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

REPORT OF THE PANEL

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<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
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<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
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<i>US – Large Civil Aircraft (2nd complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012
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<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , 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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<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AD	Anti-dumping
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AFA	Adverse facts available
AR	Administrative review
BCI	Business confidential information
CFR	Code of Federal Regulations
CVD	Countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECSC	European Coal and Steel Community
Fed. Reg. (or FR)	Federal Register
FOB	Free on board
GATT 1994	General Agreement on Tariffs and Trade 1994
GOI	Government of India
JPC	Joint Plant Committee
JSIP	Jharkhand State Industrial Policy
JSW	Jindal Steel Works
KIP	State Government of Karnataka's New Industrial Policy and Package of Incentives and Concessions
MAI	Market Access Initiative
MDA	Market Development Assistance
MMDR Act	Mines and Minerals (Development & Regulation) Act, 1957
MML	Mysore Minerals Limited.
NMDC	National Mineral Development Corporation
PLR	Prime lending rate
POR	Period of review
RBI	Reserve Bank of India
SCM Agreement (or ASCM)	Agreement on Subsidies and Countervailing Measures
SDF	Steel Development Fund
SEZ	Special Economic Zone
SGAP	State Government of Andhra Pradesh
SGOC	State Government of Chhattisgarh
SGOG	State Government of Gujarat
SGOJ	State Government of Jharkhand
SGOK	State Government of Karnataka
SGOM	State Government of Maharashtra
TPS	Target Plus Scheme
United States (or US)	United States of America
USC	United States Code
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
VMPL	Vijayanagar Minerals Pvt. Ltd.
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by India

1.1. On 24 April 2012, India requested consultations with the United States pursuant to Articles 1 and 4 of the DSU, Article XXII:1 of the GATT 1994 and Article 30 of the SCM Agreement, with regard to the imposition of countervailing duties on certain hot-rolled carbon steel flat products from India by the United States as described in document WT/DS436/1/Rev.1.

1.2. Consultations were held on 31 May and 1 June 2012, but were unsuccessful in resolving the dispute.

1.2 Panel establishment and composition

1.3. On 12 July 2012, India requested, pursuant to Articles 4.7 and 6 of the DSU and Article 30 of the SCM Agreement, that the DSB establish a panel with standard terms of reference.¹ At its meeting on 31 August 2012, the DSB established a panel pursuant to the request of India in document WT/DS436/3, in accordance with Article 6 of the DSU.²

1.4. 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/DS436/3 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

1.5. On 7 February 2013, India requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 18 February 2013, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Hugh McPhail

Members: Mr Anthony Abad
 Mr Hanspeter Tschaeni

1.6. Australia, Canada, China, the European Union, the Kingdom of Saudi Arabia (Saudi Arabia) and Turkey notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures⁴ and timetable on 8 March 2013. The Panel introduced modifications to its timetable on 18 July 2013.

1.8. The Panel held a first substantive meeting with the parties on 9-10 July 2013. A session with the third parties took place on 10 July 2013. The Panel held a second substantive meeting with the parties on 8-9 October 2013. On 25 October 2013, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 31 January 2014. The Panel issued its Final Report to the parties on 11 April 2014.

¹ WT/DS436/3.

² See WT/DSB/M/321.

³ WT/DS436/4.

⁴ See the Panel's Working Procedures in Annex A-1.

1.3.2 Working procedures on Business Confidential Information (BCI)

1.9. After consultations with the parties, the Panel adopted, on 28 March 2013, additional procedures for the protection of BCI.⁵

1.3.3 Preliminary ruling

1.10. On 3 May 2013, the United States submitted to the Panel two requests for preliminary rulings concerning the consistency of India's request for the establishment of a panel⁶ with Article 6.2 of the DSU. On 21 May 2013, in advance of the first substantive meeting of the Panel with the parties, India provided a written response to the United States' requests for preliminary rulings.

1.11. On 16 August 2013, the Panel issued the following preliminary rulings to the parties to the dispute.

1.3.3.1 Introduction

1.12. In its first written submission, the United States submitted two requests for preliminary rulings that certain claims advanced by India in its first written submission fall outside the Panel's terms of reference. The United States' requests are based on Article 6.2 of the DSU, which provides in relevant part:

The request for the establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

1.13. The United States' first request concerns India's claims under Article 11 of the SCM Agreement. In its panel request, India alleged a violation of:

Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.⁷

1.14. In its first written submission, India argued claims relating to (i) the alleged failure to initiate an investigation into new subsidies and (ii) the alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application. With respect to the former, India argued its claim under the following heading of its first written submission:

Section XII.C.4: The United States violated Article 11.1 by failing to 'Initiate' an investigation into the New Subsidies.

1.15. With respect to the claims relating to the initiation of an investigation despite the insufficiency of evidence, India argued its claims under the following headings of its first written submission:

Section XII.C.1: The United States violated Articles 11.1-11.2 by initiating investigation into NMDC and TPS programs in the 2004 AR even when the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of such subsidies.

Section XII.C.2: The United States violated Article 11.9 by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies.

⁵ Additional Working Procedures on BCI.

⁶ WT/DS436/3 (referred to hereafter as "panel request").

⁷ Ibid.

1.16. The United States' second request concerns India's argument in its first written submission with respect to a claim that the United States' 2013 sunset review determination is inconsistent with Article 12.7 of the SCM Agreement. India did not explicitly refer to the 2013 sunset review determination in its panel request.

1.17. Pursuant to Paragraph 7 of the Panel's working procedures, the Panel invited India to respond to the United States' requests prior to the first substantive meeting of the Panel with the parties.⁸ In addition, the Panel posed certain questions relating to the requests for preliminary rulings and gave both parties the opportunity to comment on each other's answers.

1.18. The United States requested the Panel to make certain findings as a preliminary matter.⁹ In contrast, India requested the Panel to reserve its findings on the preliminary ruling requests until the final report.¹⁰ As the United States' requests concern the Panel's terms of reference, and given the clarifications provided by the parties, the Panel decided to issue its rulings prior to the second substantive meeting of the Panel with the parties in order to clarify the scope of the dispute.

1.3.3.2 Arguments of the Parties

1.3.3.2.1 United States

1.19. The United States requests the Panel to find that India's claims under (i) Article 11 of the SCM Agreement, and (ii) Article 12.7 of the SCM Agreement with respect to a 2013 sunset review determination are outside the Panel's terms of reference because India's panel request fails to comply with the requirements of Article 6.2 of the DSU.

1.3.3.2.1.1 Article 11 of the SCM Agreement

1.20. The United States recalls that India's panel request only includes a general reference to Article 11 of the SCM Agreement. The United States asserts that Article 11 contains 11 subparagraphs with different obligations, and submits that India failed to identify in its panel request any specific Article 11 obligation that the United States had allegedly violated.¹¹ Thus, the United States submits that India's panel request failed to comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."¹²

1.21. Moreover, the United States notes that India's panel request suggests that the alleged violation lies in the failure to initiate or conduct an investigation at all with respect to new subsidies. However, in the United States' view, Article 11 of the SCM Agreement does not contain any obligation to initiate an investigation.¹³

1.22. With respect to the claims relating to the initiation of an investigation despite insufficient evidence in the domestic industry's written application, the United States points out that India's panel request alleges that "no investigation was initiated or conducted".¹⁴ However, the relevant arguments in India's first written submission allege that the United States erred by actually initiating an investigation into the NMDC and TPS programmes in 2004 despite an insufficient written application. The United States submits that the sufficiency of evidence in an application is a distinct issue from whether an investigation was initiated.¹⁵ Raising due process concerns, the

⁸ India considered that the United States had not properly raised a request for preliminary ruling with regard to the claim in Section XII.C.4 of India's first written submission. During the first substantive meeting of the Panel with the parties, the United States clarified that its requests also covered this claim. In light of the United States' explanation, the Panel accepted that the United States' requests for preliminary rulings covered the claim in Section XII.C.4 of India's first written submission, and invited India to respond to this aspect of the United States' requests.

⁹ United States' first written submission, para. 3.

¹⁰ India's response to the United States' requests for preliminary rulings, para. 35.

¹¹ United States' first written submission, paras. 15, 17-19 and 22; and response to Panel question No. 38, para. 2.

¹² United States' first written submission, paras. 18 and 22.

¹³ Ibid. paras. 17 and 22.

