. Commerce in fact did take account of these factors but, in the context of a *de facto* specificity analysis, was not required to address them explicitly in its determinations.

17. India repeatedly denies the existence of a captive mining program for iron ore despite record evidence. India further argues that absent a "captive" mining program for iron ore, mining rights are generally available under India's mining lease laws and thus not specific under Article 2 of the SCM Agreement. This argument has no merit. The record is replete with evidence confirming the existence of a captive iron ore mining policy for four of India's largest steel makers; in particular, two extensive reports regarding the Indian steel industry, which were commissioned by the GOI: the *Dang Report* and the *Hoda Report*, as well as newspaper reports identifying the four steel companies who have been granted captive mining rights pursuant to India's captive mine policy. Commerce's finding that India does have a captive mining program for iron ore was based on record evidence, and Commerce thus has a sound basis for finding that the program is *de facto* limited to a few steel companies.

18. Moreover, contrary to India's assertions, record evidence demonstrates that Tata Steel's captive mining rights for coal are subject to India's law on captive mining of coal. In its response to question 25 of the Panel's first set of written questions, for example, India avoids answering the Panel's yes or no question regarding whether record evidence demonstrates the existence of a captive mining program for coal. As explained in the U.S. first written submission, the GOI's provision of a captive mining lease to Tata was specific, as defined by Article 2.1(a) of the SCM Agreement.

VI. U.S. CUMULATION MEASURES ARE NOT INCONSISTENT AS SUCH, OR AS APPLIED IN THE UNDERLYING HOT-ROLLED STEEL PROCEEDINGS, WITH ARTICLE 15 OF THE SCM AGREEMENT

19. In its submissions to the Panel, India has presented "as such" and "as applied" claims under Article 15 of the SCM Agreement with respect to cumulation in original investigations and sunset reviews. As demonstrated in the U.S. first written submission and in the U.S. answers to the Panel's questions, India's claims are unfounded.

20. India's as such and as applied claims under Article 15 of the SCM agreement with respect to the cumulation of subsidized and dumped imports in sunset reviews must fail because Article 15 does not apply to sunset reviews. India included in its Panel Request a challenge to the U.S. statute and the Commission's sunset determination under Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement to the U.S. statute and the Commission's sunset determination. These provisions, however, only govern injury determinations in original investigations, and do not apply in the context of sunset reviews. The SCM Agreement does contain obligations with respect to sunset reviews; those obligations, however, are set out in Article 21 of the SCM Agreement. India's panel request does not raise any Article 21 claims with respect to sunset determinations, and therefore any such issues are not within the Panel's terms of reference.

21. In addition to the key difference between the SCM Agreement articles applicable to investigations and those applicable to sunset reviews, the United States notes that India misunderstands important factual differences between investigations and sunset reviews. Relying on *EU – Footwear from China*, India asserts that the determination in the sunset review relied on the determination in the original injury investigation, and therefore is "tainted" by the allegedly WTO-inconsistent original injury investigation. India's argument is illogical for two reasons. First, the sunset determinations for hot-rolled steel examined a different legal issue than that considered in the original investigation. The original investigation entailed an examination of whether subject imports during the original period of investigation materially injured the domestic industry or threatened it with material injury, while the sunset review involved an assessment of data during the period of the sunset review to determine whether the likely volume, price and impact of subject imports were likely to lead to continuation or recurrence of material injury to the domestic industry if the orders were revoked. Second, the Commission's determination in the sunset reviews

was based on a very different set of imports than was its original injury determination. In short, the original investigation and sunset review were distinct processes with different purposes.

22. With respect to the consistency of the U.S. cumulation measures in the context of original investigations, the United States submits that the text of Article 15.3 does not prohibit cumulation of dumped and subsidized imports in original investigations. Moreover, it is not possible, as a practical matter, for an authority to disentangle the effects of dumped imports from those of subsidized imports. The difficulty presented by India's interpretation of Article 15 can be seen from the fact that in many investigations, significant volumes of subject imports are both dumped and subsidized, as was the case in the hot-rolled steel investigations and reviews. In this situation, other investigating authorities, such as the Canadian International Trade Tribunal and the Australian Customs and Border Protection Service, have expressed the view that it is not possible to "disentangle" the injurious effects of the dumped and subsidized imports. Indeed, India acknowledges that it is not arguing that an authority must disentangle the effects of imports that are both dumped and subsidized. By taking such a position, India implicitly acknowledges the validity of the positions expressed by the United States in this dispute.

23. Therefore, India is incorrect in asserting that the United States in this dispute has stated or implied that disentanglement is possible. India's assertion is based on a misunderstanding of a discussion in the U.S. first written submission of volume trends and underselling levels of the subject imports in the steel investigations at issue in this dispute. In this portion of the U.S. submission, the United States was responding to India's partial portrayal of the record. In particular, the United States pointed out that the record of its original investigations showed the volume of subject imports found to be both dumped and subsidized represented 40% of all cumulated subject imports; that they represented nearly half of import growth during the period; and that they undersold the domestic like product in the same percentage of comparisons as the subject imports that were only found to be dumped. The United States further explained that the record data showed that the volumes of imports that were both dumped and subsidized, such as those from India, exacerbated the adverse effect on the domestic industry during the period of investigation. Nothing in this explanation, however, suggests that it was possible to disentangle the effects of these imports.

24. Based on the foregoing, the United States requests that the Panel find that the U.S. measures "as such", and "as applied" in the underlying countervailing duty proceedings, are not inconsistent with Article 15 of the SCM Agreement.

VII. THE UNITED STATES COMPLIED WITH ARTICLE 1 OF THE SCM AGREEMENT IN FINDING THAT THE SDF MANAGING COMMITTEE AND NMDC WERE PUBLIC BODIES

25. We have set out in the U.S. first written submission an interpretation of the term "public body" in Article 1.1(a)(1), based on a proper interpretation of that provision given its text, and in light of its context and the object and purpose of the SCM Agreement. Specifically, we have explained that the term public body refers to any entity controlled by the government such that the government can use the entity's resources as its own. The evidence on record in this dispute with respect to the NMDC and the SDF Managing Committee satisfies not only this interpretation of the term public body, but would satisfy any interpretation of that term, given the GOI's extensive involvement in and control over each entity, as well as the nature of the functions that each entity performs in India.

26. With respect to the SDF Managing Committee, the relevant facts with regard to the SDF Program are clear. The GOI established the SDF Program and its constituent committees to modernize the steel sector, and to ensure that there was a steady supply of certain types of iron and steel in line with government goals. Under the program, steel producers could only sell at the prices set by the JPC, and the JPC increased the prices for certain steel products and mandated that the additional funds "be remitted to the SDF." Companies that contributed to the fund were eligible to take out long-term loans at advantageous rates, and the terms and availability of these loans were approved by the SDF Managing Committee. In its final determination, Commerce found that the SDF Managing Committee was composed entirely of senior GOI officials, including the Secretary of the Ministry of Steel, the Secretary of Expenditure, the Secretary of the Planning Commission, and the Development Commissioner for Iron and Steel. Because the SDF Managing Committee made all financial decisions with respect to SDF loans, and because this committee was composed exclusively of GOI senior officials, it is clear that, at a minimum, the GOI controlled the

SDF Managing Committee for purposes of Article 1.1(a)(1), such that it could, and did, use its resources as its own. In the alternative, Commerce's determination is consistent with a finding that the SDF Managing Committee is a public body even under the standard set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties* because the SDF Managing Committee took actions that constituted governmental functions, and because the GOI exerted meaningful control over the SDF.

27. With respect to NMDC, India continues to misrepresent Commerce's determination that the NMDC is a public body by erroneously claiming that the determination is solely based on the fact that the GOI owns the NMDC. As was demonstrated in the U.S. first written submission, Commerce analyzed evidence regarding both ownership and control in making its finding that the NMDC was a public body, including evidence that the GOI was heavily involved in the selection of directors of the NMDC, and NMDC's own statement that the "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India." Therefore, India cannot deny that Commerce made its "public body" determination based on a finding of government control as well as government ownership. Moreover, even in the event that this Panel relies on the "government function" test enunciated by the Appellate Body in *US – Antidumping and Countervailing Duties*, the evidence clearly demonstrates that the NMDC performs a government function in India. In addition to the evidence of ownership and control discussed above, record evidence indicated that the Indian government, *i.e.,* the state and federal governments, owns all the mineral resources on behalf of the Indian public, and that the federal government has the final approval of the granting of mining leases for iron ore. Therefore, it is a government function in India to arrange for the exploitation of public assets, in this case iron ore, and the GOI specifically established the NMDC to perform part of this function.

28. Therefore, the Panel should reject India's claim that Commerce acted inconsistently with Article 1.1(a)(1) in finding that the SDF Managing Committee and the NMDC were public bodies.

VIII. THE SDF LOANS CONSTITUTED "A DIRECT TRANSFER OF FUNDS" WITHIN THE MEANING OF ARTICLE 1.1(A)(1)(I)

29. The facts demonstrate that Commerce reasonably concluded that the SDF levy operated as a tax imposed on consumers over which the GOI, through the SDF Managing Committee, had complete control. India has attempted to call this finding into question by presenting the transfer of funds to steel companies as a discrete and isolated action performed by the JPC, wholly divorced from the decision by the SDF Managing Committee that the funds should be transferred. India's argument draws artificial distinctions between the constituent committees of the SDF program, and would lead to a situation in which the managers of a company, for example, should be considered one entity, and the directors another. There is no basis in the SCM Agreement for drawing such artificial distinctions and no basis in the record evidence before Commerce for it to have made such a finding.

30. India attempts to obscure the straightforward facts, and has presented inconsistent arguments regarding whether the funds collected from steel consumers were "consumer funds" or "producer funds." Most recently, in its response to the Panel's questions, India has argued that the extra SDF price element collected from steel consumers constituted steel producers' "profits," and became part of the Indian steel producers' own funds when the purchase price was paid by consumers – and therefore was not analogous to a tax, as Commerce determined. However, this *GOI-mandated* levy can no more constitute a profit for steel producers than a government-determined sales tax collected on the sale of those goods could constitute profit. As explained above, the GOI required a levy to be added to the price of certain steel products, and also mandated that this levy be deposited in the SDF Fund after it had been collected by the producers. Thus, this levy, although it was collected as an extra price element, was never an extra *profit* amount determined by steel producers and intended for their use as they deemed necessary. Rather, it was a tax-like element mandated by the GOI and earmarked for the government-controlled SDF Fund. Based on the foregoing, India has not shown that Commerce acted inconsistently with Article 1.1(a)(1)(i) of the SCM Agreement in making its determination.

IX. THE U.S. MEASURES REGARDING FACTS AVAILABLE ARE NOT INCONSISTENT "AS SUCH" WITH ARTICLE 12.7 OF THE SCM AGREEMENT

31. India's claim that the U.S. measures governing facts available are inconsistent "as such" with Article 12.7 of the SCM Agreement is in error. India has cited several of Commerce's determinations in an effort to show the United States takes the approach of "systematically drawing adverse inferences in all cases of non-cooperation". Despite these arguments, however, India has clarified that "it is not challenging the 'systematic application' as a measure", but rather is challenging the statutory and regulatory provisions themselves. Indeed, India cannot argue otherwise, given that its panel request does not include a challenge to Commerce's "practice", but to the U.S. statute and regulation. Therefore, India bears the burden to demonstrate that section 1677e(b) of the U.S. statute, and section 351.308(c) of Commerce's regulations, on their face, are inconsistent with Article 12.7 of the SCM Agreement. India has not done so, and its claims therefore must fail.

32. As an initial matter, the United States has demonstrated that Commerce holds discretionary authority with respect to the use of adverse inferences in selecting from among the facts available. India ignores the statements made by Commerce in promulgating the regulation at issue, dismisses the cited cases out of hand without explanation, and continues to insist that Commerce has drawn adverse inferences "in all cases of non-cooperation." Contrary to India's assertions, however, the cases cited by the United States document Commerce's exercise of discretion, and thereby demonstrate that Commerce holds discretionary authority under U.S. law. Indeed, India acknowledges that the language of these provisions is "discretionary". Therefore, India's cannot sustain its "as such" claims against these measures.

33. In any event, India has not demonstrated that the discretionary authority provided by the U.S. measures violates Article 12.7 of the SCM Agreement, as interpreted in its context, including Article 6.8 and Annex II of the AD Agreement. In this respect, we draw the Panel's attention to India's response to Panel Question 75, where India expressly recognizes that Article 12.7 permits authorities to apply what it terms "adverse facts," provided it is "demonstrated that those 'adverse facts' are the 'most fitting and appropriate' ones." India fails to explain, however, why the discretion to apply so-called "adverse facts" provided for in the U.S. measures breaches Article 12.7. The application of facts available occurs where certain necessary facts are *not available*. Other facts, therefore, as well as certain inferences, must be used in filling in the gap in the record before the investigating authority. Without the discretion to use an adverse inference, it is unclear how an authority would otherwise reach a determination in which "the most fitting and appropriate" "adverse facts" are applied.

34. Lastly, the United States reiterates its submission that Article 6.8 and Annex II of the AD Agreement provide relevant context to interpret Article 12.7 of the SCM Agreement, as recognized by the Appellate Body in *Mexico – Rice*. India agrees with this interpretation, but argues that "use of the word 'could' [in paragraph 7 of Annex II] only acknowledges that in cases of non-cooperation, the inferences / conclusions *may* result in findings that are less favourable to the party concerned." India fails, however, to recognize the logical extension of this statement: that inferences or conclusions that *may* result in such findings therefore can properly be reflected in an authority's legislation, as is the case here. For the foregoing reasons, India has no valid basis for its claims under Article 12.7 of the SCM Agreement.

X. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH ARTICLES 11, 13, 21 OR 22 OF THE SCM AGREEMENT WITH REGARD TO NEW SUBSIDIES EXAMINED IN ADMINISTRATIVE REVIEWS

35. India claims that the United States acted inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement with respect to Commerce's review of new subsidies programs within the context of administrative reviews. India premises these claims on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. India's claims have no merit.

36. As explained in the U.S. first written submission, the SCM Agreement sets out a process by which Members may investigate instances of subsidization affecting its domestic producers and,

where appropriate, impose duties to countervail those effects. Once duties have been imposed, the SCM Agreement separately allows interested parties to request a "review" of those duties to determine whether they are still necessary to counteract subsidization. The text of each relevant provision, and the structure of the overall SCM Agreement, establishes that an "investigation" and a subsequent "review" of duties imposed pursuant to an investigation are two separate and distinct processes governed by separate provisions of the SCM Agreement. Indeed, panels and the Appellate Body have found this to be the case.

37. India has recognized the distinction between "investigations" and "reviews" under the SCM Agreement, and acknowledged that there are "categorical distinctions between an original investigation and a review proceeding under Article 21" and that "obligations applicable to original investigations will not necessarily apply to review proceedings." Nonetheless, India glosses over these distinctions – and ignores the text of the SCM Agreement – when it suggests, in response to Panel questions, that "[t]he United States may initiate and conduct the investigation against new subsidies alongside or part of review proceedings covering the old subsidies, while ensuring that the obligations under Articles 11 and 13 are complied with *qua* the new subsidies." While India states that it "is not concerned as to whether a separate docket is created for such new subsidy allegations," that is the practical result of India's claims. Even in its response to a direct question from the Panel, however, India has not explained how its novel interpretation of the SCM Agreement can be supported by the text, much less how it could work in practice.

