WORLD TRADE ORGANIZATION

WT/DS436/RW/Add.1

15 November 2019

(19-7718)

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA

REPORT OF THE PANEL

Addendum

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

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

[1] China's oral statement comprises its integrated executive summary.
[2] Egypt's written submission comprises its integrated executive summary.

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 27 June 2018

General

1. (1) In this proceeding, 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 apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If 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.

(4) Parties and 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.

Submissions

3. (1) Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel, in accordance with the timetable adopted by the Panel:

a. a first written submission, in which it presents the facts of the case and its arguments; and

b. a written rebuttal.

(2) Each third party that chooses to make a written submission prior to the substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(3) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) The following procedures shall apply if the responding party considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or the complaining party's first written submission are not properly before the Panel. Exceptions to this procedure shall be granted upon a showing of good cause.

a. The United States shall submit any such 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. India shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the United States prior to the meeting, and any subsequent submissions of the parties in relation thereto prior to the meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) The procedure set out in paragraph (1) is without prejudice to the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel with its first written submission, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) 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, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by India should be numbered IND-1, IND-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit in connection with the next submission thus would be numbered USA-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) Insofar as a party considers that the compliance panel should take into account a document already submitted as an exhibit in the original panel proceeding, it should resubmit that document as an exhibit for the purpose of this proceeding. In its list of exhibits, it should refer to the number of the original exhibit in the original panel proceedings (OP) (example: IND-1 (IND-21-OP)).

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party should consider making its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Prior to the meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of the meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally in the course of the meeting, and in writing following the meeting, as provided for in paragraphs 16 and 21 below.

Substantive meeting

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. There shall be one substantive meeting with the parties.

16. The 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 for the interpreters.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 5 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. 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. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

Third party session

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the third party session of the meeting with the Panel.

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

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

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its

statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

   i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

   ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

   iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

   iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary, which shall summarize the facts and arguments as presented to the Panel during the proceedings.

24. Each integrated executive summary shall be limited to no more than 15 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If the documents comprising a third-party's submission, oral statement and/or responses to questions do not exceed six pages in total, these may serve as the executive summary of that third party's arguments.

Interim review

27. 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.

28. 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.

Interim and Final Report

29. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties in the course of the proceeding:

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

b. Each party and third party shall submit one paper copy of its submissions and one paper copy of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute.

c. Each party and third party shall also send an e-mail to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such e-mails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose e-mail addresses have been provided to the parties in the course of the proceeding. Where it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with one copy of the Exhibits on USB keys, CD-ROMs or DVDs.

d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by e-mail or on a CD-ROM, DVD or USB key only, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should

identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 27 June 2018

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 entity who provided the information in the course of the investigations at issue 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. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorization letter referred to in paragraph 3. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in paragraph 3 to grant such authorization. If an entity refuses to grant the authorization referred to in paragraph 3, a party may bring the situation to the attention of the Panel.

5. 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.

6. 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.

7. 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 2(3) of the Working Procedures within ten days after the submission of the confidential version containing the BCI.

8. 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.

9. Any BCI information that is submitted in electronic 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 files.

10. If a party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate. A party shall make any objection referred to in this paragraph within 20 days of the submission of the relevant information to the Panel. Exceptions to this time-frame may be granted upon a showing of good cause.

11. 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. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. 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.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. On 12 July 2019, the Panel issued its Interim Report to the parties. On 26 July 2019, India and the United States submitted their written requests for review. In addition to its written request, the United States also requested that the Panel hold an interim review meeting with the parties in particular in respect of paragraphs 7.305 to 7.319 of the Interim Report. On 9 August 2019, India and the United States submitted comments on each other's requests for review of those "precise aspects of the interim report" for which no interim review meeting was requested. The Panel held an interim review meeting with the parties on 19 August 2019. On the same day, India requested the opportunity to provide written comments in response to the United States' opening statement.[1] In its response dated 20 August 2019, the United States requested that the Panel reject India's request or, alternatively, allow the United States to comment on India's comments.[2] On 21 August 2019, the Panel informed the parties of its decision to allow them to file additional written comments. India filed its written comments on 26 August 2019; the United States submitted its comments on 29 August 2019.

1.2. In accordance with Article 15.3 of the DSU, this Annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in the light of the parties' comments. In addition, we have made certain changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. We are grateful for the parties' assistance in this regard. The paragraph and footnote numbers in the Final Report have changed due to these revisions. The paragraph and footnote numbers indicated in this Annex pertain to those in the Final Report, unless otherwise specified.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 7.16

2.1. The United States makes a request, which corresponds to India's request regarding paragraph 7.28, in order to better reflect its argument in relation to the public body determination that "India has not established that the conclusions reached by the USDOC were such that an unbiased and objective investigating authority could not have reached".[3] In light of the corresponding modification in respect of India's request regarding paragraph 7.28, we have made the change requested.

2.2 Paragraph 7.19

2.2. The United States requests the inclusion of a discussion of a separate opinion regarding the interpretation of "public body" in a recent Appellate Body Report.[4] India opposes this request.[5]

2.3. We decline to include the discussion requested. As a compliance panel, we are bound by the findings adopted by the DSB in the original proceedings, including the findings regarding the interpretation of "public body" in the original proceedings. We therefore see no reason to include a discussion of a separate opinion in different proceedings that advocates a different interpretation of "public body" as compared to the interpretation reflected in the original findings adopted by the DSB in the present proceedings.

---

[1] India's letter to the Panel of 19 August 2019.
[2] United States' letter to the Panel of 20 August 2019.
[3] United States' comments on India's request for interim review, para. 5.
[4] United States' request for interim review, paras. 4-6 (referring to Appellate Body Report, *US – Countervailing Measures (Article 21.5 – China)*).
[5] India's comments on the United States' request for interim review, paras. 1-4.

2.3 Paragraph 7.22 and footnote 61

2.4. The United States requests the removal of the language that the USDOC accepted that "an evidentiary finding of 'meaningful control' *must be paired* with an evidentiary finding of the performance of a 'governmental function' in order to discharge the standard for demonstrating a 'public body'".[6] The United States disagrees that the USDOC did indeed accept such a pairing. India does not comment on this request.[7]

2.5. We have adjusted the language of footnote 61 to reflect the formulation in paragraph 7.33, to which the United States did not object, and which states that the "USDOC was *guided* in [its public body determination] by whether the NMDC performed a governmental function *and* whether the GOI exercised of meaningful control over the NMDC".[8]

2.4 Paragraph 7.25

2.6. India requests us to specify precisely where in the Report we apply the statement that "[a] legal interpretation that imposes an evidentiary burden on an investigating authority that is impossible to satisfy in practice would not be consonant with the text and structure of the SCM Agreement".[9] India suggests that paragraph 7.56 is the instance in which this statement is applied. The United States does not comment on this request.

2.7. We reject India's request. This statement appears in the section that sets out our interpretation of "public body". This interpretation imbues our subsequent analysis of India's claims and the United States' rebuttals concerning the "public body" determination at issue, and is not limited to any particular aspect of that analysis. While India correctly identifies paragraph 7.56 as one aspect for which this statement had relevance, its significance was not limited to that paragraph.

2.5 Paragraph 7.26

2.8. India requests replacing "may" with "shall" in the following sentence: "[i]f an investigating authority does not possess sufficient evidence on the record to reach a determination, it *may* need to seek or accept additional evidence".[10] The United States opposes this request.[11]

2.9. We reject India's request. An investigating authority may need to seek out additional information from interested parties in order to be capable of providing a "reasoned and adequate" explanation for its public body finding if there is insufficient record evidence, but this will not necessarily be the case in all circumstances.

2.6 Paragraph 7.28

2.10. India requests us to modify this paragraph to accurately describe its argument that the USDOC engaged in a "biased and unobjective assessment of evidence".[12] The United States did not object, but proposed a different formulation to that proposed by India.[13]

2.11. We accept India's request, which is sufficiently close to the formulation it used in its second written submission. We reject the United States' alternative formulation and request.

2.7 Paragraphs 7.42, 7.43, 7.51 and 7.67

2.12. India requests us to reconsider and amend the conclusion in paragraph 7.42 that "the 'enhanced autonomy' accorded by Miniratna is limited to only certain areas (namely 'investment

[6] United States' request for interim review, paras. 7-8 (referring to Interim Report, fn 59). (emphasis added)
[7] India's comments on the United States' request for interim review, para. 5
[8] Interim Report, para. 7.33. (emphasis added)
[9] India's request for interim review, paras. 1-2.
[10] India's request for interim review, paras. 3-5 (referring to Interim Report, para. 7.26, emphasis added).
[11] United States' comments on India's request for interim review, para. 3.
[12] India's request for interim review, paras. 6-7.
[13] United States' comments on India's request for interim review, paras. 4-5.

decisions and personnel matters')", and also, to specify or delete the "parameters" that were set by the GOI, and which were monitored by the GOI for compliance, as referred to in paragraph 7.43 and subsequently.[14] The United States objects to India's requests but proposes two footnotes to paragraphs 7.42 and 7.43 respectively in order to clarify the Panel is relying on the GOI's case brief/questionnaire response in making those remarks.[15]

2.13. We reject India's request. To recall, the GOI's own case brief description was that: "[the NMDC] is a [Miniratna] Category I Company, which gives it, enhanced autonomy with regard to investment decisions and personnel matters".[16] The Panel acknowledges at paragraph 7.42 that the GOI also submitted that the NMDC "enjoys freedom in its day-to-day operations".[17] However, the Panel then explains how the GOI clarified what this "freedom" actually meant, namely (to quote the GOI): "such companies are required to enter into annual memorandums of understanding with the government wherein annual performance parameters and targets are agreed to" and that "[t]he government monitors the performance of these companies, during the year, against these parameters and targets".[18] Accordingly, there is no basis for India's request to change this analysis. We do, however, accept the United States' proposal to add the suggested footnotes in order to provide additional clarity as to the sources relied upon in making the relevant remarks.

2.8 Paragraph 7.50

2.14. India contests the statement that "GOI-appointed directors conducted price negotiations", and requests a modification to that alleged "conclusion".[19] The United States proposes adding quotation marks to the term "GOI-appointed directors" and citing the USDOC determination in which it uses this term.[20]

2.15. We reject India's request. Contrary to India's submission, this is not a "Panel conclusion", but rather a recitation of a determination by the USDOC. For that reason, we accept the United States' proposal. We also note that the Report already deals with the substance of India's argument at paragraph 7.99.

2.9 Paragraph 7.54

2.16. India requests us to clarify what is meant by the term "administrative control".[21] The United States objects to this request.[22]

2.17. We reject India's request. Contrary to India's request, the Report already deals with this matter in footnote 228.

2.10 Paragraphs 7.87-7.91

2.18. In respect of the Panel's discussion of whether the NMDC applied export restrictions, India requests us to delete these paragraphs and modify the conclusion in paragraph 7.92.[23] India argues that the Panel is engaged in impermissible *ex post* reasoning, given that the "panel has correctly observed that the USDOC did not address the matters raised by India".[24] The United States objects to India's request.[25]

2.19. We reject India's request. The Report already deals with the substance of India's contention that these passages involved impermissible *ex post* reasoning at paragraph 7.91. In order to counter the USDOC's explanation on export restraints, India presented the alternative explanation that the

[14] India's request for interim review, paras. 8-12.
[15] United States' comments on India's request for interim review, paras. 6-8.
[16] Interim Report, para. 7.41.
[17] Interim Report, para. 7.42.
[18] Interim Report, para. 7.43.
[19] India's request for interim review, paras. 13-16.
[20] United States' comments on India's request for interim review, para. 9.
[21] India's request for interim review, para. 17.
[22] United States' comments on India's request for interim review, para. 10.
[23] India's request for interim review, paras. 18-20.
[24] India's request for interim review, para. 19.
[25] United States' comments on India's request for interim review, para. 11.

NMDC was not voluntarily imposing export restraints, and therefore the USDOC's determination reflected a violation of Article 1.1(a)(1) of the SCM Agreement. We examined that alternative explanation, and found it implausible, since the evidence instead suggested that the NMDC was limiting its exports voluntarily at a level below the GOI's export cap. India now suggests at the interim review stage that the Panel is not allowed to examine the evidence that shows that India's alternative explanation is implausible. We have already addressed that matter as part of our discussion of the Panel's standard of review in paragraphs 7.5-7.7 of the Report.

2.11 Paragraph 7.149

2.20. India requests us to reconsider our conclusions in paragraph 7.149 in light of a particular passage of the GOI's case brief.[26] The United States objects to this request.[27]

2.21. Contrary to India's submission, the Report already deals with the aspect of the GOI's case brief referred to by India in footnote 345. We therefore reject India's request.

2.12 Paragraphs 7.153-7.163

2.22. India requests us to respond to the arguments made in paragraphs 189 and 190 of India's second written submission, namely that the GOI-mandated export caps had no actual effects since they were never reached.[28] The United States objects to this request, but suggests additional citations to make the matter clearer.[29]

2.23. Contrary to India's request, the Report already deals with this matter in paragraph 7.161, which in turn cross-references back to section 7.2.6, with the pertinent findings at paragraphs 7.87 and 7.88 in that section. While we reject India's request, we accept one of the United States' suggestions for additional citations to clarify the matter at footnote 398.

2.13 Paragraph 7.183 and footnote 465

2.24. The United States requests an additional citation to India's case regarding the identification of the subsidy programme in the context of India's "length of time" claim.[30] India does not comment on this request.

2.25. We reject the United States' request, as it is already accommodated in the footnote immediately preceding, and there is no need for repetition.

2.14 Paragraph 7.184 and footnote 467

2.26. The United States requests clarification as to what is meant by "[f]or similar reasons…", for instance by bringing the reasons from footnote 467 into the body of this paragraph.[31] India does not comment on this request.

2.27. We reject the United States' request, but have made a modification to the paragraph to address its concerns.

2.15 Paragraph 7.242

2.28. India requests that we address the argument in paragraphs 235-238 of its second written submission before reaching to the conclusion in paragraph 7.242.[32] India's point was essentially that an authority must "disclose" the "essential fact" in the investigation for which that fact is used, and

[26] India's request for interim review, paras. 21-23.
[27] United States' comments on India's request for interim review, para. 12.
[28] India's request for interim review, paras. 24-26.
[29] United States' comments on India's request for interim review, paras. 13-15.
[30] United States' request for interim review, para. 9.
[31] United States' request for interim review, para. 10.
[32] India's request for interim review, paras. 27-29.

cannot rely on disclosures in previous administrative or sunset reviews (or from the original proceedings).[33] The United States objects to this request.[34]

2.29. We reject India's request. Contrary to India's request, the Report already deals with this matter in paragraph 7.234, in which we find (contrary to India's argument) that there is no rule necessarily requiring the re-application of the "disclosure of essential facts" provision in Section 129 reinvestigations. Nonetheless, we find that the circumstances of the present case did indeed require the re-application of the "disclosure of essential facts" provision with respect to the selection of the correct benchmark. Contrary to India's request, the Panel rejects the notion that export restrictions themselves were the "essential fact" at paragraph 7.241 and footnote 617. Therefore, in view of these findings, there is no basis for additionally and specifically addressing the particular points mentioned by India in this interim review request.

2.16 Paragraph 7.271

2.30. India requests us to modify this paragraph to accurately describe its arguments concerning the alleged investigation in the Section 129 proceedings of new subsidies that do not have a sufficiently close link or nexus with the subsidies that resulted in the imposition of original countervailing duties.[35] The United States does not comment on this request.

2.31. We have deleted the third sentence of the paragraph and footnote 670 of the Interim Report, which referred to another aspect of India's "new subsidies" claim. We consider that these changes reflect India's position.

2.17 Paragraph 7.301 and footnote 717

2.32. The United States requests that we expand the citations in footnote 717 to more accurately reflect the United States' arguments.[36] India does not comment on this request.

2.33. We have made the requested changes in this footnote.

2.18 Paragraph 7.303 and footnotes 722 and 723

2.34. The United States requests that we modify the summary of its arguments in this paragraph and in the accompanying footnote, to more accurately reflect its position.[37] India does not comment on this request.

2.35. We have made the requested changes.

2.19 Paragraphs 7.305-7.320

2.36. The United States requests us to review our statements at paragraphs 7.305–7.319 of the Interim Report concerning India's claim that the United States did not implement the DSB recommendation concerning 19 USC § 1677(7)(G)(i)(III) in this dispute.[38] According to the United States, if a responding Member demonstrates that it has taken steps such that a measure will not necessarily result in WTO-inconsistent action, or preclude WTO-consistent action, the complaining Member will have failed to show that the measure is WTO-inconsistent without any application of the measure to produce, concretely, WTO-inconsistent action.[39] The United States further requests us to review the part of our analysis pursuant to which if the text of a measure was found to be "as such" WTO-inconsistent in the original proceedings, considerations concerning the "application" of that measure are not directly relevant for the purposes of assessing compliance.[40]

[33] India's request for interim review, para. 28.
[34] United States' comments on India's request for interim review, para. 16.
[35] India's request for interim review, paras. 30-31.
[36] United States' request for interim review, para. 11.
[37] United States' request for interim review, paras. 12-13.
[38] United States' request for interim review, para. 14.
[39] United States' request for interim review, para. 14.
[40] United States' request for interim review, paras. 15-16.