¹⁴ Ibid. paras. 17 and 20.

¹⁵ Ibid. para. 20.

United States contends that it could not have anticipated that India would bring these claims because they were not articulated in India's panel request.¹⁶

1.3.3.2.1.2 2013 sunset review

1.23. Concerning India's claims under Article 12.7 of the SCM Agreement with respect to a 2013 sunset review determination, the United States understands India to refer to the final results in the most recent sunset review issued by the US Department of Commerce on 14 March 2013. The United States submits that this determination could not have been included in India's request for consultations or request for the establishment of a panel, since it was issued eight months after the latter.¹⁷ Furthermore, although this sunset review was initiated on 1 November 2010, India does not refer to the initiation in its consultations or panel requests. Thus, the United States submits that the final results of the 2013 sunset review fall outside the Panel's terms of reference.¹⁸

1.3.3.2.2 India

1.3.3.2.2.1 Article 11 of the SCM Agreement

1.24. India contends that its panel request need not be identically worded as the claims pursued in its first written submission, and argues that the Panel should examine the panel request as a whole and in light of "attendant circumstances".¹⁹ India contends that the United States attributed an "extremely narrow and acontextual meaning" to India's panel request. India argues that the term "initiated" in its request is to be construed in light of footnote 37 of the SCM Agreement. This would necessarily imply that "India's panel request is directed to the manner in which investigations into new subsidy programs were initiated and conducted", i.e. the fact that they were "not [] initiated, commenced and performed in the manner '*provided [for] in Article 11*' of the SCM Agreement."²⁰

1.25. Moreover, India contends that its panel request clearly connects the challenged measures with the relevant obligations under Article 11 of the SCM Agreement.²¹ According to India, the United States fails to appreciate that "India's panel request covers violations of all obligations in Article 11, barring those that are obviously and logically inapplicable to the case at hand".²² India contends that its panel request delineates that violations are limited to (i) Article 11, (ii) the initiation and conduct of investigations, and (iii) new subsidy programmes. Thus, according to India, Articles 11.6, 11.8, 11.10 and 11.11 of the SCM Agreement are logically excluded due to the words used in the panel request. India also argues it has the discretion in its first written submission to only elaborate on a sub-set of the remaining provisions in Article 11 covered by India's panel request, namely Articles 11.1, 11.2 and 11.9. However, India contends that Articles 11.3, 11.4, 11.5 and 11.7 of the SCM Agreement have also been breached, but India chose not to press these violations in its first written submission.²³ Moreover, India submits that all subparagraphs of Article 11 are closely related and interlinked, and the reference to a common obligation, i.e. the manner in which investigations are to be initiated and conducted, is sufficient to meet the standard of Article 6.2 of the DSU.²⁴

1.26. Finally, India contends that the due process rights of the United States have not been prejudiced, and the United States' first written submission shows that it was in a position to file detailed responses to India's claims. India also notes that the claims at issue here only refer to determinations made by the United States and documents made publicly available by the United States. Moreover, the consultations between the United States and India prior to the establishment of this panel revealed India's point of concern with respect to these claims.

¹⁶ United States' first written submission, para. 21.

¹⁷ Ibid. para. 24.

¹⁸ Ibid. para. 27.

¹⁹ India's response to the United States' requests for preliminary rulings, paras. 7-8 and 14-15.

²⁰ Ibid. paras. 10-11. (emphasis original)

²¹ Ibid. para. 13.

²² Ibid. para. 16.

²³ Ibid. paras. 17-19.

²⁴ Ibid. paras. 20-22.

Therefore, according to India, it cannot be said that "the United States was completely unaware that India would raise claims in relation to sufficiency of evidence for commencing investigations into new subsidies."²⁵

1.3.3.2.2 2013 sunset review

1.27. Regarding the 2013 sunset review, India notes that paragraph 5 of its panel request "covers all amendments, replacements, implementing acts or any other related measure in connection with the measures referred herein." India submits that all determinations and orders issued by the United States are measures covered in the panel request, and the 2013 sunset review determination amends the determinations included in the panel request. Referring to the understanding of past panels and the Appellate Body, India notes that the 2013 sunset review determination does not change the nature of the measures challenged, and India has not raised different claims in relation to this determination. India submits that agreeing with the United States' preliminary objection would allow the United States to evade adjudicatory review and prevent a positive resolution of the dispute on a purely technical point.²⁶

1.3.3.3 Evaluation

1.28. The United States' requests for preliminary rulings concern India's claims under (i) Article 11 of the SCM Agreement, and (ii) Article 12.7 of the SCM Agreement with respect to a 2013 sunset review. We examine each request in turn.

1.3.3.3.1 Whether India's panel request relating to Article 11 of the SCM Agreement satisfies the requirements of Article 6.2 of the DSU

1.29. The main issue before the Panel is whether the general reference to Article 11 of the SCM Agreement in India's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly."²⁷ India contends that its panel request refers to two different inconsistencies with Article 11, namely: (i) the alleged failure to initiate an investigation into new subsidies and (ii) the alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application.²⁸ We consider each alleged inconsistency separately.

1.3.3.3.1.1 Alleged failure to initiate an investigation into new subsidies

1.30. It is undisputed that India's panel request refers generally to Article 11 of the SCM Agreement, without explicitly identifying any specific paragraphs of that provision as the legal basis of its complaint. We note that Article 11 contains several paragraphs that set out multiple distinct obligations.

1.31. While the Appellate Body has explained that when "a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged"²⁹, the Appellate Body has also indicated that "compliance with the requirements of Article 6.2 [of the DSU] must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".³⁰ Thus, the mere fact that India failed to explicitly specify in its panel request the particular paragraphs of Article 11 at issue does not necessarily mean that India's panel request fails to meet the requirements of Article 6.2 of the DSU. This is because the relevant WTO obligations may nevertheless be identifiable from a careful reading of the panel request as a whole.³¹ Accordingly, we shall examine whether a careful reading of India's panel request,

²⁵ India's response to the United States' requests for preliminary rulings, paras. 24-26.

²⁶ Ibid. paras. 27-33.

²⁷ Article 6.2 of the DSU.

²⁸ See paragraphs 1.14 and 1.15 above.

²⁹ Appellate Body Report, *China – Raw Materials*, para. 220. See also Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598.

³⁰ Appellate Body Report, *US – Carbon Steel*, para. 127.

³¹ With similar understanding, see the preliminary ruling of the panel in *US – Countervailing and Anti-Dumping Measures (China)*, para. 3.35, document WT/DS449/4 dated 7 June 2013.

including any narrative explanation contained therein³², permits a sufficiently clear identification of which particular obligation(s) in Article 11 of the SCM Agreement form(s) the legal basis of India's complaint regarding Article 11, to enable us to conclude that it is consistent with Article 6.2 of the DSU.

1.32. In addition to the general reference to Article 11 of the SCM Agreement, India's panel request explains India's concern that "no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews". This text indicates that the issue raised by India concerns the United States' alleged failure to initiate or conduct an investigation into the effects of new subsidy allegations. We note that similar language in Article 11.1 of the SCM Agreement may contain a "potentially relevant obligation"³³ relating to the initiation of "an investigation to determine the existence, degree and effect of any alleged subsidy".³⁴ In our view, therefore, the general reference to Article 11 and the above-mentioned narrative explanation together are sufficient to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", consistent with Article 6.2 of the DSU. Consequently, the claim in Section XII.C.4 of India's first written submission³⁵ falls within the Panel's terms of reference.³⁶

1.3.3.3.1.2 Alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application

1.33. However, we are not persuaded that the general reference to Article 11 of the SCM Agreement and the above-mentioned narrative explanation in India's panel request are sufficient to bring India's remaining Article 11 claims within the Panel's terms of reference.

1.34. We note that the arguments in Sections XII.C.1 and XII.C.2 of India's first written submission relate to the fact that an investigation was allegedly initiated despite the fact that the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of certain subsidies.³⁷ We agree with the United States that whether an investigation was initiated despite insufficiency of evidence is an issue entirely distinct from whether an investigation to determine the effects of new subsidies was initiated or conducted at all.³⁸ Indeed, the narrative in India's panel request states that "no investigation was initiated or conducted". India contends that its panel request should be read as relating to "investigations not being initiated, commenced and performed in a manner 'provided in Article 11' of the SCM Agreement."³⁹ We must objectively determine our terms of reference on the basis of the panel request as it existed at the time of filing.⁴⁰ In our view, by clearly and only stating that an

³² We note in this regard that, in applying Article 6.2 of the DSU, the panel in *Mexico – Anti-Dumping Measures on Rice* considered the listing of the relevant provisions of the WTO Agreement together with the narrative which accompanied that listing. (Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.30)

³³ We note that the panel in *EC – Approval and Marketing of Biotech Products* referred to the concept of "potentially relevant obligations". See Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 77 of the preliminary ruling reproduced at para. 7.47 of the reports.