XI. CONCLUSION

38. For the foregoing reasons, the United States respectfully requests that the Panel reject India's claims.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF THE UNITED STATES - SECOND MEETING

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat, for your work in this dispute. In this statement, we will seek to clarify further some of the issues in this dispute. In particular, we will focus on India's arguments regarding the U.S. measures governing benefit both "as such" and "as applied", Commerce's specificity determinations, SDF loans as "direct transfers", cumulation of dumped and subsidized imports, and the interpretation and application of the U.S. "facts available" measures.

I. THE U.S. REGULATION, 19 CFR 351.511(a)(2), IS 'AS SUCH' CONSISTENT WITH ARTICLE 14(d)

2. For the reasons described extensively in the U.S. first written submission, responses to Panel's questions, and in the U.S. second written submission, India's position that Tiers-I and II of the U.S. regulation are 'as such' inconsistent with Article 14(d) of the SCM Agreement has no basis in the text of the SCM Agreement and is not supported by the findings in prior panel or Appellate Body reports. In short, India's entire mode of analysis is premised on a step that simply does not exist in the text of Article 14.

3. In its second written submission, India focuses its arguments on three textual points. First, India argues that structural differences between subparagraphs (b)-(c) and (d) of Article 14 contemplate a threshold step in Article 14(d) distinct from the "precise calculation method using an external benchmark" contained in subparagraphs (b) and (c). India has no basis for this distinction, and the United States would refer the Panel to the U.S. second written submission on this point.

4. Second, in noting that the terms "remuneration" and "benefit" are different words, India asks the Panel to accord separate "meaning to . . . the term *remuneration* and the fact that the U.S. law under challenge fails to look into the question of the *adequacy of remuneration* prior to calculating benefit." This argument has no merit. As already explained in the U.S. first written submission, while remuneration and benefit are distinct terms, they are related. The fact that the first sentence of Article 14(d) uses both terms does not mean that they are assessed from the perspective of different entities. Rather, the title to Article 14 make clear that when the financial contribution at issue is the provision of goods by a government, "benefit" is defined by the concept of "benefit to the recipient."

5. Third, in paragraph 15 of its second written submission, India notes that Article 14(d) relates to two different subsidy programs—both the purchase and provision of goods or services. India argues that the U.S. approach to assessing the adequacy of remuneration where the government is the purchaser of goods, is somehow inconsistent with the U.S. approach when the government acts as the seller. India is incorrect. With respect to government purchases of goods, the United States does not interpret Article 14(d) to require a cost to beneficiary analysis. Rather, where the government is the purchaser of goods, the comparison would be between the price the government paid for the product, and the price for which the recipient (of the benefit) could have sold the same product to another purchaser.

6. Moreover, in its second written submission, India adopts a new argument: that an assessment of prevailing market conditions requires an assessment of whether the behavior of the provider in some undefined sense can be commercially justified. This argument has no merit and, if India's position were adopted, would amount to a radical departure from the text of the Agreement for the following reasons:

7. First, India's argument assumes that for the purposes of the SCM Agreement, governments and private bodies should be treated equally. However, Members (acting through government, public bodies, funding mechanisms, or entrusted or directed private bodies) are bound by the disciplines of the SCM Agreement, and private entities are not. Moreover, Members may confer economic resources that result in negative impacts on other Members, and it is for this very reason that certain Member actions in the economic sphere are subject to the disciplines of the SCM Agreement. With respect to Article 14 specifically, the SCM Agreement ensures that the government prices are at least equivalent to market prices between private parties.

8. Second, in proposing that the price-setting behavior of governments be justified by undefined economic considerations, India seeks to carve out an unprecedented exception in the SCM Agreement. In India's view, governments have a sovereign right to set prices for goods or services as far below the market rate as they choose, provided this price-setting behavior can be justified on some sort of basis. But India's interpretation would seemingly allow a government to justify a less-than-market-price which results in driving private entities out of business on the basis that "commercial considerations" led the government to desire to expand its market share.

9. Third, India refers to this carve out from the disciplines of the SCM Agreement as an "inherent right" of governments to subsidize in any manner that they choose. The simple answer to India's argument is that this dispute is not about what types of subsidies governments may or may not, under whatever authority, determine to provide. India exercised its inherent sovereign right in agreeing to the disciplines of the SCM Agreement, and thus has agreed that other WTO Members may countervail subsidies it provides that cause injury to another Member's industry.

10. The United States offers the following additional comments on the structure of its regulation: Both the United States and India agree that the benefit calculations performed under Tier-III of the U.S. regulation are consistent with Article 14(d) of the SCM Agreement. India, however, argues that the regulation's preference for the application of a Tier-I or Tier-II analysis for the calculation of benefit is inconsistent with Article 14(d) insofar as it precludes the application of a Tier-III analysis. India's objections are without merit; they are based on India's flawed interpretation of the first sentence of Article 14(d), and India's oft-repeated, and unsupportable, insistence that the adequacy of remuneration must be assessed from the perspective of the provider of the benefit. Under the Article 14(d) guidelines, the adequacy of remuneration is assessed from the perspective of the recipient of the financial contribution and the hierarchical structure of the U.S. regulation is fully-consistent with this principle. The U.S. regulation appropriately begins with Tier-I, a preference for actual arm's length prices between private parties in the market of the economy of provision.

11. The crux of India's concern with the hierarchical structure of the U.S. regulation is its view that a government price that may be adequate under Tier-III should not be countervailed under another method, such as Tier-I or Tier II. However, if remuneration is less than adequate based on a comparison with actual arm's length prices between private parties, then a benefit has been conferred and, in such instances, the government price cannot be consistent with market principles. Application of the U.S. regulation will never lead to a result where remuneration which has been found to be inadequate under Tier-I or Tier-II will somehow be found to be adequate under Tier-III.

II. THE MANDATORY INCLUSION OF DELIVERED PRICES UNDER 19 CFR 351.511(a)(2)(iv) IS "AS SUCH" CONSISTENT WITH ARTICLE 14(d)

12. In paragraphs 36 through 45 of its second written submission, India continues to argue that the mandatory inclusion of delivery charges under subsection (iv) of the U.S. regulation is "as such" inconsistent with Article 14(d) of the SCM Agreement. The United States has addressed India's "as such" challenges to the regulation extensively in its previous submissions. We have the following additional comments:

13. First, in paragraph 38 India states that, "for reasons unknown and unsubstantiated, the United States assumes that the term 'delivery charges' covers only import duties." This statement is factually incorrect. As explained in detail in response to the Panel's questions 44 and 47, the term 'delivery charges' includes not only import duties (where appropriate) but, more specifically,

all of the delivery charges incurred by the producer to physically get the input to the producer's facility for use, which could include freight, import duties, or taxes. Second, India continues to argue in paragraph 39 of its second written submission that an apples-to-apples comparison could be completed at the ex-works level. An ex-works price does not include the costs incurred by the purchaser for getting a purchased input to its factory door and, therefore, is not reflective of the prevailing market conditions for that input from the perspective of the recipient.

14. Third, India states in paragraph 40 that "the 'delivered prices' of a domestic government provider can never be equal to or higher than such a benchmark price that includes international freight and import duties." This simply is not true. Indeed, India provides no evidence to support such a categorical statement. Fourth, India appears to be confused about what the factors listed in Article 14(d) mean. The non-exhaustive list of "prevailing market conditions for the good or service in question in the country of provision" in Article 14(d) includes price, quality, availability, marketability, transportation and, as India correctly points out, other conditions of purchase or sale. Thus, contrary to India's line of argument, the terms "availability" and "marketability", for instance, are not terms typically found in negotiated contracts.

15. Fifth, in both paragraphs 42 and 43 (in addition to others) India mischaracterizes the United States as making a "cost to exporter" (or "cost to producer") analysis. This is incorrect. The United States, consistent with Article 14 of the SCM Agreement, is making a benefit to the recipient analysis by comparing the prices that the recipient actually would pay for the benchmark product and the government product. Sixth, the United States would observe that the term "availability" is specifically included in the non-exhaustive list of prevailing market conditions identified in the second sentence of Article 14(d). For India to argue that adjustments to the benchmark with respect to "availability" are not contemplated in the text of the SCM Agreement is incorrect.

III. THE IMPOSITION OF COUNTERVAILING DUTIES IN RESPECT OF THE SALE OF HIGH GRADE IRON ORE BY NMDC IS FULLY CONSISTENT WITH ARTICLES 1.1, 2.1(c) AND 2.4 OF THE SCM AGREEMENT

16. Turning now to India's claims related to specificity, to recall, India argues that *de facto* specificity may only be determined under Article 2.1(c) where a subsidy is granted or enjoyed by a few enterprises as compared to a larger universe of similarly-situated entities otherwise capable of using that subsidy. This "comparative subset" argument simply is incorrect and India's previous arguments on this point have been adequately addressed in our previous submissions. We offer the following observations:

17. First, as clearly presented in our previous submissions, the United States disagrees with India's interpretation of Article 2.1 of the SCM Agreement. The passages of Appellate Body reports and selected negotiating documents of the SCM Agreement relied on by India to support its positions do not clarify the meaning of Article 2.1(c) do not address *de facto* specificity nor do they address specificity in the context of a financial contribution in the form of a provision of goods or services. Second, India is also incorrect in arguing that the text of Article 2.1(c) somehow mandates an order of analysis whereby an investigating authority is required to first apply the principles under Articles 2.1(a)-(b) before Article 2.1(c).

18. Third, there is no basis in Article 2.1(c) to support India's contention that the inherent characteristics of a good cannot limit its utility. There is no exception in the SCM Agreement allowing governments to provide goods, which, by their nature are of limited use, for less than market value. Fourth, India argues that in a *de facto* specificity analysis under Article 2.1(c), failure to require that a comparative subset of eligible entities be identified would result in "every form of supply of goods to be specific in all cases." Contrary to India's categorical assertions, specificity is assessed on a case-by-case basis and, under Article 2.1(c), will only be found where certain enterprises constitute a discrete segment of the economy of the Member granting the subsidy.[1]

19. India's two specificity arguments, including the one contained in section VII.C.2 of its first written submission effectively are the same: for both, India argues that the text of Article 2.1(c)

[1] *US – Upland Cotton (Panel)*, para. 7.1151.

requires that an investigating authority not only identify certain enterprises which are receiving the subsidy but also those eligible enterprises that are not.

20. In its second written submission, India continues to confuse the obligation of an investigating authority to take account of the factors identified in the second sentence of Article 2.1(c) with some sort of requirement that the authority's determinations must include a separate discussion of each factor. The United States met its obligation under Article 2.1 to take "account" of both the economic diversification of the Indian economy and the duration of the program in determining that the GOI provision of iron ore for less than adequate remuneration was *de facto* specific to a limited number of certain enterprises that used iron ore. Moreover, contrary to India's assertions, a Member does not and cannot "shirk" obligations by, as here, pointing out relevant facts on the record in a dispute.

IV. THE SALE OF IRON ORE BY NMDC CONFERRED A BENEFIT WITHIN THE MEANING ARTICLE 14(d) OF THE SCM AGREEMENT

21. Turning now to India's 'as applied' claims against the U.S. imposition of countervailing duties in respect of the sale of high grade iron ore by NMDC, in its second written submission the United States wishes to highlight the following positions: First, India is incorrect that the explanations of the United States are *ex-post facto* rationalizations of the determination. The determinations on the record in this dispute contain complete and persuasive explanations for why Commerce determined that Indian steel companies received countervailable subsidies. The alleged pricing, party identification, and iron content information contained in these documents was incomplete; this data was therefore insufficient to be used in a Tier-I analysis which, contrary to India's assertions in paragraph 193, very clearly requires that a benchmark price be based on data from actual imports or actual sales. Second, India incorrectly states that the United States starts with the presumption that all government prices (even prices not under challenge) are suspect and ought to be rejected without any examination. India has ignored paragraph 66 of the U.S. first written submission, in which the United States explains that the United States does not always reject the use of government prices as benchmarks if the government prices are determined to be set by the market. For example, a government price set by a competitively run government auction is explicitly included as a possible benchmark under Tier I of the U.S. regulation.

22. Third, the United States takes issue with India's apparent new argument that Article 12.1 of the SCM Agreement requires an investigating authority to affirmatively use all information submitted by interested parties in calculating a benchmark, regardless of that information's veracity or usability. That claim is therefore outside the Panel's terms of reference, even aside from the fact that it would be untimely to raise arguments for the first time in its second written submission.

23. India's 'as applied' challenges to the use of delivered prices in the calculation of benefit for the sale of iron ore by NMDC are identical to the arguments presented in its 'as such' challenges to the U.S. regulation, subsection (iv), the paragraph that mandates adjustments for fully delivered prices. As India's arguments are the same, for the same reasons as explained above, these arguments are without merit and are not based on the text of the SCM Agreement. Therefore, India's 'as applied' claims on the use of delivered prices must also fail.

V. THE IMPOSITION OF COUNTERVAILING DUTIES ON THE GRANT OF CAPTIVE MINING RIGHTS FOR IRON ORE AND COAL IS CONSISTENT WITH ARTICLES 12.5, 1.1, 1.2, 2 AND 14 OF THE SCM AGREEMENT

24. Article 12.5 of the SCM Agreement requires that "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based." While India has every incentive to deny the existence of a captive mining rights program for iron ore, Commerce satisfied itself as to the accuracy of information contained in the *Hoda* and *Dang* reports and therefore the U.S. actions fully complied with Article 12.5 of the SCM Agreement.

25. Further, India incorrectly argued that the Government of India did not provide iron ore or coal within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because there is no "reasonable proximate relationship" (as articulated by the Appellate Body in *Softwood Lumber IV*)

between the grant of mining rights on the one hand and the availability of the mined iron ore or coal on the other. India now argues that there is no reasonable proximate relationship because the royalty paid for the grant of mining rights is 9.03% of the total costs borne by the miner to enjoy the final minerals. Under Article 1.1(a)(1)(iii), the question regarding financial contribution is whether there was a provision of goods or services by a government or public body. The percentage of total cost represented by the financial contribution is not pertinent to this question. The price that the government charges in providing that exclusive right is not relevant.

26. India also argues that the GOI cannot be said to have provide iron ore or coal to miners if, in addition to royalty payments, miners must bear the costs of exploration, labor, and extraction. This requirement is nowhere in the text of SCM Agreement nor in the *US – Softwood Lumber IV* Appellate Body report. Analogously, making available iron ore and coal is the *raison d'etre* of the GOI's mining leases. India cannot distinguish this dispute on the basis of additional costs that a miner must incur to make the minerals marketable.

27. In paragraphs 218-219 of its second written submission India continues to argue that the GOI has not provided captive mining rights for coal to Tata Steel within the meaning of Article 1.1(a)(1) because the United States has not proven the non-existence of an alleged exemption to the Coal Mines Nationalization Act and the Ministry of Coal's guidelines for the allocation of captive coal blocks. As explained in the U.S. first written submission, Commerce properly determined that the law, as amended, clearly applies to *all coal mining leases*, without exception. It is India that has argued for the existence of an exemption for Tata, but yet has pointed to no evidence on the record of such an exemption.