2.37. At the interim review meeting held on 19 August 2019 with the Panel, the United States provided additional arguments in support of its request for interim review of the above-mentioned paragraphs. First, the United States argues that the Panel has the authority under Article 15 of the DSU to review and change its interim findings and legal conclusions.[41] Second, the United States requests the Panel to modify its findings that there is no evidence that would support the existence of a measure that the United States took to comply with the DSB recommendation in the original dispute.[42] The United States seeks to clarify that there exists a measure taken to comply, and that is "the USDOC commitment or decision to exercise the discretion that exists under U.S. law with respect to self-initiation in a manner that will not lead to WTO-inconsistent action under Subpart III".[43] The United States argues that it is an "unwritten measure that bears on the administration and operation of Subpart III"[44], and that the USDOC's letter and United States' statements at several DSB meetings confirm the existence of the USDOC's commitment.[45] The United States further maintains that the commitment was made "after" the adoption of the DSB recommendations in this dispute[46], and that it did not argue throughout these compliance proceedings that this "commitment" existed prior to the recommendations in this dispute or that the commitment was reflected in the statute never having been applied.[47] Third, the United States argues that it has demonstrated that the USDOC's "commitment" brings about compliance. In this respect, the United States maintains that the Panel's interim findings reflect a view that the United States was requested to modify or withdraw 19 USC § 1677(7)(G)(i)(III) to comply with the DSB recommendations.[48] The United States also argues that evidence that a Member has taken a measure to ensure that WTO-inconsistent results will not arise is relevant to the evaluation of an "as such" challenge.[49] In particular, the United States holds the view that while a claim against a measure "as such" is not concerned with the application of that measure in a particular instance, a panel should nevertheless assess how the measure may operate in practice, including the scope that domestic authorities are afforded to administer the measure.[50] The United States reiterates that the USDOC has discretion to decide when to self-initiate anti-dumping or CVD investigations, and thus "may" ensure that the conditions of 19 USC § 1677(7)(G)(i)(III) are not met.[51] The United States further maintains that it showed in these proceedings that it can ensure (and has ensured) that 19 USC § 1677(7)(G)(i)(III) does not produce WTO-inconsistent results and that the USDOC has discretion to "withdraw a self-initiation" or prevent that it occurs on the same day as a petition is filed.[52] According to the United States, the USDOC "broadly" committed to exercise its discretion with respect to the self-initiation of investigations consistently with the United States' WTO obligations.[53] The United States submits that it presented these arguments in prior submissions to this Panel.[54]

2.38. India's statement at the interim review meeting addressed two main points. First, India argues that the United States' request for interim review failed to identify the "precise aspects" of paragraphs 7.305–7.319 of the Interim Report that the Panel is requested to review.[55] Second, India notes that 19 USC § 1677(7)(G)(i)(III) is still in force and that its text has not been modified since the original proceedings.[56] India notes that opening statements and letters do not have any bearing on the United States law and do not form part of the anti-dumping and countervailing laws notified by the United States to the WTO. India also stresses that the United States has rejected the characterization of the statements or the letters as the "measures taken to comply" with the DSB recommendations in the original proceedings.[57] Finally, India argues that the United States does not explain how the USDOC will use its discretion to avoid a situation in which the USDOC has

[41] United States' opening statement at the interim review meeting, paras. 19-30.
[42] United States' opening statement at the interim review meeting, paras. 31-42.
[43] United States' opening statement at the interim review meeting, para. 31.
[44] United States' opening statement at the interim review meeting, para. 33.
[45] United States' opening statement at the interim review meeting, para. 34.
[46] United States' opening statement at the interim review meeting, para. 37.
[47] United States' opening statement at the interim review meeting, para. 39.
[48] United States' opening statement at the interim review meeting, paras. 44-46.
[49] United States' opening statement at the interim review meeting, paras. 47-55.
[50] United States' opening statement at the interim review meeting, para. 48.
[51] United States' opening statement at the interim review meeting, para. 52.
[52] United States' opening statement at the interim review meeting, paras. 58-59.
[53] United States' opening statement at the interim review meeting, para. 62.
[54] United States' opening statement at the interim review meeting, para. 70.
[55] India's opening statement at the interim review meeting, paras. 2-5.
[56] India's opening statement at the interim review meeting, para. 8.
[57] India's opening statement at the interim review meeting, para. 11.

already self-initiated a countervailing duty investigation and an anti-dumping petition is filed later on the same day.[58]

2.39. In a communication dated 19 August 2019, the Panel requested the United States to submit citations to previous statements in these proceedings where the United States had already argued that the USDOC's "commitment" was made after the adoption of the DSB recommendation in the original proceedings.[59] The United States, in its response dated 20 August 2019, listed the following citations: Exhibit USA-36; Exhibit USA-37; United States' first written submission, para. 51; United States' first written submission, paras. 52-53; United States' first written submission, para. 54; and United States' response to Panel question No. 54, para. 130.[60]

2.40. In its written comments submitted on 26 August 2019, India argues that the United States' opening statement (a) contradicts the arguments made during the compliance proceedings; (b) has already been addressed by the Panel; and (c) is tantamount to a request to review the Appellate Body's findings in the original proceedings.[61] India argues that, contrary to the United States' arguments, the Panel has not observed in its Interim Report that the United States could have only complied with the DSB recommendations in the original proceedings by amending or repealing 19 USC § 1677(7)(G)(i)(III).[62] India also maintains that none of the citations submitted by the United States indicates that the commitment to exercise discretion in a particular manner was made after the adoption of the DSB recommendation.[63] Finally, India argues that Article 15.2 of the DSU does not allow a panel to consider contradictory arguments in the context of an interim review.[64]

2.41. The United States submitted comments in response to India's comments on 29 August 2019. In that context, the United States argues that it duly identified the precise aspects of the Interim Report for which it seeks the Panel's review.[65] The United States submits that a compliance panel should not insist that a Member take legislative action when that is not required to achieve conformity with WTO rules.[66] The United States notes that India's response to the United States' citations disagrees with the "content" of the arguments identified in those prior submissions, but that India does not attempt to argue that the United States failed to make the relevant arguments in prior submissions.[67]

2.42. We have reviewed the parties' requests and comments. An assessment of the United States' arguments in support of its request to review paragraphs 7.305 – 7.319 of the Interim Report reveals that they are new and different from the arguments that it had presented prior to the interim review meeting in these compliance proceedings. In particular, the United States' request for interim review is premised on an understanding on the nature and form of the "commitment" that does not comport with the explanation of the "commitment" that it had previously provided throughout the proceedings. Indeed, the United States seeks to advance a new case theory whereby the measure taken to comply took the form of an unwritten decision that was later "memorialized" in an exchange of letters between the Office of the USTR and the USDOC, and which was specifically adopted *after* the adoption of the DSB recommendations in the original dispute.

2.43. We now turn to the citations that the United States submitted to the Panel on 20 August 2019. According to the United States, the listed citations refer to passages from prior submissions in which it had allegedly already argued that a "commitment" was taken after the adverse DSB ruling and in response to it. As explained below, these citations do not support the United States' position. These passages merely pertain to action taken after the DSB ruling to *confirm* a commitment by the USDOC. The passages do not demonstrate that the commitment itself was adopted after the DSB ruling. The United States first refers to Exhibits USA-36 and USA-37. These two exhibits are the letters exchanged between the Office of the USTR and the USDOC after the adoption of the DSB recommendations. In these letters, the Office of the USTR requests that the USDOC "confirm"

[58] India's statement at the interim review meeting, para. 14.
[59] Panel's communication of 19 August 2019.
[60] United States' letter to the Panel of 20 August 2019.
[61] India's written comments on the United States' opening statement, paras. 2-8.
[62] India's written comments on the United States' opening statement, para. 10.
[63] India's written comments on the United States' opening statement, para. 17.
[64] India's written comments on the United States' opening statement, para. 18.
[65] United States' written comments on India's written comments, paras. 4-5.
[66] United States' written comments on India's written comments, para. 11.
[67] United States' written comments on India's written comments, para. 12.

that it will exercise its discretion in a manner consistent with the international obligations of the United States, and the USDOC responded that it "confirm[ed]" the said commitment. These letters thus pertain to the *confirmation* of a commitment, rather than to the "commitment" itself. They do not show that the commitment itself was taken after adoption of the DSB recommendations. The United States then cites to paragraph 51 of its first written submission. Again, this passage pertains to the "confirmation" of the commitment, not the commitment itself. When read in the light of the preceding sentence – i.e. that the United States had "continued to *not* take any actions in that respect" – the "commitment" appears to reflect a continuing circumstance, i.e. a continuation of something already in existence. The United States also refers to paragraphs 52 and 53 of its first written submission, which again relate to the "confirmation" of the commitment through the letters and the DSB statements, and are silent on the timing of the "commitment" itself. The United States next cites paragraph 54 of its first written submission, which states that the United States "took affirmative steps to implement the DSB 'recommendation' as the USDOC confirmed its commitment" – but again, the "steps" referred to are the "confirmation" of the commitment, not the commitment itself, hence this does not shed light on the timing of that commitment. Finally, the United States cites paragraph 130 of its responses to the Panel's questions, in which the United States affirms that it "did take action", but again the only proof submitted was that "the letter exchange reflects the USDOC's commitment (or decision) to exercise its discretion in a WTO-consistent manner", as opposed to the adoption of the commitment itself.

2.44. While the United States had argued throughout these proceedings that the meaningfulness of the USDOC's commitment could be found, *inter alia*, in the circumstance that 19 USC § 1677(7)(G)(i)(III) had never been applied[68], it now contends that this was not its position.[69] We find another inconsistency in the United States' position when comparing the United States' argument at the interim review meeting that the "commitment" was specifically adopted to implement the DSB ruling[70] with the statement made earlier in the proceedings that "[t]he exchange of letters and other U.S. statements serve to *confirm* that the United States has been, and continues to be, in compliance".[71]

2.45. The United States asserted at the interim review meeting[72] that the measure taken to comply constituted an "unwritten measure". Earlier in these proceedings, we asked the United States a set of questions. One question, dealing specifically with the form of the alleged measure taken to comply, asked the United States to identify the date when the commitment took effect, as well as how it was made manifest.[73] In its replies to this set of questions, the United States omitted to include any response to this specific question. Indeed, the United States omitted any reference to our question from its replies. The only reference that we have been able to identify in the United States' prior submissions pertaining to an "unwritten measure" refers to a generic passage in the United States' response to the Panel questioning that a Member could decide to engage (or not) in action that amounts to an unwritten measure.[74] It is not at all apparent from this statement that the United States' contended specifically that the "commitment" took the form of an "unwritten measure".

2.46. Finally, we also note that the interim review meeting was the first instance where the United States used the term "memorialise" to describe the relationship between the "commitment"

[68] See, in particular, United States' first written submission, para. 47:
"Section 1677(7)(G)(i)(III) has never been used because of the discretionary element in the statute that was not discussed in the Appellate Body's findings. Under the statute, the administering authority charged with initiation, the USDOC, has discretion as to the timing of a self-initiated investigation. This discretion is not constrained. If the USDOC does not self-initiate an investigation on the same day a petition is filed by an industry, the statute will never be triggered. In other words, the statute's potential for cross-cumulation and use in the manner identified as raising WTO concerns is only possible if the USDOC takes the positive action to self-initiate. Continued non-use of the statute ensures the conditions of the statute will not be met."
See also United States' response to Panel Question No. 54, para. 132.

[69] United States' opening statement at the interim review meeting, para. 39.

[70] United States' opening statement at the interim review meeting, paras. 5 and 37.

[71] United States' response to Panel question No. 60, para. 147. (italics original; underlining added) See also United States' second written submission, para. 33.

[72] United States' opening statement at the interim review meeting, para. 33.

[73] Panel question No. 55: "… Can the United States identify the date when this 'commitment' took effect and how it was made manifest?"

[74] United States' response to Panel question No. 54, para. 130.

and the exchange of letters.[75] The term "memorialise" in relation to documents stems from the term "memorial", which means: "1. An abstract of a legal record, esp. a deed; … 2. A written statement of facts presented to a legislature or executive as a petition".[76] By contrast, prior to the interim review meeting, the United States appeared to present the function of the exchange of letters as being a confirmation that the pre-existing "commitment" would continue.[77] This description of the function of the exchange of letters did not clearly articulate that the letters themselves were the legal record of the "commitment". This understanding was reinforced by the United States' explicit rejection of the exchange of letters as themselves being the "measure taken to comply".[78] If the "commitment" was "memorialised" in the exchange of letters in the way that the United States now argues, then the exchange of letters would necessarily be a manifestation of the measure taken to comply (i.e. the "commitment"). But the United States rejected this possibility during the proceedings.[79] The United States has not drawn our attention to any aspect of its argument prior to the interim review meeting in which it contended that the exchange of letters "memorialised" the "commitment", as distinct from "confirming" that the commitment would "continue".[80]

2.47. Based on the foregoing, we do not understand the United States' arguments at the interim review meeting to be a mere clarification of existing arguments that the United States had already made during the proceedings.[81] Rather, the United States' arguments at the interim review stage have a fundamentally different logic to those presented during the proceedings and are equivalent to presenting a new case theory regarding matters such as the timing, form, and purpose of the "commitment". We note that, according to the Working Procedures, the United States' new case theory should have been set out in the United States' first written submission.[82] To the extent that its arguments were unclear, the United States could still correct its position in its second written submission[83] and in response to the Panel's questions that directly probed matters relating to the purpose, timing, and form of the "commitment".[84] Against this background, there is no basis in the Working Procedures to examine a new case theory at this late juncture.[85]

2.48. We therefore reject the United States' arguments pertaining to paragraphs 7.305-7.319 of the Interim Report on their merits. Having rejected the United States' interim review request on its merits in that regard, we do not consider it necessary to address India's objections that the United States' requests exceed the scope of the interim review process as established pursuant to Article 15 of the DSU.

2.49. Without changing the substance of our findings and conclusions, we nevertheless take this opportunity to make certain amendments with a view to improving the clarity of our Final Report. Specifically, we note that the United States infers from the Interim Report that the only way in which the United States could comply with the adverse DSB ruling was to repeal or amend 19 USC § 1677(7)(G)(i)(III).[86] We did not make any such finding in our Interim Report. To avoid any

[75] This is based on our review of the United States' first written submission, second written submission, response to the Panel's questions, comments on India's response to the Panel's questions, and executive summaries.

[76] *Black's Law Dictionary*, 11th edn, Bryan A. Garner (ed.) (2019), definition of "memorial".

[77] United States' response to Panel question No. 61, para 154.

[78] United States' first written submission, para. 56; second written submission, para. 33.

[79] United States' first written submission, para. 56; second written submission, paras. 33-34; and response to Panel question No. 60, para. 147.

[80] See also United States' response to Panel question No. 61, para. 154: The United States stated that it had "confirmed the USDOC's commitment to (continue to) exercise its discretion as to the timing of any self-initiated investigation in a WTO-consistent manner", and the United States made this reference in relation to the DSB statements, which in turn referred to the confirmation reflected in the exchange of letters (United States' first written submission, para. 55; request for interim review, para. 17).

[81] See United States' opening statement at the interim review meeting, paras. 7, 20, 39, and 70.

[82] Paragraph 3(1)(a) of the Working Procedures. In a similar vein, see also Panel Reports, *US – Washing Machines*, paras. 7.82-7.85; *China – Broiler Products (Article 21.5 – US)*, para. 7.452.

[83] Paragraph 3(1)(b) of the Working Procedures.

[84] Paragraph 16(f)(iii) of the Working Procedures. See also Panel questions Nos. 54, 55, 56, 60, and 61.

[85] Panel Report, *US – 1916 Act (EC),* para. 5.18 (upheld on appeal: Appellate Body Report, *US – 1916 Act (EC)*, para. 54). In the analogous context regarding the submission of new evidence at late stages, see, e.g. Panel Reports, *Russia – Railway Equipment*, para. 6.46; *EC – IT Products*, para. 6.48; and *Korea – Pneumatic Valves (Japan)*, para. 7.308.

[86] *Contra*, see United States' opening statement at the interim review meeting, paras. 46 and 69.

misunderstanding, we have expanded the language in paragraph 7.306 of the Final Report. We have also modified paragraphs 7.315 to 7.320 of the Final Report.

2.20 Paragraph 7.314

2.50. The United States requests that the Panel delete the last sentence of the paragraph, which originally reported that there is no evidence proving that the letters exchanged between the USDOC and the office of the USTR were published or otherwise made known to the general public before these compliance proceedings.[87] The United States argues that the commitment expressed in that letter exchange was disclosed through public statements of the United States' delegation in the DSB, and the letter exchange was submitted to the Panel and forms part of the record of the dispute.[88] India does not comment on this request.

2.51. We have deleted the expression "or made otherwise known to the general public", in the light of the United States' arguments that the content of the letters was made known to the public by means of official statements in the DSB. Nevertheless, the clarification submitted by the United States that the letters are part of the record of the dispute does not alter our understanding that the letters were not published before the compliance proceedings. Accordingly, we decline to change the first part of the final sentence of paragraph 7.314.

2.21 Section 7.10.3 and paragraph 7.350

2.52. India's comments are in response to the following sentence at paragraph 7.349 of the Interim Report: "India does not challenge a generic failure by the USITC to consider the significance of price underselling". India considers that, in stating so, the Panel failed to consider the full extent of India's submissions concerning its price undercutting claim and accordingly requests us to review our findings.[89] The United States notes that, in principle, a panel may reconsider and amend factual or legal conclusions contained in an interim report as part of its review of precise aspects of that report.[90] However, the United States considers that we have addressed each of the issues relating to underselling raised by the statements to which India points.[91] Accordingly, the United States considers that we should not accede to India' request.[92]

2.53. India argues that the Panel has failed to consider India's submissions recorded at paragraphs 48 and 49 of India's first written submission, as well as at paragraphs 53, 54, and 58 of India's second written submission.[93] As regards the references to India's first written submission, they relate to conclusive paragraphs concerning arguments submitted by India in support of its claim that the United States has acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement in its price underselling analysis. To the extent that India refers to the alleged failure to consider "the existence of a link or relationship between the alleged subsidized imports and the price of the domestic like products", we decline to review our findings because we have already addressed that matter in the Report. We refer to our analysis in Section 7.10.3 of the Final Report (unchanged from the Interim Report) and, specifically, to the emphasis on the "explanatory force" that subsidized imports must have on the price effects determined to occur on the domestic products.[94] India further cites to three paragraphs from its second written submission. Paragraph 53 thereof again refers to the obligation for an investigating authority to determine whether subject imports have an "explanatory force" for the price effects found to occur. For the reasons provided earlier, we do not believe that India's reference warrants a change to Section 7.10.3 of the Report. Paragraph 54 of India's second written submission refers to the allegations that the USITC disregarded evidence that would call into question the explanatory force of subject imports on the price effects for the domestic industry. The paragraphs points to the USITC's "discard[ing]" of the COMPAS model results. We note, in this respect, that we have devoted the entire Section 7.10.2 to India's claim that the USITC had ignored data from the original determination, specifically addressing India's arguments pertaining to the USITC's alleged "discard[ing]" of the COMPAS model results. As we had already

[87] United States' request for interim review, para. 17.
[88] United States' request for interim review, para. 17.
[89] India's request for interim review, paras. 33-35.
[90] United States' comments on India's request for interim review, para. 17.
[91] United States' comments on India's request for interim review, para. 17.
[92] United States' comments on India's request for interim review, para. 17.
[93] India's request for interim review, para. 33.
[94] See, in particular, paragraphs 7.346, 7.351, and 7.353 of the Final Report.

concluded that India's arguments on the COMPAS model results fell outside of the scope of these compliance proceedings, we could not rely on those arguments for the purposes of reviewing India's price undercutting claim. Accordingly, we decline to modify our analysis in Section 7.10.3. Finally, paragraph 58 of India's second written submission concerns the alleged failure by the United States to explain "how or why the instances of price undercutting which it has observed to exist may be deemed to be 'significant'". We note that the Final Report already refers to paragraph 58 of India's second written submission twice.[95] We further note that our conclusions in paragraph 7.354 already respond to India's allegations.

2.54. In the light of the foregoing, we do not consider it necessary to substantially change our findings and conclusions. To improve the clarity of our Report, we have nevertheless modified the first sentence of paragraph 7.350. We consider that this amendment duly reflects the full extent of India's submissions when read in conjunction with the remainder of Section 7.10.3 and, in particular, with our observation at paragraph 7.355 that we "dismissed a number of other India's claims because they are not within the scope of the compliance proceedings".

2.22 Paragraph 7.385 and footnotes 874, 875, and 876

2.55. The United States requests that the Panel reconsider its findings related to dumped, non-subsidized imports from China, Kazakhstan, the Netherlands, Romania, Chinese Taipei, and Ukraine.[96] The United States argues that these findings appear not to be based on a specific claim or argument by India.[97] In the alternative, the United States requests that the Panel modify paragraph 7.384 of the Interim Report so as to reflect that India "noted" the presence of dumped, non-subsidized imports from the above-mentioned countries, but did not raise a "claim" on their relevance to the USITC's analysis under Article 15.5 of the SCM Agreement.[98] India rebuts that it has clearly raised a claim in this respect.[99] Specifically, India refers to paragraph 61 of its first written submission, which lists imports from the six above-listed countries as a factor that the United States "failed to consider".[100] Furthermore, India notes that paragraphs 76 and 79 of its second written submission also refer explicitly to imports from those six countries in the context of its non-attribution claim.[101] Accordingly, India requests that we reject the United States' request.[102]

2.56. We note that India has argued throughout the proceedings that the USITC failed to address the injurious effects of certain factors, including non-subsidized, dumped imports from nine countries (China, Kazakhstan, the Netherlands, Romania, Chinese Taipei, Ukraine, Brazil, Russia and Japan).[103] To improve the clarity of our report, we have decided to distinguish between the USITC's examination of imports from Brazil, Japan, and the Russian Federation, on the one hand, and imports from China, Kazakhstan, the Netherlands, Romania, Chinese Taipei, and Ukraine, on the other hand. The fact that India has brought an all-encompassing claim concerning the impact of all dumped, non-subsidized imports does not prevent the Panel from examining parts of the same claim in different subsections, with a view to improving the clarity of its analysis. Therefore, we decline to make the requested changes. For greater clarity, however, we now explicitly affirm in the Final Report that we subdivide our analysis of India's arguments concerning the treatment of dumped, non-subsidized imports in the USITC's non-attribution analysis (see paragraph 7.376).