³⁴ Article 11.1 of the SCM Agreement.

³⁵ For a brief summary of this claim, see paragraph 1.14 above.

³⁶ We emphasize, however, that in considering whether this aspect of India's panel request complies with the requirements of Article 6.2 of the DSU we express no opinion on the merits of India's complaint. As clarified by the Appellate Body in *EC – Selected Customs Matters*, the "question of whether a measure falls within a panel's terms of reference is a threshold issue, distinct from the question of whether the measure is consistent or not with the legal provision(s) of the covered agreement(s) to which the panel request refers." (Appellate Body Report, *EC – Selected Customs Matters*, para. 131)

³⁷ For a brief summary of these claims, see paragraph 1.15 above.

³⁸ See United States' first written submission, para. 20.

³⁹ India's response to the United States' requests for preliminary rulings, para. 11. (emphasis original) India refers to footnote 37 of the SCM Agreement to argue that it "clearly suggests that an investigation should commence in a manner provided in Article 11." See India's response to the United States' requests for preliminary rulings, paras. 9-11. However, it remains unclear to us, and India has not sufficiently explained, how the meaning in footnote 37, including the reference to a *procedural action to formally commence* an investigation as provided in Article 11, permits a sufficiently clear identification of which particular obligations in Article 11 of the SCM Agreement form the legal basis of India's complaints at issue regarding Article 11.

⁴⁰ The Appellate Body has stated that "[a]lthough subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it

investigation was *not* initiated or conducted, India's panel request precludes claims relating to the alleged initiation of an investigation, or the manner in which an investigation was conducted, being included in the scope of the dispute.

1.35. India submits that the Panel should examine India's panel request in light of "attendant circumstances". India argues that its panel request "covers violations of all obligations in Article 11, barring those that are obviously and logically inapplicable to the case at hand".⁴¹ However, we are unable to reconcile India's view with the general reference to Article 11 read together with the narrative in India's panel request. Had India intended to raise claims under Articles 11.1, 11.2 and 11.9 of the SCM Agreement relating to the initiation of an investigation despite insufficient evidence, India should have provided some summary of the relevant legal basis sufficient to present this particular problem clearly, which in our view it did not. As it is, India's panel request is not reasonably open to the reading advanced by India.⁴²

1.36. India also argues that the due process rights of the United States have not been prejudiced because the claims at issue "only refer to determinations already made by the United States and only refers to documents made publicly available by the United States."⁴³ We do not consider that the United States would be made aware of the "legal basis of the complaint sufficient to present the problem clearly", simply because India's claims refer to determinations or documents issued by the United States.⁴⁴ The fact that the respondent has detailed information relating to the measure at issue does not necessarily imply that the problem raised by the complainant in WTO dispute settlement will become obvious for purposes of Article 6.2 of the DSU. We recall in this regard that, in the context of the AD Agreement, the Appellate Body in *Thailand – H-Beams* found that even when specific issues were raised before the investigating authority, the "underlying investigation cannot normally, in and of itself, be determinative in assessing the sufficiency of the claims made in a request for the establishment of a panel."⁴⁵

1.37. Finally, India contends that a certain list of questions filed during consultations reveals India's concerns relating to the claims at issue here.⁴⁶ The Panel was not privy to those consultations, and is therefore unable to refer to the substance of the consultations for present purposes. We note in this regard that the Appellate Body in *US – Upland Cotton* agreed with the finding of the panel in *Korea – Alcoholic Beverages* that "[w]hat takes place in [] consultations is not the concern of a panel."⁴⁷

existed at the time of filing." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642)

⁴¹ India's response to the United States' requests for preliminary rulings, para. 16.

⁴² We find support in the Appellate Body Report in *EC – Fasteners (China)*, where it was found that the mere reference to a general provision would not allow a complaining party to introduce an issue that does not fall within the scope of the narrative explanation or description included in the panel request. See Appellate Body Report, *EC – Fasteners (China)*, paras. 595-599.

⁴³ India's response to the United States' requests for preliminary rulings, para. 24.

⁴⁴ In *EC and certain member States – Large Civil Aircraft*, the Appellate Body clarified that the "due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction. The principal task of the adjudicator is therefore to assess what the panel's terms of reference encompass, and whether a particular measure or claim falls within the panel's remit." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640)

⁴⁵ Appellate Body Report, *Thailand – H-Beams*, para. 94. The Appellate Body found that it is not necessarily the case that there is always continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO. The Appellate Body noted that "[t]he parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute. Furthermore, although the defending party will be aware of the issues raised in an underlying investigation, other parties may not." (Appellate Body Report, *Thailand – H-Beams*, para. 94)

⁴⁶ India's response to the United States' requests for preliminary rulings, para. 25.

⁴⁷ Appellate Body, *US – Upland Cotton*, para. 287, quoting Panel Report, *Korea – Alcoholic Beverages*, para. 10.19. The Appellate Body also stated that "the Panel should have limited its analysis to the request of consultations ... Examining what took place in the consultations would seem contrary to Article 4.6 of the DSU ... In addition, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed." (Appellate Body, *US – Upland Cotton*, para. 287)

1.38. Thus, with respect to the issue of the initiation of an investigation despite insufficient evidence under Article 11 of the SCM Agreement, we conclude that India's panel request does not comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consequently, the arguments in Sections XII.C.1 and XII.C.2 of India's first written submission relate to claims that are not within the Panel's terms of reference.

1.3.3.3.2 Whether the 2013 sunset review is included in the Panel's terms of reference

1.39. We now turn to India's claims relating to the 2013 sunset review. The main issue before the Panel is whether the 2013 sunset review is one of the "specific measures" (within the meaning of Article 6.2 of the DSU) identified in India's panel request.

1.40. In considering this issue, we note that the Appellate Body in *US – Carbon Steel* explained that "compliance with the requirements of Article 6.2 [of the DSU] must be demonstrated on the face of the request for the establishment of a panel ... [and] determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."⁴⁸ The Appellate Body also found that "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".⁴⁹ Accordingly, we shall examine India's panel request as a whole, to determine whether or not that request identifies the 2013 sunset review with the requisite particularity. In this regard, we recall that India's panel request identifies the relevant measures at issue in the following terms:

The United States conducted a countervailing duty (the "CVD") investigation (No. C 533 821) and levied countervailing duties on the subject goods. The provisional measures were imposed with effect from 20 April 2001 and the final measures were imposed with effect from 3 December 2001. The United States concluded a sunset review in 2007 and continued the duties for a further period of five years. The United States also conducted several Administrative Reviews (the "AR") to determine the CVD rate/s to be applied on the imports made during the relevant AR period. The measures continue to be in force. This request covers the countervailing duties applied on the subject goods by the United States from time to time. A non-exhaustive list of determinations, orders, etc. issued by the United States in Case No. C-533-821 is enclosed as Annex 1.⁵⁰

India's panel request also states that it "covers all the amendments, replacements, implementing acts or any other related measure in connection with the measures referred herein."⁵¹

1.41. Turning first to the statement that India's panel request "covers the countervailing duties applied on the subject goods by the United States from time to time", we consider that the 2013 sunset review may reasonably be treated as a measure concerned with the application of countervailing duties on the subject goods. We also note that India explicitly referred to the only sunset review determination that had been issued prior to its panel request: the 2007 sunset review. In our view, this indicates that sunset reviews were of interest to India. Finally, we note that India's request "covers ... any other related measure in connection with the measures referred herein." We consider that the 2013 sunset review may reasonably be considered a "related measure in connection with the measures" explicitly referred to in India's panel request. Considering these factors together, we are of the view that India's panel request, read as a whole, indicates the nature of the measure and the gist of what is at issue with sufficient particularity to put the United States on notice that the 2013 sunset review, when issued, would be covered by India's claims.