28. India asks the Panel to apply a novel three-step analysis in examining whether the investigating authority properly determined specificity. India's proposed three-step standard of review is inconsistent with, and unsupported by, the text of the SCM Agreement. It also departs from prior Appellate Body findings. For example, India's third step appears to be taken from a misreading of the Appellate Body report in *US – Large Civil Aircraft*, wherein the Appellate Body's reference to the "broader legal framework" applied to determinations of *de jure* specificity in which there exist a legal framework to evaluate in the first place. Moreover, India's proposed methodology would amount to a *de novo* review of the facts on the record, requiring the Panel to substitute its judgment for that of the regulator.

29. In paragraph 225 of its second written submission, India continues to dispute Commerce's *de facto* specificity determination with respect to a captive mining rights program for iron ore on the basis that "the United States has not identified any separate regulation or guidelines governing mining rights of iron ore as distinguished from other minerals." Here too India confuses the difference between *de jure* and *de facto* specificity under Article 2.1(a)-(b) and 2.1(c). Specificity determinations under Article 2.1(c) do not require that an investigating authority identify a specific piece of legislation, regulations, or guidelines pertaining to eligibility or amount of subsidy.

VI. THE UNITED STATES CORRECTLY CALCULATED THE BENEFIT FOR A PRICE OF EXTRACTED IRON ORE AND COAL, CONSISTENT WITH ARTICLES 1.1(b) AND 14 OF THE SCM AGREEMENT

30. In paragraph 231 of its second written submission, India argues that the GOI did not "provide" extracted iron ore or coal in accordance with Article 1.1(a)(1)(iii) but rather granted mining rights and that, consequently, the costs incurred by the miner in extracting iron ore and coal cannot form part of the benchmark calculation under Article 14(d). For the reasons explained above and consistent with the Appellate Body's findings in *US – Softwood Lumber IV*, by providing the right to extract iron ore and coal, the GOI provided recipients with iron ore and coal consistent with Article 1.1(a)(1)(iii). Commerce properly constructed the cost of the iron ore and coal to Tata and compared this constructed price to a world market price for iron ore and an actual import price for coal in order to determine whether the recipients of the mining rights received something "on terms more favorable than those available in the market." These calculations are fully explained in paragraph 515 of the U.S. first written submission. India's objections to the benefit calculations for mining rights are premised on incorrect interpretations of both Articles 1 and 14 of the SCM Agreement and therefore are without merit.

VII. THE U.S. CUMULATION PROVISIONS ARE CONSISTENT WITH THE SCM AGREEMENT

31. India's arguments regarding cumulation fail because the cumulation of subsidized and dumped imports that are subject to simultaneous injury investigations is consistent with the text and context of Article 15 of the SCM Agreement, read in light of the object and purpose of the SCM Agreement. India argues that the text of Article 15.3 does not permit cumulation of subsidized imports with dumped imports. However, the text of Article 15.3 does not address this type of cumulation at all, much less prohibit it. Both the SCM and AD Agreement permit investigating authorities to cumulate imports for the purpose of assessing injury, and the Appellate Body has found cumulation to be "a useful tool for investigating authorities to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination…" By identifying this policy as a critical rationale underlying the cumulation provisions of these Agreements, the Appellate Body has acknowledged that injury to the domestic industry might come from several sources simultaneously, and has recognized that "it may well be the case that the injury the [antidumping and countervailing] duties seek to counteract is the same injury to the same industry."

32. It is telling that India has not challenged the cumulation of imports that are simultaneously subsidized and dumped, even though this circumstance was presented by the underlying determination. If Article 15.3 permits a cumulated analysis of the effects of imports that are both dumped and subsidized in injury investigations, then Article 15.3 must also permit a cumulated analysis of all unfairly traded imports, whether subsidized or dumped. For, as the United States has explained, it is simply not possible, as a practical matter, for an authority to disentangle or unravel the dumping-related effects of dumped and subsidized imports from their subsidies-related effects, because the effects are precisely the same.

33. Finally, India mistakenly claims that the U.S. aggregated "negligibility" analysis is inconsistent with Article 15.3 because it requires the Commission to perform this analysis on an individual country basis. Neither Article 15.3 nor Article 11.9 of the SCM Agreement specifically defines the term "negligibility". Moreover, the parallel provision in the AD Agreement includes the same allegedly country-specific language, but goes on to set parameters for "negligibility" findings that explicitly contemplate an aggregated analysis. Given that there is no level of negligibility specified in the SCM Agreement, the U.S. statute's negligibility test is not inconsistent, as such, with the provisions of Article 15.3.

34. With respect to the U.S. sunset provisions and the Commission's sunset analysis, India's challenges have a simple and fatal problem: they were raised under Article 15 of the SCM Agreement, which does not apply to sunset reviews. As the Appellate Body has consistently found, for example in *US – Carbon Steel* and *US – Corrosion-Resistant Steel Sunset Reviews*, the provisions of the Agreements governing dumping, subsidies, and injury findings in original investigations do not apply to an authority's likely injury analysis in sunset reviews. Therefore, India has no basis for either an "as such" or "as applied" challenge to these measures.

VIII. FINANCIAL CONTRIBUTION

35. India argues that the SDF loans are neither "direct," nor even a "transfer" of funds under the SCM Agreement, because the funds do not move "directly" from the SDF Managing Committee and because the SDF Managing Committee does not hold title to the funds such that it can "transfer" that title. However, there is no question that a loan made to an entity by a public body is a "direct transfer". Article 1.1(a)(1) includes "loans" in its illustrative list of direct transfers. Rather, India's arguments relate to which entity *made* the loan, and whether or not that entity was a public body. And as the United States has repeatedly pointed out, the record shows that the SDF Managing Committee, which is comprised exclusively of four government officials, made all the decisions regarding the issuance, terms and waivers of all SDF loans. Thus, while the JPC handled many of the day-to-day operations of the SDF program, the facts demonstrate, and Commerce found, that the SDF Managing Committee controlled the distribution of loans, and was therefore responsible for making the loans available to recipient companies.

IX. U.S. MEASURES REGARDING THE USE OF FACTS AVAILABLE

36. India claims in its second written submission that the United States "provides almost no substantive defense to India' (sic) claims" against the U.S. facts available provisions set out in paragraph 172 of its first written submission, and that we instead use the discretionary nature of the provisions as a "safe harbor". India's claims are patently wrong, as the United States has demonstrated repeatedly throughout its submissions.

37. First, we find it interesting that India refers back to these specific arguments, because two of the three arguments listed there reflect the panel's interpretation of Annex II to the AD Agreement in *Mexico – Rice*. India argues in its most recent submission, however, that the protections included in Annex II should not even apply in the context of the SCM Agreement. In addition to being incorrect, India's argument – if accepted – would mean that the entire legal premise of India's own facts available argument would disappear. This is because Article 12.7 of the SCM Agreement – standing alone and without context – provides no basis for India's facts available claim. It is the context of Annex II which provides the basis for a breach. But India cannot rely on certain elements of Annex II for context, while saying at the same time that paragraph 7 of Annex II – which explicitly notes consequences for non-cooperation – should be ignored. Rather, the United States agrees with other Members and the Appellate Body that Annex II of the AD Agreement is important context for interpreting Article 12.7. As we explained in our opening statement at the first panel meeting, the term "best" facts available – as used in the title of Annex II – refers to the facts that would be derived by an authority in its application of the protections contained in Annex II to the AD Agreement. In the U.S. view, these facts are those most probative, relevant and verifiable. The U.S. measures fully reflect these provisions.

38. Second, with respect to the third of the three bullet points in paragraph 172 of India's first written submission, the United States has consistently disputed India's assertion that the U.S. measures allow the punitive application of facts available, or apply the "worst possible inference". For example, India often refers to examples of application in which Commerce chose the highest subsidy rate found for another cooperating company from the same country, using the same program. The highest rate for a *cooperating* company is far from "the worst possible inference," and far from "punitive." Rather, in those instances, Commerce used a verifiable fact otherwise available – an actual subsidy rate – that reflected circumstances as similar as possible to those of the non-cooperating company. In reality, however, the non-cooperating party might have benefitted from the subsidy program to a *greater* extent than the parties that chose to cooperate and provide the requested information. By basing its determination upon verifiable facts, Commerce limits the extent of the inference it draws in making determinations based on facts available. Therefore, far from drawing the "worst possible inference", Commerce often may put the non-cooperating party in a *better* position than it would have been in had the party cooperated.

X. 2013 SUNSET REVIEW

39. India complains in its second written submission that the United States "offers no substantive response to the findings under challenge from the 2013 sunset review determination". However, in its own submission, India has not raised a single argument as to which findings the Panel should make, has not explained what evidence should be examined, nor described how the WTO Agreement applies. Rather, India simply states: "for substantially the same reasons as enunciated above, the entire set of findings in the 2013 sunset review determination is inconsistent with Article 12.7 of the SCM Agreement". India's claims with respect to the 2013 sunset review are "as applied" claims, which must be demonstrated on the facts. India has raised no arguments, much less informed the Panel and the United States of the findings it wishes to challenge. India has failed to even submit the measure to which it refers to the Panel as an exhibit. As the Appellate Body in *EC – Fasteners (China)* stated: "the burden rests on the complainant to substantiate its claims with legal arguments and evidence in its written and oral submissions to the panel. While the DSU, and Article 11 in particular, require a panel to make an objective assessment of the matters that are before it, the panel must turn its attention to and direct its questions at claims and arguments that the parties have articulated." That is, the party itself must articulate its claims and arguments and cannot simply raise claims for the Panel to substantiate on its own initiative. In these circumstances, India has provided no *prima facie* case for the United States to rebut, and India's claims in this respect therefore must fail.

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ANNEX D

ARGUMENTS OF THIRD PARTIES

ANNEX D-1

THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA

I. INTRODUCTION

1. Australia considers that these proceedings initiated by India under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise significant issues of legal interpretation of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

2. In this submission, Australia addresses the meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

3. Australia reserves the right to raise other issues in the third party hearing with the Panel.

II. THE SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT

A. THE MEANING OF THE TERM "PUBLIC BODY"

4. A material issue in this matter is the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. In *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body reversed the Panel's finding that the term "public body" in Article 1.1(a)(1) of the SCM Agreement means "any entity controlled by a government." The Appellate Body considered that this interpretation of "public body" lacked a proper legal basis.[1]

5. The Appellate Body concluded that a public body is an entity that **possesses**, **exercises** or is **vested** with governmental authority, which is to be determined on a case-by-case basis having regard to all the relevant facts, which may point in different directions.

6. Australia considers that the Appellate Body's conclusion suggests that a public body must meet one of three descriptions – an entity that **possesses** governmental authority, an entity that **exercises** governmental authority, or an entity that is **vested** with governmental authority. In Australia's view, these descriptions are alternatives to one another and are not cumulative. However, Australia acknowledges that the Appellate Body guidance on this is not clear.

7. For example, a statement was made by the Appellate Body that "being **vested** with, **and exercising**, authority to perform governmental functions is a core feature of a public body in the sense of Article 1.1(a)(1)".[2] It is not clear whether **possessing** government authority is included in this description of "a core feature of a public body". This statement also appears to suggest that in order to meet this description, an entity must both **be vested with**, **and exercise**, authority to perform governmental functions, whereas the Appellate Body's conclusion, as noted above, expressed these features as alternatives to each other.

8. In the same paragraph, the Appellate Body also made a statement that "being **vested** with government authority is the key feature of a public body".[3] It is not clear whether **possessing** government authority, or **exercising** government authority are also included in this description of "the key feature of a public body".

9. Another statement made by the Appellate Body in its analysis in forming its conclusion, was that in order for an entity to be able to give responsibility to a private body (entrustment), it must itself be **vested** with such responsibility.[4] This appears to suggest that in order to give

[1] Appellate Body Report, *US – AD/CVDs,* para. 322.
[2] Appellate Body Report, *US – AD/CVDs,* para. 310 (emphasis added).
[3] Appellate Body Report, *US – AD/CVDs,* para. 310 (emphasis added).
[4] Appellate Body Report, *US – AD/CVDs,* para. 294.

responsibility to a private body (entrustment), it may not be sufficient if an entity **possesses** and/or **exercises** such responsibility. Rather, it must be **vested** with it.

10. Australia would not support a view that an entity must be **vested** with governmental authority in order to be regarded as a "public body". This is because Australia considers that public bodies have government authority (without having to be **vested** with it). Australia is concerned to ensure that a focus on the idea of entities being **vested** with government authority is not used to artificially transpose the test for "entrustment or direction" onto the definition of "public body".

11. The discussion does not fully explain what the other features of a public body might be, and whether an entity might be considered a public body if it has other features even if not the core or key feature.

12. Therefore, Australia's view is that the discussion around core and key features is not clear. Australia considers that it may be useful for the Panel in this dispute to carefully examine again the term "public body" in the context of existing jurisprudence. One relevant criteria for examining a "public body" under Article 1.1(a)(1) of the SCM Agreement should be **to what extent** does the government control the entity.

13. India suggests the appropriate test for public body under Article 1.1(a)(1) for an entity is that:

(a) the entity has been vested with the power and authority to perform government functions; and
(b) the entity has the power and authority to direct or entrust a private body; and
(c) the entity is, in fact, exercising governmental functions, i.e. they can regulate control or supervise individuals, or otherwise constrain conduct.[5]

14. Australia considers that India's test does not reflect the jurisprudence on this issue. There is an important distinction between exercising governmental authority and whether an entity is performing governmental functions. In Australia's view, the Appellate Body's test for whether an entity exercises, possesses or is vested with governmental authority, does not require a determination by a competent authority as to whether an alleged public body is carrying out a governmental function for governmental purposes.

15. The Appellate Body has said that "Panel's or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body will be in a position to answer that question only by conducting a **proper evaluation of the core features of the entity concerned**, and its relationship with the government in the narrow sense".[6] Australia considers that this principle should frame the pursuit for clarity over the test for public bodies under Article 1.1(a)(1).

III. CONCLUSION

16. Central to this dispute are important issues of legal interpretation concerning aspects of the SCM Agreement, principally the meaning of the term "public body" as used in Article 1.1(a)(1). Australia is of the view that an entity should not be required to be **vested** with governmental authority in order to be regarded as a public body, but notes that the broad conclusion reached by the Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* can accommodate Australia's view.

[5] India First Written Submission, para. 234.
[6] Appellate Body Report, *US – AD/CVDs,* para. 317 (emphasis added).

ANNEX D-2

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF AUSTRALIA

1. This dispute raises important issues concerning Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Duties* (SCM Agreement) and the definition of "public body".

2. Australia considers that the interpretation of "public body" could benefit from clarification following the Appellate Body's finding in *United States – Anti-Dumping and Countervailing Duties (China)* ("*US – AD/CVD*").

3. In *US – AD/CVD*, the Appellate Body said that a public body must be an entity that "possesses, exercises **or** is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[1] Australia agrees with this statement and considers that the test to establish a public body is not a cumulative three stage test and requires a case-by-case analysis.

4. Australia's interpretation of "public body" differs to that of India's in its First Written Submission, which suggests that the test **is** cumulative and that an entity must therefore possess, exercise **and** be vested with governmental authority to be a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.[2]

5. Australia is concerned that interpreting "public body" as a cumulative test in this manner narrows the meaning of the term in Article 1.1(a)(1) of the SCM Agreement and removes the flexibility for investigating authorities to consider whether a public body exists in a range of different contexts.