2.23 Paragraph 7.386 and footnotes 878 and 879

2.57. The United States requests that we emphasise that certain arguments that are attributed to it were made in response to questions raised by the Panel.[104] The United States further requests that the third and the fourth sentences of the paragraph be deleted, because they address the United States' submissions made in response to India's claim that the USITC did not conduct any non-attribution analysis, and are not relevant to the issue addressed in Section 7.12.3.1.2.[105] India

[95] Final Report, fns 802 and 803.
[96] United States' request for interim review, para. 18.
[97] United States' request for interim review, para. 18.
[98] United States' request for interim review, para. 19.
[99] India's comments on the United States' request for interim review, para. 7.
[100] India's comments on the United States' request for interim review, para. 7.
[101] India's comments on the United States' request for interim review, para. 7.
[102] India's comments on the United States' request for interim review, para. 8.
[103] India's first written submission, paras. 61 and 63; second written submission, para. 79.
[104] United States' request for interim review, para. 20.
[105] United States' request for interim review, para. 20.

objects to the request, noting that it fails to understand how or why the United States claims that the Panel's reference to the United States' submissions is inappropriate.[106]

2.58. We accept the United States' request to clarify that certain arguments were submitted in response to our questioning. Accordingly, we amend the first sentence of paragraph 7.386 and the references in footnote 877. We decline to make the other requested changes, as the citations identified by the United States relate to arguments raised in connection to the treatment of non-subsidized imports in the context of the USITC's non-attribution analysis. Accordingly, they bear relevance to the examination to the matter examined by the Panel in Section 7.12.3.1.2.

2.24 Paragraph 7.391

2.59. The United States request that the Panel correct the numerical notation of import volumes to comport with the standard accepted by the USITC for rounding data.[107] India does not comment on this request.[108]

2.60. We have made the requested change.

2.25 Paragraph 7.390 and footnotes 867 and 868

2.61. The United States requests that the panel correct the page number citations in the two footnotes.[109] India objects that the citations are accurate.[110]

2.62. We note that the citations are accurate and, accordingly, we decline to make the requested change.

2.26 Paragraphs 8.1(g)

2.63. The United States identified a number of clerical errors in the form of inconsistencies in paragraphs 8.1(g) and 8.1(h) of the Interim Report as between findings and subsidy programmes mentioned in those paragraphs, and the findings and subsidy programmes referred to in the relevant sections of the Interim Report.[111] India did not comment. We have corrected the errors identified by the United States to ensure that the proper findings and subsidy programmes are addressed in these aspects of section 8.

2.27 Paragraph 8.1(m)(iv)

2.64. The United States requests that we reconsider our finding in relation to Articles 15.1 and 15.5 of the SCM Agreement and, accordingly, revise our conclusions and recommendations.[112] India objects.[113]

2.65. Consistent with our decision to not make the changes that the United States requested with regard to our analysis of India's non-attribution claims, we also reject the request to modify our conclusions and recommendations in that respect.

[106] India's comments on the United States' request for interim review, paras. 9-11.
[107] United States' request for interim review, para. 22.
[108] India's comments on the United States' request for interim review, para. 13.
[109] United States' request for interim review, para. 34.
[110] India's comments on the United States' request for interim review, paras. 16-17.
[111] United States' request for interim review, paras. 23-25.
[112] United States' request for interim review, para. 28.
[113] India's comments on the United States' request for interim review, paras. 14-15.

ANNEX A-4

TIMETABLE FOR THE PANEL PROCEEDINGS[1]

Adopted on 27 June 2018
Revised on 14 February 2019

Referred to original panel on 27 April 2018
Compliance panel composed on 25 May 2018

Description	Dates[2]
a. Receipt of first written submissions	
i. India	27 July 2018
ii. United States	14 September 2018
b. Receipt of third parties' written submissions	5 October 2018
c. Receipt of rebuttal submissions	
i. India	26 October 2018
ii. United States	7 December 2018
d.	
i. Substantive meeting with the Parties:	30-31 January 2019
ii. Third party session:	31 January 2019
e. Receipt of responses to questions posed by the Panel	15 February 2019
f. Receipt of comments on responses to questions posed by the Panel	1 March 2019
g. Receipt of the integrated executive summaries of the parties and of the executive summaries of third parties:	8 March 2019
h. Issuance of descriptive part of the report to the parties	5 April 2019
i. Receipt of comments by the parties on the descriptive part of the report	29 April 2019
j. Issuance of the interim report, including findings and conclusions to the parties	12 July 2019
k. Deadline for parties to request review of part(s) of the report and to request interim review meeting	26 July 2019
l. Interim review meeting, if requested – If no meeting requested, deadline for comments on requests for review	9 August 2019
m. Issuance of final report to the parties	tbd[3]
n. Circulation of the final report to the Members	After translation

[1] The above timetable may be changed in the light of subsequent developments.
[2] The exact time of the deadline for receipt of documents are 5pm of the date indicated in this column unless the Panel separately otherwise indicates.
[3] "To be determined".

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION

1. On 19 December 2014, the DSB adopted the recommendations and rulings of the Appellate Body and the Panel in *US – Carbon Steel (India)*. The DSB found that the United States of America (USA) imposed countervailing duties on exports of certain Hot-Rolled Carbon Steel Flat Products in a manner that breached the obligations of the United States under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and recommended that the United States bring its measures into conformity with its obligations under the SCM Agreement. The USA agreed to bring its measures into conformity with a reasonable period of time (RPT), which expired on April 18, 2016. The USA failed to do so and accordingly, India raised the dispute under Article 21.5 of the DSU on the grounds mentioned below:

I. Inconsistency of 19 USC § 1677(7)(G)(i)(III) with Articles 15.1 to 15.5 of the SCM Agreement

2. 19 USC § 1677(7)(G)(i)(III) requires, in a CVD investigation, cumulation of imports from countries not subjected to CVD investigations, for determining material injury in an original investigation. The Appellate Body held the said provision to be "as such" inconsistent with Articles 15.1 to 15.5 of the SCM Agreement.

3. The United States has failed to remove or amend 19 USC § 1677(7)(G)(i)(III), even after expiry of the RPT. Instead, the United States claimed in the DSB meeting, after the expiration of RPT, that the USDOC would not self-initiate CVD investigation on the same day an anti-dumping investigation petition is filed or vice versa so that there is no occasion to invoke 19 USC § 1677(7)(G)(i) (III). For this purpose, the United States also relied on letters exchanged between the USTR and the USDOC in June 2016.

4. An oral statement or oral commitment without any amendments to the law cannot be considered as a measure taken to comply with the recommendations and rulings of the DSB. Moreover, the United States has not denied that cumulation of imports will take place if 19 USC § 1677(7)(G)(i)(III) is triggered. In any case, the existence of discretion to trigger 19 USC § 1677(7)(G)(i)(III) is an *ex-post facto* rationalization to justify a measure which is declared "as such" inconsistent with the SCM Agreement by the Appellate Body.

II. Inconsistency of Section 129 Determination by the USITC with Articles 15.1 to 15.5 of the SCM Agreement

5. The Panel determined that the United States had acted inconsistently with the obligations set forth under Article 15 of the SCM Agreement in so far as it conducted its injury assessment by cumulating the imports arising from subsidized and non-subsidized sources that were not simultaneously subject to countervailing duty investigations. The Appellate Body upheld the Panel's findings.

6. The United States was required to assess the effect of the subsidized imports on prices, considering whether there has been a *significant* price undercutting by the subsidized imports on the prices of the like product or whether the subsidized imports resulted in depressing the prices of the like product or preventing price increases to a *significant* degree.

7. The USITC analysis only covered instances of price undercutting. Although underselling or overselling margins were also calculated for those instances, USITC did not consider them in the final determinations made. The USITC failed to consider the *significance* of the magnitude of underselling in each of these instances. Further, in the March 2001 Determination, the USITC noted that subsidized imports did not have a significant price effect on the domestic industry. The COMPAS model impact analysis showed that subsidized imports taken together would have an impact of 0.3%

to 0.4% on the prices of US producers. Information which formed part of the original record cannot be ignored or brushed aside especially when the conclusions are diametrically opposite.

8. The assessment carried out by the USITC in its Section 129 Determination is perfunctory at best and grossly falls short of the obligation to ensure an "objective examination" based on "positive evidence" of the impact of subsidized imports on the relevant economic factors and indices of the domestic industry. When there is positive movement in a number of factors, it would require a compelling explanation from the investigating authorities as to how in light of such positive trends, the domestic industry is materially injured.

9. The United States was required not to attribute the impact of other factors, while assessing injury caused by the subsidized imports. The USITC failed to assess the injurious effect of other factors including contraction in demand, loss in productivity of the domestic industry owing to inherent reasons, and non-subsidized but dumped imports from at least 9 countries. The USITC failed to address the injurious effect of other factors. The USITC also failed to explain the nature and extent of these factors, separating and distinguishing them from other factors, such as loss in productivity.

III. Inconsistency of Public Body determination with Article 1.1(a)(1) of the SCM Agreement

10. The Appellate Body held that 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. Under this standard, 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. The Appellate Body in *US – Carbon Steel (India)* issued a categorical finding that GOI's ownership interest in the NMDC, the GOI's power to appoint and nominate directors, and the reference on the NMDC's website indicating that NMDC is under "administrative control" of the GOI, are all merely evidence of "formal indicia" of control, and that these factors "*do not provide a sufficient basis for a determination that an entity is a public body that possesses, exercises, or is vested with governmental authority*".

11. The issue before the Panel is whether the USDOC has accounted for the above failures in Section 129 Determinations. It is an acknowledged fact that NMDC had 'miniratna' or 'navaratna' status during the period in question since this information was placed on record. The GOI asserted that such status gives NMDC "*enhanced autonomy*". In this regard, the Appellate Body observed that it was troubled by the *Panel's failure to consider whether the USDOC properly assessed the implications of the status of the NMDC in the legal order of India*. If the USDOC was in doubt, the USDOC was under an obligation to seek out the required clarifications or information to properly investigate this aspect in a reasonable and objective manner.

12. The USDOC has attempted to demonstrate that NMDC is under the meaningful control of the GOI, in its day-to-day operations. However, these conclusions of the USDOC suffer from serious factual infirmities. For instance, the actual price negotiations for NMDC are carried out by a "Committee of Directors" and not the general Board of Directors. No evidence has been cited to suggest that this "Committee of Directors" comprises only of GOI appointed board members. Moreover, the USDOC has not given sufficient credence to the "independence" of the directors that are appointed as per corporate norms, even though this was also made clear on record in the 2004 AR.

13. The two other factors relied upon by the United States relate to the export restrictions on iron ore. India submits that such export restrictions were a general measure applicable to all iron ore exporters. It was a legal mandate applied by the GOI to all iron ore exporters and it is not the case that the NMDC voluntarily decided to not export iron ore. The fact that the Chairman of NMDC occupied another position in another governmental committee that recommended such an export restriction, does not necessarily imply that the Board of Directors of NMDC had made any decisions on the same. No such positive evidence exists on record. The conclusion that market conditions in India were influenced by the export restrictions is also a mere assertion by USDOC unsupported any evidence on record.

14. While there is evidence on record that minerals are indeed owned by the State Governments within India, India submits that there is insufficient evidence for the USDOC to conclude that mining

of iron ore (or mining *per se*) is a government function. Also, NMDC does *not* approve or provide mining leases; it merely mines, and there is no positive evidence stating that mining is *per se* a governmental function in India or elsewhere.

IV. Inconsistencies of specificity determinations with Articles 2.1(c) and 2.4 of the SCM Agreement

15. After a careful review of the USDOC's determinations, the Panel found that the USDOC failed to comply with the Article 2.1(c) requirement to take those factors into account when determining whether the provision of goods by NMDC is *de facto* specific. The United States did not appeal the findings of the Panel. The USDOC issued its preliminary determination in two parts, on March 17, 2016 and March 18, 2016 and failed to address these issues. During the course of Section 129 proceedings, the USDOC did not solicit any information relating to analysis under Article 2.1(c), including information which could be relevant for determining the existence, content or scope of the subsidy programmes at issue.

16. Article 2.1(c) requires the investigating authority to account for "the length of time during which the subsidy programme has been in operation". Therefore, it follows that the investigating authority must evaluate whether a "plan or scheme" existed pursuant to which the subsidy at issue was provided. In the original as well as Section 129 Determinations, the USDOC has never undertaken such an exercise.

17. In its analysis, not once did the USDOC refer to when the alleged programme was established, whether such a plan or scheme existed and for how long had the alleged subsidy been provided. The second element of the USDOC's analysis was the fact that NMDC was established in the year 1958. The USDOC conflated the identification of the granting authority with the identification of subsidy programme.

18. During the course of the Section 129 proceedings, the USDOC did not ask a single question to India or solicit any information concerning "the length of time during which the subsidy programme has been in operation". Therefore, India submits that the USDOC has failed to substantiate its finding based on positive evidence and continues to be in violation of Article 2.1(c) of the SCM Agreement.

19. In Section 129 Determination, the USDOC determined that Mining Rights of Iron were *de facto* specific. The Section 129 Determination is erroneous and contradicts the facts on record. The rules made under MMDR Act indicate that the GOI grants mining leases based on objective criteria and conditions. The evidence conclusively establishes that the grant of mining rights for iron ore was not restricted to just steel producers and large numbers of leases for iron-ore mining were granted during the POR to various entities, including steelmakers and stand-alone miners.

20. Article 2.1(c) also mandates that "the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy programme has been in operation" are two factors that need to be taken into account before concluding that a given subsidy is *de facto* specific. A perusal of the determinations made by the United States would show that no attempt has been made to consider the economic diversification in India and the length of time the two subsidy programs "Mining Rights of Iron Ore" and "Mining of Coal" have existed in India, while concluding that they were *de facto* specific.

V. Inconsistency of rejection of in-country price of iron ore as benchmark with the chapeau to Article 14 & Article 14(d) of the SCM Agreement

21. During the 2006 AR, domestic price information of iron ore as reported by the Mine Owners /Goa Mineral Ore Exporters Association was filed by the GOI and Tata Steel. However, the USDOC did not consider these in-country price information for determining benefit conferred by the (i) sale of high grade iron ore by NMDC, and (ii) mining rights of iron ore programs but relied on export price from Australia reported in the Tex Report as appropriate benchmark. The Panel ruled that the information in question shows that it does relate to domestic prices in India but the USDOC failed to consider this information on record as benchmark.

22. The Panel concluded that the USDOC had not supported its decision by any rationale or justification in its determination and there is no explanation by the USDOC as to why it applied

Tier II instead of Tier I benchmarks. Consequently, the Panel concluded that the USDOC determination was inconsistent with Article 14(d) of the SCM Agreement. This finding of the Panel was not appealed by the United States. The USDOC concluded in its Section 129 Determination that the information on record was not suitable for benchmark price and therefore, it used prices from Australia, as listed in the Tex Report.

23. The United States specifically agreed that Tier I price "could include" other types of transactions i.e. other than the illustrative list of sample transactions contained in 19 CFR 351.511(a)(2)(i). However, the USDOC in its final determination pursuant to Section 129 proceedings strictly relied on its preference for actual transaction price. The regulatory preference for "actual transaction price" as the sole reason for rejecting the private domestic price information is not consistent with Article 14(d) of the SCM Agreement. Article 14(d) does not require use of actual transaction prices.

24. The information on record suggests that the prices reported in Tex Report are also not actual transaction prices. The Tex Report price chart is labelled as "Price Negotiations". In fact, in the 2006 AR, the USDOC observed that Tex Report contains *world-wide price negotiations for iron ore*, and include prices for high-grade iron ore that were set for 2006. The USDOC should have also demonstrated as to how the price information contained in the Tex Report was not affected by the same issues that affected the in-country prices i.e. of being quotes or that they also lacked details of the buying party, terms of sale etc. The USDOC also failed to explain why it considered domestic price information as not actual transaction prices. The GOI emphasized on the evidence and explanation during the Section 129 proceedings, which was available on the record of the USDOC, to substantiate that the domestic price information is actual transaction price.

25. The USDOC has not indicated what type of additional information would have proved that the price contained in the chart is actual transaction price. The terms of sale are clearly indicated in the chart. The categorization of entities mentioned in the price chart either as a selling entity or a buying entity does not in any way alter the reliability of price information as a benchmark. Similarly, the USDOC has not explained how the absence of information regarding the name of the purchaser in the price quote provided by Tata prejudices the reliability of such price information as a benchmark.

26. The USDOC has concluded that if the proprietary information provided by Tata is used as a benchmark, the proprietary information provided in the quote could be reverse calculated by the companies. The USDOC has not explained that how a price quote *per se*, without disclosure of the date of the price, purchasing entity, selling entity, terms of sale, type of product, etc., would result in disclosure of proprietary information. The USDOC has already disclosed the date of the price quote. It is also known that the price information was supplied by Tata Steel. The USDOC has failed to explain why the price quote presented by Tata Steel was not adopted as the benchmark for mining rights of iron ore granted to Tata Steel in the 2006 AR.

VI. Inconsistency of exclusion of the NMDC export prices as benchmarks with the chapeau to Article 14 & Article 14(d) of the SCM Agreement

27. In the 2004 AR, the USDOC adopted a world market price from the Tex Reports as benchmark for determining benefit conferred by (i) Sale of High Grade Iron Ore by NMDC and (ii) Captive mining rights of iron ore programs pursuant to 19 CFR § 351.511(a)(2)(ii). World market price from the Tex Reports contained export prices from India to Japan, as well as export prices from Australia and Brazil to Japan and Europe. The USDOC continued to rely on the Tex Reports in the preliminary determination of the 2006 AR also. However, in the final determination of the 2006 AR, the USDOC ignored the NMDC export price reported in the Tex Report. The Appellate Body held that the rejection of NMDC export price as a viable benchmark was inconsistent with Article 14(d) of the SCM Agreement.

28. The USDOC observed in its final determination pursuant to Section 129 proceedings that NMDC export price to Japan does not constitute a viable benchmark price. According to the USDOC, the Appellate Body has observed that the prices charged by the government-related entity is a financial contribution at issue and cannot constitute viable benchmark price. The USDOC has erroneously concluded that NMDC export price to Japan is a financial contribution at issue. Only NMDC's price of high grade iron ore to domestic producers is the financial contribution at issue. Only in relation to "financial contribution at issue", the Appellate body had stated that it is inherently circular to require that *the very government price that investigating authorities are seeking to test* against the market

be used as the market benchmark for the purposes of Article 14(d). In relation to the export price of the *government provider* under investigation, the Appellate Body has noted that it is expected that an investigating authority will approach such price with caution.

29. The findings by the USDOC does not even attempt to explain, based on evidence, as to why the USDOC considered world market prices from Australia and Brazil to be more appropriate than NMDC's export price.

30. India submits that the factors highlighted by the USDOC may only be relevant in the context of their attempts to show that NMDC has *formal indicia* of government control and none relate to the appropriateness of the export price of NMDC itself or the reliability of NMDC export price as a benchmark compared to the export price from Australia and Brazil. The Section 129 Determination effectively establishes that it is the standard methodology of the United States to reject all prices pertaining to government related entities. The USDOC has ignored the observation of the Appellate Body that whether a price may be relied upon for benchmarking purposes under Article 14(d) *is not a function of its source* but, rather, whether it is a market-determined price reflective of prevailing market conditions.

31. The observations regarding export restrictions on iron ore was noted for the first time by the USDOC in the final Section 129 Determination. The USDOC has failed to disclose this "essential fact" before the final determination to allow all the interested parties to defend their interest in accordance with Article 12.8 of the SCM Agreement. There is no evidence presented by the USDOC that directly leads to the conclusion that NMDC export prices were "set with the GOI policy considerations".

32. The Appellate Body had categorically noted that rejection of prices of government related entities in determining proper benchmark simply because governments may set prices in pursuit of public policy objectives is not permissible under Article 14(d). The record evidence indicates that the actual price negotiations for NMDC are carried out by a "Committee of Directors" and not the general Board of Directors. No evidence has been cited to suggest that this "Committee of Directors" comprises only of GOI appointed board members.