⁴⁸ Appellate Body Report, *US – Carbon Steel*, para. 127.

⁴⁹ Appellate Body Report, *US – Continued Zeroing*, para. 169.

⁵⁰ India's panel request, para. 3.

⁵¹ Ibid. para. 5. Similar language is also found in Annex 1 of India's panel request.

1.3.3.3.3 Conclusion

1.42. The Panel concludes that, with respect to the alleged failure to initiate or conduct an investigation into the effects of new subsidy allegations under Article 11 of the SCM Agreement, India's panel request complies with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consequently, the arguments in Section XII.C.4 of India's first written submission relate to a claim that falls within the Panel's terms of reference. In addition, the Panel concludes that the 2013 sunset review is within the Panel's terms of reference. Therefore, we will consider these claims and the arguments pertaining to them in our disposition of the issues in this case.

1.43. However, the Panel concludes that, with respect to the issue under Article 11 of the SCM Agreement relating to the alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application, India's panel request does not comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Consequently, the arguments in Sections XII.C.1 and XII.C.2 of India's first written submission relate to alleged claims that fall outside the Panel's terms of reference, and we will not consider them or make any rulings with respect to the alleged claims.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. This dispute concerns the imposition by the United States of countervailing duties on imports of certain hot-rolled carbon steel flat products from India. India has challenged the following measures, and their amendments, replacements, implementing acts 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, 20 April 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, 21 September 2001;
 - iii. Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 49635-01, 28 September 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, 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, 3 December 2001; and
 - vi. Countervailing Duty Order in the Investigation: Certain Hot-Rolled Carbon Steel Flat Products from India, 8 January 2002;
- b. Administrative Review: POR 20 April 2001 through 31 December 2002 (2002 administrative review)
 - i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 907-01, 7 January 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, 6 May 2004; and
- iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 26549-01, 13 May 2004;
- c. Administrative Review: POR 1 January 2004 through 31 December 2004 (2004 administrative review)
 - i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 1512-01, 10 January 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, 10 May 2006; and
 - iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-rolled Carbon Steel Flat Products from India, 71 FR 28665-01, 17 May 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, 7 December 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, 7 December 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, United States International Trade Commission, October 2007; and
 - 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, 27 December 2007;
- e. Administrative Review: POR 1 January 2006 through 31 December 2006 (2006 administrative review)
 - i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 73 FR 1578-02, 9 January 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, 7 July 2008; and
 - iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India, 73 FR 40295-02, 14 July 2008;
- f. Administrative Review: POR 1 January 2007 through 31 December 2007 (2007 administrative review)
 - i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 73 FR 79791-01, 30 December 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, 29 April 2009; and
- iii. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 74 FR 20923-01, 6 May 2009;
- g. Administrative Review: POR 1 January 2008 through 31 December 2008 (2008 administrative review)
 - i. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 75 FR 1496-01, 11 January 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, 19 July 2010; and
 - iii. Final Results of Countervailing Duty Administrative Review – Certain Hot-Rolled Carbon Steel Flat Products from India, 75 FR 43488-01, 26 July 2010.

2.2. The challenged measures also cover the following provisions of the United States Tariff Act, 1930 as codified in the United States Code, Title 19, Chapter 4, Subtitle IV (US statute), and the United States Code of Federal Regulations, Title 19, Volume 3, Chapter III, Part 351 (US regulations), and their amendments, replacements, implementing acts or any other related measure in connection with them:

- a. 19 CFR § 351.511(a)(2)(i) to (iii);
- b. 19 CFR § 351.511(a)(2)(iv);
- c. 19 USC § 1677(7)(G);
- d. 19 USC § 1675a(a)(7);
- e. 19 USC § 1675b(e)(2);
- f. 19 USC § 1677e (b); and
- g. 19 CFR § 351.308.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. India requests the Panel to find that:

- a. The provisions contained in 19 CFR § 351.511(a)(2) (i) to (iii) are inconsistent "as such" with Article 14(d) of the SCM Agreement;
- b. The provision contained in 19 CFR § 351.511(a)(2)(iv) is inconsistent "as such" with Article 14(d) of the SCM Agreement;
- c. The provision contained in 19 CFR § 351.511(a)(2)(iv) is inconsistent "as such" with Articles 19.3 and 19.4 of the SCM Agreement;
- d. The provisions contained in 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7) and 19 USC § 1675b(e)(2) are "as such" inconsistent with Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement;
- e. The provisions contained in 19 USC § 1677e (b) and the implementing regulations contained in 19 CFR § 351.308 are "as such" inconsistent with Article 12.7 of the SCM Agreement;

- f. In connection with the provision of "High Grade Iron Ore" by the NMDC:
 - i. The United States' determination as to the existence of financial contribution is inconsistent with Article 1.1(a)(1) of the SCM Agreement;
 - ii. The United States' determination of specificity is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement;
 - iii. The United States' determination as to the existence and calculation of benefit is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; and
 - iv. The United States' imposition of countervailing duty is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement;
- g. In connection with the provision of "Captive Mining Rights of Iron Ore":
 - i. The United States' identification of, and investigation into, the program is inconsistent with Article 12.5 of the SCM Agreement;
 - ii. The United States' determination that grant of mining rights amounts to provision of iron ore is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement;
 - iii. The United States' determination regarding specificity is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement;
 - iv. The United States' determination as to the existence and calculation of benefit is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; and
 - v. The imposition of countervailing duties by the United States is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement;
- h. In connection with the provision of "Captive Mining Rights for Coal":
 - i. The United States' determination that grant of mining rights amounts to provision of coal is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement;
 - ii. The United States' determination regarding specificity is inconsistent with Articles 2.1(a) and (b) of the SCM Agreement;
 - iii. The United States' determination as to the existence and calculation of benefit is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; and
 - iv. The imposition of countervailing duties by the United States is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement;
- i. In connection with "SDF":
 - i. The United States' determination that the loans from SDF constituted a financial contribution is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement;
 - ii. The United States' determination regarding existence and calculation of benefit is inconsistent with Articles 1.1(b) and 14(b) of the SCM Agreement; and
 - iii. The imposition of countervailing duties by the United States is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement;
- j. The injury determination by the United States is inconsistent with Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement;

- k. The initiation of investigation into new subsidies during Administrative Reviews is inconsistent with Articles 11.1, 11.2 and 11.9 of the SCM Agreement;
- l. The failure to invite India for consultation at the time of initiating investigation into new subsidies is inconsistent with Article 13.1 of the SCM Agreement;
- m. The investigation into new subsidies during Administrative Reviews is inconsistent with Articles 21.1 and 21.2 of the SCM Agreement;
- n. The failure to issue a public notice of initiation of investigation into new subsidies during Administrative Reviews is inconsistent with Article 22.1 and Article 22.2 of the SCM Agreement;
- o. The application of adverse facts available standard is inconsistent with Article 12.7 of the SCM Agreement;
- p. The United States' determinations are inconsistent with Article 22.5 of the SCM Agreement; and
- q. As a consequence of inconsistencies mentioned hereinabove, the United States' determinations are inconsistent with Articles 10 and 32.1 of the SCM Agreement, Article VI of the GATT 1994 and Article XVI: 4 of the WTO Agreement.

3.2. Pursuant to Article 19 of the DSU, India requests the Panel to suggest the following specific ways by which the United States may bring its measures into conformity with the SCM Agreement, the GATT 1994 and the WTO Agreement:

- a. the United States repeals or amends the impugned provisions of law; and
- b. the United States withdraws the countervailing duty on hot-rolled carbon steel flat products from India.

3.3. The United States requests that the Panel reject India's claims in this dispute.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties, other than in their answers to questions, are reflected in their written submissions, oral statements or executive summaries thereof, provided to the Panel in accordance with paragraph 17 of the Working Procedures adopted by the Panel (see Annexes B and C).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the third parties, other than in their answers to questions, are reflected in their written submissions, oral statements or executive summaries thereof, provided to the Panel in accordance with paragraph 17 of the Working Procedures adopted by the Panel. These arguments are attached as addenda to this Report in Annexes D-1-D-11. The arguments of Australia, Canada, China, the European Union and Saudi Arabia are reflected in their written submissions, oral statements or executive summaries thereof, while the arguments of Turkey are reflected in its oral statement.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 31 January 2014, the Panel submitted its Interim Report to the parties. On 21 February 2014, both parties submitted written requests for review of precise aspects of the Interim Report. On 14 March 2014, both parties submitted written comments on each other's written requests. Neither party requested that the Panel hold an interim review meeting.