6. Australia also considers that government ownership, **in and of itself**, is not enough to establish that an entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. Rather, when looking to whether a government **possesses or exercises governmental authority**, a key feature for establishing a public body should be the nature and extent of government control over the entity, which is a broad analysis.

7. To date, Australia's position has been, and continues to be, that establishing the nature and extent of government control over a particular entity would require an investigation into a range of factors, including how an entity is managed, whether a government issues instructions to the entity and the degree of governmental oversight.

8. In essence, it should be possible to make a finding that a public body exists in law or in fact, so long as there is evidence to do so.

9. In that regard, the evidence needed to establish a public body will depend on the facts of each case. It will often require an investigating authority to look beyond the formal structure of the entity. For example, an investigating authority could look to evidence such as:

   a. relevant statutes or other legal instruments;

   b. the degree of separation and independence of an entity from a government, including the appointment of Directors; or

   c. the contribution that an entity makes to the pursuit of government policies or interests.

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[1] Appellate Body Report, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 317 (emphasis added).

[2] India's First Written Submission, para. 234.

10. These examples of evidence, which are non-exhaustive, could potentially contribute to demonstrating whether a government has control over the activities and conduct of the entity in the sense of Article 1.1(a)(1) of the SCM Agreement.

11. Australia is not suggesting that these examples should constitute formal criteria to find a public body, whether individually or as a whole. Investigating authorities need flexibility to look at the facts of each individual case, and, based on available evidence, determine whether or not a public body exists.

12. In Australia's view, an approach which looks at the nature and extent of governmental control of an entity is consistent with the object and purpose of Article 1.1, which is to ensure that a subsidy provided by **any** public body within the meaning of Article 1.1(a)(1) is captured by the SCM Agreement.

13. Australia, in providing the Panel with its views on the meaning of "public body", has sought to look at the issue from a viewpoint that is both principled and practical for investigating authorities. Ultimately, investigating authorities within each Member State are the ones that need to apply these rules in the variety of different contexts in which they arise.

ANNEX D-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. Canada is participating in this panel proceeding because it has a substantial systemic interest in the interpretation of WTO subsidy rules.

II. PUBLIC BODY

2. In the panel and Appellate Body proceedings in *US – Anti-Dumping and Countervailing Duties (China)*, Canada, a third party in that dispute, argued that the appropriate interpretation of the term "public body" is that it is an entity controlled by the government. Such an interpretation is consistent with the context of Article 1.1(a)(1) and the object and purpose of the SCM Agreement.

3. Canada's interpretation gives sense to the reference to "public body" in Article 1.1(a)(1) because it maintains the *effet utile* of the term and distinguishes it from a "private body" entrusted or directed by a government in Article 1.1(a)(1)(iv). This interpretation also ensures that the disciplines of the SCM Agreement are given a sufficiently broad scope in terms of the entities to which they apply and as such prevents the creation of loopholes allowing for the circumvention of the disciplines of the Agreement.

4. The panel endorsed this interpretation in *US – Anti-Dumping and Countervailing Duties (China)*. Regrettably, the Appellate Body reversed the panel's findings. Nevertheless, Canada acknowledges the importance of security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the DSU.

III. SPECIFICITY

5. In the context of India's claims concerning the provision of high-grade iron ore, Canada disagrees with the interpretation of Article 2.1 of the SCM Agreement suggested by India. The ordinary meaning of the text of Article 2.1 does not require the use of "comparative sets" of "similarly-situated entities" in order to determine specificity. Article 2.1 is not a non-discrimination obligation, as India seems to suggest.

6. The language in the chapeau of Article 2.1 of the SCM Agreement provides that specificity must be determined in relation to "certain enterprises", i.e., an enterprise, industry or group of enterprises or industries, that received the subsidy. The panel in *US – Upland Cotton* found that the term "certain enterprises" refers to a "particular limited group of producers of certain products" and that a subsidy is provided to certain enterprises if the recipients of the subsidy constitute no more than a "sufficiently discrete segment" of the economy of the Member granting the subsidy.

7. Where the granting authority or the legislation pursuant to which the granting authority operates explicitly limits access to the subsidy to certain enterprises, the subsidy is specific under Article 2.1(a). According to Article 2.1(b), where neutral and objective criteria govern eligibility for a subsidy, thus making it broadly available, it is not limited to "certain enterprises" and not specific.

8. What makes a subsidy specific pursuant to Article 2.1(a) of the SCM Agreement is that it is only provided to an enterprise, an industry or group thereof that represents a sufficiently discrete segment of the economy. This determination as to whether a subsidy is limited to a sufficiently discrete group of recipients does not involve or require the establishment of sub-groups or pairs of similarly situated entities, resulting in a comparison of subsidy recipients versus similarly situated eligible companies that do not receive the subsidy, as India seems to suggest. Such an interpretation is not supported by the text of Article 2.1 of the SCM Agreement.

9. The panel's finding in *US – Softwood Lumber IV* when interpreting Article 2.1(c) of the SCM Agreement supports this interpretation.

10. Canada recognizes that a comparison may be required under Article 2.1(c) to determine *de facto* specificity. The second and the third of the four factors listed in the second sentence of Article 2.1(c), 'predominant use' and 'the granting of disproportionately large amounts of subsidy', are based on relational concepts. The application of these factors entails a comparison between sub-groupings of recipients of the same subsidy. This comparison, however, does not involve entities that do not receive the subsidy.

11. The subsidy at issue in this case is the provision of high-grade iron ore by NMDC at less than adequate remuneration to Indian steel companies. Based on the facts in the underlying investigation and reviews, Commerce inquired as to whether a limited number of industries received this subsidy, as required for a determination of *de facto* specificity under the first factor of Article 2.1(c). Contrary to what India argues, Commerce did not need to compare the group of recipient industries to another group of similarly situated industries to come to the conclusion that the number of recipient industries is limited. Thus, Commerce properly carried out the test established by Article 2.1(c) of the SCM Agreement.

12. Regarding India's argument that in its determination of *de facto* specificity, Commerce did not take into account the criteria in the last sentence of Article 2.1(c), Canada considers that the two factors in the third sentence of Article 2.1(c), although they may be of great significance for the determination of *de facto* specificity in some instances, do not warrant individual examination in every case. In particular, where it is well-known that an economy is highly diversified or that a subsidy has been provided over an extended period of time, these facts have likely been "taken into account" by the investigating authority in its analysis of *de facto* specificity under Article 2.1(c), even if they were not explicitly addressed in the determinations.

IV. THE USE OF FACTS AVAILABLE AND ADVERSE FACTS AVAILABLE UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

13. Canada considers that Article 12.7 of the SCM Agreement allows an investigating authority to make determinations based on "facts available" to it. In some situations, facts available will include facts that are less favourable to a party than the facts that the party would have submitted itself, if it had responded in a timely and complete manner.

14. Reading Article 12.7 in the context of Annex II to the Antidumping Agreement, as suggested by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, confirms that the use of facts that are detrimental to the respondent is permissible.

15. An investigating authority's discretion to choose among the available facts is not unlimited. First, the authority must take into account all the "substantiated facts" provided by a party, even where they constitute an incomplete response to a question. Second, as the Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice* stated, facts available may only be used where they "[…] reasonably replace the information that an interested party failed to provide". Most importantly, a determination must have its basis in facts. An investigating authority's determination must therefore always be based on *positive evidence* on the record.

16. An investigating authority should also be permitted to draw adverse conclusions, or inferences, under certain circumstances. Where a party withholds information, a reasonable and objective investigating authority may find that a party should not benefit from a lack of cooperation and use facts on the record in a way that is not favourable to a party.

17. This interpretation of Article 12.7 and Annex II is supported by the findings of the panel in *EC – Countervailing Measures on DRAM Chips*, which found that an investigating authority may be justified in drawing adverse inferences from the failure to cooperate of a party.

18. Canada considers that drawing of adverse inferences should not be in retribution against a party.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF CANADA

I. INTRODUCTION

1. Canada thanks the Panel for the opportunity to present its views in this important dispute.

2. In this oral statement, we will discuss three issues: the use of benchmarks other than private prices in the country of provision to calculate an amount of benefit under Article 14(d) of the SCM Agreement, and very briefly, specificity and new subsidy allegations on review.

3. We will not address in our statement today the other issues raised in our written submission – the term "public body" and the use of adverse facts – but we stand ready to respond to any questions that the Panel may have on them.

II. THE USE OF OUT-OF-COUNTRY BENCHMARKS

4. Turning first to the use of out-of-country benchmarks. In establishing the adequacy of remuneration under Article 14(d) where a government provides goods, an investigating authority may, in very limited circumstances, use a benchmark other than private prices in the country of provision to calculate the benefit to the recipient.[1]

5. Prices other than private prices in the country of provision can be used only if it is established that market prices are distorted and the distortion is due to the presence of the government in the domestic market as a provider of the same or similar goods. In *US – Antidumping and Countervailing Duties (China)*, the Appellate Body stated that price distortion must be established on a case-by-case basis and that even where evidence indicates that the government is a predominant supplier of goods, evidence other than government market share must be considered.[2]

6. As to the benchmark used for establishing adequacy of remuneration where private prices are unavailable, the Appellate Body in *US – Softwood Lumber IV* accepted that alternatives may include world market prices or prices constructed on the basis of production costs.[3] The Appellate Body emphasized that where the investigating authority proceeds in that way, it must ensure that the "resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale".[4]

7. Canada considers that the use of an alternative benchmark based on a constructed price, using among other elements, costs of production, may be appropriate in some cases. This would apply where a constructed price reflects the market conditions in the country of provision of the good as set out in Article 14(d) of the SCM Agreement.

III. SPECIFICITY

8. We turn now briefly to the issue of determinations of *de facto* specificity under Article 2.1(c) of the SCM Agreement. In its determination of *de facto* specificity, an investigating authority needs to take into account the extent of economic diversification and the length of time the subsidy programme has been in operation. This does not mean that the investigating authority needs to address these issues explicitly in every case. Rather, those issues need to be addressed where they are raised by an interested party or where the facts of the case warrant an investigation.

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[1] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.
[2] See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[3] Appellate Body Report, *US – Softwood Lumber IV*, para. 106.
[4] Ibid.

IV. NEW SUBSIDY ALLEGATIONS ON REVIEW

9. Finally, Canada disagrees with India's argument that, where the same subsidized good is concerned, every new subsidy allegation requires initiation of a new investigation under Article 11 of the SCM Agreement. New subsidy allegations should be permitted during review proceedings where appropriate protection of due process rights is provided to interested parties.

10. Mr. Chairman, distinguished members of the Panel, this concludes Canada's oral statement. We thank you for your attention and would be pleased to answer any questions that you might have.

ANNEX D-5

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. In this submission, China will present its views on the following three issues:

(i) Public body;

(ii) Input specificity; and

(iii) Adverse facts available.

II. PUBLIC BODY

2. In their respective First Written Submissions, India asserts that the United States' determination that National Mineral Development Corporation is a "public body" is contrary to Article 1.1(a)(1) of the *SCM Agreement*, relying principally on the Appellate Body's holdings in *U.S. – Antidumping and Countervailing Duties (China)*. But the United States seeks to reargue the interpretation of the term "public body". In light of the positions of the parties, China would like to submit its views in relation to the issue of "public body" in the following three subsections.

A. The Appellate Body's Definitive Interpretation of The Term "Public Body" in *U.S. – Antidumping and Countervailing Duties (China)*

3. In *U.S. – Antidumping and Countervailing Duties (China)*, the Appellate Body provided definitive interpretation of the term "public body", that is, a public body within the meaning of Article 1.1(a)(1) of the *SCM Agreement* "must be an entity that possesses, exercises or is vested with governmental authority".[1]

4. For the application of the above interpretation, the Appellate Body observed that evidence of government ownership "cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function", and accordingly, "such evidence, alone, cannot support a finding that an entity is a public body".[2]

B. Relevance to This Dispute of The Appellate Body's Legal Interpretation

5. As noted by the Appellate Body, legal interpretation embodied in adopted panel and Appellate Body reports "becomes part and parcel of the *acquis* of the WTO dispute settlement system"[3], and as such, "create legitimate expectations among WTO Members" that "should be taken into account where they are relevant to any dispute".[4] Therefore, "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[5] The Appellate Body further observed that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[6]

6. In China's view, it should be a non-controversial proposition that, at the very least, to merely advance arguments that the Appellate Body has already considered and rejected cannot justify the extraordinary step of departing from a legal interpretation embodied in a prior adopted Appellate Body report.

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[1] *U.S. – Antidumping and Countervailing Duties (China)*, Appellate Body Report, para. 317.
[2] *U.S. – Antidumping and Countervailing Duties (China)*, Appellate Body Report, para. 346.
[3] *U.S. – Stainless Steel (Mexico)*, Appellate Body Report, para. 160.
[4] *U.S. – Continued Zeroing*, Appellate Body Report, para. 362.
[5] *U.S. – Continued Zeroing*, Appellate Body Report, para. 362.
[6] *U.S. – Stainless Steel (Mexico)*, Appellate Body Report, para. 160.

7. Therefore, China submits that the legal interpretation regarding public body developed by the Appellate Body in *U.S. – Antidumping and Countervailing Duties (China)* should be followed by the Panel in this case and should serve as the foundation for any findings regarding the public body determination at issue.

C. The U.S. *Ex Post* Rationalization

8. In its *First Written Submission*, the United States seeks to justify the USDOC's public body determinations on an "alternative" basis[7], which, in China's view, presents a classic definition of *ex post* rationalization and should be rejected by the Panel.

9. China respectfully submits that it is not the Panel's task to speculate on what the USDOC might have concluded had it applied proper interpretations of the *SCM Agreement* to the facts on the record. Nor can the United States seek to defend the USDOC's determinations based on a rationale other than the rationale that the USDOC adopted. The Panel should assess whether the USDOC had based its public body finding on majority ownership in the administrative reviews at issue. If so, the Panel should apply the legal standard provided by the Appellate Body in *U.S. – Anti-Dumping and Countervailing Duties (China)* and conclude that the United States has acted inconsistently with Article 1.1(a)(1) of the *SCM Agreement*.

III. INPUT SPECIFICITY

10. In this regard, China would like to submit its views on certain important aspects of the legal standards under Article 2 of the *SCM Agreement* that it deems relevant to this dispute.

A. The "Other Factors" Under Article 2.1(c) Must Be Evaluated on the Basis of a "Prior Appearance of Non-Specificity" Resulting from the Application of Article 2.1(a) and Article 2.1(b)

11. China submits that Article 2.1 contemplates an analysis in a manner that the assessment of *de facto* specificity under Article 2.1(c) must follow the initial appearance of non-specificity concluded as a result of the analysis under Article 2.1 subparagraphs (a) and (b). Therefore, an investigating authority is obliged first to consider the principles set out in subparagraphs (a) and (b), and may proceed to the "other factors" under subparagraph (c) only if the application of the prior principles under subparagraphs (a) and (b) has led to an appearance of non-specificity.