VII. Inconsistency of continued imposition of countervailing duty on the SDF program with Article 14(b) of the SCM Agreement

33. The loans obtained from the SDF have been included as an alleged subsidy program since the original investigation by the United States. The United States found that the loans under the SDF program confer a benefit to the extent that the interest paid under the program was less than what would have been charged on a comparable commercial loan. The United States adopted the long-term loan interest rate and PLR published by the RBI in determining the benchmark interest rate while calculating the alleged benefit received by participating steel producers under the SDF program.

34. The Appellate Body observed that failing to take into account a cost that potentially alters a commercial actor's valuation of a loan simply because it does not relate to interest or repayment terms appears unduly artificial and contrary to the requirements of Article 14(b). The Appellate Body concluded that the Panel improperly excluded consideration of a borrower's costs in assessing the cost of a loan program to the recipient for the purposes of benchmark analysis.

35. In its Section 129 Determination, the United States has not addressed the issue pertaining to SDF. The United States did not examine the entry costs associated with SDF loans and thus failed to comply with the recommendations of the DSB. Therefore, the United States has failed to comply with the recommendations and rulings of the DSB. In particular, the USDOC failed to reassess its determination and consider the Supreme Court of India's final and binding decision that the SDF program was not open to those who did not make investments into the fund in the first place.

VIII. Inconsistency of imposition of CVD against new subsidy programs with Articles 21.1 and 21.2 of the SCM Agreement

36. In the initiation notice through which the subject investigation was initiated, the United States covered only twelve alleged subsidy programs. New subsidy programs were included in 2004, 2006, 2007 and 2008 ARs. The United States initiated the investigation against 4 programs in the 2004 AR, 16 programs in the 2006 AR, 3 programs in the 2007 AR and 2 programs in the Section 129

proceedings without examining the "sufficiently close link" or "nexus" of these new subsidy programs to the subsidies that resulted in the imposition of original countervailing duty. In the Section 129 Proceedings, the United States continues to countervail many of these new programs.

37. Article 21.2 provides that authorities shall *review* the need for the *continued* imposition of the duty. No investigations under Article 21 can be initiated for the first time against a new subsidy, which does not have a sufficiently close link or nexus with the subsidies countervailed in the original investigation. The United States has failed to examine whether such a sufficiently close link or nexus exists between the new subsidies countervailed in the 2004, 2006, 2007 and 2008 ARs and the subsidies that resulted in the imposition of original countervailing duty.

38. If a simplistic test offered by the United States before the Appellate Body i.e. *(i) the same Member; (ii) the same responding companies (beneficiaries of the subsidies); and (iii) the same products,* is adopted for the purposes of examining sufficiently close nexus, it could result in redundancy of the balance between the right to impose countervailing duties and the obligations disciplining the use of countervailing measures.

IX. Inconsistency of failure to provide notice of the required information, failure to seek relevant information and rejection of relevant information with Article 12.2 of the SCM Agreement.

39. The USDOC has cited insufficiency of evidence as a reason to reject various arguments raised by India and for its refusal to comply with the recommendations and rulings of the DSB. In particular the USDOC has taken recourse to insufficiency of evidence with respect to (i) Tata Steel's proprietary price quote; and (ii) Meaning of "miniratna" categorization of NMDC.

40. The USDOC was under an obligation to have sought out the required clarifications or information to properly investigate these aspects in a reasonable and objective manner in accordance with Article 12.2. However, unlike other Section 129 proceedings, the USDOC chose not to issue any questionnaires or seek any other information from the GOI on these issues.

X. Inconsistency of failure to disclose reliance on export restrictions with Article 12.8 of the SCM Agreement

41. Article 12.8 provides for disclosure of essential facts under consideration which form the basis for the decision prior to the issuance of final determination. The USDOC supported its final determination to reject NMDC export price of iron ore with an additional fact about the existence of restrictions on export of iron ore put in place by the GOI. The USDOC disclosed, only in the final Section 129 Determination, that (a) there is diversification of the industrial sector in India because the RBI annual report provides a diverse list of industrial and economic sectors; and (b) NMDC provided iron ore for three years period i.e. 2004, 2006 and 2007; and (c) NMDC was established in the year 1958. There was no disclosure concerning the aforementioned facts in the preliminary determination or in any other document issued prior to the final determination in Section 129 proceedings.

42. A fact that forms the basis of the decision to reject a particular benchmark price proposed by the interested parties is an *essential fact*. Export restrictions on iron ore was relied upon by the USDOC to exclude NMDC export price as benchmark. Diversification of industrial sector in India and the period for which sale of high-grade iron ore by NMDC was operational are factors considered by the USDOC while determining *de facto* specificity. Accordingly, they were among the *essential facts* that formed the basis of the decision by the USDOC that the "provision of iron ore by NMDC" program is *de facto* specific.

43. The only disclosure of essential facts by the USDOC, prior to the issuance of final determination, was the preliminary determination. The GOI filed a case brief containing arguments, rebuttals in response to the preliminary determination. However, the GOI did not and could not provide any comments or additional information regarding the afore mentioned three factors because the USDOC did not disclose these facts at all in the preliminary determination. The USDOC should have informed the interested parties about its reliance on these facts prior to the issuance of final determination. The USDOC should also have provided sufficient time to the interested parties to respond to its disclosure of this fact before issuing the final determination.

XI. Inconsistency of the USDOC's unilateral decision to terminate the countervailing rate agreed between JSW Steel Ltd. and the USDOC and between Tata Steel and the USDOC with Article 19.3 of the SCM Agreement

44. The USDOC published its final results for levying countervailing duty of 577.28 percent on exports made by Tata Steel in the 2008 AR (POR - 1st January, 2008 to 31st December, 2008). Tata Steel challenged the USDOC decision in appeal before the CIT. During the court proceedings, Tata Steel and the USDOC entered into a settlement agreement wherein the USDOC agreed to levy countervailing duty of 102.74 % after amending the final results of 2008 AR with respect to Tata Steel (Tata Amended Final Results). However, pursuant to the final determinations in Section 129 proceedings, the USDOC has revised this countervailing duty rate to 140.18%.

45. For JSW Steel Ltd., the USDOC imposed countervailing duty of 484.41% vide final determination in the 2006 AR (POR – 1st January 2006 to 31st January 2006). JSW Steel Ltd. challenged the USDOC decision before the CIT. During the Court proceedings. JSW Steel Ltd. and the USDOC entered into a settlement agreement wherein the USDOC agreed to levy duty of 76.88% after amending the final results of 2006 AR with respect to JSW Steel Ltd. (JSW Amended Final Results). However, pursuant to the final determination in Section 129 proceedings, the USDOC has revised this countervailing duty rate to 215.54%.

46. Article 19.3 of the *SCM Agreement* provides that countervailing duties be levied in the "appropriate amounts in each case". "Appropriate amounts" of countervailing duty has been interpreted to mean, in accordance with its ordinary meaning, the amount of countervailing duty which is "proper", "fitting" and "specially suitable". The Appellate Body observed that the term "appropriate amount" implies certain tailoring of the countervailing duty amounts according to circumstances.

47. In the circumstances of the present case i.e. where two countervailing duty rates were allegedly applicable, the USDOC should have decided the "appropriate amount" of countervailing duty rate by carrying out proper comparison of the two different rates of duty, considering the breakdown and components of subsidization contained therein. The USDOC should have explained on the basis of facts and circumstances of this case, why the countervailing duty rate determined pursuant to Section 129 determination is the "appropriate amount" of countervailing duty vis-à-vis its own agreement to apply a different countervailing duty rate pursuant to the Amended Final Results.

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION

I. Inconsistency of 19 USC § 1677(7)(G)(i)(III) with Articles 15.1 to 15.5 of the SCM Agreement

48. The United States expressly disagrees with the Appellate Body's finding in the original proceedings that Section 1677(7)(G)(i)(III) is "as such" inconsistent with Articles 15.1 to 15.5 of the SCM Agreement. India submits that in a compliance proceeding under Article 21.5 of the DSU, the Panel cannot re-examine or invalidate the findings of the Appellate Body. The United States claims that the interpretation of Section 1677(7)(G)(i)(III) was not an issue of law covered by the panel report or raised by the parties before the original panel and therefore was not properly before the Appellate Body. However, in the original proceedings, India's challenge covered Section 1677(7)(G) in entirety including all three sub-clauses, and was also reviewed by the Panel and Appellate Body.

49. It may be noted observed that the Appellate Body inadvertently omitted to note clause "(i)" while mentioning sub-clause III of Section 1677(7)(G). This typographical error is also reflected in the Request for consultations and Request for establishment of the Panel by India. Notwithstanding the error while referring to the Section 1677(7)(G)(i)(III), India's request for the establishment of the Panel clearly notes the measure at issue and a brief summary of the legal basis for the complaint.

50. It was in the DSB meeting on 22nd June 2016 i.e. two months after the expiration of the reasonable period of time, the United States, for the first time, stated that *under US law, Commerce had discretion to decide the timing when it would self-initiate an investigation.* India submits that for the purposes of addressing "as such" inconsistencies, "commitment" expressed through internal exchanges of letters or through oral statements without any amendments to the law "as such" cannot

be considered as a measure taken to comply with the recommendations and rulings of the DSB. Moreover, and the United States has not denied that cumulation of imports will take place if Section 1677(7)(G)(i)(III) is triggered.

II. Inconsistency of the USITC's Section 129 Consistency Determination with Articles 15.1 to 15.5 of the SCM Agreement

51. India submits that the injury assessment conducted by the USITC in the Section 129 Consistency Determination is inconsistent with Article 15 of the SCM Agreement. India submits that the "measure taken to comply" by the USITC, i.e., the Section 129 Consistency Determination is subject to review before this Panel. The claims pertaining to assessment by the USITC could not have been raised in the original Panel proceedings because Section 129 Consistency Determination relies on data that is starkly different from the data contained in the 2001 US Determination.

52. India submits that the mere *existence* of subsidized import volumes or price effect would not, by itself, be sufficient to arrive at a conclusion of material injury in terms of Article 15 of the SCM Agreement. The emphasis throughout the text of Article 15.2 is on the significance of the increase in volume and price effect of such imports on the domestic like products. The USITC discarded the only data on record that measured the impact of the instances of price underselling, i.e., the COMPAS model on the grounds that it was one analytic tool and that it preferred to rely on the actual empirical data on the record. It is submitted that the absence of such an assessment pertaining to the *significance* of price underselling extinguishes any possibility of an assessment pertaining to the "explanatory force" between the subsidized imports and the price effect determined to exist.

53. India notes that the volume of the subsidized imports was limited in absolute terms and such subsidized imports only held 5.8% of the market share in relation to US demand in 2000. Further, India notes that the United States has not pointed out any part of the USITC determination that draws a definitive correlation between the subsidized imports, and not just imports at large, and the injury parameters of the domestic industry.

54. India also submits that no express non-attribution analysis is contained in the Section 129 Consistency Determination of the United States. The USITC, determination is at odds with the decision of the United States to impose anti-dumping duties against Brazil, Japan & Russia as well as against the non-subject imports from the six countries which were simultaneously subjected to trade remedial investigation. The United States admits that the plant closures were not co-related to the subsidized imports or caused by them. India submits that the existence of such inherent factors, that had caused shut down of parts of the domestic industry, should have formed part of the non-attribution assessment carried out by the USITC.

III. Inconsistency of Public Body determination with Article 1.1(a)(1) of the SCM Agreement.

55. India submits that the USDOC's revised findings on NMDC's *conduct* being meaningfully controlled by the GOI is not supported by positive evidence and thereby, violates Article 1.1(a)(1) of the SCM Agreement. The USDOC failed to evaluate the relationship between the NMDC and the GOI within the Indian legal order, and the extent to which the GOI in fact "exercised" meaningful control over the NMDC and over its conduct. Firstly, the parties agree that NMDC had 'miniratna' or 'navaratna' status during the period in question since this information was placed on record. India reiterates that the United States completely discarded the substantial evidence actually available on record that the companies with such status possess significant degree of autonomy from the Government, despite the Government being the majority shareholder.

56. Secondly, the United States' determination and argument seems to be based on an assumption that engaging in mining amounts to 'governmental function' and such an assumption is misconceived. While there is evidence on record that minerals are indeed owned by the State Governments within India, there is insufficient evidence for the USDOC to conclude that mining of iron ore (or mining *per se*) is a government function. In this regards India specifically invites the Panel's attention to 2004 AR Verification Report (Exhibit USA – 3) page 9 which corroborates India's position.

57. Thirdly, the USDOC itself acknowledges that at a minimum, the GOI is not involved in the selection of at least 4 (of 13) directors of NMDC. India submits that the uncontroverted evidence is that out of 13 Board of Directors, only 2 are appointed by the GOI and 7 are independent directors. Further, it is also an uncontroverted fact that throughout the investigation period, i.e. 2004-2008 ARs, NMDC was a listed company and therefore, was complying with Clause 49 of the Listing Agreement with Stock Exchanges. The Section 129 Determinations completely ignore the independence of directors. Other 4 directors are professionals appointed as functional directors to look after production, technical, commercial and finance functions. The fact that Government may approve their nomination is irrelevant to the determination whether NMDC is a public body or not.

58. Fourthly, there is no positive evidence on record cited by the USDOC as to the size of the "Committee of Directors" holding price negotiations, or its composition and in particular, no evidence has been cited to suggest that this "Committee of Directors" comprises only of GOI appointed board members. There is not even a shred of evidence that the government directions or policies have influenced the transactions or pricing of the products sold by NMDC.

59. Lastly, India submits that existence of canalization and export restriction are in no way relevant for determining NMDC to be a public body. Further, the fact that the Chairman of NMDC occupied another position in another governmental committee that recommended such an export restriction, does not necessarily imply that the Board of Directors of NMDC had made any decisions on the same. India submits that had the NMDC been under meaningful control and as the USDOC argues that the export restriction was not a general measure, then there would have been no need for the canalization or such export restriction through a separate measure. The fact that such a policy was specifically introduced by the GOI to prevent export of high-grade iron ore, establishes that the GOI could not meaningfully control the conduct of NMDC and that NMDC was not performing any governmental function.

IV. Inconsistencies of specificity determinations with Articles 2.1(c) and 2.4 of the SCM Agreement

60. The United States merely offers *ex-post facto* rationalizations for its determination regarding Article 1.2 read with Article 2.1(c). The United States considered the extent of diversification of India's economy and the length of time the program has been in operation only with respect to provision of High-Grade Iron Ore by NMDC. India submits that existence of NMDC since 1958 has no relationship to the length of time for which the program titled Mining Rights of Iron Ore or Mining of Coal has been in existence.

61. The United States also relies on *Dang Report* and *Hoda Report* to argue that *iron ore leases were limited to India's steel companies*. In the Section 129 Determination the USDOC acknowledges that India grants Mining Rights of Iron Ore to Steel Companies as well as independent miners. Therefore, it is evident that the United States' submissions before this Panel and Section 129 Determination contradict each other. Further, The record evidence demonstrates the total number of iron ore mining licenses granted by GOI during 2006 which conclusively established that the grant of mining rights for iron ore was not restricted to just steel producers and that large numbers of leases for iron-ore mining were granted during the POR to various entities, including steelmakers and stand-alone miners. Further, the USDOC's assertion that *[t]he numbers do not indicate the proportion of leases held by steel and mining companies* contradicts the facts on record.

62. It is noteworthy that the United States' reliance on (i) *Dang Report;* (ii) *Hoda Report;* and (iii) *Times of India* article as well as its assertion that *record evidence relied on by the USDOC demonstrates that iron ore leases were limited to India's steel companies* were challenged by India in the original proceedings. The evidence was considered by the Panel and it concluded that the USDOC failed to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information, as required by Article 12.5. The United States reiterates different passages of the same evidence to reach the same conclusions which were held to be insufficient by the Panel in original proceedings.

V. Inconsistency of rejection of in-country price of iron ore as benchmark with the chapeau to Article 14 & Article 14(d) of the SCM Agreement

63. The GOI emphasized on the following evidence and explanation during the Section 129 proceedings, which was available on the record of the USDOC, to substantiate that the domestic

price information was the actual transaction price – (i) names of at-least three entities are provided in the document; (ii) documentary evidence of close to 11 transactions in the name of these entities; (iii) such 11 entries specify the type of iron ore, the content of iron, and the terms of sale; (iv) prices were compiled by the association and were prevailing market prices in the relevant period; and (v) the document specifically states that these are prices of iron ore and not notional prices or price estimates. The USDOC has not responded to any of these claims made by the GOI in its Section 129 Determination. Further, India submits that a careful review of the price information in the chart by an objective and unbiased investigating authority would have clearly revealed that not all the price information contained therein was provisional in nature. India specifically notes that the information on record suggests that the prices reported in the Tex Report, which was used as a benchmark, were also not actual transaction prices. Further, the reasons cited by the United States before the compliance Panel to reject the information, are not contained in the Section 129 Determination. Therefore, it amounts to an *ex post facto* rationalization.

64. The United States, before the original Panel, agreed that a Tier I price "could include" other types of transactions i.e., all market determined in-country price information other than "actual transactions, actual imports, or actual sales from competitively-run government auctions". The Appellate Body, after relying on the inclusive reading of the provision agreed upon by the United States, clearly foresaw the possibility of including "other types of transactions including government related prices" as Tier I benchmark. However, the USDOC rejected the plea of the GOI in Section 129 Determination to consider such a possibility and observed that the USDOC's "preference" is to compare the government price to market-determined price "stemming from actual transactions."

65. The United States has claimed repeatedly in its FWS that in-country price information submitted by the GOI and Tata were not market determined. However, the USDOC has not determined in its Section 129 Determination based on positive evidence that the price information was not "market determined". Instead, the USDOC has relied solely on the regulatory preference, contrary to its submissions before the Panel and Appellate Body, to determine that the price noted in Tex Report was the appropriate benchmark.

66. India submits that the terms of sale are clearly indicated in the chart in the second column. It is clear from the names of the three entities listed in the second column that these entities are selling entities i.e. Mysore Minerals Ltd., SJ Harvi Mines, and TATA. The absence of the name of buying entity can only imply that prices are not fixed vis-à-vis a particular buyer. Sale price, irrespective of the buyer, does not diminish its characterization as "market determined price" in terms of Article 14(d) of the SCM Agreement.

67. India has claimed that the United States had wrongly rejected price information furnished by Tata for the purpose of benchmark determination. However, the United States has not explained why the price quote presented by Tata was not adopted as the benchmark for Tata itself for mining rights of iron ore program in the 2006 AR.

VI. Inconsistency of exclusion of the NMDC export prices as benchmarks with the chapeau to Article 14 & Article 14(d) of the SCM Agreement

68. India submits that as per the Appellate Body observation, the USDOC was required to examine NMDC export prices to Japan for the purpose of benchmark. It is clear that the government provider referenced in the observation of Appellate Body is NMDC. It is also clear that export price referenced in the above observation is export price of NMDC. However, the United States simply denies the existence of the above findings of the Appellate Body in its FWS and also the obligation to examine NMDC export price for the purpose of benchmark determination. India submits that all the arguments put forth by the United States directly contradict the Appellate Body Report and thus cannot be accepted.

69. The United States also claims that the USDOC considered multiple facts, including (i) GOI's ownership and control of both the NMDC and MMTC, (ii) GOI's extensive involvement in price setting in the NMDC, (iii) and GOI's export restrictions on iron ore. In its FWS, India has submitted in detail that reliance of the USDOC on the aforementioned reasons is both inadequate and incorrect. In response to India's claim, the United States has only stressed upon the verification report of the GOI's questionnaire response in 2004 AR to support its determination regarding GOI's extensive involvement in price setting.

