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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

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Canada – Renewable Energy/ Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
Canada – Renewable Energy/ Canada – Feed-in Tariff Program	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, DSR 2013:I, p. 237
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China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
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EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report WT/DS316/AB/R, DSR 2011:II, p. 685
EC and certain member States – Large Civil Aircraft (Article 21.5 – US)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States*, WT/DS316/RW and Add.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS316/AB/RW
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US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:1, p. 7
US – Countervailing Measures (China)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R, DSR 2015:1, p. 183
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US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/AB/RW and Add.1, adopted 11 April 2019

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US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, adopted 11 April 2019, as modified by Appellate Body Report WT/DS353/AB/RW
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US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
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US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641
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US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
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US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
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US – Washing Machines	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875

Short Title	Full Case Title and Citation
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117

EXHIBITS REFERRED TO IN THIS REPORT

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IND-5	USITC's 2001 Determination	USITC, hot-rolled steel products from Argentina and South Africa, investigation No. 701-TA-404 (Final) and investigation Nos. 731-TA-898 and 905 (Final), Publication 3446 (August 2001)
IND-6	2000 Issues and decision memorandum	Issues and decision memorandum, Final results of the countervailing duty investigation, 66 ITADOC 49635 (28 September 2001)
IND-8	Indian Supreme Court Judgment	Supreme Court, Tata Iron and Steel Co Limited v. Collector of Central Excise, Jamshedpur (24 October 2002) 8, 338
IND-13	GOI's supplemental questionnaire response, 2004 administrative review	Administrative review for the period 01/01/04-12/31/04, GOI's supplemental questionnaire response (2 September 2005)
IND-14	Preliminary results of administrative review (2004)	Notice of preliminary results of countervailing duty administrative review, 71 FR 1512 (10 January 2006)
IND-15	Final results of administrative review (2004)	Issues and decision memorandum, Final results of administrative review (10 May 2006)
IND-18	GOI's questionnaire response, 2006 administrative review	Administrative review for the period 01/01/06-12/31/2006, GOI's response to the USDOC's questionnaire dated 16 April 2007 (23 April 2007)
IND-30	Essar's supplemental questionnaire response, 2006 administrative review	Essar Steel Limited's supplemental questionnaire response, 2006 AR (14 November 2007)
IND-32	2006 Preliminary results of CVD administrative review	Notice of preliminary results of countervailing duty administrative review, 2006 AR, 73 FR 1578 (9 January 2008)
IND-33	Tata's supplemental questionnaire response, 2006 administrative review	Tata Iron and Steel Co Limited's questionnaire response to supplemental questionnaires dated 11 and 18 January 2008 (8 February 2008)
IND-35	GOI 2006 administrative review (8 February 2008)	GOI's Response to supplemental questionnaire, 2006 AR (8 February 2008)
IND-36	Tata verification exhibits	Certification of service of verification exhibits and minor corrections (17 March 2008)
IND-38	2006 Issues and decision memorandum	Issues and decision memorandum, Final results of administrative review (7 July 2008)
IND-41	Essar's supplemental questionnaire response, 2007 administrative review	Essar Steel Limited's response to supplemental questionnaire, 2007 AR (21 November 2008)
IND-43	Final results of administrative review (2007)	Issues and decision memorandum, final results and partial recession of administrative review (29 April 2009)
IND-48	JSW Amended final results (2010)	USDOC, certain hot-rolled carbon steel flat products from India, amended final results of countervailing duty administrative review pursuant to court decision, 75 FR 80455 (22 December 2010)
IND-49	Tata Amended final results (2011)	USDOC, certain hot-rolled carbon steel flat products from India, amended final results of countervailing duty administrative review pursuant to court decision, 76 FR 77775 (14 December 2011)
IND-55	Preliminary Determination	USDOC, Preliminary Determination on other issues, Section 129 proceeding, countervailing duty measures on certain hot-rolled carbon steel flat products from India (WTO/DS436) (18 March 2016)
IND-56	Rejected case brief	USDOC, GOI's rejected case brief in Section 129 proceeding on other issues (28 March 2016)
IND-57	Case brief	USDOC, GOI's revised case brief in Section 129 proceeding on other issues (31 March 2016)
IND-58	USITC's Section 129 Determination	USITC, hot-rolled steel products from India, investigation No. 701-TA-405 (Section 129 Consistency Determination), Publication 4599 (March 2016)
IND-59	Transcript of the hearing before the USDOC	Transcript of the hearing before USDOC's International Trade Administration (8 April 2016)

Exhibit	Short Title (if any)	Description
IND-60	Final Determination	USDOC, Final Determination, Section 129 proceeding, countervailing duty measures on certain hot-rolled carbon steel flat products from India (WTO/DS436) (14 April 2016)
IND-63	DSB minutes WT/DSB/M/380	DSB, Minutes of the meeting held on 22 June 2016, WT/DSB/M/380 (26 September 2016)
IND-64	DSB minutes WT/DSB/M/385	DSB, Minutes of the meeting held on 26 September 2016, WT/DSB/M/385 (1 November 2016)
IND-65	DSB minutes WT/DSB/M/387	DSB, Minutes of the meeting held on 26 October 2016, WT/DSB/M/387 (5 December 2016)
IND-66	Hoda Report	A. Hoda, "National Mineral Policy, report of the High Level Committee", GOI (December 2006)
IND-67	Excerpt from Dang Report, Expert Group Report	Excerpt from R. K. Dang (chair), "Report of the Expert Group on preferential grant of mining leases for iron-ore, manganese ore and chromium ore"
USA-2	Dang Report	Letter dated 23 May 2007 to Secretary Gutierrez, "Fifth administrative review of certain hot-rolled carbon steel flat products from India", exhibit 31, R. K. Dang (chair), "Report of the Expert Group on preferential grant of mining leases for iron-ore, manganese ore and chromium ore"
USA-3	Verification Report	Memorandum dated 3 January 2006 to E. B. Greynolds, programme manager, "Verification of the questionnaire responses submitted by the Government of India"
USA-8	Hoda Report	Letter dated 23 May 2007 to Secretary Gutierrez, "Fifth administrative review of certain hot-rolled carbon steel flat products from India", exhibit 10: A. Hoda, "National Mineral Policy, report of the High Level Committee", GOI (December 2006)
USA-14	GOI's supplemental questionnaire response 2001	Letter dated 20 March 2001 to Secretary Evans, "countervailing duty investigation of certain hot-rolled carbon steel flat products from India"
USA-17	USDOC Implementation of Section 129 Determination	USDOC, certain hot-rolled carbon steel flat products from India, Implementation of determinations under Section 129 of the Uruguay Round Agreements Act, 81 Fed. Reg. 27,412 (6 May 2016)
USA-31	GOI's Section 129 brief	USITC, GOI's Section 129 brief
USA-36		Letter dated 23 June 2016 from the Office of the USTR to the USDOC
USA-37		Letter dated 28 June 2016 from the USDOC in response to the Office of the USTR

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
CIT	Court of International Trade
COMPAS	commercial policy analysis system
Covered Agreements	The covered Agreements of the WTO
CVD	countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Essar	Essar Steel India Limited
GATT 1994	General Agreement on Tariffs and Trade 1994
GOI	Government of India
ISPAT	Ispat Industries Limited
JPC	Joint Plant Committee
JSW	JSW Steel Limited
LTAR	less than adequate remuneration
MMDR Act	Mines and Minerals (Development and Regulation) Act
MML	Mysore Minerals Limited
NMDC	National Mineral Development Corporation
POI	Period of investigation
POR	Period of review
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDF	Steel Development Fund
Tata	Tata Iron and Steel Co Limited
URAA	Uruguay Round Agreements Act
USC	United States Code
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
USTR	United States Trade Representative
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by India

1.1. This compliance dispute concerns India's claims against measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceeding in *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*.

1.2. On 5 June 2017, India requested consultations with the United States pursuant to paragraph 1 of the Agreement between India and the United States dated 6 May 2016 concerning "Agreed Procedures under Articles 21 and 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)".[1]

1.3. Consultations were held on 13 July 2017 and 4 October 2017. These consultations failed to resolve the dispute.

1.2 Panel establishment and composition

1.4. On 29 March 2018, India requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU, Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with standard terms of reference.[2] At its meeting on 27 April 2018, the DSB referred this dispute to the original panel in accordance with Article 21.5 of the DSU.

1.5. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered Agreements cited by the parties to the dispute, the matter referred to the DSB by India in document WT/DS436/18 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those Agreements.[3]

1.6. In accordance with Article 21.5 of the DSU, the Panel was composed on 25 May 2018 as follows:

Chairperson: Mr Hugh McPhail

Members: Mr Anthony Abad
Mr Hanspeter Tschaeni

1.7. Canada, China, Egypt, the European Union, Japan, and the Russian Federation notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.8. After consultation with the parties, the Panel adopted its Working Procedures[4] and timetable on 27 June 2018. The Panel subsequently revised its timetable on 24 September 2018 and 14 February 2019.

1.9. The Panel held its substantive meeting with the parties on 30 and 31 January 2019. A session with the third parties took place on 31 January 2019. The Panel issued its Interim Report to the parties on 12 July 2019. The Panel issued its Final Report to the parties on 4 October 2019.

2 FACTUAL ASPECTS

2.1. This compliance dispute concerns the imposition by the United States of countervailing duties (CVDs) on imports of certain hot-rolled carbon steel flat products from India. India has challenged

[1] Request for consultations by India, WT/DS436/17 (India's consultations request).
[2] Request for the establishment of a panel by India, WT/DS436/18 (India's panel request).
[3] Constitution note of the Panel, WT/DS436/19.
[4] Panel's Working Procedures (Annex A-1).

the following measures, and their amendments, replacements, implementing acts (as identified in India's panel request), or any other related measure in connection with them:

a. Original Investigation:

   i. Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination With Final Antidumping Duty Determinations: *Certain Hot-Rolled Carbon Steel Flat Products From India*: 66 FR 20240-01, April 20, 2001.

   ii. Issues and Decision Memorandum – Final Results of the Countervailing Duty Investigations: *Certain Hot-Rolled Carbon Steel Flat Products From India*, 66 ITADOC 49635, September 21, 2001.

   iii. Final Affirmative Countervailing Duty Determination: *Certain Hot-Rolled Carbon Steel Flat Products From India*, 66 FR 49635-01, September 28, 2001.

   iv. Injury Determination: *Hot Rolled Steel Products from China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 701-TA-405-408 and 731-TA-899-904 and 906-908, Pub. 3468, United States International Trade Commission (USITC), November 2001.

   v. Amended Final Results of Countervailing Duty Orders*: Certain Hot-Rolled Carbon Steel Flat Products From India and Indonesia*, 66 FR 60198-01, December 3, 2001.

   vi. Countervailing Duty Order in the Investigation: *Certain Hot Rolled Carbon Steel Flat Products from India*, January 8, 2002.

b. Administrative Review: period of review (POR) April 20, 2001 through December 31, 2002

   i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 907-01, January 7, 2004.

   ii. Issues and Decision Memorandum – Final Results of the Countervailing Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products From India, 69 ITADOC 26549, May 6, 2004.

   iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 26549-01, May 13, 2004.

c. Administrative Review: POR January 1, 2004 through December 31, 2004

   i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 1512-01, January 10, 2006.

   ii. Issues and Decision Memorandum – Final Results of Administrative Review of the Countervailing Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 ITADOC 28665, May 10, 2006.

   iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-rolled Carbon Steel Flat Products from India, 71 FR 28665-01, May 17, 2006.

d. Sunset Review:

   i. Issues and Decision Memorandum – Final Results of Expedited Sunset Reviews of the Countervailing Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand, 71 ITADOC 70960, December 7, 2006.

ii. Final Results of the Expedited Five-Year (Sunset) Reviews of the Countervailing Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand, 71 FR 70960-03, December 7, 2006.

iii. Injury Determination – Hot Rolled Steel Products from China, India, Indonesia, Kazakhstan, Argentina, Romania, South Africa, Taiwan, Thailand, and Ukraine, 701-TA- 404-408 and 731-TA-898-902 and 904-908 (Review), Pub. 3956, USITC, October 2007.

iv. Continuation of Antidumping Duty and Countervailing Duty Orders – Certain Hot-Rolled Carbon Steel Flat Products from India, Indonesia, the People's Republic of China, Taiwan, Thailand, and Ukraine, 72 FR 73316-03, December 27, 2007.

e. Administrative Review: POR January 1, 2006 through December 31, 2006

i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 73 FR 1578-02, January 9, 2008.

ii. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India, 73 ITADOC 40295, July 7, 2008.

iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India, 73 FR 40295-02, July 14, 2008.

f. Administrative Review: POR January 1, 2007 through December 31, 2007

i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 73 FR 79791-01, December 30, 2008.

ii. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 74 ITADOC 20923, April 29, 2009.

iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 74 FR 20923-01 May 6, 2009.

g. Administrative Review: POR January 1, 2008 through December 31, 2008

i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 75 FR 1496-01, January 11, 2010.

ii. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot Rolled Carbon Steel Flat Products from India, 75 ITADOC 43488, July 19, 2010.

iii. Final Results of Countervailing Duty Administrative Review – Certain Hot Rolled Carbon Steel Flat Products from India, 75 FR 43488-01, July 26, 2010.

h. In relation to the proceedings by the United States Department of Commerce (USDOC):

i. Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Commencement of Compliance Proceedings Pursuant to Section 129 of the Uruguay Round Agreements Act (URAA), 80 FR 57336 dated September 23, 2015.

ii. Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436): Preliminary Determination of Facts Available dated March 17, 2016.

iii. 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 dated March 18, 2016.

iv. Preliminary Determination – No Change: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2004 and DS436-2007).

v. Calculations for Preliminary Determination: JSW Steel Limited (JSW) - Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2006).

vi. Calculations for Preliminary Determination: Tata Iron and Steel Co. Limited (Tata) - Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2008).

vii. Final Determination - Section 129 Proceeding: United States - Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 14, 2016.

viii. Calculations for Final Determination: Essar Steel India Limited (Essar) - Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2006).

ix. Calculations for Final Determination: Essar Steel India Limited (Essar) - Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2007).

x. Calculations for Final Determination: Ispat Industries Limited (ISPAT) - Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2006).

xi. Calculations for Final Determination: JSW Steel Limited (JSW) - Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2006).

xii. Calculations for Final Determination: Tata Steel Ltd. (Tata) - Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2006).

xiii. Calculations for Final Determination: Tata Steel Ltd. (Tata) - Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436) dated April 21, 2016 (DS436-2008).

xiv. Certain Hot-Rolled Carbon Steel Flat Products from India: Implementation of Determinations Under Section 129 of the URAA, 81 FR 27412 dated May 6, 2016.

xv. Amended cash deposit instructions for certain hot-rolled carbon steel flat products from India pursuant to the final determination under Section 129 (C-533-821) dated May 13, 2016.

i. In relation to the proceedings by the USITC:

i. Letter from the Chairman of the USITC to United States Trade Representative (USTR) Ambassador dated October 23, 2015.

ii. Hot-Rolled Steel Products from India; Scheduling of a Countervailing Duty Proceeding Under the URAA, Investigation No. 701–TA–405 (Section 129 Consistency Determination), USITC, 80 FR 75132, dated December 1, 2015.

iii. Hot-rolled Steel products from India, Investigation No. 701-TA-405 (Section 129 Consistency Determination), USITC, Publication 4599 dated March 7, 2016.

j. Others:

i. Section 19 United States Code (USC) 1677 (7)(G)(iii).[5]

ii. Dispute Settlement Body, Minutes of the Meeting dated 21 July 2016, WT/DSB/M/383, dated October 11, 2016.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. India requests the Panel to find that:

a. The United States' failure to amend or repeal 19 USC § 1677(7)(G)(iii)[6] is inconsistent with the DSB recommendation in this dispute as well as Articles 15.1, 15.2, 15.3, 15.4, and 15.5 of the SCM Agreement.

b. The United States' determination regarding the existence of a financial contribution is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

c. The United States determination regarding *de facto* specificity of "sale of high grade iron ore by [National Mineral Development Corporation]", "Mining rights of Iron Ore" and "Mining of Coal" is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement.

d. The United States' failure to provide a notice of information which it required from India and rejection of information voluntarily submitted by India during Section 129 Determination is inconsistent with Article 12.1 of the SCM Agreement.

e. The United States' failure to inform India and all interested parties of the essential facts under consideration which form the basis for the decision as to whether to apply definitive measures is inconsistent with Article 12.8 of the SCM Agreement.

f. The exclusion of and the failure to adequately explain the exclusion of (i) available in-country benchmarks for iron ore; and (ii) National Mineral Development Corporation (NMDC)'s export prices, as benchmarks, when determining benefit conferred by the alleged programmes titled "sale of high grade iron ore by NMDC" and "Mining rights of Iron Ore" is inconsistent with the chapeau to Article 14 and Article 14(d) of the SCM Agreement.

g. The continued imposition of CVDs against the Steel Development Fund (SDF) programme without accounting for the borrower's cost in obtaining loans under that programme is inconsistent with the *chapeau* of Article 14 and Article 14(b) of the SCM Agreement.

h. The United States' failure to consider the existence of a link or relationship or explanatory force between the import of the alleged subsidized imports and the price of the domestic like products is inconsistent with Articles 15.1 and 15.2 of the SCM Agreement.

[5] This is the formulation used by India in its panel request. We acknowledge that this formulation contains a typographical error and that the correct reference is "19 USC § 1677(7)(G)(i)(III)". See section 7.9.2 below.

[6] See footnote 5 above.

i. The United States' failure to examine and evaluate the existence of a link or relationship or explanatory force between the alleged subsidized imports and the state of the domestic industry is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement.

j. The erroneous examination of causal link by the United States is inconsistent with Articles 15.1 and 15.5 of the SCM Agreement.

k. The unilateral termination of the CVD rate agreed between JSW and the USDOC in the *Amended Final Results of Countervailing Duty Administrative Review Pursuant to Court Decision*, 75 FR 80455 dated 22 December 2010 and between Tata and the USDOC in the *Amended Final Results of Countervailing Duty Administrative Review Pursuant to Court Decision*, 76 FR 77775 dated 14 December 2011 is inconsistent with Article 19.3 of the SCM Agreement.

l. The continued imposition of CVD against new subsidy programmes pursuant to Section 129 Determination pertaining to 2004, 2006, 2007, and 2008 administrative reviews (ARs) is inconsistent with Articles 21.1 and 21.2 of the SCM Agreement.

m. The imposition of CVD against "Mining rights of Iron Ore" and "Mining of Coal" is inconsistent with Articles 21.1 and 21.2 of the SCM Agreement.

n. As a consequence of the inconsistencies mentioned hereinabove, the measures are inconsistent with Article 10 of the SCM Agreement and Article VI of the GATT 1994.

3.2. India requests the Panel to find that the United States has failed to comply with the recommendations and rulings of the DSB.

3.3. The United States requests that the Panel find that the United States has complied with the recommendations and rulings of the DSB and that the United States' measures taken to comply are not inconsistent with the SCM Agreement or the GATT 1994. The United States further requests that the Panel reject India's claims to the contrary.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries that were provided to the Panel in accordance with paragraph 23 of the Working Procedures, as adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Canada, China, Egypt, the European Union and Japan are reflected in their executive summaries in accordance with paragraph 26 of the Working Procedures (see Annexes C-1, C-2, C-3, C-4, and C-5).[7]

6 INTERIM REVIEW

6.1. 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 with respect to those "precise aspects of the interim report" for which the United States had requested that meeting. On the same day,

[7] The Panel informed the third parties in a communication dated 13 March 2019 that it would use Egypt's third-party submission and China's third-party statement as their executive summaries pursuant to paragraph 26 of the Working Procedures. The Russian Federation indicated on 7 March 2019 that it would not submit an executive summary, and we note that the Russian Federation did not submit a third-party submission nor make a third-party statement.

India requested the opportunity to provide written comments in response to the United States' oral statement at the interim review meeting.[8] 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.[9] 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. The requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-3.

7 FINDINGS

7.1 General principles regarding treaty interpretation, standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered Agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.[10]

7.1.2 Standard of review

7.2. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered Agreements.

7.3. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[11]

7.4. The Appellate Body has also stated that a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[12]

7.5. A panel must limit its examination to the evidence that was before the authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[13] In that regard, a panel may be called upon to respond to allegations by a complainant concerning the significance of record evidence that the investigating authority allegedly ignored, or on which it placed insufficient weight, or from which it drew incorrect inferences, or that there was no record evidence that could have possibly substantiated its conclusion.[14] The fact that an investigating authority has not cited every piece of record evidence which negates – or substantiates – these kinds of allegations does not mean that a panel is prevented from considering such evidence to test the veracity of such allegations. A panel's review of the record evidence in order to establish the veracity of such allegations, and thus determine whether the complainant has

[8] India's letter to the Panel of 19 August 2019.
[9] United States' letter to the Panel of 20 August 2019.
[10] Appellate Body Reports, *US – Gasoline*, DSR 1996:I, pp. 15-16; *Japan – Alcoholic Beverages II*, DSR 1996:I, p. 10, section D.
[11] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[12] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; and *US – Lamb*, paras. 106-107.
[13] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[14] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99.

demonstrated sufficiently that the authority's conclusions were not reasoned and adequate, does not amount to a *de novo* review of the record evidence.[15]

7.6. Likewise, a panel's examination of whether an investigating authority's conclusions were reasoned and adequate is not necessarily limited to the pieces of evidence *expressly* relied upon by the authority in its establishment and evaluation of the facts in arriving at a particular conclusion.[16] Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the Final Determination.[17] However, since a panel's review cannot be *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's finding that the authority's conclusion was reasoned and adequate.[18]

7.7. We also note that not every error made or questionable inference drawn by an investigating authority in its treatment of a given piece of evidence will necessarily rise to the level of a violation of an obligation of the WTO Agreements. Rather, a panel's evaluation of whether an investigating authority's explanation is "reasoned and adequate" requires an assessment of the totality of evidence relied upon by an investigating authority to justify its reasoning on a given point.[19]

7.1.3 Burden of proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[20] Therefore, India bears the burden of demonstrating that the challenged measures are inconsistent with the WTO Agreements. In the context of Article 21.5 proceedings, this includes demonstrating that the United States did not take measures to comply with the DSB recommendation in the original dispute or, if it did, that such measures are not consistent with the WTO Agreements. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[21] It is generally for each party asserting a fact to provide proof thereof.[22]

7.1.4 The scope of compliance proceedings under Article 21.5 of the DSU

7.9. In the present dispute, the United States objects that a number of India's claims are outside of the scope of compliance proceedings under Article 21.5 of the DSU. We therefore provide an overview of the general principles governing the scope of compliance proceedings under Article 21.5 of the DSU as relevant to the present dispute, while addressing each of the United States' specific objections as they arise in the subsequent sections in light of these general principles.

7.10. Article 21.5 of the DSU provides, in relevant part:

> Where there is disagreement as to the existence or consistency with a covered Agreement of *measures taken to comply* with the recommendations and rulings [of the DSB] such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.[23]

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[15] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99.
[16] Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.
[17] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.
[18] Appellate Body Report, *US – Lamb*, paras. 153-161. See also Appellate Body Reports, *US – Steel Safeguards*, para. 326; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; *Argentina – Poultry Anti-Dumping Duties*, para. 7.48.
[19] See e.g. Appellate Body Report, *Japan – DRAMs (Korea),* paras. 133 and 134. See also Panel Report, *EC – Fasteners (China*), para. 7.359.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 337.
[21] Appellate Body Report, *EC – Hormones*, para. 104.
[22] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.
[23] Emphasis added.

7.11. Panels and the Appellate Body have explained that the purpose of Article 21.5 is to provide for expedited procedures to determine whether a Member has properly implemented the recommendations and rulings of the DSB in the dispute.[24] The Appellate Body has made clear that, compared to the original panel proceedings, Article 21.5 proceedings "do not concern just *any* measure".[25] The mandate of a panel established under Article 21.5 is limited to an examination of "measures 'taken to comply' with the recommendations and rulings" of the DSB.[26] These are "measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB".[27] Thus, the scope of Article 21.5 proceedings depends on: (a) the existence of relevant recommendations and rulings of the DSB; and (b) the existence (or otherwise) of measures taken to comply with those recommendations and rulings.

7.12. The scope of a panel's jurisdiction with respect to what measures and claims it may consider in an Article 21.5 compliance proceeding has been addressed by a number of panels and the Appellate Body, and several fundamental principles have emerged from these decisions and are also relevant for the case before us. On the one hand, in the interests of ensuring prompt and thorough verification of compliance and due process for the complainant, it is now accepted that nothing in Article 21.5 limits the scope of a compliance panel's mandate to considering only certain claims in relation to, or certain aspects of, a measure taken to comply. In other words, a measure taken to comply with the DSB's recommendations and rulings is "a new and different measure" that must be examined in its totality, and an Article 21.5 panel must, in principle, examine all claims of inconsistency regarding the new measure, including those claims that are new and different from those raised in the original proceeding.[28] Thus, a complainant can challenge all aspects of a new measure taken to comply, not only those aspects related to issues covered by the original proceeding.[29]

7.13. On the other hand, a compliance panel proceeding is not an opportunity to "re-litigate" issues that were addressed, or that could have been addressed, in the original proceeding.[30] The Appellate Body has concluded that, in the context of a compliance proceeding, a complainant may be precluded from bringing the same claim with respect to an aspect of the respondent's measure that is unchanged from the original dispute.[31] We agree with the Appellate Body's conclusion and adopt it as our own in the current proceedings. An unchanged aspect of the original measure that the respondent did not have to change, and did not change, in complying with the recommendations and rulings of the DSB should thus not be susceptible to challenge in a compliance proceeding.[32] This limitation is pertinent to two circumstances of particular relevance to the present dispute.

7.14. First, this limitation applies when a complainant could have challenged the unchanged measure (or unchanged aspect thereof) in the original proceeding but chose not to.[33] By definition, a claim that a complainant could have made in the original proceedings – but did not – will relate to a matter that did *not* give rise to recommendations and rulings of the DSB. Such a claim would therefore not involve a "measure taken to comply" with recommendations and rulings of the DSB that is susceptible to challenge in compliance proceedings under Article 21.5.[34] However, a

[24] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 98; and Panel Reports, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.74; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 7.135.

[25] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36. (emphasis original)

[26] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 199.

[27] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

[28] Appellate Body Reports, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 86-87; *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40-42; and *EC – Bed Linen (Article 21.5 – India)*, para. 79.

[29] See, e.g. Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.8-6.10.

[30] Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 96; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210; and Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.35.

[31] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89.

[32] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89.

[33] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.8 (quoting Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 424). See United States' first written submission, paras. 22-23 and fn 9; India's second written submission, paras. 213-214.

[34] Further, since such a claim was not made in the original proceedings, its inclusion in compliance proceedings under Article 21.5 would expand the scope of the dispute between the parties in a way that is not envisaged by Article 21.5, which instead relates only to *compliance* with the recommendations and rulings of

complainant can bring a new claim in compliance proceedings that it could have brought in the original proceedings – but did not – if the claim pertains to an aspect that is integral to the steps taken by the investigating authority to comply with the rulings and recommendations of the DSB.[35] Therefore, the possibility to challenge an element of the measure at issue for the first time in compliance proceedings, even if that element may not have changed, hinges on the "critical question" of whether such an element forms "an integral part of the measure taken to comply".[36]

7.15. Second, this limitation applies when an issue is decided on the merits against the complainant in the original proceedings, such as when the complainant challenged the unchanged measure (or aspect thereof) in the original proceeding but failed to establish a *prima facie* case.[37] Otherwise, a complainant could use Article 21.5 proceedings as a "second chance" to reargue a claim that has been decided on the merits in an adopted report.[38] The Appellate Body has treated differently, however, cases in which claims against aspects of a measure were not decided on the merits in the original proceedings. This is because such claims, despite having been brought in the original proceeding, are not covered by the recommendations and rulings of the DSB in respect of that proceeding.[39] Accordingly, the Appellate Body has entertained in compliance proceedings certain claims that had been raised in original proceedings but on which no ruling on the merits of the claims had been rendered.[40] One example is where the Appellate Body has reversed panel findings but has not been able to complete the legal analysis.[41] Similarly, the Appellate Body has permitted claims to be reasserted in compliance proceedings when the exercise of judicial economy has caused a claim to remain unresolved in the original proceedings without a decision on the merits having been rendered.[42] Thus, compliance proceedings cannot be used to "re-open" issues that were decided on the merits in the original proceedings.[43] But claims against aspects of a measure that are not decided on the merits in the original proceedings are not covered by recommendations and rulings of the DSB and thus can be reasserted in compliance proceedings.[44]

7.2 Public Body: India's claims under Article 1.1(a)(1) of the SCM Agreement

7.2.1 Introduction

7.16. India requests the Panel to find that the USDOC's determination regarding the existence of a "financial contribution" through the provision of high-grade iron ore by the National Mineral Development Corporation (NMDC) for less than adequate remuneration (LTAR) is inconsistent with Article 1.1(a)(1) of the SCM Agreement due to a number of errors in its determination that the NMDC constitutes a "public body". These alleged errors are as follows. First, India submits that the USDOC erred in identifying the alleged "governmental function" performed by the NMDC.[45] Second, India submits that the USDOC erred in its treatment of evidence concerning the NMDC's so-called "Miniratna status", according to which the NMDC is said to operate autonomously on commercial principles.[46] Third, India submits that the USDOC erred in its findings regarding the export restrictions applying to the NMDC and the significance of these to the "public body" determination.[47]

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the DSB from the *original* dispute. (Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.434).

[35] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 432-433.

[36] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.8 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 434).

[37] United States' first written submission, para. 23; India's second written submission, para. 9.

[38] Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.19; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 427; and *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210. The Appellate Body has found that the same applies when a complainant has failed to establish a prima facie case. (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96).

[39] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 424.

[40] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.20.

[41] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210.

[42] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148.

[43] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.21.

[44] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.21.

[45] India's first written submission, paras. 80-82; second written submission, paras. 88-92.

[46] India's first written submission, paras. 71-74; second written submission, paras. 85-87; and response to Panel question No. 11.

[47] India's first written submission, paras. 75(b) and (c), and 78; second written submission, paras. 99-102.

Finally, India submits that the USDOC made an incorrect factual finding that the NMDC's Directors appointed by the Government of India (GOI) hold price negotiations for the sale of iron ore.[48] These are largely standalone allegations of error that relate to individual aspects of the USDOC's "public body" determination. The United States contends that, taken as a whole, the Panel should find the USDOC's "public body" determination to be "reasoned and adequate", and 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.[49]

7.17. We begin our assessment of these allegations of error by setting out the legal standard applicable to "public body" determinations. We then provide an overview of the legal and evidentiary background to the USDOC's finding that the NMDC constitutes a "public body" – that is, the evidence and inferences that the USDOC accepted and rejected, and the legal standard that it applied. It is useful to trace this background in full at the outset of our assessment, given that India's allegations of error pertain to discrete and distinct aspects of the USDOC's "public body" determination. This is followed by our evaluation of each of India's allegations of error regarding the USDOC's "public body" determination.

7.2.2 The legal and evidentiary standard applicable to the public body enquiry

7.18. Article 1.1(a)(1) of the SCM Agreement provides that a subsidy shall be deemed to exist if a financial contribution is provided by a government or any public body within the territory of a Member. The particular conduct of the government or public body must fall within any of the subparagraphs (i) to (iii) in Article 1.1(a)(1), or pursuant to subparagraph (iv), a government or public body may make payments to a funding mechanism, or otherwise entrust or direct a private body to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii).[50]

7.19. The Appellate Body has explained that a public body within the meaning of Article 1.1(a)(1) "must be an entity that possesses, exercises or is vested with governmental authority".[51] In evaluating whether an entity is a public body, a relevant enquiry is whether "an entity is vested with authority to exercise governmental functions".[52] The Appellate Body has further explained that "[w]hether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had 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 in which the investigated entity operates".[53] In addition, "just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[54] We find the Appellate Body's reasoning persuasive, and shall be guided by it in our own objective assessment of the matter.

7.20. Different types of evidence may be relevant to show that a government has bestowed authority on a particular entity, including such as when a statute or legal instrument expressly vests authority in an entity.[55] Absent express statutory delegation of governmental authority, evidence that an entity is *in fact* exercising governmental functions may serve as evidence that the entity in question possesses or has been vested with governmental authority, particularly when the evidence points to a sustained and systematic practice.[56]

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[48] India's first written submission, paras. 75(a) and 77; second written submission, paras. 94-98.

[49] United States' first written submission, paras. 151-152, 164-167, 171, 176-177, 186, and 192; second written submission, paras. 80-84, 94, 96, 105, 112, and 115-116.

[50] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

[51] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[52] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[53] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317 ("[p]anels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense").

[54] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[55] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.

[56] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

7.21. The Appellate Body has also observed 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".[57] The Appellate Body has cautioned, however, that "the mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body".[58] Rather, "where evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority".[59]

7.22. In the original proceedings in the present dispute, the Appellate Body shed further light on its interpretation of "public body" and the evidentiary standard for "meaningful control" in its explanation of how the Panel erred:

> [T]he Panel erred in its substantive interpretation of Article 1.1(a)(1) by construing the term "public body" to mean *any* entity that is "meaningfully controlled" by a government. …
>
> … the Panel did not analyse, in our view, the question of whether the GOI in fact *exercised* control over the NMDC and its conduct. Nor did the Panel assess whether the USDOC had properly established that the NMDC "possesses, exercises or is vested with governmental authority", and is therefore a public body. …
>
> The Panel reviewed some indicia of control by the GOI (such as shareholding and the GOI's involvement in the selection of directors), but did not address the question of whether there was evidence that the NMDC was performing governmental functions on behalf of the GOI.[60]

In view of these remarks, we recognize that it is not sufficient for an investigating authority to show than an entity is "meaningfully controlled" by a government for the purposes of a "public body" finding. Rather, it must also be shown that the entity is performing a governmental function, such that the entity is vested with, exercises, or possesses governmental authority.[61] Such determinations are necessarily case-by-case.[62] In terms of the process for identifying "governmental functions", we agree with the Appellate Body that "it may be relevant to consider 'whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member'" and "the classification and functions of entities within WTO Members generally".[63]

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[57] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.

[58] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318 ("[w]e stress, however, that apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority.")

[59] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[60] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.36, 4.37, and 4.42 (emphasis original). See also Panel Report, *US – Carbon Steel (India)*, paras. 7.73, 7.80, and 7.89, and fn 261.

[61] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.52. This also reflects the USDOC's understanding of the DSB ruling insofar as it was guided by whether the NMDC performed a governmental function and whether the GOI exercised meaningful control over the NMDC in order to demonstrate that it was a "public body". (Preliminary Determination, (Exhibit IND-55), p. 7; Final Determination, (Exhibit IND-60), p. 19). The Appellate Body seems to have been responding to the Panel's statement in the original proceedings that: "[w]e consider that the USDOC's determination, when viewed in light of the above-mentioned record evidence, effectively amounted to a determination that the NMDC was under the 'meaningful control' of GOI", and that "[t]aking this view, we need not and do not address the United States' arguments relating to the relevance of India's legal order (and the performance of government function) to this matter". (Panel Report, *US – Carbon Steel (India)*, para. 7.89 and fn 261 (fns omitted)).

[62] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317).

[63] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.9 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297).

7.23. A further matter of interpretation raised in this dispute concerns the significance of an entity acting autonomously, or in commercial ways, to the "meaningful control" evidentiary standard and to the "public body" legal standard generally. The evidence on an entity's autonomy from a government may shed light on their relationship, but it does not *ipso facto* disqualify the entity from constituting a "public body". Rather, as just mentioned, "statutory *delegation*" – that is, the *delegated* capacity to operate autonomously – is one means of proving a "public body".[64] In the original proceedings, the Appellate Body considered that the USDOC's failure to "discuss" the "evidence on record regarding … Miniratna" – according to which, the NMDC was allegedly conferred with "enhanced autonomy"[65] – manifested an error because such evidence "could have been relevant" to the question of meaningful control.[66] For the Appellate Body, the failure to *discuss* such evidence reflected the application of an incorrect legal standard by the USDOC.[67] The Appellate Body did not indicate that this evidence would be necessarily *dispositive* to an affirmative or negative "public body" finding. Thus, we do not accept that an entity acting autonomously necessarily disqualifies it from constituting a "public body".[68] On the contrary, the delegation of autonomy by a government to an entity could in some circumstances indicate that it constitutes a "public body".

7.24. Further, we do not accept that an entity acting in commercial ways disqualifies it from being a "public body".[69] The SCM Agreement includes provisions in relation to the benefit analysis which foreshadow explicitly that the entities regulated by the SCM Agreement (including "public bodies") could be operating on commercial principles.[70] However, that does not mean that whether an entity acts commercially – or uncommercially – is irrelevant to the "public body" analysis.[71] For instance, if an entity's practice is not profit-maximising, or if it is structurally incapable of acting in profit-maximising ways, this could corroborate other evidence from which it can be inferred that the entity is performing a governmental function.[72] Beyond that, in the absence of any direct textual guidance in the SCM Agreement on the role of commercial or non-commercial conduct in identifying a "public body", it would be imprudent to affix rigid rules as to how evidence regarding such conduct should be treated in a given "public body" determination. Rather, it is a matter for an investigating authority to determine the proper role and probative weight of the evidence regarding commercial or non-commercial conduct in a given case, and to justify its findings on such evidence through a reasoned and adequate explanation.

7.25. We make a further observation regarding the evidentiary standard for proving "meaningful control" and for satisfying the legal test for "public body" determinations generally. The interpretation of any provision of the SCM Agreement must leave intact an investigating authority's ability to arrive at a negative or affirmative determination. A legal interpretation that

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[64] That is, if the delegation involves a government vesting an entity with the authority to perform a governmental function.

[65] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.40.

[66] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.54.

[67] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.41, 4.44, 4.52, and 4.54.

[68] To the extent this is India's argument, we reject it. (India's response to Panel question Nos. 5 and 11).

[69] To the extent this is India's argument, we reject it. (India's second written submission, paras. 88-89; response to Panel question Nos. 5 and 11).

[70] Article 14(b) of the SCM Agreement presupposes that loans made by public bodies could be the same as "comparable commercial loans", and likewise Article 14(d) presupposes that the provision of goods or services or purchase of goods by a public body could reflect prevailing market conditions. If entities operating on commercial principles were excluded from the scope of "public body" entirely, these provisions would be redundant, at least insofar as they involve identifying whether a benefit has been conferred. (Appellate Body Report, *Brazil – Aircraft*, para. 157; Panel Report, *Korea – Commercial Vessels*, para. 7.48).

[71] To the extent this is the United States' and Japan's argument, we reject it. (United States' response to Panel question No. 14; Japan's third-party response to Panel question No. 2, para. 6).

[72] See, e.g. Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 350 and 355. In an analogous reference to Article 1.1(a)(iv) of the SCM Agreement, see Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.105. We emphasize, however, that undue significance should not be accorded to individual instances of the entity's conduct or actions (whether commercial or uncommercial). Rather, the focus of the enquiry is on the *entity*, and accordingly, evidence regarding its conduct (whether commercial or non-commercial) is relevant only where it sheds light on the features of the *entity* itself. (Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 7.28 and 7.36). We agree in this connection with India's response to Panel question No. 14; Canada's third-party response to Panel question No. 1, para. 1; China's third-party response to Panel question Nos. 1-2, paras. 5-7; and European Union's third-party response to Panel question No. 2, para. 18. Moreover, we note that by avoiding the attachment of undue significance to individual transactions, the concern raised about the benefit analysis being subsumed by the public body analysis is avoided.

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.[73] Moreover, an evidentiary standard for proving "public body" that differentiates, in practice, between Members whose governments tend to control their entities through formal and publicly-documented methods *vis-à-vis* those who tend to control their entities through informal or undocumented methods would not be consonant with the proper interpretation of that term. If such an evidentiary standard were applied, it could lead to the term "public body" having a different scope in practice for different Members.[74] This would frustrate the underlying objective of interpreting terms in treaties, namely to arrive at the *common* intention of the parties.[75]

7.26. Finally, in order to be able to provide a reasoned and adequate explanation of their conclusions on the existence of a "public body", the Appellate Body has stated that investigating authorities are "under an obligation to actively seek out information relevant to the analysis".[76] This does not mean that Article 1.1(a)(1) of the SCM Agreement embeds a standalone obligation to seek and accept evidence. Nothing in the text of Article 1.1(a)(1) justifies the existence of such a standalone obligation. Rather, the presence of sufficient evidence on the record is a corollary of an investigating authority being able to undertake the evaluation necessary to comply with the legal standard for a substantive obligation. If an investigating authority does not possess sufficient evidence on the record to reach a determination, it may need to seek or accept additional evidence in order to be capable of providing a "reasoned and adequate" explanation that satisfies the requirements of a substantive obligation. However, it does not follow that there is a standalone obligation in Article 1.1(a)(1) to seek or accept evidence separate from the basic requirement to provide a "reasoned and adequate" explanation.

7.2.3 The USDOC's determination on the NMDC as a public body

7.27. We now set out the legal and evidentiary background to the USDOC's determination that the NMDC comprises a "public body" under Article 1.1(a)(1) of the SCM Agreement.

7.28. It is useful to trace this background in full at the outset, given that India's allegations of error pertain to discrete and distinct aspects of the USDOC's "public body" determination. By setting out this background, we seek to contextualize our subsequent assessment of each of India's allegations of error. This is an important aspect of our assessment because, on the one hand, the United States submits that India's claims are focused too narrowly on individual inferences or pieces of evidence.[77] India's view, on the other hand, is that the USDOC engaged in "selective reading of available evidence and rejected the information which did not support its pre-determined conclusions" and engaged in a biased and unobjective assessment of evidence.[78]

7.29. We do not draw any conclusions at this stage. However, we do make a number of observations as we recount the legal and evidentiary background to the USDOC's determination. These observations seek to contextualize this background in light of the Appellate Body's legal and evidentiary standard for "public body" determinations described in section 7.2.2. These observations are without prejudice to our subsequent evaluation of India's allegations, and should not be taken to imply any conclusions.[79]

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[73] Article 12.12 of the SCM Agreement: "[t]he procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement." Article 12.7 creates a mechanism for investigating authorities to proceed with an investigation and reach preliminary and final determinations (affirmative or negative) "[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation".

[74] European Union's third-party response to Panel question No. 1, paras. 10-13.

[75] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 845.

[76] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 344 and 346.

[77] United States first written submission, para. 165.

[78] India's second written submission, para. 84.

[79] For instance, our observations in this section do not imply a conclusion that the USDOC's determination was necessarily "reasoned and adequate". There may be probative contradictory

7.30. We begin in this section by recounting the legal standard and elements of evidence relied upon by the USDOC in its Preliminary Determination that the NMDC comprises a "public body". We then set out the legal and evidentiary arguments that the GOI made in rebuttal to the Preliminary Determination. Finally, we set out how the USDOC responded to these rebuttals, and explain the legal and evidentiary basis for its Final Determination.

7.2.3.1 The USDOC's Preliminary Determination

7.31. In its Preliminary Determination, the USDOC explained that it was "revising the analysis underlying these four determinations in accordance with findings in the relevant reports adopted by the WTO Dispute Settlement Body (DSB)"[80], and explained its understanding of the applicable "public body" DSB finding as follows:

> The AB found that the Department did not provide a reasoned and adequate explanation of its basis for finding the NMDC to be a public body within the meaning of Article 1.1(a) of the SCM Agreement. The AB explained that a determination of whether an entity performs a government function is dependent on the entity's position in the legal structure of the country in question, and found that the Department did not adequately analyze the extent to which the GOI exercised meaningful control over the NMDC and its conduct.[81]

7.32. The USDOC assessed certain evidence and reached the following Preliminary Determination:

> Because the NMDC is exploiting public resources on the behalf of the Indian government, the owner of the resources, the Department preliminarily determines the GOI exercises meaningful control over the NMDC, which is vested with government authority in performing a government function in India. Therefore, we preliminarily determine that the NMDC is a government authority within the meaning of section 771(5)(B) of the Act, and thus a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.[82]

7.33. It is apparent from these extracts that the legal standard that the USDOC sought to apply for its "public body" determination was whether the NMDC was vested with governmental authority in India. The USDOC was guided in this regard by whether the NMDC performed a governmental function and whether the GOI exercised of meaningful control over the NMDC.

7.34. The evidence cited by the USDOC for its Preliminary Determination that the NMDC constituted a "public body" included that: (a) 98.38% of the NMDC was owned by the GOI; (b) the GOI appoints, or has approval power over, a majority of the board of directors; (c) the GOI owns all the mineral resources on behalf of the Indian public and has the final approval of the granting of mining leases for iron ore, which meant that "it is a function of the government of India to arrange for the exploitation of public assets, in this case iron ore"; (d) the NMDC's website indicated that it was established specifically by the GOI to perform part of that governmental function; (e) the NMDC's website also stated that it was under the "administrative control" of the Ministry of Steel and the GOI; and (f) a Ministry of Steel official described the NMDC as a "strategic company which was monitored and reviewed by the government because it provided a specific service to the Indian public".[83] The USDOC considered that the NMDC's Board of Directors acts on the "GOI's behalf in the day-to-day operations of the NMDC", and that "in the legal order of India, the NMDC performs a government function".[84]

7.35. In respect of the USDOC's discussion of the evidence regarding the NMDC's Miniratna status in the Preliminary Determination, it is useful to extract the full passage:

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evidence that was ignored, or there may be significant mistakes in arriving at factual conclusions. As mentioned, our evaluation and conclusion on India's specific allegations of error is set out in other sections.

[80] Preliminary Determination, (Exhibit IND-55), p. 1.
[81] Preliminary Determination, (Exhibit IND-55), p. 5.
[82] Preliminary Determination, (Exhibit IND-55), p. 7.
[83] Preliminary Determination, (Exhibit IND-55), pp. 5-7.
[84] Preliminary Determination, (Exhibit IND-55), p. 6.

> The website further states that NMDC was accorded the status of a "Public Sector Company by the GOI [Miniratna] in 'A' category in its categorisation of Public Enterprises." No further evidence on the record defines the [Miniratna] categorization, nor does any further evidence refer to the GOI's "Ratna" designations for companies. The evidence on the record shows that the GOI treated the NMDC as a public sector company, and was significantly involved in its day-to-day operations, as explained further below. This constitutes further evidence that the GOI treated the NMDC as a public entity.[85]

7.36. We note that the parties contest how to understand the USDOC's treatment of Miniratna status, and we also note that India contests the veracity and significance of the evidence cited in paragraph 7.34 particularly when viewed against other evidence. Without prejudice to our evaluation of India's specific claims below, we observe that the evidence cited by the USDOC reflects the type and nature of evidence that can be relevant to demonstrating that an entity is a "public body", as elaborated above in section 7.2.2. This includes, for instance, evidence that an entity is performing a function that is governmental in the legal order of the investigated Member, and evidence that the government is meaningfully controlling the entity through significant involvement in its day-to-day operations.

7.2.3.2 The GOI's case brief in response

7.37. The GOI submitted a case brief dated 28 March 2016 that responded to the USDOC's Preliminary Determination.[86] This case brief contained "new factual information" according to the USDOC, including in relation to whether the NMDC constituted a "public body".[87] The USDOC rejected the GOI's case brief because it contained this "new factual information".[88] The GOI resubmitted a case brief dated 31 March 2016 which omitted that information.[89] This procedural history is relevant because it relates to whether the "new factual information" was properly on the record of investigation, and therefore whether – and to what extent – this information may be considered by the Panel. For present purposes, we use the case brief dated 31 March 2016 as our primary point of reference, without prejudice to our discussion below on the status of the "new factual information".

7.38. In response to the Preliminary Determination, the GOI submitted that the USDOC had "not engaged in any analysis to explain how and why the NMDC 'possess[es], exercise[s] or [sic] [is] vested with government authority'"[90], and thus failed to satisfy the requisite legal standard.[91] In terms of the evidence relied on by the USDOC, the GOI submitted that the USDOC "has come to the conclusion that the GOI was involved in the 'day-to-day operations' of NMDC based on the GOI's shareholding, the power to appoint and nominate the board of directors, and the reference on the NMDC's website indicating that the NMDC is under 'administrative control' of the GOI", and that these were mere "formal indicia of control" and insufficient for a "public body" determination.[92]

7.39. The GOI also submitted that the evidence "actually supports the conclusion that 8 of the 12 directors, i.e. a majority, are not government appointees and have no allegiance to the GOI inasmuch as their salaries are from the profits of NMDC" as opposed to the GOI.[93] This was based on the evidence that four directors were appointed by the Public Enterprise Selection Board (an independent body within the GOI's Department of Public Enterprises), and another four directors were outside part-time directors whose functions were as experts.

7.40. Further, the GOI submitted that other evidence indicated that eight "independent non-executive Directors [are] required to comply with the corporate governance norms of the

[85] Preliminary Determination, (Exhibit IND-55), p. 6. (fns omitted)
[86] Rejected case brief, (Exhibit IND-56), p. 1.
[87] Final Determination, (Exhibit IND-60), p. 2.
[88] Final Determination, (Exhibit IND-60), p. 2.
[89] Case brief, (Exhibit IND-57), p. 1.
[90] Case brief, (Exhibit IND-57), pp. 12 and 15. (emphasis omitted)
[91] Case brief, (Exhibit IND-57), pp. 12 and 15.
[92] Case brief, (Exhibit IND-57), pp. 15-16. (emphasis omitted; fns omitted)
[93] Case brief, (Exhibit IND-57), p. 18.

national stock markets regulator".[94] This meant that those directors "were independent of the GOI", and that the "GOI cannot be said to have had a majority in, or control over, NMDC's board".[95] The GOI also argued that the evidence that the NMDC conducted iron ore price negotiations based on commercial principles and without interference from the Ministry of Steel rebutted the USDOC's conclusion that the GOI was involved in the day-to-day operations of the NMDC.[96] In particular, the GOI pointed to evidence that the NMDC Chairman and a subset of Directors were directly involved in price negotiations and took into account factors such as international price increases, net sales realization, and a comparison with the landed cost of comparable imports of iron ore.[97]

7.41. In respect of Miniratna status, the GOI rejected the USDOC's finding that there was no evidence on record as to its meaning and scope[98], and instead quoted its supplemental questionnaire response in the 2004 administrative review:

> *How is the government involved in the daily operations of NMDC?*
>
> … It is a [Miniratna] Category I Company, which gives it, enhanced autonomy with regard to investment decisions and personnel matters ... [.][99]

7.42. On the basis of this quotation, the GOI submitted that "the fact that NMDC has [Miniratna] status has been placed on record and the GOI has asserted that as a result, NMDC has 'enhanced autonomy'".[100] The Panel observes at this juncture that the quotation relied upon by the GOI suggests that the NMDC's "enhanced autonomy" is not plenary. Rather, it is confined "to investment decisions and personnel matters". The picture of the NMDC's autonomy being confined is augmented by another passage in the GOI's case brief that quotes the GOI's supplemental questionnaire response in the 2004 administrative review, namely that:

> NMDC is operating in a commercial, market driven de-regulated environment and conducts its operations and businesses on commercial principles. It enjoys freedom in its day-to-day operations. Except for certain personnel related matters and investment decisions over specified limits, it takes its own decisions with the approval of its Board. All commercial matters are dealt with by the company on its own.[101]

Although this passage asserts that the NMDC enjoyed "freedom in its day-to-day operations", it explains that this freedom was curtailed "for certain personnel related matters and investment decisions over specified limits". This accords to some extent with the GOI's explanation that the "enhanced autonomy" accorded by Miniratna is limited to only certain areas (namely "personnel related matters and investment decisions").[102]

7.43. We also observe that the above extract quoted by the GOI in its case brief is followed subsequently in the GOI's supplemental questionnaire response in the 2004 administrative review with the additional explanation that:

> As stated above the government's shareholding in NMDC is over 98% but the ownership of the mines vests with the company. The Government of India is involved in setting broad guidelines for the administrative functioning of the companies in the public sector like NMDC. Investment decisions, over certain specified limits, also require government approval. Beyond this, these companies have full operational, commercial and

[94] Case brief, (Exhibit IND-57), p. 18 (quoting GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 4).
[95] Case brief, (Exhibit IND-57), p. 19.
[96] Case brief, (Exhibit IND-57), pp. 19-20.
[97] Case brief, (Exhibit IND-57), pp. 19-20.
[98] Case brief, (Exhibit IND-57), p. 15.
[99] Case brief, (Exhibit IND-57), p. 20 (quoting GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 4).
[100] Case brief, (Exhibit IND-57), p. 21. (emphasis omitted)
[101] Case brief, (Exhibit IND-57), p. 19 (quoting GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 4).
[102] Case brief, (Exhibit IND-57), p. 19 (quoting GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 4).