12. This is not a simple matter of form, but an important issue of substance. As the Appellate Body observed in *U.S. – Anti-Dumping and Countervailing Duties (China)*, "subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle," and "the application of one of the subparagraphs of Article 2.1 may not by itself be determinative in arriving at a conclusion that a particular subsidy is or is not specific."[8]

B. The First Factor of Article 2.1(c) Operates on the Predicate of A "Subsidy Programme"

13. China holds the view that a "subsidy programme" must have been identified and substantiated when an investigating authority evaluates specificity under the first two "other factors" under Article 2.1(c). As explained by the panel in *EC and certain member States – Large Civil Aircraft*, "[i]t is apparent from the text of the first and second specificity factors that 'the subsidy programme' stands for the programme that must be considered when evaluating whether there has been 'use of a subsidy programme by a limited number of certain enterprises' or 'predominant use by certain enterprises'."[9]

14. As a result, in any evaluation of specificity under these two factors, logically, "the starting point should be the identification of the relevant subsidy programme."[10] Without first identifying

[7] United States' First Written Submission, para. 379.
[8] *U.S. – Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report, para. 366.
[9] *EC and certain member States – Large Civil Aircraft*, Panel Report, para. 7.966.
[10] *EC and certain member States – Large Civil Aircraft*, Panel Report, para. 7.993.

the relevant subsidy programme, including its scope and content, the investigating authority is unable to know who the users of that program are and whether they represent "a limited number of certain enterprises" or "predominant use".

C. Article 2.1(c) Requires Consideration of the Two Factors in The Last Sentence

15. China submits that an investigating authority must take into account the two factors set forth in the third sentence of Article 2.1(c), namely, the extent of diversification of economic activities within the jurisdiction of the granting authority and the length of time during which the subsidy programme has been in operation.

16. As the panel held in *U.S. – Large Civil Aircraft (2nd Complaint)*, each of the "other factors" set forth under Article 2.1(c) must be evaluated in light of the two factors described in the third sentence.[11] Therefore, the requirement that the two factors set forth in the third sentence of Article 2.1(c) must be considered is clear and unambiguous. If an investigating authority skips the mandatory consideration, the panel should find that the investigating authority has acted inconsistently with Article 2.1(c).

IV. ADVERSE FACTS AVAILABLE

17. The wording of Article 12.7 of the *SCM Agreement* is clear and unambiguous. What is allowed under Article 12.7 is merely the use of "facts available" when there is non-cooperation by any interested Member or interested party, not the use of "adverse facts available", let alone "adverse inferences".

18. In light of the Appellate Body's analysis in *Mexico – Anti-Dumping Measures on Rice*[12], China submits that, in a countervailing duty investigation, the investigating authority is precluded from using whatever evidence it wishes. Even in a case where the investigating authority deems an interested Member or interested party uncooperative, the authority must evaluate objectively the alternative information on the record to decide which is most fitting and appropriate for filling in the gap in the record. Such information can only be the "best information available" and "those that may reasonably replace the information that an interested party failed to provide", but not simply the "adverse facts". If such information is from secondary sources, the investigating authority should further ascertain its reliability and accuracy.

19. An even more fundamental requirement under Article 12.7 is that the investigating authority's determination must be based on actual facts on the record. As observed by the panel in *China – GOES*, "even when applying facts available, an investigating authority's determination must have a factual foundation."[13] The panel thus concluded that "[w]hile non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences."[14]

20. In sum, China submits that the use of "adverse facts available" or "adverse inferences", as opposed to facts available on the record, is inconsistent with Article 12.7 of the *SCM Agreement*.

V. CONCLUSION

21. In conclusion, China is of the following opinion:

(i) To find a "public body" within the meaning of Article 1.1(a)(1) of the *SCM Agreement*, the investigating authority must find "an entity that possesses, exercises or is vested with governmental authority". Evidence of government ownership in itself cannot serve as the basis for establishing a "public body". The legal interpretation regarding "public body" developed by the Appellate Body in *U.S. – Antidumping and Countervailing Duties (China)* should be followed and serve as the foundation for any findings on India's claims regarding "public body" determination. Further, the Panel should reject the United States' attempt of *ex post* rationalization and review the

[11] *U.S. – Large Civil Aircraft (2nd Complaint)*, Panel Report, para. 7.747.
[12] *Mexico – Anti-Dumping Measures on Rice*, Appellate Body Report, paras. 289~298.
[13] *China – GOES*, panel report, para. 7.296.
[14] *China – GOES*, panel report, para. 7.302.

USDOC's determinations in dispute based only on the rationales as set out in those determinations.

(ii) In respect of the interpretation and application of Article 2.1(c) of the *SCM Agreement*, *firstly*, China submits that the "other factors" under Article 2.1(c) must be evaluated on the basis of a "prior appearance of non-specificity" resulting from the application of Article 2.1(a) and Article 2.1(b). Because the USDOC failed to follow the proper order of analysis and to accord appropriate weight to each of the principles under Article 2.1, the United States has acted inconsistently with Article 2.1(c) of the *SCM Agreement* for this reason alone. *Secondly*, China opines that the first factor under Article 2.1(c) operates on the predicate of a "subsidy programme". Because of the failure to properly identify and substantiate a "subsidy programme" in the USDOC's *de facto* specificity finding, the administrative reviews at issue are WTO-inconsistent. *Thirdly*, because Article 2.1(c) explicitly requires consideration of the two factors in the last sentence but the USDOC manifestly failed to do so, the United States has acted inconsistently with Article 2.1(c).

(iii) Article 12.7 of the *SCM Agreement* only permits the use of "facts available", which requires the investigating authority to use the "best information available" and "those that may reasonably replace the information that an interested party failed to provide". Meanwhile, the use of "facts available" prohibits the investigating authority from drawing adverse inferences that could not find factual foundations in the record at all. Thus, the use of "adverse facts available" or "adverse inference" in a countervailing duty investigation is inconsistent with Article 12.7 of the *SCM Agreement*.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF CHINA

1. Mr. Chairman, members of the Panel, it is my honor to appear before you today to present the views of China as a third party. In this oral statement, China will discuss three issues raised in this case, namely, public body, input specificity and adverse facts available.

2. China will first submit its views on the issue of ***public body***. In their respective *First Written Submissions*, India asserts that the USDOC's determination that National Mineral Development Corporation is a "public body" is contrary to Article 1.1(a)(1) of the *SCM Agreement*. India relied principally on the Appellate Body's holdings in *U.S. – Antidumping and Countervailing Duties (China)*. But the United States seeks to reargue the interpretation of the term "public body". In light of the positions of the parties, China would like to submit its views on the issue of "public body" in the following three aspects.

3. ***First***, the Appellate Body has provided a definitive interpretation of the term "public body" in *U.S. – Antidumping and Countervailing Duties (China)*. That is, a public body within the meaning of Article 1.1(a)(1) of the *SCM Agreement* "must be an entity that possesses, exercises or is vested with governmental authority".[1]

4. For the application of the above interpretation, the Appellate Body observed that evidence of government ownership "cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function". Accordingly, "evidence [of government ownership], alone, cannot support a finding that an entity is a public body".[2]

5. ***Second***, the Appellate Body's legal interpretation in *U.S. – Antidumping and Countervailing Duties (China)* is decisive in resolving the issue of public body in this dispute. As noted by the Appellate Body, legal interpretation embodied in adopted panel and Appellate Body reports "becomes part and parcel of the *acquis* of the WTO dispute settlement system"[3], and as such, "create legitimate expectations among WTO Members" that such reports "should be taken into account where they are relevant to any dispute".[4] Therefore, "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[5] According to the Appellate Body, "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[6]

6. In this dispute, the United States merely advances arguments that the Appellate Body has already considered and rejected. In China's view, this clearly cannot justify the extraordinary step of departing from a legal interpretation embodied in an adopted Appellate Body report. Therefore, China submits that the Panel should follow the legal interpretation regarding public body developed by the Appellate Body in *U.S. – Antidumping and Countervailing Duties (China)*. That legal interpretation should serve as the foundation for any findings regarding the public body determination at issue.

7. ***Third,*** the United States' attempt of *ex post* rationalization must be rejected by the Panel. In its *First Written Submission*, the United States seeks to justify the USDOC's public body determinations on an "alternative" basis.[7] That attempt, in China's view, is a classic example of *ex post* rationalization and must be rejected by the Panel.

8. China respectfully submits that it is not the Panel's task to speculate on what the USDOC might have concluded had it applied the proper interpretations of the *SCM Agreement* to the facts

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[1] *U.S. – Antidumping and Countervailing Duties (China)*, Appellate Body Report, para. 317.
[2] *U.S. – Antidumping and Countervailing Duties (China)*, Appellate Body Report, para. 346.
[3] *U.S. – Stainless Steel (Mexico)*, Appellate Body Report, para. 160.
[4] *U.S. – Continued Zeroing*, Appellate Body Report, para. 362.
[5] *U.S. – Continued Zeroing*, Appellate Body Report, para. 362.
[6] *U.S. – Stainless Steel (Mexico)*, Appellate Body Report, para. 160.
[7] United States' First Written Submission, para. 379.

on the record. Nor can the United States seek to defend the USDOC's determinations based on a rationale other than the rationale that the USDOC adopted. The Panel should assess whether the USDOC had based its public body finding on majority ownership in the administrative reviews at issue. If so, the Panel should apply the legal standard provided by the Appellate Body in *U.S. - Anti-Dumping and Countervailing Duties (China)* and conclude that the United States has acted inconsistently with Article 1.1(a)(1) of the SCM Agreement.

9. Now I come to the second issue, ***input specificity***. In this regard, China would like to submit its views on certain important aspects of the legal standards under Article 2 of the *SCM Agreement* that it deems relevant to this dispute.

10. ***First of all,*** China submits that Article 2.1 contemplates a sequential analysis. That is, the assessment of *de facto* specificity under Article 2.1(c) must come after the initial appearance of non-specificity concluded by the analysis under Article 2.1 subparagraphs (a) and (b). An investigating authority is obliged first to consider the principles set out in subparagraphs (a) and (b). It may proceed to the "other factors" under subparagraph (c) only if the application of the prior principles under subparagraphs (a) and (b) has led to an appearance of non-specificity.

11. As the Appellate Body has explained, "[t]he inquiry under Article 2.1(c) … focuses on whether a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure."[8] For this reason, the analysis of the "other factors" under Article 2.1(c) must follow from, and be informed by, the conclusions that led to the initial appearance of non-specificity under subparagraphs (a) and (b).

12. This is not a simple matter of form, but an important issue of substance. As the Appellate Body observed in *U.S. – Anti-Dumping and Countervailing Duties (China)*, "subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle." Also, "the application of one of the subparagraphs of Article 2.1 may not by itself be determinative in arriving at a conclusion that a particular subsidy is or is not specific."[9]

13. ***Secondly,*** China holds the view that a "subsidy programme" must have been identified and substantiated when an investigating authority evaluates specificity under the first two "other factors" under Article 2.1(c). In *EC – Large Civil Aircraft*, the panel read from the text of the first two "other factors" that "'the subsidy programme' stands for the programme that must be considered when evaluating whether there has been 'use of a subsidy programme by a limited number of certain enterprises' or 'predominant use by certain enterprises'."[10]

14. As a result, in any evaluation of specificity under these two factors, logically, "the starting point should be the identification of the relevant subsidy programme."[11] Without first identifying the relevant subsidy programme, including its scope and content, the investigating authority is unable to know who the users of that program are and whether they represent "a limited number of certain enterprises" or "predominant use".

15. In determinations at issue, although the USDOC purported to consider the "sale of high-grade iron ore for less than adequate remuneration" to be a "subsidy programme", it had failed to explain in the one-sentence finding why or how the sales of the input at issue constitutes a "subsidy programme". In China's view, because of the failure properly to identify and substantiate a "subsidy programme" in the USDOC's *de facto* specificity finding under the first factor of Article 2.1(c), the administrative reviews at issue are thus WTO-inconsistent.

16. ***Last but not the least,*** China submits that an investigating authority must take into account in its determination of *de facto* specificity the two factors set forth in the third sentence of Article 2.1(c), namely, the extent of diversification of economic activities within the jurisdiction of the granting authority and the length of time during which the subsidy programme has been in operation.

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[8] *U.S. – Large Civil Aircraft (2nd Complaint)*, Appellate Body Report, para. 877.
[9] *U.S. – Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report, para. 366.
[10] *EC and certain member States – Large Civil Aircraft*, Panel Report, para. 7.966.
[11] *EC and certain member States – Large Civil Aircraft*, Panel Report, para. 7.993.

17. In its *First Written Submission*, the United States appears to propose that an investigating authority is not required to "address explicitly" the two factors in the third sentence of Article 2.1(c) if the interested party failed to raise issues regarding those two factors.[12] That China cannot agree.

18. As the panel held in *U.S. – Large Civil Aircraft (2nd Complaint)*, each of the "other factors" set forth under Article 2.1(c) must be evaluated in light of the two factors described in the third sentence.[13] This requirement is clear and unambiguous. If an investigating authority skips the mandatory consideration, a panel should find that the investigating authority has acted inconsistently with Article 2.1(c).

19. In respect of the third issue, ***adverse facts available***, China is of the view that Article 12.7 allows the use of only "facts available" when there is non-cooperation by any interested Member or interested party. It does not contemplate the use of "adverse facts available", let alone "adverse inferences".

20. In light of the Appellate Body's analysis in *Mexico – Anti-Dumping Measures on Rice*[14], China submits that, in a countervailing duty investigation, the investigating authority is precluded from using whatever evidence it wishes. Even in a case where the investigating authority deems an interested party uncooperative, the authority must evaluate objectively the alternative information on the record, in order to decide which is the most fitting and appropriate for filling in the gap in the record. Rather than simply the "adverse facts", such information must be the "best information available" and "those that may reasonably replace the information that an interested party failed to provide". If such information is from secondary sources, the investigating authority shall further ascertain its reliability and accuracy.

21. The United States seems to have distorted what the Appellate Body meant by the "most fitting and appropriate" facts. This is what the United States stated in its own *First Written Submission*, which China quotes from paragraph 215: "the 'adverse' element is introduced when Commerce decides which available facts are appropriate to use when a party has provided no verifiable, substantiated information relevant to the determination at hand." In this manner, using "adverse facts", instead of "most fitting and appropriate" ones, seems to have become the standard adopted by the United States.

22. In China's reading of Article 12.7 and the Appellate Body's interpretation, the rule does not mandate the use of facts that are favorable or adverse to the party. However, it does compel the use of facts that are most fitting and appropriate. Therefore, if there is any exercise of using "adverse facts", it must be demonstrated that those "adverse facts" are the "most fitting and appropriate" ones.

23. An even more fundamental requirement under Article 12.7 is that the investigating authority's determination must be based on actual facts on the record. As observed by the panel in *China – GOES*, "even when applying facts available, an investigating authority's determination must have a factual foundation."[15] The panel thus concluded that "[w]hile non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences."[16] This conclusion simply negates the position of the United States that "Commerce 'may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available' if an interested party has failed to cooperate".[17]

24. In sum, China submits that the use of "adverse facts available" or "adverse inferences", as opposed to the most fitting and appropriate facts available on the record, is inconsistent with Article 12.7 of the *SCM Agreement*.

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[12] U.S. *First Written Submission*, para. 420.
[13] *U.S. – Large Civil Aircraft (2nd Complaint)*, Panel Report, para. 7.747.
[14] *Mexico –Anti-Dumping Measures on Rice*, Appellate Body Report, paras. 289~298.
[15] *China – GOES*, panel report, para. 7.296.
[16] *China – GOES*, panel report, para. 7.302.
[17] U.S. *First Written Submission*, para. 215.