70. The record evidence indicates that the actual price negotiations for NMDC are carried out by a "Committee of Directors" and not the general Board of Directors. The USDOC itself acknowledges that at a minimum, the GOI is not involved in the selection of at least 4 (of 13) directors of NMDC. There is no positive evidence on record cited by the USDOC to suggest that this "Committee of Directors" comprises only of GOI appointed board members. The USDOC fails to appreciate that "directors" referred by the NMDC official in the verification report are in fact "Committee of Directors." Even if the United States arguments is accepted in totality, it can only imply that "government" was deciding the "export price of NMDC". It does not mean that NMDC export price were "not market determined". The NMDC official statement does not even remotely suggest that the government decided NMDC export price of iron ore based on public policy considerations. The USDOC also does not explain on what basis it determined that "setting the export price of iron ore" is the "national policy" concerned and is the "activity" reviewed and monitored by the GOI. The MMTC official specifically noted that all decisions are made for commercial reasons, otherwise they are held accountable, as there is an oversight process by their legislature and the Comptroller Auditor General, who is the chief vigilance commissioner. NMDC official specifically noted that Ministry of Steel does not play a role in setting the prices of iron ore and that "it is a commercially independent company." The USDOC specifically inquired as to "when the government would become involved in any decision made by their respective boards". The MMTC official in response explained that the GOI involvement was in the decisions regarding investments beyond an allotted amount. The detailed explanation provided by the NMDC official and recorded by the USDOC in its verification report clearly demonstrates that NMDC export prices are "market determined." Further, notwithstanding the fact that export restriction on iron ore cannot be relied upon by the USDOC because it was not disclosed to the interested parties prior to the issuance of final determination, India submits that the USDOC's reliance on export restriction is incorrect and inadequate. The USDOC has not demonstrated based on evidence as to how such export restriction influenced the price of exports of iron ore so as to make it unviable as a benchmark. It is clear that there was no actual effect because of export restrictions as the total exported quantity never reached the threshold.

71. In the 2004 AR, the USDOC adopted a world market price from the Tex Reports as benchmark for determining benefit. Such world market price from the Tex Reports contained export prices from India to Japan, as well as export prices from Australia and Brazil to Japan and Europe. The USDOC continued the same methodology for benchmark determination in the preliminary determination of the 2006 AR. However, in the final determination of the 2006 AR, the USDOC ignored the NMDC export price reported in the Tex Report. The USDOC notes in the Section 129 Determination that the decision to exclude NMDC export prices is simply a matter of refining its approach consistent with its standard benchmark methodology even though no party had addressed the issue. India objected to the adequacy of this explanation in its FWS. India submits that mere use of the expression "refinement of approach" in and of itself cannot be considered as adequate reasoning for coming to an entirely opposite decision in the 2006 AR. The USDOC has not based its explanation on any change in the evidence on record such as information indicating the unreliability of NMDC price, additional information indicating appropriateness of other benchmark, etc.

VII. Inconsistency of continued imposition of countervailing duty on the SDF program with Article 14(b) of the SCM Agreement

72. India submits that there is a clear finding of the Appellate Body that loans obtained by the recipients cannot be determined to confer benefit in accordance with Article 14(b) without taking into account the costs incurred by such recipient in obtaining the loan. The United States cannot contend that even though the Appellate Body clearly held that the exclusion of cost incurred by the steel producers while determining the benefit is inconsistent with Article 14(b) of the SCM Agreement, there is no finding of the Appellate Body on the issue of SDF program and the United States is not required to implement the recommendation and ruling of the DSB emanating from such finding. India submits that the USDOC never considered the issue whether steel producers' own contribution to the fund could be considered as costs for the purpose of determination of benefit under Article 14(b). The findings of the USDOC in 2006 AR determination clearly suggest that steel producers are voluntarily contributing funds derived from price increase to the SDF and therefore it is a cost to such loan recipient steel producers.

73. The United States also independently argues as to why there was no need for re-determination of benefit by the USDOC. The United States notes that the (i) GOI established price increases that were to be added to steel products; (ii) Indian Supreme Court ruling is not relevant for characterizing the aspects of the law under WTO legal principles and it disagrees with the conclusion of the Supreme

Court of India; (iii) price increase mandated by the GOI was not different from other types of involuntary taxes; (iv) India has not identified any other costs on record etc. India submits that the United States arguments amounts to *ex-post facto* rationalizations to substantiate that contributions made by the steel producers did not amount to "costs" incurred by these recipients and therefore cannot be taken into account. As already submitted, a Member is precluded from providing an *ex post* rationale to justify the investigating authority's determination.

VIII. Inconsistency of imposition of CVD against new subsidy programs with Articles 21.1 and 21.2 of the SCM Agreement

74. The United States' concedes that India did ask for the Panel to find that the USDOC breached Article 21 by failing to examine properly each of the new subsidy allegations at issue. The Panel ruled that *USDOC was entitled, under Articles 21.1 and 21.2 of the SCM Agreement, to examine new subsidy allegations in the administrative reviews at issue*. The Appellate Body added an important caveat to the conclusion arrived at by the Panel that *Article 21 requires an investigating authority to establish that there is a sufficiently close nexus between the subsidies that are the subject of the original investigation and the new subsidy allegations that the investigating authority proposes to examine as part of its administrative review*. However, what India did not do, was allege which of the factors listed in Footnote 1256 of the Appellate Body Report were applicable in the case before the Appellate Body. In other words, the Appeal was limited in scope and India is not reagitating the same issue again. The core question before this Panel is whether the element challenged by India forms an integral part of the measure taken to comply or are separable. India submits that when the quantum of benefits accruing to such a product is re-determined in Section 129 Proceedings, India cannot be precluded from challenging the new subsidies allegations in the 2004, 2006, 2007 and 2008 administrative reviews.

75. With regard to India's claims under Article 21 concerning the "new" subsidy programs in the Section 129 Determinations the arguments advanced by the United States are not alternative arguments, rather they are mutually exclusive and contradictory to each other.

76. The United States introduced, investigated and countervailed two completely new programs "Mining Rights of Iron Ore" and "Mining of Coal" in Section 129 proceedings which are distinct and broader than "Captive mining of iron ore" and "Captive Mining of Coal" which were countervailed in the 2006 AR. India submits that comparison of the specificity determinations with respect to these programs in the 2006 AR and Section 129 Proceedings is dispositive of the issue at hand. Further, with regard to Mining of Coal, the USDOC relied on different facts and legislations which were never considered in the 2006 AR. Further, in Section 129 Determinations, the USDOC acknowledge that it investigated different programs India submits that the record is totally silent and not even once the USDOC has mentioned that the "Mining Rights of Iron Ore" and "Mining of Coal" introduced, investigated and countervailed in Section 129 Proceedings have sufficiently close link or similarity with the subsidies that were the subject of the original investigation. India has already submitted that if the simplistic test offered by the United States before the Appellate Body i.e. *(i) the same Member; (ii) the same responding companies (beneficiaries of the subsidies); and (iii) the same products,* is adopted for the purposes of examining sufficiently close nexus, it could result in redundancy of the balance between the right to impose countervailing duties and the obligations disciplining the use of countervailing measures. It would also lead to an unfettered right to the investigating authorities which is precisely the situation which was highlighted by the Appellate Body in its Report. India submits that the granting authority for (i) the subsidy programs that were the subject of the original investigation (10 Programs with different granting authority within and outside the Government of India); and (ii) the new subsidies introduced, investigated and countervailed in Section 129 Proceedings (namely Ministry of Mines), are different. Further, the nature of the 10 subsidy programs that were subject of the original investigation was also different from "Mining Rights of Iron Ore" and "Mining of Coal".

IX. Inconsistency of failure to provide notice of the required information, failure to seek relevant information and rejection of relevant information with Article 12.1 of the SCM Agreement

77. It is evident that Article 12 applies to all the reviews conducted under Article 21 and its application is not limited to sunset reviews. It is uncontested that administrative reviews are governed under Article 21 of the SCM Agreement. As a necessary corollary, Section 129 Proceedings

pertaining to such ARs would also be governed under Article 21 of the SCM Agreement. Accordingly, Article 12.1 would be applicable to both the ARs in question and the Section 129 Proceedings.

78. It is evident from the original Panel proceedings, Appellate Body proceedings, the Section 129 Proceedings and above submissions that USDOC reached multiple factually erroneous conclusions on (i) Tata Steel's proprietary price quote; and (ii) meaning of "miniratna" categorization of NMDC which could not have been reached by an unbiased and objective investigating authority and which the United States had sought to correct in subsequent submissions at each stage. India submits that its assertions on the two key pieces of evidence remain unchallenged throughout the course of original proceedings and Section 129 proceedings. India has already established above that an unbiased and objective investigating authority could not have rejected (i) Tata Steel's proprietary price quote; and (ii) meaning of "miniratna" categorization of NMDC. Therefore, the United States has acted in a manner inconsistent with Articles 12.1 of the SCM Agreement due to its failure to provide notice of the required information, failure to seek relevant information from India and rejection of relevant information voluntarily provided by India.

X. Inconsistency with Article 12.8 of the SCM Agreement

79. It is clear that the disclosure under Article 12.8 concerns the disclosure of facts in the course of the same investigation. For example, Article 21.4 of the SCM Agreement provides that the provisions of Article 12 shall apply to any review carried out under this Article. Thus, the Authority is required to provide disclosure of essential facts before a final determination is made in a review proceeding separately as distinguished from the original investigation. Similarly, proceedings under Section 129 is a separate investigation and therefore requirement under Article 12.8 of the SCM Agreement is required to be complied as part of this separate investigation proceeding.

80. The United States admits that the essential fact at issue is "export restrictions on iron ore". India submits that mere reference to the 2004 AR verification report in the Section 129 preliminary determination cannot be equated to disclosure of the essential facts under consideration, which are contained in such verification report. There was no disclosure of fact regarding export restriction on iron ore in the Section 129 preliminary determination. Secondly, the aforementioned factual observations in the Section 129 preliminary determination were disclosed in the context of deciding whether NMDC is a public body in terms of Article 1 of the SCM Agreement. There was not even a reference to the 2004 AR verification report in the Section 129 preliminary determination while deciding the issue of exclusion of NMDC export price.

XI. Inconsistency of the USDOC's unilateral decision to terminate the countervailing rate agreed between JSW Steel Ltd. and the USDOC and between Tata Steel and the USDOC with Article 19.3 of the SCM Agreement

81. The United States objects to India's claim that its unilateral decision to terminate the countervailing duty rate agreed between JSW Steel Ltd. and the USDOC and between Tata Steel and the USDOC is inconsistent with Article 19.3 of the SCM Agreement.

82. Contrary to the United States' submissions, there is nothing in the plain text of Article 19.3 to suggest that the word "appropriate amount" is with reference to the source of imports or is confined to the application of countervailing duty on a non-discriminatory basis. The Appellate Body in *US - Anti-dumping and Countervailing Duties (China)* has already settled the meaning of "appropriate amounts in each case" from the dictionary definitions. The Appellate Body clearly observed that the term "appropriate amount" implies certain tailoring of the countervailing duty amounts according to circumstances.

83. India stresses on the observation of the Appellate Body that the term appropriate means "something that must be assessed by reference or in relation to something else; they suggest some core norm—"proper", "fitting", "suitable"—and at the same time adaptation to particular circumstances." In the present case, the United States had two amounts of countervailing duties before it and if the USDOC were to apply the countervailing duty rate determined in the Section 129 proceedings it should have provided an adequate and reasoned explanation based on positive evidence as to why the rate prescribed under Section 129 proceedings is an "appropriate amount" of countervailing duty rate.

84. The United States also claims that application of countervailing duty rate is appropriate because it correlates to subsidy programs in the underlying proceedings and there is a dramatic decline in the countervailing duty rates for JSW and Tata as compared to original proceedings. According to the United States, reliance on the settled rates, i.e., rates that were applicable pursuant to the Amended Final Results in lieu of rates calculated in conformity with the DSB ruling and recommendation would not have been proper because settled rates are not based upon specific margin and bear no relation to an analysis of individual subsidy. These reasons and explanations are inadequate as it does not fully disclose the actual basis of the settled rates. In any case, these explanations by the United States are not incorporated in the Section 129 determination and amounts to an *ex post facto* rationalization. A Member is precluded from providing an *ex post* rationale to justify the investigating authority's determination. It is settled that an investigating authority's determinations must be evaluated in light of the rationale provided contemporaneously by that investigating authority.

85. To conclude, India submits that if the application of a higher countervailing duty rate is allowed to be sustained instead of lower rates negotiated between the parties, it would create conflict between the domestic judicial review under Article 23 of the SCM Agreement and WTO dispute settlement proceedings under Article 30 of the SCM Agreement. Article 23 of the SCM Agreement is not subject to Article 30 of the SCM Agreement. SCM Agreement allows for invocation of Article 30 even when the affected member country has opted for remedy pursuant to Article 23. However, the United States approach would be able to effectively prevent affected member countries from invoking Article 30 of the SCM Agreement whenever they have invoked judicial review within the United States legal system pursuant to Article 23 of the SCM Agreement.

86. India submits that the settled rates between the USDOC and the exporters concerned reflected lower subsidy amounts determined by the USDOC, though the USDOC did not disclose the basis for such subsidy amounts so determined by it. As a result of the Section 129 proceedings, the changes shall be made to such lower subsidy amounts determined and applied by them and not the original subsidy amounts determined by them. The USDOC has not provided any explanation as to why (a) the lower subsidy amount determined by it shall be ignored and (b) it went back to the initial subsidy amount. Such an unbridled discretion poses a serious systemic flaw and shall not be permitted.

EXECUTIVE SUMMARY OF THE OPENING STATEMENT

I. 'As such' claim against 19 USC Section 1677(G)(7)(i)(III).

87. The United States has not amended or repealed Section 1677(7)(G)(i)(III) pursuant to the decision of the Appellate Body. This omission of the United States clearly means that it has not met its obligations to implement the recommendations and rulings of the DSB. According to the United States, Section 1677(7)(G)(i)(III) is not inconsistent with Article 15 of the SCM Agreement because the United States Department of Commerce (USDOC) has 'discretion' to decide the timing when it would self-initiate an investigation and the USDOC has 'confirmed its commitment' to exercise its discretion in a manner that would be consistent with the United States obligation under the SCM Agreement. India submits that oral statements and exchanges of letters do not have any bearing on the United States law and do not form part of the anti-dumping and countervailing duty laws notified by the United States to the WTO. Further, such oral statements were made after the expiry of reasonable period of time. In any case, the text of Section 1677(7)(G)(i)(III) does not vest any such discretion. The United States does not explain how the USDOC will use its discretion to avoid a situation in which the USDOC has already self-initiated a countervailing duty investigation and a petition is filed for initiation of anti-dumping investigation later on the same day or vice versa.

II. Determination of material injury by the USITC.

88. The USITC in its Section 129 Determination has determined that subsidized imports were causing material injury to the domestic industry in the United States. India challenges this assessment of the USITC with respect to examination of (i) the price effect of the alleged subsidized imports from countries subject to CVD investigations; (ii) state of the domestic industry and the alleged injury suffered by them; and (iii) causality between the alleged subsidized imports and the state of the domestic industry.

89. The analysis by the USITC only covered instances of price undercutting/underselling. The USITC failed to consider the significance of the magnitude of underselling in each of these instances.

Further, the USITC's assessment of the state of the domestic industry falls short of the obligation to ensure an 'objective examination' based on 'positive evidence'. Finally, with respect to the assessment of causality, India submits that the USITC was required to assess the injury suffered by the United States' domestic industry because of the insignificant volume and price effect of the subsidized imports. Further, the USITC was required not to attribute the impact of other factors, such as the volumes and prices of non-subsidized imports, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance, productivity of the domestic industry as well as plant closures of the domestic industry owing to inherent factors. However, the Section 129 Determination is silent on these aspects. Specifically, with respect to the plant closures, India notes that the United States' submission establishes that the plant closures were not co-related to the subsidized imports or caused by them. India, therefore, submits that the USITC's injury assessment is flawed and inconsistent with the provisions contained in Article 15 of the SCM Agreement.

III. Public body determination with respect to NMDC.

90. The core question before the Appellate Body was the test proposed by the United States that *a public body may also include an entity controlled by the government … such that the government may use the entity's resources as its own*. The Appellate Body expressly observed that such a terminology is difficult to reconcile with that used by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. However, it also observed that such a fact may certainly be relevant evidence for the purposes of determining whether a particular entity constitutes a public body. Before the compliance Panel, the United States proposes a completely new test i.e. the United States does not argue or establish Government of India's ability to use NMDC's resources as its own for which no evidence exists, rather it relies on NMDC's alleged ability to transfer government's resources. India submits that pursuant to Article 21.5, the Panel cannot modify or alter the legal test proposed in the Appellate Body Report adopted by the DSB. India also submits that if the test proposed by the United States is accepted, every licensee for every economic resource could be considered as a public body, which will lead to incongruous results.

91. The United States fails to ascribe any meaning to the term administrative control, it continues to rely on this term to treat NMDC as a public body. It also relies on selective extracts of 2004 AR Verification Report to substantiate its pre-determined conclusions, rather than the explicit statements made by GOI and officials of NMDC regarding the (i) composition of directors; (ii) enhanced autonomy of NMDC; and (iii) pricing mechanism contained in the very same Report, which till date have not been rebutted by contrary evidence. As to the aspect of NMDC being a governmental authority performing governmental functions, 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.

IV. Rejection of in-country benchmarks.

92. The USDOC in its Section 129 Determination concluded that in-country price information reported by the Mine Owners Association was not suitable as benchmark prices ignoring (a) the actual transactions prices for two financial years - April 2004 to March 2005 and April 2005 to March 2006 contained therein; (b) Other associated details such as the name of mines or entities from which the iron ore was obtained, terms of sale, Fe content of iron ore and destination of the iron ore, etc. and without recording any reasons for rejection.

93. In any case, provisional in-country price can constitute as Tier I benchmark under the United States law. The Appellate Body observed, and the United States specifically agreed that even though preference is given to actual transactions between private parties, actual imports, actual sales from competitively run government auctions, Tier I benchmark under 19 CFR 351.511(a)(2)(i) 'could include' other types of transactions as well. The USDOC has also failed to note that the Tex Report price chart is labelled as 'Price Negotiations' and therefore were also not actual transaction prices.

V. Rejection of export price of NMDC as a benchmark

94. The USDOC, in the final determination in the 2006 AR excluded the NMDC export price reported in the Tex Report because it observed that the NMDC export price pertain to the very

government provider of the goods. Such export prices were not excluded in the final determination in the 2004 AR and the preliminary determination in the 2006 AR. Despite a categorical finding and disagreement of the Appellate Body with the reasoning given by the USDOC in the 2006 AR that 'price of the very government provider of the goods would not normally be used for comparison purposes under Tier I or Tier II', the USDOC has used the same reasoning and conclusions in its Section 129 determination. The assessment of the USDOC ignores the fact that export price of NMDC to Japan is not the 'financial contribution at issue'. Further, instead of relying on the nature of price information, its characteristics, associated details or any other form of positive evidence distinguishing NMDC export price from the export price from Australia and Brazil, the USDOC has once again adopted a *formulaic* approach in which prices charged by the government entity in question is required to be excluded for benchmark determination.

95. In the Section 129 Determination, the USDOC has stated an additional reason that there were restrictions on iron ore. This reason of the USDOC finds mention for the first time in the final Section 129 determination. Since no disclosure was made of this 'essential fact' in accordance with Article 12.8 of the SCM Agreement prior to the issuance of final determination, reliance on the same cannot be permitted for justifying the USDOC decision.

96. Further, Section 129 Determination ignores the fact on record that there was a restriction on exports of iron ore only if it exceeded 6.8 million tonnes and that annual exports during the last 10 years was never more than 4.0-5.0 million tonnes. Thus, *de jure* export restriction on iron ore was irrelevant because *in fact* the actual exports were far below the prescribed threshold. The USDOC also ignored other facts on record such as absence of restriction on iron ore with Fe content 64% or less and that such restriction was not on iron ore generally but against the iron ore obtained from a particular (Bailadila) mine. Further, the USDOC has not demonstrated as to how such export restriction influenced the price of exports of iron ore so as to make it unviable as a benchmark.