> functional autonomy. Besides such companies are required to enter into annual memorandums of understanding with the government wherein annual performance parameters and targets are agreed to. The government monitors the performance of these companies, during the year, against these parameters and targets.[103]

This explanation clarifies further what is meant by the NMDC's "freedom in its day-to-day operations" and its "autonomy". In particular, the NMDC operates autonomously only within parameters that have been set by the GOI, and which are monitored by the GOI for compliance.[104] Further, there are areas where the NMDC has no autonomy, namely "[i]nvestment decisions, over certain specified limits", which "require government approval". These apparent limitations on the NMDC's autonomy are an important aspect of the evidence on this point, to which we will return.

7.44. In terms of the legal implications of Miniratna status, the GOI submitted in its case brief that "since the [Miniratna] status of NMDC is not a fact in dispute, this forms an integral part of the relationship between the GOI and NMDC and this is governmental policy that ensures that companies like NMDC operate as independent corporate entities, on commercial principles", which in turn rebuts the USDOC's conclusion that the GOI meaningfully controlled the NMDC.[105] For the GOI, if the USDOC did not consider there to be sufficient record evidence to substantiate this implication of Miniratna status, then the USDOC was "under an obligation to have sought out the required clarifications or information to properly investigate this aspect in a reasonable and objective manner".[106]

7.2.3.3 The USDOC's Final Determination

7.45. In its Final Determination, the USDOC responded to these submissions of the GOI and added a number of aspects of evidence to its determination that the NMDC constituted a public body.

7.46. In respect of the GOI's contention regarding the NMDC's price negotiations, the USDOC noted that "[t]he directors, not NMDC staff members, hold negotiations with customers to discuss price and quantity", and "[t]he chairman approves negotiation and then contracts are submitted to the Board for ratification".[107] For the USDOC, "[t]his demonstrates that the board members, particularly the chairman, which is appointed by the GOI, are not mere observers but active and involved in the day-to-day operations of the NMDC on the GOI's behalf".[108] Further, in response to the GOI's argument that the NMDC's prices were set commercially, the USDOC pointed to evidence that: (a) the NMDC Chairman had recommended an export ban on high-grade iron ore (except when exported under long term contracts), which was in line with the GOI policy; and (b) export restrictions had been applied to the NMDC. In particular, the USDOC cited page 185 of the Dang Report, in which the NMDC Chairman is recorded as stating:

> NMDC is exporting iron ore only to meet its commitment under long term contract. …
>
> Government should re-examine the whole issue of export of iron ore. He suggested that except long term contract, export of iron ore should not be allowed. …
>
> There is a shortage in supply of iron ore which is reflected in terms of its rising prices.[109]

7.47. We observe that other passages of the Dang Report also record views expressed by the NMDC on these matters, including that the "[e]xport of lump ore should be discouraged to meet the domestic demand", and that "[t]he raw material being natural reserves should be available adequately for the domestic industry and exports should not be at the cost of domestic industry".[110]

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[103] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 6.
[104] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit-13), p. 6.
[105] Case brief, (Exhibit IND-57), p. 22.
[106] Case brief, (Exhibit IND-57), pp. 21-22.
[107] Final Determination, (Exhibit IND-60), p. 20.
[108] Final Determination, (Exhibit IND-60), p. 20.
[109] Dang Report, (Exhibit USA-2) p. 185.
[110] Dang Report, (Exhibit USA-2) pp. 204 and 206. These were not cited explicitly by the USDOC. However, the aspects we refer to are clearly connected to the USDOC's explanation regarding the NMDC Chairman's recommendation of export restrictions for iron ore, and are thus within the purview of the

In that regard, we note that the USDOC stated that the NMDC Chairman's recommendation to the Dang Report on export restrictions was "in line with governmental policies".[111] The USDOC did not attach a reference to that statement. We nonetheless observe that the record evidence from a report prepared by and for the GOI suggests that "it is the GOI's intention to restrict exports of iron ore with Fe content higher than 64 per cent, with a view to ensuring that the *exports do not take place at the cost of supplies to domestic steel producers*".[112] This appears to show a degree of alignment between the NMDC's rationale for export restrictions and the GOI's policy rationale for export restrictions.

7.48. The USDOC also cited page 8 of the Verification Report in concluding that "[c]ontrary to the GOI's assertion that prices are determined by the supply and demand of the market, NMDC described at verification that there are export restrictions in place", which includes in relevant part:

> Officials [of the NMDC] explained that the Export Bulletin is a cap on what is allowed to be exported; however, the mine has never reached this cap. The export restriction begins if exports exceed or approach 6.8 MT; the official explained that the mine only exports between 4-5 MT. Other mines do not have this restriction limit. We asked why this mine has a restriction and the others do not. The official explained that the Bailadila mines are very rich in Fe content … As a result of this high Fe content, the government does not want all of it to be exported[.]
>
> Iron ore of +64 is one of these products and thus can only be exported by a special trading company, the [Metals and Minerals Trading Corporation of India]. … The Ministry of Commerce monitors the export of high grade through the MMTC … [.][113]

7.49. The picture that emerges from this aspect of the Verification Report and the aspect of the Dang Report extracted earlier[114] is as follows. Not only did the NMDC Chairman recommend certain export restrictions on high-grade iron ore to the GOI, but he also indicated that the NMDC itself only exported high-grade iron ore to meet the commitments under long term contracts. The NMDC's rationale for exporting iron ore only to meet such commitments appears to have been that "exports should not be at the cost of domestic industry".[115] The GOI also imposed export caps on the NMDC's exports of high-grade iron ore, and for substantially the same rationale as articulated by the NMDC, but the NMDC never reached those GOI-mandated caps. Thus, the NMDC's export of high-grade iron ore only to meet commitments under long term contracts – and its recommendation that the GOI adopt such a limitation – appears to reflect a stricter limitation in practice than the existing GOI-mandated export caps.

7.50. Against this evidentiary background, and also in light of the evidence that the NMDC was monitored by the GOI as a "strategic company" whose "GOI-appointed directors" conducted price negotiations, the USDOC considered that "the conditions of the market are being influenced by the GOI's policy considerations and actions … rather than by the activity of unfettered participants in a private market".[116]

7.51. The USDOC also addressed the GOI's submissions regarding the NMDC's Miniratna status. It found that "the GOI does not point to supporting record evidence that shows that this categorization reflects 'enhanced autonomy' on the part of the NMDC".[117] We recall at this juncture that the

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Panel's review. (Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99. See also above paras. 7.5-7.6).

[111] Final Determination, (Exhibit IND-60), p. 20.

[112] Hoda Report, (Exhibit USA-8), para. 7.61 (emphasis added). We note that the USDOC relied on the Hoda Report in other aspects of its determination (see e.g. Final Determination, (Exhibit IND-60), pp. 24-25). We also note that India appears to dispute the relevance of the Hoda Report to this matter. (India's response to Panel question No. 19). We draw no conclusions in this background section and evaluate the parties' arguments, as relevant, in subsequent sections below.

[113] Verification Report, (Exhibit USA-3), p. 8.

[114] See above para. 7.46.

[115] As we have observed, the USDOC considered this to be "in line with governmental policies", and other record evidence suggests this rationale mirrored the GOI's rationale for imposing export caps. (Hoda Report, (Exhibit USA-8), para. 7.61).

[116] Final Determination, (Exhibit IND-60), p. 21.

[117] Final Determination, (Exhibit IND-60), p. 21.

evidence cited in the GOI's case brief pertained to the "enhanced autonomy *with regard to investment decisions and personnel matters*", and not to "enhanced autonomy" generally.[118] The USDOC also "disagree[d] that the record was deficient regarding NMDC's [Miniratna] status as it related to NMDC's autonomy".[119]

7.52. The USDOC concluded in its Final Determination that "the record shows that NMDC's management and day-to-day operations remained under the control of the GOI, and that NMDC provided a governmental function in the legal order of India", and therefore "the NMDC possesses, exercises, or is vested with governmental authority".[120]

7.53. Without prejudice to our evaluation of India's specific claims below, we observe that, as with the Preliminary Determination, the evidence cited in the Final Determination reflects the type and nature of evidence that can be relevant to demonstrating a "public body" (see further section 7.2.2 above). In particular, the evidence that the NMDC Chairman was appointed by a GOI body and took steps to advocate a position on exports that aligned with governmental policy and appeared to diverge from profit-maximising behaviour[121] gives rise to a reasonable inference that the government is exercising "meaningful control" over the entity through its appointee. Likewise, the evidence that this same Chairman supervises price negotiations with customers warrants the inference that the government is involved in the day-to-day operations of the NMDC through its appointee, and thus that the GOI exercises "meaningful control" over the NMDC.

7.54. This inference is corroborated by the evidence cited by the USDOC that the NMDC perceived itself as being under the "administrative control" of the GOI, together with the evidence cited by the USDOC that the GOI perceived the NMDC as being a "strategic compan[y]" that provides a "specific service to the people". The GOI contended that the inference of "meaningful control" was rebutted by the "enhanced autonomy" of the NMDC. However, by the GOI's own description, this "autonomy" was limited to "investment decisions and personnel matters". Thus, the alleged "autonomy" did not pertain to the areas where the USDOC found evidence of governmental involvement in the operations of the entity, namely the NMDC's price negotiations and the application of export restrictions.[122] This, in turn, elucidates the USDOC's comment that "the record was [not] deficient regarding NMDC's [Miniratna] status as it related to NMDC's autonomy". We also recall that the GOI's own questionnaire response indicated that the NMDC's autonomy was exercised within parameters that were set annually, and monitored regularly, by the GOI. These aspects of the questionnaire were confirmed in the USDOC's Verification Report.[123] Accordingly, the record evidence on the scope and nature of the autonomy enjoyed by the NMDC did not necessarily warrant the inference that the GOI was not involved in the conduct of the NMDC.

7.2.3.4 Conclusion

7.55. On the basis of the foregoing, we observe that the legal standard that the USDOC sought to apply for its "public body" determination was whether the NMDC was vested with governmental authority in India. The USDOC was guided in this regard by whether the NMDC performed a governmental function and whether the GOI exercised meaningful control over the NMDC. We also

[118] Case brief, (Exhibit IND-57), p. 20 (quoting GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 4). (emphasis added)

[119] Final Determination, (Exhibit IND-60), p. 21.

[120] Final Determination, (Exhibit IND-60), p. 21.

[121] See below para. 7.85. Record evidence suggested that applying an export restraint on one's own iron ore curtailed opportunities to secure the highest price, thus potentially conflicting with profit-maximization: see the NMDC Chairman's own statement, when read in light of the fact that the NMDC is a seller of iron ore, that: "[t]here is a shortage in supply of iron ore which is reflected in terms of its rising prices". (Dang Report, (Exhibit USA-2) p. 185. See also Hoda Report, (Exhibit USA-8), para. 7.55). In relation to these aspects of evidence, we reiterate that a panel is not precluded from considering aspects of evidence that are connected to or corroborate an investigating authority's explanation, even where those aspects were not cited explicitly in the authority's determination. (See above paras. 7.5-7.6.)

[122] See also Final Determination, (Exhibit IND-60), p. 16: "[t]he record further demonstrates that the GOI appointed directors at the NMDC not only set export prices but that the GOI, through its 'canalization' policy, exercises its control of the supply and demand of high grade iron ore that the NMDC sells in the Indian and global market. Such actions are not mere presumptions of control, but constitute an actual means by which the GOI shapes the market for high grade iron ore" (cross-referenced in the "public body" explanation at ibid. p. 21).

[123] Verification Report, (Exhibit USA-3), pp. 9-10.

observe that the evidence relied upon by the USDOC was of a nature and type that can be relevant to "public body" determinations. The inferences drawn by the USDOC from that evidence appear on their face to be reasonable and mutually reinforcing. This does not mean that the USDOC's explanation was necessarily "reasoned and adequate", and thus consistent with Article 1.1(a)(1) of the SCM Agreement.[124] Rather, we reiterate that our observations in this section are intended only to provide background and context to our evaluation of India's specific allegations of error and the United States' rebuttals, to which we now turn.

7.2.4 Whether the USDOC erred in its finding that the NMDC performs a governmental function within the legal order of India

7.56. India claims that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by concluding that mining is a "governmental function" in India.[125] We disagree. India relies on an incorrect legal standard that would require the USDOC to show that mining is both: (a) classified as a governmental function in the legal order of India; and (b) normally classified as "governmental" within other WTO Members.[126] To require an investigating authority to make such a showing would be to apply an impossible evidentiary standard.[127] Moreover, this proposed legal standard does not comport with the standard articulated by the Appellate Body.[128]

7.57. India also argues that the record evidence of a governmental function was confined only to the *approval* of mining *leases*, and not to the *activity* of mining iron ore.[129] In our view, this is an overly formalistic distinction. The USDOC determined that it is a function of the GOI to arrange for the exploitation of public assets including iron ore[130], relying principally on the evidence in the Dang Report that the GOI owns all mineral resources and is responsible for approving mining leases.[131] The USDOC also relied on the fact that the NMDC was established by the GOI to mine iron ore, which a GOI official had described as performing a "service to the people".[132] In our view, it was reasonable for the USDOC to conclude from this evidence that it is a function of the GOI to arrange for the exploitation of iron ore. The fact that the USDOC did not rely upon evidence that the GOI itself was undertaking mining is not dispositive. The grant of a right or lease to an entity to extract a good can be tantamount to providing that good to the entity.[133] Therefore, it would be unduly narrow to

[124] For instance, there may be probative contradictory evidence that was ignored, or there may be significant mistakes in arriving at factual conclusions or interpreting and applying the legal standard. As mentioned, our evaluation and conclusion on India's specific allegations of error is set out in other sections.

[125] India's first written submission, para. 81; second written submission, para. 92.

[126] India's first written submission, para. 81.

[127] We note that India responded to the Panel's question "[h]ow would an investigating authority obtain evidence from other non-investigated WTO Members as to classifications of their governmental functions?" with the answer that "India considers that the starting point would be a detailed questionnaire issued by the investigating authority to all the interested parties." (India's response to Panel question No. 2(c)). This response did not demonstrate to us how an investigating authority could feasibly undertake the evaluation that India contends was required, as other WTO Members would not receive that questionnaire. We also note that, in response to the Panel's question "[d]oes your domestic legal or administrative system provide for explicit designations of functions as "governmental"?", a number of third parties indicated that either their systems did not provide for such explicit designations, or that they did not consider such explicit designations were necessary for a function to be considered "governmental". (Canada's third-party response to Panel question No. 3, para. 6; China's third-party responses to Panel question Nos. 3-4, paras. 8-9; European Union's third-party response to Panel question No. 3, para. 32; and Japan's third-party response to Panel question No. 3, para. 8).

[128] The Appellate Body has emphasized that the process for identifying a governmental function is non-prescriptive, and more specifically, that domestic classifications of governmental functions "may" – *not* "must" – be relevant to that process. The Appellate Body has not defined its concept of "governmental functions", nor has it set out exhaustively how such a determination should be made. Instead, the Appellate Body has recognized that such determinations are necessarily case-by-case. (Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.9; *US – Anti-Dumping and Countervailing Duties (China)*, paras. 297 and 317).

[129] India's first written submission, para. 81.

[130] Final Determination, (Exhibit IND-60), p. 20.

[131] Final Determination, (Exhibit IND-60), p. 20.

[132] Final Determination, (Exhibit IND-60), pp. 15-16; Preliminary Determination, (Exhibit IND-55), pp. 6-7 (referring to Dang Report, (Exhibit USA-2), p. 102; and Verification Report, (Exhibit USA-3), p. 9).

[133] Appellate Body Report, *US – Softwood Lumber IV*, para. 75; Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 7.136, 7.229, and 7.243. See also Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.60-5.63 and 5.75-5.79. For the outer limits to this approach, see Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.387 and 7.394.

construe the "governmental function" in this case as providing leases or rights to the good, rather than as encompassing the exploitation of the good. The Appellate Body has stated that the determination of "whether a particular conduct is that of a public body must be made by evaluating the core features of the entity and its relationship to government in the narrow sense".[134] Contrary to India's argument, the USDOC's determination was not based only on whether the particular conduct of mining iron ore comprised a "governmental function". Rather, the USDOC evaluated this conduct as part of its examination of the relationship between the NMDC and the GOI, including by referring to the fact that the GOI established an entity (the NMDC) – in which it continued to hold a 98% ownership stake – for the very purpose of undertaking mining.[135] Indeed, the USDOC's determination was not that the conduct of mining iron ore alone comprised a "governmental function", but was instead the "arrang[ing] of the exploitation" of iron ore, including through owning the resource, granting leases to the resource, and establishing the NMDC as a government-owned entity to exploit the resource.[136]

7.58. India also argued that the "SCM Agreement [is] intended to apply only when entities operate in the public realm", whereas the NMDC was set up by the government to operate in the "private realm".[137] For India, entities operating in the "private realm" cannot be said to be performing a "governmental function", since "the Appellate Body has evolved the test of 'governmental functions' as a tool to determine areas that do not concern the 'public realm'".[138] According to India, "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'".[139] We disagree. The SCM Agreement is directed at facilitating remedies to injury incurred by the domestic industry as a result of certain types of governmental interventions in markets. This presupposes that such interventions are occurring in "realms" where markets are operating and other enterprises can be harmed. There is thus no basis for inferring a distinction between "public" and "private" realms for the purposes of the SCM Agreement.

7.59. In summary, the USDOC sought to ascertain whether the NMDC "provided a governmental function in the legal order of India".[140] The USDOC relied on evidence regarding the GOI's legal ownership of the resource in question and the legal tools deployed by the GOI (i.e. granting leases and establishing the NMDC) for the development of the resource. This provided a sufficient evidentiary basis for the USDOC's conclusion that "it is a function of the government of India to arrange for the exploitation of public assets, in this case iron ore" and that the "NMDC provided a governmental function in the legal order of India."[141] India has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) by reaching this conclusion.[142]

7.2.5 Whether the USDOC erred in its assessment of the Miniratna status of the NMDC in respect of establishing "meaningful control" by the GOI

7.60. India pursued two alternative grounds[143] on which the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in its treatment of NMDC's Miniratna status, and the GOI's assertion that the NMDC possessed "enhanced autonomy" as an implication of that status:

[134] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 345.
[135] Final Determination, (Exhibit IND-60), p. 19.
[136] Final Determination, (Exhibit IND-60), pp. 19-20.
[137] India's second written submission, para. 90.
[138] India's second written submission, para. 90 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.61). We are not persuaded by India's reliance on the Appellate Body's interpretation of "governmental agency" in Article III:8(a) of the GATT. This is because the Appellate Body relied on a distinction between "state trading enterprises" in Article XVII of GATT *vis-à-vis* "governmental agencies" in Article III:8(a) of GATT, but India has not pointed to any such distinction or equivalent context in the SCM Agreement. (See further Appellate Body Report, *US – Carbon Steel (India)*, para. 4.26; United States' second written submission, para. 92).
[139] India's second written submission, para. 90.
[140] Final Determination, (Exhibit IND-60), p. 21.
[141] Final Determination, (Exhibit IND-60), pp. 20-21.
[142] India's first written submission, para. 81; second written submission, para. 92.
[143] India's response to Panel question No. 6.

a. the USDOC erred by failing to accord "due significance" to the existing record evidence regarding the implications of Miniratna status[144]; and

b. the USDOC erred by failing to seek further evidence and clarifications regarding the implications of Miniratna status, and likewise by failing to accept the voluntarily-submitted evidence on that point.[145]

7.61. India argued that the Appellate Body "pointed to the failure of the USDOC in not evaluating the implication of NMDC's [Miniratna] … status", and that the USDOC was therefore "forced to consider this factor by the Appellate Body" as part of the reinvestigation.[146] According to India, it was therefore insufficient for the USDOC to decline to consider the legal implications of Miniratna status on the grounds of insufficient record evidence. Either the USDOC should have accounted for the "enhanced autonomy" flowing from Miniratna status in its evaluation, or, if the USDOC doubted the assertion of "enhanced autonomy", it should have sought and accepted further evidence.[147]

7.62. The United States responds that the Appellate Body reports on which India relies to infer a "duty to seek or accept evidence" are unrelated to Article 1.1(a)(1) of the SCM Agreement, nor does the text of that provision impose such a duty.[148] Further, the DSB ruling[149] in the present dispute did not call for additional evidence to be sought. Thus, for the United States, the USDOC was justified in limiting its evaluation of Miniratna status to the existing record evidence. For the United States, this evidence suggested that the conferral of Miniratna status did not displace an inference of meaningful control. Instead, the United States contends that the evidence of Miniratna status corroborated other evidence of the GOI's involvement in the NMDC's operations.[150]

7.63. Our analysis of the parties' arguments proceeds on the basis of the existing record evidence, and not the "new factual information" that the GOI submitted as part of its rejected case brief (see above paragraph 7.37). We address the proper role and significance of this "new factual information" later in our analysis.

7.64. An initial matter where the parties disagree concerns how the USDOC used the evidence of Miniratna status in its determination. India contends that the USDOC simply disregarded the evidence of Miniratna status.[151] By contrast, the United States considers that the USDOC found that the existing record evidence regarding Miniratna status demonstrated sufficiently that Miniratna status did not accord the NMDC with a generalized "enhanced autonomy".[152] Rather, for the United States, the evidence of Miniratna status supported the USDOC's determination that the NMDC was a "public body".[153]

7.65. We agree with the United States' reading of the USDOC's determination. We accept that the USDOC may have simply disregarded evidence of the legal implications of Miniratna status in the *Preliminary* Determination.[154] However, the USDOC did not simply disregard this evidence in the *Final* Determination. Rather, the USDOC stated in the Final Determination that it "disagrees that the record was deficient regarding NMDC's [Miniratna] status as it related to NMDC's autonomy".[155] This indicates to us that the USDOC assessed the record evidence concerning the NMDC's autonomy, including the evidence to which the GOI had referred in its case brief, as part of its Final

[144] India's second written submission, paras. 87 and 229-230.
[145] India's first written submission, paras. 73-74.
[146] India's first written submission, paras. 71 and 73.
[147] India's first written submission, para. 73.
[148] United States' first written submission, paras. 188-189; second written submission, para. 96 and fn 158.
[149] For the avoidance of doubt, we use the term "DSB ruling" in this report to refer to the recommendations or rulings of the DSB arising from the DSB's adoption of panel and Appellate Body reports (see Article 21 of the DSU).
[150] United States' first written submission, paras. 179 and 190; responses to Panel question Nos. 7-8.
[151] India's response to Panel question No. 8.
[152] United States' response to Panel question No. 8.
[153] United States' response to Panel question No. 8.
[154] Preliminary Determination, (Exhibit IND-55), p. 6: "[t]he website further states that NMDC was accorded the status of a 'Public Sector Company by the GOI [Miniratna] in 'A' category in its categorisation of Public Enterprises.' *No further evidence on the record* defines the [Miniratna] categorization, nor does any further evidence refer to the GOI's 'Ratna' designations for companies." (fn omitted; emphasis added).
[155] Final Determination, (Exhibit IND-60), p. 21.

Determination, and concluded that the record was not deficient on that point.[156] The USDOC also stated that "the GOI does not point to supporting record evidence that shows that this categorization reflects 'enhanced autonomy' on the part of the NMDC".[157] When viewed against the evidence to which the GOI had referred in its case brief, this statement does not suggest that the USDOC disregarded the alleged "enhanced autonomy" conferred by Miniratna status. Rather, this conclusion is indicative of the USDOC having reviewed the record evidence and having found it showed that the NMDC's autonomy was confined in certain ways, and thus did not possess a generalized "enhanced autonomy". We also agree with the United States' understanding that the USDOC used Miniratna status as corroborating evidence for its "public body" determination. In particular, the USDOC explained in its Preliminary Determination that this status showed "that the GOI treated the NMDC as a public sector company" and that "[t]his constitutes further evidence that the GOI treated the NMDC as a public entity".[158] On the basis of this understanding of the USDOC's determination, we now evaluate India's two alternative grounds.

7.2.5.1 Whether the USDOC accorded "due significance" to record evidence on Miniratna status and its associated autonomy

7.66. We turn now to India's first ground, namely that the USDOC failed to accord "due significance" to the existing record evidence demonstrating that "enhanced autonomy" flowed from Miniratna status. In terms of the "significance" that the USDOC should have accorded to Miniratna status, India argues that this "evidence proves that Government of India did not in fact exercise meaningful control over the NMDC as an entity and over its *conduct* and that NMDC was an autonomous entity".[159] As we have just recounted, the USDOC did not use Miniratna status in that way, but instead made two other findings. First, the USDOC found that the record evidence did not substantiate the "enhanced autonomy" that India now claims to have been an implication of Miniratna status. Second, the "significance" actually ascribed by the USDOC to Miniratna status was that it corroborated its "public body" determination because it "showed that the GOI treated the NMDC as a public sector company".[160] Against that background, the question before us is whether the USDOC provided reasoned and adequate explanations for those two findings, or instead, whether the USDOC was required to treat Miniratna status as rebutting "meaningful control", as contended by India.

7.67. In respect of the USDOC's first finding, we consider that the USDOC had a sufficient evidentiary basis for concluding that "the GOI does not point to supporting record evidence that shows that this categorization reflects 'enhanced autonomy' on the part of the NMDC".[161] The existing record evidence – including that which the GOI had relied upon in its case brief – showed that the "autonomy" conferred by Miniratna status was: (a) confined to certain investment and personnel matters[162]; and (b) periodically delimited by the GOI through "annual performance parameters and targets".[163] Further, the spheres in which the record evidence indicated that the NMDC operated autonomously due to Miniratna status – namely, "investment and personnel" matters[164] – are different to the spheres where the USDOC found evidence of "meaningful control" by the GOI – namely, price negotiations and export restrictions.[165] Thus, the fact that the NMDC may have accrued a degree of autonomy in certain areas through Miniratna status – namely "investment and personnel" matters – does not clearly rebut the inference that the GOI exercised "meaningful control" over the NMDC in other areas, contrary to India's contention. Further, any such autonomy subsisted only within parameters that had already been set through annual memoranda with the GOI.[166] In that regard, we affirm our earlier observation that the record evidence on the

[156] See above section 7.2.3 which sets out the evidentiary background.
[157] Final Determination, (Exhibit IND-60), p. 21.
[158] Preliminary Determination, (Exhibit IND-55), p. 6.
[159] India's response to Panel question No. 5. (emphasis original)
[160] Preliminary Determination, (Exhibit IND-55), p. 6.
[161] Final Determination, (Exhibit IND-60), p. 21.
[162] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 4.
[163] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 6.
[164] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), pp. 4 and 6.
[165] Final Determination, (Exhibit IND-60), pp. 16 and 20-21.
[166] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 6. See also Verification Report, (Exhibit USA-3), p. 9: "[t]he official from the Ministry of Steel, further noted that because the [Metals and Minerals Trading Corporation of India] and NMDC provide a specific service to the people, they are monitored and reviewed by the government, as they are viewed as strategic companies".

scope and nature of the autonomy enjoyed by the NMDC does not warrant an inference that the GOI was not involved in the conduct of the NMDC.[167]

7.68. In respect of the USDOC's second finding, we consider that the USDOC had a sufficient evidentiary basis for concluding that Miniratna status "constitutes further evidence that the GOI treated the NMDC as a public entity".[168] We note that this finding did not form the core of the USDOC's "public body" determination.[169] It was, at most, peripheral corroborating evidence. Nonetheless, the fact that the NMDC "was accorded the status of a 'Public Sector Company by the GOI [Miniratna] in 'A' category in its categorisation of Public Enterprises'"[170] corroborates the evidence cited by the USDOC that the GOI viewed the NMDC as a public entity that "provides a specific service to the people".[171] In view of that role, a GOI official had described the NMDC as a "strategic compan[y]".[172] This, in turn, supported other evidence regarding the importance that the GOI placed on the NMDC, such as that the GOI set annual parameters and targets for the NMDC which were regularly monitored.[173] Further, we do not consider it incongruous for the USDOC to have found, on the one hand, that the NMDC was subject to "meaningful control" by the GOI in certain ways, while also finding, on the other hand, that the designation as a Miniratna company (with its attendant degree of autonomy and apparent parliamentary/governmental supervision[174]) corroborated a finding of "public body". This is because the record evidence suggests that, in the factual circumstances of the present case, the exercise of "meaningful control" and the grant of a degree of autonomy through Miniratna status could plausibly coexist.[175]

7.69. We therefore conclude that India has not demonstrated that the USDOC failed to give "due significance" to Miniratna status, nor that the USDOC failed to provide reasoned and adequate explanations for its findings on Miniratna status and the autonomy that it allegedly conferred.[176]

7.2.5.2 Whether the USDOC erred by failing to seek or accept additional evidence on the legal implications of Miniratna status

7.70. We turn now to India's alternative ground for challenging the USDOC's treatment of Miniratna status and the GOI's assertion that the NMDC possessed "enhanced autonomy" through that status, namely that the USDOC erred by failing to seek further evidence and clarifications regarding the implications of Miniratna status, and likewise by failing to accept the voluntarily-submitted evidence on that point.[177]

7.71. India's alternative argument is premised on its understanding that the USDOC declined to take into account the assertion that Miniratna status conferred "enhanced autonomy" on the basis that the record evidence from 2004-2007 did not contain sufficient information substantiating that assertion.[178] By failing to seek such information and rejecting information submitted voluntarily, India claims that the USDOC violated Article 1.1(a)(1) of the SCM Agreement.[179]

7.72. We disagree with the premise of India's argument concerning the basis on which the USDOC rejected the allegation of "enhanced autonomy" conferred by Miniratna status. As we have explained

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[167] See above para. 7.54.
[168] Preliminary Determination, (Exhibit IND-55), p. 6.
[169] Preliminary Determination, (Exhibit IND-55), pp. 5-7; Final Determination, (Exhibit IND-60), pp. 16 and 19-21. Evidence of meaningful control by the GOI over the NMDC was emphasized by the USDOC.
[170] Preliminary Determination, (Exhibit IND-55), p. 6.
[171] Verification Report, (Exhibit USA-3), p. 9.
[172] Verification Report, (Exhibit USA-3), p. 9.
[173] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 6; Verification Report, (Exhibit USA-3), p. 9.
[174] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), pp. 6-7; Verification Report, (Exhibit USA-3), p. 9.
[175] As we have explained earlier, the spheres where the USDOC found evidence of meaningful control over the NMDC were different to the spheres in which the evidence suggested the NMDC was granted autonomy through Miniratna status. Further, the evidence suggests that this "autonomy" operated only within parameters and targets set in annual memoranda with the GOI.
[176] We recall that this conclusion is based on the existing record evidence and does not take into account the "new factual information" – we will return to this below in section 7.2.5.3.
[177] India's first written submission, paras. 73-74.
[178] India's first written submission, para. 71.
[179] India's first written submission, paras. 73-74; second written submission, para. 86.

earlier[180], the USDOC did not reject the assertion of "enhanced autonomy" from Miniratna status due to a paucity of evidence. Rather, when read against the broader evidentiary background and the submissions made by the GOI in its case brief, it is apparent that the USDOC considered there to be sufficient record evidence concerning Miniratna status which contradicted the assertion of a generalized "enhanced autonomy", and which instead pointed to a confined autonomy that did not rebut the inference of "meaningful control" by the GOI. As we have explained earlier, the USDOC had a sufficient evidentiary basis for adopting this position.[181]

7.73. We also disagree with India's contention that Article 1.1(a)(1) of the SCM Agreement embeds a "duty"/"obligation" to both seek and accept evidence.[182] We acknowledged earlier that, if an investigating authority does not possess sufficient evidence on the record to reach a determination, it may need to seek or accept additional evidence in order to be capable of providing a "reasoned and adequate" explanation that satisfies the requirements of a substantive obligation.[183] However, it does not follow that there is a standalone obligation in Article 1.1(a)(1) to seek or accept evidence separate from the basic requirement to provide a "reasoned and adequate" explanation. In view of our conclusion at paragraph 7.69 we likewise conclude that India has not demonstrated that the USDOC needed to seek and accept additional evidence on the legal implications of Miniratna status in order to be capable of providing a "reasoned and adequate" explanation for its "public body" determination.

7.74. India additionally argued that the USDOC was required to seek and accept evidence on Miniratna status (and its legal implications) because the USDOC was "forced to consider this factor by the Appellate Body" in the original proceedings, but had declined to do so in the reinvestigation due to insufficient record evidence on this factor.[184] Again, we disagree with the premise that the USDOC dismissed the relevance of Miniratna status due to a paucity of record evidence. We also disagree that the relevant DSB ruling "forced [the USDOC] to consider this factor", including by seeking and accepting additional evidence. The Appellate Body did not suggest that Miniratna status was necessarily relevant or dispositive (nor more probative than other elements of evidence), but rather, that the failure to *discuss* such evidence reflected the application of an incorrect legal standard by the USDOC.[185] Accordingly, the DSB ruling required the USDOC to provide an explanation that reflects the application of the *correct* legal standard, which would include a discussion of the kinds of evidence relevant to that legal standard, such as Miniratna status and its legal implications.[186] Beyond that, the DSB ruling did not prescribe explicitly that additional evidence would be required for the USDOC to apply the correct legal standard, nor that there was anything especially probative about the evidence of Miniratna status – other than that it was pertinent to questions of the relationship between the GOI and NMDC, which was the correct legal standard to be applied.[187] As we have explained above[188], the existing record evidence provided the USDOC with a sufficient evidentiary basis for considering that the record was not deficient regarding Miniratna status. The NMDC was not endowed with a generalized "enhanced autonomy", and any autonomy exercised by the NMDC was confined in such a way that it did not rebut other evidence indicating "meaningful control" of the NMDC by the GOI.

7.2.5.3 Whether the "new factual information" can be taken into account by the Panel

7.75. Finally, we address the matter of the "new factual information" contained in the GOI's rejected case brief to the extent it pertains to India's claim under Article 1.1(a)(1) of the SCM Agreement. According to the United States, the "new factual information" was rejected because it was considered

[180] See above para. 7.65.
[181] See above paras. 7.41-7.43, 7.54, and 7.67.
[182] India's first written submission, paras. 73-74 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 344 and 346).
[183] See above para. 7.26.
[184] India's first written submission, para. 198.
[185] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.52 and 4.54.
[186] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.43, 4.52, and 4.54-4.55.
[187] The overall error by USDOC was a failure to provide a reasoned and adequate explanation for its finding that the NMDC is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.55) which flowed from its failure to apply the correct legal standard (ibid. para. 4.52)). See also ibid. paras. 4.37, 4.52, and 4.54.
[188] See above para. 7.67.

untimely.[189] In turn, the submission of this information was considered untimely because "[t]he information contained in the GOI's case brief's exhibits and arguments were not placed on the record of the administrative reviews that cover these [Section 129] proceedings."[190] In response to questions from the Panel, the United States explained that:

> [T]he GOI's rejected case brief was kept on the record, "solely for the purposes of establishing and documenting the basis for rejecting the document." However, the arguments and exhibits contained within the document were not eligible for consideration because the USDOC's regulations prohibit the agency from using rejected information. Therefore, the content of the rejected case brief was not information on the record.[191]

7.76. Although the "new factual information" was technically on the record, the key point is that, according to the United States, the USDOC was legally precluded from having regard to this information in its investigation. The oft-used formulation of a panel's standard of review under the SCM Agreement is that "a panel must examine whether, *in the light of the evidence on the record*, the conclusions reached by the investigating authority are reasoned and adequate".[192] The "new factual information" cannot be said to be "on the record" for this purpose. This is because the conclusions of the USDOC were not reached in light of that information, since the USDOC was legally precluded from considering that information.

7.77. India contended that the Panel could permissibly take the "new factual information" into account.[193] For India, "the evidence was already on record and within the knowledge of the United States".[194] India explained that the corresponding exhibits had been submitted in the original panel proceedings, and also that some of the information could be found in weblinks that had been provided in the underlying investigations, while other aspects of the information pertained to concepts, terms, or evidence that the USDOC had itself referenced in its own documents and determinations.[195] None of the reasons offered by India rebut the proposition that the "new factual information" was not on the record *for the purpose of the USDOC's evaluation*, and thus is not permissibly within the purview of this Panel's evaluation. To find otherwise would be to invite an impermissible *de novo* review – that is, to take into account new evidence that was not before the investigating authority for the purposes of its evaluation.[196]

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[189] United States' response to Panel question No. 15.

[190] United States' response to Panel question No. 15.

[191] United States' response to Panel question No. 15. (fns omitted)

[192] See Appellate Body Report, *US – Washing Machines*, para. 5.258 (quoting Appellate Body Report*, US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93). (emphasis added)

[193] India's response to Panel question No. 16; comments on the United States' responses to Panel question Nos. 15-16.

[194] India's comments on the United States' response to Panel question No. 16.

[195] India's comments on the United States' responses to Panel question Nos. 8 and 15-16; second written submission, para. 93.

[196] In paragraphs 7.5 and 7.6, we explained two ways in which panels may permissibly consider record evidence that was not explicitly cited by an investigating authority in its determination:

Where the complainant bases its claim on record evidence that was not cited by the authority, and asserts that this uncited record evidence warranted a different explanation and conclusion to that reached by the authority; and

Where evidence that was not cited by the authority corroborates the inferences, reasoning and conclusions reached by the investigating authority. Consideration of such uncited record evidence is permissible because it does not involve any inferences, reasoning or conclusions that are different to those reached by the authority, and hence involves neither a *de novo* consideration of the matter, nor any substitution of the authority's inferences, reasoning and conclusions with different inferences, reasoning and conclusions.

We distinguish the "new factual information" from these circumstances. The USDOC was not legally permitted to consider this evidence in arriving at its conclusions. It cannot have provided an alternative basis for the USDOC's conclusions, since the USDOC was not permitted to consider it. Likewise, this "new factual information" cannot now be treated by the Panel as evidence that corroborates the USDOC's inferences, reasoning and conclusions, since the USDOC's inferences, reasoning and conclusions were legally precluded from being based on this evidence. To find otherwise would be to rely on material and draw inferences that the USDOC could not lawfully have done, thus necessarily substituting our own evaluation with that of the USDOC.

7.2.5.4 Conclusion on Miniratna status

7.78. India has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement on either of its alternative grounds relating to the USDOC's treatment of Miniratna status and the GOI's assertion that the NMDC possessed "enhanced autonomy" as an implication of that status. This is because the existing record evidence provided a sufficient foundation for the USDOC to reject the proposition that the NMDC was endowed with a generalized "enhanced autonomy". Instead, the autonomy enjoyed by the NMDC was confined in ways that meant that this autonomy did not rebut the inference of "meaningful control" of the NMDC by the GOI. In view of that conclusion, there is no basis for finding that the USDOC was required to seek or accept additional evidence on Miniratna status and its legal implications in order to be capable of providing a reasoned and adequate explanation for its "public body" determination under Article 1.1(a)(1), nor can such a basis be found in the relevant DSB ruling. Finally, we find that the "new factual information" was not on the record of investigation for the purpose of the USDOC's evaluation, and thus is not within the purview of our evaluation in these proceedings.

7.2.6 Whether the USDOC erred in relation to the export restraints applying to the NMDC

7.79. India claims that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by concluding that the Chairman of the NMDC recommended export restrictions on iron ore in accordance with GOI policy, and that export restrictions influenced the market for high-grade iron ore.[197] India argues that the export restrictions were a mandatory measure of general application, as opposed to a measure voluntarily undertaken by the NMDC.[198] India also cautions against attributing, to the NMDC itself, the Chairman's recommendation regarding export restrictions. India instead contends that "the Chairman of NMDC occupied another position in another governmental committee" when he made that recommendation.[199]

7.80. The United States responds that the record evidence demonstrates that the export restrictions were applied only by the NMDC because it was the sole entity that mined the particular type of iron ore that was subject to those restrictions.[200] In any event, the United States contends that it is immaterial whether the export restrictions were limited to the NMDC. Rather, the key point was that the Chairman actively recommended such restrictions, suggesting that the "NMDC's board members were not merely observers, but active participants working daily to effectuate the GOI's policies".[201]

7.81. The relevant passage of the USDOC's explanation is worth extracting in full:

> Further, the record shows that the chairman of NMDC, in line with governmental policies and as part of the Expert Group on Preferential Grants of Mining Leases, recommended that except for long term contracts, the export of iron ore not be allowed. Contrary to the GOI's assertion that prices are determined by the supply and demand of the market, NMDC described at verification that there are export restrictions in place for high-grade iron ore with a high Fe content. … We find that the prices from the NMDC do not represent prevailing market conditions in India because the conditions of the market are being influenced by the GOI's policy considerations and actions, as described above, rather than by the activity of unfettered participants in a private market.[202]

7.82. It is apparent from this passage that the USDOC used the evidence of the NMDC Chairman's recommendation on export restrictions to infer that he was acting in line with governmental policies, and that the USDOC used the application of export restrictions to rebut the GOI's assertion in its case brief that the NMDC's prices were determined commercially based on

[197] India's first written submission, paras. 75(b) and (c), 76, and 78.
[198] India's first written submission, para. 78; second written submission, para. 99.
[199] India's first written submission, para. 78; second written submission, para. 101.
[200] United States' first written submission, para. 183.
[201] United States' first written submission, paras. 174 and 184.
[202] Final Determination, (Exhibit IND-60), pp. 20-21. (fns omitted)

supply and demand.[203] India argues that both of these inferences were unwarranted[204], and we address each in turn.

7.83. The NMDC Chairman clearly recommended to the Expert Group that the export of iron ore not be allowed except under long term contracts: "[g]overnment should re-examine the whole issue of export of iron ore. He suggested that except long term contract, export of iron ore should not be allowed".[205] This aspect of the USDOC's explanation is taken almost verbatim from the Dang Report (the Expert Group's report), and we do not understand the parties to dispute the fact that this recommendation was made. However, India seems to suggest that the Chairman was not participating in the Expert Group in his capacity as the NMDC Chair or reflecting NMDC positions.[206] This suggestion cannot be sustained. The evidence clearly demonstrates otherwise.[207] Further, the NMDC itself made substantially the same submission to the Expert Group, as recorded in the Dang Report: "[e]xport of lump ore should be discouraged to meet the domestic demand".[208]

7.84. The evidence also shows that the NMDC Chairman's recommendation was, as described by the USDOC, "in line with governmental policies". The GOI applied a policy of restricting exports of high-grade iron ore, and likewise, the NMDC Chairman was recommending restricting exports of iron ore.[209] Further, as we have observed earlier[210], the rationale articulated by the NMDC Chairman (and the NMDC itself) for restricting iron ore aligns with the record evidence on the policy rationale of the GOI for restricting iron ore, namely to ensure that exports do not take place at the cost of supplies to domestic steel producers.[211] Thus, we consider that the USDOC had a sufficient evidentiary basis for using the NMDC Chairman's recommendation on export restrictions to infer that he was acting in line with governmental policies in that regard.

7.85. We note that India contended that the "NMDC presented arguments to the committee which were most commercially advantageous to NMDC like any other private enterprise would do".[212] However, India does not point to any record evidence that export restrictions on the NMDC's own product would be commercially advantageous to the NMDC. Rather, the NMDC Chairman's own statement to the Expert Group was that "[t]here is a shortage in supply of iron ore which *is reflected in term of its rising prices*".[213] Export restrictions would have the intended effect of arresting that shortage, and the consequent rise in prices of iron ore.[214] The NMDC extracts and sells iron ore. We therefore reject India's contention that the NMDC Chairman's recommendation of export restrictions

[203] See further above section 7.2.3.3.

[204] India's first written submission, paras. 75(b) and (c), 76, and 78.

[205] Dang Report, (Exhibit USA-2) p. 185.

[206] India's first written submission, para 78; second written submission, para. 101. Not only does India characterize the NMDC Chairman's involvement as "occup[ying] another position in another governmental committee", but further, despite the NMDC itself making submissions to the Dang Report, India states that the Chairman's involvement "does not necessarily imply that the Board of Directors of NMDC had made any decisions on the same" and "[n]o such positive evidence exists on record".

[207] The Dang Report describes its "Composition" as including "CMD, National Mineral Development Corporation Limited – Member". (Dang Report, (Exhibit USA-2) p. 5). The Dang Report also describes the NMDC Chairman's interventions as follows: "Shri B. Ramesh Kumar Chairman, NMDC in his presentation stated as under: …" (ibid. p. 185 (emphasis added)). The Dang Report also references the positions submitted by the NMDC on various matters. (Ibid. pp. 103, 105, 194, 204, and 206). The Dang Report also refers to a: "POSITION PAPER ON NATIONAL GUIDELINES ON IRON ORE MINING 12. NMDC". (Ibid. p. 179 (upper-case original)).

[208] Dang Report, (Exhibit USA-2), p. 204.

[209] United States' response to Panel question No. 19.

[210] See above para. 7.47.

[211] For evidence on the NMDC's rationale, see: Dang Report, (Exhibit USA-2), pp. 185, 204, and 206. For evidence on the GOI's rationale, see: Hoda Report, (Exhibit USA-8), para. 7.61. We note that the USDOC relied on the Hoda Report in other aspects of its determination. (See e.g. Final Determination, (Exhibit IND-60), pp. 24-25). We also note that India appears to dispute the relevance of the Hoda Report to this matter. (India's response to Panel question No. 19). We disagree. This evidence is clearly connected to the USDOC's explanation that the recommendation was in line with GOI policy considerations, and is hence within our purview: see above paras. 7.5-7.6. (See also Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99; Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.8).

[212] India's response to Panel question No. 17.

[213] Dang Report, (Exhibit USA-2), p. 185. (emphasis added)

[214] Hoda Report, (Exhibit USA-8), para. 1.35 ("[a] limitation on exports would also amount to restricting the market for Indian ores, thereby depriving the miner of the best international price for his product"), and para. 7.61; see also Dang Report, (Exhibit USA-2), pp. 204 and 206.

(and the NMDC's similar recommendations) "merely reflect the advocacy and arguments by NMDC, *as any other private player would*".[215] Rather, the NMDC's advocacy of export restrictions evokes the observation of another panel in the analogous context of Article 1.1(a)(iv) of the SCM Agreement: "[t]he fact that private parties act in a strange or not commercially reasonable manner can form part of the proof that someone was requiring these private parties to act in this abnormal way."[216]

7.86. We turn now to the USDOC's reliance on the application of export restrictions to rebut the GOI's assertion in its case brief that the NMDC's prices were determined commercially based on supply and demand. India raises a number of matters before us that were not addressed explicitly by the USDOC in the passage from its determination that we extracted above. In particular, the USDOC did not address explicitly the question that India now raises as to whether the relevant export restrictions were "a legal mandate applied by the GOI to all iron ore exporters" and whether "the NMDC voluntarily decided to not export iron ore".[217] Nor did the USDOC address the question that India now raises as to whether the conclusion that market conditions in India were influenced by the export restrictions is a "mere assertion" by the USDOC unsupported by any evidence on record.[218]

7.87. Although the USDOC did not discuss these matters explicitly in its determination, it is apparent that they are addressed in the evidence and exhibits cited by the USDOC in its explanation on export restrictions extracted above, as well as by other corroborating record evidence. Page 185 of the Dang Report, which was cited by the USDOC[219], records the NMDC Chairman as stating that: "NMDC is exporting iron ore only to meet its commitment under long term contract".[220] India contends that this was simply a factual observation, rather than indicative of the NMDC itself imposing an export restriction.[221] However, the NMDC Chairman's statement must be read in context. It appears alongside a recommendation that the GOI adopt an export restriction of an identical character to that reflected in the NMDC Chairman's statement. It also appears alongside the articulation of a rationale for adopting such a restriction by both the NMDC Chairman and the NMDC itself.[222] This context suggests that the NMDC was purposive in "exporting iron ore only to meet its commitment under long term contract", and that it was not, for instance, a mere coincidence that the NMDC's exports were "only to meet its commitment under long term contract".