6.2. The Panel explains below its response to substantive issues raised by the parties in their comments on the Interim Report. The Panel has also corrected a number of typographical errors and other non-substantive errors, including those identified by the parties. Due to changes as a result of our review, certain numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

6.2 United States' requests for changes to the Interim Report

6.2.1 Paragraph 7.51 (paragraph 7.51 of the Final Report)

6.3. The United States requests that paragraph 7.51 be modified to include an explanation of Section 351.511(a)(2)(ii) itself.⁵²

6.4. India disagrees with the United States' request, because paragraph 7.51 is part of the Panel's evaluation. If the United States' suggestion is to be included, India (i) submits that it may be more appropriately placed in the paragraph summarizing the United States' submissions, and (ii) requests that India's position also be included, as explained in its written comments.⁵³

6.5. We have decided not to accommodate the United States' request. Paragraph 7.51 is part of our evaluation, and sets forth our understanding of the measures at issue and resolution of the claim. In the absence of evidence regarding how the USDOC determines the availability of benchmarks, and bearing in mind the United States' reply to Panel question No. 84, the Panel is not persuaded that the United States has established that a standard referring to "a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question"⁵⁴ necessarily provides the type of analysis of "prevailing market conditions" envisaged by the Panel in this paragraph.

6.2.2 Paragraph 7.63 (paragraph 7.62 of the Final Report)

6.6. The United States requests the Panel to note that India did not provide any evidence in support of India's specific argument at issue.⁵⁵

6.7. India disagrees with the United States' request, because India's claim at issue is an "as such" claim which does not depend on any factual evidence. In addition, India recalls that paragraph 7.63 is part of the Panel's evaluation. If the United States' suggestion is included, India (i) submits that it may be more appropriately placed in the paragraphs summarizing the United States' submissions, and (ii) requests that India's position be also included, as explained in its written comments.⁵⁶

6.8. We have decided not to accommodate the United States' request, because we are able to resolve India's claim as a matter of law, without assessing whether India has established any factual basis for that claim.

6.2.3 Paragraph 7.87 (paragraph 7.86 of the Final Report)

6.9. The United States requests that paragraph 7.87 be modified to reflect that there is no evidence that Clause 49 applied to NMDC during the review periods, and consequently there is no need for the Panel to address the significance of Clause 49 on the question of whether NMDC

⁵² United States' requests to review precise aspects of the Interim Report, paras. 3-5.

⁵³ India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 1-2.

⁵⁴ United States' requests to review precise aspects of the Interim Report, paras. 4-5. (emphasis omitted)

⁵⁵ Ibid. para. 6.

⁵⁶ India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 4-6.

directors are independent.⁵⁷ The United States also proposes deletion of the last sentence of paragraph 7.87.

6.10. India disagrees with the bulk of United States' requests. India submits that it did not concede to any non-compliance of Clause 49. In addition, India objects to the unfounded selective deletion proposed by the United States. India proposes the deletion of the entire paragraph 7.87.⁵⁸

6.11. For the most part, we have decided not to accommodate the United States' requests. We do not consider that the WTO-consistency of the USDOC's public body determination should hinge on whether or not Clause 49 was complied with, since in any event that provision does not regulate the conduct of NMDC's governmental directors. We have, though, deleted the last two sentences of paragraph 7.87.

6.2.4 Paragraph 7.124 (paragraph 7.123 of the Final Report)

6.12. The United States requests the Panel to add a reference to the Panel Report in *US – Upland Cotton* as further support for the Panel's interpretation.⁵⁹

6.13. India disagrees with the United States' request. India submits that the specific reference suggested by the United States concerns a factual finding in *US – Upland Cotton* and does not relate to the Panel's evaluation in paragraph 7.124. Alternatively, India submits a number of other references that the Panel could consider.⁶⁰

6.14. We have decided not to accommodate the United States' request. While a reference to the findings in *US – Upland Cotton* would not be inconsistent with our evaluation, our reasoning focuses more on the issue of limited access.

6.2.5 Paragraph 7.179 (paragraph 7.178 of the Final Report)

6.15. The United States submits that the description of its arguments relating to India's alleged "comparative advantage" is incomplete, and suggests a revision to paragraph 7.179.⁶¹

6.16. India submits that, if the Panel accepts the United States' suggestions, the Panel should clarify that the text reflects the position of the United States. In addition, India requests the Panel to revise paragraph 7.176 (paragraph 7.175 of the Final Report) to fully capture India's arguments.⁶²

6.17. We have modified paragraphs 7.176 and 7.179 to reflect the comments of both parties.

6.2.6 Paragraph 7.186 (paragraph 7.185 of the Final Report)

6.18. The United States requests that paragraph 7.186 be modified to reflect that India failed to present any actual evidence of a comparative advantage.⁶³

6.19. India disagrees with the United States' request, because paragraph 7.186 is part of the Panel's evaluation and the United States' contention is already included in paragraph 7.179 (paragraph 7.178 of the Final Report), which summarized the United States' arguments.⁶⁴

⁵⁷ United States' requests to review precise aspects of the Interim Report, para. 7.

⁵⁸ India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 8 and 10.

⁵⁹ United States' requests to review precise aspects of the Interim Report, para. 9.

⁶⁰ India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 13-14.

⁶¹ United States' requests to review precise aspects of the Interim Report, para. 10.

⁶² India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 15-16.

⁶³ United States' requests to review precise aspects of the Interim Report, para. 11.

⁶⁴ India's comments on the United States' requests to review precise aspects of the Interim Report, paras. 17-18.

6.20. We have decided not to accommodate the United States' request, because we are able to resolve India's claim without assessing whether India advanced evidence of any comparative advantage.

6.2.7 Paragraph 7.199 (paragraph 7.198 of the Final Report)

6.21. The United States requests that paragraph 7.199 be modified to accurately reflect the United States' arguments.⁶⁵

6.22. India does not comment on this request.

6.23. We have decided to accommodate the United States' request and have made the adjustment sought.

6.2.8 Paragraph 7.251 (paragraph 7.250 of the Final Report)

6.24. The United States requests the Panel to correct a factual inaccuracy with respect to the Indian laws at issue, and reconsider its findings in this respect.⁶⁶

6.25. While India agrees with the factual inaccuracy identified by the United States, India submits that the Panel's conclusions need not be modified.⁶⁷

6.26. We have corrected the factual inaccuracy in our evaluation, and modified paragraph 7.247 (paragraph 7.246 of the Final Report), which also refers to this matter, and paragraph 7.251 accordingly.

6.2.9 Paragraph 7.311 (paragraph 7.310 of the Final Report)

6.27. The United States requests that a footnote be added to the end of paragraph 7.311 to reflect that India does not dispute that the PLRs were the only interest rates on record that were comparable to SDF loans examined in the 2006 administrative review.⁶⁸

6.28. India does not comment on this request.

6.29. We have decided to accommodate the United States' request and have made the adjustment sought.

6.2.10 Paragraphs 7.324 and 7.325 (paragraphs 7.323 and 7.324 of the Final Report)

6.30. The United States requests that paragraphs 7.324 and 7.325 be modified to reflect that imports from India were subsidized and dumped, and that all subsidized imports from other countries were also dumped.⁶⁹

6.31. India does not comment on this request.

6.32. We have decided to accommodate the United States' requests and have made the adjustments sought, albeit not in the precise manner proposed by the United States.

⁶⁵ United States' requests to review precise aspects of the Interim Report, paras. 12-13.

⁶⁶ Ibid. paras. 14-15.

⁶⁷ India's comments on the United States' requests to review precise aspects of the Interim Report, para. 19.

⁶⁸ United States' requests to review precise aspects of the Interim Report, para. 17.

⁶⁹ Ibid. paras. 18-19.