ANNEX D-7

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. INDIA'S CLAIMS "AS SUCH" AGAINST THE US LAW CONTAINED IN 19 CFR § 351.511(A)(2)(I) TO (III): ADEQUACY OF REMUNERATION FOR THE PROVISION OF GOODS OR SERVICES BY THE GOVERNMENT

1. The EU is of the view that India's claims appear to be based on flawed interpretations of Article 14(d) of the SCM Agreement. The perspective of the provider of the goods or services, in the sense of whether the government makes a reasonable return when providing the goods or services in question, is not dispositive in determining the existence of "benefit" under Article 1.1(b) or its amount in accordance with Article 14(d) of the SCM Agreement. The perspective of the provider advocated by India is similar to the "cost to the government" approach that has already been rejected to determine the existence of "benefit" under Article 1.1(b) of the SCM Agreement. The AB Report in *Canada – Aircraft* stands for the proposition that a "benefit" is to be determined, not by reference to whether the transaction imposes a net cost on the government, but rather by reference to whether the terms of the financial contribution are more favourable to what is available to the recipient on the market. Thus, in the EU's view, the perspective of the recipient of the goods provided by the government is the relevant starting point of the benefit analysis. Moreover, the commercial considerations of the government when setting its prices would be relevant to the extent that they reflect those "prevailing market conditions" in the country of provision. However, they cannot be dispositive of whether the provision of goods or services conferred a "benefit" to the recipient. Whether the government sold the good in question with profit or not is not determinative of whether the provision of such good conferred a "benefit" under Article 1.1(b) of the SCM Agreement. The same conclusion should be reached, *mutatis mutandi*, in the context of Article 14(d) of the SCM Agreement. Consequently, the EU submits that India's interpretation of Article 14(d) of the SCM Agreement is incorrect and thus should be rejected.

2. INDIA'S CLAIMS "AS SUCH" AGAINST THE US LAW CONTAINED IN 19 CFR § 351.511(A)(2)(IV): ADJUSTMENT TO REFLECT THE PRICE THAT A FIRM ACTUALLY PAID OR WOULD PAY IF IT HAD IMPORTED THE PRODUCT

2. The adequacy of the remuneration under Article 14(d) of the SCM Agreement should start by locating a proper comparator in the marketplace of the country of provision, i.e., the prices at which the same or similar goods are bought by private suppliers in arm's length transactions in the country of provision. If such prices are distorted in that market, thus rendering the comparison required under Article 14(d) of the SCM Agreement circular, it may be necessary to have recourse to an external proxy benchmark or to a constructed proxy duly adjusted that somehow relates or refers to, or is connected with, the conditions prevailing in the market of the country of purchase. In other words, in the absence of an actual price that is available on the market for the same product (e.g., because all prices are distorted because of the government intervention or, simply because the government controls prices or is the only provider), the comparison envisaged in the benefit analysis can be made by using a proxy for what *would* have been paid on a comparable purchase of goods that could have been obtained on the market in the absence of the distortion (i.e., by reference to market principles) and, if needed, by making appropriate adjustments in order to avoid in particular the countervailing of genuine comparative advantages.

3. Once the proper benchmark price has been identified, either in-country, outside-country or constructed proxy, the comparison required to determine the existence and amount of benefit has to be made at the same level of trade. Indeed, if the government price was set on an ex-works basis and the benchmark price is established on a Delivered At Place (DAP) basis, an adjustment should be made to make a proper comparison at the same level of trade. Such an adjustment would not seek to reproduce the "conditions of sale" in the country of provision in accordance with Article 14(d); rather, it would pursue that, once the benchmark price has been found, the comparison between the government price and that benchmark price is properly made at the same level of trade. Indeed, the benchmark price would already be established taking into account the "prevailing market conditions" of the country of provision. Thus, the EU is of the view that

adjusting the government price and the benchmark price at the same level of trade (e.g. delivered prices) would not be inconsistent with Article 14(d) or Articles 19.3 and 19.4 of the SCM Agreement.

4. Moreover, the EU observes that, if in-country prices are not available because the product in question is only imported (that is, not produced locally), then it would appear reasonable to adjust the benchmark price taking into account such factor. To illustrate this with an example. Finally, the EU observes that it may be appropriate to compare the government price with a benchmark price on a delivered basis in other situations where in-country prices are not available because e.g. they are distorted. That would be the case, for instance, when import prices are considered to be a proper market benchmark (i.e. reproducing the price that the recipient would have obtained in the country of provision on market terms).

3. INDIA'S CLAIMS "AS SUCH" AGAINST THE US LAW CONTAINED IN 19 USC § 1677(7)(G), 19 USC § 1675A(A)(7), AND 19 USC § 1675B(E)(2): CUMULATION OF IMPORTS IN THE INJURY ANALYSIS

5. Article 15.3 of the SCM Agreement permits ("may") cumulating subsidised imports from different countries "only" if three cumulative conditions ("and") are met. *First*, if the amount of subsidisation established in relation to the imports from each country is *de minimis*, i.e., 1 per cent or less *ad valorem*, the investigation must be terminated with respect to those imports, in accordance with Article 11.9 of the SCM Agreement. As a consequence of such termination, imports from such a country cannot be considered as "subsidised imports" within the meaning of those terms in Article 15 of the SCM Agreement. Consequently, in cases where several countervailing investigations against imports of the same product from different countries have been initiated, the volume of imports with respect to the country or countries for which the investigation was terminated in accordance with Article 11.9 of the SCM Agreement cannot be considered as part of the volume of "subsidized imports" within the meaning of that term in Article 15 of the SCM Agreement. Thus, the first condition in Article 15.3 of the SCM Agreement (i.e., cumulation is permitted only if the amount of subsidisation established in relation to the imports from each country is more than *de minimis*) would imply that the volume of imports found to be non-subsidised and thus terminated pursuant to Article 11.9 of the SCM Agreement cannot be cumulated. The same should be concluded in cases where imports of products found to be subsidised are cumulated with imports found to be dumped in a parallel anti-dumping investigation. In the EU's view, the terms "subsidized imports" in Article 15 of the SCM Agreement should be interpreted as referring to imports for which the investigating authority has found subsidisation specifically. The inclusion of dumped imports in the volume of subsidised imports for the purpose of the injury assessment in the context of the countervailing duty investigation would not be based on any provision of the SCM Agreement and would be illogical. *Second*, if the volume of imports from each country is negligible, the investigation must also be terminated with respect to those imports in accordance with Article 11.9 of the SCM Agreement.

6. In the EU's view, Article 15.3 of the SCM Agreement permits the cumulation of subsidised imports for the purpose of the injury analysis only if certain conditions are met. Further, the terms "subsidized imports" in Article 15 of the SCM Agreement should be understood as including imports for which there is a finding of subsidisation in the same period of time and may include imports of several countries.

4. INDIA'S CLAIMS "AS SUCH" AGAINST THE US LAW CONTAINED IN 19 USC § 1677E(B) AND THE IMPLEMENTING REGULATIONS CONTAINED IN 19 CFR § 351.308: USE OF "ADVERSE FACTS AVAILABLE"

7. In drawing inferences, an authority is not permitted to identify two different equally possible inferences, and then select the inference that is more adverse to the interests of a particular interested party, solely because it is more adverse (for example, in order to "punish" non-cooperation). Rather, the authority must draw the inference that best fits the facts that have been evidenced. However there are no facts that are *per se* excluded from the set of facts to be taken into consideration for this purpose: so they include such things as the precise question that has been put; the procedural circumstances; the availability of the evidence being sought; and all the circumstances surrounding the absence of the requested information from the record. Thus, in this way, the behaviour of an interested party can colour the inferences that it may or may not be reasonable to draw in any particular instance. The more uncooperative a party is in fact, the more

attenuated and extensive the inferences that it may be reasonable to draw. The EU would tend towards the view that whether or not a WTO Member has acted inconsistently with Article 12.7 of the SCM Agreement might depend less upon the particular label that has been used, and more upon a specific examination of all the surrounding facts and procedural context. Turning to the US law itself, the EU observes that it does not actually state that, in selecting facts and inferences, an investigating authority is entitled to prefer a particular fact or inference *only* because it is more adverse than some other fact or inference to the interests of a particular interested party, in order to *punish* non-cooperation. It merely provides for the use of facts available; introduces the concept of adverse inference; and refers to the process of selecting from the facts otherwise available. On its face, therefore, the US law would appear to be perfectly capable of being applied in a manner consistent with Article 12.7 of the SCM Agreement. Furthermore, the US does not argue that an investigating authority is entitled to prefer a particular fact or inference *only* because it is more adverse than some other fact or inference to the interests of a particular interested party, in order to *punish* non-cooperation. In these circumstances, the EU is not persuaded that India has demonstrated that the cited provisions of US law are "as such" inconsistent with the relevant provisions of the SCM Agreement.

5. INDIA'S CLAIMS "AS APPLIED" AGAINST THE IMPOSITION OF COUNTERVAILING DUTY IN RESPECT OF SALE OF HIGH IRON GRADE IRON ORE BY NMDC

8. With respect to the public body issue, the AB Report in *US – Anti-Dumping and Countervailing Duties on China* had to be unconditionally accepted by the parties to that dispute and is now part of the *acquis* of the WTO dispute settlement system, implying that, absent cogent reasons, the same legal question will be resolved in the same way in a subsequent case. In that case, the AB sought a balance between the US approach, with its emphasis on *ownership and control* in general terms and China's approach, with its emphasis on governmental *authority* and *function*, which approach the AB considered to coincide with and correspond to the *attribution* rules in the ARSIWA. The EU remains of the view that, insofar as the abstract test would be cast only in terms of the possibility of control through whatever means, that would be too broad. Ultimately, through their powers of regulation and taxation, for example, governments have the possibility to control all of the resources subject to their jurisdiction. The EU considers that private bodies cannot be the source of entrustment or direction, but can transmit it. Public bodies *may* be the source of entrustment or direction, but need not necessarily have that capacity.

9. With respect to *de facto* specificity, the EU disagrees with India and agrees with the US on the question of whether or not Article 2.1(c) pre-supposes an appropriate "comparative set" of "similarly situated" firms. Contrary to what India asserts, Article 2.1 is not addressed towards an issue of *discrimination*: rather, it addresses the issue of *specificity*. Furthermore, it is also not correct that the issue of *revenue otherwise due* in Article 1 is the same as, or particularly informs, the issue of *specificity* in Article 2.1. Given the inherent nature of taxation, it is not the case that the fiscal burden in any particular WTO Member falls equally on all firms or economic activities. This does not automatically mean that there are financial contributions. Rather, as the US correctly explains, it is necessary to establish a benchmark, against which to assess whether or not revenue otherwise due has been foregone. The function of Article 2.1 is quite different. It is to reasonably distinguish between measures that are generally applicable in a particular WTO Member, and those that rather apply to certain enterprises, as defined in Article 2.1.

6. INDIA'S CLAIMS "AS APPLIED" AGAINST THE IMPOSITION OF COUNTERVAILING DUTY ON GRANT OF CAPTIVE MINING RIGHTS FOR IRON ORE AND COAL

10. With respect to the existence of a financial contribution, the EU agrees with the US that, taking into account the facts and circumstances of this case, the grant of mining rights for iron ore and coal does amount to the "provision" of a good within the meaning of Article 1 of the SCM Agreement. In the opinion of the EU, India has not established any meaningful distinction between the facts of *US – Softwood Lumber IV* and the facts of this case.

11. With respect to the question of specificity, the EU refers to its observations above, and notes that the assessment of this issue may depend, in part, on the assessment of the factual matter of whether or not the measures referred to in the measure at issue actually exist. However, we would also point that, as already explained above, we do not consider that a finding of *de facto* specificity under Article 2.1(c) necessarily requires identification of a subsidy programme.

7. INDIA'S CLAIMS "AS APPLIED" AGAINST THE SDF PROGRAM

12. With respect to the issue of public body, the EU respectfully refers to the explanations that it has already provided above, and which it is not necessary to repeat. The EU notes that the US has referred to a number of elements, going beyond government ownership, that could be relevant to a determination of whether or not the relevant entity is a public body. As indicated above, for the purposes of this dispute, the EU takes no position on the conclusions and findings that the Panel should eventually reach when applying the law to the particular facts of this case.

13. With respect to the question of whether or not there is any direct transfer of funds, the EU would point out that Article 1.1(a)(1)(i) begins with the phrase "a government practice involves". This is what is therefore required to meet the requirements of that provision. The text does not provide that the transfer must involve a change in ownership over the funds from the government to the putative beneficiary, as India would have it: merely that "a government practice involves" such a transfer. Thus, even if would be the case that the transfer would be made by the JPC, as India asserts but the US contests, in itself that would not necessary mean that the measure at issue would be inconsistent.

ANNEX D-8

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION

I. ALLEGED NEW SUBSIDIES IN REVIEW INVESTIGATIONS

1. We address in this Oral Statement an issue that we did not address in our Third Party Written Submission: the issue of alleged "new" subsidies in prospective reviews and retrospective final assessments. We recall, in this respect, that the US administrative reviews about which India complains combine both a prospective element (that is, the rate of duty to be applied going forward) and a retrospective element (that is, the amount of duty to be finally collected with respect to the past). In our view, the prospective element is subject to the relevant disciplines of Article 21 of the SCM Agreement. The retrospective element is subject to the relevant disciplines of Article 19.3 of the SCM Agreement, the SCM Agreement not having any provisions directly equivalent to Article 9.3 of the Anti-Dumping Agreement.

A. The prospective element

2. We deal first with the prospective element. India's position is that alleged "new" subsidies may only be brought within the scope of prospective reviews conducted pursuant to Article 21.2 of the SCM Agreement if the disciplines of Articles 11.1, 11.2, 13.1, 22.1 and 22.2 are complied with. In case such "new" subsidies are included in the scope of prospective reviews *ex officio*, that is, without a written application by the domestic industry, India claims that, pursuant to Article 11.6, the disciplines of Article 11.2 must still be complied with. Since these rules were not complied with in this case, the measures at issue are inconsistent with the SCM Agreement. The US position is that these provisions do not apply to such reviews, because they only apply to "investigations".

3. The European Union does not agree with India that Article 11 applies to review investigations initiated pursuant to Article 21.2. In our view, it is clear that, by its own terms, Article 11 of the SCM Agreement applies to a particular type of investigation, namely an investigation "to determine the existence, degree and effect of any alleged subsidy", commonly referred to as an original investigation. It does not apply to a review investigation conducted pursuant to Article 21.2, the purpose of which is different, namely, to determine whether or not the countervailing duty continues to be warranted. Article 21.4 incorporates the provisions of Article 12, but not the provisions of Article 11.

4. On the other hand, the European Union does not agree with the United States that the SCM Agreement is based on an absolute definitional distinction between the term "investigation" and the term "review". Neither term is defined in the SCM Agreement. In fact, there are many provisions of the SCM Agreement that use the term "investigation" or a similar term in a context that can only refer not only to original investigations, but also to review investigations. A contextual analysis of the SCM Agreement reveals that there are five types of proceeding: an original proceeding pursuant to Article 11; an interim review proceeding pursuant to Article 21.2; a sunset review proceeding pursuant to Article 21.3; a newcomer review proceeding pursuant to Article 19.3, second sentence; and a final assessment proceeding pursuant to Article 19.3, first sentence. Each of these involves an investigation, albeit it of a different type with different objectives. This observation is of great importance when it comes to a systematic interpretation of both the SCM Agreement and the Anti-Dumping Agreement, it being simply wrong to posit that any provision using the term "investigation" is necessarily limited to original investigations.