7.88. The significance of this lies in the fact that, according to the exhibit cited by the USDOC, the volume of relevant NMDC exports under long term contracts was consistently lower than the GOI-mandated export caps.[223] Thus, not only was the NMDC advocating that the GOI adopt an export restriction on its own product that was stricter than the existing GOI-mandated export caps, but moreover, the NMDC seems to have purposively set its exports at a level that happened to be below this cap (namely, exports only to meet commitments under long term contracts). Therefore, whilst India invites us to consider that "it is not the case that the NMDC voluntarily decided to not export iron ore"[224], the record evidence suggests the contrary. To this extent, we agree with the United States that "the fact that the NMDC never reached the cap does not reveal the export restriction to have had no effect", but rather, "the fact that the NMDC stayed within this export limit

[215] India's response to Panel question No. 19.
[216] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.105.
[217] India's first written submission, para. 78.
[218] India's first written submission; para. 78; second written submission, para. 101. India seems to suggest that, because the GOI-mandated export caps were never reached, there was concomitantly no impact on market conditions or prices. (India's second written submission, para. 189). Such an inference is displaced by the NMDC Chairman's explanation in the Dang Report that the NMDC "is exporting iron ore only to meet its commitment under long term contract". (Dang Report, (Exhibit USA-2), p. 185).
[219] Final Determination, (Exhibit IND-60), fn 73.
[220] Dang Report, (Exhibit USA-2), p. 185.
[221] India's response to Panel question No. 19.
[222] For the NMDC Chairman's rationale, see: Dang Report, (Exhibit USA-2), pp. 185: "[t]here is a shortage in supply of iron ore which is reflected in term of its rising prices". For the NMDC's rationale, see ibid. pp. 204 and 206: "[e]xport of lump ore should be discouraged to meet the domestic demand"; and "[t]he raw material being natural reserves should be available adequately for the domestic industry and exports should not be at the cost of domestic industry".
[223] Final Determination, (Exhibit IND-60), fn 74 (referring to Verification Report, (Exhibit USA-3), p. 8).
[224] India's first written submission, para. 78.

would only serve to corroborate the USDOC's finding that this export restriction was closely monitored and enforced by the GOI".[225]

7.89. Accordingly, India's contention that the GOI-mandated export caps were a measure of general application is not relevant. The evidence in the exhibits referred to by the USDOC suggests that regardless of the GOI-mandated export caps, the NMDC itself purposively exported iron ore only to meet its commitments under long term contracts, which happened to be consistently lower than those caps. Additionally, the NMDC's apparent rationale for exporting iron ore only to meet its commitments under long term contracts aligned with the GOI's policy rationale for its own export caps.[226] We therefore disagree with India's argument that "export restrictions imposed by [GOI] are of no relevance to the determination of whether NMDC is a public body". Rather, we consider it relevant – as did the USDOC[227] – that the GOI maintained a measure on the basis of a policy rationale which appears to have been advocated by the NMDC Chairman and which appears to have been emulated by the NMDC in limiting exports only to meet commitments under long term contracts. We also recall, in this regard, that the NMDC Chairman was appointed by a GOI body, and the NMDC itself was 98% owned by the GOI and described itself as being under the "administrative control"[228] of the GOI.[229] Against that evidentiary background, the USDOC had a sufficient basis for concluding that the "export restrictions in place for high-grade iron ore" contradicted the GOI's assertion that the NMDC's prices were set "by the supply and demand of the market", and for instead inferring from these export restrictions that "the conditions of the market are being influenced by the GOI's policy considerations and actions".[230]

7.90. For the same reasons, we reject India's contention that "[t]he conclusion that market conditions in India were influenced by the export restrictions is … a mere assertion by USDOC unsupported any evidence on record".[231] The aforementioned record evidence supports the inference that the NMDC was purposive in limiting its iron ore exports, with the underlying rationale reflected in the following statements of the NMDC Chairman and the NMDC as recorded in the Dang Report:

> NMDC is exporting iron ore only to meet its commitment under long term contract. …
>
> Government should re-examine the whole issue of export of iron ore. He suggested that except long term contract, export of iron ore should not be allowed. …
>
> There is a shortage in supply of iron ore which is reflected in terms of its rising prices.
>
> Export of lump ore should be discouraged to meet the domestic demand. …
>
> The raw material being natural reserves should be available adequately for the domestic industry and exports should not be at the cost of domestic industry.[232]

7.91. It is apparent from these extracts that the NMDC Chairman (and the NMDC as an entity) articulated that the very purpose of limiting iron ore was to affect market conditions, particularly as

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[225] United States' second written submission, para. 173.

[226] For evidence on the NMDC's rationale, see: Dang Report, (Exhibit USA-2) pp. 185, 204, and 206. For evidence on the GOI's rationale, see: Hoda Report, (Exhibit USA-8), para. 7.61. See also para. 7.47.

[227] Final Determination, (Exhibit IND-60), pp. 20-21; United States' first written submission, paras. 174 and 184.

[228] We find, as a matter of fact, that it was reasonable for the USDOC to infer that this term refers to actual and executive control in GOI/NMDC parlance. See, e.g. the use of the term "administratively controlled" on p. 7 of GOI's questionnaire response, 2006 administrative review, (Exhibit IND-18), and "controlled" on p. 8 of the same exhibit.

[229] Final Determination, (Exhibit IND-60), pp. 19-21.

[230] The evidentiary background also contradicts India's contention that the fact of the GOI-mandated export caps demonstrates that it did not exercise meaningful control over the NMDC. India suggests that such caps would be unnecessary if the GOI did in fact control the NMDC. (India's second written submission, para. 102). India's suggestion in this regard is contradicted by the record evidence reviewed above from which it can be reasonably inferred that: (a) the NMDC purposively exported iron ore only to meet its commitments under long term contracts, which happened to be consistently lower than the GOI-mandated caps; and (b) the NMDC did this on the basis of a rationale that aligned with the GOI's policy rationale for its export caps.

[231] India's first written submission; para. 78; second written submission, para. 101.

[232] Dang Report, (Exhibit USA-2) pp. 185, 204, and 206.

they related to domestic supply. Thus, contrary to India's argument, there is record evidence to support the USDOC's assertion that market conditions were being influenced by GOI policy considerations, including through export restrictions.[233] India appears to suggest that, to the extent that the USDOC did not itself explicitly cite certain evidence, it is "*ex post facto rationalization*, and thus, irrelevant for the purposes of present proceedings".[234] We disagree. As we have stated earlier, an investigating authority need not cite explicitly all the evidence that supports its conclusion on a given point.[235] Further, we note that it was India who raised the question in the present proceedings concerning whether and how the NMDC was involved in export restrictions that could affect market conditions, and what the record evidence did or did not demonstrate in that regard.[236]

7.92. For the foregoing reasons, we conclude that India has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by finding that the Chairman of the NMDC recommended export restrictions on iron ore in accordance with GOI policy, and that export restrictions influenced the market for high-grade iron ore.

7.2.7 Whether the USDOC erred in finding that the Directors (appointed by the GOI) hold price negotiations for the sale of iron ore

7.93. India claims that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by incorrectly finding, as a matter of fact, that the NMDC's Directors appointed by the GOI hold price negotiations for the sale of iron ore.[237] In particular, India argues that the USDOC engaged in the following errors in concluding that "[d]irectors (who are appointed by the GOI) hold price negotiations for the sale of iron ore": (a) the USDOC found that price negotiations are carried out by the "Board [of Directors]", whereas the record evidence indicates they were undertaken by a "Committee of Directors"; (b) at least four Directors are not appointed by the GOI and there is no record evidence cited by the USDOC as to the size or composition of the "Committee of Directors", which means it is at least plausible that price negotiations were carried out by non-GOI-appointed/independent Directors; and (c) in any case, the USDOC did not address the importance of the obligation on Directors to act independently in accordance with "corporate norms".[238] In rebuttal, India supplemented these arguments with additional evidence and argumentation seeking to demonstrate that the NMDC Board was, in fact, independent of the GOI.[239]

7.94. The United States responded that the key point of the USDOC's explanation was that the Directors, not the staff, held price negotiations, and that the GOI-appointed Chairman had approval power over such negotiations. For the United States, these conclusions can be drawn irrespective of whether price negotiations were undertaken by a "Committee" of Directors or the "Board" of Directors. In respect of the "corporate governance norms", the United States contends that there was no record evidence to support this assertion, and in any case, that fact was outweighed by the totality of evidence showing meaningful control by the GOI.[240]

7.95. In light of India's allegation of error, the question before us is whether the USDOC made a factual error in concluding, in India's words, that "[d]irectors (who are appointed by the GOI) hold

[233] We reiterate, in this regard, that the NMDC's apparent rationale appeared to align with the evidence on the GOI's policy rationale for export restrictions (see above paras. 7.47, 7.84 and 7.89). We also note that, contrary to India's contention that the USDOC engaged in a "mere assertion… unsupported by any evidence on record", the Hoda Report explicitly stated that export restrictions would "have an adverse impact on domestic prices of the commodity and, consequently, on the development of iron ore mining as a whole". (Hoda Report, (Exhibit USA-8), para. 7.55). This too demonstrates to us that there was record evidence that supports the USDOC's explanation, contrary to India's contention.

[234] India's comments on the United States' response to Panel question No. 19.

[235] See above paras. 7.5-7.6. See also Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.99.

[236] India's first written submission, paras. 75(b) and (c), 76 and 78; second written submission, paras. 99-102; United States' response to Panel question No. 18; India's comments on the United States' response to Panel question Nos. 18-19. Indeed, India framed its case in large part as premised on whether there is any record evidence at all that could sustain certain propositions.

[237] India's first written submission, para. 77.

[238] India's first written submission, paras. 75-77; second written submission paras. 95-98.

[239] India's second written submission, para. 94.

[240] United States' first written submission, paras. 181-182.

price negotiations for the sale of iron ore".[241] The relevant passage of the USDOC's explanation that India challenges is as follows:

> The directors, not NMDC staff members, hold negotiations with customers to discuss price and quantity. The chairman approves negotiation and then contracts are submitted to the Board for ratification. This demonstrates that the board members, particularly the chairman, which is appointed by the GOI, are not mere observers but active and involved in the day-to-day operations of the NMDC on the GOI's behalf.[242]

7.96. The principal evidence relied upon by the USDOC to justify this explanation is from the GOI Verification Report, as follows:

> The NMDC official also explained that the directors hold negotiations with customers where they discuss the price and quantity of the contracts. These negotiations are approved by the chairman and then are submitted to the Board for ratification. Each contract is included on a list that is ratified by the Board, as every pricing contract must be ratified by the entire Board. The NMDC official explained that at a minimum, Board meetings are held once a quarter.[243]

7.97. The evidence with which India now seeks to rebut the USDOC's explanation is from the GOI's questionnaire response in the 2004 administrative review, as follows:

> In accordance with Board approved policy the Chairman and the Managing Director of NMDC constitutes a Committee of Directors to carry our negotiations with various domestic customers on price fixation. …
>
> As explained above, a Committee of Directors carries out negotiations with various customers and finalizes the prices.[244]

7.98. Contrary to India's argument[245], there is nothing inherently inconsistent between these aspects of evidence. Both explain a price negotiation process in which the Chairman and Directors are actively involved. Both aspects of evidence largely corroborate the USDOC's conclusion that "[t]his demonstrates that the board members, particularly the chairman, which is appointed by the GOI, are not mere observers but active and involved in the day-to-day operations of the NMDC on the GOI's behalf".[246]

7.99. We note that India does not challenge the USDOC's findings regarding the fact that certain Directors were appointed by GOI bodies.[247] Rather, India seems to suggest that, since the price negotiations were conducted by a subset of Directors (i.e. the Committee), and since the USDOC itself acknowledged that some of the Directors were not appointed by GOI bodies, it is at least possible that the price negotiations were conducted by those Directors not appointed by GOI bodies.[248] This argument is unconvincing. Even if India is correct that the "Committee" was comprised of Directors not appointed by GOI bodies, the evidence shows that the process was led by the Chairman (who was appointed by a GOI body), and was subsequently subject to approval by the Board[249], which the USDOC found to comprise a majority of Directors appointed by GOI bodies.[250] Thus, in line with the USDOC's finding, the Directors appointed by GOI bodies were involved in the price negotiations regardless of the composition or role of the "Committee of Directors" that India relies upon.

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[241] India's first written submission, paras. 75(a) and 77.
[242] Final Determination, (Exhibit IND-60), p. 20. (fn omitted)
[243] Verification Report, (Exhibit USA-3), p. 6 (referred to in Final Determination, (Exhibit IND-60), p. 20).
[244] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), pp. 5-6.
[245] India's first written submission, para. 77; second written submission, paras. 95 and 98.
[246] Final Determination, (Exhibit IND-60), p. 20.
[247] India's first written submission, para. 77; second written submission, para. 94.
[248] India's first written submission, para. 77; second written submission, para. 98.
[249] Final Determination, (Exhibit IND-60), p. 20 (referring to Verification Report, (Exhibit USA-3), p. 6).
[250] Final Determination, (Exhibit IND-60), p. 20.

7.100. India also argued that the USDOC failed to give "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 [administrative review]"[251], citing a passage in the GOI's questionnaire response that "[t]he Board also has 8 positions of independent non-executive Directors required to comply with the corporate governance norms of the national stock markets".[252] Again, however, this argument and evidence is unconvincing because it relates only to the "independent non-executive Directors". India has not demonstrated that it relates to the Directors appointed by GOI bodies[253], who the USDOC found to comprise a majority of the Board, and we recall that India does not challenge this finding.[254]

7.101. We note that India made certain arguments regarding the Board's independence in rebuttal to arguments by the United States. We do not delay in addressing these arguments of India because they do not support India's original claim that the USDOC made a factual error in finding that "[d]irectors (who are appointed by the GOI) hold price negotiations for the sale of iron ore".[255]

7.102. For the foregoing reasons, we conclude that India has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by incorrectly finding, as a matter of fact, that the NMDC's Directors appointed by the GOI hold price negotiations for the sale of iron ore.[256]

7.2.8 Conclusion on India's claims under Article 1.1(a)(1) of the SCM Agreement

7.103. We have evaluated each of India's allegations of error. As we have explained in the foregoing sections, India has not demonstrated to the Panel on the basis of these allegations of error that the USDOC had acted inconsistently with Article 1.1(a)(1) of the SCM Agreement. Therefore, our overall conclusion is that India has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement.

7.3 Benefit: India's claims under Article 14(d) of the SCM Agreement

7.104. India requests the Panel to find that the USDOC's determination of a benchmark for ascertaining whether the NMDC's sales of high-grade iron ore conferred a benefit is inconsistent with Article 14(d) of the SCM Agreement as a result of a number of errors regarding three potential sources of benchmarking data: the Tata price quote, an association price chart, and the NMDC's export prices.

7.105. These alleged errors are as follows. First, India submits that the USDOC applied an incorrect legal standard in preferring "actual transaction prices" to identify a benchmark under Article 14(d).[257] Second, India submits that the USDOC failed to explain why it considered the association price chart and the Tata price quote – which we refer to collectively as the "domestic pricing information" – to be "not actual prices".[258] Third, India submits that the USDOC failed to carry out an objective assessment of domestic pricing information, particularly in relation to the terms of sale, the identities of the selling or buying parties, and the destination for the

[251] India's first written submission, para. 77.
[252] GOI's supplemental questionnaire response, 2004 administrative review, (Exhibit IND-13), p. 4. In its second written submission, India draws attention to copies of the NMDC's financial reports that it has submitted to the Panel proceedings, together with copies of the "corporate norms" with which the independent board members were required to comply. The Panel rejected these financial statements in the original proceedings as non-record evidence (Panel Report, *US – Carbon Steel (India)*, fn 255), and likewise the "corporate norms" evidence now submitted by India was rejected from inclusion on the reinvestigation record by the USDOC (Rejected case brief, (Exhibit IND-56), annexes 1 and 2). For the same reasons as in section 7.2.5.3 we consider that this material is not properly before us.
[253] That is, the Chairman and functional directors appointed by the Public Enterprise Selection Board of the Department of Public Enterprises (GOI), the directors appointed from the Ministry of Steel (GOI), and the director appointed from the GOI-owned Minerals & Metals Trading Corporation.
[254] See above para. 7.99.
[255] India's first written submission, paras. 75(a) and 77.
[256] India's first written submission, para. 77.
[257] India's first written submission, paras. 111-113.
[258] India's first written submission, paras. 119-121.

transactions.[259] Fourth, India submits that the USDOC failed to provide a reasoned and adequate explanation as to why the Tex Report prices were a more appropriate benchmark than the domestic pricing information.[260] Fifth, India submits that the USDOC erred in rejecting the Tata price quote on the basis of its designation as confidential information. Sixth, India submits that the USDOC erred in its rejection of the NMDC's export prices as an appropriate benchmark under Article 14(d). India also contends that these errors violate the *chapeau* of Article 14 of the SCM Agreement.

7.106. The United States responds that the USDOC analysed the three potential sources of benchmarking data referred to by India, and determined that these three sources were not appropriate benchmarking sources.[261] This was because they were not shown to consist of market-determined prices and did not reflect prevailing market conditions in India. For the United States, these determinations were supported by positive record evidence, and were thus consistent with both the *chapeau* of Article 14 and Article 14(d) of the SCM Agreement, as well as the recommendations and rulings of the DSB.[262] The United States also contends that one of India's claims or arguments is outside the scope of the present proceedings under Article 21.5 of the DSU.

7.107. We begin our assessment of India's allegations of error by setting out the legal standard applicable to identifying benchmarks for "benefit" determinations under Article 14(d) of the SCM Agreement. We then evaluate each of these allegations of error regarding the USDOC's rejection of the three aforementioned sources of benchmarking data.

7.3.1 The legal standard applicable to "benefit" determinations under Article 14(d) of the SCM Agreement

7.108. Article 14(d) of the SCM Agreement deals with situations in which the financial contribution in the sense of Article 1.1(a)(1)(iii) of the SCM Agreement is in the provision of goods or services or the purchase of goods by a government. It sets out a framework[263] for investigating authorities in determining whether the provision of goods or services in question confers a benefit on the recipient. Specifically, the provision of a good by a government:

> [S]hall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration[.] … The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

7.109. The Appellate Body has established that determining the benefit conferred by a subsidy involving the provision of a good for LTAR requires a comparison between the terms on which the good in question is provided to the producers/exporters under investigation and the terms "that would have been available to [those producers/exporters] on the market".[264] Article 14(d) establishes that the standard for determining whether goods were provided to producers/exporters for LTAR is whether they were provided on terms more advantageous than those available in the market. The focus of the analysis is on the "adequacy of the remuneration" received by the government: if it is inadequate, i.e. lower than the market remuneration for the goods in question, a benefit is deemed to have been conferred on the recipient of the goods.[265]

7.110. An analysis of whether remuneration is "less than adequate" and thus confers a benefit in the sense of Article 1.1(b) involves a comparator or benchmark, i.e. the "adequate" remuneration, with which the price paid by the producer/exporter for the goods in question can be compared. Since

[259] India's first written submission, paras. 122-124.
[260] India's first written submission, paras. 114-117. India submits both that this argument is not a "separate claim" (India's second written submission, para. 149), but also appears to present it as a standalone allegation of error that could itself suffice to ground a violation of Article 14(d). (India's first written submission, paras. 114-118; second written submission, para. 143). We deal with this question of characterization below, to the extent it becomes relevant to our analysis.
[261] United States' first written submission, para. 320.
[262] United States' first written submission, para. 320.
[263] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[264] Appellate Body Report, *Canada – Aircraft*, para. 157.
[265] Appellate Body Report, *US – Softwood Lumber IV*, para. 84.

terms on the market in the country of provision are the relevant standard for the comparison, Article 14(d) requires investigating authorities to determine and use a benchmark which relates to the prevailing market conditions in the country of provision.[266] The last sentence of Article 14(d) sets out an illustrative list of prevailing market conditions which may be relevant in undertaking the necessary comparison between the terms on which the good was provided by the government and the benchmark used by the authority, "including price, quality, availability, marketability, transportation and other conditions of purchase or sale" for the goods in question.

7.111. We agree with the Appellate Body's view that "prevailing market conditions" in Article 14(d) "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices".[267] It follows that any benchmark for comparison purposes in determining the adequacy of remuneration must consist of *market-determined* prices for the same or similar goods in the country of provision.[268] Accordingly, prices established in accordance with the prevailing market conditions for the same or similar goods in the country of provision are presumed to be an adequate benchmark. They are the "starting-point"[269] of any analysis carried out in this context.[270] This implies that, before resorting to an alternative benchmark, an investigating authority must determine whether market prices in the country of provision can be used as a benchmark to establish whether the recipient has benefitted from the financial contribution in question.[271] If not, an investigating authority must adequately explain its decision before proceeding to determine an alternative benchmark.[272] In the original proceedings, the Appellate Body clarified that the ability to have recourse to out-of-country prices:

> [D]oes not suggest that an investigating authority may have easy recourse to out-of-country prices. … [T]he obligation under Article 14 to calculate the amount of subsidy in terms of the benefit to the recipient encompasses a requirement to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts, and to base a determination on positive evidence on the record. To our minds, it is only once an investigating authority has properly complied with its obligation to investigate whether there are in-country prices that reflect prevailing market conditions in the country of provision that it may, consistently with Article 14(d) of the SCM Agreement, use alternative benchmarks.[273]

7.112. There is no defined, exhaustive set of circumstances in which an authority may resort to an out-of-country benchmark.[274] One circumstance identified in *US – Softwood Lumber IV* is where it is established that in-country prices are unreliable or unavailable due to government predominance in the market as a provider of goods.[275] Further, in the original proceedings, the Appellate Body stated:

> [W]e do not consider that in-country prices may not be used to determine a benchmark only where such prices are distorted as a result of governmental intervention in the

[266] Appellate Body Report, *US – Softwood Lumber IV*, paras. 89 and 96.

[267] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.46 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150).

[268] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.46 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151; in turn referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 89).

[269] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

[270] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151:
> Proper benchmark prices would normally emanate from the market for the good in question in the country of provision. To the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d).

[271] See, e.g. Appellate Body Report, *US – Softwood Lumber IV*, para. 90: "investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), *if it is first established that private prices in that country are distorted* because of the government's predominant role in providing those goods". (emphasis added)

[272] Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 7.274 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 93).

[273] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.190.

[274] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.76.

[275] Appellate Body Report, *US – Softwood Lumber IV*, para. 99.

> market. Indeed, there may be other circumstances where an investigating authority would not be required to use in-country prices to determine a benchmark for the purposes of Article 14(d), for example, where information pertaining to in-country prices cannot be verified so as to determine whether they are market determined in accordance with the second sentence of Article 14(d). As we see it, to find that an investigating authority is precluded from using alternative benchmarks in these situations would be contrary to a proper interpretation of Article 14(d).[276]

7.113. With the foregoing understanding in mind, we now turn to the parties' arguments in relation to the proper legal standard for the identification of an appropriate benchmark under Article 14(d) of the SCM Agreement.

7.3.2 Whether the USDOC applied an incorrect legal standard in rejecting the domestic pricing information

7.114. India claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by rejecting the domestic pricing information solely because it did not reflect "actual" transactions.[277] India argues that the Appellate Body concluded in the original proceedings that Article 14(d) does not require the use of actual transaction prices.[278] For India, based on the Appellate Body's ruling, the USDOC's reinvestigation "was expected" to consider any market-determined prices, including e.g. non-actual prices.[279]

7.115. The United States disagrees that the lack of actual transaction prices was the "sole reason" for the USDOC's determination, pointing instead to other reasons that impugned the reliability of the domestic pricing information.[280] Further, the United States disagrees that Article 14(d) *requires* the use of domestic data not based on actual sales. Rather, contrary to India's arguments on the Appellate Body's reasoning on that point, the United States contends that the Appellate Body has recognized that actual transaction prices should be used over provisional/notional prices as the primary benchmark.[281]

7.116. It is apparent that the parties disagree as to the legal standard actually applied by the USDOC. For India, the USDOC applied a legal standard in which the "sole reason" for rejecting the domestic pricing information was because it was not "actual".[282] For the United States, the USDOC applied a legal standard in which the domestic pricing information was rejected on the basis that it was not reliable since it did not contain actual market determined transactions.[283] According to the United States, this assessment included – but was not limited to – the "non-actual"[284] character of the domestic pricing information.[285]

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[276] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.189. (emphasis added)
[277] India's first written submission, para. 113.
[278] India's first written submission, paras. 112-113.
[279] India's first written submission, paras. 108-109.
[280] United States' first written submission, paras. 279 and 284.
[281] United States' first written submission, paras. 287 and 291.
[282] India's first written submission, para. 113.
[283] United States' second written submission, paras. 144 and 147.
[284] The parties use various descriptors including "non-actual prices" and "non-actual sales transactions" (India's second written submission, paras. 130, 133, and 135), "not actual transaction prices" (United States' first written submission, para. 276; India's second written submission, para. 125), "notional prices or price estimates" (India's second written submission, para. 124(e); United States' second written submission para. 142). We understand these terms to refer to a figure or a piece of pricing data that is not a price for a completed sales transaction. (Preliminary Determination, (Exhibit IND-55), p. 10: "there was no record evidence to show that the prices are for completed sales transactions as opposed to a notional price list or prices estimates" (emphasis added); and "the chart does not indicate whether the prices were for actual transactions or merely were for price quotes" (emphasis added)). We understand the reference to "provisional" prices to be more specific, referring to uncompleted sales transactions in particular. (Final Determination, (Exhibit IND-60), p. 10: "2006 prices are provisional, i.e., not final, and thus not actual transaction prices" (emphasis added)). We use these terms in the same way as the parties in their submissions, and as the USDOC in its determinations.
[285] United States' second written submission, paras. 151 and 153.

7.117. We therefore begin by ascertaining the legal standard that the USDOC applied, as revealed through its determinations, before examining whether that standard comports with our understanding of Article 14(d) as set out above.[286]

7.118. As the USDOC explained, its "preferred benchmark … is an observed market price from actual transactions within the country under investigation … because such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation."[287] On that basis, the USDOC set out to "first determine whether there are market prices from actual sales transactions that can be used to determine whether [the] NMDC sold high grade iron ore for [LTAR]".[288] In respect of the association price chart, the USDOC found that the 2006 prices – that is, the prices corresponding with the period of investigation (POI) – were "provisional, i.e., not final, and thus not actual transaction prices".[289] The USDOC also considered that "the GOI is unable to point to any evidence to contradict the Department's determination that these provisional or estimated prices are not reliable for benchmarking purposes".[290] The USDOC noted in particular that "[i]t is not clear the selling or the buying party [*sic*] and whether the destination is domestic or export".[291] The USDOC made similar observations with respect to the Tata price quote, namely that "there is insufficient information on the record to determine what the price represents", noting in particular that "[i]t is unclear as to whether it is a price quote or an actual transaction price", and further, that "[t]he record also does not identify the purchaser" and "[t]here is no information on the record identifying what or who the entity is". The USDOC had applied similar considerations in its Preliminary Determination:

> With respect to the association chart, the data provided therein, with three exceptions, does not identify the entities selling the iron ore. In addition, there was no record evidence to show that the prices are for completed sales transactions as opposed to a notional price list or prices estimates. The association chart is simply a page of data with no explanation of the information contained in the document. Therefore the Department is unable to rely on the chart for benchmarking purposes due to the fact that the record does not contain enough information on how the list prices were determined, what parties were involved in determining the prices and if the prices are actual iron ore transactions during the POR.
>
> …
>
> With regard to the March 4, 2006 Tata price quote there is insufficient information on the record to determine what the price represents. It is unclear whether it is a price quote or an actual transaction price. The record also does not identify the purchaser. There is no information on the record identifying what or who the entity is.[292]

7.119. Based on the foregoing, we find that the legal standard applied by the USDOC in rejecting the domestic pricing information was whether the data was reliable as evincing market-determined prices. The USDOC indicated a preference for completed sales transactions in that regard, because these will *more reliably* evince market-determined prices.[293] The USDOC also looked for other information that might indicate that the data reliably evinced market-determined prices despite exhibiting a "notional", "estimated" or "provisional" character, namely the destination of the transaction (domestic or for export), the identities of the transacting parties, and the terms of sale.

7.120. We turn now to whether the USDOC's legal standard comports with what is required by the legal standard under Article 14(d) of the SCM Agreement. We consider it permissible under Article 14(d) for the USDOC to have treated what it considered to be "notional", "provisional" and

[286] See above section 7.3.1.
[287] Final Determination, (Exhibit IND-60), p. 10.
[288] Final Determination, (Exhibit IND-60), p. 10.
[289] Final Determination, (Exhibit IND-60), p. 10.
[290] Final Determination, (Exhibit IND-60), p. 10.
[291] Final Determination, (Exhibit IND-60), p. 10.
[292] Preliminary Determination, (Exhibit IND-55), p. 10. (fns omitted; emphasis added)
[293] Final Determination, (Exhibit IND-60), p. 10: "[a]s provided in our regulations, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation. This is because such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation." (fn omitted)

"estimated" prices with caution. This is because, if a putative price is unfinalized and subject to continuing negotiation in a market, the interaction between market forces has not yet fully taken place for such transactions.[294] Likewise, if the "price" is merely an estimate[295] of what actual prices may be, as opposed to being the direct result of a completed sales transaction, it will be unlikely to constitute direct evidence of the interaction between market forces. Pricing data based on "notional", "provisional" and "estimated" prices, therefore, may not be indicative of "*prevailing*" market conditions under Article 14(d). By their nature, they are not direct evidence of actual instances where market conditions have *prevailed* to produce a price through a completed, arms-length sales transaction. In saying this, we do not suggest that "non-actual" prices should be *precluded* from being used under Article 14(d) as indicative of "prevailing market conditions". They may represent the only available record evidence[296], or there may be other evidence indicating that they reflect the full interaction between market forces despite not being "actual" or finalized prices.[297]

7.121. In a context where price quotes or estimates may not be indicative of "market-determined" prices because they are not the direct result of an interaction between market forces or because they are unfinalized and may change through a process of negotiation between a buyer and seller, we consider it permissible under Article 14(d) for the USDOC to have required additional information in order to be satisfied that such pricing data is nonetheless reliable and market-determined. Such information could indicate that these "non-actual" prices are indeed close approximations of "market-determined" prices, or could have enabled the USDOC to verify with the transacting parties what the pricing data actually represents.[298] Where these kinds of additional details are lacking, we consider it permissible under Article 14(d) for the USDOC to have rejected such pricing information as not reliable in evincing market-determined prices.

7.122. India suggests that the Appellate Body's findings in the original proceedings support its argument that the USDOC applied an incorrect legal standard.[299] We disagree. The key point for the Appellate Body in the original proceedings was whether the benchmark chosen "is a market-determined price reflective of prevailing market conditions in the country of provision".[300] In our view, when confronted with pricing information that it considered to have a "notional", "estimated" or "provisional" character, the USDOC acted reasonably in probing whether such information was "market-determined". Further, the Appellate Body recognized in the original proceedings that in-country prices need not be used "where information pertaining to in-country prices cannot be verified so as to determine whether they are market determined in accordance with the second sentence of Article 14(d)".[301] As illustrated earlier[302], the USDOC sought to verify whether the information it considered to be "notional", "estimated" or "provisional" was "market-determined" through other information, and found this to be lacking. In our view, therefore, the USDOC acted in a manner that is consistent with the Appellate Body's findings in the original proceedings.

7.123. In summary, India has not demonstrated how the USDOC erred in the legal standard it applied when evaluating the domestic pricing information. As the United States contends, the focus of the USDOC was on whether the domestic pricing information reliably evinced market-determined prices.[303] The USDOC's conclusion was that the information pertained to "notional", "estimated" or "provisional" prices as opposed to "completed sales transactions" and that this impugned the reliability of the information, together with an absence of other information that could have verified

[294] European Union's third-party submission, para. 94: "[a]ctual transaction prices are a more accurate and reliable indicator of the adequate remuneration than a provisional price (e.g. a list price or offer price) which may be subject to further negotiations and changes, possibly even significant changes."

[295] See footnote 280 above regarding the terms "estimated" and "notional" prices.

[296] The United States also accepts this. (United States' first written submission, para. 293). The European Union takes the same position. (European Union's third-party submission, para. 94).

[297] Canada states, in this regard, that: "[i]t is not difficult to imagine circumstances where provisional prices track actual transaction prices closely, such that they can be viewed as a reliable measure of 'market-determined prices that reflect prevailing market conditions in the country of provision'." (Canada's third-party submission, para. 19).

[298] Canada's third party-submission, para. 19.

[299] India's first written submission, paras. 109 and 112; second written submission, paras. 131 and 134.

[300] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

[301] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.189.

[302] See above para. 7.119.

[303] United States' first written submission, paras. 279-280, 284, and 287; second written submission, para. 140.

whether these prices were market-determined despite their "notional", "estimated" or "provisional" character.[304]

7.124. We therefore find that India has not demonstrated that the USDOC applied an incorrect legal standard, and thus acted inconsistently as a matter of law, with Article 14(d) of the SCM Agreement.

7.3.3 Whether the USDOC erred in its factual finding that the data in the association price chart was "provisional or estimated"

7.125. India claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to undertake an objective examination of, and explain sufficiently, the basis for rejecting the prices in the association price chart as not representing actual transactions.[305] India argues that the association price chart "specifically states that these are prices of iron ore and not notional prices or price estimates", and that the prices for "financial years 2004-05 and 2005-06 are undisputedly actual prices".[306] India also submits that other details, including the identities of some of the transacting parties and the nature of the product transacted, substantiate these as actual transaction prices.

7.126. The United States responds that the chart clearly designates the 2006 prices as "provisional", which corresponds to the period of investigation for the review in question (1 January-31 December 2006).[307] The United States also explains that the absence of other information on, e.g. terms of sale, contributed to the USDOC's consideration that the domestic pricing information did not reliably evince market-determined prices.[308]

7.127. In view of India's claim, the question before us is whether it was reasonable for the USDOC to conclude, in relation to the association price chart, that:

> [T]here was no record evidence to show that the prices are for completed sales transactions as opposed to a notional price list or prices estimates.[309]

> [T]he GOI is unable to point to any evidence to contradict the Department's determination that these provisional or estimated prices are not reliable for benchmarking purposes.[310]

7.128. It is useful at this stage to distinguish between the 2005-2006 prices and 2006-2007 prices in the association price chart. This is because the 2006-2007 prices are designated clearly as "P" for "provisional", whereas the 2005-2006 prices are not designated in that way. In response to a question from the Panel, India stated that it "accepts that the designation 'p' for 'provisional' is in respect of 2006-07 prices and does not reflect actual, or completed, sales transactions".[311] Accordingly, we do not consider that the USDOC erred to the extent that it concluded that the 2006-2007 prices were "provisional" or "estimated" prices.

7.129. Turning to the 2005-2006 prices, during the substantive meeting with the parties, in response to a question of the Panel[312], India stated that these prices:

> [A]re actual transaction prices, but certainly, we would say that they cannot be disaggregated because the single price chart only shows, for the entire year, what must

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[304] United States' first written submission, paras. 276 and 279-280; second written submission, paras. 140, 144, 151, and 153.

[305] India's first written submission, para. 119.

[306] India's first written submission, paras. 119-120. India clarified that its claim in this regard did not extend to the Tata price quote. (India's response to Panel question No. 22).

[307] United States' first written submission, paras. 276-277.

[308] United States' first written submission, paras. 277-278 and 280.

[309] Preliminary Determination, (Exhibit IND-55), p. 10.

[310] Final Determination, (Exhibit IND-60), p. 10.

[311] India's response to Panel question No. 24.

[312] In question No. 12(b) at the meeting with the Parties, the Panel asked: "[c]an the parties please comment on whether anything in the association price chart or otherwise on the reinvestigation record shows whether, and how, the 2005-06 prices listed in that chart could have been disaggregated to match the period of investigation in order to reliably evince market-determined prices prevailing during that period?"

> be an average price from various mines with various terms of sale what are the various prices that have been indicated …
>
> … it must be [an] average of actual prices because it is not one particular customer to whom from one mine it is sold. It is an aggregation of the various prices sold from a particular mine to various customers, but it is an average actual price.

7.130. India subsequently confirmed that the prices in the association price chart, including the 2005-2006 prices, are not individual transaction prices but are averages for the relevant period described.[313]

7.131. Based on this understanding of what the 2005-2006 prices represent, we see nothing erroneous in the USDOC's finding that they were "a notional price list or price[] estimates".[314] The figures listed in the chart were not real prices. They did not themselves represent the direct outcome of the interaction between market forces that resulted in a completed sales transaction. Rather, they were averages that sought to reflect what the price would be (or, indeed, was) across the listed time period. These figures were thus "notional"[315] prices, insofar as they were averages that aggregated the various prices paid by various customers on the basis of various terms of sale over a certain time period, according to India's own explanation, as opposed to themselves being the price that was actually paid in a completed sales transaction.

7.132. Further, the underlying data may have been derived from actual transactions, but the figures listed in the chart were an average of various prices that, according to India, could not be disaggregated.[316] This is significant for several reasons.

7.133. First, the time period that the notional 2005-2006 pricing data represented only overlapped with the first quarter of the POI. Therefore, it was not possible to isolate from the association price chart the portion of data reflected in the notional 2005-2006 pricing data that matched the POI. This diminishes the utility of the notional 2005-2006 pricing data substantially, because the association price chart shows large variations between these averaged notional data as between 2004-2005, 2005-2006, and 2006-2007.[317] Against a background of price volatility, the inability to disaggregate the notional 2005-2006 pricing data made it impossible to verify whether that data reflected prevailing market conditions during the POI. In this regard, we find it reasonable for the USDOC to have concluded that it was "unable to rely on the chart for benchmarking purposes due to the fact that the record does not contain enough information on how the list prices were determined, what parties were involved in determining the prices and *if the prices are actual iron ore transactions during the POR*."[318]

7.134. Second, the inability to disaggregate the notional 2005-2006 pricing data made it impossible to verify whether the transactions on which the data were based were market-determined. For instance, it would not have been possible to test whether the sales were at arm's-length, or whether they involved related-party transactions or government procurement.[319] The USDOC referred to this

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[313] India's response to Panel question No. 25.

[314] Preliminary Determination, (Exhibit IND-55), p. 10, confirmed in Final Determination, (Exhibit IND-60), p. 10. Indeed, this understanding accords with the GOI's submission during the reinvestigation: In the GOI's case brief ((Exhibit IND-57), p. 32), the GOI stated that "the prices indicated in this association chart are based on actual transaction prices." (emphasis added)

[315] Final Determination, (Exhibit IND-60), p. 10. See footnote 280 above regarding the term "notional".

[316] India's response to Panel question No. 26(b).

[317] GOI 2006 administrative review (8 February 2008), (Exhibit IND-35), p. 5.

[318] Preliminary Determination, (Exhibit IND-55), p. 10 (emphasis added). In view of the significant and self-evident price volatility across different Indian financial years that was reflected in the figures in the association price chart, we reject India's contention that the USDOC should have used the 2004-2005 data over other sources. (India's response to Panel question No. 27).

[319] We do not presume that the prices paid by governmental purchasers are inherently unreliable or not market-determined. We merely illustrate, in the abstract, what could result from an inability to disaggregate the data and verify its source. For instance, the record evidence from the original proceedings showed that Tata was both a buyer and seller of iron ore, and thus its sales reflected in the association price chart could give rise a plausible possibility of related-party transactions whose reliability an investigating authority may wish to test for benchmarking purposes. (Panel Report, *US – Carbon Steel (India)*, paras. 7.148 and 7.155). There was also evidence in the original proceedings that Mysore Minerals Limited (MML) – an entity that the USDOC found to be a "public body" (ibid. fn 332) – purchased iron ore. (Ibid. para. 7.459).

problem when it explained that "the record does not contain enough information on *how the list prices were determined*, [and] *what parties were involved* in determining the prices".[320]

7.135. Based on India's explanation that figures in the association price chart were averages as earlier described, and that these averages could not be disaggregated to be tailored to the POI or to be tested against whether the transactions on which they were based were market-determined, we consider it reasonable for the USDOC to have concluded that "these provisional or estimated prices are not reliable for benchmarking purposes".[321] We reject, as factually inaccurate, India's contention that the association price chart "specifically states that these are prices of iron ore and not notional prices or price estimates".[322]

7.136. We finally note that India suggests that the USDOC erred because, during the reinvestigation, it did "not indicate[] what type of additional information would have proved that the price contained in the chart is actual transaction price".[323] However, as India's own explanation above demonstrates, the figures in the association price chart did not themselves represent actual transaction prices. Rather, the figures were averages, and it was not possible to disaggregate these averages to identify actual transaction prices. Thus, we cannot find fault with the USDOC for failing to indicate to the interested parties what additional information would have demonstrated that the association price chart contained actual prices, when it is apparent that the USDOC had already arrived at the correct conclusion that the figures in the association price chart comprised "a notional price list or prices estimates", and when it is also apparent that these figures cannot be disaggregated to derive their underlying actual transaction data. We also note that India clarified in response to a question from the Panel that it did not pursue a claim in relation to the association price chart on the basis of "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".[324]

7.137. For the foregoing reasons, we find that India has not demonstrated that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to undertake an objective examination of, and explain sufficiently, the basis for rejecting the prices in the association price chart as not representing actual transactions.[325]

7.3.4 Whether the USDOC erred because its examination of the domestic pricing information was neither objective nor based on coherent reasoning

7.138. India claims that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement because its treatment of the terms of sale, the identities of the transacting parties, and the destination for the transaction, was not based on an objective examination.[326] India challenges both the relevance and accuracy of the USDOC's assessment of these variously-lacking elements in the domestic pricing information.[327]

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[320] Preliminary Determination, (Exhibit IND-55), p. 10 (emphasis added). We therefore reject India's contention that "the fact regarding purchase of iron ore by government or a related party has no bearing on the present proceeding" and that "[t]he USDOC did not request such information and did not disclose this as a reason for rejection of prices listed in the association price chart". (India's response to Panel question No. 31). The inability to identify who the transacting parties were, including the purchasers, was explicitly referred to in the Preliminary Determination, and the GOI responded to this in its case brief, e.g.: "[f]irst, the Department admits that the names of at least three companies are provided in the document and the document evidences close to 11 transactions in the name of these three entities. … Fourth, even for the other entries in the said document where the names of the sellers are not mentioned, we submit that nothing in the SCM Agreement, Article 14(d) or US law mandates that only actual sale transactions with the names of the transacting parties are to be used". (Case brief, (Exhibit IND-57), p. 32). The GOI did not provide information on the purchasers.

[321] Final Determination, (Exhibit IND-60), p. 10.

[322] India's second written submission, para. 124(e).

[323] India's first written submission, para. 121. See also comments on the United States' response to Panel question No. 26.

[324] India's response to Panel question No. 51. Accordingly, India has not claimed that the USDOC had insufficient evidence before it to construe the association price chart.

[325] India's first written submission, paras. 119 and 121.

[326] India's first written submission, paras. 119-124.

[327] India's first written submission, paras. 122-124.

7.139. The United States acknowledges that the USDOC's determination "inadvertently stated that the association chart did not include whether the destination was domestic and export, and had intended to include this observation with respect to the price quote".[328] The United States also acknowledges that the finding that the Tata price quote failed to identify the purchaser was "inadvertently placed", and was instead intended to refer to the association chart.[329] However, the United States points to the "totality of circumstantial evidence" in respect of these factors.[330]

7.140. As we have explained above[331], price quotes, estimates and "notional" prices may not be indicative of "market-determined" prices because they may not represent the direct result of an interaction between market forces or because they are unfinalized and may change through a process of negotiation between a buyer and seller. We therefore considered it permissible under Article 14(d) for the USDOC to have required additional information in order to be satisfied that such prices are nonetheless reliable and market-determined. This included information on the destination of the transaction (domestic or for export), the identities of the transacting parties, and the terms of sale. We disagree with India to the extent it contends that these details are irrelevant.[332] On the contrary, identifying whether a transaction is domestic or for export is essential to understanding whether the transaction reflects an in-country price. Likewise, identifying the transacting parties can be important to ensuring that the price is reliably market-determined in a context where it is known that "public bodies" are participating in a market and also where it is known that the same entity could be both buying and selling iron ore.[333] It is also self-evident that an understanding of the terms of sale of a transaction can shed light on whether those terms are market-determined. The text of Article 14(d) of the SCM Agreement makes clear that the "adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (*including price, quality, availability, marketability, transportation and other conditions of purchase or sale*)".[334]

7.141. We accept India's argument that there were a number of deficiencies in the USDOC's assessment of these factors. The United States acknowledges this. In respect of the association price chart, however, we have already concluded that its pricing data could not be disaggregated to reveal whether it was based on transactions that were market-determined, nor to match the POI.[335] Our conclusion in that regard was based on India's own explanation of what the figures in the association price chart represent. Therefore, we cannot impugn the USDOC for deficiencies that were ultimately immaterial to ascertaining whether the association price chart reliably evinced market-determined prices.

7.142. Turning to the Tata price quote, we likewise accept India's argument that there were a number of deficiencies in the USDOC's assessment of these factors, but again they were immaterial. The evidence shows unambiguously that the prices reflected in this evidence were not yet finalized and potentially subject to continuing negotiation: "***Sub[ject]: Revision in price*** *… We would like to inform you that to align with the market price, we have revised the rate of sized iron ore … All other terms and conditions will remain unchanged … Please acknowledge and confirm acceptance of the same*".[336] The plain text of this evidence shows that the price was only an offer by the seller, which had not yet been accepted by the putative buyer. The deficiencies identified by India in the USDOC's assessment do not alter the clear implication that this price could not yet be said to be "market determined", that is, it did not yet reflect the interaction between forces of supply and demand to yield a final transaction price. It was therefore permissible for the USDOC to reject this

[328] United States' first written submission, fn 451.
[329] United States' first written submission, fn 468.
[330] United States' first written submission, paras. 279-280.
[331] See above para. 7.120.
[332] India's first written submission, paras. 123-124.
[333] The record evidence from the original proceedings showed that Tata was both a buyer and seller of iron ore, and thus its sales reflected in the association price chart could give rise to a plausible possibility of related-party transactions whose reliability an investigating authority may wish to test for benchmarking purposes. (Panel Report, *US – Carbon Steel (India)*, para. 7.148). There was also evidence in the original proceedings that MML – an entity that the USDOC found to be a "public body" (ibid. fn 332) – purchased iron ore (ibid. para. 7.459).
[334] Emphasis added.
[335] See above para. 7.135.
[336] Tata verification exhibits, (Exhibit IND-36), p. 23. (emphasis added)

evidence as not indicative of "*prevailing* market conditions" under Article 14(d) of the SCM Agreement.

7.143. For the foregoing reasons, India has not demonstrated that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement on the basis that its treatment of the terms of sale, the identities of the transacting parties, and the destination for the transaction, was not based on an objective examination.[337]

7.3.5 Whether the USDOC erred by failing to explain adequately the reasons for rejecting the Tata price quote on the basis of disclosing confidential data

7.144. India advances two alternative arguments that the USDOC erred by rejecting the Tata price quote. First, India contends that there was no basis for declining to use this data *despite* its proprietary designation.[338] Alternatively, India submits that the USDOC was not bound under the SCM Agreement to accept Tata's claim of confidentiality, and should rather have examined whether Tata's request was warranted and sought further information in this regard.[339]

7.145. We have already found that the USDOC had sufficient alternative grounds to reject the Tata price quote as a benchmarking source.[340] We therefore do not consider it necessary to the effective resolution of this dispute to address India's above-mentioned arguments, nor the United States' arguments in rebuttal and objection under Article 6.2 of the DSU.

7.3.6 Whether the USDOC erred by failing to explain adequately its reliance on the prices reported in the Tex Report as the appropriate benchmark

7.146. India argues that the Tex Report does not reflect "actual" prices[341], and that additional explanation by the USDOC was required to account for *prima facie* similarities between the Tex Report – whose pricing data the USDOC accepted – and the association price chart, which was rejected.[342]

7.147. The similarities between these pieces of evidence are clear[343]: one document is entitled "Prices of Iron Ore", the other "Iron Ore Prices"; one document designated certain prices as "Provisional", the other is headed "Price Negotiations"; both documents appear to lack comprehensive details on terms of sale[344] and the identity of purchasers.

7.148. The USDOC did not discuss these *prima facie* similarities in its explanation, possibly because these aspects of the Tex Report were not called into question during the reinvestigation.[345] Rather, in its Final Determination, the USDOC concluded that "in the absence of suitable Tier I prices, we correctly derived a benchmark in the Other Issues Preliminary Determination using Tier II prices from Australia, as listed in the *Tex Report*".[346] The USDOC cited the 2004, 2006, and 2007 final results in support of that conclusion. These determinations indicate that GOI officials gave

[337] India's first written submission, paras. 119-124.
[338] India's first written submission, paras. 126-129.
[339] India's first written submission, para. 130.
[340] See above para. 7.142.
[341] India's first written submission, para. 116. See also second written submission, para. 127.
[342] India's first written submission, para. 117.
[343] Indeed, the Panel recognized these *prima facie* similarities in the original proceedings: Panel Report, *US – Carbon Steel (India)*, para. 7.162: "we are not persuaded that the price charts submitted by the GOI and Tata should be treated any differently [to the Tex Report], particularly since they are similarly entitled 'Prices of Iron Ore'". (emphasis added)
[344] That is, beyond e.g. the designation as "f.o.b." or "*ex mine*".
[345] Case brief, (Exhibit IND-57), p. 27. The only issue raised regarding the Tex Report was as follows: "[w]e submit that even a price quote can be used as an appropriate in-country benchmark under both the SCM Agreement and US law. To the extent the Department is applying prices as reflected in the Tex Reports as appropriate benchmarks, the Department cannot apply a doublestandard". (Ibid. p. 33). The GOI did not elaborate on this point in its case brief. This was also not raised by the GOI in its hearing. (Transcript of the hearing before the USDOC, (Exhibit IND-59)). India now suggests that the reference to a "doublestandard" in the case brief demonstrates that "India argued that Tex Report price is also not actual transaction prices". (India's response to Panel question No. 33). In our view, this is not sufficiently clear, as demonstrated by this quote from the case brief which was the only passage where an issue was raised regarding the Tex Report.
[346] Final Determination, (Exhibit IND-60), p. 12. (emphasis original)

evidence that the Tex Report listed Indian prices from "concluded negotiations"[347], and that the reported Australian prices flowed from "concluded talks".[348] Although the USDOC indicated that the Tex Report "reports on world-wide price *negotiations* for high-grade iron ore"[349], it understood the reported prices to be "*negotiated* iron ore prices"[350], as opposed to prices subject to continuing negotiation.[351]

7.149. Thus, the USDOC clearly took the view that the Tex Report prices pertain to actual, completed sales transactions. Not only was this understanding not called into question in the underlying investigation (nor in the reinvestigation), but the GOI and other producers appeared to treat the Tex Report evidence in the underlying investigation as a reliable indicator of market-determined prices.[352] For instance, the record evidence demonstrates that, in response to a request from the USDOC for "a copy of any price lists the GOI or the NMDC uses to base its negotiations on prices", the GOI responded that "[t]he price of NMDC iron ore during 2005-06 onwards are decided based on the FOB prices of NMDC iron ore as appearing in the Tex Report".[353]

7.150. India now argues that the "GOI submitted Tex Report prices in the questionnaire because the USDOC requested Tex Report price information" and "the fact that the GOI responded to the specific question of the USDOC to provide Tex Report price neither prejudices GOI's stand that such price information was 'not actual transaction prices' nor enhances its reliability as 'market determined price'".[354] However, the USDOC also requested that "[i]f you … have questions concerning the Tex Report, please contact the officials in charge"[355], to which the GOI responded without questions[356], but by indicating that "[t]he NMDC iron ore lump and fines prices published in the Tex Report are f.o.b. prices in US $ per DLT (Dry long ton)".[357] Other record evidence demonstrated that the Tex Report data was relied upon by the GOI, NMDC, and exporters as "function[ing] as a guideline for international iron ore prices".[358] Accordingly, unlike the "non-actual" character of the Tata price quote and the association price chart, additional details to ascertain the nature or veracity of the Tex Report data do not appear to have been warranted.