97. Therefore, the conclusions reached by the investigating authority are not reasoned and adequate, lacks critical examination, and are not based on information contained in the record.

VI. Revision of the countervailing duty rate assigned to JSW Steel Ltd. and Tata Steel.

98. Countervailing duty rates of 102.74% and 76.88% were applicable for Tata Steel and HSW Steel Ltd. respectively pursuant to the settlement agreement entered into between the USDOC and these companies during the respective proceedings before the Court of International Trade. Pursuant to the Section 129 proceedings, the USDOC has revised this countervailing duty rate to 215.54% for JSW Steel and to 140.18% for Tata Steel. The USDOC fails to disclose the breakup of individual subsidy programs of the countervailing duty rates determined in the settlement agreement qua the Section 129 determinations.

99. Article 19.3 of the SCM Agreement requires that the countervailing duty rate should be levied in the 'appropriate amount' in each case. The USDOC should have decided the 'appropriate amount' of countervailing duty rate in this case by starting from the rate applied pursuant to the settlement agreement. The USDOC should have then explained how it arrived at the revised rates.

VII. New subsidy programs in the Section 129 Determinations.

100. The United States argues that the two programs discussed in Section 129 Determinations were re-evaluation of the previously considered programmes and therefore, USDOC had no obligation to examine a sufficient link or nexus. If the said argument is assumed to be correct, i.e. the 'mining rights of iron ore' programme is the same as the 'captive mining of iron ore' programme covered in the original investigation, the United States forgets that in the original proceeding, pursuant to a claim under Article 12.5, on an extensive examination of all the evidence, the Panel held that the United States did not have a sufficient basis to properly determine the existence of the captive mining of iron ore programme. The United States examined the same evidence reviewed by the Panel i.e. Hoda Report, Dang Report and the newspaper reports and has countervailed the 'mining rights of iron ore' programme. If the programme remained the same, at the very least, the United States was precluded from countervailing the Mining Rights for Iron Ore programme in the absence of any additional evidence.

101. With respect to mining of coal, the entire basis has changed from the original to the Section 129 proceedings. The legislation relied upon to establish existence of the alleged programme

was the Nationalisation Act of 1973 in the original investigation. On the contrary, the United States relies on MMDR Act of 1957 and the Bihar Land Reform Act of 1950 in the Section 129 proceedings. Secondly, the specificity determination has also changed from de jure to de facto specificity. Therefore, on its face, the programme investigated by the United States is not the same as originally examined in 2006 AR. Accordingly, the United States was mandated to examine close link or nexus of the alleged new subsidies with the subsidies investigated in the original proceedings. If the simplistic test offered by the United States i.e. *(i) the same Member; (ii) the same responding companies (beneficiaries of the subsidies); and (iii) the same products,* is adopted for the purposes of examining sufficiently close nexus, it would result in redundancy of the test itself.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES OF AMERICA

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

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

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

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

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

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

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

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

6. India is precluded from making several of the claims. First, as to India's claims of inconsistency under SCM Agreement Article 15.4, the underlying facts and findings relevant to that claim did not change from the United States International Trade Commission's ("Commission") original 2001 determination to its Section 129 determination. Likewise, certain other arguments that India makes in its Article 21.5 submission are based wholly on methodologies and factual findings that originated in the original USITC determination: India's challenge to the data and methodology used by the Commission for the purposes of its price effects analysis; India's challenges to the Commission's exercise of its discretion not to rely on the results of the COMPAS model; and India's claim under Articles 15.1 and 15.5 that the Commission failed to consider factory closures in its non-attribution analysis.

7. Moreover, India's claims are based on a selective and incomplete reading of the Commission determination. India disregards the Commission's detailed analysis of the conditions of competition relevant to the hot-rolled steel market, and the Commission's analysis that underselling by subsidized imports resulted in a significant impact on domestic prices. Further, India overlooks the Commission's explanation of why subject imports had a significant impact on the domestic industry, notwithstanding some positive trends, and its examination of factors other than subject imports that

injured the domestic industry to ensure that such other factors were not attributed to subsidized imports.

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

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

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

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

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

12. The USDOC then evaluated "whether the functions or conduct [of the NMDC] are of a kind that are ordinarily classified as governmental in the legal order of [India]". The USDOC concluded that because the GOI owned all of the mineral resources in India, "it is a function of the government of India to arrange for the exploitation of public assets, in this case iron ore". The USDOC then established that the NMDC exploited public resources on behalf of the GOI, and is thus vested with governmental authority.

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

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

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

16. India then complains that the USDOC failed to sufficiently investigate the NMDC's "*miniratna*" status. In bringing its Article 1.1(a)(1) claim, India relies on a quote from *US – Antidumping and Countervailing Duties (China)* that investigating authorities have a duty to seek out relevant information. Although the Appellate Body made this general observation in the context of an Article 1.1(a)(1) claim, the Appellate Body cited to *US – Corrosion Resistant Steel Sunset Review* and *US – Wheat Gluten* as support. *US – Corrosion Resistant Steel Sunset Review* involved Article 11.3 of the AD Agreement and an investigating authority's role in a sunset review to include both investigatory and adjudicatory aspects, and *US – Wheat Gluten* involved an investigating authority's duty under Article 3.1 of the *Agreement on Safeguards*. Thus, the text of Article 1.1(a)(1) does not itself impose an obligation on an investigating authority to seek out additional information or clarification – rather, a Member may be found not to have satisfied Article 1.1(a)(1) if its findings on financial contribution (including public body) are not reasoned and adequate, in light of the record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31. India is also precluded from raising new arguments under Article 21 because it previously had an opportunity to do so, but opted not to. In the original proceedings, although India appealed the original panel's finding concerning Article 21, India did not ask for the Appellate Body to find that the USDOC breached Article 21 by failing to examine properly each of the new subsidy allegations at issue. Therefore, India cannot now argue in this compliance proceeding that the USDOC failed to establish a sufficiently close link or nexus and failed to consider certain factors when it could have raised those arguments in the original proceeding.

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

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

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

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

IX. INDIA'S CLAIMS UNDER ARTICLE 12.8 LACK MERIT

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

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

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

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

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

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

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

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

settled rates to consider which were more (in a seemingly abstract sense) "appropriate" is disingenuous and unsupported by the text and plain meaning of Article 19.3.

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

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

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

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

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

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

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

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

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

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

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

50. Thus, the commercial nature of an entity also does not preclude it from being a public body. The panel in *Korea – Commercial Vessels* likewise recognized this, finding that "it is not clear to us that an entity will cease to act in an official capacity simply because it intervenes in the market on commercial principles if that intervention is ultimately governed by that entity's obligation to pursue a public policy objective." Rather, an investigating authority must take into consideration the totality of the evidence regarding the relationship between the government and the public body at issue, and base its determination on the specific facts of each case.

51. India also argues that "there *must* have been positive evidence on the record before the USDOC to establish that mining iron ore or at a minimum, mining in general, must be '*ordinarily classified as governmental in the legal order*' of India and that it is also normally classified as a governmental function within other WTO members." This argument, however, results from a too narrow reading of the Appellate Body's findings. Examining whether the functions or conduct of an entity are of a kind that are ordinarily classified as governmental is but one relevant consideration that *may* be examined on a case-by-case basis.

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

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

53. India submits that if the USDOC's higher rates calculated in the Section 129 Proceedings could be imposed instead of lower settled rates negotiated between the parties, it would set up a conflict between the domestic judicial review provided for under Article 23 of the SCM Agreement and WTO dispute settlement proceedings under Article 30 of the SCM Agreement. The specific entries subject to the settled rates in the USDOC's Amended Final Determination were liquidated, and consequently the imports of steel subject to the relevant administrative proceedings received the full benefits of the settled rates. Accordingly, this is not a situation where proceedings under Article 23 are superseded and nullified by proceedings under Article 30. Further, although India argues that Article 23 of the SCM Agreement is not subject to Article 30, accepting India's interpretation would effectively render Article 30 subject to Article 23. That is, administering authorities would be limited in their ability to fully implement DSB recommendations if they were required to modify the results of such implementation based on prior rates determined pursuant to domestic judicial proceedings.

Such a result would run contrary to the text of both provisions and lead to absurd results, as illustrated by India's arguments before this panel.

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

U.S. RESPONSE TO PANEL QUESTION 14

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

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

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

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

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

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

60. On the other hand, a "private body" may be found to provide a financial contribution attributable to a Member through the conduct described in Article 1.1(a)(1)(i)-(iii) only when it is "entrust[ed] or direct[ed]" by the government to do so. That is, a private body may make a financial contribution if the government entrusts or directs the private body "*to carry out* one or more of the

functions illustrated in (i) to (iii)." Accordingly, as the Appellate Body has correctly explained, the entrustment or direction must be linked to the private body's *conduct*.

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

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

U.S. RESPONSE TO PANEL QUESTION 45

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

U.S. RESPONSE TO PANEL QUESTION 49

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

U.S. RESPONSE TO PANEL QUESTION 55

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

U.S. RESPONSE TO PANEL QUESTION 56

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

U.S. RESPONSE TO PANEL QUESTION 72

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

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

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

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

69. Nowhere does the DSU consider that a panel should consider whether a party has identified "cogent reasons" for reaching a different finding or conclusion than the Appellate Body. Were a panel to decide to simply apply the reasoning in a prior Appellate Body report and decline to fulfill its function under Articles 7.1, 11, and 3.2 to make findings on the applicability of existing provisions of the covered agreements, as understood objectively through customary rule of interpretation, the panel would risk creating additional obligations for Members that are beyond what has been provided for in the covered agreements – an act strictly prohibited under Articles 3.2 and 19.2 of the DSU.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

[1] China submitted the text of the oral statement as its integrated executive summary.
[2] Egypt submitted the text of the oral statement as its integrated executive summary.

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

1. India's argument that there must have been positive evidence on the record that mining is a governmental function for the NMDC to be considered a public body is a conclusion that results from a narrow and selective reading of the jurisprudence.

2. The Appellate Body explained in *US – Anti-Dumping and Countervailing Measures (China)* and in *US – Carbon Steel (India)* that in making a public body determination, the conduct of the entity in question is to be analyzed with regard to the core characteristics and functions of the entity, its relationship with the government, and the prevailing legal and economic environment. The Appellate Body provided examples of the type of evidence to be sought, including government policies in the sector, and whether the functions or conduct of the entity are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member.

3. The fact that the function of an entity may be a relevant *consideration* in terms of evidence that the entity is a public body within the legal order of a Member is a wholly different standard from that articulated by India. In practice, evidence that an entity is carrying out a government function is not limited to showing that the sector in which the entity operates is ordinarily classified as a government function.

4. For example, a state-owned commercial bank that provides low-interest loans could be considered a public body, as was the case in *US – Anti-Dumping and Countervailing Duties (China)*. Yet, the activity of providing loans might not ordinarily be classified as "governmental" in most countries, and so it would likely not bear on the question of the features of a public body. Thus, this is a clear example of how the classification in the domestic legal or administrative system cannot be a necessary factor in a public body determination, as it is possible for entity to be a public body even where the activities are not ordinarily classified as governmental in the legal order of the country.

5. There is a great deal of other evidence that could be available to an investigating authority showing that an entity is carrying out a government function. Moreover, whether an entity is carrying out a function that is ordinarily classified as governmental is but one "relevant consideration" amongst many for an investigating authority to assess in a public body determination, if such evidence exists.

6. In Canada's view, it is incumbent on the investigating authority to objectively assess all of the relevant evidence available to it on the characteristics of the entity. If the entity is acting in a commercial manner, this could be relevant evidence that the entity is not pursuing governmental functions. However, this in itself is not necessarily "dispositive". Similarly, if there is evidence that an entity is engaging in non-commercial behaviour, this could also be relevant evidence related to the pursuit of governmental functions or the existence of meaningful control, although this too would not necessarily be "dispositive".

7. Along similar lines, the fact that an entity may be engaging in the same activity or even be engaging in competition with private actors may constitute relevant evidence to be considered by an investigating authority, but it does not necessarily mean that an entity is not a public body. An entity could be engaging in such activities and still be meaningfully controlled by the government, pursuing governmental functions, or be in possession of governmental authority such that it would be considered a public body.

8. In sum, an investigating authority must determine on a *case-by-case* basis that an entity is either a public body or that it is not based on an evaluation of the core characteristics and features of the entity and its relationship with the government. A public body designation should be made on the basis of available evidence related to government policies, the applicable legal order, the prevailing economic environment in the country, and other evidence related to the core features of

the entity and its relationship with the government, including whether the government exercises meaningful control over an entity and its conduct.

II. ARTICLE 14(D) OF THE SCM AGREEMENT

9. It is well-established that, when selecting such a benchmark, an investigating authority must first consider market prices for the same or similar good in the relevant market in the country of provision. An investigating authority must also conduct a sufficiently diligent investigation into, and solicitation of, relevant facts so that it is able to base its determination on positive evidence on the record.

10. In light of the primacy of in-market prices as benchmarks, it is particularly important that an investigating authority solicit the information it needs to properly assess them. Indeed, the Appellate Body has explained "that it is only once an investigating authority has properly complied with its obligation to investigate whether there are market-determined in-country prices that reflect prevailing market conditions in the country of provision that it may, consistently with Article 14(d), use alternative benchmarks for the purposes of Article 14(d)".

11. Commerce had such private prices from the market in question available to it, and was required to conduct a diligent investigation into, and solicitation of, relevant facts surrounding those prices. It appears to have assumed that certain private prices in the market of provision were unreliable because they were "provisional", without soliciting information about what "provisional" meant in that context. While Article 14(d) is silent on the question of whether actual transaction prices must be used as the basis for in-market benchmark prices, the same principles stemming from a proper interpretation of Article 14(d) apply. The determinative question is whether the prices constitute a reliable measure of "market-determined prices that reflect prevailing market conditions in the country of provision". In Canada's view, soliciting information both about what "provisional" meant in this context, and about whether the provisional prices accurately reflected market-determined prices should have been integral parts of conducting a sufficiently diligent investigation into, or solicitation of, relevant facts pertaining to in-market prices. The mere statement that prices are "provisional", without any further analysis as to whether they reflect prevailing market prices for the good in question, is an insufficient basis to reject prices from within the relevant market.

12. What is an appropriate benchmark should be determined on a case-by-case basis. Indeed, the analysis under Article 14(d) is a factual one that requires an investigating authority to conduct its investigation in a diligent manner, and to base its determination on positive evidence on the record. If, after conducting a diligent investigation into the relevant prices, an investigating authority concludes that private prices are unreliable as a benchmark, it must ensure that its conclusion is based on positive evidence on the record, and that it provides a reasoned and adequate explanation of the basis for its decision.

13. Where an alternative benchmark price, such as export prices for the good in question to a third country market, includes government prices, an investigating authority may not reject the government prices simply on the basis that they are a government price. Canada reiterates the Appellate Body's guidance that an investigating authority cannot "presume that the export price set by a government provider is inherently unreliable. This must be proven on the basis of evidence that an investigating authority must examine so it may base its determination on positive evidence on the record".

14. Finally, both the *chapeau* of Article 14 and the Appellate Body's finding that an investigating authority must provide a reasoned and adequate explanation of its determination are equally applicable to review investigations. Canada agrees that investigating authorities can use different methodologies to calculate benefit in different reviews. However, the obligations that any method used to calculate benefit be transparent and adequately explained apply to the new methodology. While there may be situations in which an explanation of the reasons for changing methodologies may be required to meet the standard of transparency and adequate explanation for the new methodology, it is not strictly necessary as a general rule, and will depend on the particular facts of the case.

III. ARTICLE 19.3 OF THE SCM AGREEMENT

15. Canada considers that investigating authorities are required to determine whether countervailing duties are imposed in appropriate amounts in relation to parallel domestic judicial, arbitral or administrative review proceedings. Article 19.3 requires the imposition of countervailing duties in "appropriate amounts". The Appellate Body has explained that the term "appropriate" is synonymous with "proper", which is a relative standard that must be assessed in relation to something else. It also found that this assessment should occur in relation to what it referred to as "core norms" and that this required investigating authorities to adapt countervailing duties to particular circumstances.

16. This is consistent with the context of Article 19.3. The Appellate Body has emphasized that the obligation to impose subsidies in appropriate amounts is related to the requirement to calculate a subsidy as precisely as possible under Article VI:3 of the GATT 1994. The requirement to "maintain" judicial, arbitral or administrative procedures to review final determinations can be considered a core norm set out in Article 23 of the SCM Agreement (especially in light of the identical provision set out in Article 13 of the *Anti-Dumping Agreement*). This interpretation of Article 19.3 is also supported by the object and purpose of the SCM Agreement, which is intended to "strik[e] a balance between the right to impose countervailing duties to offset subsidization … and the obligations that Members must respect in order to do so".

17. The U.S. interpretation of Article 19.3 on the other hand is untenable. It appears to suggest that, if domestic judicial review proceedings finish prior to parallel WTO dispute settlement proceedings, there is no requirement to take into account the outcome of these judicial review proceedings in a redetermination to implement an adverse WTO decision. This simply cannot be the case.

18. It is entirely possible to envisage circumstances where a respondent company requests domestic judicial review following a countervailing duty investigation for a claim that eventually results in a reduction of its countervailing duty rate from 20% to 15% in a redetermination. The same respondent could request that its country initiate WTO dispute settlement proceedings on a separate claim that would reduce its countervailing duty rate by a further 3% in a subsequent redetermination to implement an adverse WTO decision. The U.S. position would result in a countervailing duty rate of 17% instead of 12% as the redetermination implementing the WTO decision would always replace the earlier redetermination issued as a result of domestic judicial review proceedings.

19. This interpretation would effectively cast a chill over WTO dispute settlement concerning trade remedies measures. The fact that domestic judicial review proceedings and WTO dispute settlement must exist alongside one another is reflected in Articles 23 and 30 of the SCM Agreement. These different forms of review will sometimes lead to different results, but investigating authorities have an obligation to ensure that they reconcile these results in a good faith manner that ensures that any remaining countervailing duty rate is only imposed in "appropriate amounts" in accordance with Article 19.3 of the SCM Agreement.

20. The U.S. interpretation also ignores the fact that the outcome of parallel judicial review proceedings could be considered a "measure taken to comply" in compliance proceedings under Article 21.5 of the DSU. Measures taken to comply are not restricted to measures formally or explicitly taken by Members to the rulings and recommendations of the Dispute Settlement Body. Rather, the Appellate Body has specifically found that "measures taken to comply" may include measures with a particularly close relationship with the declared measures taken to comply, such as a section 129 determination and a subsequent administrative review.

21. Here, Commerce should have provided a reasoned and adequate explanation as to why it was appropriate to replace the negotiated settlement agreements with the results of its section 129 redetermination. It was not entitled to simply replace the settlement agreement because the section 129 redetermination was issued afterwards.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

31 January 2019

Introduction

1. Mr. Chairman, members of the Panel, China welcomes this opportunity to present its views as a third party in these proceedings concerning the United States' compliance with the recommendations and rulings of the Dispute Settlement Body in *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*.

2. China's comments this morning will address issues relating to the proper framework for evaluating whether an entity is a "public body" under Article 1.1(a)(1) of the SCM Agreement, *de facto* specificity, and Article 14(d).