6.2.11 Paragraph 7.376 and footnote 521 to paragraph 7.390 (paragraph 7.375 and footnote 646 to paragraph 7.389 of the Final Report)

6.33. The United States submits that the US provision referred to in these paragraphs is not at issue in this dispute, and India has acknowledged this fact. The United States requests that these paragraphs be revised accordingly.⁷⁰

6.34. India does not comment on this request.

6.35. We have decided to partly accommodate the United States' requests. Although the United States contends that India acknowledged that the relevant provision is not at issue in this dispute, we note India only accepted that "the said provision has nothing to do with cumulation in changed circumstances review".⁷¹ Thus, we have modified footnote 491 (footnote 616 of the Final Report) accordingly. However, we also note that India contends that "the sunset review [can be] conducted post such countries becoming members of the WTO."⁷² For this reason, we have decided not to accommodate the United States' request regarding footnote 521.

6.2.12 Paragraphs 7.410, 7.415-7.418, 7.421 and 7.299 (paragraphs 7.409, 7.414-7.417, 7.420 and 7.298 of the Final Report), and abbreviations table

6.36. The United States submits that it may be confusing to refer to the US measures at issue using the abbreviation "AFA", defined as "adverse facts available", since this expression does not reflect the legal operation of such measures. The United States requests deleting the abbreviation "AFA Provisions" from the abbreviations table, and changing the references in the mentioned paragraphs to the expression "U.S. facts available provisions".⁷³

6.37. India does not comment on this request.

6.38. We note that "AFA Provisions" is an expression repeatedly used in India's submissions and statements. Thus, a reference to it, including in the abbreviations table, is necessary for a proper understanding of India's arguments, as summarized in paragraphs 7.410 and 7.415-7.418. For this reason, we have decided not to accommodate the United States' requests in these places. We note, however, that paragraphs 7.421 and 7.299 do not specifically summarize India's arguments. Thus, although the USDOC itself uses the abbreviation "AFA", we have decided to accommodate the United States' request with respect to these paragraphs, and have modified them accordingly.

6.2.13 Paragraph 7.419 (paragraph 7.418 of the Final Report)

6.39. The United States requests a change to the wording in paragraph 7.419.⁷⁴

6.40. India does not comment on this request.

6.41. We have decided to accommodate the United States' request and have made the adjustment sought.

6.2.14 Paragraphs 7.453 and 7.460 (paragraphs 7.452 and 7.459 of the Final Report)

6.42. The United States requests changes to the wording in paragraphs 7.453 and 7.460 to reflect the proper standard of review of the Panel.⁷⁵

6.43. India does not comment on this request.

⁷⁰ United States' requests to review precise aspects of the Interim Report, paras. 20-21.

⁷¹ India's response to Panel question No. 31.

⁷² Ibid.

⁷³ United States' requests to review precise aspects of the Interim Report, paras. 22-23.

⁷⁴ Ibid. para. 24.

⁷⁵ Ibid. paras. 25-26.

6.44. We have decided to accommodate the United States' requests and have made the adjustments sought.

6.3 India's requests for changes to the Interim Report

6.3.1 Paragraphs 1.34-1.38 (paragraphs 1.34-1.38 of the Final Report)

6.45. India requests that the Panel examine the term "initiated" in India's panel request in light of footnote 37 of the SCM Agreement. India recalls its argument that the statement in its panel request that "no investigation was initiated or conducted" should be read as no investigation was "initiated, commenced and performed in the manner '*provided [for] in Article 11*' of the SCM Agreement".⁷⁶ India contends that "the Panel simply ignored the legal basis of India's claim", despite being required to evaluate such legal basis.⁷⁷

6.46. The United States submits that India's request must be disregarded for the same reasons the Panel rejected India's arguments in its Interim Report. In addition, the United States notes that India's request is not for "review precise aspects of the interim report", but rather for the Panel to evaluate India's claim.⁷⁸

6.47. We have decided not to accommodate India's request. We note that India's arguments, referred to above, were summarized in paragraph 1.24 of the Interim Report (paragraph 1.24 of the Final Report), and specifically addressed and rejected in paragraph 1.34. However, for the sake of clarity, we have made minor modifications to paragraph 1.34, including adding a sentence in footnote 39 to paragraph 1.34 (footnote 39 of the Final Report).

6.3.2 Section 7.2: India's third ground

6.48. India requests the Panel to evaluate the specific and independent ground raised by India, as the Panel has neither recorded nor evaluated such ground in the Interim Report.⁷⁹

6.49. The United States disagrees with India's request, because the Panel has in fact both noted and discussed India's argument at issue.⁸⁰

6.50. We have decided not to accommodate India's request, because the matter raised by India is already addressed effectively by our evaluation set forth in Section 7.2.3. The fact that we have not followed the order set forth in India's first written submission does not mean that parts of India's claims have been overlooked, or misrepresented.

6.51. The third ground identified by India relates, in India's words, to the "hierarchical approach" provided for in Section 351.511(a)(2)(i)-(iii). This is evident from paragraphs 71 and 72 of India's first written submission. We addressed the issue of "hierarchical preference" in Section 7.2.3. In further support of its third ground, India also argues in its first written submission that "without the United States proving that the 'provision [of goods] is made for less than adequate remuneration', there is no benefit conferred by providing the goods".⁸¹ This issue again relates to the substance of Section 7.2.3. The overlap with matters raised in Section 7.2.3 is further evidenced by the opening phrase of paragraph 67 of India's first written submission, which refers the reader to a previous section of India's submission. In that section, India argues that the "adequacy of remuneration referred to in Article 14(d) must be assessed from the perspective of

⁷⁶ India's requests to review precise aspects of the Interim Report, paras. 2-4. See also India's response to the United States' requests for preliminary rulings, paras. 9-11.

⁷⁷ India's requests to review precise aspects of the Interim Report, paras. 2 and 5.

⁷⁸ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 6-7, referring to Article 15.2 of the DSU.

⁷⁹ India's requests to review precise aspects of the Interim Report, para. 9.

⁸⁰ United States' comments on India's requests to review precise aspects of the Interim Report, para. 10.

⁸¹ India's first written submission, para. 64.

whether the remuneration is adequate to the provider of the goods or not".⁸² Again, this is precisely the matter addressed in Section 7.2.3.

6.3.3 Section 7.2: India's sixth ground

6.52. India requests the Panel to evaluate the specific and independent ground raised by India, as the Panel has neither recorded nor evaluated such ground in the Interim Report.⁸³

6.53. The United States disagrees with India's request, because the Panel has in fact both noted and considered India's argument at issue.⁸⁴

6.54. We have decided not to accommodate India's request, because the matter raised by India is already addressed effectively in our findings. We note that this ground is based on India's allegations that the Tier-II approach (i) countervails the exporting Member's "comparative advantage"⁸⁵, and (ii) gives preference to the method "that is not in relation to the market in question"⁸⁶. As stated above, we have already evaluated and rejected these arguments in our findings.

6.3.4 Paragraph 7.20 (Paragraph 7.20 of the Final Report)

6.55. India requests the Panel to (i) re-evaluate its argument concerning "commercial considerations" as an independent ground to challenge the measures at issue, and (ii) modify paragraph 7.20 by correcting one of its references and replacing the first sentence as proposed by India.⁸⁷

6.56. The United States disagrees with India's requests, because the Panel has examined and rejected India's proposed two-step analysis, and contrary to India's statement, the first sentence and the reference at paragraph 7.20 support the Panel's view.⁸⁸

6.57. We have decided not to accommodate India's request. With respect to India's first point, as stated in footnote 80 (footnote 195 of the Final Report), India's argument concerning "commercial considerations" is no longer relevant once one rejects the notion that Article 14(d) of the SCM Agreement requires a two-step analysis. For this reason, there is no need for us to evaluate this argument as an independent ground.

6.58. Turning to India's second point, in our view, the Panel's statement is a fair representation of paragraph 50 of India's first written submission, where India states that "a given 'remuneration' may be 'adequate' under Article 14(d) even if there is a difference between the price in question and the price for the similar goods transacted between private parties in the market concerned". Furthermore, we considered it unnecessary to include a reference to paragraphs 58-62 of India's first written submission, since paragraph 63 of that submission makes it clear that the basic issue addressed in those paragraphs concerns the fact that USDOC "determines a remuneration to be inadequate merely on the basis of a price difference with a certain benchmark price (i.e. Tier-I and Tier-II method), without actually evaluating whether the remuneration is otherwise justified by market or commercial considerations (i.e. Tier-III method)." This is precisely the point addressed by the Panel.

6.3.5 Paragraphs 7.19 and 7.31 (paragraphs 7.19 and 7.31 of the Final Report)

6.59. India recalls that India raised separate and independent arguments on the first and second sentences of Article 14(d) of the SCM Agreement, and submits that the Panel erroneously treated

⁸² India's first written submission, para. 23.