7.151. Finally, we note that India's argument regarding the Tex Report is premised on an incorrect understanding of the USDOC's reason for rejecting the domestic pricing information. India's argument is premised on its understanding that the "sole reason" for rejecting the domestic pricing information was because it was not "actual".[359] However, we found earlier that the correct understanding is that the USDOC rejected the domestic pricing information on the basis of whether

[347] Preliminary results of administrative review (2004), (Exhibit IND-14), p. 1517.
[348] Preliminary results of administrative review (2004), (Exhibit IND-14), p. 1517. In this respect, we agree with United States' comments on India's response to Panel question No. 36.
[349] Final results of administrative review (2007), (Exhibit IND-43), p. 15. (emphasis added)
[350] Preliminary results of administrative review (2004), (Exhibit IND-14), fn 4. (emphasis added)
[351] Final results of administrative review (2004), (Exhibit IND-15), pp. 4 and 7.
[352] It appears that the GOI itself referred to the Tex Report data as reflecting "[i]ron Ore prices for lumps and fines from the Bailadila and Donimalai mines for the periods 2005-2006 and 2006-2007". (Essar's supplemental questionnaire response, 2006 administrative review, (Exhibit IND-30), p. 6), and that exporters submitted this data as "prices for both Bailadila and Donimalai lumps and fines". (Ibid. and Essar's supplemental questionnaire response, 2007 administrative review, (Exhibit IND-41)). Tata's objections to the Tex Report related to technical differences and terms of sale affecting price comparability as opposed to any reliability issues. (Tata's supplemental questionnaire response, 2006 administrative review, (Exhibit IND-33), p. 6). See also GOI's questionnaire response, 2006 administrative review, (Exhibit IND-18), pp. 40-41). In this respect, we agree with United States' responses to Panel question Nos. 33, 34, 35, and 36, paras. 74-80.
[353] GOI's questionnaire response, 2006 administrative review, (Exhibit IND-18), p. 43.
[354] India's comments on the United States' response to Panel question No. 36.
[355] GOI's questionnaire response, 2006 administrative review, (Exhibit IND-18), p. 40. (emphasis original)
[356] United States' response to Panel question Nos. 33, 34, 35, and 36, paras. 74-80; India's response to Panel question No. 34. Based on the plain text of the USDOC's request, we disagree with India that this request was limited in scope to "if the GOI was not aware about 'Tex Report' or what it exactly means or how to obtain Tex Report or how to report such price information in the questionnaire response etc to allow the GOI to respond effectively". (India's response to Panel question No. 34).
[357] GOI's questionnaire response, 2006 administrative review, (Exhibit IND-18), pp. 40-41. (emphasis original)
[358] Verification Report, (Exhibit USA-3), pp. 6-7.
[359] India's first written submission, paras. 113 and 114.

the data was reliable as evincing market-determined prices.[360] Thus, India is misplaced in contending that whether the Tex Report prices were "actual" or "non-actual" is determinative.[361] Rather, the key question is whether the USDOC had a reasonable basis for inferring that the Tex Report data reliably evinced market-determined prices. In view of the material set out above[362], including how the GOI and interested parties appeared to treat the Tex Report in the underlying investigations, we consider that the USDOC did have a reasonable basis for drawing such an inference. By contrast, as we found earlier[363], the USDOC had a reasonable basis for concluding in respect of the association price chart that "these provisional or estimated prices are not reliable for benchmarking purposes".[364] Accordingly, India has not demonstrated that the USDOC failed to make an objective assessment by failing to explain why the Tex Report is more appropriate than the domestic pricing information despite being affected by the same issues that affected the domestic pricing information.[365]

7.152. In view of this conclusion, we do not consider it necessary to address the United States' objection under Article 21.5 of the DSU to India's submissions on the Tex Report, nor India's response in that regard (including India's argument that this allegation of error does not comprise a separate claim).[366]

7.3.7 Whether the USDOC erred by rejecting NMDC export prices in favour of Australian/Brazilian world prices

7.153. India argues that, based on the Appellate Body's ruling in the original proceedings, the USDOC was permitted only to reject the NMDC's export price on the basis of positive evidence rather than an inference that using the NMDC's export price would result in using the financial contribution itself as the benchmark.[367] Further, India argues that the USDOC failed to properly explain why it relied on the NMDC's export price in the 2004 administrative review, but rejected it in the 2006 administrative review.[368]

7.154. The United States disagrees with India's understanding of the Appellate Body's findings, and argues that the USDOC was permitted to exclude NMDC export prices on the basis that these prices emanated from the same government-related entity at issue.[369] The United States also argues that the USDOC provided additional analysis demonstrating that the NMDC export price was distorted by GOI involvement, namely the GOI's export restraints.[370] Finally, the United States submits that the USDOC adequately explained that its change in approach between the 2004 and 2006 reviews regarding the NMDC export price was a refinement in approach rather than a change in methodology.[371]

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[360] See above para. 7.119.
[361] India's response to Panel question No. 36; first written submission, para. 116; and second written submission, para. 127.
[362] See above paras. 7.148-7.150.
[363] See above para. 7.135.
[364] Final Determination, (Exhibit IND-60), p. 10.
[365] India's first written submission, paras. 114-117.
[366] The United States made an Article 21.5 objection against India's claim that the Tex Report prices exhibited the same deficiencies as the domestic pricing information. The United States notes that India made this same argument before the Panel in the original proceedings, and that the Panel offered observations on that argument (United States' first written submission, paras. 294-296). The Panel's observations in that regard were declared by the Appellate Body to be "alternative findings" that were "moot and of no legal effect", thus resulting in no DSB ruling on the merits of these arguments (United States' first written submission, para. 295). India responded, *inter alia*, that its submissions in this regarded did not reflect a separate claim, but instead comprised arguments "to substantiate its claim that the Section 129 Determination rejecting the in-country price information is not in compliance with the recommendations and rulings of the DSB and is also not consistent with the chapeau of Article 14 and Article 14(d) of the SCM Agreement". (India's second written submission, para. 149).
[367] India's first written submission, paras. 141-142. See also second written submission, paras. 165-173.
[368] India's first written submission, paras. 152 and 154.
[369] United States' first written submission, paras. 301-303 and 312. See also second written submission, paras. 162-165.
[370] United States' first written submission, paras. 304 and 313. See also second written submission, paras. 169-171.
[371] United States' first written submission, para. 319.

7.155. We begin by setting out our understanding of the USDOC's explanation for rejecting the NMDC's export prices as a benchmarking source. We then set out our understanding of the circumstances under which it is legally permissible to reject a putative public body's export prices as a benchmark under Article 14(d) of the SCM Agreement. We follow this with our evaluation of the USDOC's explanation in light of our understanding of Article 14(d).

7.156. In the Preliminary Determination, the USDOC determined that the NMDC constituted a "public body", and therefore that "using the NMDC prices at issue (e.g. the iron ore prices the NMDC charged to Japanese buyers during the POR) would be unreliable and would result in an inadequate comparison."[372] The USDOC recognized that the Appellate Body found in the original proceedings that investigating authorities cannot presumptively exclude the prices of government-related entities from the consideration of appropriate benchmarks under Article 14(d) of the SCM Agreement.[373] However, the USDOC understood the Appellate Body's finding in this regard to be limited to government-related entities that were not providing the financial contribution at issue, and thus excluded the very "public body" under investigation.[374]

7.157. In its Final Determination, in response to the GOI's case brief, the USDOC engaged in further discussion of the Appellate Body's findings in the original proceedings. It reaffirmed its conclusion that the Appellate Body's reasoning supported excluding the prices of the NMDC as the putative "public body" at issue.[375] The USDOC also elaborated upon how its finding that the NMDC constituted a "public body" justified its determination to exclude its export prices, explaining that "[t]he manner in which the NMDC is owned and controlled further supports the Department's decision not use its export prices as the basis for the Tier II benchmark".[376] For instance, the USDOC noted how the GOI sought to exercise "meaningful control" over the NMDC through export restrictions.[377] The USDOC also noted that the NMDC's Board of Directors – a majority of whom it had found to be appointed by GOI bodies – "were directly involved in the price negotiations with potential foreign buyers", and that "GOI appointed directors at the NMDC … set export prices".[378] The USDOC also referred to its "public body" determination in finding that "the NMDC's export prices are set with GOI policy considerations".[379] In summary, the USDOC determined not to use the NMDC's export prices as a potential benchmarking source because the NMDC constituted a "public body", and therefore that "using the NMDC prices at issue (e.g. the iron ore prices the NMDC charged to Japanese buyers during the POR) would be unreliable and would result in an inadequate comparison"[380], as evidenced by the grounds on which the USDOC reached its "public body" determination.

7.158. We turn now to the circumstances in which it is permissible for an investigating authority to reject the export prices of the putative "public body" as a benchmarking source under Article 14(d). India and the United States point to differing aspects of the Appellate Body's Report in the original proceedings to argue that the Appellate Body's findings support[381] – or, alternatively, do not support[382] – the use of the NMDC's export prices in identifying a benchmark under

[372] Preliminary Determination, (Exhibit IND-55), p. 11.
[373] Preliminary Determination, (Exhibit IND-55), pp. 10 and 12.
[374] Preliminary Determination, (Exhibit IND-55), pp. 11-12. The USDOC quoted a series of passages from the Appellate Body Report in the original proceedings, one of which was: "[f]or example, prices on record of government-related entities other than the entity providing the financial contribution at issue also need to be considered to assess whether they are market determined and can therefore form part of a proper benchmark". (Ibid. p. 11 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154) (underlining added)).
[375] Final Determination, (Exhibit IND-60), p. 14.
[376] Final Determination, (Exhibit IND-60), p. 14.
[377] Final Determination, (Exhibit IND-60), p. 15.
[378] Final Determination, (Exhibit IND-60), pp. 15-16.
[379] Final Determination, (Exhibit IND-60), p. 16.
[380] Preliminary Determination, (Exhibit IND-55), p. 11.
[381] India's first written submission, para. 140: "[t]he USDOC has ignored the explicit observation of the Appellate Body that unreliability of a price as a benchmark must be proven on the basis of evidence by the investigating authority" (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.287).
[382] United States' second written submission, section entitled "The Appellate Body's Report Supports The USDOC's Determination To Not Use The NMDC's Export Prices", paras. 162-165 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.166 and fn 770).

Article 14(d). In our view, the Appellate Body did not address this question directly in the original proceedings.[383] We therefore address this question afresh.

7.159. We note that, by the time an investigating authority is called upon to examine a public body's *export* prices as a potential benchmarking source, it has already moved to out-of-country benchmarks. This is because, if reliable and market-determined data from in-country transactions were available, there would be no need to rely on a public body's *export* prices. If there is positive record evidence in a given case that the putative "public body's" export prices are reliable and market-determined despite emanating from the "public body" at issue[384], it would not be unreasonable for an investigating authority to consider those prices amongst the other available sources of out-of-country benchmarks. However, if the assessment of whether an entity is a "public body" has revealed evidence that its participation in export markets is being influenced by governmental policy considerations as opposed to commercial considerations, it would be reasonable for an investigating authority to disregard that entity's prices in favour of other out-of-country benchmarks.

7.160. More generally, in the absence of any positive evidence that the putative public body's export prices are reliable and market-determined, we consider it reasonable for an investigating authority to infer that the relationship between price and domestic cost pressures may no longer be reliable for that entity. This is because, when the "financial contribution" at issue involves the provision of goods by a "public body", the putative "public body" might be selling goods domestically at below market rates, which could suggest that its domestic pricing strategy is not being determined exclusively by market forces. In such circumstances, contrary to preferring the export prices of that "public body", it would seem reasonable to consider that – absent record evidence to the contrary – *other* out-of-country evidence would be preferable. This is because the reliability of such other evidence would be untainted by non-commercial pricing strategies of "public bodies" selling domestically at below market rates.

7.161. We now evaluate the USDOC's explanation in light of this understanding of the circumstances in which Article 14(d) permits investigating authorities to reject the export prices of a putative "public body". As part of our assessment of India's claims under Article 1.1(a)(1) of the SCM Agreement, we found that the USDOC had a sufficient evidentiary basis for concluding that the "export restrictions in place for high-grade iron ore" contradicted the GOI's assertion that the NMDC's prices were set "by the supply and demand of the market", and for instead inferring from these export restrictions that "the conditions of the market are being influenced by the GOI's policy considerations and actions".[385] With that in mind, it was clearly reasonable for the USDOC to conclude in light of its "public body" determination that "using the NMDC prices at issue (e.g. the iron ore prices the NMDC charged to Japanese buyers during the POR) would be unreliable and would result in an inadequate comparison".[386] Indeed, as we have already explained[387], the USDOC recounted much of the evidence from its "public body" finding in its Final Determination rejecting the NMDC's export prices as a benchmarking source.[388]

7.162. India contends that the USDOC erroneously concluded that the NMDC's export price to Japan was the "financial contribution" at issue, and thus its reliance on the Appellate Body's reasoning was

[383] The Appellate Body explicitly excluded the government-related entity under examination from its general remarks on inclusion/exclusion of government prices and the principle that "whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source". (Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.154 and 4.166-4.167, and fn 770). Also, the Appellate Body's general remark that investigating authorities "can[not] *presume* that the export price set by a government provider is inherently unreliable" but instead "[t]his must be proven on the basis of … positive evidence on the record" (ibid. para. 4.287 (emphasis original)), pertains to a presumption relating to governmental entities generally, as opposed to the specific entity under investigation, and hence does not resolve whether it is sufficient to disregard an entity's export price on the basis that it is the entity under examination.

[384] This could be through evidence that, e.g. the export price is pegged to international benchmarks that are reliable and market-determined.

[385] See above section 7.2.6.

[386] Preliminary Determination, (Exhibit IND-55), p. 11.

[387] See above para. 7.157.

[388] See also United States' first written submission, para. 315; second written submission, para. 167.

misplaced.[389] We disagree. As stated above[390], we do not consider that the Appellate Body has expressed a view on the specific situation of the export prices of an entity found to be a "public body". Moreover, the USDOC's focus was on the reliability of the entity engaging in the transaction, not the transaction itself. For instance, the USDOC quoted the Appellate Body's statement that "prices on record of government-related entities other than the entity providing the financial contribution at issue also need to be considered to assess whether they are market determined and can therefore form part of a proper benchmark".[391] The focus in the USDOC's extract of the Appellate Body's reasoning is clearly on the reliability of the *entity*.[392] We thus do not agree with India that the USDOC erroneously relied on the Appellate Body's reasoning by treating the NMDC's sales to Japan as the "financial contribution" at issue.

7.163. India also contends that "[t]he USDOC has ignored the explicit observation of the Appellate Body that unreliability of a price as a benchmark must be proven on the basis of evidence by the investigating authority".[393] Again, we disagree. As we have explained above[394], the USDOC recounted evidence from its "public body" determination which indicated that the NMDC's participation in export markets was influenced by GOI policy considerations. For the same reason, we disagree with India's contention that "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".[395] As part of its "public body" determination, and as we have reviewed above, the USDOC examined the NMDC's participation in export markets and found it to be influenced by GOI policy considerations as opposed to unfettered participations in a market.[396] We likewise reject India's contention that "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'."[397] We have already examined such evidence in detail. As our examination showed, India is incorrect to suggest that "[t]he 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".[398] Our examination also showed that India is incorrect to suggest that the USDOC did not have a sufficient basis for inferring that the GOI was not involved in the NMDC's export price[399], and that the NMDC's export price was determined by commercial considerations.[400]

7.164. Finally, we address India's argument that the USDOC has not explained adequately why the USDOC accepted the NMDC's export price in the 2004 review, but rejected it in subsequent reviews.[401] We note that the Appellate Body drew particular attention to this factor in its finding of error in the original proceedings: "[w]e do not see that the USDOC provided in its determination a reasoned and adequate explanation as to why the benchmark data that it relied on, namely, world market prices from Australia and Brazil, is *more appropriate than the benchmark data that it had previously relied on but subsequently excluded, namely, the NMDC's export prices at issue*".[402] In

[389] India's first written submission, paras. 138 and 141.

[390] See above para. 7.158.

[391] Preliminary Determination, (Exhibit IND-55), p. 11 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154 (underlining added)).

[392] This should not be taken to imply that the USDOC's rejection of the NMDC's export prices was merely a "function of its source" in contradiction to the Appellate Body's statement 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 in the country of provision". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154). Rather, we recall that this finding was a stepping stone to the USDOC's conclusion that "we find that the prices from the NMDC do not represent prevailing market conditions in India because the conditions of the market are being influenced by the GOI's policy considerations and actions, as describe above, rather than by the activity of unfettered participants in a private market" (Final Determination, (Exhibit IND-60), p. 16), which correlates to this statement of the Appellate Body.

[393] India's first written submission, para. 140.

[394] See above para. 7.157.

[395] India's first written submission, para. 145.

[396] See above paras. 7.47, 7.84, and 7.89. See also United States' first written submission, para. 318.

[397] India's first written submission, para. 149.

[398] India's first written submission, para. 149; second written submission, paras. 186-190. See above paras. 7.54 and 7.85.

[399] India's second written submission, para. 177. See also the evidence of the GOI's involvement in setting the export price at GOI's questionnaire response, 2006 administrative review, (Exhibit IND-18), p. 42.

[400] India's second written submission, paras. 175 and 181-184.

[401] India's second written submission, paras. 192-199.

[402] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.290. (emphasis added)

the reinvestigation, the USDOC explained that the failure to exclude the NMDC's export prices in the 2004 administrative review was because "no party had squarely addressed the issue of whether it was appropriate for the Department to include export prices charged by the NMDC in the calculation of the Tier II benchmark", but that "further consideration" of the matter in subsequent reviews had revealed that "the NMDC export prices contained in the Tex Report constituted prices from the very provider of the financial contribution at issue".[403] We consider it reasonable for the USDOC to have corrected an error from an earlier investigation by excluding the NMDC's export price, particularly in light of the evidence regarding the influence of the GOI on the NMDC's participation in export markets. In our view, this change in approach did not reflect a radical departure from the USDOC's previous practice or methodology, and did not necessitate any additional justification by the USDOC beyond the explanation that it provided.[404]

7.165. In light of the above, we conclude that India has not demonstrated that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by rejecting the NMDC's export prices as a benchmarking source.

7.3.8 Conclusion

7.166. We have evaluated India's allegations of error in relation to the three potential sources of benchmarking data that were rejected by the USDOC. In respect of each allegation, we found that India has not demonstrated that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement. Our overall conclusion, therefore, is that India has not demonstrated that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement. In view of that conclusion, we do not consider it necessary for the effective resolution of this dispute to address India's claims under the *chapeau* of Article 14 of the SCM Agreement.

7.4 Benefit: India's claims under Article 14(b) of the SCM Agreement

7.167. India claims that the USDOC acted inconsistently with Article 14(b) of the SCM Agreement by failing to account for the borrower's cost in obtaining loans under the Steel Development Fund (SDF) programme.[405] The USDOC did not reconsider the matter of borrower's costs under the SDF programme in its reinvestigation. Rather, India's challenge pertains to the USDOC's explanation in the 2006 administrative review.[406] The United States objects that India's claim in this regard is outside of the scope of these compliance proceedings under Article 21.5 of the DSU.[407]

7.168. We begin our evaluation of India's claim by assessing the United States' objection. We first set out the relevant procedural background to India's claim, before explaining our understanding of Article 21.5 as applicable to the United States' objection. We then apply that understanding to the United States' objection.

7.169. The relevant procedural background is as follows. In the original proceedings, the Panel rejected India's factual claim "that SDF levies should have been treated as the producers' own funds", as well as India's legal claim that "investigating authorities are required to take account of the costs incurred by recipients in participating in the scheme under which the loans are provided".[408] The Appellate Body overturned the Panel's finding on India's legal claim, and held instead that Article 14(b) requires an examination of "the total cost of the investigated loan … to the loan recipient".[409] The Appellate Body did not consider it necessary to address India's challenge under Article 11 of the DSU against the Panel's factual finding on the SDF levies[410], and attempted but

[403] Final Determination, (Exhibit IND-60), p. 16.
[404] In any event, it is questionable whether a change in methodology can, in and of itself, be the basis for a violation of Article 14(d). (See, by analogy, Panel Report, *EU – Footwear (China)*, para. 7.858).
[405] India's first written submission, para. 174.
[406] India's first written submission, para. 166; second written submission, paras. 203 and 208.
[407] United States' first written submission, paras. 323-327.
[408] Panel Report, *US – Carbon Steel (India)*, para. 7.311.
[409] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.347.
[410] Appellate Body Report, *US – Carbon Steel (India)*, paras. 2.104 (and 4.349): "India further contends that the Panel acted inconsistently with Article 11 of the DSU in disregarding material evidence on the Panel record relating to the manner in which consumers paid for increased levies on steel products." The Appellate Body did not exercise judicial economy, but instead rejected that claim: see ibid, para. 5.1(i).

ultimately declined to complete the legal analysis.[411] There was thus no DSB ruling of a violation by the United States on India's claim in this regard in the original proceedings, and the USDOC did not re-evaluate the SDF loan/levies in its reinvestigation.[412] Despite the matter not being re-evaluated by the USDOC in its Preliminary Determination, the GOI did not raise it in its case brief in response. Indeed, no interested party raised this matter in the USDOC's reinvestigation.[413] India now seeks to make essentially the same claim in the present compliance proceedings that it made in the original proceedings, namely that the USDOC erred under Article 14(b) of the SCM Agreement by failing to account of the borrower's cost in obtaining loans under the SDF programme.[414]

7.170. We turn now to our understanding of Article 21.5 of the DSU as relevant to the present objection. As we have elaborated earlier[415], compliance proceedings under Article 21.5 cannot be used to "re-open" issues that were decided on the merits in the original proceedings.[416] This would disrupt the finality of DSB rulings, contrary to Article 17.14 of the DSU.[417] But claims against aspects of a measure that are not decided on the merits in the original proceedings are not covered by DSB rulings and thus can be reasserted in compliance proceedings to the extent that this would not disrupt the finality of a DSB ruling.[418] For instance, this can occur when the Appellate Body reverses a panel's findings but does not complete the legal analysis, resulting in no DSB ruling.[419]

7.171. We now apply this understanding of the scope of Article 21.5 of the DSU to the United States' objection against India's claim. The United States' case is that there was no finding of inconsistency in the original proceedings relating to the USDOC's finding of benefit conferred by the SDF programme in the 2006 administrative review, and thus no DSB ruling with which the United States was required to comply.[420] India responds 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", and the United States was "required to implement the recommendation and ruling of the DSB emanating from such finding".[421] In view of the parties' disagreement in this regard, we are called upon to ascertain what was adopted by the DSB in respect of India's claim on this matter in the original proceedings. In its "Findings and Conclusions" section, the Appellate Body stated:

> For the reasons set out in this Report, the Appellate Body:
>
> …
>
> d. with respect to the Panel's "as applied" findings regarding benefit under Article 14 of the SCM Agreement:
>
> v. reverses the Panel's finding, in paragraph 7.313 of the Panel Report, rejecting India's claim as it relates to the USDOC's determination that loans provided under the

[411] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.353.
[412] Preliminary Determination, (Exhibit IND-55); Final Determination, (Exhibit IND-60). Nor did the GOI raise this during the reinvestigation. (Case brief, (Exhibit IND-57); Transcript of the hearing before the USDOC, (Exhibit IND-59)).
[413] India's response to Panel question No. 40. We do not suggest that raising a matter during a respondent's implementation procedure – despite the opportunity to do so – is a determinative factor or a prerequisite to being able to reassert a claim in a subsequent compliance proceeding under Article 21.5 of the DSU where the dispute concerns a countervail investigation. We note that whether an interested party has raised a matter during an investigation has been a relevant consideration in a number of contexts in countervail and anti-dumping disputes. (See, e.g. Panel Reports, *EC – Countervailing Measures on DRAM Chips*, para. 7.229; *EU – Fatty Alcohols (Indonesia)*, para. 7.196; and *Egypt – Steel Rebar*, paras. 7.382 and 7.386).
[414] India's first written submission, para. 168; Appellate Body Report, *US – Carbon Steel (India)*, para. 2.104.
[415] See above para. 7.15.
[416] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.21.
[417] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.19.
[418] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.21.
[419] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 5.20.
[420] United States' second written submission, paras. 176 and 180.
[421] India's second written submission, paras. 203-204.

> SDF conferred a benefit within the meaning of Articles 1.1(b) and 14(b) of the SCM Agreement, and finds that it is unable to complete the legal analysis[.][422]

7.172. Thus, there was no finding that the USDOC had acted inconsistently. However, the "Findings and Conclusions" section is not the only portion of the report that is "adopted" by the DSB. Rather, the "report" is adopted as a whole pursuant to Article 17.14 of the DSU. Likewise, the "Findings and Conclusions" section is qualified by the introductory *chapeau* "[f]or the reasons set out in this Report". The Appellate Body's *reason* for reversing the Panel's finding of inconsistency, as articulated in its adopted Report, was due to an error of legal interpretation by the Panel.[423] In particular, the Appellate Body found that "the Panel improperly excluded consideration of a borrower's costs in assessing the cost of a loan programme to the recipient for purposes of a benchmark analysis, and that the Panel therefore erred in finding that Article 14(b) does not require the USDOC to take into account the costs incurred by SDF loan recipients in obtaining SDF loans".[424] The Appellate Body's reversal of the Panel's finding in paragraph 7.313 of the Panel Report[425] must be read in that context. Although India brought a separate challenge under Article 11 of the DSU against the Panel's factual finding on the SDF levies[426], the Appellate Body declined to rule on that.[427] Thus, the following factual finding of the Panel was not overturned in the Appellate Body Report:

> As a factual matter, we do not agree that SDF levies should have been treated as the producers' own funds. SDF levies were rather collected from consumers, through an addition to the steel producers' ex-works prices, and then remitted directly to the SDF. Since the levies were collected from consumers and always destined for the SDF, steel producers would not have been able to obtain interest by investing those funds elsewhere.[428]

7.173. The Panel Report was adopted by the DSB as modified by the Appellate Body Report[429], which did not, in turn, modify this factual finding of the Panel.[430] We thus understand that this factual finding of the Panel Report was adopted by the DSB, and stands as an adopted aspect of the DSB ruling on India's claim in the original proceedings.[431] Our review of the merits of India's case in the present proceedings suggests that India contests the substance of the aforementioned factual finding by the Panel.[432] Accordingly, there is a real prospect that permitting India's claim would

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[422] Appellate Body Report, *US – Carbon Steel (India)*, para. 5.1(a)(v). (emphasis original)

[423] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.349: "the Panel's finding regarding India's claim was based on an understanding of Article 14(b) that we have found to be in error."

[424] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.349.

[425] This states: "[f]or the above reasons, we reject India's claims against the USDOC's determinations that loans provided under the SDF constitute direct transfers of funds by public bodies, and that such loans conferred benefit on the recipient steel producers." (Panel Report, *US – Carbon Steel (India)*, para. 7.313).

[426] Appellate Body Report, *US – Carbon Steel (India)*, para. 2.104: "India further contends that the Panel acted inconsistently with Article 11 of the DSU in disregarding material evidence on the Panel record relating to the manner in which consumers paid for increased levies on steel products."

[427] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.349: "because the Panel's finding regarding India's claim was based on an understanding of Article 14(b) that we have found to be in error, we need not separately consider India's claim that the Panel acted inconsistently with Article 11 of the DSU by disregarding the significance of certain evidence". We note that the Appellate Body discussed this factual finding as part of its attempt to complete the legal analysis, including by remarking that "we do not see how the piece of evidence to which the Panel refers supports the conclusion reached by the Panel that the steel levies necessarily consist of consumer funds". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.351). However, having rejected India's separate challenge under Article 11 of the DSU on this factual finding (see ibid, para. 5.1(i)), the Appellate Body did not overturn this factual finding of the Panel.

[428] Panel Report, *US – Carbon Steel (India)*, para. 7.311. (fn omitted)

[429] Action by the Dispute Settlement Body – Appellate Body Report and Panel Report – *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/11.

[430] Article 17.6 of the DSU reads: "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." Outside of the context of an Article 11 DSU challenge (Appellate Body Report, *US – Wheat Gluten*, paras. 150–151), the Appellate Body has indicated that a panel's factual finding cannot be modified or overturned on appeal. (Appellate Body Reports, *Australia – Salmon*, para. 261; *EC – Bananas III*, paras. 237 and 239). See also United States' second written submission, para. 184.

[431] Article 11 of the DSU foreshadows that a panel's "assessment of the facts of the case" can comprise a "finding" that "will assist the DSB in making the recommendations or giving the rulings provided for in the covered Agreements".

[432] India's first written submission, paras. 171-174.

disrupt the finality of the DSB ruling on this factual finding. We therefore conclude that India's claim under Article 14(b) is not within the scope of the present compliance proceedings under Article 21.5 of the DSU.

7.174. We nonetheless address the merits of India's claim to "provide [a] sufficient factual basis to allow the Appellate Body to complete the analysis, if necessary".[433] In particular, we reaffirm the Panel's factual finding in the original proceedings, based on the following review of the USDOC's explanation in the 2006 administrative review and the evidence submitted by the GOI.

7.175. The evidence submitted by the GOI in the underlying investigation presents the following picture. When the SDF was established in 1978, the main producers of steel at the time were subject to price controls by the GOI.[434] Specifically, these main steel producers were members of a "Joint Plant Committee" (JPC), which the GOI had established in 1971 to determine and fix the prices of the main producers of steel.[435] In 1978, the GOI authorized the JPC to require its members to add an element to their *ex mine* price (already subject to price controls) for the purposes of funding the SDF.[436] This extra pricing element was compulsory[437] and collected by the main steel producers[438] – presumably from consumers (or whoever was paying the price)[439] – and remitted to the SDF within a 90 day timeframe.[440] The SDF served as a mechanism initiated by the GOI to provide finance to the main steel producers (i.e. members of the JPC).[441]

7.176. Turning to the USDOC's explanation, it characterized the funds collected by the main steel producers as "levies paid by steel consumers [that] were indeed compulsory and were designed to benefit Indian steel producers".[442] The USDOC disagreed that the funds collected by the main producers represented their "own funds", but rather that they "are analogous to tax revenues collected from consumers as mandated by the GOI".[443] The USDOC specifically found "that the levies originated from producer price increases that were mandated and determined by the JPC."[444] The USDOC noted further that "[i]n order to create the SDF, the GOI, acting through the JPC, mandated steel price increases which were earmarked for the SDF", and that "[s]teel producers collected this

[433] Panel Report, *US – Continued Suspension*, para. 7.275.

[434] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), pp. 1-2; Indian Supreme Court Judgment, (Exhibit IND-8), pp. 342-343.

[435] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), pp. 1-3.

[436] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), p. 1; Indian Supreme Court Judgment, (Exhibit IND-8), pp. 342-343.

[437] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), p. 3: "[t]he GOI did not require the main integrated steel producers to participate in the SDF. The SDF component added to the ex-works prices was included in the controlled prices, which applied to the products produced by the main steel plants as members of the JPC"; and ibid. p. 3: "[t]he SDF component, which was also equally applied to all the member producers" (emphasis added); and Indian Supreme Court Judgment, (Exhibit IND-8), p. 345: "[i]t were the members of the [JPC] … [that] were made bound to add an element of ex-works price and to remit that amount for the constitution of the SDF". (emphasis added)

[438] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), p. 3:

> The SDF component, which was also equally applied to all the member producers, was separately collected as well and then remitted to the Fund.
>
> …
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> From 1978 to 1994, each main integrated steel producer furnished monthly dispatch statements, supported by copies of invoices, to the JPC. These statements and invoices indicated the amount to be collected for the SDF during the month, which had to be deposited into the Fund within 90 days from the date of dispatch.

[439] Indian Supreme Court Judgment, (Exhibit IND-8), pp. 350-351: agreeing with the proposition that the SDF levy comprised part of the "purchase price" paid by the consumer.

[440] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), p. 3.

[441] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), p. 2 and exhibit 20, p. 1; Indian Supreme Court Judgment, (Exhibit IND-8), pp. 338-339 and 345 (quoting another judgment): "It is the Central Government, which exercises control over the SDF though there is no backing of any statutory provision for creation of SDF".

[442] 2006 Issues and decision memorandum, (Exhibit IND-38), p. 78.

[443] 2006 Issues and decision memorandum, (Exhibit IND-38), p. 78. See also 2000 Issues and decision memorandum, (Exhibit IND-6), p. 10.

[444] 2006 Preliminary results of CVD administrative review, (Exhibit IND-32), p. 1590. See also 2000 Issues and decision memorandum, (Exhibit IND-6), p. 9.

price increase, which was paid by steel consumers in India, and these additional funds were then placed into the SDF as a source of concessional financing for the Indian steel industry."[445]

7.177. The USDOC's explanation thus correlates with the evidence submitted by the GOI regarding the nature of the SDF programme, particularly on the following key aspects: (a) the main steel producers participated in the SDF programme; (b) the SDF raised funds through adding a fixed price element to the *ex mine* price of steel to be paid (i.e. by consumers), which was in turn collected by the main steel producers and remitted to the SDF; and (c) the *ex mine* price of steel was itself fixed by the JPC, which was controlled by the GOI, and which the producers could not themselves raise.

7.178. India's suggestion that "steel producers are *voluntarily* contributing funds derived from price increase[s] to the SDF and therefore it is a cost to such loan recipient steel producers"[446] is not supported by the evidence recounted above.[447] While participation in the SDF was itself not required by the GOI[448], we note that all main steel producers participated[449], and more importantly, that the price increase to fund the SDF was mandatorily applied after being decided by the JPC.[450] Further, no evidence has been brought to our attention which suggests that the price increase to fund the SDF was an amount that the main producers could otherwise have used themselves. On the contrary, the main producers were not permitted to otherwise modify their *ex mine* prices beyond the fixed levels.[451] Therefore, it would be incorrect to infer that the levies collected by the main steel producers represented amounts that they could have invested elsewhere for other purposes.[452] Further, it would be incorrect to infer that the funds collected through the levies were the producers' "own funds" in a context where the only permissible basis for collecting those funds was for transmittal to the SDF within 90 days. Rather, as a discrete pricing component that added to the *ex mine* price (which, we recall, was already fixed by the JPC), it was reasonable for the USDOC to characterize the SDF levy as a cost incurred by consumers. Thus, contrary to India's argument, the SDF levy does not appear to reflect a "cost incurred by the SDF loan recipients in obtaining loans"[453], nor does it represent the "pooling the collective 'profits' of the participating steel enterprises".[454] We recognize that an investigating authority is required to take into account all of the borrower's costs associated with obtaining a loan when identifying an appropriate benchmark under Article 14(b).[455] However, for the reasons set out above, we conclude that the USDOC was not required to make adjustments to its benefit benchmark under Article 14(b) to accommodate the SDF levy as an entry cost incurred by the loan recipients. We consider it immaterial that the USDOC's assessment in that regard was made within the rubric of its "financial contribution" determination as opposed to its "benefit" determination.[456]

[445] 2006 Preliminary results of CVD administrative review, (Exhibit IND-32), p. 1590.
[446] India's second written submission, paras. 208 and 210. (emphasis added)
[447] See above para. 7.175.
[448] United States' responses to Panel question Nos. 38-40.
[449] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), exhibit 22, p. 1.
[450] Indian Supreme Court Judgment, (Exhibit IND-8), p. 345: "[i]t were the members of the [JPC] … were made bound to add an element of ex-works price and to remit that amount for the constitution of the SDF" (emphasis added). See also GOI's supplemental questionnaire response 2001, (Exhibit USA-14), p. 4: "[t]he SDF component, which was also equally applied to all the member producers". (emphasis added)
[451] GOI's supplemental questionnaire response 2001, (Exhibit USA-14), pp. 2-3 ("[t]he JPC determined the prices for the products manufactured by these steel producers" and "[p]rior to 1992, these producers could not unilaterally increase the price for their products, and they could only sell their products at the prices determined by the JPC, which were applied equally to all producers").
[452] We note that there was a brief period between 1992-1994 when the JPC (i.e. GOI) ceased fixing the prices of the main steel producers, but they continued to pay into the SDF. (GOI's supplemental questionnaire response 2001, (Exhibit USA-14), p. 2). Neither party raised this as a relevant aspect to the present dispute.
[453] India's second written submission, para. 201; first written submission, para. 166.
[454] India's first written submission, para. 173.
[455] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.349.
[456] We see no obligation in the SCM Agreement that requires a determination to address certain matters only under certain headings. (Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.173).

7.5 Specificity: India's claims under Article 2.1(c) of the SCM Agreement

7.179. In its reinvestigation, the USDOC provided fresh determinations regarding the specificity of three subsidy programmes, namely the NMDC's sales of high-grade iron ore, the provision of leases to mine iron ore, and the provision of leases to mine coal.[457]

7.180. The fresh determination for the NMDC's sales of high-grade iron ore arose from the Panel's finding in the original proceedings that Article 2.1(c) expressly required that "account shall be taken" of "the length of time that the relevant [subsidy] programme has been in operation"[458], and that the USDOC's determination had omitted any indication that this factor had been considered, either implicitly or explicitly.[459] The fresh determination for the other two subsidy programmes arose from the Panel's finding in the original proceedings that there was insufficient factual evidence to demonstrate their existence as subsidies in the first place under Articles 1.1(a)(iii) and 12.5 of the SCM Agreement.

7.181. India now claims that the USDOC erred in its reinvestigation by arriving at the conclusion that each of these three subsidy programmes were *de facto* specific under Article 2.1(c) of the SCM Agreement. We address below each of India's three separate claims.

7.5.1 Whether the USDOC erred in its specificity assessment for the NMDC's sales of high-grade iron ore

7.182. India claims that the USDOC acted inconsistently with the final sentence of Article 2.1(c) of the SCM Agreement by failing to identify a "subsidy programme" and the "length of time during which that subsidy programme has been in operation".[460] The United States objects under Article 21.5 of the DSU that India's claim is outside the scope of the present compliance proceedings.[461] We address that matter first.

7.183. The United States argues that India could have challenged the identification of the "subsidy programme" in the original WTO proceedings, but did not.[462] For the United States, the DSB ruling required the USDOC to take into account the mandatory "length of time" factor under Article 2.1(c), but did not require a reassessment of the "subsidy programme" at issue.[463] In response to a question from the Panel, India clarified that there is no aspect of its argument on the identification of a "subsidy programme" that is unconnected from its claim on the "length of time" factor.[464] Accordingly, India is not challenging the identification of a "subsidy programme" independently, but only to the extent that it forms part of its claim regarding the "length of time" factor. Since there was a DSB ruling in the original proceedings that the USDOC failed to account for the "length of time" factor for the NMDC's sales of high-grade iron ore and thus acted inconsistently with Article 2.1(c) of the SCM Agreement, we reject the United States' objection under Article 21.5 of the DSU, whilst also taking note of the limited manner in which India pursues its argument on the identification of a "subsidy programme". In particular, we understand India to argue that the USDOC failed to identify the "subsidy programme" sufficiently to enable a consideration of the "length of time" factor.[465]

[457] The parties' and the USDOC's terminology for these programmes varies between "rights", "leases", and simply "mining of coal" and "mining of iron ore" – we adopt the term "leases" in this section for ease of reference. See also the parties' responses to Panel question No. 46, indicating that these were synonyms.
[458] Panel Report, *US – Carbon Steel (India)*, para. 7.136.
[459] Panel Report, *US – Carbon Steel (India)*, paras. 7.118 and 7.136-7.138.
[460] India's first written submission, paras. 85-86.
[461] United States' first written submission, para. 212.
[462] United States' first written submission, para. 212.
[463] United States' first written submission, paras. 215 and 218.
[464] India's response to Panel question No. 42.
[465] India's first written submission, paras. 85-86 and 91.

7.184. We also reject the United States' argument that India cannot challenge the identification of the "subsidy programme" under the third sentence of Article 2.1(c).[466] India's submission in that regard is not independent from its claim under the third sentence on the "length of time" factor.[467]

7.185. We turn now to the substance of India's claim. The parties differ as to what needs to be demonstrated, as a matter of law, under Article 2.1(c) of the SCM Agreement. India's case is that an investigating authority can only ascertain whether a subsidy programme has been "use[d] … by a limited number of certain enterprises" in light of the "length of time during which that subsidy programme has been in operation" after having made "two identifications".[468] First, the investigating authority must identify the "subsidy programme".[469] This involves evaluating whether a "plan or scheme" exists pursuant to which the subsidy at issue was provided.[470] Second, the investigating authority must identify the length of time during which the subsidy programme has been in operation.[471] This involves ascertaining when the programme was established and how long subsidies have been provided pursuant to that programme.[472]

7.186. The United States responds that Article 2.1(c) has a "fact-driven nature", wherein the analysis required is flexible and can vary according to the factual scenario at issue.[473] For the United States, "evidence regarding the nature and scope of a subsidy program may be found in a wide variety of forms and often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1", particularly where the programme at issue is unwritten.[474]

7.187. As an initial matter, therefore, we are called upon to address whether, as a matter of law, Article 2.1(c) calls for a prescriptive analysis comprising the explicit identification of a "subsidy programme" and its overall duration, or alternatively, whether Article 2.1(c) reflects a more flexible legal standard that can be satisfied by citing evidence from which it can be inferred that a "programme" exists and that it has been operating for a certain period of time.

7.188. We note that the text of Article 2.1(c) of the SCM Agreement – and specifically its third sentence – does not prescribe any particular method or analytical process for identifying a "subsidy programme" and "the length of time during which [it] has been in operation".[475] The context of the provision suggests that the function of identifying these aspects is, *inter alia*, to inform the evaluation of whether a subsidy is *de facto* specific due to "use of a subsidy programme by a limited number of certain enterprises".[476] The rationale for taking into account the "length of time during which the subsidy programme has been in operation" in that regard is because, if the programme has been

[466] United States' first written submission, paras. 235-237.

[467] The United States is correct insofar as the third sentence appears to presuppose that the existence of the "subsidy programme" has already been determined. However, the third sentence also reveals features of the "subsidy programme" that need to be identified for the purposes of the analysis under Article 2.1(c). In particular, the third sentence reveals that the duration of the "subsidy programme" is a feature of the programme that may need to be ascertained. Thus, it is incorrect to argue that all relevant features of the "subsidy programme" that need to be identified for the purposes of the analysis under Article 2.1(c) are already clear in the second sentence. (Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142). An investigating authority may have identified that a "subsidy programme" exists without, for instance, identifying when the programme was established, or how long it has been (or is projected to be) operating.

[468] India's first written submission, paras. 86 and 90.

[469] India's first written submission, paras. 86 and 88.

[470] India's first written submission, para. 92.

[471] India's first written submission, para. 86.

[472] India's first written submission, para. 89.

[473] United States' first written submission, para. 226.

[474] United States' first written submission, para. 234.

[475] More generally, the Appellate Body has considered that the broader context of Article 2.1 suggests a flexible analytical framework, holding that "a proper understanding of specificity under Article 2.1 must allow for the concurrent application of these principles *to the various legal and factual aspects of a subsidy in any given case*". (Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.117 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371) (emphasis added); see also ibid. para. 4.130).

[476] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.146.

operating only for a short period of time, its use by a limited number of enterprises may not be indicative of specificity but rather a mere reflection of it being short-lived.[477]

7.189. In view of the function and rationale for identifying the "subsidy programme" at issue and its "length of time", we conclude that the investigating authority's analytical process must be sufficient to enable it to ascertain whether a subsidy is *de facto* specific due to the "use of a subsidy programme by a limited number of certain enterprises", or instead, whether that limited use can be explained by the programme being short-lived.[478] There are a number of facets that would logically form part of that analytical process. First, the analysis would need to ascertain whether the "programme" has been operating for a certain period of time such that its limited use by certain enterprises is not due simply to it being short-lived.[479] Second, the consideration of whether there is a "programme" which is capable of being "use[d]" by certain enterprises over a certain period of time suggests that the subsidy in question is part of some systematic activity[480] that has some duration (be it long or short), as distinct from the isolated provision of a non-recurring subsidy.[481] Beyond that, however, Article 2.1(c) does not prescribe a particular method or analytical process for identifying the existence of a "subsidy programme" for the purposes of taking into account the "length of time" factor.[482] Since the USDOC explicitly considered the "length of time" factor for the NMDC's sales of high-grade iron ore, we are not confronted in respect of this subsidy programme by the question of whether an unwritten "implicit" consideration can suffice under Article 2.1(c).

7.190. We turn now to the USDOC's explanation. The USDOC relied on three pieces of evidence to account for the "length of time of the operation of the subsidy programme" in its broader evaluation of whether the NMDC's sales of high-grade iron ore were specific due to their "limited use by certain enterprises". In view of the limited usefulness of one of those pieces of evidence[483], we focus on the other two pieces of evidence relied upon by the USDOC in its explanation.

7.191. The first piece of evidence relied on by the USDOC was the fact that the NMDC was established "in 1958 with the objective of developing all minerals other than coal, petroleum oil and atomic minerals".[484] India contends that this evidence merely conflates the establishment of the granting authority with the existence of a broader subsidy "programme". It is true that the USDOC did not cite evidence or arrive at a conclusion that the NMDC was established specifically to provide domestic subsidies through selling high-grade iron ore for LTAR. However, the United States points to record evidence showing that the NMDC's sales of iron ore was "consistent with the strategic objectives and plan of the Indian Government", particularly evidence relating to the importance that the GOI placed on the domestic availability of iron ore for the purposes of fostering domestic steel consumption.[485] The United States argues that this evidence – which was relied upon in (or otherwise

[477] Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 7.259 and 7.269. The panel in that case explained further that "[i]t is for this reason that Article 2.1(c) 'concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise' when making a determination of *de facto* specificity, while 'the last sentence of Article 2.1(c) function[s] as a safeguard that keeps in check this flexibility'". (Ibid. para. 7.272).

[478] Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 7.269 and 7.273.

[479] Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 7.271 and 7.273.

[480] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

[481] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

[482] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141. See also Panel Reports, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 7.283; and *US – Coated Paper (Indonesia)*, para. 7.145.

[483] This evidence is the existence of the question put to the GOI by the USDOC's *Standard Questions Appendix* as to the number of recipients of the subsidy programme over a four-year period. (Final Determination, (Exhibit IND-60), pp. 32-33; see also United States' first written submission, para. 221; response to Panel question No. 44, para. 103). Although the USDOC requested this information (in somewhat generic terms), the GOI did not respond because it disagreed that the NMDC supplied iron ore for LTAR and, on that basis, considered the *Standard Questions Appendix* to be inapplicable. (GOI's questionnaire response, 2006 administrative review, (Exhibit IND-18), p. 40). Despite the GOI declining to respond to this request for information, the USDOC did not treat the GOI as uncooperative nor seek recourse to the "facts available". Thus, the alleged "evidence" that the USDOC relied upon was merely the request for information as part of the generic questionnaire. In the absence of recourse to "facts available", it is unclear how a mere request for information can comprise evidence that an investigating authority actually took into account whether a subsidy programme has been operating for a certain time period.

[484] Final Determination, (Exhibit IND-60), p. 33.

[485] United States' first written submission, paras. 241-242.

connected to[486]) the USDOC's "public body" determination – can now be used to augment the USDOC's assessment of the "subsidy programme" at issue. We recall, in that regard, that the Appellate Body has recognized that "the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1", including that it has existed for a certain period of time.[487] In such instances, an investigating authority does not need to repeat the aspects of its evaluation in determining the existence of the "subsidy" under Article 1.1 when subsequently determining the existence and duration of the "subsidy programme" under Article 2.1(c).[488] On that basis, we consider it appropriate to take into account relevant evidence and explanations of the USDOC regarding its "public body" determination as part of our examination of whether the USDOC has adequately considered that a "subsidy programme" existed for some minimum period of time under Article 2.1(c).

7.192. We consider, in turn, that the USDOC's discussion of the NMDC as a "public body" indicates that it considered the NMDC's sales of iron ore to be "consistent with the strategic objective and plan of the Indian Government", and hence comprised a "systematic activity" that evinces the existence of a "programme" that endured over a certain period of time.[489] In particular, the USDOC discussed its Verification Report in which a GOI official described the NMDC as "provid[ing] a specific service to the people" and is therefore "monitored and reviewed by the government, as [it is] viewed as [a] strategic compan[y]" by the GOI.[490] Additionally, the USDOC discussed the NMDC Chairman's recommendation as part of the Dang Report that "except [for] long term contract, export of iron ore should not be allowed".[491] We likewise recall that the NMDC recommended that "[e]xport of lump ore should be discouraged to meet domestic demand", and that "[t]he raw material being natural reserves should be available adequately for the domestic industry and exports should not be at the cost of [the] domestic industry".[492] As we have found earlier, these aspects of the "public body" determination provided a sufficient evidentiary basis for the USDOC to infer that the NMDC's supply of high-grade iron ore was affected by GOI policy considerations.[493] This evidence implies a strategic motivation behind the NMDC's domestic sales of iron ore that extends beyond a mere repetition of transactions by the NMDC for LTAR.

7.193. The second piece of evidence relied on by the USDOC was the fact that the investigated producers received the subsidy at issue over the course of a number of review investigations occurring in successive years, namely in 2004, 2006, and 2007.[494] India argues that the USDOC's reliance on evidence of the NMDC's sale of iron ore to certain producers is not sufficient to demonstrate that the "length of time" factor was addressed properly.[495] We need not resolve in this dispute whether such evidence is alone sufficient. Rather, we consider that the provision of individual subsidies over a number of years can permissibly corroborate other evidence that a "subsidy

[486] The United States cites certain aspects of the Hoda Report, the Dang Report, and the 2004 New Subsidies Allegation that were not *explicitly* relied upon by the USDOC in its assessment of whether the NMDC constitutes a "public body" and whether its sales of high-grade iron ore constitute a "subsidy". (United States' first written submission, paras. 241-242). Those materials were instead cited by the USDOC in its Preliminary Determination concerning the Captive Mining of Iron Ore subsidy programme. (Preliminary Determination, (Exhibit IND-55), pp. 8-9). Nonetheless, as we explained above at fn 207 and para. 7.87 we may permissibly take those aspects of evidence into account because they are connected to the USDOC's explanation regarding the NMDC as a "public body". In particular, they are connected to the USDOC's discussion of the NMDC Chairman recommending export restraints in line with the GOI policy, and the NMDC's prices being influenced by the GOI's policy considerations and actions. (Final Determination, (Exhibit IND-60), pp. 21-22).

[487] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.

[488] Panel Report, *US – Coated Paper (Indonesia)*, paras. 7.159 and 7.164.

[489] Evidence of a "systematic activity" can be sufficient to evince a "programme", particularly when it is unwritten. (Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.141 and 4.149).

[490] Final Determination, (Exhibit IND-60), pp. 19-20; Preliminary Determination, (Exhibit IND-55), pp. 6-7 (referring to Dang Report, (Exhibit USA-2), p. 79; and Verification Report, (Exhibit USA-3), p. 9).

[491] Dang Report, (Exhibit USA-2), p. 185.