5. The European Union observes that Article 21.1 provides for the duty to remain in force only as long as necessary to counteract injurious subsidization. Article 21.2 uses the term "recur" expressly with respect to injury, but the context of this paragraph and the Article as a whole supports the view that it also captures the concept of *subsidization* that recurs or may recur. Article 21.3 also refers to the "recurrence" of subsidization. In the view of the European Union, the term "recur" indicates something that has stopped and then started again, or that may start again. In other words, it refers to something that is not the same subsidy as the subsidy assessed in the original investigation. In contrast, the term "continue" appears to refer to a subsidy that was the

subject of the original investigation. The term "recur" therefore supports the view that an interim review pursuant to Article 21.2 may relate to a new subsidy.

6. At the same time, the term "recur" suggests an element of commonality between what occurred previously and what occurred or what may occur subsequently. It most obviously catches so-called recurring subsidies, such as those granted pursuant to an overarching programme, or those that have such a close nexus that they are, in effect, incidences of the application of such a programme, even if the programme itself is not subject to investigation. In fact, the European Union would go further and suggest that the element of commonality is simply that the measures in question are both subsidies within the meaning of Article 1 of the SCM Agreement. This would mean that new subsidies could be brought within the scope of review investigations. As the United States observes, there would not appear to be any point in running a new original investigation in parallel to an existing measure, insofar as one is considering the prospective application of a duty or a combined duty, because no issue of due process arises. Just as in an anti-dumping proceeding, where the continuing and changing behaviour that is subject to scrutiny, also in review investigations, is the pricing by the firm investigated, so, in a countervailing duty case, the continuing and changing behaviour that is subject to scrutiny, also in review investigations, is the "subsidization" by the Member investigated. In this respect, the European Union finds it particularly significant that it is this general term (subsidization) that is used in Articles 21.1, 21.2 and 21.3 of the SCM Agreement: there is no reference to individual subsidies or subsidy programmes. This is consistent with Article VI:3 of the GATT 1994, which provides that the purpose of a countervailing duty is to offset *any* subsidy bestowed on the exported good.

7. That being said, the European Union would take the view that the right of an investigating authority to initiate a review pursuant to Article 21.2 of the SCM Agreement is not unfettered. Rather, by the terms of that provision, such a review may only be initiated where it is "warranted" or if an interested party submits "positive evidence substantiating the need for a review." In our view, what this actually means in practice will depend on the facts of a particular case, and be informed, as a matter of context, by Article 11 of the SCM Agreement.

8. For example, if the original subsidy and the *alleged* new subsidy are both incidences of the application of a subsidy programme countervailed by the original duty, it would seem self-evident that the more recent subsidy may be included in the scope of the Article 21.2 review, since it would not be a new subsidy at all, but simply an incidence of the application of an original subsidy. This would also be the case where an original subsidy programme has been amended: the amended programme could be dealt with in a review investigation.

9. On the other hand, if the original subsidy and the alleged new subsidy are very different (for example, different regional level, different granting authority, different type of financial contribution, different calculation of benefit, different assessment of specificity, etc.), then it seems to us that the evidential requirements for initiation of the review with respect to such a genuinely new subsidy, contextually informed by Article 11, may, in practice, more closely approach the requirements set out in Article 11. Thus, such new subsidies could be investigated in reviews upon provision of sufficient evidence by the applicant or, in special circumstances, the investigating authority.

10. In an intermediate situation, where the alleged new subsidy is distinct from but similar to the original subsidy, and there may, for example, be a discussion about whether or not the original subsidy has been "replaced" by the subsequent subsidy, the evidential requirements may, in practice, similarly be at an intermediate level.

11. The European Union considers that, in its assessment, the Panel should also take into account that, under Article 11.2 of the SCM Agreement, an application is required to contain such information as is reasonably available to the applicant (that is, in the public domain and accessible at no or little cost to the applicant), and this same approach would apply in the context of Article 21.2. Thus, if information about a subsidy (including such things as the products it benefits, the amounts of financial contribution involved, the benefits involved and its specificity) only becomes reasonably available after the initiation of an original investigation or review investigation, an applicant could seek to add such subsidy to a pending investigation, subject to requirements of due process.

12. Similarly, the European Union considers that the Panel should also take into account the fact that both Article 21.2 and Article 11.6 provide for the possibility of *ex officio* initiation. This could include, for example, a situation in which information about a subsidy was not publicly available prior to initiation, but is only obtained by the investigating authority during the course of an investigation.

13. The European Union leaves it to the Panel to assess whether or not, in this particular case, the evidence of the alleged new subsidies was sufficient to amount to positive evidence warranting the initiation of the relevant review investigations.

14. Consistent with these observations, the European Union is of the view that, by its own terms, Article 13.1 of the SCM Agreement applies to "any investigation". As we have explained above, this is not limited to original investigations within the meaning of Article 11 of the SCM Agreement, but extends to each of the five types of investigations that we have already identified.

15. At the same time, in our view, the obligation of prior consultation applies only once with respect to each subsidy. This means that if the same subsidy or subsidy programme that was the subject of an original investigation is subsequently the subject of a review investigation, there is no obligation to re-consult. However, if a new subsidy is brought within the scope of a review investigation, either following a request from the applicant or in special circumstances by the investigating authority, because there is positive evidence warranting the initiation of the review investigation also with respect to such new subsidy, then the obligation of prior consultation in Article 13.1 applies. This seems to us to be the necessary and reasonable corollary to accepting that new subsidies can be brought within the scope of review investigations conducted pursuant to Article 21.2 of the SCM Agreement.

B. The retrospective element

16. We turn now to the backward looking element of a US administrative review, which is similar to a refund proceeding in prospective duty systems. As we have already observed, the SCM Agreement contains no provisions that are directly equivalent to Article 9.3 of the Anti-Dumping Agreement, which deals with final assessment proceedings. There is merely the rule in Article 19.3, first sentence of the SCM Agreement that duties are to be levied in an appropriate amount, taking into account the renouncing of any subsidies. Nevertheless, in our opinion, Members are entitled to operate final assessment proceedings of the type used by the United States. The question is whether or not, in such final assessment proceedings, they are entitled to include new subsidies.

17. In our view, it may be that there is no absolute answer to this question. Rather, it may depend on the facts of particular cases. Following the example that we have already set out, if the original subsidy and the more recent subsidy are incidences of the application of a countervailed subsidy programme, then it seems self-evident that final assessment of the more recent subsidy can also be retrospective.

18. On the other hand, if the new subsidy is very different, and actually existed prior to the original proceedings, and the measure in question was a matter of public knowledge both for the complaining interested parties and the investigating authorities, but was not included in the original proceedings, then it must be doubtful that it would be possible to bring it directly into a final assessment proceeding *with respect to the past*, without that giving rise to some form of retroactivity and/or issues of due process. This question may require a case-by-case assessment because, as we have already indicated, there may be various reasons, some legitimate, some not, why a particular subsidy was not included in the original investigation. Thus, the European Union would suggest that the Panel may need to scrutinise carefully the facts of each case and measure in order to ascertain whether or not, in this respect, the terms of the SCM Agreement have been complied with.

ANNEX D-9

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. The Kingdom of Saudi Arabia's participation in this dispute addresses systemic issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). These issues relate to public body, benefit, extraction rights and specificity. The Kingdom takes no position on the merits of the claims that are based on the particular facts of this case.

II. A "PUBLIC BODY" MUST POSSESS, EXERCISE OR BE VESTED WITH GOVERNMENTAL AUTHORITY

2. For the purposes of finding the existence of a financial contribution under Article 1.1(a)(l) of the SCM Agreement, a public body must possess, exercise or be vested with "governmental authority", which is the power of an entity to command or compel a private body. The unique "defining elements" of the term "government" – "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority" – also define the term "public body". Possessing or exercising governmental authority is distinct from being owned or controlled by the government, and the two concepts are not interchangeable. A government-owned or controlled entity might be a public body, but only where the government has delegated to the entity the ability to "control or govern the actions of a private body". The government's delegation of authority, not its ownership or control, thus dictates the entity's status as a public body.

3. An investigating authority must ensure that any determination that an entity is a public body is supported by positive evidence establishing that the relevant entity possesses, exercises or is vested with governmental authority (properly defined to mean the ability to compel – or give such power to – a private body). No single fact or combination thereof can automatically fulfill the positive evidence standard that must support a finding of governmental authority. This is especially so with respect to government ownership or control, which relates only indirectly to governmental authority. A public body standard that relies systematically on evidence of government ownership or control as a proxy for governmental authority undermines both the Appellate Body's interpretation of Article 1.1(a)(1) of the SCM Agreement and the evidentiary provisions of the Agreement.

4. Investigating authorities have an affirmative obligation under the SCM Agreement to examine objectively all evidence related to the question of public body and to base their determinations on positive evidence *establishing* – not merely implying – that an entity possesses, exercises or is vested with governmental authority. They may not use evidence of government ownership or control to avoid this obligation.

III. THE USE OF ALTERNATIVE BENCHMARKS FOR THE DETERMINATION OF BENEFIT IS PERMISSIBLE ONLY IN EXCEPTIONAL CIRCUMSTANCES, AND IS SUBJECT TO STRICT DISCIPLINES

5. In determining whether the government provision of a good confers a benefit, an investigating authority may use a benchmark other than private, in-country prices in "very limited" circumstances. Article 14(d) of the SCM Agreement establishes domestic market prices as the principal standard for determining whether and to what extent a benefit is conferred by the provision of a good. Price is foremost among the "prevailing market conditions" enumerated in Article 14(d) and it should be the first reference point used by an investigating authority to determine benefit.

6. In order to reject private, in-country benchmarks when determining whether a government-provided good confers a benefit, an investigating authority must establish that domestic prices of

that good are "distorted". The government's predominant role in the domestic market might support an investigating authority's finding that private prices are distorted, but it may not serve as a *per se* proxy for price distortion.

7. Only the government (or an entity properly found to be a public body) providing the financial contribution may be considered a "predominant supplier" whose sales of a good distort domestic prices such that an alternative benchmark may be used to determine whether the government's provision of that same good confers a benefit. "Predominance" in a market refers to more than merely having a large market share – it is the ability of the government to exercise "influence on prices". Furthermore, having a "significant" market share is distinct from being the "predominant" supplier in that market, the former carrying far less evidentiary weight in a determination of price distortion. These principles also preclude an investigating authority from disregarding as a benchmark the prices offered domestically by a state-owned enterprise, unless the authority has properly determined that the enterprise is a public body.

8. Although external benchmarks may be used in very limited situations, they should be avoided because they are inherently incapable of reflecting prevailing in-country market conditions. Article 14(d) requires an investigating authority to ensure that any benchmark "relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)". The Appellate Body has further emphasized that this obligation requires the investigating authority to adjust any alternative benchmark to reflect prevailing market conditions. The Kingdom is of the view that external benchmarks should not be permitted unless an exhaustive application of these standards demonstrates otherwise. Moreover, the use of external benchmarks also should be avoided because they negate comparative advantages – a result precluded by both the Appellate Body and the SCM Agreement's negotiating history.

9. Where an investigating authority has established price distortion, it should use in-country, cost-based benchmarks instead of external benchmarks. Such benchmarks can be tailored to the unique circumstances of the country, industry and enterprises concerned, and they can reflect prevailing market conditions with little or no adjustment. Domestic cost-based benchmarks also are more likely to be consistent with the rule that a benefit analysis may not nullify a country's comparative advantage. Such benchmarks are therefore preferable to any other form of alternative benchmark.

IV. THE GRANTING OF THE RIGHT TO EXTRACT A NATURAL RESOURCE CANNOT CONSTITUTE A SUBSIDY

10. A government's granting of extraction rights is not covered by the definition of a "financial contribution" in Article 1.1(a)(1) of the SCM Agreement. In particular, extraction rights are intangible assets that do not constitute "goods" under Article 1.1(a)(1)(iii). Panel and Appellate Body rulings support the distinction between goods and intangible extraction rights. The Appellate Body has stated that government acts do not constitute the provision of a good unless (i) the government has control over the availability of the good in question and (ii) there is a reasonably proximate relationship between the government action and the enjoyment of the tangible goods by the recipient. Neither of these requirements is met where the government grants intangible extraction rights. This jurisprudence provides compelling support for the conclusion that the granting of a "potentiality" in the form of extraction rights cannot constitute the provision of a good under Article 1.1(a)(1)(iii) of the SCM Agreement.

11. Because the granting of extraction rights does not constitute the provision of a good or service under Article 1.1(a)(1)(iii), an investigating authority may not use "adequacy of remuneration" under Article 14(d) to determine whether the granting of such rights confers a benefit. Article 14(d) applies only to the "the provision of *goods* or *services* or purchase of *goods* by a government", and states that "adequacy of remuneration *shall* be determined in relation to prevailing market conditions *for the good or service in question*". (emphasis added) Article 1.1(b) of the SCM Agreement reinforces this conclusion: as an extraction right cannot constitute a financial contribution, no benefit can "thereby" be conferred.

12. The granting of a right to exploit a nation's *in situ* natural resources is a sovereign function that the Panel should distinguish from the government's actual provision of those resources. A

determination that the granting of intangible extraction rights alone constitutes a "financial contribution" would infringe upon the public international law principle that each State enjoys permanent sovereignty over its natural resources (PSNR). Many developing countries work with non-governmental entities to maximize the efficient, sustainable exploitation of their natural resources. Seen in this light, the granting of extraction rights, by itself, is not a financial contribution by a government but instead a necessary act by which the government delegates to the rights-holder responsibility for developing sovereign resources. Subjecting Members' resource development policies to SCM Agreement disciplines would undermine the certainty of control over sovereign development that PSNR is intended to ensure.

V. DETERMINATIONS OF *DE FACTO* SPECIFICITY MUST TAKE INTO ACCOUNT THE LEVEL OF DIVERSIFICATION OF ECONOMIC ACTIVITIES IN THE EXPORTING COUNTRY AND CANNOT BE BASED ON THE INHERENT CHARACTERISTICS OF A GOOD OR SERVICE

13. When determining *de facto* specificity under Article 2.1(c) of the SCM Agreement, investigating authorities must take into account the level of diversification of economic activities in the exporting country. The explicit diversification requirement of Article 2.1(c) obligates investigating authorities to consider the broader economic context in which a subsidy program operates. It is the Kingdom's view that *de facto* specificity cannot be applied in the same way to less diversified developing countries as it would be applied to a fully developed, diversified economy. Such an approach would penalize less diversified, developing economies for seeking to diversify and develop in a WTO-consistent manner. That is exactly what the diversification requirement of Article 2.1(c) was designed to prevent.

14. Saudi Arabia further submits that *de facto* specificity may not be determined solely on the basis of the inherent characteristics of a good or service. First, there is nothing in the text of the SCM agreement that permits a finding of specificity on this basis. Second, investigating authorities have an affirmative obligation under the SCM Agreement to "clearly substantiate" determinations of *de facto* specificity on the basis of positive evidence relating to the four factors found in Article 2.1(c). Authorities may not avoid this obligation by simply referring to the "inherent characteristics" of a good. Third, this expansive interpretation could also render the specificity determination under Article 2 redundant – the investigating authority need only determine (under Article 1) the nature of the "good" which is provided, and that determination would often automatically justify a finding of *de facto* specificity. Finally, any decision on whether *de facto* specificity may be based solely on a good's inherent characteristics may not penalize less diversified economies in express violation of Article 2.1(c).