⁸³ India's requests to review precise aspects of the Interim Report, para. 11.

⁸⁴ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 15-16.

⁸⁵ India's first written submission, para. 84.

⁸⁶ Ibid.

⁸⁷ India's requests to review precise aspects of the Interim Report, paras. 14-18.

⁸⁸ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 20-29.

these two grounds as if they were one. India requests the Panel to correct this error and review its evaluation in the relevant paragraphs accordingly.⁸⁹

6.60. The United States disagrees with India's request, because the Panel found that it was not necessary to evaluate India's arguments with respect to "commercial considerations" in light of the fact that the adequacy of remuneration is assessed from the perspective of the recipient and not the government provider.⁹⁰

6.61. We have decided not to accommodate India's request. As noted above, footnote 80 (footnote 195 of the Final Report) makes it clear that, once Article 14(d) of the SCM Agreement is interpreted properly, the issue of "commercial considerations" is not legally relevant. Furthermore, India improperly suggests that the Panel's findings in section 7.2.3 are concerned exclusively with the first sentence of Article 14(d), when in fact, at paragraph 7.33 (paragraph 7.33 of the Final Report), the Panel also considers aspects relating to the second sentence thereof, particularly the requirement that the adequacy of remuneration be assessed "in relation to prevailing market conditions ... in the country of provision".

6.3.6 Section 7.2: India's second ground

6.62. India requests the Panel to evaluate the specific and independent ground raised by India, as the Panel has failed to do so in the Interim Report.⁹¹

6.63. The United States disagrees with India's request, because the Panel has already considered and rejected India's argument at issue.⁹²

6.64. We have decided not to accommodate India's request, because, as noted above, footnote 80 (footnote 195 of the Final Report) makes it clear that, once Article 14(d) of the SCM Agreement is interpreted properly, the issue of "commercial considerations" is not legally relevant.

6.3.7 Paragraphs 7.26 and 7.28 (paragraphs 7.26 and 7.28 of the Final Report)

6.65. India requests the Panel to clarify the language in paragraphs 7.26 and 7.28, because while the former appears to present a possibility, the latter suggests a more definitive conclusion.⁹³

6.66. The United States disagrees with India's request, because the United States considers the language used by the Panel in the paragraphs at issue appropriate, in light of the text of Article 14(d) of the SCM Agreement.⁹⁴

6.67. We have decided to accommodate India's request. Thus, we have amended paragraph 7.28 to more closely reflect the language in Article 14(d) of the SCM Agreement.

6.3.8 Section 7.2.5.2: comparative advantage

6.68. India requests the Panel to evaluate the specific ground raised by India, as the Panel has neither recorded nor evaluated such ground in the Interim Report.⁹⁵

6.69. The United States disagrees with India's request, because the Panel is not required to include a recitation and separate discussion of every argument put forward by the parties. In any event, the United States submits that the Panel has already both fully considered and rejected

⁸⁹ India's requests to review precise aspects of the Interim Report, paras. 21-23.

⁹⁰ United States' comments on India's requests to review precise aspects of the Interim Report, para. 32.

⁹¹ India's requests to review precise aspects of the Interim Report, para. 27.

⁹² United States' comments on India's requests to review precise aspects of the Interim Report, paras. 34-35.

⁹³ India's requests to review precise aspects of the Interim Report, para. 31.

⁹⁴ United States' comments on India's requests to review precise aspects of the Interim Report, para. 38.

⁹⁵ India's requests to review precise aspects of the Interim Report, para. 32.

India's arguments with respect to an alleged "comparative advantage". If the Panel decides to accommodate India's request, the United States requests the Panel to similarly record the United States' submissions in respect of comparative advantage.⁹⁶

6.70. We have decided to partly accommodate India's request. Thus, we have included a footnote at the end of paragraph 7.51 (paragraph 7.51 of the Final Report) with a cross-reference to the Panel's treatment of India's comparative advantage argument at paragraph 7.63 (paragraph 7.62 of the Final Report).

6.3.9 Paragraph 7.47 (paragraph 7.47 of the Final Report)

6.71. India requests that paragraph 7.47 be modified to accurately reflect India's position. India also requests the Panel to revise its findings in paragraph 7.50 (paragraph 7.50 of the Final Report) accordingly.⁹⁷

6.72. The United States disagrees with India's request, because the Panel has accurately captured India's primary argument, and the Panel need not include a separate discussion of every argument put forward by the parties. Moreover, the United States also contends that India's argument at issue lacks factual or legal basis.⁹⁸

6.73. We have decided not to accommodate India's request, as we see no need to amend our description of the "main arguments" made by India. India's argument regarding the use of out-of-country benchmarks "every time there is lack of information relating to in-country benchmark" is clearly linked to this main argument, in the sense that India suggests that the United States' uses lack of information "as an excuse to desecrate the ... very narrow exception that has been tailored by the Appellate Body for extreme cases".⁹⁹ Once it is established by the Panel that the exception identified by the Appellate Body is not as narrow as India suggests, India's concern about that exception allegedly being "desecrate[d]" becomes moot.

6.74. Regarding the so-called "exhaustion" of Tier I benchmarks, we note that India is referring to an argument, at paragraph 29 of its second written submission, made in response to an argument by the United States regarding the object and purpose of the SCM Agreement. Since the Panel did not consider it necessary to evaluate this US argument in its findings, there is similarly no need for the Panel to evaluate India's response to this argument.

6.3.10 Paragraph 7.49 (paragraph 7.49 of the Final Report)

6.75. India submits that the Appellate Body in *US – Softwood Lumber IV* referred to the use of out of country benchmarks in "very limited" circumstances. India request the Panel to replace the phrase "appropriate circumstances" with the phrase "very limited circumstances".¹⁰⁰

6.76. The United States disagrees with India's request, because the use of the phrase "appropriate circumstances" is fully consistent with the Appellate Body Report in *US – Softwood Lumber IV*. In addition, the United States contends that India repeats arguments which the Panel has considered and properly rejected in the Interim Report.¹⁰¹

6.77. We see no need to make the change proposed by India. Out-of-country benchmarks may be used in appropriate circumstances, irrespective of how limited those circumstances may be.

⁹⁶ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 40-41.

⁹⁷ India's requests to review precise aspects of the Interim Report, paras. 37-39.

⁹⁸ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 47-48.

⁹⁹ India's first written submission, para. 79, last sentence.

¹⁰⁰ India's requests to review precise aspects of the Interim Report, paras. 34-35.

¹⁰¹ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 44-45.

6.3.11 Paragraph 7.60 (paragraph 7.60 of the Final Report)

6.78. India submits that the Panel has taken India's arguments out of context, and requests the Panel to (i) review its findings in paragraph 7.60 and Section 7.2.6.3 accordingly, and (ii) delete paragraph 7.61 (paragraph 7.61 of the Final Report).¹⁰²

6.79. The United States disagrees with India's requests, because contrary to India's assertions the Panel has accurately captured India's arguments.¹⁰³

6.80. We have decided not to accommodate India's requests. We do not agree with India that the Panel has considered an extract from India's oral statement at the first substantive meeting out of context. Paragraph 15 of India's first oral statement expresses the concern that the delivered price will be applied "even if the government price in question does not include such delivery charges". India then refers to the application of this mandatory requirement in cases "where the price under challenge" is *ex works*. At paragraph 16 of its oral statement, India asserts that the delivered price adjustment is made "[e]ven where the prevailing 'conditions of sale' for the **transaction** of the goods **in question** do not include transportation or other delivery charges, such as when goods are being transacted on an *ex-works* basis" (bold emphasis added). India then explains that "this method allows the United States to consider something more than the actual *remuneration* received **by the provider of the goods**, which disregards the plain words of Article 14(d)" (bold emphasis added). These subsequent references to the "transaction in question" and the "remuneration received by the provider of the goods" confirm the Panel's understanding of India's argument, and make it clear that the reference in paragraph 15 of India's oral statement was not an isolated case taken out of context by the Panel. The argument is also made at paragraph 8 of India's first written submission, where India indicates that "[e]ven if the *government price* is at ex-factory level, ocean freight, delivery charges and import duties are included in the benchmark price to arrive at delivered prices".