[492] Dang Report, (Exhibit USA-2), pp. 204 and 206.

[493] See above paras. 7.47, 7.84 and 7.89. We also recall the evidence that the NMDC seemed to limit its exports in a way that happened to be stricter than the legal maximum.

[494] Final Determination, (Exhibit IND-60), p. 33.

[495] India's first written submission, paras. 90 and 93.

programme" persisted over a period of time, thus demonstrating that the "limited use" of the subsidy was not merely due to the programme being short lived.

7.194. The sufficiency of the evidence relied upon by the USDOC must also be considered in light of the context of its assessment[496]: namely, the nature of the putative subsidy programme as an *unwritten* measure involving the "provision of goods"[497], and the nature of determinations of *de facto* specificity (as opposed to *de jure* specificity).[498] In particular, this context means that the assessment will often be made in the absence of direct documentary evidence that the programme's use is confined to a "limited number of certain enterprises". In such a context, we consider that the USDOC's reliance on the two aforementioned facts formed a sufficient evidentiary basis for taking into account the length of time during which the subsidy programme has been in operation as part of the broader assessment of whether the subsidy is *de facto* specific due to the "use of a subsidy programme by a limited number of certain enterprises". We therefore conclude that India has not demonstrated that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement in its assessment of the "length of time" factor for the NMDC's sales of high-grade iron ore.

7.5.2 Whether the USDOC erred in its finding that mining leases for iron ore were *de facto* specific

7.195. India claims that the USDOC acted inconsistently with Articles 1.2, 2.1(c), and 2.4 of the SCM Agreement in its finding that the "leases to mine iron ore" programme is *de facto* specific. First, India points to a "contradiction" between the USDOC's explanation and the United States' submissions in the present proceedings.[499] In particular, according to India, the USDOC found that the leases were provided to both steelmakers[500] *and* standalone miners, whereas the United States now submits that the leases were limited to steelmakers.[501] Second, India argues that the USDOC failed to address the fact that the law governing mining leases established objective criteria under which all applicants were treated equally.[502] For India, this was corroborated by record evidence showing that steel producers were not favoured over independent miners of iron ore either in terms of allocation of rights or the payment of royalties.[503]

7.196. The United States responds that "the USDOC relied on substantial record evidence that India had a mining leases for iron ore program under which mining rights were granted to Indian steel and mining companies through leases, and that those steel companies represented limited users of the iron ore."[504] The United States rejects India's suggestion of a "contradiction" between its submissions and the USDOC's explanation.[505] Rather, both its submissions and the USDOC's explanation rely on the provision of leases to mine iron ore being limited to two industries, specifically steelmakers and mining companies.[506] The finding that the "use of the iron ore from leases is limited to steel companies" was a factual matter demonstrating that the inherent characteristics of iron ore make it limited to steelmakers as an input for producing steel, as opposed to reflecting the *de facto* specificity determination in and of itself.[507] In relation to India's argument that the applicable law provides that mining leases are based on objective criteria, the United States argues first that this is irrelevant to findings of *de facto* specificity, and second that the record evidence shows that the use of iron ore was limited to steel producers – both as a function of its

[496] See, e.g. Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.117 and 4.141; *US – Anti-Dumping and Countervailing Duties (China)*, para. 371.
[497] Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 7.271; Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.129 and 4.131, and fn 654.
[498] See generally Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.
[499] India's second written submission, para. 118.
[500] In relation to the terminology in this section, see the parties' responses to Panel question No. 46, indicating that the following sets of terms variously used by the USDOC and the parties are synonyms: (a) "steel makers"; "steel companies"; "the steel industry"; "steel producers"; and (b) "standalone mining companies"; "mining companies"; "mining entities"; "independent miners"; "miners".
[501] India's second written submission, para. 118.
[502] India's first written submission, para. 96; second written submission, para. 118.
[503] India's first written submission, paras. 96-97; second written submission, para. 118.
[504] United States' second written submission, para. 131.
[505] United States' second written submission, paras. 132 and 134.
[506] United States' second written submission, para. 134.
[507] United States' second written submission, para. 133; response to Panel question No. 45, paras. 107-108.

inherent utility to those producers, and as a function of an explicit GOI strategy to channel iron ore to domestic steel producers.[508]

7.197. An important dimension of the parties' dispute under this claim is that the Preliminary Determination defined the subsidy programme at issue as the "direct provision of a good" to "Indian [steelmakers] in exchange for a per unit fee"[509], whereas the Final Determination expanded the finding of the "limited users" of the subsidy programme from domestic steelmakers alone to domestic steelmakers *and* standalone miners.[510]

7.198. India refers to a "contradiction" between the USDOC's explanation that mining leases for iron ore were limited to steelmakers and standalone miners, on the one hand, and the United States' submissions in the present proceedings that they were limited to steelmakers.[511] This contradiction is apparent between the USDOC's Preliminary Determination and Final Determination. The Preliminary Determination defined the subsidy programme at issue as the "direct provision of a good" to "Indian [steelmakers] in exchange for a per unit fee".[512] The USDOC then found there to be *de facto* specificity in its Preliminary Determination on the basis of limited use by Indian steelmakers, since the inherent use of iron ore is for steel production and the GOI pursued a strategy of directing iron ore to its domestic steelmakers.[513] In the Final Determination, the USDOC expanded its finding of the "limited users" from domestic steelmakers alone to domestic steelmakers *and* standalone miners.[514] However, the USDOC did not adjust any of its other findings from the Preliminary Determination regarding its definition of the subsidy programme (including the entities using the programme, i.e. steelmakers) and the rationale for its "limited use" finding.[515]

7.199. The USDOC's failure to make adjustments to other aspects of its *de facto* specificity determination when switching from "limited use" by steelmakers to "limited use" by steelmakers *and* standalone miners results in a number of internal contradictions in its reasoning. First, the USDOC defined the "subsidy programme" at issue as the "direct provision" of iron ore to steelmakers through the provision of iron ore mining leases to steelmakers.[516] By limiting the "subsidy programme" to steelmakers in this way, it is not possible for the programme to be used by other entities. Accordingly, it does not make sense for the USDOC to proceed to find "limited use" of this programme by a second industry not covered by the programme, i.e. standalone miners. Second, the USDOC's rationale for its "limited use" finding pertained to the inherent use of iron ore as an input for steel, together with the pursuit by the GOI of a strategy of directing iron ore to domestic steelmakers.[517] This may explain an inherent limitation (and therefore specificity) in the use of the leases for mining iron ore by *domestic steelmakers*, but it does not explain the limitation in the use of these leases by *standalone miners*. Standalone miners did not use the mining leases to produce steel, but rather to extract and sell iron ore, both domestically and for export.[518] Thus, "limited use" of the mining leases for iron ore on the basis of their inherent use for domestic steel production by the recipient enterprises does not substantiate a "limited use" finding for standalone miners.

7.200. In summary, the USDOC included standalone miners within the category of "a limited number of certain enterprises" under Article 2.1(c)[519], but did not include standalone miners within

[508] United States' first written submission, paras. 255-262.

[509] Preliminary Determination, (Exhibit IND-55), p. 8. The USDOC determined *de facto* specificity on the basis of limited use of the subsidy programme by Indian steelmakers, since the inherent use of iron ore is for steel production and the GOI pursued a strategy of directing iron ore to its domestic steelmakers. (Preliminary Determination, (Exhibit IND-55), p. 9; confirmed in Final Determination, (Exhibit IND-60), p. 25).

[510] Final Determination, (Exhibit IND-60), pp. 24-25.

[511] India's second written submission, para. 118. See also's response to Panel question No. 48.

[512] Preliminary Determination, (Exhibit IND-55), p. 8.

[513] Preliminary Determination, Exhibit IND-55, p. 9; confirmed in Final Determination, (Exhibit IND-60), p. 25.

[514] Final Determination, (Exhibit IND-60), pp. 24-25.

[515] If anything, the USDOC confirmed those aspects. (Final Determination, (Exhibit IND-60), p. 25).

[516] Preliminary Determination, (Exhibit IND-55), pp. 7-8 and fn 34.

[517] Preliminary Determination, (Exhibit IND-55), pp. 8-9; confirmed in Final Determination, (Exhibit IND-60), p. 25.

[518] This follows from how the USDOC defines standalone miners as distinct from steelmakers engaged in captive mining of iron ore at the Preliminary Determination, (Exhibit IND-55), pp. 8-9 and fn 34. See also India's response to Panel question No. 48.

[519] Final Determination, (Exhibit IND-60), pp. 24-25.

the category of entities that could "use" the "subsidy programme" under Article 2.1(c).[520] Further, the USDOC's rationale for the "limitation" of the programme to "certain enterprises" pertained only to the use of the programme by domestic steelmakers, and not by standalone miners.[521]

7.201. We recognize that there could be several plausible bases on which the USDOC could have sought to justify a "limited use" finding in respect of both domestic steelmakers and standalone miners. In its Final Determination, however, the USDOC reiterated its rationale from the Preliminary Determination that "iron ore's inherent characteristics makes the use of iron ore limited to steel companies as an input for producing steel".[522] This rationale was despite the USDOC's finding that standalone miners comprised an additional industry to whom the leases were granted[523], and despite its finding that a significant portion of the iron ore granted under the leases may have been exported (i.e. used by standalone miners for export rather than for sale to domestic steelmakers).[524]

7.202. The United States has not reconciled these aspects of the USDOC's explanation before us. On one hand, the United States argued that the USDOC's determination was based on "limited use" by "two industries, specifically steel producers and mining companies".[525] On the other hand, the United States' maintained that the "use of the iron ore from leases is limited to steel companies".[526] We agree with India that there is no explanation in the USDOC's determination setting out a rationale for the limited nature of the programme at issue *vis-à-vis* "standalone mining companies", as distinct from steelmakers.[527]

7.203. For all of the foregoing reasons, we are unable to conclude that the USDOC provided a reasoned and adequate explanation for its finding that the mining leases for iron ore programme was *de facto* specific under Article 2.1(c) of the SCM Agreement. We therefore find that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement in finding that the mining leases for iron ore programme was *de facto* specific. In view of this conclusion, we do not consider it necessary for the effective resolution of this dispute to address India's claims under Articles 1.2 and 2.4 of the SCM Agreement on this point.

7.5.3 Whether the USDOC erred in its consideration of mandatory factors under Article 2.1(c) in respect of "mining leases for iron ore" and "mining leases for coal"

7.204. India claims that the USDOC acted inconsistently with Articles 1.2, 2.1(c), and 2.4 of the SCM Agreement by making "no attempt … to consider the economic diversification in India and the length of time [of] the two subsidy programs", despite proceeding to find *de facto* specificity.[528] India's case is simply that a "perusal" of the USDOC's determination reveals no consideration of these factors.[529] India rejects the suggestion that these factors could have been considered implicitly as evinced by other aspects of the determination, arguing instead that this would be tantamount to *ex post* reasoning, and further, that the context afforded by the public notice requirements in Article 22 of the SCM Agreement suggest that the USDOC must "determine" and "publish" its findings on these points.[530]

7.205. The United States makes an Article 21.5 objection against India's claim that the USDOC erred by failing to take into account the mandatory "length of time" and "extent of the diversification" factors under Article 2.1(c) for these two subsidy programmes.[531] We briefly address this objection first. The United States correctly notes that India could have challenged these matters in the original

[520] Preliminary Determination, (Exhibit IND-55), pp. 7-8.
[521] Preliminary Determination, (Exhibit IND-55), pp. 8-9. See also Final Determination, (Exhibit IND-60), p. 25.
[522] Final Determination, (Exhibit IND-60), p. 25.
[523] Final Determination, (Exhibit IND-60), p. 24.
[524] Preliminary Determination, (Exhibit IND-55), p. 8.
[525] United States' second written submission, para. 134 (quoting Final Determination, (Exhibit IND-60), p. 24). (emphasis added)
[526] United States' second written submission, para. 133. (emphasis original)
[527] India's comments on United States' response to Panel question No. 47.
[528] India's first written submission, para. 100; second written submission, para. 113.
[529] India's first written submission, para. 100.
[530] India's second written submission, paras. 114-116.
[531] United States' first written submission para. 250.

proceedings, but did not.[532] Indeed, India made these claims in respect of other subsidy programmes in the original proceedings, but not in respect of the present two subsidy programmes.[533] However, the United States' objection fails for the following reason. The Panel's findings of violation regarding these two subsidy programmes in the original proceedings were based on the absence of *sufficient evidence to demonstrate their existence*.[534] Thus, in order to implement the DSB ruling, the USDOC was required to undertake its investigation afresh as to whether these putative subsidy programmes actually existed and, in turn, satisfied each of the legal elements necessary to permit the application of CVDs. This included an analysis of whether those programmes were specific under Article 2.1. Indeed, in the original proceedings the Panel exercised judicial economy over India's specificity claims[535] regarding these two programmes for the very reason that the DSB ruling would require a reconsideration of specificity in any event.[536] Thus, the United States' objection fails.

7.206. Turning to the merits of India's claim, the United States rebuts that India's claim is "generic and unsupported", and in any case, the extent of diversification of India's economy was considered in the determination of the specificity of another subsidy programme (the NMDC's sales of iron ore), and the length of time of the mining leases for coal programme was considered as part of the timing of the conferral of the coal lease to Tata.[537] For the United States, the requirement to "account" for these factors is sufficiently broad as to cover instances where these factors have been considered implicitly, and further, where these factors are not relevant in a given case, they need not be discussed explicitly.[538]

7.207. We now evaluate the merits of India's claim that the USDOC failed (made "no attempt") to consider the "extent of diversification" and "length of time" factors under Article 2.1(c). In light of India's claim and the United States' rebuttal, the issue before us is whether the USDOC's determination reveals that it did in fact consider these mandatory factors to the extent required by Article 2.1(c) in the particular circumstances of these subsidy programmes.

7.208. Since the parties diverge on what it means to consider the "extent of diversification" and "length of time" factors under Article 2.1(c), we begin by addressing what investigating authorities are required to do under that provision, including whether an unwritten "implicit" consideration can suffice. The relevant portion of Article 2.1(c) states:

> In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[539]

7.209. We note first that the term "taking account" (in the active voice) is used to define and delimit the role played by these factors within the context of Article 2.1(c). The ordinary meaning of this term, as identified by panels in relation to Article 2.1(c)[540], and by the Appellate Body in other contexts, refers to considering a matter along with other factors before reaching a decision.[541] While "taking account" of these factors is mandatory, this term does not prescribe a specific result or require a Member to conform to or act in accordance with a particular matter.[542]

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[532] United States' second written submission, para. 117.

[533] Panel Report, *US – Carbon Steel (India)*, paras. 7.100, 7.136, 7.219, 8.2(a), 8.4(a), and 8.4(b).

[534] Panel Report, *US – Carbon Steel (India)*, paras. 7.217 and 7.252.

[535] Those specificity claims were different to the specificity claims that India now brings before the compliance Panel: Panel Report, *US – Carbon Steel (India)*, paras. 7.100, 8.2(a), 8.4(a), and 8.4(b).

[536] Panel Report, *US – Carbon Steel (India)*, paras. 7.219, 8.4(a), and 8.4(b).

[537] United States' first written submission, paras. 250-253.

[538] United States' second written submission, paras. 121-123.

[539] Emphasis added.

[540] The two panels that considered this term in the particular context of Article 2.1(c) considered it to impose "an obligation 'to take something into reckoning or consideration; to take something on notice'". (Panel Reports, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 7.259; *EC and certain member States – Large Civil Aircraft*, para. 7.969 (referring to *Shorter Oxford English Dictionary*, 4th edn, A. Stevenson (ed.) (Oxford University Press, 1993), p. 15)).

[541] See e.g. Appellate Body Report, *US – Softwood Lumber V*, para. 133. See also Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1620; *US – COOL*, paras. 7.775-7.787; and *US – Continued Suspension*, paras. 7.492 and 7.611.

[542] Panel Reports, *US – Clove Cigarettes*, paras. 7.632-7.633; *Japan – Apples*, para. 8.241.

7.210. Since Article 2.1(c) does not prescribe the manner in which "account shall be taken" of these factors, past panels have concluded it can be sufficient for other aspects of a determination to demonstrate that "account was taken" of the matter. For instance, in *US – Softwood Lumber IV*, the panel found that:

> While it is clear that the USDOC did not explicitly and as such address the extent of economic diversification in its Final Determination, we consider that in noting that "the vast majority of companies and industries in Canada does not receive benefits under these programmes", the USDOC showed that it had *taken account of* the extent of economic diversification in Canada and its provinces, i.e. the publicly known fact that the Canadian economy and the Canadian provincial economies in particular are diversified economies.[543]

7.211. Other panels have likewise found that "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly", so long as there is some indication in the determination that the factors had been considered implicitly.[544] Relatedly, it may be the case, as the United States contends, that one of these factors is simply irrelevant in a particular factual matrix.[545] Even in such cases, there would still need to be an indication (implicit or explicit) that the investigating authority considered the factor and concluded it to be irrelevant.[546] Such an indication could flow from the nature and implications of the investigating authority's reasoning on a given point, or may be self-evident from the investigating authority's review of the record evidence or from the submissions of an interested party during the investigation. This can only be determined in light of the circumstances of a given case. One particular circumstance that would, in our view, attenuate the level of scrutiny required of an investigating authority concerns whether interested parties had explicitly questioned specificity with supporting evidence during the investigation on the basis of the short duration of the subsidy programme or the lack of diversity in the relevant economy.[547] An investigating authority would ordinarily be expected to consider the matter explicitly when confronted with relevant evidence, whereas it would be reasonable to expect only limited or implicit analysis if the matter was not raised at all by interested parties during an investigation.

7.212. We turn now to India's claim regarding the "extent of diversification" factor. It is uncontested that the USDOC's determination does not mention this factor in its *de facto* specificity determinations for the mining leases for coal programme and mining leases for iron ore programme.[548] The question before us, therefore, is whether the USDOC's explicit consideration of this factor in relation to another subsidy programme (the NMDC's sale of iron ore) was sufficient to reveal an implicit consideration of this factor for the two programmes that India now challenges. We conclude that this was sufficient for two reasons.

7.213. First, the nature of the "extent of diversification" factor is not specific to a given subsidy programme. Rather, the reason for taking this factor into account is because "where the extent of the underlying economic diversification is low, lack of diversification in the distribution of benefits would not by itself give rise to a finding of *de facto* specificity".[549] Thus, as the United States points out[550], the consideration of this factor involves a macroeconomic assessment of diversification, which need not vary as between subsidy programmes operating within the same economy.

7.214. Second, the way in which the USDOC evaluated the "extent of diversification" factor in its determination was not programme-specific, despite being situated within the "NMDC sales of iron

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[543] Panel Report, *US – Softwood Lumber IV*, para. 7.124 (fns omitted; emphasis original). This finding was not appealed.

[544] Panel Report, *US – Countervailing Measures (China)*, para. 7.253 (referring to Panel Report, *US – Softwood Lumber IV*, para. 7.124). See also Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.229. India's argument that the context of Article 22 of the SCM Agreement militates against "implicit" considerations by investigating authorities is misplaced; India relies on the requirement for investigating authorities to "publish" what they "determine", whereas the text of Article 2.1(c) refers to "account shall be taken" (i.e. not "determine"). (India's second written submission, para. 116).

[545] United States' second written submission, para. 121.

[546] Panel Report, *US – Carbon Steel (India)*, para. 7.138.

[547] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.229.

[548] United States' first written submission, para. 251.

[549] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.37.

[550] United States' second written submission, para. 125.

ore" programme. The USDOC's starting point was, in general terms, that "the extent of diversification of economic activities would only be material or relevant when diversification of economic activities does not exist".[551] In examining whether "diversification of economic activities does not exist" in India, the USDOC's methodology was to consider the "economic statistics on India's industrial sector" in the annual reports of the Reserve Bank of India. Based on this data, the USDOC found there to be "diversification of the industrial sector in India as this sector is comprised of [nineteen] industries and economic activities".[552] Since the two subsidy programmes that India now challenges are likewise situated within "India's industrial sector"[553], the methodology and explanation provided by the USDOC in respect of the "NMDC sales of iron ore" programme applies equally to the two present programmes. We also note that, during the reinvestigation, the GOI only raised the USDOC's failure to consider the "extent of diversification" factor in relation to the "NMDC sales of iron ore" programme. In that context, it is not unreasonable for the USDOC to have considered this generic factor only under the particular heading of the "NMDC sales of iron ore" programme.[554]

7.215. We turn now to the "length of time" factor. It is useful to address the two subsidy programmes separately. We begin with the mining leases for coal programme. This programme was limited to the provision of a mining lease to Tata, and it is clear that the USDOC's determination examined the length of time over which this lease had extended. As the United States identifies, the determination tracks the history of this lease from its original grant by the Raja of Ramgarh in 1907, to the post-independence affirmation of this grant by the *Bihar Land Reform Act* in 1950, to the exemption of the lease from renegotiation under the MMDR *Act* in 1957.[555] Although not explicitly discussed within the rubric of *de facto* specificity and the "length of time" factor, we find this sufficient to demonstrate that the USDOC did consider the length of time over which the subsidy programme had been operating, at least implicitly. India has thus not demonstrated that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement in this regard.

7.216. We turn now to India's claim regarding the USDOC's consideration of the "length of time" factor for the mining leases for iron ore programme. India correctly notes that there is no explicit discussion in the USDOC's determination of the "length of time" during which this programme had been operating.[556] For India, this shows that the USDOC did not, in fact, take the "length of time" factor into account.[557] In response, the United States argued that:

> With respect to the mining rights of iron ore program, the USDOC explained in its Section 129 Determinations that all mining rights are owned by the state governments and mining leases for iron ore are granted with approval from the GOI to the steel industry. It further noted that NMDC was "[i]ncorporated in 1958 as a fully Government of India owned public enterprise with the objective of developing all minerals other than coal, petroleum, and atomic minerals." Thus, contrary to India's assertions, the record evidence shows that the USDOC took into account the length of time the subsidy programs have been in operation.[558]

7.217. The United States elaborated that:

> The aim of a subsidy program becomes more evident as time progresses. In the context of the mining rights of iron program, and taking the inherent characteristics of iron ore into account – i.e., that the mineral is inherently *limited* to steel companies as an input for producing steel – the USDOC observed that it became more evident as time progressed that *leases for mining rights of iron ore* were *limited* to India's *steel companies*, including the NMDC. In light of this analysis in the USDOC's Section 129

[551] Final Determination, (Exhibit IND-60), p. 31.
[552] Final Determination, (Exhibit IND-60), p. 31.
[553] Final Determination, (Exhibit IND-60), p. 32: "[b]asic metal and alloy industries"; "[m]ining and Quarrying"; "[r]ubber, plastic, petroleum and coal"; "[n]on-metallic mineral products".
[554] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.229.
[555] Final Determination, (Exhibit IND-60), pp. 27-28.
[556] India's first written submission, para. 100.
[557] India's first written submission, para. 100.
[558] United States' first written submission, para. 253. (footnotes omitted)

> Determinations, it is apparent that the USDOC took account of the length of time the mining rights of iron ore program has been in operation.[559]

7.218. It is apparent from these extracts that three factors inform the United States' rebuttal: (a) the NMDC was established in 1958; (b) the use of iron ore is inherently limited to steel companies; and (c) the USDOC's observations regarding the then-current and forecast demand for iron ore by domestic steelmakers.

7.219. As we have indicated earlier, an assessment of the mandatory factors under Article 2.1(c) can be implicit[560], and likewise they can potentially be addressed through other aspects of a determination[561], e.g. when identifying the features of the financial contribution at issue. Further, the fact that no interested party or interested Member raised this matter during the reinvestigation is relevant procedural context.[562] It informs the Panel's assessment of the level of scrutiny that was reasonably required of the USDOC in taking account of the length of time factor in its specificity determination for the mining leases for iron ore programme. We also note that, in the original proceedings, the Panel made the following remarks in respect of another subsidy programme on "inherent use", specificity, and the length of time factor:

> We also note the United States' argument that the evidence underlying USDOC's specificity findings with respect to high-grade iron ore led to the conclusion that the issue of the duration of that programme's operation was not relevant to the subsidy programme at issue. The United States contends that because the USDOC found that "the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number", no additional analysis of the duration of the subsidy was necessary. *Since there is no statement to this effect in the USDOC's determinations, nor in any contemporaneous documentation, we are unable to take this argument into account when considering whether or not the USDOC complied with the requirements of Article 2.1(c)*.[563]

7.220. In line with these remarks, we recognize that an "inherent use" rationale could render the "length of time" factor irrelevant or redundant in a given case.[564] However, there must be some indication that this was the rationale of the investigating authority.[565]

7.221. With these considerations in mind, we now address whether the USDOC could be said to have taken account of the "length of time" factor for the mining leases for iron ore programme. No material has been brought to our attention to suggest that the GOI or any interested party raised the issue of the "length of time" factor during the reinvestigation in respect of the mining leases for iron ore programme.[566] This attenuates the level of scrutiny that was reasonably required of the USDOC in taking account of the length of time factor. However, there would still need to be some indication that this factor was, in fact, taken into account. While the United States draws attention to the date of establishment of the NMDC being 1958, we see nothing to indicate in the USDOC's discussion of this matter to suggest that it reflected an implicit consideration of the length of time of the mining leases for iron ore programme.[567] There is simply no link drawn between that fact and the duration of the mining leases for iron ore programme. Likewise, the United States draws attention to the USDOC's observations regarding the then-current and forecast demand for iron ore by domestic steelmakers, but again we cannot discern a link between this and an implicit consideration of the length of time of the mining leases for iron ore programme.[568] Further, the United States makes reference to the "inherent use" nature of the USDOC's reasoning, but there is

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[559] United States' second written submission, para. 126. (foonotes omitted)
[560] See above para. 7.211. This depends, of course, on the circumstances of a given case.
[561] See above para. 7.210. This depends, of course, on the circumstances of a given case.
[562] See above para. 7.211.
[563] Panel Report, *US – Carbon Steel (India)*, para. 7.138. (fn omitted; emphasis added)
[564] See also Panel Report, *US – Carbon Steel (India)*, para. 7.131: "once it is established that access to the subsidy is limited, that subsidy is specific within the meaning of Article 2".
[565] Thus, the United States' argument that "[w]here these two factors are not relevant to the authority's determination, it need not include express discussion of each factor" does not hold. (United States' second written submission, para. 121).
[566] This was not raised by the GOI in its case brief: Case brief, (Exhibit IND-57), pp. 32-37.
[567] Final Determination, (Exhibit IND-60), p. 33.
[568] United States' second written submission, para. 126.

nothing in the USDOC's determination or any contemporaneous documentation which indicates that it found the "length of time" factor to be irrelevant because of the inherent use of iron ore.[569] The United States' arguments on these points would therefore appear to reflect *ex post* reasoning in relation to the length of time factor under Article 2.1(c).

7.222. We recognize that there was material before the USDOC regarding the length of time that the mining leases for iron programme had been operating. For instance, the GOI noted in its case brief that the alleged subsidy programme had been available to other entities in periods between 1999-2000 and 2003-2004, as well as 2004-2005 and in the 2006 administrative review.[570] The GOI also cited an exhibit[571], which in turn set out the mineral concession approvals that had been made by the Central Government.[572] This exhibit lists concessions to mine iron ore that had been approved over a period spanning 1999-2008. Again, however, there is no indication that the USDOC took this material or any other relevant material into account as part of a consideration of the mandatory "length of time" factor for this subsidy programme under Article 2.1(c). It is uncontested that there is no explicit discussion of this factor in the USDOC's explanation, and nothing indicates to us that it was otherwise considered implicitly.

7.223. We therefore find that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take account of the length of time during which the mining leases for iron ore programme had been in operation. In view of our conclusions in this Section, we do not consider it necessary for the effective resolution of this dispute to address India's claims under Articles 1.2 and 2.4 of the SCM Agreement.

7.6 Soliciting and accepting new evidence in the reinvestigation: India's claims under Article 12.1 of the SCM Agreement

7.224. India claims that the USDOC acted inconsistently with Article 12.1 of the SCM Agreement by failing to: (a) notify interested parties of the information it required; (b) seek relevant information; and (c) reopen the record and accept information voluntarily provided.[573] India's claim concerns the USDOC's treatment of two separate matters, namely the alleged "enhanced autonomy" granted to the NMDC through "Miniratna" status, and the proprietary Tata price quote. The text of Article 12.1 provides:

> Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

7.225. It is uncontested that there was no finding of violation of Article 12.1 in the original proceedings. Therefore, there was no explicit DSB ruling that required the USDOC to reobserve the procedural protections under Article 12.1 as part of its Section 129 reinvestigation. Accordingly, the question before us is whether the DSB rulings somehow necessitated the seeking and acceptance of new evidence, thus re-enlivening Article 12.1 in the USDOC's reinvestigation, despite the absence of an explicit DSB ruling in that regard.

7.226. In respect of the Tata price quote, we have already found that the USDOC had a sufficient basis for rejecting this evidence as not reflecting "prevailing market conditions" under Article 14(d) of the SCM Agreement. We therefore exercised judicial economy over India's alternative claim regarding the confidentiality of the price quote.[574] Since India's claim under Article 12.1 likewise relates to the confidentiality of the Tata price quote, we also exercise judicial economy over this claim. In respect of the legal implications of the NMDC's Miniratna status, we have already found that the DSB ruling did not prescribe explicitly that additional evidence would be required for the

[569] Thus, the United States' argument that "[w]here these two factors are not relevant to the authority's determination, it need not include express discussion of each factor" does not hold. (United States' second written submission, para. 121).
[570] Case brief, (Exhibit IND-57), pp. 26-27.
[571] Case brief, (Exhibit IND-57), fn 64.
[572] Tata verification exhibits, (Exhibit IND-36), pp. 4-17.
[573] India's first written submission, paras. 195 and 199; second written submission, para. 233.
[574] See above section 7.3.5.

USDOC to apply the correct legal standard, nor that there was anything especially probative about the evidence of Miniratna status – other than that it was pertinent to questions of the relationship between the Government and NMDC, which was the correct legal standard to be applied.[575] As we have explained above[576], the existing record evidence provided the USDOC with a sufficient evidentiary basis for concluding that the NMDC was not endowed with a generalized "enhanced autonomy", and that any autonomy exercised by the NMDC was confined in such a way that it did not rebut other evidence indicating "meaningful control" of the NMDC by the GOI. We therefore see no basis arising from the DSB ruling to require the USDOC to reobserve Article 12.1 of the SCM Agreement and to thereby have imposed an obligation on the USDOC to allow the submission of the "new factual information" on Miniratna status.

7.227. We note that India also argues that, regardless of whether the DSB ruling explicitly required new evidence to be sought and accepted in the reinvestigation, Article 21.4 of the SCM Agreement requires the observance of Article 12 in reviews. For India, this means that Article 12 applies to the Section 129 reinvestigation through Article 21.4, since it involved the reinvestigation of administrative reviews.[577]

7.228. We have evaluated India's argument, and likewise the United States' rebuttal[578], and we consider that the SCM Agreement does not refer to the steps that an investigating authority must take to implement DSB rulings or to the collection of evidence at that stage.[579] It therefore does not prescribe anything particular in that regard. It does not explicitly preclude[580], nor explicitly mandate[581], the reopening of the evidentiary record for the purposes of a reinvestigation. The key question pertains to what the DSB ruling required of the USDOC[582], and as we have found, India has not demonstrated that the DSB ruling in this case required the USDOC to reobserve Article 12.1 of the SCM Agreement in its Section 129 reinvestigation. We therefore conclude that India's claim under Article 12.1 regarding Miniratna status is not within the scope of the present compliance proceedings under Article 21.5 of the DSU.

7.7 Disclosure of essential facts: India's claims under Article 12.8 of the SCM Agreement

7.229. India claims that the USDOC acted inconsistently with Article 12.8 of the SCM Agreement by failing to disclose two "essential facts" in the Section 129 Preliminary Determination, which in turn inhibited the GOI's ability to defend its interests.[583] India does not allege there to be a DSB ruling arising from a violation of Article 12.8 in the original proceedings. Rather, India's argument is that the USDOC's implementation of two other DSB rulings reactivated the procedural protections under

[575] The overall error by the USDOC was a failure to provide a reasoned and adequate explanation for its finding that the NMDC is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.55), which flowed from its failure to apply the correct legal standard (ibid. para. 4.52). See also ibid. paras. 4.37 and 4.54.

[576] See above paras. 7.41-7.43 and 7.67.

[577] India's second written submission, para. 232; response to Panel question No. 53.

[578] United States' first written submission, paras. 377-379.

[579] See, by analogy, Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 167. Contrary to India's contention (India's response to Panel question No. 53), the Section 129 reinvestigation is not a "new" administrative review governed by Article 21 of the SCM Agreement that is separate from e.g. the administrative review that it is seeking to amend following an adverse DSB ruling. Unlike Article 21.4 of the SCM Agreement, nothing in the text of the SCM Agreement directly applies Article 12 to reinvestigations that seek to implement adverse DSB rulings. The Panel agrees in this regard with the European Union's third-party response to Panel question No. 8.

[580] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 167.

[581] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.74. In this regard, we disagree with the Canada's third-party response to Panel question No. 8. Unlike Article 21.4 of the SCM Agreement, nothing in the text of the SCM Agreement directly applies Article 12 to reinvestigations that seek to implement adverse DSB rulings.

[582] We find support for this in Article 19 of the DSU, which provides in relevant part that: "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered Agreement, it shall recommend that the Member concerned bring the *measure into conformity with that Agreement*" (emphasis added; fn omitted). Thus, the question of whether Article 12.1 of the SCM Agreement needed to be reobserved in the Section 129 reinvestigation hinges on whether that would be a necessary facet of bringing the measure into conformity, that is, of complying with the applicable DSB rulings. See also European Union's third-party response to Panel question No. 8, para. 57; and Japan's third-party response to Panel question No. 8, para. 27.

[583] India's first written submission, paras. 203, 206, and 220.

Article 12.8, with which the USDOC failed to comply. First, India submits that the USDOC failed to mention the export restrictions on iron ore as a reason for rejecting the NMDC's export price as a benchmark under Article 14(d) in the Section 129 Preliminary Determination, despite relying on this fact in the Section 129 Final Determination. Second, India submits that the USDOC's Section 129 Preliminary Determination failed to analyse the mandatory "length of time" and "diversification" factors in relation to the NMDC's sale of high-grade iron ore, and instead addressed these for the first time in the Section 129 Final Determination.

7.230. The United States responds that Article 12.8 does not require the disclosure of reasoning, nor does it prescribe the manner in which essential facts are to be disclosed.[584] Thus, the disclosure of the fact regarding export restrictions on iron ore in a verification report in the 2004 administrative review sufficed to comply with Article 12.8[585], despite not being linked to the rejection of the NMDC's export price as a benchmark.[586] According to the United States, this fact was also disclosed in the Section 129 Preliminary Determination in relation to its analysis of the NMDC as a "public body" (insofar as the document containing this fact was cited).[587] The United States likewise contends that the facts regarding the mandatory "diversification" and "length of time" factors were "disclosed" consistently with Article 12.8 by their inclusion on the record in the original investigation/reviews, despite not being linked to the USDOC's specificity analysis in the Section 129 Preliminary Determination.[588] For the United States, the USDOC's disclosure of the essential facts at issue was sufficient to enable the GOI to defend its interests.[589]

7.231. The text of Article 12.8 of the SCM Agreement provides:

> The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.232. In light of the parties' arguments, we are called upon to resolve two main issues. The first issue is whether Article 12.8 applied afresh to the Section 129 reinvestigation. The second issue concerns the extent to which Article 12.8 requires an investigating authority to indicate *how* it intends to use the "essential fact" in question. Under the United States' approach, Article 12.8 does not contain such a requirement; rather, it is sufficient for an investigating authority to disclose the fact in relation to a different aspect of the determination, or through mentioning the fact in a verification report, or through placing the fact on the record.[590] Under India's approach, Article 12.8 requires not only the disclosure of a given fact, but also the disclosure of an investigating authority's *reliance* on that fact, such that an interested party may defend its interests.[591]

7.233. Beginning with whether Article 12.8 of the SCM Agreement applied afresh to the Section 129 reinvestigation, the United States argues that the USDOC complied with this requirement in the underlying reviews/investigations, and thus did not need to again disclose the "essential facts under consideration" in the Section 129 reinvestigation.[592] The United States emphasizes that "from the outset of the Section 129 proceeding, India was aware that the USDOC was reevaluating and providing additional analysis concerning the record evidence from the proceedings at issue – the 2004, 2006, 2007, and 2008 administrative reviews – as a result of WTO-inconsistent findings".[593] India's response is that the Section 129 reinvestigation was a "separate investigation" *vis-à-vis* the underlying reviews/investigation, hence requiring the separate application of Article 12.8 to the reinvestigation.[594] In support, India relies on the context afforded by Article 21.4 of the SCM Agreement, which requires the reapplication of the disciplines of Article 12 (including

[584] United States' first written submission, paras. 385-386 and 389.
[585] United States' first written submission, para. 388; second written submission paras. 226, 228, and 233.
[586] United States' first written submission, para. 389.
[587] United States' first written submission, para. 391.
[588] United States' first written submission, para. 395.
[589] United States' second written submission, paras. 230-231 and 237-238.
[590] United States' first written submission, paras. 386, 389, 392, and 396.
[591] India's first written submission, para. 221; second written submission para. 239.
[592] United States' first written submission, para. 390; second written submission, paras. 226-230.
[593] United States' first written submission, para. 390; see also ibid. para. 395.
[594] India's second written submission, para. 236.

Article 12.8) to administrative and sunset reviews, as opposed to relying on the disclosure in the original investigation.[595]

7.234. In our evaluation of India's claim under Article 12.1, we have already explained[596] that the SCM Agreement does not refer to the steps that an investigating authority must take or to the collection of evidence when undertaking a reinvestigation to implement adverse DSB ruling.[597] We consider that the same observation applies to an investigating authority's treatment of essential facts in such a reinvestigation.[598] As with Article 12.1, nothing in the text of the SCM Agreement explicitly precludes or mandates the disclosure of essential facts under Article 12.8 for the purposes of a reinvestigation. That being the case, the key question pertains to what the DSB ruling required of the USDOC.

7.235. The United States contends that when an investigating authority's consideration is limited to the same pool of record evidence as in the originally-challenged investigation, there is no need to reobserve Article 12.8.[599] We accept that this may sometimes be the case.

7.236. However, if the DSB ruling requires a *fresh factual evaluation* of the same pool of record evidence, this may result in an investigating authority relying on different factual bases *vis-à-vis* the originally-challenged investigation, thus necessitating a new disclosure of the essential facts that are under consideration for the purposes of Article 12.8.[600] In our view, this was clearly the case in respect of the DSB rulings pertaining to India's present claim. With regard to the alleged failure to disclose the export restrictions on the NMDC's iron ore in the context of its benchmark determination, the USDOC's reinvestigation arose from a DSB ruling that the USDOC had failed to take into account certain evidence (the domestic pricing information).[601] With regard to the alleged failure to disclose the length of time and extent of diversification of the Indian economy in the context of its specificity determination, the USDOC's reinvestigation arose from a DSB ruling that the USDOC had failed to take those mandatory factors into account.[602] In both of these instances, the DSB rulings necessarily required a reconsideration of evidence, thus creating the potential for a different set of "essential facts" forming the basis of the determination in the Section 129 reinvestigation, and relatedly, generating a renewed basis for interested Members and interested parties to defend their interests.

7.237. We therefore find that the USDOC was required to reapply Article 12.8 in the Section 129 reinvestigation in relation to the two matters identified by India. We now evaluate whether India has demonstrated that the USDOC acted inconsistently with Article 12.8 by failing to disclose the essential facts in relation to the two matters referred to by India. We begin our evaluation of India's claims with an overview of the legal standard under Article 12.8, before applying this to the alleged steps taken by the USDOC to "disclose" the "essential facts" that were "under consideration" in the Section 129 redetermination.

7.238. We recall that the text of Article 12.8 of the SCM Agreement requires investigating authorities to "inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". The second sentence of the provision indicates that one of the functions of such disclosure is to enable "the parties to defend their interests".[603] This suggests that the manner of "disclosure" should suffice to discharge that function.[604] Further, the context afforded by Article 12.3, which sets out interested parties' right to inspect the record, suggests that the disclosure under Article 12.8 requires

[595] India's second written submission, paras. 236-237.
[596] See above para. 7.228.
[597] See, by analogy, Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 167.
[598] See above para. 7.228.
[599] United States' first written submission, paras. 388-389; second written submission paras. 226, 228, and 233; and response to Panel question No. 53, para. 126.
[600] Panel Reports, *Korea – Certain Paper (Article 21.5 – Indonesia)*, paras. 6.79-6.80; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.150 (proceeding on the assumption that Article 6.9 of the Anti-Dumping Agreement reapplied in the Section 129 redetermination at issue).
[601] Panel Report, *US – Carbon Steel (India)*, para. 7.154. See also ibid. para. 7.158.
[602] Panel Report, *US – Carbon Steel (India)*, para. 7.136.
[603] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.177; Panel Report, *Guatemala – Cement II*, para. 8.229.
[604] United States' first written submission, para. 387.

something more than merely placing facts on the record of investigation.[605] Beyond that, Article 12.8 does not prescribe the method of disclosure. We agree with the panel in *Argentina – Ceramic Tiles* that Article 12.8 can be "complied with in a number of ways" such as "through the inclusion in the record of documents – such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters – which actually disclose to the interested parties the essential facts".[606]

7.239. We also agree with the panel in that case that the disclosure must convey that the facts being disclosed "are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures".[607] This is because Article 12.8 requires the disclosure of the essential facts that are "under consideration".[608] Thus, the disclosure must somehow make the interested party aware that the "essential fact" is "under consideration" by the investigating authority as the authority proceeds towards a final determination.[609] This does not mean that Article 12.8 requires the disclosure of the reasoning or legal rationale behind the investigating authority's consideration of the fact[610], nor the conclusions of the investigating authority.[611] Rather, the focus of Article 12.8 is on the disclosure of the essential *facts*, and to that extent we agree with India that it is "intended to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the *facts* being considered by the investigating authority, provide additional information or correct perceived *errors*, and comment on or make arguments as to the proper interpretation of 'those *facts*'".[612]

7.240. We now apply this understanding of Article 12.8 to the two aspects of the Section 129 reinvestigation challenged by India. We begin with India's allegation that the USDOC failed to disclose the fact that the GOI placed export restrictions on iron ore in the context of the USDOC's rejection of the NMDC's export prices as a benchmark under Article 14(d). We have already recounted above the procedural context in which this "fact" emerged in the USDOC's "benefit" analysis, and relatedly in the USDOC's "public body" analysis.[613] In short, the GOI sought to rebut the USDOC's Preliminary Determination of the NMDC as a "public body" by pointing to record evidence that the NMDC's prices were based on commercial considerations.[614] The USDOC examined the exhibits relied upon by the GOI, and found in relation to its "public body" determination that "[c]ontrary to the GOI's assertion that prices are determined by the supply and demand of the market, NMDC described at verification that there are export restrictions in place for high-grade iron ore with a high Fe content".[615] These exchanges between the USDOC and GOI took place in the "public body" context. However, they are also significant to the USDOC's rejection of the NMDC's export prices in the "benefit" context. This is because the USDOC relied on its assessment of the NMDC as a "public body" to justify its rejection of the NMDC's export prices as a benchmark under Article 14(d) in the Preliminary Determination.[616] It is thus not surprising that this exchange between the GOI and USDOC on export restrictions also emerged in the USDOC's rejection of the NMDC's export prices as a benchmark in the Final Determination, given that the very character of the NMDC as a "public body" had been the USDOC's key consideration in the Preliminary Determination.

7.241. Indeed, in our view, the USDOC's factual assessment of the NMDC as a "public body" and its rejection of the NMDC's export prices as distorted by the export restrictions are inherently linked.[617] The USDOC identified the potential unreliability of the NMDC's export prices – by virtue of

[605] Panel Report, *Guatemala – Cement II*, para. 8.230.
[606] United States first written submission, para. 386 (quoting Panel Report, *Argentina – Ceramic Tiles*, para. 6.125).
[607] Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.
[608] Panel Report, *US – OCTG (Korea)*, para. 7.232.
[609] Appellate Body Report, *China – GOES*, fn 390; Panel Report, *Guatemala – Cement II*, para. 8.229.
[610] Panel Report, *China – GOES*, para. 7.407.
[611] Panel Report, *US – OCTG (Korea)*, para. 7.233.
[612] India second written submission, para. 250. (emphasis added)
[613] See above sections 7.2.3.3 and 7.3.7.
[614] Case brief, (Exhibit IND-57), pp. 13-14.
[615] Final Determination, (Exhibit IND-60), pp. 20-21 (referring to Verification Report, (Exhibit USA-3), p. 8).
[616] Preliminary Determination, (Exhibit IND-55), p. 14.
[617] We disagree with the United States that the export restrictions were themselves an "essential fact". (United States' first written submission, para. 388). Nothing in the USDOC's determinations suggests that this was an independent basis for rejecting the NMDC's export prices as unreliable, but rather, the Final

it being the investigated public body – as the factual basis for rejecting those prices in the Preliminary Determination.[618] We consider this to be the "essential fact" that was "under consideration". The GOI in its case brief accepted that the Appellate Body had stated that the "export prices of NMDC need to be used with caution", and further quoted the Appellate Body as stating that an "investigating authority can[not] presume that the export price set by a government provider is inherently unreliable", but rather "[t]his must be proven on the basis of evidence that an investigating authority must examine so that it may base its determination on positive evidence on the record".[619] Thus, the GOI responded to the fact that the NMDC was the putative public body at issue, and more specifically, the fact that its export prices may be unreliable by virtue of its status as a "public body". The GOI's engagement suggests that these facts had been disclosed as the "essential facts" that were "under consideration" in respect of the NMDC's export prices.

7.242. Further, as we have mentioned[620], the same exhibit through which the GOI sought to demonstrate that the NMDC's prices were commercially determined also provided the evidence for the USDOC's finding in response that there were export restrictions applying to the NMDC's exports. When viewed in context, therefore, it was sufficiently clear to the GOI that potential distortions impacting the NMDC's export prices arising from its character as a "public body" were "under consideration" by the USDOC. In our view, the USDOC's reliance on evidence of such distortions in the very exhibit submitted by the GOI cannot manifest a violation of Article 12.8. Therefore, India has not demonstrated that the USDOC acted inconsistently with Article 12.8 of the SCM Agreement on this point.

7.243. We turn now to the facts regarding the length of time of the NMDC's sales of iron ore, and the extent of diversification of the Indian economy, which we recall are mandatory factors to be taken into account as part of *de facto* specificity determinations under Article 2.1(c). The United States contends that the mere inclusion of these facts on the record was sufficient to "disclose" them under Article 12.8, in view of certain contextual considerations.[621] These contextual considerations were as follows: (a) due to the Panel's finding in the original proceedings that the USDOC erred by failing to discuss the length of time and extent of diversification factors, the GOI was aware that the USDOC would need to address those factors at some stage in the reinvestigation[622]; (b) these facts were disclosed in the originally-challenged investigation, and India had the opportunity to comment at that stage[623]; and (c) India did in fact address the mandatory length of time and extent of diversification factors in its case brief in the Section 129 reinvestigation, demonstrating that it had the opportunity to defend its interests.[624]

7.244. India's case is premised on its assertion that the USDOC failed to analyse the facts regarding: (a) the diversification of the industrial sector in India, and (b) the length of time for which the "provision of iron ore by NMDC programme was in operation, when assessing whether that programme was *de facto* specific".[625] It is clear to us, however, that the USDOC's Preliminary Determination referred to the fact that the NMDC was established in 1958[626], which was a key

Determination appears to merely extrapolate upon the reasons why using the putative public body's prices would be improper in this case. (Final Determination, (Exhibit IND-60), p. 14).

[618] The USDOC stated "[we] … preliminarily determine that using the NMDC prices at issue (*e.g.*, the iron ore prices the NMDC charged to Japanese buyers during the POR) would be *unreliable* and would *result in an inadequate comparison*", and that " the Department preliminarily determines to exclude the prices at issue not solely because they originated from the GOI, but *because they were set by the NMDC, the very public body* whose iron ore for LTAR program the Department is evaluating". (Preliminary Determination, (Exhibit IND-55), pp. 11 and 14 (emphasis added)). It is clear to us that the USDOC identified reliability issues with using the NMDC's export prices due to it being the very public body at issue as the factual basis for its Preliminary Determination.

[619] Case brief, (Exhibit IND-57), pp. 35 and 37 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.165). (emphasis omitted)

[620] See above paras. 7.40 and 7.46-7.49.

[621] United States' first written submission, para. 394; second written submission, para. 237. See also first written submission, para. 395: "[b]ecause this underlying information was available on the record, India had ample opportunity to respond to such disclosure of information".

[622] United States' first written submission, para. 395.

[623] United States' second written submission, para. 237.

[624] United States' second written submission, para. 237.

[625] India's first written submission, para. 205.

[626] Preliminary Determination, (Exhibit IND-55), p. 6.

consideration in its "length of time" explanation.[627] Likewise, the USDOC's Preliminary Determination referred to multiple industrial activities being undertaken in the Indian economy, including the development of "coal, petroleum oil and atomic minerals", as well as mining iron ore, and domestic steel production to serve increasing consumption "as the country builds out its infrastructure in the coming decades".[628] This correlates to the facts ultimately relied upon by the USDOC in its Final Determination concerning the "diversification of the industrial sector in India" covering sectors such as "[n]on-metallic mineral products", "[r]ubber, plastic, petroleum and coal", "[b]asic metal and alloy industries", and "[m]ining and [q]uarrying".[629]

7.245. These facts were not assessed by the USDOC as part of a dedicated discussion of whether the NMDC's sales of high-grade iron ore were *de facto* specific. However, in the circumstances of the present claim, we do not consider this to have been necessary in order to comply with Article 12.8 of the SCM Agreement. We recall in this regard that India's claim pertains to the disclosure of facts on the two mandatory factors under Article 2.1(c). This provision requires that "account be taken of" the two mandatory factors, but it is not prescriptive as to the manner in which this is carried out. Indeed, as we have explained earlier, an assessment of these factors can be implicit[630], and likewise they can potentially be addressed through other aspects of a determination[631], e.g. when identifying the features of the financial contribution at issue. Against that background, the USDOC sufficiently disclosed the essential facts that were under consideration for the purposes of its *de facto* specificity analysis regarding the NMDC's sales of high-grade iron ore through its reference to the aforementioned evidence in the Preliminary Determination. While these references were in aspects of the "public body" determination for the NMDC and the specificity determination for a different subsidy programme, we recall that Article 12.8 does not require the disclosure of an authority's legal reasoning. Rather, it requires the disclosure of the essential facts under consideration, such that an interested party or interested Member can defend its interests. As we have explained, the Preliminary Determination disclosed sufficiently that the USDOC was considering the fact that the NMDC had been operating as a miner of iron ore since 1958, and that the industrial sector in India was comprised of a number of different activities. It was open to the GOI or any interested party to contest the veracity, accuracy, or completeness of those facts, and seek to correct any errors in relation to those facts and how they were being understood.[632] We consider it significant, in that regard, that the GOI did indeed defend its interest by addressing the "length of time" and "extent of diversification" in its case brief.[633] We thus conclude that India has not demonstrated that the USDOC acted inconsistently with Article 12.8 of the SCM Agreement on this point.