Public Body

3. It is now well established that a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement is an entity "vested with authority to exercise governmental functions".[1] It is similarly well established that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions."[2]

4. In China's view, it is likewise clear that Article 1.1(a)(1), properly interpreted, requires the "government function" identified by an investigating authority to have a clear and logical connection to the conduct alleged to constitute a financial contribution. In the context of the ongoing dispute regarding the U.S. compliance determinations at issue in *US – Countervailing Measures (China) (Article 21.5 – China)* ("DS437"), China notes that the United States professes to disagree with this view. The United States maintains that an entity vested with authority to perform a "government function" that has *no connection whatsoever* to the conduct that is alleged to constitute a financial contribution can still be deemed a public body.[3]

5. The U.S. interpretive position in DS437 is diametrically opposed to the position that the United States took before the Appellate Body in the original proceedings in *this* dispute, where the United States explained that the "authority required of a public body" is the authority to exercise "the key governmental functions … described in the subparagraphs [of Article 1.1(a)(1)]".[4] The U.S. position was not that the "authority required of a public body" is the authority to perform *any governmental function whatsoever*. Rather, the United States properly understood the necessary relationship between the "government function" that an entity is vested with authority to perform, and the conduct at issue under Article 1.1(a)(1).

6. Likewise, the U.S. Department of Commerce ("USDOC")'s analysis in the compliance determination at issue before this Panel does not reflect the overly broad interpretive position that the United States has staked out in DS437. Rather, in its public body analysis of India's National Mineral Development Corporation ("NMDC"), the USDOC properly recognized that the relevant question was whether NMDC was performing a "government function" when it sold iron ore to downstream entities – i.e. the conduct at issue under Article 1.1(a)(1).

7. In this respect, the USDOC explained in its determination that the Government of India owns all mineral resources on behalf of the Indian public, and that the Indian federal government has final

[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[3] See Panel Report, para. 7.28.
[4] United States' opening statement before the Appellate Body, *US – Carbon Steel (India)* (24 September 2014), para. 11 (emphasis original).

approval with respect to granting mining leases for iron ore.[5] The USDOC found that it is therefore "'a function of the government of India to arrange for the exploitation of public assets, in this case iron ore'".[6]

8. The USDOC further found that the Government of India "specifically established the NMDC to perform part of this function, *i.e.*, 'developing all minerals other than coal, petroleum oil and atomic minerals.'"[7] The USDOC explained that NMDC operates several iron ore mines and sells the iron ore it obtains from those mines.[8] Based on the evidence before it, the USDOC concluded that because NMDC is exploiting public resources on behalf of the Government of India, NMDC is performing a "government function" when it sells iron ore.[9]

9. The USDOC then proceeded to analyse whether the Government of India exercised "meaningful control" over NMDC when it engaged in the conduct at issue under Article 1.1(a)(1) of the SCM Agreement "(*i.e.*, the sale of high grade iron ore)".[10] In conducting this analysis, the USDOC did not examine whether the Government of India exercised control over NMDC's conduct in the abstract. Rather, the USDOC properly examined the government's control over the specific conduct alleged to constitute a financial contribution – the sale of iron ore – and concluded based on its examination of the relevant evidence that the government "exercised meaningful control over the NMDC and its conduct."[11]

10. In sum, China's view is that in the compliance proceedings at issue before this Panel, the USDOC correctly evaluated whether NMDC was vested with authority to perform a "government function" that is relevant to the conduct potentially being attributed to the Government of India under Article 1.1(a)(1), and that the USDOC also understood that in order to evaluate whether the Government of India was exercising *meaningful* control over NMDC, it needed to evaluate whether the Government of India was exercising control over NMDC in relation to *that conduct*. I would note that, unfortunately, this framework has eluded the USDOC entirely in its evaluation of whether Chinese companies are public bodies.

11. My comments today have focused on the fact that at a high level, China believes that the USDOC adopted a proper *framework* for its public body analysis, but China takes no position on whether the *evidence* relied upon by the USDOC in its analysis of NMDC substantiates the USDOC's ultimate conclusion that NMDC is a public body. China would, however, draw the Panel's attention to the recent panel report in *US – Countervailing Measures on Certain Pipe and Tube Products (Turkey)*("DS523") as the Panel evaluates the sufficiency of the evidence relied upon by the USDOC.

12. The panel in DS523 examined the extent to which the USDOC's determination that certain Turkish entities were public bodies rested upon evidence that each entity had in fact exercised governmental authority as opposed to "formal indicia of control".[12] The panel explained that it did not consider the "mere fact" that an entity's business strategy "*align[ed] with* GOT macroeconomic policy objectives" showed an exercise of governmental authority.[13] In this respect, China notes the USDOC's reliance in the present dispute on evidence of a recommendation by NMDC's chairman that was "*consistent with* the GOI's policies and actions".[14]

13. On the other hand, the panel in DS523 also emphasized the lack of factual evidence presented by the USDOC relating to the exertion of influence by government officials over an entity's business

[5] See U.S. Department of Commerce Issues and Decision Memorandum in the Section 129 Proceeding *United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (WTO/DS436): "Preliminary Determination on Other Issues" (18 March 2016) ("DS436 Preliminary Public Bodies Determination"), p. 6.

[6] United States' first written submission, para. 170, quoting USDOC Section 129 Other Issues Preliminary Determination, p. 6 (Exhibit IND-55); USDOC Section 129 Final Determination, p. 20 (Exhibit IND-60).

[7] United States' first written submission, para. 171.

[8] See United States' first written submission, para. 171.

[9] United States' first written submission, para. 171.

[10] United States' first written submission, paras. 173-176.

[11] United States' first written submission, para. 186.

[12] Panel Report, *US – Countervailing Measures on Certain Pipe and Tube Products (Turkey)*, paras. 7.39 and 7.40; 7.49.

[13] Panel Report, *US – Countervailing Measures on Certain Pipe and Tube Products (Turkey)*, para. 7.44 (emphasis added).

[14] United States' first written submission, para. 174 (emphasis added).

operations. For example, the panel emphasized that the United States had not shown that the presence of government officials on an entity's board of directors amounted to more than an "*ability* … to determine critical aspects" of the entity's operations.[15] By contrast, China notes the USDOC's finding in the compliance determination at issue before this Panel that the "the GOI was significantly involved in NMDC's day-to-day operations" based on, *inter alia*, evidence of the alleged involvement of NMDC directors in the actual negotiation of prices and quantities of iron ore.[16]

14. While China does not endorse all aspects of the panel's analysis in DS523, China does consider that aspects of that analysis may be of use to this Panel as it evaluates whether the evidence relied upon by the USDOC in reaching its revised determination includes evidence that the Government of India exercised control in a *meaningful* way, or whether the USDOC's analysis remains focused on mere "formal indicia" of control.

Specificity

15. China will now briefly comment on an issue pertaining to specificity. India has argued that the USDOC failed to identify the existence of the relevant subsidy programmes.[17] The United States disputes that this argument is within the scope of these compliance proceedings.[18] The United States has also asserted that "India's suggestion that the USDOC failed to identify the relevant subsidy program misinterprets Article 2 of the SCM Agreement"[19] and that "[t]his only reinforces that India's challenge is outside the scope of these Article 21.5 proceedings."[20]

16. China disagrees with the United States that India has misinterpreted Article 2 of the SCM Agreement. In the United States' view, "the existence of a [subsidy] program is not a question that is to be resolved within the confines of the third sentence of Article 2.1(c)".[21] According to the United States, "[t]o read somehow a requirement to establish the existence of 'a subsidy programme' in applying the final sentence of Article 2.1(c) misinterprets that provision to require an investigating authority to identify a subsidy program for a second time."[22]

17. The United States' interpretation Article 2.1(c) as divisible into three *isolated* sentences is illogical and overly mechanistic. In order for an investigating authority to take account of the duration of the subsidy programme as required under the third sentence of Article 2.1(c), the subsidy programme has to be identified and substantiated in the first place. If no subsidy programme is properly identified under the correct legal standard, any consideration of the length of time during which such "programme" has been in operation will necessarily be inconsistent with Article 2.1(c). In contrast, a holistic interpretation of Article 2.1(c) is consistent with the logical progression of the specificity inquiry. A holistic interpretation is also consistent with the Appellate Body's findings in DS437.[23]

18. The panel should therefore find India's argument to be within the scope of this compliance proceeding and conduct its evaluation of whether the USDOC failed to identify the existence of a subsidy program consistently with that of the Appellate Body and compliance panel in DS437.

Article 14(d)

19. Before concluding, China would like to offer its views on Article 14(d). China recalls the Appellate Body's finding that the circumstances in which an investigating authority may resort to an out-of-country benchmark under Article 14(d) are "very limited".[24] China therefore urges the Panel to carefully evaluate whether the reasons submitted by the USDOC in support of its decision to rely on an out-of-country benchmark are valid in light of the record evidence.

---

[15] Panel Report, *US – Countervailing Measures on Certain Pipe and Tube Products (Turkey)*, para. 7.42.
[16] United States' first written submission, para. 174.
[17] See India's first written submission, paras. 88-94.
[18] See United States' first written submission, Section VI.B.1.
[19] United States' first written submission, para. 210.
[20] United States' first written submission, para. 237.
[21] United States' first written submission, para. 236.
[22] United States' first written submission, para. 236.
[23] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.156.
[24] Appellate Body Report, *US – Softwood Lumber IV*, para. 102. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 439.

Conclusion

20. China thanks the Panel for the opportunity to address these important issues.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF EGYPT

I. Introduction

1. Egypt welcomes this opportunity to present its views on these compliance proceedings under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in *United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat products from India* (DS436). Egypt considers that these compliance proceedings raise significant issues of legal interpretation of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

2. In this third party submission, Egypt will focus on the following key issues:

i. The consistency with Articles 15.1 and 15.3 of the SCM Agreement of 19 USC § 1677(7)(G)(i)(III) (Section § 1677(7)(G)(i)(III)) (cross-cumulation);

ii. The USITC's injury determination;

iii. Other causes of injury (non-attribution factors);

iv. The consistency with Article 14(b) of the SCM Agreement of the continued imposition of the countervailing duty on the SDF program;

v. The consistency with the chapeau to Article 14 and Article 14(d) of the SCM Agreement of the rejection of in-country price of iron ore as a benchmark for the benefit analysis; and

vi. The issue of the "close link" in the inclusion of new subsidy programs under Articles 21.1 and 21.2 of the SCM Agreement.

II. The consistency of Section § 1677(7)(G)(i)(III) with Articles 15.1 and 15.3 of the SCM Agreement (cross-cumulation)

3. India argues that Section 1677(7)(G)(i)(III) requires the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports when petitions to initiate countervailing duty investigations or anti-dumping duty investigations are filed on the same day and countervailing duty investigations or anti-dumping duty investigations are initiated by the investigating authority. India also notes that, in certain situations, Section 1677(7)(G)(i)(III) requires that the assessment of injury be based on, *inter alia*, the volume, effects and impact of non-subsidized, dumped imports.[1]

4. In response, the United States contends that Section 1677(7)(G)(i)(III) requires cross-cumulation when the administering authority self-initiates an antidumping investigation on the same day as the filing of a countervailing duty petition by an industry, or vice versa. It further states that Section 1677(7)(G)(i)(III) requires cross-cumulation if the specific conditions of that provision are met.[2]

5. In the original proceedings, the Appellate Body held that "the effects of imports other than such subsidized imports must not be incorporated in a cumulative assessment pursuant to Article 15.3".[3] The Appellate Body further found that Section 1677(7)(G)(i)(III) requires the USITC to cumulate the effects of subsidized imports with the effects of non-subsidized imports for the

[1] India's first written submission, para. 34.
[2] United States' first written submission, para. 39.
[3] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.579.

assessment of material injury. On this basis, the Appellate Body agreed with the Panel that Section 1677(7)(G)(i)(III) is inconsistent with Articles 15.1 and 15.3 of the SCM Agreement.[4]

6. Following the guidance of the panel and the Appellate Body in the original dispute, Egypt considers that cumulating the effects of subsidized imports with the effects of non-subsidized imports (e.g. dumped, non-subsidized imports) for assessment of material injury is inconsistent with Articles 15.1 and 15.3 of the SCM Agreement.

III. The injury determination

7. According to India, the United States has acted inconsistently with Articles 15.1 and 15.4 of the SCM Agreement because the USITC failed objectively to assess the state of the domestic industry. India notes that the assessment carried out by the USITC in its Section 129 Determination is perfunctory at best and grossly falls short of the obligation to ensure an "objective examination" based on "positive evidence" of the impact of subsidized imports on the relevant economic factors and indices of the domestic industry.[5] When there is positive movement in a number of factors, it would require a compelling explanation from the investigating authorities as to how in light of such positive trends, the domestic industry is materially injured.

8. The United States alleges that the USITC found that subsidized imports had a significant impact on the domestic industry during the period of investigation. The USITC found that although most of the domestic industry's trade indicators were higher in 2000 than in 1998, many indicators declined in the latter portion of the period as subsidized imports increased their presence in the U.S. market. The U.S. industry's commercial shipments and market share declined from 1999 to 2000, even while apparent U.S. consumption in the merchant market increased, and production and capacity utilization were both substantially lower in interim 2001 than in interim 2000.[6]

9. In Egypt's view, when there is a positive movement in number of factors, the injury analysis would require a compelling explanation from the investigating authorities as to how the domestic industry is materially injured in light of, and despite, those positive trends. This is consistent with the analysis of the panel in *Thailand – H-Beams*, which stated that where an authority finds positive trends in a number of Article 3.4 factors, the injury analysis:

> … would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the [period of investigation].[7]

10. Assuming that India's understanding of the evidence before the Panel is correct, in the present dispute, subsidized imports increased by 572% during 2000 compared to 1998 (Table HRS-1). During that period, it appears that most of the domestic industry indices have improved such as total U.S. shipments, the market share, production, capacity, capacity utilization, inventories, productivity, and production cost. Conversely, it also appears that, when subsidized imports decreased by 28% during interim 2001 compared to in interim 2000, the performance of most of the economic factors deteriorated. Egypt therefore observes that these facts would appear to negate or attenuate – in the absence of a "thorough and persuasive explanation" – the causal link between the injury suffered by the domestic industry and the subsidized imports. Egypt invites the panel to examine the above mentioned view on the injury analysis.

IV. Other causes of injury (non-attribution factors)

11. India submits that the USITC failed properly to examine the following factors:

a) Imports from non-subsidized sources[8]:

- The USITC noted that imports from Brazil, Japan and Russia constituted 32.6 percent of the merchant market consumption during 1998 and subsequent to the imposition of duties on imports from the aforesaid countries, the volume of imports from these sources

[4] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.600.
[5] India's first written submission, para. 50.
[6] United States' first written submission, paras. 74 and 75.
[7] Panel Report, *Thailand – H Beams*, para. 7.249.
[8] India's first written submission, para. 61.

decreased. However, there is no rationale to presume that the "injury" to the domestic industry evident in the period was not attributable to such dumped imports; and

- Moreover, the United States' market also faced dumped imports from countries such as China, Kazakhstan, Netherlands, Romania, Chinese Taipei and Ukraine. Substantial import volumes were also coming in from these sources at less than fair value.

b) The constituents of the domestic industry faced closure owing to reasons unrelated to imports, subsidized or otherwise[9]:

- Several U.S producers experienced a number of closures; and

- Interruptions to their operations in producing hot-rolled steel products. The causes for the reported closures interruptions included equipment failure; installation of new equipment, power outages, and fires reduced demand.

c) Contraction in domestic demand: demand in the United States declined during the period of investigation.[10]

12. The United States responds that:

- The USITC acknowledged that such imports had a significant presence in the U.S. market during the period of investigation, but reasonably found that non-subject import volumes and market share declined substantially, even while the volume and market share of subsidized imports increased[11];

- The USITC examined demand trends as an alternative cause of injury. The USITC determined that declines in the domestic industry's indicators in 2000, which began early in that year, did not correspond with declines in demand, which began later that year. By identifying these temporal distinctions, the USITC ensured that it was not attributing any adverse effects of declining demand to the subsidized imports[12]; and

- The USITC did not find that these closures were caused by the subsidized imports or were otherwise indicative of material injury. Indeed, the USITC noted that the closures did not prevent the U.S. industry’s production capacity from increasing during this period.[13]

13. Egypt observes that the Appellate Body has recently undertaken a comprehensive interpretation of Article 15.5 of the SCM Agreement in *EU – PET (Pakistan)*. Specifically, the Appellate Body noted that Article 15.5 requires that the authority establish that the subsidized imports are "causing" injury to the domestic industry. This "causal relationship" requires establishing the existence of a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury sustained by the domestic industry.[14]

14. For the subsidizing imports to rise to the level of a "genuine a substantial" cause, the authority must examine both:

i. the existence and extent of the link between the subsidized imports and the injury suffered by the domestic industry (genuine); and

[9] India's first written submission, para. 61.
[10] India's first written submission, para. 61.
[11] United States' first written submission, para. 144.
[12] United States' first written submission, para. 143.
[13] United States' first written submission, para. 146.
[14] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.168 (quoting Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 132, *US – Wheat Gluten*, para. 69; *US – Lamb*, para. 179 (addressing the causation standard under Article 4.2(b) of the Agreement on Safeguards); *US – Upland Cotton*, para. 438; and *US – Large Civil Aircraft (2nd complaint)*, para. 913 (addressing the causation standard under Articles 5 and 6 of the SCM Agreement).

ii. the comparative significance of such a link in relation to the contributions of other known factors to that injury (substantial).[15]

15. The Appellate Body further recognized that factors other than the subsidized factors may "at the same time" contribute to the injury sustained by the domestic industry.[16] Thus, an investigating authority must not attribute to the subsidized imports the injuries caused by other known factors. The Appellate Body has consistently held that "[t]his analysis involves separating and distinguishing the injurious effects of other known factors from the injurious effects of the subsidized imports".[17] The authority must "provide a satisfactory explanation of the nature and extent of the injurious effects of the other known factors, as distinguished from the injurious effects of the subsidized imports".[18]

16. While recognizing that Article 15.5 of the SCM Agreement does not prescribe a particular methodology to assess causation[19], the Appellate Body has stated that the authority must satisfy itself that "the subsidized imports, on their own, qualify as a 'genuine and substantial' cause of the injury".[20] The Appellate Body also addressed the issue of how to analyze the effects of other factors even if those effects are individually "insignificant". The Appellate Body stated that:

> … in a situation where multiple other known factors, taken together, have a significant impact on the state of the domestic industry – while the impact of each of them in isolation may be only insignificant – an investigating authority may be required to assess whether the effects of all of these factors, collectively, are so significant that the subsidized imports cannot be characterized as a "genuine and substantial" cause of the injury.[21]

17. At the same time, the Appellate Body held that an authority would not be required to undertake a collective analysis of the effects of the other factors where it finds that "only a limited number of those other factors contribute to the injury, and each of them to a limited degree".[22]

18. Egypt further notes that Article 15.5 of the SCM Agreement lists certain types of "other factors" which may be relevant, including "volumes and prices of non-subsidized imports of the product in question" and "contraction in demand or changes in the pattern of consumption".[23]

19. According to India's statement of facts, it appears that the USITC has not properly examined the other known factors that may have contributed to the injury sustained by the domestic industry such as non-subsidized products; several U.S producers experiencing a number of closures; and contraction in demand. In particular:

- With respect to the volumes and prices of non-subsidized imports, Egypt takes note of the presence of other imports in the US market, which increased by 150% in 2000 compared to 1998. Consequently, the non-subsidized imports may significantly contribute to the material injury suffered by the domestic industry;

- Moreover, several U.S producers experienced a number of closures. Although the USITC found that the closures did not prevent the production capacity of the U.S industry from increasing during this period, during 2001 compared to 2000 manufacturing capacity in the US industry declined. Consequently, factory closures may considered one of the other causes of material injury suffered by the domestic industry;

- With respect to contraction in demand, Egypt notes that there is a decline in total consumption during 2000 compared to 1998 and in interim 2001 when compared to in

[15] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.169.
[16] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.169.
[17] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.171 (referring to Appellate Body Reports, *China – GOES*, para. 151; and *US – Hot-Rolled Steel*, para. 223).
[18] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.171.
[19] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.171 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 224 (in the context of Article 3.5 of the Anti-Dumping Agreement)).
[20] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.175.
[21] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.176.
[22] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.177.
[23] Panel Report, *Mexico – Olive Oil*, para. 7.305.

interim 2000 which refers to decrease in demand during the same period. Consequently, the contraction in demand may also be considered another significant cause of material injury suffered by the domestic industry.