VI. CONCLUSION

15. The decision to be rendered by the Panel in this case will serve as an important precedent with respect to key systemic issues under the SCM Agreement. The Kingdom of Saudi Arabia respectfully urges the Panel to consider the Kingdom's positions on the interpretive issues set out above.

ANNEX D-10

THIRD PARTY ORAL STATEMENT OF THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. Thank you, Mr. Chairman and Members of the Panel. The Kingdom of Saudi Arabia would like to take this opportunity to affirm all of the positions set out in its Third Party submission. Today, the Kingdom will summarize its views on the proper interpretation of the Agreement on Subsidies and Countervailing Measures. In particular, the Kingdom will address (i) the proper standard for a public body determination; (ii) the use of alternative benchmarks in benefit calculations; (iii) why extraction rights cannot constitute a subsidy; and (iv) the proper interpretation and application of the *de facto* specificity criterion.

II. A "PUBLIC BODY" MUST POSSESS, EXERCISE OR BE VESTED WITH GOVERNMENTAL AUTHORITY

2. First, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* established the definitive standard that an investigating authority must apply when determining that an entity is a public body for the purposes of finding a financial contribution under Article 1.1(a)(1) of the SCM Agreement. A public body must possess, exercise or be vested with "governmental authority", which is properly defined as the power to command or compel a private body.

3. Under this standard, a finding that an entity is a public body must be supported by positive evidence establishing governmental authority. The Kingdom notes that no single fact or combination thereof can automatically fulfill the positive evidence standard that must support a finding of governmental authority. This is especially so with respect to government ownership or control, which relates only indirectly to governmental authority and was singled out by the Appellate Body as insufficient to establish a public body.

4. In making a public body determination, investigating authorities have an affirmative obligation under the SCM Agreement to examine objectively all evidence related to the question of public body and to base their determinations on positive evidence *establishing* – not merely implying – that an entity possesses, exercises or is vested with governmental authority. Accordingly, they may not use evidence of government ownership or control to avoid this obligation.

III. ALTERNATIVE BENCHMARKS ARE PERMISSIBLE ONLY IN EXCEPTIONAL CIRCUMSTANCES, SUBJECT TO STRICT DISCIPLINES

5. Turning now to the use of benchmarks in calculating benefit, the Kingdom notes that Article 14(d) of the SCM Agreement establishes domestic market price as the principal standard for determining whether and to what extent the government provision of a good confers a benefit. Accordingly, private, domestic prices must be the first reference point used to determine benefit, and a benchmark other than such prices may be used only in "very limited" circumstances.

6. In order to reject private, in-country price benchmarks, an investigating authority must establish that domestic prices of the good at issue are distorted. Price distortion *might* exist where, for example, the government is the "predominant" supplier of the good in the domestic market, but such distortion must always be proven with actual evidence. Thus, the government's predominant role in the domestic market might support an investigating authority's finding that private prices are distorted, but it may not serve as a *per se* proxy for price distortion. Moreover, any inquiry into price distortion requires an investigating authority to consider all evidence, not just the role of the government.

7. In order to find that the government is the "predominant" supplier of a good, an investigating authority must demonstrate that the government (or a public body) is the

predominant, rather than just a significant, supplier. The SCM Agreement's text and related jurisprudence establish that the same standard for defining "government" or "public body" under Article 1.1(a)(l) of the SCM Agreement must apply when determining whether the "government" is the predominant supplier of a good under Article 14(d) of the SCM Agreement. Article 14(d) addresses "provision of goods or services... by a *government*", which is a direct reference to the type of government financial contribution in Article 1.1(a)(1)(iii) of the SCM Agreement. Thus, only the government (or entities properly determined to be public bodies) providing the financial contribution may be considered a "predominant supplier". State-owned enterprises would not meet this standard merely by virtue of their ownership structure.

8. These principles also preclude an investigating authority from disregarding prices offered by state-owned enterprises for the purposes of calculating a benefit unless those enterprises have been properly determined to be public bodies. The Appellate Body has established that state-ownership or control is not sufficient to deem an entity a public body, and that the conduct of state-owned enterprises is presumptively not attributable to the state. Thus, a price offered by a state-owned enterprise may not be considered a "government price" and deemed unusable as a benchmark unless the enterprise has been found to possess, exercise or be vested with governmental authority.

9. The Kingdom would also like to emphasize that although external benchmarks may be used in "very limited" situations, they should be avoided because they are inherently incapable of reflecting prevailing in-country market conditions. The Kingdom is of the view that external benchmarks should not be permitted unless an exhaustive application of the standard provided in Article 14(d) of the SCM Agreement demonstrates otherwise. Appellate Body jurisprudence supports this view. In fact, the Appellate Body has cautioned that "it has to be kept in mind that prices in the market of a WTO Member would be expected to reflect prevailing market conditions in that Member; they are unlikely to reflect conditions prevailing in another Member". More recently, the Appellate Body in *Canada – Renewable Energy* noted serious difficulties in using an external benchmark, including the level and number of adjustments that may be required.

10. Furthermore, an external benchmark which does not reflect the domestic market circumstances of the recipient of an alleged subsidy is an arbitrary measure that could negate the natural comparative advantages of the Member under investigation – a result that the Appellate Body has warned against. The adjustments needed to make external benchmarks reflect a Member's comparative advantage would typically be so subjective as to vitiate the benchmark's ultimate reliability.

11. Thus, the Kingdom is of the view that, where an investigating authority has established price distortion, it should use in-country, cost-based benchmarks instead of external benchmarks.

IV. THE GRANTING OF THE RIGHT TO EXTRACT A NATURAL RESOURCE CANNOT CONSTITUTE A SUBSIDY

12. The Kingdom now turns to the issue of extraction rights. The Kingdom is of the view that a government's granting of extraction rights cannot constitute a subsidy because it is not covered by the definition of a "financial contribution" in Article 1.1(a)(1) of the SCM Agreement. Only those actions listed in Article 1.1(a)(1) may constitute "financial contributions" and thus be subject to the SCM Agreement's subsidy disciplines. The granting of extraction rights, however, does not fall within the plain meaning of any of these financial contributions, including the provision of a good.

13. First, extraction rights are intangible assets that do not constitute "goods" under Article 1.1(a)(1)(iii) of the SCM Agreement. Panel and Appellate Body rulings support the distinction between goods and intangible extraction rights. Extraction rights are not tangible items because the quantity and value of resources at issue are unknown when the government grants the right to extract them. Whether an extraction right will produce any tangible good is speculative, and will depend on, among other things, the quantities of extractable resources actually available and the actions of the rights-holder.

14. Second, the Appellate Body has stated that government acts do not constitute the provision of a good unless (i) the government has control over the availability of the good in question, and (ii) there is a reasonably proximate relationship between the government action and the

enjoyment of the tangible goods by the recipient. Neither of these requirements is met where the government grants intangible extraction rights.

15. The Kingdom also notes that the granting of a right to exploit a nation's natural resources is a sovereign function that the Panel should distinguish from the government's actual provision of those resources. A determination that the granting of intangible extraction rights alone constitutes a "financial contribution" would infringe upon the public international law principle that each state enjoys permanent sovereignty over its natural resources. Such a determination would also undermine Members' certainty of control over their own sovereign development.

V. DETERMINATIONS OF *DE FACTO* SPECIFICITY MUST ACCOUNT FOR ECONOMIC DIVERSIFICATION AND CANNOT BE BASED ON THE INHERENT CHARACTERISTICS OF A GOOD OR SERVICE

16. Turning now to the last issue of specificity, the Kingdom would like to confirm that Article 2.1(c) of the SCM Agreement expressly requires investigating authorities to take into account the level of diversification of economic activities in the exporting country when determining *de facto* specificity. This express requirement means that the specificity criterion is highly dependent on the unique economic conditions of the Member in question. The SCM Agreement prohibits authorities from applying the *de facto* specificity requirement in a manner that disadvantages economies simply because they are less diversified. To the contrary, the diversification requirement obligates investigating authorities to consider the broader economic context in which a subsidy program operates. It is the Kingdom's view that *de facto* specificity cannot be applied in the same way to less diversified developing countries as it would be applied to a fully developed, diversified economy. Such an approach would penalize less diversified, developing economies for seeking to diversify and develop in a WTO-consistent manner.

17. The Kingdom also submits that *de facto* specificity may not be determined solely on the basis of the inherent characteristics of a good or service. First, nothing in the SCM Agreement's text permits a finding of specificity on this basis. Second, investigating authorities must "clearly substantiate" determinations of *de facto* specificity on the basis of positive evidence and may not avoid this obligation by simply referring to the "inherent characteristics" of a good. Third, such an expansive interpretation of *de facto* specificity could render the specificity determination redundant because an investigating authority need only determine under Article 1 of the SCM Agreement the nature of the "good" which is provided, and that determination would often automatically justify a finding of *de facto* specificity.

VI. CONCLUSION

18. Mr. Chairman, this concludes the Kingdom's statement. I thank you for your attention.

ANNEX D-11

THIRD PARTY ORAL STATEMENT OF TURKEY

I. INTRODUCTION

Mr. Chairman, Members of the Panel,

1. Turkey would like to thank the Panel for the opportunity to present its views in this proceeding on the dispute between the United States of America (hereinafter referred to as United States) and Republic of India (hereinafter referred to as India).

2. The Republic of Turkey (hereinafter referred to as "Turkey") would like submit its third party opinion due its interest on the correct and coherent interpretation of the Agreement on Subsidies and Countervailing Measures (hereinafter referred to as the "SCM Agreement").

3. In this statement Turkey will focus on the issue whether "facts available" methodology can be used to draw "adverse inferences" in (hereinafter referred to as "adverse facts available") countervailing duty investigations.

II. THE USE OF "FACTS AVAILABLE" FOR ADVERSE INFERENCES IN COUNTERVAILING DUTY INVESTIGATIONS

Mr. Chairman,

4. Before moving to the question whether "*adverse facts available"* is justified under SCM Agreement, Turkey would like to briefly discuss whether such a method has a legal presence in the structure of the WTO Law at all.

5. Turkey underscores that Annex II of the AD Agreement serves as a determining guideline. The last sentence of paragraph 7 of Annex II provides legal flexibility to the investigating authority to use information that is *less favorable* to the interest of the party if it denies cooperating through *"withholding"* relevant information. Paragraph 7 reads as follows:

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

6. The textual reading of the sentence points out that the investigating authority has to answer a threshold question concerning whether the interested party refused to cooperate through "withholding" relevant information.

7. "*Withhold* "has a meaning of "*to refuse give or grant something*"[1] which, as matter of fact, necessitates an adverse way of acting. In light of a conceptual interpretation it is noteworthy to discuss whether the word "withholding" is different from "refusal of granting access to" or "refusal of providing" relevant information as underlined in Article 6.8 of the AD Agreement. Turkey opines that these concepts are not different from each other. Quite the contrary, it would be accurate to point out that the two scenarios shown in Article 6.8 of the AD Agreement can also be considered as acts of "*withholding*" since this word itself encompasses a wide variety of possibilities. In that context, the refusal of giving or granting something can be considered to be corresponding the situations depicted in Article 6.8 of AD Agreement.

8. Considering the impediment of the investigation, however, Turkey supports a more cautious stance. In this respect, the investigating authority should consider the facts gathered during the investigation and decide whether the position of the interested party amounts to "withholding" in terms of paragraph 7 of Annex II.

[1] Chambers English Dictionary.

9. Pursuant to paragraph 7 of Annex II, the investigating authority has the discretion to draw negative inferences through "facts available" methodology in the event that the interested party is found to be non-cooperative and withholds relevant information. This discretion, however, is not unlimited. In terms of textual interpretation, Turkey understands that the investigating authority may resort to "secondary" information" less favorable to the non-cooperating interested party compared to the information that the authority would have possessed if the interested party had cooperated in full manner. In that regard, the last sentence of paragraph 7 envisages a compare and contrast exercise. The investigating authority is obliged to choose among different sets of information the one that would be considerably less favorable to the interest of the non-cooperative party as defined in the last sentence of paragraph 7 of Annex II.

10. Such an examination, however, is complicated. The authority has to decide on the right group of information by depending on a hypothetical reference point on what the non-cooperative interested party would have submitted if it had cooperated in full manner. As an answer to this question, paragraph 7 of Annex II stipulates that the use of secondary sources should be undertaken with special circumspection which brings the obligation to act as an unbiased and objective investigating authority.

11. In light of our explanation Turkey underlines that "*adverse facts available*" is justified under AD Agreement.

Mr. Chairman,

12. Addressing the primary question whether "adverse facts available" is applicable under the SCM Agreement, Turkey would like to highlight that the answer is closely related to the issue whether Annex II of AD Agreement is applicable to Article 12.7 of the SCM Agreement.

13. Turkey supports the approach that there is textual and conceptual parallelism between Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement. Both articles serve guidance on how to react if the interested party in question refuses to submit necessary information requested by the authority or significantly impedes the investigation through various means.[2] The primary difference between two articles is the inclusion of "*interested member*" to the text of Article 12.7 of the SCM Agreement, which is understandable considering that countervailing duty investigations primarily concentrate on the structure and mechanics of the alleged subsidy program. In terms of "*interested parties*", however, both articles have the same application pattern.

14. Turkey considers that Annex II is an integral part of the AD Agreement constituting the "context" of the Article 6.8 in terms of Article 31 of Vienna Convention on Law of Treaties (hereinafter referred to as "VCLT"). This interpretation was underscored in a number of panel and Appellate Body Reports in which Annex II was considered to contain certain substantive parameters for the application of the individual elements of Article 6.8 of the AD Agreement[3] and accepted to be incorporated to the Article 6.8 by reference.[4]

15. Considering the significance and position and legal weight of the rules stipulated in Annex II of the AD Agreement, it would be legally unreasonable to hold that the investigating authority is bound with clear-cut and carefully detailed rules and procedures in an dumping investigation while the same authority have a "free-ride" in countervailing duty investigation for the simple reason that there is no legal discipline resembling the rules in Annex II. In fact, this issue was addressed in Appellate Body Report of *Mexico – Anti-Dumping Measure on Rice* in which the Appellate Body held the view that it would be anomaly to conclude that Article 12.7 of the SCM Agreement permitted to use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.[5]

16. In light of our explanations, Annex II of AD Agreement should be considered as an integral part of the Article 12.7 of the SCM Agreement, in regard to applying "facts available" based conclusions in countervailing duty investigations.

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[2] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, para. 291.
[3] *Egypt – Anti Dumping Measures on Rebar* (Panel), para. 7.152.
[4] *US – Hot Rolled Steel* (AB), para. 75.
[5] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, para. 295.

17. Accepting Annex II as an integral part of the Article 12.7 of the SCM Agreement, Turkey considers that the use of "adverse facts available" is justified in countervailing duty investigations. As a matter of law, however, the investigating authority is obliged to observe the same legal discipline envisaged in the last sentence of paragraph 7 of Annex II before drawing negative inferences through the use of facts available.

18. Mr. Chairman, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of SCM Agreement. We thank you for your kind attention and remain at your disposal for any question you may have.

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