7.246. For all of the foregoing reasons, we find that India has not demonstrated that the USDOC acted inconsistently with Article 12.8 of the SCM Agreement.

7.8 New Subsidies: India's claims under Articles 21.1 and 21.2 of the SCM Agreement

7.8.1 Introduction

7.247. India claims that the USDOC expanded the scope of the original CVD determination by including new subsidies in the 2004, 2006, and 2007 administrative reviews and in the Section 129 proceedings without showing the existence of a "close link or nexus" between those new subsidies and the ones examined in the original investigation. We will first address India's claims concerning

[627] Final Determination, (Exhibit IND-60), p. 33.
[628] Preliminary Determination, (Exhibit IND-55), pp. 6 and 8-9.
[629] Final Determination, (Exhibit IND-60), pp. 31-32.
[630] See above para. 7.211. This depends, of course, on the circumstances of a given case.
[631] See above para. 7.210. This depends, of course, on the circumstances of a given case.
[632] India's second written submission, para. 250: "Article 12.8 is intended to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of 'those facts'". (fn omitted)
[633] Case brief, (Exhibit IND-57), pp. 7-8. The GOI's choice to defend its interests in relation to these factors by claiming that they were not addressed does not change our conclusion. In our view, the Preliminary Determination disclosed sufficiently that the USDOC was considering the fact that the NMDC had been operating as a miner of iron ore since 1958, and that the industrial sector in India was comprised of a number of different activities, as part of its overall determination as to whether to apply CVDs. It was open to the GOI or any interested party to contest the veracity, accuracy, or completeness of those facts, and seek to correct any errors in relation to those facts and how they were being understood.

the 2004 to 2007 administrative reviews, and then turn to India's "new subsidies" claim in relation to the USDOC's Section 129 Determination.

7.8.2 India's "new subsidies" claims concerning the 2004, 2006, and 2007 administrative reviews

7.248. In this section, we will examine India's claims concerning the alleged failure by the USITC to establish a "close link or nexus" between the subsidies investigated in the original determination and those investigated in the 2004 to 2007 administrative reviews. To do this, we will first summarise the unappealed panel findings in the original proceedings concerning the inclusion of "new subsidies" in the 2004 to 2007 administrative reviews, before turning to the parties' arguments and our evaluation of the matter.

7.8.2.1 Original proceedings

7.249. In the original proceedings, India claimed that the United States violated, *inter alia*, Articles 21.1 and 21.2 of the SCM Agreement by examining new subsidies allegations in administrative reviews.[634] Before the original panel, India argued that administrative reviews are limited to the correction or re-examination of the determinations related to subsidization and injury that already exist.[635] Accordingly, India held the view that an investigating authority cannot review subsidy programmes that were not examined in the original investigation ("new subsidies"), in the context of an administrative review.[636] The original panel rejected India's claim, finding that the scope of an administrative review is not necessarily limited to the specific subsidy programmes that had been formally examined in the original investigation. The panel explained that nothing in Article 21.1 suggests that the term "subsidization" does not encompass newly alleged subsidy programmes.[637] Furthermore, the original panel found nothing in Articles 21.1 and 21.2 of the SCM Agreement that would require an investigating authority to consider only whether the original basis for the measure alone justifies the continued imposition of the duties.[638] According to the original panel, if there is an allegation that new subsidy programmes benefit the product that was already subject to CVDs and these programmes are countervailable, interested parties may request the investigating authority to take these subsidies into account and to amend the duty level accordingly.[639]

7.250. India did not appeal the panel's finding that an investigating authority may examine new subsidy allegations in administrative reviews, nor did it challenge the precise considerations that the USDOC took into account when deciding to examine the new subsidy allegations.[640] The Appellate Body also confirmed that Articles 21.1 and 21.2 of the SCM Agreement permit an investigating authority to examine new subsidy allegations in the context of an administrative review.[641] In the context of an appeal by India concerning the applicability of *inter alia* Article 22 to the USDOC's review of new subsidy allegations, the Appellate Body however held that the types of new subsidies that could be properly examined in an administrative review are limited to those with a sufficiently close link or nexus with the subsidies examined in the original investigation.[642] According to the Appellate Body, several factors could be considered in that regard on a case-by-case basis.[643] The Appellate Body did not examine whether the contested new subsidies were sufficiently

[634] Panel Report, *US – Carbon Steel (India)*, para. 7.481.
[635] Panel Report, *US – Carbon Steel (India)*, para. 7.492.
[636] Panel Report, *US – Carbon Steel (India)*, para. 7.492.
[637] Panel Report, *US – Carbon Steel (India)*, para. 7.503.
[638] Panel Report, *US – Carbon Steel (India)*, para. 7.505.
[639] Panel Report, *US – Carbon Steel (India)*, para. 7.506.
[640] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.511.
[641] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.540.
[642] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.543.
[643] Appellate Body Report, *US – Carbon Steel (India)*, fn 1256:
We note that, in the instant dispute, the Panel took into account the fact that the specific new subsidy allegations involved the same product at issue in the original investigation. (See Panel Report, paras. 7.500 and 7.506) We further note that, in response to questioning at the oral hearing, the United States and the European Union suggested that, in their view, for new subsidy allegations to be considered in an administrative review, they should share the following elements with the original subsidies subject of the countervailing duty: (i) the same Member; (ii) the same responding companies (beneficiaries of the subsidies); and (iii) the same products. In addition, the European Union referred to other potential considerations such as the nature of a

linked with the subsidies investigated in the original investigation, as required by Article 21, because India had not raised any appeal under this provision.[644]

7.251. In the original WTO proceedings, therefore, India did not specifically claim that the USDOC failed to establish the existence of a "sufficiently close link" or "nexus" between new subsidy programmes in the 2004, 2006, and 2007 administrative reviews and the subsidies that were the subject of the original investigation.

7.8.2.2 The Panel's evaluation of India's claim regarding the inclusion of "new subsidies" in the 2004, 2006, and 2007 reviews

7.252. India argues before this compliance Panel that the United States violated Articles 21.1 and 21.2 of the SCM Agreement by expanding the scope of the original investigation by 4 new programmes in the 2004 administrative review, 16 new programmes in the 2006 administrative review, and 3 new programmes in the 2007 administrative review.

7.253. According to India, an investigating authority cannot initiate administrative reviews under Article 21 of the SCM Agreement for the first time against a new subsidy without establishing a "sufficiently close link" or "nexus" between this new subsidy programme and the subsidies that were the subject of the original investigation.[645] India asserts that, to conclude that a sufficiently close link or nexus exists with the subsidies that constituted the subject of the original determination, an investigating authority should at least examine the following characteristics of "new subsidies": (a) the subsidy programme and its features; (b) the nature of the subsidy; (c) the granting authority of the subsidy; and (d) whether the new subsidy is a replacement programme.[646] India contends that the USDOC in its Section 129 Determination failed to engage in that kind of exercise with respect to the new subsidy programmes examined in the 2004, 2006, and 2007 administrative reviews.[647]

7.254. India acknowledges that it did not allege in its appeal which of the factors identified by the Appellate Body should have been considered by the USDOC when examining "new subsidies". In that regard, India argues that its appeal was limited in scope and that, therefore, it is not reagitating the same issue again.[648] India maintains that the challenged elements are an integral part of the measure taken to comply, because the quantum of benefits accruing to the product concerned in the CVD investigation and subsequent reviews has been redetermined in the Section 129 proceedings. Therefore, India maintains that it is not precluded from challenging the new subsidies included in the 2004, 2006, and 2007 administrative reviews.[649]

7.255. The United States objects that India is precluded from raising claims before a compliance panel against an unchanged aspect of a measure that was found to be WTO-consistent in the original proceedings.[650] In this regard, the United States notes that the original panel rejected India's claims against the examination of new subsidies in administrative reviews.[651] Furthermore, the United States notes that India did not ask the Appellate Body in the original proceedings to find that the USDOC acted in breach of Article 21 by failing to properly examine each of the new subsidy allegations at issue and cannot now bring claims that it should have raised before.[652] In addition, having failed to make a *prima facie* case in the original proceedings as regards aspects of a measure that remained unchanged, India cannot relitigate the same claim in compliance proceedings.[653] Finally, the United States maintains that the USDOC was not required to analyse whether the new subsidy programmes in the administrative reviews had a sufficient link or nexus with the schemes examined in the original determination, because there was no DSB recommendation requiring such

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subsidy, whether the same or a different granting authority or the same or a different subsidy programme is involved, or whether a subsidy has been replaced by another subsidy. (European Union's third participant's submission, paras. 70 and 71).

[644] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.543.
[645] India's first written submission, para. 185.
[646] India's first written submission, para. 191.
[647] India's first written submission, para. 191.
[648] India's second written submission, para. 212.
[649] India's second written submission, para. 215.
[650] United States' first written submission, para. 334.
[651] United States' first written submission, para. 341.
[652] United States' first written submission, para. 344.
[653] United States' second written submission, para. 197.

action.[654] For these reasons, the United States requests the Panel to reject the new subsidies claims concerning the 2004, 2006, and 2007 administrative reviews.

7.256. The key question is whether India can bring a claim in these compliance proceedings regarding the same subsidies and legal provisions as a claim that the Panel dismissed in the original proceedings, and that was not subsequently appealed.

7.257. The United States' objection that India's claim was not properly brought in the context of these compliance proceedings is twofold. First, the United States argues that the alleged "new subsidies" examined in the 2004, 2006, and 2007 reviews are unchanged aspects of the original proceedings that were not found to be WTO-inconsistent. Thus, the United States argues that India failed to make a *prima facie* case in the original proceedings and cannot relitigate the same claim regarding an unchanged element of the measure in compliance proceedings. Second, the United States argues that India had the opportunity to appeal the panel's findings of non-inconsistency and opted not to do so. Accordingly, India should not be given an unfair second chance to raise the matter in the context of compliance proceedings. India's main response to the United States' objection, essentially, is that the USDOC redetermined in the compliance proceedings the quantum of benefits accruing to the product concerned and therefore India should not be precluded from challenging the "new subsidies" featuring in the 2004, 2006, and 2007 reviews.

7.258. We disagree with the United States' argument that India is trying to relitigate the absence of a "sufficient nexus" between the new subsidies countervailed pursuant to the 2004 to 2007 administrative reviews and those examined in the original investigation. In fact, as the Appellate Body recognized, the "sufficient nexus" was not part of the scope of India's appeal. Nor could it be, since the notion of a "sufficiently close link or nexus" between the subsidies investigated in an administrative review and those subject to the original determination first emerged when the Appellate Body report in the original dispute was circulated. Therefore, India could not have raised it at that time. In other words, India cannot be attempting to *re*-litigate an issue that it never litigated in the first place.

7.259. The remainder of the United States' objection, however, is more pertinent. We note that India, in principle, could have appealed the panel's findings and did not. As discussed earlier[655], unappealed panel findings that are adopted by the DSB must be regarded as the final resolution to a dispute between the parties in respect of the specific claim and the components of the measure that are the subject of that claim.[656]

7.260. Before the original panel, India claimed that the inclusion of "new subsidies" in the 2004 to 2007 administrative reviews was inconsistent with Articles 21.1 and 21.2 of the SCM Agreement, arguing that the scope of administrative reviews should be limited to subsidies already subject to the original determination. The United States prevailed before the original panel and those findings were not appealed. However, India prevailed on certain other claims concerning the original determination and the administrative reviews. As a result, the USDOC and the USITC initiated Section 129 proceedings, with a view to bringing the measure(s) into conformity with the DSB recommendation. As the DSB recommendation did not concern the consideration of "new subsidies" in the 2004 to 2007 administrative reviews, however, the USDOC was entitled to consider that aspect of its previous determinations as not being WTO-inconsistent, hence not in need of being reassessed.

7.261. The inclusion in the Section 129 Determination of the "new subsidies" previously investigated in the 2004 to the 2007 reviews is an unchanged aspect of the original measure reviewed in the original WTO proceedings, separable from the measure taken to comply with the DSB recommendation.[657] As a result, this separable aspect of the original measure cannot and should not be reviewed for the first time by a compliance panel.

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[654] United States' second written submission, para. 203.

[655] See above para. 7.15.

[656] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93. See also Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.30. See also para. 7.170. Compliance proceedings under Article 21.5 cannot be used to "re-open" issues that were decided on the merits in the original proceedings. This would disrupt the finality of DSB rulings, contrary to Article 17.14 of the DSU.

[657] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 85-86.

7.262. We note that India could not have anticipated that the Appellate Body would elaborate a new test for the consistency of administrative reviews with Articles 21.1 and 21.2 of the SCM Agreement, suggesting that administrative reviews could only include those new subsidies having a sufficiently close link or nexus with the subsidies subject to the original determination. However, India still had the opportunity to appeal the panel's findings based on various other arguments and did not do so.

7.263. A different conclusion would imply that the USDOC should have assumed that an aspect of a measure that was found to be WTO-consistent in unappealed panel findings needed to be amended. Such conclusion would be highly questionable, and at odds with the role assigned by the Members to the WTO dispute settlement system as a central element in providing security and predictability to the multilateral trading system.[658] Finally, we further note that, in practical terms, a finding of inconsistency at the compliance stage would have the effect of depriving the United States of a reasonable period of time to bring its measure into conformity, and would thus be excessively burdensome.[659] For the foregoing reasons, we conclude that India's claim concerning the USDOC's investigation of "new subsidies" in the 2004 to 2007 administrative reviews is outside the scope of these compliance proceedings.

7.8.3 "New subsidies" in the Section 129 Determination

7.264. In this section, we will examine India's claims concerning the alleged inclusion of "new subsidies" in the Section 129 proceedings, different from the subsidies investigated in the original determination and in subsequent administrative reviews. We will first provide an overview of the factual background, before turning to the parties' arguments and our evaluation of the matter.

7.8.3.1 Factual background

7.265. In the original dispute, the panel found that the USDOC did not have a sufficient basis to determine the existence of the "captive mining of iron ore" programme, and that the USDOC therefore acted inconsistently with Article 12.5 of the SCM Agreement.[660] The panel also found that the USDOC's determination that GOI granted Tata a financial contribution in the form of a lease under the "captive mining of coal" programme lacked a sufficient evidentiary basis and was therefore inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.[661]

7.266. The United States launched Section 129 proceedings to revise parts of the original CVD determination and subsequent reviews that were found to be WTO-inconsistent by the panel and the Appellate Body in the original dispute. With specific regard to India's claim before us, the USDOC re-evaluated two subsidy schemes on which the original panel had made findings of inconsistency. Since the parties disagree as to whether this exercise led to the investigation of two "new subsidies", distinct from the ones originally investigated in the 2006 administrative review, it is important to summarize the background of the Section 129 USDOC determination and of the underlying 2006 administrative review.

7.267. In the 2006 administrative review, the USDOC found that the GOI's provision of mining rights of iron ore to Indian steel companies was a countervailable subsidy, because it constituted a good (iron ore) provided by a public entity (GOI) to steel makers for LTAR. The programme was described as the allocation of iron mines to steel makers so that they could extract iron ore (integral to the production of steel) without the intermediation of standalone miners, hence the adjective "captive". The USDOC found that the programme was *de facto* specific because of the predominant use of iron ore by the steel industry.[662] The USDOC found evidence of the existence of a national mineral policy in the *Dang Report*[663] and in the *Hoda Report*.[664] The original panel found this

[658] Article 3.2 of the DSU.

[659] Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.81. See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.

[660] Panel Report, *US – Carbon Steel (India)*, para. 7.217.

[661] Panel Report, *US – Carbon Steel (India)*, para. 7.252.

[662] 2006 Preliminary results of CVD administrative review, (Exhibit IND-32), p. 1591; 2006 Issues and decision memorandum, (Exhibit IND-38), p. 63.

[663] Excerpt from Dang Report, Expert Group Report, (Exhibit IND-67). We note that this exhibit is an extract from the Dang Report, (Exhibit USA-2).

[664] Hoda Report, (Exhibit IND-66).

determination to be inconsistent with Article 12.5 of the SCM Agreement, because the USDOC failed to determine the existence of the "captive mining of iron ore" programme on the basis of accurate information.[665]

7.268. In the Section 129 proceedings, the USDOC re-examined the record of the investigation and concluded that the provision of mining rights of iron ore was limited to two industries: steel producers and standalone miners. The USDOC relied on the same record evidence as in the 2006 administrative review and continued to characterize the investigated scheme as the provision of a good (iron ore) provided by a public entity (GOI) for LTAR. The USDOC, however, no longer found specificity on the basis of "predominant use" by steel companies, but instead on the limited number of users (steel producers and mining companies). Therefore, the USDOC concluded that the provision of "mining rights of iron ore" was *de facto* specific, and thus countervailable.[666] The USDOC referred to the subsidy scheme as "captive mining of iron ore" in the preliminary Section 129 Determination[667], and then changed the name to "mining rights of iron ore" in the final Section 129 Determination.[668]

7.269. In the 2006 administrative review, the USDOC investigated the GOI's provision of coal to firms with captive mining rights for LTAR under the Nationalization Act of 1973. The original panel found that the USDOC lacked a "sufficient evidentiary basis" to conclude that Tata was granted a coal mining lease based on the above-mentioned legislation.[669] The original panel held:

> We observe that there would appear to be sufficient evidence on the USDOC's record for a determination that Tata is presently mining coal under a lease that has validity in Indian law, and could therefore be attributed to the GOI. Provided the relevant requirements of the SCM Agreement are complied with, we see no reason why the provision of coal under that lease could not be countervailed. However, the USDOC's determination that the Coal Mining Nationalization Act/Captive Mining of Coal Programme is *de jure* specific would obviously not be relevant in this context.[670]

7.270. In the Section 129 proceeding, the USDOC re-examined the record evidence, and issued supplemental questionnaires to the interested parties, including the GOI and Tata. The USDOC concluded that the Raja of Ramgarh (the governmental authority at the time) granted Tata the coal mining lease in 1907. When India became independent in 1947, the GOI replaced the Raja of Ramgarh as the governmental authority. The USDOC further found that, under the Bihar Land Reform Act in 1950, the existing leases and subleases including the coal mining lease to Bakaro & Ramgur and the sublease to West Bokaro Ltd. (the predecessor to Tata) were deemed to have been leased by the State Government of Bihar to the leaseholder. The GOI then recognized the validity of all leases issued by the Raja of Ramgarh. Under the MMDR Act of 1957, the GOI became the only entity with the ability to provide leases, requiring that all new mining licences be obtained from the GOI. The USDOC also found that, pursuant to the MMDR Act of 1957, pre-existing leaseholders could continue to hold their leases and did not need to renegotiate them with the GOI. In short, the USDOC found that the GOI legislated an exemption for pre-existing leaseholders, allowing Tata to continue to hold the original coal mine lease and replacing the Raja of Ramgarh with the State Government of Bihar as the authority providing the lease.[671] The USDOC thus found that the GOI, in allowing Tata to retain its original lease, provided a financial contribution. The USDOC, based on the evidence before it, concluded that the program was *de facto* specific.

7.8.3.2 The Panel's evaluation of India's "new subsidies" claims concerning the Section 129 proceedings

7.271. India argues that the United States expanded the scope of Section 129 proceedings by including two new programmes that were not previously subject to the original determination: "mining rights of iron ore"; and "mining of coal".[672] India submits that an

[665] Panel Report, *US – Carbon Steel (India)*, para. 7.217.
[666] Final Determination, (Exhibit IND-60), pp. 22-25.
[667] Preliminary Determination, (Exhibit IND-55), p. 7.
[668] Final Determination, (Exhibit IND-60), p. 21.
[669] Panel Report, *US – Carbon Steel (India)*, para. 7.252.
[670] Panel Report, *US – Carbon Steel (India)*, fn 458.
[671] Final Determination, (Exhibit IND-60), pp. 27-28.
[672] India's first written submission, para. 181.

administrative review cannot examine for the first time a new subsidy that does not have a sufficiently close link or nexus with the subsidies countervailed in the original investigation.[673] According to India, the USDOC was mandated to examine, at least, the following characteristics: (a) the subsidy programme and its features; (b) the nature of the subsidy; (c) the granting authority; and (d) whether the new subsidy is a replacement programme.[674] India submits that the United States failed to engage in such an exercise. India thus argues that the "new subsidies" investigated and countervailed in the Section 129 proceedings are completely different from and broader in scope than the "captive mining of iron ore" and the "captive mining of coal", which were countervailed pursuant to the 2006 administrative review.[675] India also contends that the granting authority for the subsidy programmes subject to the original investigation and the new subsidies investigated and countervailed in the Section 129 proceedings are different, and so is the nature of the subsidies.[676]

7.272. The United States argues that the Panel should dismiss India's claims concerning the alleged investigation of two new subsidy schemes in the USDOC's Section 129 proceedings on three main grounds. First, the United States maintains that the USDOC did not investigate new subsidies in its Section 129 proceedings.[677] According to the United States, the Section 129 Determination concerns programmes that were already investigated in the 2006 administrative review[678], and the USDOC only re-evaluated certain aspects of those programmes as a result of the original panel's findings.[679] With regard to "mining rights of iron ore", the USDOC re-examined the record evidence and decided that India had mining programmes for iron ore that were not limited to captive mining.[680] The United States argues that the programme concerned the GOI's grant of mining leases of iron ore to the steel industry, which thereby benefitted the same product that was investigated in the original investigation (hot-rolled carbon steel flat products).[681] In addition, the United States argues that the mining rights of the iron ore programme also involved the granting of a mining lease by the GOI, the government at issue in the original investigation, and benefitted the same product from the original investigation.[682] Concerning "mining of coal", the USDOC re-evaluated the record evidence and issued a supplemental questionnaire to Tata and the GOI. Based on a re-examination of the record evidence, the USDOC established the validity of Tata's coal mining lease.[683]

7.273. Second, the United States argues that India has not demonstrated the absence of a "link" or "nexus" between the programmes investigated in the Section 129 proceedings and others that were investigated in the 2006 administrative review.[684] According to the United States, India only made conclusory statements and failed to make a *prima facie* case of violation of Articles 21.1 and 21.2 of the SCM Agreement.[685] Should the Panel consider the two programmes to be "new subsidies", the United States submits that its Section 129 Determination is consistent with Articles 21.1 and 21.2 of the SCM Agreement. According to the United States, the USDOC established the existence of a link or nexus between the "new subsidies" and the programmes investigated in the 2006 administrative review, because they involve the same government, the same responding companies, and the same products.[686]

7.274. Third, the United States argues that India is proposing an unduly rigid standard to determine whether there exists a sufficiently close link or nexus between the "new" subsidies and the previously investigated ones.[687] According to the United States, the evaluation should be made on a

[673] India's first written submission, para. 185.
[674] India's first written submission, para. 191.
[675] India's first written submission, para. 192; second written submission, para. 218.
[676] India's second written submission, para. 227.
[677] United States' first written submission, para. 348.
[678] United States' first written submission, para. 352.
[679] United States' first written submission, paras. 354-355; second written submission, para. 211.
[680] United States' first written submission, para. 355; second written submission, para. 212.
[681] United States' second written submission, para. 211.
[682] United States' second written submission, para. 212.
[683] United States' first written submission, para. 356.
[684] United States' first written submission, para. 360.
[685] United States' first written submission, para. 360.
[686] United States' first written submission, paras. 361-368.
[687] United States' first written submission, para. 368.

case-by-case basis, and different factors could be potentially taken into account according to the specific circumstances of the case.[688]

7.275. The key question for this Panel is thus whether "mining rights of iron ore" and "mining of coal" constitute new subsidies, investigated for the first time in the Section 129 Determination.

7.276. With regard to "mining rights of iron ore", we note that the USDOC used a different name for the subsidy scheme compared to the one used in the 2006 administrative review ("captive mining of iron ore"). We further note that the subsidy scheme investigated in the 2006 determination and the scheme investigated in the Section 129 proceedings differ with regard to the findings on specificity, wherein the former was considered to be available to captive miners and the latter to steel producers and mining companies. We do not consider these differences to be sufficient to qualify "mining rights of iron ore" as a new subsidy. Regarding the change in the title, it amounts to a means for identifying the scheme used by the investigating authority. As India concedes in its second written submission, "nomenclature alone may not be sufficient to establish if the programs were indeed new subsidies".[689] The changes in the findings on specificity are not dispositive either. We note that the notions of "subsidy" and "specificity" are separate, as it is evident from the structure of the SCM Agreement. While Article 1 of the SCM Agreement is concerned with the "Definition of a Subsidy", Article 2 is entitled "Specificity". In particular, Article 2 is concerned with the circumstances in which a subsidy may be determined to be specific. It follows that a modification to the conclusions on specificity need not amount to a change in the underlying subsidy. In addition, the modification of the findings on specificity had no impact on the identification of the companies subject to CVD duties. The record evidence reveals that the USDOC reopened the file of the investigation in response to the original panel's findings of inconsistency. The challenged subsidy scheme is thus the same programme that was countervailed pursuant to the 2006 administrative review, save for the non-dispositive differences that we have previously recalled. Based on the foregoing, we find that "mining rights of iron ore" is not a new subsidy compared to "captive mining of iron ore".

7.277. Concerning "mining of coal", the USDOC essentially relied on the same record evidence, issuing supplemental questionnaires to obtain clarifications from the parties. The USDOC continues to find that the GOI granted a coal mining rights lease to Tata. Therefore, we find that "mining of coal" is not a new subsidy compared to "captive mining of coal".

7.278. For the reasons spelled out above, we reject India's claim that "mining rights of iron ore" and "mining of coal" constitute new subsidies. On the contrary, we note that these programmes are essentially the same that the USDOC investigated in the 2006 administrative review. While the USDOC modified its analysis of these programmes to implement the ruling and recommendation of the DSB, the changes in the USDOC's analysis are not dispositive and do not justify treating these schemes as new subsidies. We acknowledge that the characterization of certain aspects of the specificity determinations has changed from the 2006 administrative review. However, we are not persuaded that these changes led to a more remote link between the subsidies subject to the original CVD investigation and those investigated in the 2006 administrative review and carried over in the Section 129 proceedings.

7.279. In light of the above, the question as to whether or not the USDOC complied with any applicable legal standard in examining new subsidies in comparison with the subsidies countervailed pursuant to the original investigation is not relevant for the purpose of these compliance proceedings. Having prevailed on the "new subsidies" claims in the original dispute, the United States was not expected to evaluate or re-evaluate the existence of a close link or nexus between "mining rights of iron ore" and "mining of coal" with the subsidies countervailed pursuant to the original investigation. This is not to say that "mining rights of iron ore" and "mining of coal" could not be challenged at the compliance stage. India, in fact, was not prevented from bringing claims concerning new elements emerged in the Section 129 proceedings concerning the two subsidy schemes concerned. However, since they are the same subsidies as those already investigated in the 2006 administrative review, and since the United States prevailed in the original proceedings with regard to the inclusion of those new subsidies in the 2006 administrative review, the USDOC was not obligated by a DSB recommendation to conduct a new inquiry in the Section 129

[688] United States' first written submission, para. 368.
[689] India's second written submission, para. 218.

proceedings to establish the presence of a close link or nexus with the subsidies investigated in the original CVD proceedings.

7.8.4 Conclusion

7.280. For the reasons explained above, we conclude that India's claim concerning the USDOC's investigation of "new subsidies" in the 2004, 2006, and 2007 administrative reviews is outside the scope of these compliance proceedings. We also conclude that the USDOC did not investigate new subsidies in the Section 129 proceedings, and therefore we conclude that India failed to demonstrate that the United States acted inconsistently with Articles 21.1 and 21.2 of the SCM Agreement.

7.9 India's claim that the United States' failure to amend 19 USC § 1677(7)(G)(i)(III) is inconsistent with the DSB recommendation in this dispute

7.9.1 Introduction

7.281. India claims that the United States failed to remove or amend 19 USC § 1677(7)(G)(i)(III), which the Appellate Body in the original dispute found to be "as such" inconsistent with Articles 15.1-15.5 of the SCM Agreement.[690] Accordingly, India requests that this Panel conclude that the United States has failed to implement the relevant DSB recommendation.[691]

7.282. In its first written submission, the United States requests us to reject India's claim because 19 USC § 1677(7)(G)(i)(III) is not a measure within the Panel's terms of reference.[692] In evaluating India's claim, we first address the United States' objection concerning the Panel's terms of reference before turning to the merits of India's claim.

7.9.2 Whether India's claim is within the Panel's terms of reference

7.283. The United States notes that India's panel request, in relevant part, is concerned with the alleged failure to amend "19 USC § 1677(7)(G)(iii)".[693] According to the United States, this provision is entitled "Records in final investigations" and was not the subject of findings in the original dispute, which instead dealt with a different provision, 19 USC § 1677(7)(G)(i)(III).[694] Therefore, the United States argues that a claim concerning 19 USC § 1677(7)(G)(iii) is outside the mandate of a compliance Panel under Article 21.5 of the DSU.[695] Moreover, the United States argues that to the extent that India seeks findings in relation to 19 USC § 1677(7)(G)(i)(III) in its first written submission, that measure does not coincide with the measure listed by India in its panel request, and the Panel should therefore consider it to be outside its terms of reference.[696]

7.284. India rebuts that the consistency of 19 USC § 1677(7)(G)(i)(III) with Article 15 of the SCM Agreement was an issue of law that was discussed in the original WTO proceedings.[697] India notes that the Appellate Body "inadvertently" misquoted the measure, and that this typographical error was carried over to India's request for consultations and panel request.[698] According to India, the typographical error cannot be ambiguous, since the Appellate Body identified the correct text of the measure and India's panel request is clearly aimed at the United States' failure to amend a measure that requires the cross-cumulation of imports in certain circumstances.[699] Therefore, India submits that the Panel should dismiss the United States' terms of reference objection.[700]

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[690] India's first written submission, para. 9 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.629).
[691] India's first written submission, para. 32; second written submission, para. 34; and opening statement at the meeting of the Panel, para. 11.
[692] United States' first written submission, para. 43.
[693] United States' first written submission, para. 41 (referring to India's panel request, para. 8).
[694] United States' first written submission, paras. 41-42.
[695] United States' first written submission, para. 42.
[696] United States' first written submission, para. 43.
[697] India's second written submission, paras. 10-14.
[698] India's second written submission, paras. 16-17.
[699] India's second written submission, paras. 19-20.
[700] India's second written submission, para. 18.

7.285. Prior to addressing the United States' procedural objection, we consider it appropriate to review the background of India's claim. In the original dispute, India requested consultations and brought claims against the entire 19 USC § 1677(7)(G). The original panel found that the whole of 19 USC § 1677(7)(G) was "as such" inconsistent with Articles 15.1-15.5 of the SCM Agreement.[701] The Appellate Body partially reversed the panel's findings and concluded that only the third Subsection of 19 USC § 1677(7)(G)(i) clearly requires the cross-cumulation of imports when petitions to initiate CVD investigations *or* anti-dumping duty investigations are filed on one day *and* CVD investigations *or* anti-dumping duty investigations are self-initiated by the investigating authority on the same day.[702] Consequently, the Appellate Body found that only the third Subsection of 19 USC § 1677(7)(G)(i) is inconsistent as such with Article 15 of the SCM Agreement.[703]

7.286. Throughout the report, the Appellate Body cites the inconsistent Subsection as "1677(7)(G)(iii)". However, the correct citation for the statute is "19 USC § 1677(7)(G)(i)(III)", as the United States rightfully notes in its first written submission. Despite the incorrect reference, the Appellate Body correctly extracted the text of the relevant provision of US law and reproduced it in the report as follows:

> (G) Cumulation for determining material injury
>
> (i) In general
>
> For purposes of clauses (i) and (ii) of subparagraph (C), and subject to clause (ii), the Commission shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which–
>
> …
>
> (III) petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day,
>
> if such imports compete with each other and with domestic like products in the United States market.[704]

7.287. Therefore, the reference to Section 1677(7)(G)(iii) throughout the Appellate Body Report should be considered as a typographical error.

7.288. This typographical error was repeated in India's panel request (referring to the United States' failure to amend 19 USC § 1677(7)(G)(iii)), but not in India's first written submission (which uses the correct citation: 19 USC § 1677(7)(G)(i)(III)). We should now verify whether this discrepancy is sufficient to consider 19 USC § 1677(7)(G)(i)(III) as being outside of this compliance Panel's terms of reference.

7.289. Article 6.2 of the DSU is the provision regulating the content of panel requests. It reads:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

7.290. The requirement in Article 6.2 of the DSU to indicate the "specific measures at issue" in a panel request serves the due process objective of notifying the parties and the third parties of the

[701] Panel Report, *US – Carbon Steel (India)*, para. 7.369.
[702] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.629.
[703] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.629.
[704] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.617.

measure(s) that constitute the object of the complaint.[705] The relevant question for us is whether the erroneous citation of the US statute in India's panel request creates uncertainty as to the measures that are subject to compliance proceedings, thus impairing the United States' due process rights.[706] To respond to this question, we need to examine whether the panel request as a whole, in light of the attendant circumstances, permits the identification of the "specific measures at issue" in accordance with Article 6.2 of the DSU.[707] We further note that, in the context of compliance proceedings, the requirements of Article 6.2 of the DSU must be read in light of the nature of Article 21.5 proceedings.

7.291. In this regard, the Appellate Body in *US – FSC* clarified that an Article 21.5 panel request is consistent with Article 6.2 of the DSU when: (a) it cites the DSB recommendations and rulings that, in the view of the complaining party, have not been complied with; (b) it identifies the measures taken to comply and any omissions; and (c) it provides the legal basis for the complaint, specifying how the measures taken to comply (or the respondent's inaction) fail to remove the WTO-inconsistency.[708] We agree with this approach and shall be guided by it in our own assessment of the matter.

7.292. India's panel request, in relevant part, reads:

> India considers that the United States' failure to amend 19 USC § 1677(7)(G)(iii) is inconsistent with the DSB recommendations in this dispute as well as Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement because the provision continues to require the United States International Trade Commission ("USITC") to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports.

7.293. India's panel request concerns the failure to amend a measure of United States' law that continues to require the cross-cumulation of imports in injury assessments. India notes that the DSB recommended to bring that measure into compliance with the United States' obligations under Article 15 of the SCM Agreement, but the United States did not act. According to India, the United States' omission does not cure the measure's inconsistency with Article 15 of the SCM Agreement.[709] In this regard, India explains that the misquotation of the statute is due to a typographical error carried over to the request for consultations and to the panel request from the Appellate Body Report in the original dispute.[710] We find this explanation to be reasonable.

7.294. In this respect, the reference in the panel request to the recommendations on cross-cumulation is particularly compelling. In fact, the Appellate Body found that the third subparagraph of 19 USC § 1677(7)(G)(i) is "as such" inconsistent with Article 15 of the SCM Agreement. The misquotation should not be overemphasized, because the panel request as a whole demonstrates how India identified with sufficient clarity the measure at issue, the relevant DSB recommendation, and the reasons why it believes that the United States failed to bring its measure into conformity with the latter.

7.295. We confirm this understanding also looking at the attendant circumstances. In particular, we note that India and the United States discussed the matter at several DSB meetings which took place prior to the panel request. In those circumstances, notwithstanding India's use of the wrong reference to the US statute, the United States explained how it addressed the DSB recommendation concerning "19 USC § 1677(7)(G)(i)(III)" (i.e. using the correct reference).[711] This is another indication that the United States' due process rights were not impaired by the typographical error.

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[705] Appellate Body Report, *EC – Selected Customs Matter*, para. 152.

[706] Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 8.20-8.32.

[707] For the notion of "attendant circumstances", see Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.138, 7.143-7.144, and 7.150 (referring to Panel Report, *US – Lamb*, paras. 5.32 and ff). Attendant circumstances may include, and are not limited to, discussions in committees, consultations, and the establishment of the panel by the DSB.

[708] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, paras. 61-62. See, in this respect, European Union's third-party submission, para. 13.

[709] India's panel request, para. 8.

[710] India's second written submission, para. 17.

[711] DSB minutes WT/DSB/M/380, (Exhibit IND-63), paras. 4.3-4.4; DSB minutes WT/DSB/M/385, (Exhibit IND-64), paras. 4.2-4.6.

7.296. Based on the foregoing, we consider that India's panel request was sufficient to put the United States on notice as to the measure at issue and the reasons for the claim. Therefore, we dismiss the United States' objection.

7.9.3 Whether the United States complied with the recommendation to bring 19 USC § 1677(7)(G)(i)(III) into conformity with the SCM Agreement

7.297. To begin, we note the United States' contention that the Appellate Body's findings in the original proceedings do not constitute a valid basis for the DSB recommendation, because the Appellate Body exceeded its powers under Article 17.6 of the DSU by not limiting its analysis to issues of law covered in the panel report.[712]

7.298. In accordance with Articles 16.4, 19.1, 21.1, and 22.1 of the DSU, we consider that the Appellate Body findings and unappealed panel findings adopted by the DSB constitute the final resolution to a dispute between the parties in respect of the specific claim and the components of the measure that are the subject of that claim. Past panels and the Appellate Body held the same.[713]

7.299. Against this background, compliance panels are expected to take DSB recommendations ensuing from adopted Appellate Body or panel reports in original proceedings as a "given". Importantly, a compliance panel lacks the authority to review the Appellate Body's findings in the original proceedings. Rather, once the Appellate Body's findings are adopted by the DSB, they become the "recommendations or rulings *of the DSB*".[714] The DSB has the singular "authority" under the DSU to "adopt panel and Appellate Body reports", and "maintain surveillance of implementation of rulings and recommendations".[715] The reopening by a compliance panel of a finding that had been adopted by the DSB in the original proceedings would run counter to the singular "authority" granted to the DSB under Article 2 to adopt such findings. It would also run counter to the requirement that a DSB recommendation be "implemented", which means "[t]o complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise)".[716]

7.300. Pursuant to Article 21.5 of the DSU, compliance panels are established when the parties disagree as to "the existence or consistency with a covered Agreement of measures taken to comply with the recommendations and rulings [of the DSB]". Compliance panels, therefore, have a very precise and limited task and do not have the authority to review the validity of the basis for DSB recommendations. Any analysis by this Panel concerning the merits of the original Appellate Body report or the DSB recommendation would be irrelevant for the purposes of these compliance proceedings and would, at the very best, amount to an advisory opinion, which is not envisaged by the DSU.

7.301. Similar considerations apply to the United States' argument that the Appellate Body erred in finding that 19 USC § 1677(7)(G)(i)(III) is "as such" inconsistent with Article 15 of the SCM Agreement, because the text of the US measure reveals an embedded discretion that it need not be enlivened, and relatedly, that there is a corresponding practice of exercising that discretion in a way such that it has never been applied.[717] Essentially, the United States is requesting the Panel to reopen the findings of the Appellate Body adopted by the DSB on the meaning of 19 USC § 1677(7)(G)(i)(III) on the basis of this new argumentation. Article 17.14 of the DSU unequivocally states that adopted Appellate Body reports shall be "unconditionally accepted by the parties" to the dispute, unless the DSB decides, by consensus, not to adopt them. As Article 17.14 of the DSU recognizes, Members keep the right to express their views on an Appellate Body report. The United States is therefore entirely entitled to express its concerns regarding the manner in which the Appellate Body has reached its conclusions. However, this Panel can only take note of the United States' arguments in that regard and does not have the authority to address them. The authority of a compliance panel is limited to a determination of whether the losing party to a dispute

[712] United States' first written submission, para. 29; second written submission, para. 20.
[713] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93. See also Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.30.
[714] Article 2.1 of the DSU. (emphasis added)
[715] Article 2.1 of the DSU.
[716] Oxford Dictionaries online, definition of "implement" https://www.oed.com/view/Entry/92452?redirectedFrom=implemented#eid (accessed 18 July 2019).
[717] United States' first written submission, paras. 27-28, 47, and 52-55; second written submission, paras. 29-30 and 33-34.

has brought its measure into conformity with the covered Agreements. Under no circumstance can a compliance panel revisit "as such" findings of violation from the original proceedings that have been adopted by the DSB.[718] Accordingly, we dismiss the objections raised by the United States.

7.302. Turning to the matter that we, as a compliance panel, should address, we recall that the Appellate Body in the original proceedings found that 19 USC § 1677(7)(G)(i)(III) requires the USITC to cross-cumulate the injurious effects of subsidized and dumped, non-subsidized imports, when CVD petitions are filed on the same day as the USDOC self-initiates an anti-dumping investigation (or *vice versa*).[719] The Appellate Body found that 19 USC § 1677(7)(G)(i)(III) was "as such" inconsistent with Article 15 of the SCM Agreement, which does not permit the cross-cumulation of imports in original CVD investigations.[720]

7.303. In the current compliance proceedings, India and the United States disagree as to whether the latter complied with the DSB recommendation in the original dispute. India's argument is that there exists no such "measure taken to comply".[721] The United States maintains that: (a) 19 USC § 1677(7)(G)(i)(III) does not require the United States to take WTO-inconsistent action, and therefore the United States is not required to take any measure to comply with the DSB recommendation[722]; and (b) the United States has not acted inconsistently with the DSB recommendation because the USDOC has exercised its discretion to not self-initiate countervailing or anti-dumping investigations on certain dates, and has confirmed its commitment to exercise its discretion in such a manner in the future.[723]

7.304. We begin by setting out the relevant factors that guide us in determining whether there exists a "measure taken to comply". These factors pertain to the form, substance, and timing of the alleged "measures taken to comply". We then set out the evidence concerning the existence of the alleged "measure taken to comply", before ascertaining whether, in light of the aforementioned factors, this evidence demonstrates the existence of a "measure taken to comply" as a matter of fact.

7.305. There are no rigid requirements in the DSU that specify what *form* the "measure taken to comply" must take. In the abstract, therefore, we cannot exclude any measure taken to comply due to the form it takes.[724] However, the form that we would expect an alleged "measure to comply" to take is inextricably linked with the nature of the DSB recommendation in the original proceedings. In this respect, it is significant that the current compliance proceedings concern a DSB recommendation relating to a finding of inconsistency "as such". We recall that the infringing measure in the original proceedings was a provision in a statute, and the inconsistency was found based on the plain text of that provision, without reference to whether or how it may have been applied. In that regard, we recall that an "as such" claim can be brought against a measure irrespective of its application.[725] Claims of inconsistency "as such" are not concerned with the application of a specific measure, other than to ensure that it is not applied in the future.[726]

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[718] Several third parties intervening in these compliance proceedings expressly share this understanding. (European Union's third-party response to Panel question No. 10, para. 60; Canada's third-party response to Panel question No. 10, para. 20; and Japan's third-party response to Panel question No. 10, para. 35).

[719] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.629.

[720] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.629.

[721] India's first written submission, paras. 16 and 32; second written submission, para. 28.

[722] United States' first written submission, para. 50; second written submission, paras. 28-30; and response to Panel question No. 54, paras. 129 and 133, No. 55, para. 137, No. 58, para. 145, No. 60, para. 147, and No. 61, para. 159.

[723] United States' first written submission, paras. 44-55; second written submission, paras. 28, 30, and 33-34; and response to Panel question No. 54, paras. 128-134, No. 55, para. 138, No. 58, para. 145, No. 60, para. 147, and No. 61, paras. 154 and 157-158.

[724] Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, paras. 6.23-6-24.

[725] Ex multis, see Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

[726] Although the Appellate Body found that the Panel erred by failing to account for "evidence concerning the application of the measure" in addressing an "as such" claim in the original proceedings, we emphasize that its finding in that regard pertained to establishing the meaning of the measure in the first place. (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.455). As we have explained above, the Appellate Body's finding on the meaning of the measure must now be accepted in these compliance proceedings as a "given".

7.306. The form of the infringing measure and the nature of the DSB ruling as an "as such" inconsistency thus provide guidance in identifying whether there exists a "measure taken to comply". As an example, if a measure is found to be inconsistent due to the way in which it is applied, a change in the application of the measure could be sufficient to comply with an adverse ruling, without requiring a change in the text of the measure or any other written implementing measures.[727] On the other hand, if the text of the measure has been found to be "as such" inconsistent with a Member's WTO obligations, regardless of the manner of its application, a change in the way a measure is applied, or the reiteration of a practice already followed in the past, is irrelevant for the purposes of remedying an inconsistency "as such". In saying that, we do not exclude that there may be ways of remedying such an inconsistency which do not involve changing the text of a measure itself, and in this regard we agree with the following remarks of the panel in *US – Gambling (Article 21.5 – Antigua and Barbuda)*:

> [C]ompliance with a recommendation under Article 19.1 of the DSU could conceivably be achieved through changes to the factual or legal background to a measure at issue, without a change to the text of the measure itself. For example, a measure may lapse, or satisfy a requirement in a covered agreement, due to the subsequent occurrence of a relevant circumstance. If changes to the measure's factual or legal background modified the effects of that measure sufficiently to bring about a situation in which it complied with the relevant covered agreement, there seems to be no reason why this should not fulfil the aim of the recommendation of the DSB, which is to achieve a satisfactory settlement of the matter in accordance with the rights and obligations under the DSU and the covered agreements, as provided in Article 3.4 of the DSU. The essential point is that there needs to be compliance. However, even in these cases, compliance would entail a change relevant to the measure since the original proceeding. This dispute does not present any such changes.[728]

As this passage makes clear, however, even where a Member seeks to cure an "as such" inconsistency "without a change to the text of the measure itself", compliance must nonetheless entail a change relevant to the measure that was found to be inconsistent in the original proceedings.

7.307. Turning now to the *timing* of the alleged "measure taken to comply", we agree with the panel in *US – Gambling (Article 21.5 – Antigua and Barbuda)* that a compliance panel deals with events taking place *after* the DSB's recommendations in a dispute.[729] The focus of a compliance proceeding is to verify whether a Member, *after* the DSB recommendation, has taken steps to bring a measure that was previously found to be WTO-inconsistent into conformity with the covered Agreements. A "measure taken to comply", in fact, is a new measure, distinct from the one that was the subject of the findings of inconsistency in the original proceedings.[730] Accordingly, the reiteration of a practice that was already in place before the DSB recommendation cannot remedy the inconsistency "as such" of a provision in a statute with a Member's WTO obligations.

7.308. As regards the *substance* of an alleged "measure taken to comply", we recall that Article 3.7 of the DSU clearly establishes a preference for the *withdrawal* of a WTO-inconsistent measure.[731] While the measure taken to comply can take various forms, we would expect its substance to be directed towards having an equivalent effect, namely to bring about compliance with the covered Agreements in light of the recommendations and rulings of the DSB. In the case of a finding of WTO-inconsistency in respect of a legislative act "as such", we would normally expect the alleged "measure taken to comply" to modify the legislative authority of that measure in respect of the WTO-inconsistency at issue.

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[727] Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 6.21.

[728] Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 6.22. (emphasis added, footnotes omitted)

[729] Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 6.16.

[730] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36 (referred to in Appellate Body Reports, *US – Shrimp (Article 21.5 – Malaysia)*, para. 86; and *EC – Bed Linen (Article 21.5 – India)*, para. 81).

[731] Article 3.7 of the DSU reads, in relevant part:

> In the absence of a mutually agreed solution, the *first* objective of the dispute settlement mechanism is *usually* to secure the withdrawal of the measures concerned[.]
> Emphasis added.

7.309. We note that the parties do not disagree that 19 USC § 1677(7)(G)(i)(III) is still in force, and that its text has not been modified since the original proceedings. In other words, the legislative authority of 19 USC § 1677(7)(G)(i)(III) remains intact.

7.310. The United States however contends that its "measure taken to comply" took the form of the USDOC's commitment to not self-initiate CVD investigations on certain products on the same day as petitioners file anti-dumping duty petitions concerning the same product, or vice versa (hereinafter, the "commitment").[732] This "commitment" was referred to in several statements made by the United States at meetings of the DSB where the compliance with the recommendations from the original dispute was discussed.

7.311. The United States made the following statement at the 22 June 2016 DSB meeting:

> The United States did not understand the concern India now raised with respect to a finding on one provision of US law, Section 1677(7)(G)(i)(III) of the Trade Act of 1930. As the United States had explained to India previously, no further US action was needed with respect to this finding. The provision of US law at issue was not applied in the underlying investigation, and therefore had no bearing on compliance with respect to the countervailing duty at issue in this dispute. Indeed, to the United States' knowledge, this provision of US law had never been used in any investigation. With respect to any future investigations, the statutory provision related to a decision by the administering authority to self-initiate a CVD investigation on the same day as an AD petition was filed by an industry, or vice versa. Under US law, Commerce had discretion to decide the timing when it would self-initiate an investigation. Having never been triggered before, it was not now the intention of the United States to exercise the discretion on timing provided under US law differently. That is, *the Department of Commerce had confirmed its commitment to exercise its discretion with respect to Section 702(a) of the Tariff Act of 1930 pertaining to countervailing duty investigations and Section 732(a) of that Act pertaining to anti-dumping duty investigations in a manner that was consistent with the international obligations of the United States*.[733]

7.312. At the DSB meeting of 26 September 2016, the United States asserted:

> With respect to the "as such" finding on Section 1677(7)(G)(i)(III) of the Tariff Act of 1930, the US had explained, both to India and to the DSB, that no further US action was needed. As the United States had explained before, under US law, the US Department of Commerce had discretion with respect to the timing of a self-initiated investigation. And, to reiterate*, Commerce had confirmed its commitment to exercise this discretion in a manner that was consistent with the international obligations of the United States.* Therefore, no further action was needed and India had no basis for its insistence that US law had to be changed in order for the United States to comply with the DSB recommendations in this dispute. India was incorrect that the US claim of compliance was based on the statute never having been applied. While it was true that the statutory provision at issue had never been applied, as had just been noted, that was not the reason a change to the statute was not necessary. Given that the United States had fully complied in this dispute, the United States was not required to submit further status reports in this matter.[734]

7.313. At the DSB meeting held on 26 October 2016, the United States reiterated that:

> [T]he Department of Commerce had confirmed its commitment to exercise its discretion with respect to section 702(a) of the Tariff Act of 1930, pertaining to countervailing duty investigations, and section 732(a) of that Act, pertaining to antidumping duty investigations, in a manner that was consistent with the WTO obligations of the United States.[735]

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[732] United States' second written submission, para. 28; response to Panel question No. 54, para. 129.
[733] DSB minutes WT/DSB/M/380, (Exhibit IND-63), para. 4.3. (emphasis added)
[734] DSB minutes WT/DSB/M/385, (Exhibit IND-64), para. 4.6. (emphasis added)
[735] DSB minutes WT/DSB/M/387, (Exhibit IND-65), para. 5.6.