20. To the extent that India's statement of the facts is correct, it would appear that the effects of the above-mentioned non-attribution factors could potentially be significant. The USITC was "required to assess whether the effects of all of these factors, collectively, are so significant that the subsidized imports cannot be characterized as a 'genuine and substantial' cause of the injury".[24] Egypt invites the panel to analyze the USITC non attributed analysis in the light of WTO recent jurisprudences. However, in the absence of a proper "non-attribution" analysis with respect to the injurious effects of the other known factors, it would appear that the USITC attributed the effects of these other factors to the allegedly subsidized imports.

V. The consistency of the continued imposition of countervailing duties on the SDF program with Article 14(b) of the SCM Agreement

21. Regarding the interpretation and implementation of Article 14(b) of the SCM Agreement, India claims that the USDOC acted inconsistency with Article 14(b) of the SCM Agreement in determining the benchmark interest rate with respect to the loans under the Steel Development Fund (SDF). In India's view, the USDOC did not take into account the costs incurred by recipients in order to obtain SDF loans.

22. In the original proceedings, the Appellate Body found that a proper assessment under Article 14(b) involves an examination of the total cost of the investigated loan to the recipient, and whether there is a difference between that cost and the total cost of a comparable commercial loan.[24]

23. Egypt is of the opinion that, in order to prove the existence of a "benefit" conferred by the SDF loans, the authority must derive the difference between the amount paid by the recipient company for the loan and the amount it would have paid for a similar/comparable commercial loan in the market. The difference would be the benefit under Article 1.1(b) of the SCM Agreement.

24. Moreover, when calculating the benefit conferred by the SDF loans, Egypt considers that the USDOC should clearly explain the methodology used for the calculation in a detailed and transparent manner, in accordance with the provisions of Article 14(b) of the SCM Agreement.

25. In calculating the benefit, Egypt submits that the comparison between the terms and conditions of the loan under investigation and the terms and conditions of the comparable commercial loan in the same market must be taken into consideration. The adjustments of any other expenses or fees must be taken into consideration when calculating the benefit of the investigated loans.

VI. Rejection of in-country price of iron ore as benchmark for the benefit analysis under the chapeau to Article 14 and Article 14(d) of the SCM Agreement

26. In the challenged determinations, India submits that the USDOC did not consider the in-country price of India/private domestic prices for purposes of determining the benefit conferred by the: (i) sale of high-grade iron ore by NMDC, and (ii) mining rights of iron ore programs. Rather, the USDOC relied on the export price from Australia as an appropriate benchmark.

27. In the original proceedings, the Appellate Body concluded that the USDOC determination of an out-of-country benchmark was inconsistent with Article 14(d) of the SCM Agreement because the USDOC did not adequately support its conclusion that private domestic prices were not suitable as a benchmark.[25]

28. Egypt agrees with the Appellate Body's conclusion in the original proceedings because the USDOC's dismissal or rejection of the Indian domestic prices as a benchmark should have been based on a reasonable basis. In particular, the criteria for using the export price from Australia as an appropriate benchmark should have been sufficiently explained by the USDOC.

[24] Appellate Body Report, *US – Carbon Steel (India)*, para. 7.311.
[25] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.269.

29. Egypt further submits that, consistently with Article 14(d) of the SCM Agreement, in-country benchmarks are more appropriate than the external benchmarks because they include the circumstances reflecting the prevailing market conditions in the country concerned. For this reason, the exceptional situations in which an authority may ignore in-country benchmarks is an important matter that needs adequate clarification in WTO jurisprudence.

VII. New subsidy programs under Articles 21.1 and 21.2 of the SCM Agreement

30. In the original proceedings, the Appellate Body explained that, in assessing the likelihood of subsidization under Articles 21.1 and 21.2 of the ACM Agreement, an investigating authority may "examine new subsidy allegations in the conduct of an administrative review".[26] The Appellate Body, however, cautioned that the "new subsidies" must be "those that have a sufficiently close link to the subsidies that resulted in the imposition of the original countervailing duty".[27]

31. Egypt considers that it may be useful for the Panel to provide further clarification on the "close link or similarity between the injury resulting from the original subsidization and the new subsidies being proposed for examination".[28]

VIII. Conclusion

32. Egypt thanks the Panel for the opportunity to submit its view and stands ready to answer any questions that the Panel may have.

[26] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.541.
[27] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.541.
[28] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.541.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INDIA'S CLAIMS CONCERNING 19 USC §1677(7)(G)(I)(III)

1. The US objects to India's claims concerning Section 1677(7)(G)(i)(III), arguing that the Panel should not assess compliance with the correlative DSB findings because the Appellate Body acted in violation of Article 17.6 DSU, by finding that section to be as such WTO incompatible. The EU considers that since the Appellate Body report has been adopted by the DSB, pursuant to Article 17.14 of the DSU, both India and US shall accept it unconditionally, as a final resolution to that dispute. Accordingly, pursuant to Article 21.5, this Panel has a legal obligation to check compliance with all the recommendations and rulings of the DSB, to the extent there is a disagreement between the parties about compliance with them.

2. In any case, the Appellate Body did not violate Article 17.6 DSU by making findings on an issue outside the scope of the appeal. Instead, it responded to the Article 11 DSU appeal lodged by the US and then it completed the legal analysis. In order to provide a prompt and effective settlement of the dispute, the Appellate body is entitled to complete the legal analysis, notably of an "as such" claim when the text of the allegedly WTO incompatible measure is clear and undisputed. Even if the panel request contains a clerical error, the EU also believes that India's claims are within the panel's terms of reference, when one reads India's Panel request in light of the Appellate Body jurisprudence on the application of Article 6.2 DSU in the context of Article 21.5 panel's proceedings.

3. Coming to the merits of India's claims, the EU notes that the Appellate Body found Section 1677(7)(G)(i)(III) to be as such incompatible with US WTO obligations "in the event that the conditions set out in that provision are fulfilled". The US has argued that the US administration can use its discretion so as to prevent those conditions to be fulfilled. However, the US does not seem to have taken any lawful commitment, binding its administration to exercise that discretion in that way. Finally, in light of WTO case law, the EU considers that when assessing whether the US has complied with DSB recommendations and rulings, the Panel, in order to secure a prompt settlement of this dispute, should take into account implementation actions taken subsequent to the expiry of the reasonable period of time.

4. With regard to India's claims concerning the USDOC determination that NMDC is a public body, the EU is of the view that the USDOC reviewed its previous public body determination in line with the jurisprudence of the Appellate Body and taking care to implement the specific recommendations and rulings of the DSB in the original dispute. Indeed, the USDOC looked at the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country, and notably at evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates. The USDOC also assessed the extent to which the GOI in fact exercises meaningful control over the entity and its conduct, by looking at the degree of control exercised by the GOI over NMDC and the degree of autonomy by the NMDC in carrying out its statutory activity. The EU does not opine on the evidentiary value of any particular piece of evidence or the totality of the evidence presented by India or the US. However, the EU stresses that the question of "public body" can be assessed on the basis of any type of evidence that is capable of pointing to the government involvement in the entity. Hence, also the entity's non-commercial behaviour could be a relevant evidence, even if not determinative in itself. If the existence of a public body could only be demonstrated on the basis of official or formal evidence there would be a risk of discriminating between those Members which rely on formal and transparent means to relate with their public entities vis-à-vis those that rely on informal ones. Likewise, the EU does not think that an explicit designation of a function is required for that function to be considered as "governmental" and for the entity performing that function to constitute a public body. For instance, the observation of the concrete conduct of an entity may reveal that such entity is a public body when its behaviour reflects the fact that it exercises a governmental function. By the same token, the performance of the same function by private, commercial entities in competition with a governmental entity does not remove the possibility that such a function can be characterised as "governmental".

5. The US maintains that India is precluded from arguing that in order to assess *de facto* specificity of the subsidy for the sale of high grade iron ore the USDOC should have first identified the subsidy programme and should not have relied solely on the provision of the alleged subsidy to the mandatory respondents as the relevant duration. The EU finds that India is precluded to raise only those claims that concern unchanged aspects of the measure taken to comply, which are separable from other aspects of the measure taken to comply and which were resolved on the merits in the original proceedings.

6. Further, the EU considers that a formal finding of existence of a subsidy program was not necessary in order for the USDOC to take account of the length of time during which that subsidy programme was in operation. At the same time the US should be able to show that it had an appropriate understanding of the subsidy programme at issue when assessing the question of specificity. Evidence of such understanding may result for instance from the investigating authority analysis of the existence of the subsidy and of the Member's policy in the sector in which the subsidy was granted. The EU thinks it is also important to stress that whether the authority's understanding of the program is sufficient or not will greatly depend on the nature of the subsidy and the subsidy program itself. Finally, the EU recalls that several panels have found that taking into account the two factors in the final sentence of Article 2.1(c) (including the "length of time" requirement) need not be done explicitly.

7. As regards India's claims against USDOC findings of *de facto* specificity of the sale of mining rights of iron ore and mining rights of coal, the EU agrees with the US. When the investigating authority has found a subsidy to be *de facto* specific because of use of the subsidy programme by a limited number of certain enterprises, arguments grounded on the existence of objective criteria and conditions in the domestic legislation governing the eligibility to the subsidy program are irrelevant.

8. With respect to India's claim that the US acted inconsistently with Article 14(d) SCMA by rejecting domestic prices because they were not actual transaction prices, the EU considers that actual prices are to be preferred over provisional prices because they provide a more accurate indicator of the "adequate remuneration" for the provision of goods. Provisional prices can differ quite significantly from actual prices. The EU does not exclude, however, that also domestic provisional prices may be used instead of export prices where such use is properly argued and substantiated. Regarding India's claim with respect to the USDOC's rejection of domestic prices because of concerns of confidentiality, the EU considers that such rejection may be justified under certain strict conditions.

9. Regarding the USDOC's rejection of NMDC's export prices as benchmark because they were prices from the government entity whose financial contribution was under investigation, the EU considers that Appellate Body case law does not exclude the use of such prices per se but has found that they should only be used with caution. The threshold for investigating authorities to exclude such prices should therefore not be set at a high level.

10. India claims that the USDOC acted inconsistently with Articles 21.1 and 21.2 by investigating various new subsidies in ARs between 2004 and 2008 and two new subsidies in the Section 129 proceedings despite the absence of a sufficiently close nexus. The EU notes that India did not raise a claim regarding the sufficient nexus in the original proceedings with respect to the ARs 2004 to 2008. Under Appellate Body case law, if India had been able to make such claim in the original proceedings – which would appear to be the case - it would be precluded from making such claim in the Article 21.5 proceedings. Concerning the question whether the two subsidies investigated by the USDOC in the Section 129 proceedings have a sufficiently close nexus, the EU does not opine on the facts but recalls its position that relevant criteria in this respect include *inter alia* whether the subsidies in question concern the same Member, the same beneficiaries and the same products.

11. The EU agrees with a previous panel that when a procedural obligation set forth in the SCM Agreement has been fulfilled in the original proceeding (e.g. certain obligations under Article 12 SCMA), the adjudicator will refrain from ruling that it had to be re-observed, unless the steps taken by the investigating authority made it necessary. With respect to India's claim under Article 12.1 SCMA, the EU considers that Article 12.1 does not provide for a general obligation to request additional information in administrative review proceedings. Such obligation to request information will depend on the circumstances of each case, including *inter alia* the amount of available evidence on record from the original proceedings and the adequacy of such evidence. An investigating

authority has a degree of discretion to assess whether additional evidence is needed. The EU also recalls case law that there is no indefinite right to submit evidence in CVD investigations.

12. Regarding India's claim under Article 12.8 SCMA the EU takes the position that it may not be sufficient for an investigating authority to simply put essential facts on the record to comply with Article 12.8. The respective disclosure document must somehow indicate – even if only implicitly – that the essential facts in question are envisaged by the investigating authority to form the basis of the final determination.

13. Concerning India's claim under Article 19.3, the EU considers that Article 19.3 does not constitute a catch-all provision that allows a complainant to challenge an investigation authority's calculation and determination of a countervailing duty rate. While it is not excluded that certain factors such as settlements may be taken into account under Article 19.3, the EU fails to see an "affirmative obligation" for settlements in this case similar to the one that was found by the Appellate Body as regards double remedies. Such obligation neither seems to exist under specific SCM provisions such as Articles 23 or 30 nor under more general principles such as legitimate expectations.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan is participating in this dispute because of its systemic interest in the correct and consistent interpretation and application of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). In particular, Japan addresses the definition of "public body" under Article 1.1(a)(1); the use of an "administrative commitment" as a means to comply with DSB recommendations and rulings; cross-cumulation under Article 15; the ability to challenge procedural deficiencies under Article 12.1 in compliance proceedings; and the determination of the likelihood of "continuation or recurrence of subsidization and injury under Article 21.3.

II. THE DEFINITION OF "PUBLIC BODY" UNDER ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

2. The Appellate Body has explained that a "public body" is "an entity that possesses, exercises or is vested with governmental authority."[1] There are "different types of evidence" that may be relevant to showing governmental authority.[2] The Appellate Body has stated that "a government's exercise of 'meaningful control' over an entity *and its conduct*, including control such that the government can use the entity's resources as its own, *may certainly be relevant evidence* for purposes of determining whether a particular entity constitutes a public body."[3] It also has stated that "whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member *may be a relevant consideration* for determining whether or not a specific entity is a public body."[4] The Appellate Body has not required that each conduct of an entity must be classified as "governmental" or "in the public realm" in order for the entity to be found to be a "public body".

3. Rather, in examining whether an entity is a "public body", an investigating authority must give due regard to "the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country."[5] The "core characteristics and functions of the relevant entity"[6] may be assessed by observing the entire activities of the relevant entity. This overall assessment requires a holistic analysis. Japan considers that an investigating authority is not required to find a link or relationship between the relevant government function and the conduct giving rise to the financial contribution, as this holistic analysis can be done without finding such a link or relationship.[7]

4. Japan considers that the business sector to which an entity belongs, or whether the entity engages in commercial transactions, are not decisive factors for a finding of "public body".[8] Therefore, the fact that the industry includes several commercial private entities does not exclude the possibility that an entity operating in that industry is a "public body". In the same way, it would be unreasonable to categorically deem an entity operating in a certain industry as a "public body" only because the industry is considered a public utility in that country regardless of its core characteristics and functions, its relationship with the government, and the legal and economic environment in that country. Although the nature of the industry in which an entity operates may be taken into account, it cannot be the sole decisive factor in determining whether the relevant entity is a "public body".

---

[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[3] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20. (emphasis added)
[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297. (emphasis added); see also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.
[5] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.29, 4.43; see also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[6] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.
[7] See Japan's response to Panel question No. 4.a.
[8] See Japan's answer to Panel question No. 1.

5. Japan further maintains that the requirements of "financial contribution" and "public body" under Article 1.1(a)(1) underscore the importance of the transfer of the public's resources. Indeed, the Appellate Body has found that "a government's exercise of 'meaningful control' over an entity and its conduct, including control such that the government can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body."[9] In Japan's view, government resources by their very nature are distinct from private resources. Government resources derive from the government's capability to procure financial resources through taxation and accordingly, the procurable amount by the government is not constrained by the economic feasibility of its activities. This stands in sharp contrast to private enterprises that must provide a financial return in order to attract resources from the market. Therefore, whether or not an entity can use, including transfer, government resources is an important factor that distinguishes government and private entities.

6. Finally, Japan considers that even if there is "compelling evidence" on a few factors that are relevant to the "public body" investigation, such evidence should not preclude an investigating authority from taking into account other factors. Rather, an investigating authority should "avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant."[10]

III. ARTICLE 15 OF THE SCM AGREEMENT

A. The United States' "As Such" Inconsistency

7. Japan recognizes that "it is, in principle, within the Member's discretion to choose the means of implementation and to decide in which way it will seek to achieve compliance".[11] However, a Member must achieve full compliance with the DSB's recommendations and rulings. As the Appellate Body has found, "[t]here will not be full compliance where the implementing Member fails to take action to rectify the WTO-inconsistent aspects of a measure that remains in force after the end of the reasonable period of time".[12] Furthermore, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement impose affirmative obligations on all WTO Members to take steps to ensure the conformity of their laws with their WTO obligations. Thus, a panel would have to exercise extreme caution before accepting that an administrative "commitment" achieves compliance with DSB recommendations and rulings, where the implementing Member has made no adjustments to the statute found to be "as such" WTO-inconsistent.

B. Cross-Cumulation

8. The Appellate Body has found that "the effects of imports other than such subsidized imports must not be incorporated in a cumulative assessment pursuant to Article 15.3."[13] Japan notes that the Appellate Body's ruling, if taken at face value, would appear to leave a logical gap with regards to the principal objective of Article 15.3 of the SCM Agreement, as well as the parallel provisions under Article 3.3 of the Anti-Dumping Agreement. In Japan's view, the purpose of Article 15.3 is to capture circumstances where the causal relationship between the injury and subsidized imports may escape scrutiny simply because it would be difficult to identify, individually, the injurious effects of subsidized imports that originate from multiple countries. Similarly, just as the effects of subsidized imports originating from several countries may not be adequately taken into account in a country-specific analysis, depending on the conditions of competition in the domestic market in question, the combined effects of subsidized and dumped imports from several countries may not be adequately taken into account if cross-cumulation is prohibited.

IV. ARTICLE 12.1 OF THE SCM AGREEMENT

9. Under Article 21.5 of the DSU, the terms of reference of a compliance panel cover any disagreement as to the WTO consistency "with the covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. Japan is thus of the view that, even when there were no findings of violations of certain procedural obligations in an original proceeding, there may

[9] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20.
[10] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.
[11] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 212.
[12] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 160.
[13] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.579.

be circumstances where an investigating authority takes new steps to remedy the violations of substantive obligations. In such circumstances, the consistency of such new steps with the same procedural obligations will be a new issue. On the other hand, if the authority has not taken any new steps to comply with the recommendations and rulings, then there are no "measures taken to comply", whose consistency with the procedural obligation would be within the compliance panel's terms of reference.

10. However, procedural obligations under the WTO agreements vary considerably, and their nature and scopes are different. Even within Article 12 of the SCM Agreement there are a number of different procedural obligations. Furthermore, even if new "steps" are taken in the implementation period, the nature and functions of such steps may vary. Whether Article 12 applies to these "steps" will depend on the nature of the "steps" as well as the specific obligations at issue in each case.

V. ARTICLE 21.3 OF THE SCM AGREEMENT

11. The text of Article 21.3 of the SCM Agreement does not specify particular analyses that an investigating authority must undertake or particular factors or elements that the investigating authority is required to consider, when making a determination of the likelihood of "continuation or recurrence of subsidization and injury". However, considering that a countervailing duty shall remain in force only to the extent necessary to "counteract subsidization which is causing injury"[14], a causal link between subsidization and injury to the domestic industry is fundamental to the imposition and maintenance of a countervailing duty. If subsidized imports cease to exist, or subsidized imports, if any, cease to (be able to) cause injury to the domestic industry, no countervailing duty can be imposed. Thus, Japan maintains that the determination of the likelihood of "continuation or recurrence of subsidization and injury" must clearly demonstrate the nexus between the termination of countervailing duties and the continuation or recurrence of the injury.

12. Based upon this standard, the investigating authority cannot simply assume that there is a basis to maintain the countervailing duties in place and accordingly the determination of likelihood under Article 21.3 cannot solely be based on the determinations made in the original investigation and prior reviews. Article 21.3 requires an investigating authority to make a likelihood determination based on positive evidence and an objective examination, as well as reaching a reasoned and adequate conclusion based on a sufficient factual basis.[15]

VI. CONCLUSION

13. Japan thanks the Panel for the opportunity to share its views.

[14] Article 21.1 of the SCM Agreement.
[15] See Japan's response to Panel question No. 9.