7.314. The USDOC's "commitment" was also referred to in an exchange of letters between the Office of the USTR and the USDOC. In a letter dated 23 June 2016, the Office of the USTR expressed its understanding that the USDOC enjoys discretion concerning the timing for the initiation of investigations and requested the USDOC to confirm its "commitment" to exercise that discretion in a manner "consistent with the international obligations of the United States".[736] Responding with a letter dated 28 June 2016, the USDOC confirmed its "commitment" to exercise its discretion relating to the timing of investigations "in a manner that will not lead to results that are inconsistent with the international obligations of the United States, as reflected in the [SCM Agreement] and the [Anti-Dumping Agreement]".[737] There is no evidence on the record that these letters were published before these compliance proceedings.

7.315. Although the above-mentioned US statements at the DSB, and the exchange of letters between the Office of the USTR and the USDOC, refer to the USDOC's "commitment", the United States affirms that neither its statements nor the exchange of letters constitute "measures taken to comply" with the DSB recommendation. For the United States, these statements and letters rather *confirm* that the United States has been and continues to be in compliance in respect of 19 USC § 1677(7)(G)(i)(III).[738] In other words, the "commitment" relied on by the United States as a "measure taken to comply" pre-dates those statements and exchange of letters. The latter merely confirm the pre-existing "commitment". However, the United States has not adduced any evidence regarding the existence or nature of that "commitment".[739] We specifically asked the United States a question concerning the date in which the "commitment" took effect and how it was made manifest.[740] The United States did not respond to this question. As a result, besides statements *confirming* the existence of the "commitment", there is no direct evidence before this Panel clarifying the form and timing of the "commitment".

7.316. The United States has described its measure taken to comply as a commitment to "*continue* to" exercise discretion in a manner that is not inconsistent with its international obligations[741], whilst simultaneously arguing that "a proper interpretation of [19 USC § 1677(7)(G)(i)(III)] shows that [it] does *not* require the United States to take WTO-inconsistent action", and that it took "action to confirm *this interpretation through an exchange of letters*".[742] In other words, within the United States' own framing, the "commitment" was not a "change", but rather the continuing exercise of discretion, which in its view was sufficient because that discretion likewise demonstrated that the measure was always WTO-consistent and no actual action was therefore required to cure the "as such" inconsistency.[743] The United States repeated this understanding at multiple junctures, e.g. describing its authorities' approach as being the "[c]ontinued non-use of the statute"[744] and "to (continue to) exercise its discretion"[745], with the attendant argument that "the USDOC's commitment is meaningful [as] demonstrated by the fact that the USDOC has never triggered Subpart III, in this investigation or any investigation"[746], and that "[b]ecause Subpart III does not require the United

[736] Letter dated 23 June 2016 from the Office of the USTR to the USDOC, (Exhibit USA-36).

[737] Letter dated 28 June 2016 from the USDOC in response to the Office of the USTR, (Exhibit USA-37).

[738] The United States repeatedly held before this Panel that this evidence only served to "confirm" the USDOC's "commitment". (United States' first written submission, paras. 26, 33-34, 44-45, 51, and 54-55; second written submission, paras. 30 and 33-34; opening statement at the meeting with the Panel, paras. 10 and 12; responses to Panel question No. 54, paras. 128 and 131, No. 55, para. 138, No. 60, para. 147, No. 61, paras. 154 and 158, and No. 62, para. 160).

[739] We asked the United States to indicate whether additional documental evidence proved the existence of the "commitment". The United States did not identify any other document in its response (United States' response to Panel question No. 55, paras. 137-138).

[740] Panel question No. 55. We asked the United States the following question: "[c]an the United States identify the date when this "commitment" took effect and how it was made manifest?". The United States did not respond to this question.

[741] United States' response to Panel question No. 61, para 154. (emphasis added)

[742] United States' comments on third party's response to Panel question No. 10, para. 80. (emphasis added)

[743] The United States also described the DSB statements, in which the exchange of letters were explained, in the following terms: "[n]ot having had a chance to defend a claim against Subpart III before the panel or Appellate Body in the underlying proceedings, the United States explained the operation of Subpart III at meetings of the DSB, and 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." (United States' response to Panel question No. 61, para 154). (emphasis added)

[744] United States' first written submission, para. 47.

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

[746] United States' response to Panel question No. 54, para. 132.

States to take WTO-inconsistent action, the United States did not need to take an additional measure in order to implement the DSB recommendation."[747]

7.317. As already discussed[748], we do not exclude the possibility that the United States could have achieved compliance through means other than changing the text of the inconsistent measure by amending its legislation. In the specific circumstances of this case, however, the United States has failed to identify any measure that might address the specific underlying WTO-inconsistency of 19 USC § 1677(7)(G)(i)(III) by introducing a *change* relevant to the specific finding of WTO-inconsistency. Rather, according to the United States' own description of the relevant DSB statements, they were not intended to convey that any such "change" had taken place, but rather that the USDOC would *continue* to exercise its discretion in a WTO-consistent manner on the basis of the United States' own understanding of the operation of the statute[749]:

> Not having had a chance to defend a claim against Subpart III before the panel or Appellate Body in the underlying proceedings, the United States explained the operation of Subpart III at meetings of the DSB, and 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.

7.318. In any event, even if we were able to treat the above-mentioned DSB statements and the letters as the "measure taken to comply", a number of problems would still remain. The letters and DSB statements acknowledge the USDOC's discretion concerning the timing of the self-initiation of investigations. This aspect is not disputed by the parties, it was not an issue in the original proceedings, and it has no bearing for the resolution of these compliance proceedings. However, the DSB statements and the exchange of letters do not qualify this discretion any further than a generic reference to the United States' obligations under the SCM Agreement and the Anti-Dumping Agreement. The above-mentioned documents are thus too broad and lack details necessary to assess the scope of the USDOC's "commitment".[750] More importantly, even if these documents were clear in indicating, as the United States argues in its submissions, that the USDOC will not self-initiate countervailing duty investigations on the same day as anti-dumping petitions are filed, or *vice versa*, we note that the self-initiation of an investigation by the USDOC is only one factor of the equation. The USDOC, in fact, cannot control the timing of the filing of a petition by complainants. A situation may thus arise where the USDOC self-initiates a CVD investigation on one day, and petitioners submit an anti-dumping petition on the same day. The answers submitted by the United States in response to the Panel's questioning reinforce this understanding. First, the preparatory work leading to the self-initiation of a countervailing or anti-dumping investigation is confidential. Therefore, the representatives of the domestic industry are not formally aware of the day when the USDOC plans to self-initiate an investigation. This does not rule out the possibility that a petition be filed on that same day. The United States characterizes this scenario as being "highly speculative", but it does not offer convincing arguments that it will never materialize.[751] The United States further notes that the USDOC "may" always self-terminate an investigation.[752] However, this does not guarantee that the investigation "will" necessarily be terminated every time a certain factual matrix materializes. And if the investigation proceeds, the USITC will still have an obligation to cross-cumulate the injurious effects of subsidized and dumped, non-subsidized imports. The United States finally notes that the relevant USITC regulation (19 C.F.R. § 207.19(a)) provides that "if the petition is filed … after 12:00 noon … the petition shall be deemed filed on the next business day" and argues that the USDOC could ensure that petitions are not filed on the same day by self-initiating investigations later in the day.[753] While this possibility exists, there is no evidence on the Panel record that the USDOC formally committed to self-initiate investigations on the following day or to receive petitions only after a certain time.

7.319. Notwithstanding the alleged actions taken by the United States to comply with the DSB recommendation in the original proceedings, 19 USC § 1677(7)(G)(i)(III) remains in force and

[747] United States' response to Panel question No. 61, para 159.
[748] See para. 7.306 above.
[749] United States' response to Panel question No. 61, para 154.
[750] We note that the panel in *Canada – Aircraft (Article 21.5 – Brazil)* rejected a measure adopted by the respondent in that dispute to remedy a WTO-inconsistency, on the grounds that it was "generally worded", and thus not sufficient to ensure compliance. (Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.144).
[751] United States' response to Panel question No. 58, para. 144.
[752] United States' response to Panel question No. 58, para. 144.
[753] United States' response to Panel question No. 58, para. 144.

the United States has not demonstrated that it introduced some other change relevant to the specific finding of WTO-inconsistency in order to cure the effects of that finding. Based on the foregoing, there is no evidence before this Panel that would permit the conclusion that there exists a measure taken to comply with the DSB recommendation to bring 19 USC § 1677(7)(G)(i)(III) into conformity with the covered Agreements.

7.9.4 Conclusion

7.320. We find that India has demonstrated that the United States has taken no measure to comply with the DSB recommendation in the original dispute to bring 19 USC § 1677(7)(G)(i)(III) into conformity with Articles 15.1-15.5 of the SCM Agreement.

7.10 Injury: India's "as applied" claims under Articles 15.1 and 15.2 of the SCM Agreement

7.321. India argues that the USITC's Section 129 Determination failed to assess the impact of subsidized imports on the prices for the domestic like products. In this regard, India submits three main arguments.[754] First, India argues that the USITC used flawed methodology and data.[755] Second, India maintains that the USITC in its Section 129 Determination "brushed aside" the results of the price comparisons conducted under the commercial policy analysis system (COMPAS[756]) model, which showed in the original determination that subsidized imports had a minimal impact on the prices of US producers.[757] Finally, India contends that the USITC failed to consider the significance of the magnitude of price undercutting, and instead only focused on the frequency of undercutting.[758]

7.322. Before addressing India' arguments and the US counter-arguments, it is important to understand the background that led to the USITC's Section 129 Determination. In the original dispute, the panel found that the application of Section 1677(7)(G)(i) in the USITC's original injury determination was inconsistent with Article 15 of the SCM Agreement, because it led to the cross-cumulation of subsidized and dumped, non-subsidized imports for the purposes of the injury assessment.[759] Pursuant to a request received from the Office of the USTR, the USITC initiated Section 129 proceedings with a view to complying with the DSB recommendation in the original dispute.[760]

7.323. In the introduction to the Section 129 Determination, the USITC explained that the document would not address issues that were not disputed in the original WTO proceedings, or as to which the Panel or the Appellate Body did not make findings of inconsistency.[761] In essence, the USITC reopened the file of the original investigation, and examined whether cumulated subsidized imports from Argentina, India, Indonesia, South Africa, and Thailand (thus excluding dumped, non-subsidized imports) caused injury to the domestic producers of hot-rolled steel products.

7.10.1 Whether the methodology and the data used by the USITC were flawed

7.324. India argues that the USITC failed to conduct a proper injury assessment because of the methodology used for the comparison of the prices of subject imports with those of the domestic like product in the US market. India maintains that the USITC did not base the comparison on a transaction-by-transaction analysis but, rather, on an assessment of the number of quarters in which subject imports undercut the prices of US commercial shipments.[762] In addition, India argues that the determination does not indicate whether quarters were only counted when an importer provided data concerning both import prices and prices at which the same importer procured from

[754] India's submissions do not specifically follow this order of arguments. For the purposes of addressing these arguments in this Report, however, we decided to slightly modify the order of the arguments.
[755] India's first written submission, para. 41; second written submission, para. 59.
[756] The United States defines the COMPAS model as "an empirical analysis using certain economic assumptions". (United States' first written submission, para. 121).
[757] India's first written submission, paras. 45-47; second written submission, paras. 54-56.
[758] India's first written submission, para. 43.
[759] Panel Report, *US – Carbon Steel (India)*, paras. 8.2(c) and (d).
[760] USITC's Section 129 Determination, (Exhibit IND-58), p. 5.
[761] USITC's Section 129 Determination, (Exhibit IND-58), p. 7.
[762] India's first written submission, para. 43.

US producers, or if import prices reported by one importer were compared with the domestic procurement prices of another importer.[763] Finally, India argues that the underlying pricing data analysed in the Section 129 Determination changed from the original determination.[764]

7.325. The United States' rebuttal is that claims concerning the USITC's methodology could have been brought in the context of the original WTO proceedings and that India opted not to.[765] The United States notes that the USITC relied on the same data sources and used the same methodology in the original proceedings, and that India did not raise the issue in the context of the original proceedings although it could have.[766] The United States further denies India's allegation that the underlying pricing data has changed from the original determination.[767]

7.326. Against this background, we note that the USITC based its Section 129 Determination on the same methodology, data, and record evidence as used in the original determination, to the extent that they were not changed in light of the panel's and the Appellate Body's findings in the original WTO proceedings. We further note that India did not raise any claim concerning the methodology used by the USITC in its 2001 determination's price undercutting analysis in the original WTO proceedings.

7.327. The USITC disaggregated data on dumped imports, and relied on the data on subsidized products already collected and used in the context of the original determination. With specific regard to the price undercutting analysis, we note that, in its reinvestigation, the USITC did not modify the methodology used in the original investigation, nor did it rely on different sources for the data on price comparisons. Save for the correction of a clerical error concerning the number of the quarters where underselling (or overselling) occurred[768], the USITC simply subtracted the quarters concerning price comparisons between dumped imports and US commercial shipments from the total number of comparisons of the prices of subject imports with those of the domestic like product. Thus, the methodology and the data used in the Section 129 Determination are the same as in the original determination.

7.328. Based on the foregoing, we find that India's claims concerning the methodology and the data used by the USITC in the price undercutting analysis are outside the scope of these compliance proceedings, since those claims could have been raised in the original WTO proceedings.[769] A different conclusion would imply that the USITC was not entitled to assume that unchallenged aspects of the measure were not inconsistent with the United States' obligations under the SCM Agreement. Such a conclusion, in fact, would be excessively burdensome, since it would deprive the United States of the reasonable period of time that it would have enjoyed after the original proceeding to bring its measure into conformity.[770]

7.10.2 Whether the USITC ignored data from the original determination

7.329. India contends that the USITC omitted information from the original record in its Section 129 Determination. According to India, considering this information in the Section 129 Determination would have led the USITC to reach diametrically opposite conclusions on the occurrence of material injury.[771] India notes that the USITC in the original determination made findings that the COMPAS model impact analysis results showed how subsidized imports taken together would have an impact of 0.3% to 0.4% on the prices charged by US producers.[772] India notes that the COMPAS model provides the only quantified information with respect to the impact of the subsidized imports on the prices of domestic like products and on the state of the domestic

[763] India's first written submission, para. 42; second written submission, para. 59.
[764] India's second written submission, para. 48(b).
[765] United States' first written submission, para. 86; second written submission, para. 44.
[766] United States' first written submission, para. 92; second written submission, para. 44.
[767] United States' first written submission, fn 63.
[768] United States' first written submission, para. 72 and fn 63.
[769] See above section 7.1.4.
[770] Other panels and the Appellate Body reached similar conclusions in previous disputes. See e.g. Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.81. See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.
[771] India's first written submission, paras. 44 and 47.
[772] India's first written submission, paras. 45-46.

industry and that the assertion that COMPAS results did not form part of the original determination is contradicted by their inclusion in an appendix to the original determination.[773]

7.330. The United States argues that this claim is outside the scope of these compliance proceedings. According to the United States, India should have brought this claim in the original proceedings, since it concerns an unchanged aspect from the original determination.[774] The United States argues that COMPAS results were included in the report accompanying the USITC's opinions in the original determination, but were not relied upon as the basis for findings or determinations.[775] The USITC similarly declined to rely on COMPAS results in its Section 129 Determination, because: (a) COMPAS results never constituted the sole basis for the USITC's analysis; (b) the model is no longer included in the USITC's reports; and (c) quarterly pricing data provided better evidence for its findings.[776] According to the United States, quarterly pricing data better indicated the changes in domestic prices resulting from the increased volume of low-priced subsidized imports in the US market than a theoretical economic model.[777]

7.331. We note that the COMPAS model results were included in appendix D to the 2001 Original Determination.[778] However, the United States argues that the USITC did not rely on them in its original determination.[779] This is confirmed by the original determination, which discusses the price effects of subject imports without reference to or incorporation of COMPAS model results.[780] In the Section 129 Determination, the USITC again did not resort to COMPAS model results. Quoting from the Section 129 Determination:

> Respondent GOI contends that the Commission should consider the results of the COMPAS model relating to subject CVD imports in its analysis. GOI Comments at 19 and 20. We do not find the COMPAS model to be a useful tool in our analysis. COMPAS modeling was one analytic tool that appeared in Commission staff reports during the 1990s and early 2000s; it was in the staff report in the original Final Determinations. The results of the COMPAS model were never used by a majority of the Commission as its sole form of analysis in a Commission opinion because of its limitations. As the Commission explained shortly after it stopped providing the COMPAS model in its reports, we prefer to rely on the actual empirical data in the record. See, e.g., *Circular Seamless Stainless Steel Hollow Products from Japan*, Inv. No. 731-TA-859 (Remand), USITC Pub. 3475 at 7 and n.24 (December 2001); *accord Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004).[781]

7.332. It appears from the record evidence that the USITC had already ceased relying on the COMPAS model prior to the original determination. Rather than simply "brushing aside" the COMPAS model data – as argued by India – the USITC explained why it did not use it in its original determination and in its Final Determination. India was in a position to challenge the non-reliance on COMPAS model results in the original determination in the original WTO dispute, but did not do so. Since India is bringing this claim for the first time in these compliance proceedings, we find that it is outside the scope of these compliance proceedings for the reasons already spelled out above.[782]

7.10.3 Whether the USITC failed to determine the significance of price undercutting

7.333. Before turning to the parties' arguments and to our evaluation of the matter, it is useful to briefly summarise the factual background of India's claim.

7.334. To conduct its price effects analysis, the USITC identified four pricing products and divided the POI into quarters. To determine whether undercutting occurred in a quarter for each pricing product, the USITC used the following approach. First, the USITC determined average quarterly

[773] India's second written submission, para. 48(d).
[774] United States' first written submission, paras. 86 and 92.
[775] United States' first written submission, para. 123.
[776] United States' first written submission, para. 124.
[777] United States' first written submission, para. 125; second written submission, para. 59.
[778] USITC's 2001 Determination, (Exhibit IND-5), appendix D.
[779] United States' first written submission, para. 123; second written submission, para. 59.
[780] USITC's 2001 Determination, (Exhibit IND-5), pp. 21-22.
[781] USITC's Section 129 Determination, (Exhibit IND-58), fn 130.
[782] See above para. 7.328.

prices for subsidized products and the domestic like product. When the average quarterly price for subsidized products from a country was lower than that of the domestic like product, the USITC concluded that the imports from that country were undersold in a given quarter. When the average quarterly price for subsidized products from a country was higher than that of the domestic like product, the USITC concluded that the imports from that country were oversold in a given quarter.[783]

7.335. As we mentioned earlier, in the Section 129 Determination, the USITC subtracted the quarters concerning price comparisons between dumped imports and US commercial shipments from the total number of comparisons of the prices of subject imports with those of the domestic like product.[784] The data relied on by the USITC in the Section 129 Determination was derived from its evaluation in the original determination, in which the USITC set out, *inter alia*, quarterly margins of underselling (or overselling).[785]

7.336. The USITC's findings on price effects can be summarized as follows. The USITC began its analysis by noting that the record evidence indicates that subject CVD imports and domestically produced hot-rolled steel are "at least moderately substitutable" and that price is an important factor influencing purchasing decisions.[786] Subsidized imports and domestic products share the same essential chemical and physical properties.[787] They are interchangeable; therefore, price is a principal factor influencing purchasing decisions[788] and sustained underselling by even a moderate amount of subject CVD imports can have price-suppressing or price-depressing effects.[789] The USITC noted that subject CVD imports undersold the domestic like products in 74 out of 124 quarterly comparisons (59.7% of the comparisons).[790] According to the USITC, this underselling was particularly probative, in light of the importance of price in purchasers' decisions to increase inventories.[791] Specifically, low subject CVD import prices led to a significant growth in subject CVD import volume between the end of 1999 and the first half of 2000, at a time when (i) the prices of domestic products were rising and (ii) apparent US consumption was increasing.[792] The USITC explains that prices were at their highest level in 1998, corresponding to the entrance in the market of unfairly traded imports from Brazil, Japan, and the Russian Federation.[793] After the imposition of anti-dumping duties on imports from those three countries, prices rose through the first quarter of 2000, but "generally did not recover" to the levels of 1998, despite increases in US consumption.[794] The restrained price recovery occurred during the same quarters as the volume of subject CVD imports increased sharply.[795] This coincided with peaks in inventories for the POI, to which subject CVD imports contributed.[796] These excesses in inventories had a negative impact on domestic prices, leading to their sharp decline during the end of 2000 and the beginning of 2001.[797] Based on the foregoing, the USITC found that significant price underselling by subject CVD imports had significant adverse effects on domestic prices during the POI.[798]

7.337. India argues that the USITC's analysis on the price effects of subject CVD imports only covered instances of price undercutting.[799] India argues that the USITC failed to consider the

[783] United States' response to Panel question No. 65, para. 167. The Panel takes note of India's objection that it is not clear how the USITC determined average quarterly prices (India's comments on United States' response to Panel question No. 65). India does not further elaborate on this aspect and, in absence of additional arguments, the Panel is not in the position to address India's comment.

[784] See above para. 7.327.

[785] USITC's Original Determination, (Exhibit IND-5), pp. V-17-V-20.

[786] USITC's Section 129 Determination, (Exhibit IND-58), p. 23.

[787] USITC's Section 129 Determination, (Exhibit IND-58), p. 23.

[788] Quoting from the Section 129 Determination: "[p]urchasers indicated that anticipated future demand was the most important factor in deciding to hold inventories, although low purchase prices, whether domestic or import, also were a factor". (USITC's Section 129 Determination, (Exhibit IND-58), fn 104). See also USITC's 2001 Determination, (Exhibit IND-5), p. V-9.

[789] USITC's Section 129 Determination, (Exhibit IND-58), p. 23.

[790] USITC's Section 129 Determination, (Exhibit IND-58), p. 23.

[791] USITC's Section 129 Determination, (Exhibit IND-58), pp. 23-24.

[792] USITC's Section 129 Determination, (Exhibit IND-58), p. 24.

[793] USITC's Section 129 Determination, (Exhibit IND-58), p. 24.

[794] USITC's Section 129 Determination, (Exhibit IND-58), p. 24.

[795] USITC's Section 129 Determination, (Exhibit IND-58), p. 24.

[796] USITC's Section 129 Determination, (Exhibit IND-58), p. 24.

[797] USITC's Section 129 Determination, (Exhibit IND-58), p. 25.

[798] USITC's Section 129 Determination, (Exhibit IND-58), p. 25.

[799] India's first written submission, para. 43.

significance of the magnitude of underselling where it materialized, and simply focused on the frequency of underselling.[800] According to India, the significance and the impact of underselling cannot be fully ascertained without weighing the extent of underselling or overselling in each discovered instance.[801] India argues that at no point did the USITC discuss how or why the instances of price underselling which it has observed to exist may be deemed to be "significant".[802] India further argues that, rather than counting isolated instances, the USITC should have assessed the trends of underselling and overselling.[803]

7.338. India submits that, in addition to establishing the existence of price underselling, an investigating authority is also required to determine whether the subject CVD imports have an "explanatory force" for the established price underselling.[804] According to India, the USITC failed to comply with this standard by not assessing the magnitude, the significance or the "explanatory force" between the subsidized imports and the underselling determined to exist.[805] India submits that the USITC should have considered underselling in and of itself, and the absence of such an assessment forecloses any possible determination concerning the explanatory force between subject CVD imports, on one side, and the price effect determined to exist, on the other.[806]

7.339. The United States responds that the USITC objectively found, based on positive evidence, that underselling by subsidized imports was significant.[807] The United States explains how the USITC found that subsidized imports undersold domestic like products in 74 out of 124 quarterly comparisons.[808] Because price was an important factor in purchasing decisions, the USITC found underselling to be "particularly probative" and to provide the impetus for significant growth in the volume and inventories of subsidized imports in 1999 and 2000.[809] The United States further notes that "the increased volume of low-priced subsidized imports restrained price increases for the domestic like product during late 1999 and early 2000, and the inventory overhangs caused by purchasers' acquisition of low-priced subsidized imports ultimately resulted in price decreases for the domestic like product in late 2000 and 2001".[810] The United States argues that Article 15.2 of the SCM does not prescribe any methodology that an investigating authority conducting a price effects analysis is expected to follow.[811]

7.340. According to the United States, an investigating authority's objective examination of price undercutting must ensure that subject import prices have "explanatory force" for the changes of the prices of domestic products.[812] In this respect, the United States argues that the USITC took into account the market conditions in reaching its conclusions, determining that the fair degree of substitutability between subject CVD imports and domestic products, combined with the finding that price was a principal factor influencing purchasers' decisions, contributed to the conclusion that subject CVD imports had explanatory force for changes in domestic prices.[813] The United States submits that the USITC fully acknowledged that price underselling did not occur in all quarterly comparisons, but it nevertheless found that sustained underselling by "even a relatively moderate amount of subject CVD imports" could have price-suppressing or price-depressing effects.[814] The United States also argues that the USITC did not limit its analysis to the end points of the POI, but utilized its quarterly pricing data to consider changes in prices within the said period.[815]

[800] India's first written submission, para. 43.
[801] India's first written submission, para. 43; second written submission, para. 58.
[802] India's second written submission, para. 58.
[803] India's first written submission, para. 44.
[804] India's second written submission, para. 53.
[805] India's second written submission, para. 53.
[806] India's second written submission, para. 57.
[807] United States' first written submission, para. 99.
[808] United States' first written submission, para. 99.
[809] United States' first written submission, para. 99.
[810] United States' first written submission, para. 99.
[811] United States' first written submission, para. 103.
[812] United States' first written submission, para. 114 (citing Appellate Body Report, *China – GOES*, para. 138); second written submission, para. 52 (referring to Appellate Body Report, *China – GOES*, para. 154).
[813] United States' first written submission, para. 114; second written submission, para. 53.
[814] United States' first written submission, para. 115.
[815] United States' first written submission, para. 118; second written submission, para. 54.

7.341. The Panel now turns to its analysis[816], beginning with the text of Article 15.2 of the SCM Agreement:

> With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. *With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member*, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.[817]

7.342. The second sentence of Article 15.2 of the SCM Agreement is concerned with the effect of subsidized imports on the prices for the domestic like product. The ordinary meaning of the word "effect" is, *inter alia*, "something accomplished, caused, or produced; a result, consequence".[818] The relevant enquiry, therefore, concerns the consequences produced by the prices of subsidized imports on the prices for the domestic like product in the importing country. An investigating authority, in particular, shall consider whether there has been significant price undercutting by the subsidized imports as compared with the like domestic product in the importing Member.

7.343. The undercutting analysis concerns whether subsidized imports are sold at lower prices compared to the like domestic product. Article 15.2 qualifies the price undercutting analysis with the adjective "significant", which is ordinarily defined as "[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential; expressive or indicative of something".[819] The adjective "significant" is featured in two additional instances in Article 15.2 of the SCM Agreement, and characterizes the degree to which subsidized imports suppress or depress the prices of the domestic like product. Therefore, all price effects envisaged in Article 15.2 of the SCM Agreement must materialize in a significant fashion for an investigating authority to make positive conclusions.

7.344. The text of Article 15.2 does not prescribe any particular methodology for the determination of price effects in injury analysis[820], save for the general requirement laid down in Article 15.1 of the SCM Agreement that an investigating authority makes an "objective examination" of the effect of subsidized imports on prices in the domestic market for the like product "based on positive evidence".

7.345. Article 15.2 of the SCM Agreement, like its corresponding provision in the Anti-Dumping Agreement (Article 3.2), does not establish a fixed numerical threshold to consider the price undercutting as significant. This aspect is relevant, bearing in mind that both the SCM Agreement and the Anti-Dumping Agreement use an explicit numerical statutory threshold in other provisions concerning other aspects of countervailing or anti-dumping investigations.[821] The

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[816] The Panel notes that the parties have submitted arguments concerning the reliability of the data and products chosen for the product mix relevant for the price comparison in the injury assessment. Since the data and choice of the product are the same as in the original investigation, consistent with the Panel's approach throughout the whole report, the Panel does not engage with these arguments as they could have been brought to the Panel's attention in the context of the original dispute.

[817] Emphasis added.

[818] Oxford Dictionaries online, definition of "effect" https://www.oed.com/view/Entry/59664?rskey=8q0vqR&result=1&isAdvanced=false#eid (accessed 19 July 2019). The Panel notes that the Appellate Body reported the same ordinary meaning for the word "effect" in Article 3.2 of the Anti-Dumping Agreement (which, *mutatis mutandis*, is almost identical in wording as Article 15.2 of the SCM Agreement) in Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.155; *China – GOES*, para. 135 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 798).

[819] Oxford Dictionaries online, definition of "significant" https://www.oed.com/view/Entry/179569?redirectedFrom=significant#eid (accessed 19 July 2019).

[820] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.334.

[821] For the SCM Agreement, see, e. g. Article 6.1(a) (on determining serious prejudice through the total *ad valorem* value of subsidization), Article 8.2 (for various thresholds on non-actionable subsidies (now expired)), Article 11.4 (on the threshold for domestic industry support to initiate an investigation); and Article 11.9 (on the *de minimis* threshold). For the Anti-Dumping Agreement, see, e.g. footnote 2 (on the

Panel infers, therefore, that the drafters of the provision intentionally left considerable margin for an investigating authority to determine whether price undercutting is "significant", based on the specific circumstances of the case. Accordingly, there is no fixed numerical threshold that must always be met.

7.346. The Panel notes that both parties in their submissions refer to the Appellate Body Report in *China – GOES*, which recognized that Article 15.2 of the SCM Agreement (and Article 3.2 of the Anti-Dumping Agreement) establish "a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two".[822] Importantly, the same report concluded that "an investigating authority is required to examine domestic prices in conjunction with subject imports" in order to determine whether subject imports have "explanatory force" for the price effects determined to occur on the domestic products.[823]

7.347. The panel in *EC – Countervailing Measures on DRAM Chips* held that "[t]he ordinary meaning of 'significant' encompasses 'important', 'notable', 'major', as well as 'consequential', which all suggest something that is more than just a nominal or marginal movement".[824] Previous reports contain similar considerations concerning the interpretation of the same notion in the context of Article 6.3(c) of the SCM Agreement.[825] The Appellate Body noted that the word "significant", in the context of an evaluation of the effects of import prices on domestic prices, has both "quantitative and qualitative dimensions".[826]

7.348. In another dispute, the Appellate Body held:

> [W]e note that the term "price undercutting" in Article 3.2 is qualified by the word "significant", which is relevantly defined as "important, notable, consequential". … Article 3.2 expressly establishes a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two. This comparison contemplates a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI. The *significance* of the price undercutting found on the basis of that dynamic assessment is a question of the magnitude of the price undercutting. What amounts to *significant* price undercutting – that is, whether the undercutting is important, notable, or consequential – will therefore necessarily depend on the circumstances of each case. In order to assess whether the observed price undercutting is significant, an investigating authority may, depending on the case, rely on all positive evidence relating to the nature of the product or product types at issue, how long the price undercutting has been taking place and to what extent, and, as appropriate, the relative market shares of the product types with respect to which the authority has made a finding of price undercutting.[827]

7.349. We take note of these prior findings. In particular, we emphasize that Article 15.2 does not limit the scope of the elements that an investigating authority can or shall take into account to reach a conclusion that price undercutting is significant. Such an assessment depends on the available evidence and on the specific circumstances of the case. Against this background, we now turn to our own objective assessment of whether the USITC's price effects analysis is consistent with the requirements of Article 15.2 of the SCM Agreement.

7.350. India challenges the failure by the USITC to consider the significance of price underselling. More specifically, India challenges the USITC's failure to consider the significance of the magnitude of price underselling every time it concluded that subject CVD imports undersold the domestic like

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threshold for "sufficient quantity" of relevant sales); footnote 5 (on the threshold for "substantial quantities" of sales below cost); Article 5.8 (on the *de minimis* threshold).

[822] Appellate Body Report, *China – GOES*, para. 136.

[823] Appellate Body Report, *China – GOES*, para. 138.

[824] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307. (fn omitted)

[825] Appellate Body Reports, *US – Upland Cotton*, para. 426; *US – Large Civil Aircraft (2nd Complaint)*, para. 1052; and Panel Report, *Korea – Commercial Vessels*, para. 7.570.

[826] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1052.

[827] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161. (emphasis original; fns omitted)

product in a given quarterly comparison.[828] According to India, the USITC focused simply on the frequency of price underselling, and this cannot permit the full measurement or examination of the significance and impact of price underselling.[829]

7.351. India's argument that the USITC "simply" focused on the frequency of price underselling is contradicted by the record evidence. Recalling that the USITC had to demonstrate the explanatory force of the prices of subject CVD imports on the prices for domestic products, the USITC began its analysis with the identification of the product concerned. Having verified that subject CVD imports and domestic products were interchangeable, of comparable quality, and sharing similar physical and chemical characteristics, the USITC also determined, based on the responses to questionnaires by interested parties, that price was a principal factor influencing purchasing decisions. Against that background, the USITC found the frequency of underselling (which occurred in 59.7% of the quarterly comparisons) to be particularly probative, in light of other specific characteristics of the market for the product concerned. We also recall that the data relied on by the USITC in the Section 129 Determination was derived from its evaluation in the original determination, in which the USITC set out, *inter alia*, quarterly margins of underselling (or overselling).[830] It is apparent to us that the USDOC considered the importance of frequency to the "significance of the magnitude"[831] of underselling as part of a broader "objective examination" of the matter before it, based on positive evidence.

7.352. India further argues that the USITC disregarded the trends of underselling and overselling, and instead focused on isolated instances of the same. The Panel reiterates that there is no prescribed methodology that an investigating authority must follow in determining the occurrence of price effects. Specifically, Article 15.2 is silent on whether and how underselling and overselling trends must be evaluated in the context of a price effects analysis. In any event, the Panel is not persuaded by India's arguments. The text of the Section 129 Determination reveals that the USITC did look at pricing trends during the POI. In particular, the USITC found that the increase in volume of subsidized imports between 1999 and 2000 restrained the increase of domestic prices following the imposition of anti-dumping duties on Brazil, Japan, and the Russian Federation, and that there was a coincidence in time between price decreases starting the second half of 2000 and subject CVD imports' inventories overhangs.

7.353. It therefore appears that, to determine the "explanatory force" of price underselling, the USITC conducted an objective examination, looking at the frequency of price underselling together with, at least, the following elements of positive evidence: the interchangeability of the products, the correlation between increases in subsidized imports and inventories, restrained price increases, and declines in prices for the domestic like product.

7.354. The facts on the record thus contradict India's contention that the USITC "simply" relied on the frequency of price underselling in its price effects analysis. We also dismiss India's argument that the USITC should have considered the magnitude of underselling or overselling in every quarterly comparison. In fact, we see nothing in the text of Article 15.2 of the SCM Agreement that would always require that a similar exercise be conducted.

7.355. In light of the foregoing, and having dismissed a number of other India's claims because they are not within the scope of these compliance proceedings, the Panel concludes that India has not demonstrated that the United States acted inconsistently with Articles 15.1 and 15.2.

7.10.4 Conclusion

7.356. India has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement.

[828] India's first written submission, para. 43.
[829] India's first written submission, para. 43.
[830] See above para. 7.335.
[831] India's first written submission, para. 43.

7.11 Injury: India's "as applied" claims under Articles 15.1 and 15.4 of the SCM Agreement

7.357. India argues that when there is a positive movement in a number of injury factors, the investigating authority would need to explain how, despite such positive trends, the domestic industry is nevertheless materially injured.[832] In particular, India argues that the analysis under Article 15.4 requires an investigating authority to draw a correlation between the subsidized imports and the state of the domestic industry.[833] According to India, the volume and price effects of subject imports analysed in the Section 129 Determination cannot be correlated with the state of the domestic industry in any manner.[834] According to India, the United States has not pointed to any part of the Section 129 Determination that draws a definitive correlation between the subsidized imports and the injury parameters indicating the state of the domestic industry.[835] India contends that the low volume of subject imports relative to consumption (5.8% of the market share in 2000) cannot be considered to have a meaningful impact on the state of the domestic industry.[836] India further argues that the low volume of subject imports required a more compelling explanation concerning its impact on the state of the domestic industry, especially in light of their marginal market share as compared to that of imports from countries subject to anti-dumping duty investigations.[837]

7.358. The United States argues that India errs in interpreting Article 15.4 of the SCM Agreement as requiring an investigating authority to provide a "compelling explanation" and show a "definitive correlation" when positive economic indicators are present.[838] The United States notes that the USITC duly acknowledged the existence of certain positive trends, and yet it explained why it found significant impact and material injury caused by subsidized imports notwithstanding such trends.[839] The United States, in particular, notes that while many indicators were higher in 2000 than in 1998, the declines in many other indicators in the latter portion of the period corresponded with peaks in import volumes and inventories.[840] Finally, the United States argues that India conflates the obligation under Article 15.4 with the requirement to demonstrate a causal link as per Article 15.5.[841]

7.359. We begin our evaluation of India's claim with the text of Article 15.4 of the SCM Agreement:

> The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.360. Article 15.4, like the corresponding provision in the Anti-Dumping Agreement Article 3.4, requires an investigating authority to examine the impact of subsidized imports on the domestic industry. To this effect, Article 15.4 provides a non-exhaustive list of economic factors and indices having a bearing on the state of the domestic industry. The Appellate Body in *China – GOES* explained that Article 15.4 does not simply require an evaluation of the state of the domestic industry by looking at certain economic parameters.[842] We agree with the Appellate Body, noting that Article 15.4 establishes that an investigating authority must examine the *impact* of subsidized imports on the domestic industry. We also agree with the Appellate Body in *China – GOES* that, similarly to Article 15.2, Article 15.4 requires an examination of the "explanatory force" of subsidized

[832] India's first written submission, para. 53.
[833] India's first written submission, para. 54.
[834] India's first written submission, para. 55.
[835] India's second written submission, para. 63.
[836] India's second written submission, para. 64.
[837] India's second written submission, para. 70.
[838] United States' second written submission, para. 64.
[839] United States' first written submission, para. 129.
[840] United States' first written submission, para. 134.
[841] United States' second written submission, para. 69.
[842] Appellate Body Report, *China – GOES*, para. 149.

imports in relation to the state of the domestic industry. As such, the analysis required by Article 15.4 is part of the logical progression established under Article 15 leading to the final question as to whether the injury suffered by the domestic industry is caused by subsidized imports.

7.361. That said, the analysis under Article 15.4 should not be confused with that under Article 15.5. While Article 15.4 is concerned with the examination of the impact of subsidized imports on the domestic industry, an investigating authority under Article 15.5 is required to demonstrate that subsidized imports are causing injury. The latter analysis is broader, as the investigating authority is expected to examine "all relevant evidence" before it. Furthermore, Article 15.5 requires an investigating authority to conduct a non-attribution analysis concerning other factors causing injury to the domestic industry at the same time as the subsidized imports.[843]

7.362. Having clarified the scope of the analysis under Article 15.4 as well as the differences with the causality and non-attribution analysis envisaged in Article 15.5, we now turn to the evidence before us in order to make findings concerning India's claim.

7.363. The USITC in its Section 129 Determination noted that several indicators of the state of the domestic industry increased from 1998 to 2000.[844] Nevertheless, the USITC observed that the domestic industry's financial performance was poor during most of the POI (losses on commercial and total US sales in 1999 and 2000; several producers entered bankruptcy proceedings; the number of workers, the hours worked, and the wages declined; the industry productivity increased from 1998 to 2000, but decreased in 2001; total capital expenditures increased between 1998 and 2000, but expenditures on research and development declined).[845] The Section 129 Determination, therefore, reveals that the USITC acknowledged the existence of positive trends in certain factors.

7.364. Concerning the explanations for the state of the domestic industry, the USITC noted that the relief obtained by means of anti-dumping duties on imports from certain countries in mid-1999 "did not last". The USITC explained that the domestic industry's commercial shipments declined at the same time as subject CVD imports continued to increase, with subject imports reaching peak levels between the end of 1999 and the first half of 2000. Further, inventories of subject CVD imports almost doubled from 1999 to 2000 and remained at high levels in the first quarter of 2001.[846] According to the USITC, increases in subject CVD imports in the first half of 2000 (before CVD petitions were filed) and peak levels of inventories adversely affected the performance of the domestic industry.[847] The USITC noted that virtually every financial and production indicator was lower in 2001 as compared to 2000.[848] Against this background, the USITC also acknowledged that the volume of CVD imports in 2001 was lower than in 2000, but attributed this decline to the filing of the petitions in 2000 and to substantial importer inventories.[849] The USITC therefore concluded that subject CVD imports had a significant adverse impact on the domestic industry.[850]

7.365. We find that the examination and the explanation provided in the Section 129 Determination are consistent with the requirements of Article 15.4 of the SCM Agreement. In particular, low levels of financial indicators corresponded to peaks in inventories of subsidized products. Besides, domestic shipments and production contracted at a time when overall apparent domestic consumption was strong and subject CVD imports substantially increased.[851] The USITC relied on this coincidence in time to prove the impact of subject imports on the state of the domestic industry, and how the two are correlated. Furthermore, we are not persuaded by India's argument that the limited market share of subsidized imports would preclude a finding that subject imports had an impact on the state of the domestic industry. The USITC specifically discussed the market share of subsidized imports and found that it increased significantly during the POI, moving from 0.8% to 5.8% of apparent US consumption between 1998 and 2000 (from 246,688 short tons in 1998 to 1.1 million short tons in

[843] In a similar vein, see Appellate Body Report, *China – GOES*, para. 150.
[844] USITC's Section 129 Determination, (Exhibit IND-58), pp. 25-27.
[845] USITC's Section 129 Determination, (Exhibit IND-58), pp. 27-28.
[846] USITC's Section 129 Determination, (Exhibit IND-58), p. 29.
[847] USITC's Section 129 Determination, (Exhibit IND-58), p. 29.
[848] USITC's Section 129 Determination, (Exhibit IND-58), p. 29.
[849] USITC's Section 129 Determination, (Exhibit IND-58), p. 30.
[850] USITC's Section 129 Determination, (Exhibit IND-58), p. 30.
[851] United States' first written submission, para. 127 (referring to USITC's Section 129 Determination, (Exhibit IND-58), pp. 25-30).

1999 and 1.7 million short tons in 2000).[852] This element was one of the factors that led the USITC to conclude that subject imports had an adverse impact on the domestic industry producing hot-rolled steel, together with the increase in volume and price effects of subject imports at a time where domestic shipments and production contracted.[853]

7.366. Based on the foregoing, we find that India has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.4.[854]

7.11.1 Conclusion

7.367. India has not demonstrated that the USITC failed to examine the impact of subsidized imports on the state of the domestic industry.

7.12 Causation and non-attribution: India's "as applied" claims under Articles 15.1 and 15.5 of the SCM Agreement

7.12.1 Introduction

7.368. India claims that the USITC's causation and non-attribution analysis in the Section 129 Determination is inconsistent with Articles 15.1 and 15.5 of the SCM Agreement. In particular, India makes the following claims:

a. The USITC failed to demonstrate that subsidized imports caused injury to the domestic industry.

b. The USITC's non-attribution analysis failed to consider the impact of imports from non-subsidized sources, the reasons for the closures experienced by the domestic industry and the impact of contraction in domestic demand. To the extent that the USITC considered these factors, India contends that it failed to explain their nature and impact.

7.12.2 Whether the USITC's Section 129 Determination failed to demonstrate that subsidized imports caused injury to the domestic industry

7.369. India claims that the USITC's Section 129 Determination is inconsistent with Articles 15.1 and 15.5 of the SCM Agreement. India argues that the USITC's Section 129 Determination failed to assess "the nature of the injury being faced by the … domestic industry in view of the insignificant volume and price effects of the subsidized imports".[855]

7.370. India does not explain any further this part of its Article 15.5 claim. India's reference to the "insignificant" volume and price effects of subsidized imports might be an allusion to the substance of its claims under Articles 15.2 and 15.4 of the SCM Agreement. This might, in turn, mean that this part of India's Article 15.5 claim is somehow dependent on India's claims under Articles 15.2 and

[852] USITC's Section 129 Determination, (Exhibit IND-58), pp. 21 and 30.
[853] USITC's Section 129 Determination, (Exhibit IND-58), p. 30.
[854] In response to India's argument that several indices of the United States' industry showed positive trends (India's first written submission, para. 51), the United States objects that India cannot make claims concerning the USITC's examination of certain economic factors before this compliance Panel. (United States' first written submission, para. 88). The United States notes that India already challenged the consistency of the USITC's examination of certain other industry factors with Article 15.4 of the SCM Agreement and the original panel concluded that India did not establish a prima facie case of inconsistency. (United States' first written submission, para. 88 (referring to Panel Report, *US – Carbon Steel (India)*, para. 7.408). In its second written submission, India clarifies that its claim is not directed at the evaluation of the injury parameters *per se*, but rather at the alleged USITC's failure to evaluate the impact of subsidized imports on the injury parameters. (India's second written submission, paras. 61-63). Since India is not seeking findings on the USITC's examination of specific economic factors, we do not need to address the United States' procedural objection.
[855] India's first written submission, para. 58. India made similar remarks in its opening statement at the substantive meeting with the Panel, para. 18.

15.4. However, in the absence of additional arguments submitted to our attention, we consider that India has failed to establish a *prima facie case* supporting this part of its Article 15.5 claim.

7.12.3 Whether the USITC's Section 129 Determination failed to consider the impact of certain known factors in the non-attribution analysis

7.371. India claims that the USITC's Section 129 Determination is deficient with regard to the examination of the impact on the domestic industry of certain other injurious factors that were known to the USITC. Specifically, India directs its claims to the alleged failure to consider the impact of the following three factors: (a) non-subsidized imports; (b) the reason for the closure of certain plants; and (c) contraction in domestic demand. To the extent that the USITC conducted a non-attribution analysis, India argues that it did not analyse each of those factors separately and failed to explain the nature and extent of their injurious effects by separating and distinguishing them from the injurious effects of the subsidized imports.[856]

7.372. Before we turn to the examination of the parties' arguments, we will first set out the legal standard for the evaluation of India's claims under Articles 15.1 and 15.5 of the SCM Agreement. The third and fourth sentences of Article 15.5 govern the non-attribution analysis that an investigating authority is required to conduct in CVD investigations. They read:

> The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, 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 and productivity of the domestic industry.

7.373. At the outset, we note that the third sentence of Article 15.5 contains the word "shall", which means that the requirement to conduct a non-attribution analysis is mandatory in the presence of factors that are known to the investigating authority and are causing injury to the domestic industry at the same time as subsidized imports. The point in time when these factors produce their effects matters, as Article 15.5 unequivocally refers to factors causing injury "at the same time" as subsidized imports. A third important element in the third sentence of Article 15.5 is the qualifier "known". Accordingly, an investigating authority is required to conduct a non-attribution analysis only if the existence of other injurious effects is "known" to it either because an interested party has raised the issue during the investigation or on the basis of other elements. The fourth sentence contains an illustrative list of factors which "may be relevant" in a non-attribution analysis. That the list is illustrative is clear because of the presence of the words "include" and "inter alia". The non-attribution analysis should thus not be confined to the illustrative list of factors provided in the fourth sentence, and should instead encompass the whole range of injurious factors that are known to the authority.

7.374. The Appellate Body has held on more than one occasion that, through a non-attribution analysis, an investigating authority ensures that "the injury it ascribes to the subsidized imports is actually caused by those imports", as opposed to other factors.[857] Such an exercise requires that the effects of the various factors causing injury to the domestic industry be separated and distinguished.[858] We agree with these clarifications on the scope and the nature of the non-attribution analysis, and therefore we adopt them as our own in the evaluation of the matter before us. Finally, we note that Article 15.5 does not prescribe any specific methodology for the conduction of a non-attribution analysis.[859]

7.375. Against this background, we now turn to the specific claims raised by India.

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[856] India's first written submission, paras. 62-63 (quoting Panel Report, *Mexico – Olive Oil*, para. 7.305).
[857] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.171 and the previous reports cited in fn 360 thereto.
[858] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *EU – PET (Pakistan)*, para. 5.171.
[859] Appellate Body Report, *EU – PET (Pakistan)*, para. 5.172.

7.12.3.1 Whether the USITC's Section 129 Determination failed to consider the impact of non-subsidized imports on the state of the domestic industry

7.12.3.1.1 Non-subsidized imports already subject to anti-dumping duties

7.376. India has brought an all-encompassing claim concerning the USITC's examination of the impact of all dumped, non-subsidized imports in its non-attribution analysis. In this subsection, we will examine the part of India's claim concerning the USITC's examination of imports from Brazil, Japan, and the Russian Federation. In the following subsection, we will examine the remainder of India's claim, concerning the USITC's examination of imports from China, Kazakhstan, the Netherlands, Romania, Chinese Taipei, and Ukraine. At the outset, we recall that the United States imposed CVDs on imports of hot-rolled steel from, *inter alia*, India in 2001. We further recall that anti-dumping duties on imports of the same product from Brazil, Japan, and the Russian Federation had been in force in the United States since 1999.

7.377. According to India, the USITC's conclusion that no factors other than subject imports could explain the poor performance of the domestic industry[860] is contradicted by the circumstance that anti-dumping duties on hot-rolled steel products from Brazil, Japan, and the Russian Federation were already in force during the USITC's investigation.[861] In other words, India argues that the imports from these three countries were necessarily a factor other than subsidized imports causing injury to the domestic industry and the United States failed to examine it.[862] Furthermore, India argues that there is no rationale to presume that the injury determined to exist in the Section 129 Determination was not attributable to imports from Brazil, Japan, and the Russian Federation, even if their volume decreased subsequent to the imposition of anti-dumping duties.[863]

7.378. The United States rebuts that the USITC explained why imports from Brazil, Japan, and the Russian Federation, already subject to anti-dumping duties, did not cause injury to the domestic industry at the same time as subject subsidized imports. In particular, the USITC explained that the effects of these imports were mitigated following the imposition of anti-dumping duties in 1999, leading to a temporary improvement in the domestic industry's performance.[864] According to the United States, the subsequent deterioration of the state of the domestic industry corresponded with an increase in the volume of subject subsidized imports, and could thus not be attributed to imports from Brazil, Japan, and the Russian Federation.[865] Finally, the United States argues that India's claim is based on the erroneous assumption that an investigating authority is prohibited from finding simultaneous injury from dumped and subsidized imports over the same time period.[866]

7.379. In its non-attribution analysis, the USITC noted that it had "already discussed the impact that the imports from Brazil, Japan, and Russia had on the domestic industry at the beginning of the period of the investigation".[867] In this regard, we note the following discussion of the impact of imports from Brazil, Japan, and the Russian Federation in the Section 129 Determination:

> We recognize that the domestic industry's performance in the early portion of the period of investigation reflected the adverse effects of unfairly traded hot-rolled steel imports from Brazil, Japan, and Russia and that the industry had gained some benefit from the import relief imposed on such imports by mid-1999. For a brief time, domestic shipments increased, prices increased (although prices generally remained below peak 1998 levels), and the domestic industry's financial performance improved. This brief improvement is evident in the industry's substantially better performance in first quarter 2000 not only compared to first quarter 2001, but also relative to its performance for full years 1999 and 2000. This improvement did not last. Despite increases in apparent U.S. consumption in the merchant market from 1999 to 2000, the domestic industry's commercial shipments declined at the same time as subject

[860] USITC's Section 129 Determination, (Exhibit IND-58), p. 32.
[861] India's first written submission, para. 60; second written submission, para. 76.
[862] India's first written submission, para. 61 (a).
[863] India's first written submission, para. 61(a).
[864] United States' first written submission, para. 145.
[865] United States' first written submission, para. 145 (referring to USITC's Section 129 Determination, (Exhibit IND-58), pp. 28-30); second written submission, para. 71.
[866] United States' second written submission, para. 73.
[867] USITC's Section 129 Determination, (Exhibit IND-58), p. 32.

> CVD imports continued to increase and reached peak period levels in late 1999 and the first half of 2000. Moreover, U.S. importers' inventories of subject CVD imports almost doubled from 1999 to 2000 and remained at high levels in the first quarter of 2001. These increases in subject CVD imports in the first half of 2000 (prior to the November 2000 filing of the petitions) that coincided with peak levels of purchasers' inventories, to which low-priced subject CVD imports contributed, adversely affected the performance of the domestic industry. Virtually every financial and production indicator was lower in interim 2001 than in interim 2000.[868]

7.380. This excerpt from the Section 129 Determination permits the conclusion that imports from Brazil, Japan, and the Russian Federation already subject to anti-dumping duties were considered in the context of a general discussion on the impact of non-subsidized imports and were also the subject of a specific examination by the USITC. In light of the foregoing, we reject India's claim that the USITC failed to examine the impact of imports from Brazil, Japan, and the Russian Federation on the domestic industry and to distinguish it from that of subject CVD imports.

7.381. A separate question is whether the USITC properly explained the nature and extent of the effects of imports from Brazil, Japan, and the Russian Federation that were already subject to anti-dumping duties. In this respect, we find the following elements to be particularly useful for our assessment. First, the injurious effects of imports from Brazil, Japan, and the Russian Federation were concentrated at the beginning of the POI. By mid-1999, the domestic industry initially recovered due, *inter alia*, to the imposition of anti-dumping duties on exporters from the three above-mentioned countries. However, as observed by the USITC in the above extract, the situation of the domestic industry declined again at the same time as an increase in subsidized imports volumes and market share. In this regard, the United States argues that this subsequent decline could not be attributed to non-subject imports from Brazil, Japan, and the Russian Federation, because the injurious effects of those imports were mitigated by the imposition of anti-dumping duties.[869] The explanation provided by the United States is in line with the explanation rendered by the USITC in the Section 129 Determination as extracted above.[870] We find this temporal distinction to be crucial, especially in consideration of the fact that Article 15.5 of the SCM Agreement requires that an investigating authority examine any known factors other than the subsidized imports which "at the same time" are injuring the domestic industry. Clearly, the analysis conducted by the USITC reveals that the injurious effects of the subject subsidized imports materialized *after* the injurious effects of imports from Brazil, Japan, and the Russian Federation would have been mitigated by the imposition of anti-dumping duties in 1999.

7.382. In this respect, India emphasizes the circumstance that, by imposing anti-dumping duties on imports from Brazil, Japan, and the Russian Federation, the USITC acknowledged that they were causing injury to the domestic industry.[871] However, this allegation does not take into account the fact that the injury investigation period for the anti-dumping investigation leading to the imposition of duties on imports from Brazil, Japan, and the Russian Federation covered the years of 1996, 1997, and 1998.[872] As a result, there was only one year of overlap with the underlying CVD investigation. Also, the injury caused by imports from Brazil, Japan, and the Russian Federation was mitigated by the imposition of anti-dumping duties.

7.383. In light of these considerations, we conclude that the USITC analysed imports from Brazil, Japan, and the Russian Federation separately and explained the nature and extent of their effects on the state of the domestic industry.

7.12.3.1.2 Non-attribution: "decumulated" dumped imports

7.384. In the original determination, the USITC cross-cumulated the injurious effects of subsidized imports from Argentina, India, Indonesia, South Africa, and Thailand with those of dumped (non-subsidized) imports from China, Kazakhstan, the Netherlands, Romania, Chinese Taipei, and Ukraine during the same investigation period. The premise of the Section 129 Determination lies in the original finding by the original panel and the Appellate Body that the USITC acted inconsistently with

[868] USITC's Section 129 Determination, (Exhibit IND-58), pp. 28-29. (fns omitted)
[869] United States' second written submission, para. 71.
[870] USITC's Section 129 Determination, (Exhibit IND-58), p. 29.
[871] India's first written submission, para. 60.
[872] United States' response to Panel question No. 66, para. 169.

Article 15 of the SCM Agreement by cross-cumulating the injurious impact of subsidized and dumped, non-subsidized imports. In the Section 129 Determination, the USITC decumulated dumped imports from subsidized imports. The injury analysis in the Section 129 Determination, therefore, is only concerned with the effects of subsidized imports.

7.385. India argues that the USITC failed to examine in its non-attribution analysis the impact of dumped imports from China, Kazakhstan, Netherlands, Romania, Chinese Taipei, and Ukraine.[873] According to India, the USITC's conclusion that no alternative cause can explain the poor performance of the domestic industry is contradicted by the imposition of anti-dumping duties against the six above-mentioned countries, which were simultaneously subject to a "trade remedial" investigation.[874] To the extent that a non-attribution analysis was conducted, India argues that the USITC failed to explain the nature and the impact of dumped imports from China, Kazakhstan, Netherlands, Romania, Chinese Taipei, and Ukraine on the state of the domestic industry.[875]

7.386. In responding to questions raised by the Panel, the United States maintains that Article 15.5 refers to "the volumes and prices of non-subsidized imports of the product in question" and does not identify further subsets of non-subsidized imports that must be examined. According to the United States, the covered Agreements do not demand that an investigating authority segregates various groups of non-subsidized imports for the purposes of a non-attribution analysis.[876] The United States argues that the USITC closely examined the impact of non-subsidized imports. While recognizing that such imports had significant presence in the US market during the POI, the USITC found that their volume and market share declined at the same time as the volume and market share of subsidized imports increased.[877] Further, the United States argues that the USITC examined available pricing data concerning non-subject imports and found that non-subject imports were priced higher than subsidized imports in more than half of the quarterly comparisons.[878]

7.387. We now turn to the evidence before us in order to address India's claim. The USITC examined the impact of all the imports not subject to a CVD investigation (i.e. non-subject imports) as a single group in its non-attribution analysis. The relevant passage from the Section 129 Determination reads:

> We have also closely examined the role of nonsubject imports in this proceeding. While nonsubject imports had a significant presence in the U.S. market, they accounted for a substantially declining share of the U.S. merchant and total market during the period of investigation. Nonsubject imports declined from 11.5 million short tons in 1998 to 5.7 million short tons in 2000, or by 50.8 percent. Nonsubject imports' share of apparent U.S. consumption in the merchant market declined from 36.2 percent in 1998 to 19.7 percent in 2000, and was 20.3 percent in interim 2000 and 11.9 percent in interim 2001. Moreover, the available pricing data for imports from six nonsubject sources (China, Kazakhstan, Netherlands, Romania, Taiwan, and Ukraine) indicate that nonsubject imports as a group were priced higher than subject CVD imports in 231 of 453 quarterly price comparisons. In addition, we have already discussed the impact that the imports from Brazil, Japan, and Russia had on the domestic industry at the beginning of the period of investigation.[879]

7.388. We note that the USITC discussed the decline in volume and market share of the whole of non-subject imports over the injury investigation period, without distinguishing between goods subject to the anti-dumping investigation and goods not subject to any trade remedy proceeding. In response to the Panel's questioning, the United States stressed that Article 15.5 refers to "the volumes and prices of non-subsidized imports of the product in question" as a potential other known

[873] India's first written submission, para. 61(a).
[874] India's second written submission, para. 76.
[875] India's second written submission, para. 79.
[876] United States' response to Panel question No. 67, paras. 170-171.
[877] United States' first written submission, para. 144; second written submission, para. 71.
[878] United States' first written submission, para. 144; second written submission, para. 71.
[879] USITC's Section 129 Determination, (Exhibit IND-58), pp. 31-32. (fns omitted)

factor which might cause injury to the domestic industry at the same time as subsidized imports and does not identify further subsets of non-subsidized imports that must be examined.[880]

7.389. We recall that the list of potential other known factors laid down in Article 15.5 is non-exhaustive.[881] The non-attribution analysis should necessarily be conducted on a case-by-case basis, and the factors that an authority is supposed to consider in such an exercise vary according to the specific circumstances of the investigation and the situation in the market for the product concerned. While it is true that Article 15.5 does not explicitly require an investigating authority to break down the whole range of non-subsidized products, it does not exclude this possibility either. While imports from all third countries might not necessarily be injurious, there can be situations where the authority is aware that imports from a subset of third countries are. The Section 129 proceedings at issue here are one such case.

7.390. Pursuant to the original investigation, the United States imposed anti-dumping duties on imports from China, Kazakhstan, Netherlands, Romania, Chinese Taipei, and Ukraine. It was the USITC itself that concluded that dumped imports from these countries were causing injury to the domestic industry, a necessary condition for the imposition of anti-dumping duties. We further recall that the original anti-dumping investigation was conducted simultaneously with the original CVD investigation, and covered the exact same injury investigation period. Dumped imports from China, Kazakhstan, Netherlands, Romania, Chinese Taipei, and Ukraine were thus a factor known to the USITC which caused injury to the domestic industry at the same time as subsidized imports.

7.391. The USITC opted to consider the impact of non-subsidized imports as a single factor. We note, however, that the data annexed to the Section 129 Determination suggests that the decumulated dumped imports had a different impact *vis-à-vis* the imports from all other sources, which in turn warranted a separate assessment. While the volume of the whole of non-subject imports decreased from 11.5 million short tons in 1998 to 5.6 million short tons in 2000 (i.e. by 50.8%), decumulated dumped imports increased from 1.2 million short tonnes in 1998 to 2.6 million short tonnes in 2000 (i.e. by 124.7%).[882] Similarly, while the share of apparent US consumption in the merchant market of the whole of non-subject imports declined from 36.2% in 1998 to 19.7% in 2000, the share of decumulated dumped imports increased from 3.6% in 1998 to 9% in 2000 (i.e. +5.4%).[883]

7.392. Two main elements can be extracted from the data reproduced above. First, both as regards import volumes and share of apparent US consumption, decumulated dumped imports follow divergent trends as opposed to the rest of non-subject imports. In particular, over the POI, the decumulated dumped imports' volumes and share of apparent US consumption substantially increased while the rest of non-subject imports decreased. Second, decumulated dumped imports and subsidized imports follow parallel trends with regard to both sets of data, and decumulated dumped imports' volumes and share of apparent US consumption are higher than the figures for subsidized imports throughout the whole POI. In light of the diverging trends between decumulated dumped imports and the rest of non-subject imports, it could have been expected that a reasonable and unbiased investigating authority would have identified these differences and provided an adequate explanation that it was not attributing to subject imports the injury that it had concurrently found to be caused to the domestic industry by decumulated dumped imports. The USITC failed to do so. Instead, even though it had concluded in a concurrent anti-dumping investigation that such dumped imports were causing injury to the domestic industry, the USITC essentially ignored this other known cause of injury and considered the impact of non-subsidized imports as a single factor, aggregating the effects of decumulated dumped imports with those of other non-subject imports from other third countries.

7.393. The USITC also compared the pricing data for decumulated dumped imports with those of subsidized, subject imports from India, concluding that such Indian imports were priced lower than decumulated dumped imports in 77 of 128 quarterly price comparisons.[884] Our concerns with this examination are twofold. First, the USITC draws a conclusion for the entire set of non-subsidized products by exclusively looking at the prices of imports from six countries. Second, the USITC limits

[880] United States' response to Panel question No. 67, para. 170.
[881] See above para. 7.373.
[882] USITC's Section 129 Determination, (Exhibit IND-58), table No. HRS-1, p. I-2.
[883] USITC's Section 129 Determination, (Exhibit IND-58), table No. HRS-1, p. I-5.
[884] USITC's Section 129 Determination, (Exhibit IND-58), fn 135.

itself to a comparison between the prices of dumped, non-subsidized products with those of Indian like products. Nowhere does the USITC compare the prices of dumped, non-subsidized products with the prices of the domestic like product in the United States. As such, the Section 129 Determination is silent on the impact of decumulated dumped imports on the prices for the domestic like product in the United States.

7.394. While recalling that an investigating authority is not required to follow any specific methodology for a non-attribution analysis, it is expected to make its conclusions on the basis of all the available evidence before it. The record evidence suggests that the USITC omitted to consider evidence that it had already collected, and therefore was immediately available to it.

7.395. Based on the foregoing, we find that the USITC failed to acknowledge the existence of decumulated dumped imports as a factor, distinct from other non-subsidized imports more generally, causing injury to the domestic industry. As a result, we conclude that the USITC acted inconsistently with Articles 15.1 and 15.5 of the SCM Agreement.

7.12.3.2 Non-attribution: plant closures

7.396. India argues that the USITC failed to note that during the POI US producers experienced several plant closures and interruptions to their production of hot-rolled steel products. According to India, the causes reported in the original determination for the closures and interruptions included equipment failure, installation of new equipment, power outages, and reduced demand, and were thus unrelated to imports.[885]

7.397. The United States preliminarily objects that this claim is outside the Panel's terms of reference. According to the United States, the facts pertaining to the closure of domestic facilities during the POI were unchanged from the original investigation and were not raised in the original proceedings.[886] In addition, the United States submits that no interested party raised the issue in the context of the CVD investigation and that, in any event, the USITC did not find that plant closures caused injury.[887] Further, the United States argues that the USITC did not attribute the plant closures to subsidized imports, nor did it establish that they were indicative of material injury.[888] The United States reports that the USITC actually noted that the closures did not prevent the US production capacity from increasing.[889] In conclusion, the United States argues that since the USITC did not find the plant closures to be injurious, and no interested party argued otherwise in the CVD investigation, these were not a known factor that deserved evaluation pursuant to Article 15.5 of the SCM Agreement.[890]

7.398. We first address the United States' objections as to the inclusion of this claim in the scope of these compliance proceedings. The United States correctly notes that plant closures were already discussed in the context of the original determination, that the factual background remained unchanged and that India did not bring related claims in the original WTO proceedings. The closure of plants can be considered as a severable aspect from the measure taken to comply with the adverse rulings.[891] For these reasons, we consider this claim to be outside the scope of these compliance proceedings.

7.399. In any event, even if we were to examine the merits of India's claim, we would not find that the USITC acted inconsistently with the requirement laid down in Articles 15.1 and 15.5 for the following reasons. In this respect, it is relevant to stress that India's claim concerns the alleged failure by the USITC to "note" the causes[892] for the plant closures and to ensure that they were not

[885] India's first written submission, para. 61(b).
[886] United States' first written submission, para. 92. India responds that the non-attribution analysis in the Section 129 Determination is a completely distinct examination as opposed to the non-attribution analysis conducted in the original investigation against the background of a cumulative assessment of dumped and subsidized imports. (India's second written submission, para. 48(e)).
[887] United States' first written submission, para. 146.
[888] United States' first written submission, para. 146.
[889] United States' first written submission, para. 146.
[890] United States' first written submission, para. 147.
[891] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432.
[892] India's response to Panel question No. 68.

attributed to subject CVD imports in the Section 129 Determination. We extract below the relevant passage from the Section 129 Determination:

> Despite increased production and shipments, the domestic industry's financial performance was poor during most of the period of investigation. The domestic industry had operating losses on commercial and total U.S. sales in both 1999 and 2000. *Several domestic producers entered Chapter 11 bankruptcy proceedings and two ceased operations altogether*, despite increases in both commercial shipments and production.[893]

7.400. The United States affirms that while the USITC noted several plant closures, it did not attribute them to subsidized imports, nor did it establish that they were indicative of material injury, and in fact concluded that the closures did not prevent the US industry's production capacity from increasing during this period.[894] In a footnote, the United States explains that the USITC referred to closures only to demonstrate why some domestic producers had not provided responses to the questionnaires.[895] We note that the passage reproduced above is essentially identical to the relevant portion of the 2001 original determination.[896]

7.401. India's claim is simply directed at the USITC's alleged "failure to note" the causes for closure of several plants. However, India does not explain how this alleged "failure to note" rendered the USITC's non-attribution analysis inconsistent with Article 15.5 of the SCM Agreement. Nothing in India's claim calls upon the Panel to address the merits or the substance of how the USITC considered such plant closures. Since the record evidence proves that the USITC acknowledged this evidence, we dismiss India's claim.

7.402. In addition, India provides a list of factors that could explain the closure of plants (equipment failure, installation of new equipment, power outages, fires, and reduced demand).[897] However, it does not clearly explain or substantiate that there was another "known factor" causing injury to the domestic industry. In this respect, we note that an investigating authority need only address an alleged factor raised by an interested party where sufficient evidence has been provided that the factor causes injury.[898] India has not satisfied the Panel that the USITC had a sufficient threshold of evidence before it to warrant the explicit and discrete consideration of an "other known factor".

7.403. In this regard, the United States notes in its second written submission that neither India, nor any other interested party suggested that the USITC should investigate the reasons for the plant closures, or that such reasons could amount to factors that needed to be examined for the purposes of a non-attribution analysis.[899] The evidence shows that India mentioned plant closures in the context of a request to the USITC to consider the decline in productivity of the domestic industry in its injury analysis.[900] In that context, India noted that "certain internal issues" experienced by US producers were responsible for any individual decline in the production and sale of the domestic producers, and that therefore closures and interruptions should be taken into account in the assessment of the impact of subsidized imports.[901] India did not substantiate its request further, nor did it provide supporting evidence.

7.404. The USITC examined India's request explicitly in the non-attribution analysis and concluded that, notwithstanding a decline between 2000 and 2001, productivity increased substantially for most of the period (i.e. between 1998 and 2000).[902] Because the USITC concluded that injury did not materialize as a decline in productivity, it logically did not need to investigate as to the causes

[893] USITC's Section 129 Determination, (Exhibit IND-58), pp. 27-28. (emphasis added; fn omitted)
[894] United States' first written submission, para. 146.
[895] United States' first written submission, fn 170 (referring to USITC's Section 129 Determination, (Exhibit IND-58), pp. 27-28; and 2000 Issues and decision memorandum, (Exhibit IND-6), p. III-1).
[896] Compare USITC's 2001 Determination, (Exhibit IND-5), p. 23.
[897] India's first written submission, para. 61(b).
[898] Panel Report, *EU – Fatty Alcohols (Indonesia)*, paras. 7.196-7.200.
[899] United States' second written submission, para. 76.
[900] GOI's Section 129 brief, (Exhibit USA-31), paras. 6.1-6.2.
[901] GOI's Section 129 brief, (Exhibit USA-31), para. 6.2.
[902] USITC's Section 129 Determination, (Exhibit IND-58), p. 32.

for this non-existent decline. Furthermore, India does not claim that the USITC's conclusion that the domestic industry's productivity did not decline was flawed.

7.405. Based on the foregoing, even if we were to consider that this claim is within the scope of these compliance proceedings, we would conclude that the United States did not act inconsistently with Article 15.5 of the SCM Agreement.

7.12.3.3 Non-attribution: contraction in demand

7.406. India argues that the USITC failed to examine the injury caused to the domestic industry by the decline in US domestic demand during the POI.[903] India reports data from the tables annexed to the Section 129 Determination showing that US consumption declined by 10% between 1998 and 2000.[904]

7.407. The United States rebuts that the USITC explicitly examined demand trends as an alternative cause of injury.[905] According to the United States, the USITC explained that the demand changes could not explain the injury suffered by the domestic industry, because of a temporal mismatch between declines in domestic industry's indicators (which began early in 2000) and declines in demand (which began later that year).[906] The United States further notes that while apparent US consumption also declined between 1998 and 1999, other indicators improved during the same period (production, shipments, and market share) and the USITC did not find that indicators in that period amounted to evidence of material injury.[907]

7.408. The main question for the Panel is whether the USITC considered contraction in demand as a factor, other than subsidized imports, causing injury to the domestic industry. The text of the Section 129 Determination shows that, in the context of its non-attribution analysis, the USITC did consider the potential injury caused by the contraction in demand:

> We have considered factors other than subject CVD imports to ensure that we are not attributing any injury from other such factors to subject imports. We recognize that the domestic industry's condition was affected by a *decline in apparent U.S. consumption* in the latter part of 2000,[131] but also find that domestic shipments and production contracted at a time when overall apparent consumption was still strong and while rapidly increasing subject imports gained sales from the domestic industry largely through underselling. Specifically, *the decline in demand* for hot-rolled steel did not occur until the end of 2000, yet the substantial drop in the domestic industry's commercial shipments began in the beginning of 2000 as low-priced subject CVD import volumes reached peak period levels.[132]908

[131] The industrial production index peaked in the third quarter of 2000 and declined thereafter. USITC Pub. 3446 at II-7.
[132] USITC Pub. 3446 at Table III-5 and calculated from V-10-V-11. Based on quarterly data, the domestic industry's commercial shipments were 6.0 million short tons in first quarter 2000, 5.6 million short tons in second quarter 2000, 4.9 million short tons in third quarter 2000, and 4.7 million short tons in fourth quarter 2000. *Id.* at Table III-5. Moreover, commercial shipments, which compete directly with subject CVD imports, declined by 19.2 percent from first quarter 2000 to third quarter 2000, whereas internal consumption declined only by 5.3 percent for the same period. *Id*.

7.409. Not only did the USITC recognize the decline in demand, but it also separated the injurious effects of this factor from the injurious effects of subsidized imports. In particular, the USITC found that the decline in demand only started at the end of 2000, while the domestic shipments had already started their contraction at the beginning of 2000, at the same time as subsidized imports peaked.[909]

[903] India's first written submission, para. 61(c); second written submission, para. 72.
[904] India's first written submission, para. 61(c).
[905] United States' first written submission, para. 143.
[906] United States' first written submission, para. 143; second written submission, para. 71.
[907] United States' first written submission, fn 163.
[908] USITC's Section 129 Determination, (Exhibit IND-58), p. 31. (emphasis added)
[909] USITC's Section 129 Determination, (Exhibit IND-58), p. 31.

7.410. Therefore, we conclude that India has not demonstrated that the USITC has failed to separate and distinguish the impact of the contraction in demand on the domestic industry from the impact of subsidized imports.

7.12.4 Conclusion

7.411. India has not demonstrated that the USITC failed to establish a causal relationship between subsidized imports and the injury to the domestic industry.

7.412. India has not demonstrated that the USITC, in its non-attribution analysis, failed to consider the impact of goods from Brazil, Japan, and the Russian Federation.

7.413. India has demonstrated that the USITC failed to consider the impact of dumped imports from China, Kazakhstan, Netherlands, Romania, Chinese Taipei, and Ukraine on the injury suffered by the domestic industry and to separate and distinguish it from the effects of subsidized imports and other known factors.

7.414. India's claim that the USITC failed to consider the cause for the closure of several plants is outside the scope of these compliance proceedings.

7.415. India has not demonstrated that the USITC, in its non-attribution analysis, failed to consider the contraction in demand.

7.13 Whether the USDOC's termination of previously agreed CVD rates is inconsistent with Article 19.3 of the SCM Agreement

7.13.1 Factual background

7.416. In the 2006 administrative review, the USDOC determined a CVD of 484.41%[910] on the importation of JSW's hot-rolled flat steel products. The USDOC applied total adverse facts available to JSW for its failure to fully participate in the investigation. JSW challenged the USDOC's decision before the Court of International Trade (CIT) and, in December 2010, the USDOC and JSW settled the case by agreeing on a CVD rate for JSW of 76.88%.[911]

7.417. In the 2008 administrative review, the USDOC determined a CVD of 577.28%[912] on the importation of Tata's hot-rolled flat steel products. The USDOC applied total adverse facts available to Tata for its failure to fully participate in the investigation. Tata challenged the USDOC's decision before the CIT and, in December 2011, the USDOC and Tata settled the case by agreeing on a CVD rate for Tata of 102.74%.[913]

7.418. India requested WTO consultations in 2012. Before the original panel, India challenged the application of facts available to the evaluation of certain subsidy programmes. India did not challenge the rates agreed upon by the USDOC with JSW and Tata in the context of domestic court proceedings. The original panel found that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement with regard to the evaluation of seven subsidy schemes and the United States did not appeal these findings.[914] The United States launched Section 129 proceedings to comply with the DSB recommendation concerning the original determination. In that context, the USDOC reviewed its application of facts available in respect of JSW and Tata in the 2006 and 2008 reviews, and determined CVD rates of 215.54% for JSW and 140.18% for Tata.[915]

7.419. In the Section 129 proceedings, JSW contested that the USDOC failed to consider that an agreed rate was already in place. In its response, the USDOC argued that JSW's objection did not fully take into account the US law governing redeterminations in the aftermath of unfavourable

[910] India's first written submission, para. 225.
[911] JSW Amended final results (2010), (Exhibit IND-48), p. 1.
[912] India's second written submission, para. 226.
[913] Tata Amended final results (2011), (Exhibit IND-49), p. 1.
[914] Panel Report, *US – Carbon Steel (India)*, paras. 7.451-7.475.
[915] USDOC Implementation of Section 129 Determination, (Exhibit USA-17), p. 27414.

WTO dispute settlement proceedings.[916] The USDOC explained that under Section 129 of the URAA, when so requested by the Office of the USTR, an investigating authority (be it the USITC or the USDOC) must issue a determination that would render its action not inconsistent with the Panel's or Appellate Body's findings.[917] The USDOC noted that the Statement of Administrative Action connected with Section 129 provides that such determination has prospective effects only and is a "new", "second" and "different" determination.[918] The USDOC also noted that such a determination is subject to domestic judicial review, independent from the review of the original determination that was previously found to be WTO-inconsistent.[919] Finally, the USDOC concluded that having prevailed on certain WTO claims, India must understand that the resulting Section 129 redetermination supersedes previous steps in the investigation, including final results and accompanying cash deposit rates.[920]

7.420. India argues that the USDOC had two applicable CVD rates: the CVD rates determined in the context of the settlement agreements between the USDOC, on one side, and JSW and Tata, respectively, on the other; and the newly determined CVD rates determined in the Section 129 proceedings. India argues that the USDOC acted inconsistently with the requirement laid down in Article 19.3 that duties be levied in the appropriate amounts, by failing to compare the two rates and to explain why the newly determined CVD rates were to be preferred to the lower settlement rates.[921] The parties do not contest the factual background to India's claim. Therefore, we turn immediately to our analysis.

7.13.2 The Panel's analysis

7.421. Article 19.3 of the SCM Agreement reads, in relevant part:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

7.422. In support of its claim, India refers to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, according to which the notion of "appropriate amounts" implies a certain tailoring of the CVD levied, according to the specific circumstances of the case.[922] According to India, in the current proceedings, two CVD rates were applicable: one determined by means of a settlement in the context of domestic court proceedings; and another one determined in the context of a subsequent Section 129 redetermination.[923] India argues that the USDOC should have compared the two rates and explained why the revised CVD rate determined in the context of the Section 129 proceedings was the "appropriate amount" of CVD levied on imports produced by JSW and Tata.[924]

7.423. The United States responds that Article 19.3 of the SCM Agreement is essentially concerned with the non-discriminatory application of CVDs, as appropriate to each source of imports.[925] In the United States' view, neither Article 19.3 of the SCM Agreement nor any other provision of the SCM Agreement or the DSU impose a "ratchet", whereby if a CVD rate was lower in the past, it may not be increased in the future.[926] The United States further argues that India incorrectly relies on the Appellate Body's interpretation of Article 19.3. According to the United States, the Appellate Body's interpretation of Article 19.3 in *US – Anti-Dumping and Countervailing Duties (China)* is incorrect insofar as it considers the provision to relate not only to the imposition of the

[916] Final Determination, (Exhibit IND-60), p. 7.
[917] Final Determination, (Exhibit IND-60), p. 7.
[918] Final Determination, (Exhibit IND-60), p. 7.
[919] Final Determination, (Exhibit IND-60), p. 7.
[920] Final Determination, (Exhibit IND-60), p. 8.
[921] India's first written submission, paras. 236 and 239.
[922] India's first written submission, para. 235 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 552-553).
[923] India's first written submission, paras. 225-226; second written submission, para. 272.
[924] India's second written submission, para. 273.
[925] United States' first written submission, para. 415.
[926] United States' first written submission, para. 400.

duties, but also to their calculation.[927] Moreover, the United States notes that the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* does not provide useful guidance since that case concerned the double imposition of anti-dumping duties and CVDs on the same product, whereas the Section 129 redetermination is concerned with a different factual situation.[928] Finally, the United States argues that the rates determined by the USDOC are entirely appropriate and tailored to the circumstances: the USDOC redetermined the CVD calculations with a view to bringing its measures into conformity with the DSB recommendation and the ensuing Section 129 rates correlate to the subsidy programmes affected by the findings in the original WTO dispute.[929] By contrast, the USDOC had reached a settlement with JSW and Tata in the context of the domestic court proceedings that took place before the original WTO dispute started and thus bore no relation to an analysis of individual subsidy programmes.[930] Therefore, the United States argues that reliance on those previously agreed rates would not have been proper.[931]

7.424. The Appellate Body read the first sentence of Article 19.3 as containing two distinct elements: a requirement that duties be levied in the appropriate amounts in each case; and a requirement that duties be levied on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury.[932] It therefore concluded that Article 19.3 of the SCM Agreement is not simply a non-discrimination provision, as argued by the United States in its submissions. More than that, it contains an obligation that, while meeting the non-discrimination requirement, duties be levied in the appropriate amounts. To properly address India's claims, it is necessary to clarify the meaning and the scope of this requirement in light of the facts of this case, noting that Article 9.2 of the Anti-Dumping Agreement contains, *mutatis mutandis*, identical language and that both Article 19.3 of the SCM Agreement and Article 9.2 of the Anti-Dumping Agreement have already been interpreted by previous panels and the Appellate Body.

7.425. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* noted that the dictionary definitions of the term "appropriate" include "proper", "fitting" and "specially suitable (*for*, *to*)".[933] These definitions suggest the existence of core norms that require adaptation to particular circumstances.[934] The Appellate Body considered that, in light of the content of the first sentence of Article 19.3, it would not be appropriate to levy CVDs on imports from sources that have renounced relevant subsidies, or on imports from sources whose price undertakings have been accepted.[935] Similarly, the notion of "appropriate amounts" requires a certain tailoring of the amounts according to the circumstances, meaning that the requirement that duties be imposed on a non-discriminatory basis should not be read in a formalistic manner.[936] We consider that this characterization of the ordinary meaning of "appropriate amounts" is persuasive and we adopt it as our own.

7.426. Interpreting "appropriate amounts" in its context, the Appellate Body turned to the other paragraphs of Article 19 and warned against ascribing great significance to the requirement in Article 19.4 that CVDs not be imposed on imported products in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product. In the Appellate Body's view, the imposition of CVDs in excess of the amount of subsidization is not the only circumstance where duties are not levied in their "appropriate amounts".[937]

7.427. The Appellate Body further noted that Article 19.2 states that it is "desirable" that duties be less than the total amount of the subsidy if such lesser duty is adequate to remove the injury (the

[927] United States' first written submission, para. 430.
[928] United States' first written submission, para. 434.
[929] United States' first written submission, paras. 437-439.
[930] United States' first written submission, para. 440.
[931] United States' first written submission, para. 440; second written submission, para. 260.
[932] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552.
[933] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552 and fn 531 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 106).
[934] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552.
[935] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 553.
[936] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 553.
[937] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 555-556. We note that a previous panel examining a claim brought under Article 9.2 of the Anti-Dumping Agreement found it reasonable to conclude that an anti-dumping duty meeting the requirements of Article 9.3 (i.e. not exceeding the margin of dumping) would be "appropriate" within the meaning of Article 9.2. (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.365).

so-called "lesser-duty rule"). According to the Appellate Body, Article 19.2 "encourages" investigating authorities "to link the actual amount of the countervailing duty to the injury to be removed".[938] The Appellate Body inferred from these considerations that the imposition and levying of CVDs are not "hermetically isolated" from considerations pertaining to the injury suffered by the domestic industry.[939] It is important to stress, however, that the Appellate Body reached these conclusions based on a situation where countervailing and anti-dumping duties were simultaneously imposed and levied in respect of the same products exported by the same producers. In that context, the Appellate Body found that an investigating authority should not ignore, when fixing the appropriate amount of CVDs, that anti-dumping duties are simultaneously in place to offset the same subsidization.[940] Noting that both Article 19.4 of the SCM Agreement and Article 9.3 of the Anti-Dumping Agreement set ceilings on the maximum amount of duties that can be imposed to remedy subsidization and dumping, respectively[941], the Appellate Body concluded that a joint reading of the two Agreements suggests that "the imposition of double remedies would circumvent the standard of appropriateness that the two Agreements separately establish for their respective remedies".[942] In other words, according to the Appellate Body, the simultaneous levying of a total amount of anti-dumping and CVDs would not be appropriate and would be in excess of the combined amounts of dumping and subsidization found by the investigating authority.[943] In light of the different underlying scenario, we consider this reasoning of the Appellate Body to be of limited practical relevance for the resolution of the case before us.

7.428. The facts on the record show that the United States took steps to remedy an inconsistency found in the original WTO dispute. Since the original WTO proceedings concerned the application of adverse facts available for the determination of the subsidization received by the two companies, and that element was found to be WTO-inconsistent, the USDOC revised its determination of the rates of subsidization in the 2006 and 2008 reviews. The USDOC did not compare the adequacy of the CVD rates stemming from the reviewed subsidization rates with the rates previously agreed in the context of CIT proceedings. The question for the Panel is whether the USDOC should have done so.

7.429. As a preliminary matter, we note that the SCM Agreement says nothing about rates that may or may not be agreed in the context of domestic court proceedings. This is a matter for domestic law. Furthermore, a closer look at the JSW and Tata *Amended Final Results* summarising the results of the settlements reveals that the agreed rates were to remain in place until the USDOC changed them in future administrative reviews of the respective firms.[944] The explanation provided by the USDOC in response to JSW in the Section 129 Determination is consistent with this. The USDOC, in fact, clarified that the Section 129 Determination has prospective effects and is a "new", "second", and "different" determination compared to the amended final results. As a result of the determination of new CVD rates for the two companies, the previously agreed rates were no longer relevant. Thus, even if the provisions of the SCM Agreement were somehow applicable in this context, we still cannot see how a consideration of the "appropriateness" of the CVDs levied would have required any comparison with previously settled rates.

7.430. India further argues that the USDOC failed to provide a reasoned and adequate explanation for its decision to disregard the previously agreed rates.[945] We disagree with India for the following reasons. First, as already concluded above, the USDOC was not required to weigh newly determined CVD rates against previously agreed ones. Second, we note that of the two interested exporting producers concerned, only JSW submitted comments to the USDOC in the context of the Section 129 Determination. In response to JSW, the USDOC explained that the *Amended Final Results* did not render the results of the Section 129 Determination moot, because the latter is a new and separate segment of the proceedings, with prospective effects and reviewable under US law.[946] In addition,

[938] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 557.
[939] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 558.
[940] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 571 and 582.
[941] I.e. the amount of the subsidy found to exist, in the case of Article 19.4 of the SCM Agreement; and the margin of dumping in the case of Article 9.3 of the Anti-Dumping Agreement.
[942] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 572.
[943] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 572.
[944] JSW Amended final results (2010), (Exhibit IND-48), p. 1; Tata Amended final results (2011), (Exhibit IND-49), p. 1.
[945] India's first written submission, para. 239.
[946] Final Determination, (Exhibit IND-60), p. 7.

the USDOC clarified that all the JSW's entries subject to the 2006 review were liquidated on the basis of the agreed rates and that the already liquidated entries were not affected by the Section 129 Determination.[947]

7.431. In the absence of an affirmative obligation to compare newly determined rates and rates previously agreed in the context of domestic court proceedings, we consider that the explanation rendered by the USDOC is reasoned and adequate. In fact, since the USDOC was not under an obligation to conduct the said comparison, it could not be expected to elaborate further on the matter, also in light of the limited scope of the comments raised by interested parties in the Section 129 proceedings.

7.432. While we do not exclude that previously determined rates can be relevant for the assessment of the appropriateness of the rates of CVD to be levied under different factual scenarios, the specific circumstances of this case point to the conclusion that the USDOC was not obligated to take the previously agreed rates into account in the Section 129 Determination. In particular, we note the United States' argument that the settlement rates were based on the agreement between the interested parties reflecting their respective considerations on the risks and benefits of the continuation of domestic court proceedings.[948] Accordingly, the United States maintains that reliance on the settled rates would not be proper because those rates were not based upon specific margins, they bore no relation to an analysis of the subsidies received by the investigated exporting producers, and there is no record of how the USDOC and the interested parties reached an agreement on those rates, as those proceedings were kept confidential.[949] India disagrees and argues that the settled rates were determined on the basis of lower subsidy amounts received by the companies, and that therefore the USDOC should have explained why it ignored them.[950] In its comments on the United States' responses to the Panel's questions after the hearing, India has drawn our attention to the circumstance that, for example, the amount of CVD agreed for Tata in the context of the settlement agreement is similar to the amount determined for the same company in the 2008 administrative review (the difference being lower than 0.20%).[951]

7.433. India has not persuasively rebutted the US arguments. Absent record evidence pointing to the contrary, we are not in the position to second-guess the basis used by the interested parties to arrive at a settled rate. Based on the evidence before this Panel, no consideration of the subsidization rate, the appropriateness of the duties levied, or the adequacy of the duties to offset the injury caused by subsidized imports can be found in the *Amended Final Results* by means of which the agreed countervailing rates became operative.[952] At least, if considerations as to the appropriateness of the amount of the duties levied in light of the need to remedy the injury caused by subsidized imports were made in that context, there is no evidence before this Panel in that regard. Against this background, and absent evidence to the contrary, we fail to see how the USDOC should have weighed the appropriateness of newly determined CVD rates against amounts likely agreed upon based on a pure negotiation that took place in the context of domestic court proceedings.

7.434. India finally maintains that allowing the USDOC to apply a higher rate as compared to the level negotiated in the context of domestic court proceedings creates a conflict between domestic judicial review under Article 23 of the SCM Agreement and WTO dispute settlement proceedings under Article 30 of the SCM Agreement.[953] Whilst the SCM Agreement allows for the activation of both domestic and international remedies, India argues that the USDOC's approach would prevent WTO Members from bringing claims before WTO panels every time interesting parties start domestic court proceedings.[954] The United States denies India's allegation that the USDOC's approach creates a conflict between Articles 23 and 30 of the SCM Agreement. The United States maintains that the settlements with JSW and Tata were not negated and that the rates applied subsequent to the Section 129 Determination had no impact on the settled rates that were already liquidated, meaning

[947] Final Determination, (Exhibit IND-60), p. 7.
[948] United States' second written submission, para. 260.
[949] United States' first written submission, para. 440; second written submission, para. 260.
[950] India's second written submission, para. 280.
[951] India's comments on United States' response to Panel question No. 72.
[952] JSW Amended final results (2010), (Exhibit IND-48), pp. 1-2; Tata Amended final results (2011), (Exhibit IND-49), pp. 1-2.
[953] India's second written submission, para. 279.
[954] India's second written submission, para. 279.

that the USDOC duly complied with the results of both domestic court proceedings and WTO dispute settlement.[955]

7.435. Articles 23 and 30 of the SCM Agreement read:

> Article 23
>
> *Judicial Review*
>
> Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.
>
> Article 30
>
> The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

7.436. At the outset, we note that the two provisions do not explicitly address the specific situation of this dispute. We also note that the two provisions do not establish any hierarchy between them, and actually make it possible for interested parties and WTO Members to activate domestic court proceedings and WTO dispute settlement proceedings against the same measures.

7.437. We reject India's argument that the USDOC's imposition of the higher rates calculated in the Section 129 Proceedings, instead of the rates negotiated between the parties, sets 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. India's argument is that condoning the USDOC's approach would prevent Members from initiating WTO dispute settlement proceedings in parallel with legal actions taken by companies in domestic judicial proceedings. First, the newly determined rates do not impact the imports already liquidated based on the settled rates. In this regard, we recall again that the United States argues that it gave full effect to the *Amended Final Results* and that entries liquidated based on the settled rates are not affected by the newly determined rates. India does not contest this point, which we consider sufficient to safeguard the meaningfulness of domestic court proceedings under Article 23 of the SCM Agreement under the specific circumstances of this case. Second, we see the merits of the United States' argument that accepting India's interpretation would limit the ability of an investigating authority to fully implement DSB recommendations if it was required to modify the results of such implementation based on prior rates determined pursuant to negotiated settlements in domestic court proceedings. This result is unwarranted and would lead to absurd consequences in situations where the newly determined CVDs pursuant to the Section 129 redetermination are lower than the previously agreed rates in domestic proceedings. We further note that nothing would prevent interested parties from challenging the consistency of the duties levied pursuant to the Section 129 redetermination before domestic courts in the United States, if they believe that they are inconsistent with US law. Therefore, we fail to see how the approach followed by the USDOC in the Section 129 proceedings sets up a conflict between Articles 23 and 30 of the SCM Agreement.

7.13.3 Conclusion

7.438. Based on the foregoing, we find that India has not demonstrated that the USDOC failed to impose CVDs against Tata and JSW in the appropriate amounts. Therefore, we conclude that India has not demonstrated that the United States acted inconsistently with Article 19.3 of the SCM Agreement.

[955] United States' second written submission, para. 261.

7.14 India's claims under Articles 10 of the SCM Agreement and VI of the GATT 1994

7.439. India also alleges consequential violations of Articles 10 of the SCM Agreement and VI of the GATT 1994 based on its substantive claims under Articles 1.1(a)(1), 2.1(c), 12.1, 12.8, 14(b), 14(d), 15.1, 15.2, 15.3, 15.4, 15.5, 19.3, 21.1, and 21.2 of the SCM Agreement.[956]

7.440. Article 10 of the SCM Agreement reads:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.[957]

7.441. Article VI of the GATT 1994 reads:

> 1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
>
> (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
>
> (b) in the absence of such domestic price, is less than either
>
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
>
> (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.
>
> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*
>
> 2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*
>
> 3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or

[956] India's first written submission, para. 240; second written submission, para. 281.
[957] Fns omitted.

subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of subparagraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in subparagraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; Provided that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

7.442. We recall our findings above that the United States acted inconsistently with the obligations under Articles 2.1(c), and 15.1-15.5 of the SCM Agreement. We note that the Appellate Body has treated claims under Articles 10 of the SCM Agreement as consequential claims in the sense that, when the essential elements of the subsidy within the meaning of Article 1 of the SCM Agreement are not present, or the right to impose a CVD has not been established, the CVDs imposed are inconsistent with Articles 10 of the SCM Agreement.[958] We are persuaded by the Appellate Body's approach and therefore adopt it as our own. Accordingly, to the extent that we have found the USDOC's and USITC's determinations to be inconsistent with Articles 2.1(c), 15.1, and 15.5 of the SCM Agreement, and that we have found that the United States has taken no measure to comply with the DSB recommendation in the original dispute concerning the inconsistency "as such" of 19 USC § 1677(7)(G)(i)(III) with Articles 15.1-15.5 of the SCM Agreement, we also find that the United States acted inconsistently with its obligations under Article 10 of the SCM Agreement.

7.443. From the text of Article 10, it is clear that CVDs may only be imposed in accordance with Article VI of the GATT 1994 *and* the SCM Agreement.[959] As a result, having determined that the United States acted inconsistently with Articles 2.1(c), and 15.1-15.5 of the SCM Agreement, we also find that the United States acted inconsistently with its obligations under Article VI of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, we conclude as follows:

a. With respect to India's claims under Article 1.1(a)(1) of the SCM Agreement, India has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1).

b. With respect to India's claims under Article 14(d) of the SCM Agreement:

   i. India has not demonstrated that the USDOC applied an incorrect legal standard, and thus acted inconsistently with Article 14(d) as a matter of law, in rejecting the domestic pricing information.

   ii. India has not demonstrated that the USDOC acted inconsistently with Article 14(d) by failing to undertake an objective examination of, and explain sufficiently, the basis for rejecting the prices in the association price chart as not representing actual transactions.

   iii. India has not demonstrated that the USDOC acted inconsistently with Article 14(d) on the basis that its treatment of the domestic pricing information was not based on an objective examination.

   iv. We exercise judicial economy with regard to India's claim that the USDOC acted inconsistently with Article 14(d) by failing to explain adequately the reasons for rejecting the Tata price quote on the basis of disclosing confidential data.

   v. India has not demonstrated that the USDOC acted inconsistently with Article 14(d) by failing to make an objective assessment by failing to explain why the Tex Report is more appropriate than the domestic pricing information. We exercise judicial economy over whether India's allegation of error in this regard comprised a separate claim.

   vi. India has not demonstrated that the USDOC acted inconsistently with Article 14(d) by rejecting the NMDC's export prices as a benchmarking source.

c. India's claim under Article 14(b) of the SCM Agreement is not within the scope of the present compliance proceedings under Article 21.5 of the DSU, and in any case, we also conclude that India has not demonstrated that the USDOC acted inconsistently with

[958] Appellate Body Reports, *US – Softwood Lumber IV*, para. 143; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

[959] Appellate Body Report, *Brazil – Desiccated Coconut*, DSR 1997:I, p. 180.

Article 14(b) by failing to make adjustments to its benefit benchmark to accommodate the SDF levy as an entry cost incurred by the loan recipients.

d. In light of our conclusions in paragraphs 8.1(b) and 8.1(c), we exercise judicial economy with regard to India's claims under the *chapeau* of Article 14 of the SCM Agreement.

e. With respect to India's claims under Article 2.1(c) of the SCM Agreement:

   i. India has not demonstrated that the USDOC acted inconsistently with Article 2.1(c) in its assessment of the "length of time" factor for the NMDC's sales of high-grade iron ore.

   ii. The USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to provide a reasoned and adequate explanation for its finding that the mining leases for iron ore programme was *de facto* specific.

   iii. In respect of the "mining leases for coal" programme, India has not demonstrated that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to consider the mandatory factors under that provision.

   iv. In respect of the "mining leases for iron ore" programme, the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take account of the length of time during which that programme had been in operation. India has not demonstrated that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to consider the extent of diversification of the Indian economy with respect to that programme.

   v. In light of our conclusions in paragraph 8.1(e)(ii)-(iv), we exercise judicial economy with regard to India's claim that the USDOC acted inconsistently with Articles 1.2 and 2.4 of the SCM Agreement.

f. With respect to India's claims under Article 12.1 of the SCM Agreement:

   i. In light of our conclusion in paragraph 8.1(b)(iv), we exercise judicial economy with regard to India's claim that the USDOC acted inconsistently with Article 12.1 regarding the Tata price quote.

   ii. India's claim that the USDOC acted inconsistently with Article 12.1 regarding the legal implications of the NMDC's Miniratna status is not within the scope of the present compliance proceedings under Article 21.5 of the DSU.

g. With respect to India's claims under Article 12.8 of the SCM Agreement, India has not demonstrated that the USDOC acted inconsistently with Article 12.8 by failing to disclose the two matters referred to by India.

h. With respect to India's claims under Articles 21.1 and 21.2 of the SCM Agreement:

   i. India's claim under Articles 21.1 and 21.2 concerning the USDOC's investigation of "new subsidies" in the 2004 to 2008 administrative reviews and the inclusion of these subsidy programmes in the Section 129 Determination is not within the scope of the present compliance proceedings under Article 21.5 of the DSU.

   ii. India failed to establish that the USDOC investigated "new subsidies" in the Section 129 proceedings, and therefore has not demonstrated that the USDOC acted inconsistently with Articles 21.1 and 21.2 of the SCM Agreement.

i. India's claim that the United States' failure to amend 19 USC § 1677(7)(G)(i)(III) is inconsistent with the DSB recommendation in this dispute as well as with Articles 15.1-15.5 of the SCM Agreement is within the Panel's terms of reference. India has demonstrated that the United States has taken no measure to bring 19 USC § 1677(7)(G)(i)(III) - which was found to be inconsistent "as such" with Articles 15.1-15.5

of the SCM Agreement in the original dispute - into compliance with the United States' obligations under the SCM Agreement.

j. With respect to India's claims under Articles 15.1 and 15.2 of the SCM Agreement:

   i. India's claims that, in the Section 129 proceedings, the USITC acted inconsistently with Articles 15.1 and 15.2 by using flawed methodology and data and ignoring data from the original determination are not within the scope of the present compliance proceedings under Article 21.5 of the DSU.

   ii. India has not demonstrated that the USITC, in its price undercutting analysis, acted inconsistently with Articles 15.1 and 15.2.

k. With respect to India's claims under Articles 15.1 and 15.4 of the SCM Agreement, India has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.4 by failing to examine and evaluate the existence of a link or relationship or explanatory force between the subsidized imports and the state of the domestic industry.

l. With respect to India's claims under Articles 15.1 and 15.5 of the SCM Agreement:

   i. India has not made a *prima facie* case that the USITC acted inconsistently with Articles 15.1 and 15.5 by failing to demonstrate that the subsidized imports caused injury to the domestic industry.

   ii. India has not demonstrated that the USITC, in its non-attribution analysis, acted inconsistently with Articles 15.1 and 15.5 by failing to consider the impact of goods from Brazil, Japan, and the Russian Federation, and the contraction in demand.

   iii. India's claim that the USITC, in its non-attribution analysis, acted inconsistently with Articles 15.1 and 15.5 by failing to examine the causes for the closure of certain plants is outside the scope of these compliance proceedings.

   iv. India has demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.5 by failing to consider the impact of dumped imports from China, Kazakhstan, Romania, Chinese Taipei, and Ukraine on the injury suffered by the domestic industry and to separate and distinguish it from the effects of subsidized imports and of other known factors.

m. With respect to India's claims under Article 19.3 of the SCM Agreement, India has not demonstrated that the USDOC acted inconsistently with Article 19.3.

n. As a consequence of the Panel's findings of inconsistency with respect to the Section 129 reinvestigation under Articles 2.1(c) and 15.1-15.5 of the SCM Agreement, India has demonstrated that the United States acted inconsistently with Articles 10 of the SCM Agreement and VI of the GATT 1994.

8.2. Under Article 3.8 of the DSU, when there is an infringement of the obligations assumed under a covered Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the SCM Agreement and the GATT 1994, they have nullified or impaired benefits accruing to India under these agreements.

8.3. We also conclude that the United States has failed to implement the recommendations and rulings of the DSB to bring 19 USC § 1677(7)(G)(i)(III) into conformity with its obligations under the SCM Agreement. To the extent that the United States has failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the SCM Agreement and the GATT 1994.