6.81. Finally, the above-mentioned reference to the remuneration of the provider of the goods (which, in the context of Article 14(d) of the SCM Agreement, would indicate the remuneration to the *government* provider) is also included in paragraph 89 of India's first written submission, where India asserts that "transportation and other delivery charges can never be considered as 'remuneration' to the provider of goods" in cases where "terms of sale of the goods in question in the country of provision may be on an ex-works or ex-mines, or CIF or FOB, or anything other than 'delivered'".

6.3.12 Section 7.2.6.3: foreclosure of examination of prevailing market conditions

6.82. India contends that the Interim Report contains no finding on why mandatory foreclosure should or should not be considered an "as such" violation of Article 14(d) of the SCM Agreement, despite India's arguments on this matter. India requests the Panel to evaluate the relevant submissions of India, and review its findings accordingly.¹⁰⁴

6.83. The United States disagrees with India's request, because contrary to India's assertions the Panel has considered and rejected India's arguments.¹⁰⁵

6.84. We have decided not to accommodate India's request. India's request is based on an understanding of its argument that would not equate "prevailing market conditions" to the specific conditions of sale by the government provider at issue. As noted above, this does not reflect a proper understanding of India's argument.

¹⁰² India's requests to review precise aspects of the Interim Report, paras. 41-44.

¹⁰³ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 49-52.

¹⁰⁴ India's requests to review precise aspects of the Interim Report, paras. 45-46.

¹⁰⁵ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 53-55.

6.3.13 Paragraph 7.62 (deleted from the Final Report)

6.85. India queries the relevance of the Panel's evaluation set forth in paragraph 7.62. India notes that the Panel refers to issues pertaining to India's "as applied" claims, whereas the relevant Section of the Report addresses India's "as such" claim.¹⁰⁶

6.86. The United States disagrees with India's request, and considers that India's critiques are misplaced.¹⁰⁷

6.87. We have decided to delete paragraph 7.62 from our Report. We have amended the introduction to paragraph 7.63 (paragraph 7.62 of the Final Report) accordingly.

6.3.14 Section 7.3.1.4

6.88. India requests the Panel to evaluate the implications of the United States' admission before the panel in *US – Anti-Dumping and Countervailing Duties (China)*. India submits that the Panel has neither recorded nor evaluated such matter in the Interim Report.¹⁰⁸

6.89. The United States disagrees with India's request, because the investigations at issue in the present dispute are wholly distinct from the investigations at issue in *US – Anti-Dumping and Countervailing Duties (China)*, and those statements are simply not relevant to the present dispute.¹⁰⁹

6.90. We have decided not to accommodate India's request. Our findings should not be based on any alleged admission by the United States in other WTO dispute settlement proceedings. Rather, our findings should be based on the evidence placed on the record by the parties. As this issue was raised in a footnote to India's first written submission, we consider there is no need to include this matter in the summary of India's "main" arguments.

6.3.15 Footnote 131 (footnote 245 of the Final Report)

6.91. India requests the Panel to record that the term "governed by" was never explained by the United States in the determination at issue, and that this term was first explained by the United States before this Panel.¹¹⁰

6.92. The United States disagrees with India's request, because India is incorrect in stating that the explanations provided by the USDOC were not contained in the determinations themselves.¹¹¹

6.93. We have decided not to accommodate India's request, because there is no need to provide the requested clarification. As to whether or not the term "governed by" was explained in the USDOC's determinations at issue, we consider that those determinations speak for themselves.

6.3.16 Paragraph 7.82 and footnote 130 (paragraph 7.81 and footnote 244 of the Final Report)

6.94. India requests the Panel to review its findings after properly evaluating the implication of certain USDOC's statements in the 2007 administrative review.¹¹²

¹⁰⁶ India's requests to review precise aspects of the Interim Report, paras. 47-48.

¹⁰⁷ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 57-58.

¹⁰⁸ India's requests to review precise aspects of the Interim Report, paras. 56-57.

¹⁰⁹ United States' comments on India's requests to review precise aspects of the Interim Report, para. 68.

¹¹⁰ India's requests to review precise aspects of the Interim Report, para. 58.

¹¹¹ United States' comments on India's requests to review precise aspects of the Interim Report, para. 71.

¹¹² India's requests to review precise aspects of the Interim Report, paras. 59-63.

6.95. The United States disagrees with India's request, because there is no inconsistency between the Panel's acknowledgment of the USDOC's statements and the Panel's findings.¹¹³

6.96. We have decided not to accommodate India's request. Footnote 130 of the Interim Report explains that, notwithstanding the USDOC's assertion in the relevant issues and decision memorandum, the USDOC had already referred to a factor other than majority government share ownership in a prior determination. There is no contradiction between this statement and the findings of the Panel in paragraphs 7.82-7.84 (paragraphs 7.81-7.83 of the Final Report). Furthermore, the Panel is correct to resolve India's claim on the basis of the totality of the evidence before it.

6.3.17 Paragraph 7.83 (paragraph 7.82 of the Final Report)

6.97. India requests the Panel to (i) consider that the reference to evidence in the 2007 administrative review is irrelevant to the 2004 and 2006 administrative reviews, as the latter pre-dated the former; and (ii) record that the United States has specifically admitted before the Panel that "administrative control" was not used in its determinations.¹¹⁴

6.98. The United States disagrees with India's requests. The United States recalls that the Panel has referred to several facts considered by the USDOC in the 2004, 2006 and 2007 administrative reviews. The Interim Report also does not indicate that the evidence referred to in the 2004 administrative review was insufficient to support the USDOC's public body finding. Finally, the United States made no such statements as India contends.¹¹⁵

6.99. We have decided not to accommodate India's requests. First, we do not consider that there is any inaccuracy regarding the last sentence of paragraph 7.83 (paragraph 7.82 of the Final Report). While that sentence refers to evidence of government appointment of directors addressed by the USDOC in the 2007 administrative review, paragraph 7.84 (paragraph 7.83 of the Final Report) also discusses similar evidence of government appointment of directors on USDOC's record of the 2004 administrative review. In addition, paragraph 7.83 cites a statement in USDOC's 2007 Issues and Decision Memorandum to the effect that the 2007 evidence "bolsters" the 2004 evidence. Thus, the fact that the 2007 evidence post-dates the 2004 review does not mean that there was no evidence of government appointment of directors in respect of that earlier review.

6.100. Second, we do not consider that the United States should be understood to have admitted that USDOC did not rely on "administrative control" in its determinations. The fact that this phrase may not have been used by the USDOC does not mean that the United States is precluded from relying on evidence – on USDOC's record – of "administrative control" in this Panel proceeding.

6.3.18 Paragraphs 7.85-7.87 (paragraphs 7.84-7.86 of the Final Report)

6.101. India requests the Panel to record the distinction highlighted in the underlying investigation, as well as before the Panel, between GOI *nomination* and GOI *appointment* of directors. India also requests the Panel to examine whether NMDC would be a public body considering that the GOI is involved only in the nomination of a majority of NMDC's board as opposed to appointing a very small minority of NMDC's board.¹¹⁶

6.102. The United States does not object to India's request that this argument be recorded by the Panel in its Final Report. The United States submits that this argument does not warrant any changes to the Panel's findings.¹¹⁷

¹¹³ United States' comments on India's requests to review precise aspects of the Interim Report, para. 73.

¹¹⁴ India's requests to review precise aspects of the Interim Report, paras. 65-66.

¹¹⁵ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 76-77.

¹¹⁶ India's requests to review precise aspects of the Interim Report, paras. 65-66.

¹¹⁷ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 78-79.

6.103. We have decided to accommodate India's request, and have modified paragraph 7.86 to record India's appointment versus nomination argument. However, we do not consider that this argument alters the Panel's findings. We have also amended the first line of paragraph 7.87.

6.3.19 Paragraph 7.87: content of websites (paragraph 7.86 of the Final Report)

6.104. India requests the Panel to record India's rebuttal to this issue, including the fact that annual reports are indeed part of the static portion of the website and such published annual reports are not changed.¹¹⁸

6.105. The United States does not object to India's request, and suggests that it could be addressed in existing footnote 140 (footnote 254 of the Final Report). The United States submits that this argument does not warrant any changes to the Panel's findings.¹¹⁹

6.106. We have decided to accommodate India's request, and have included a new footnote 255 in the Final Report and modified paragraph 7.87 accordingly. However, our finding remains unchanged, since it is based on the fact that websites are generally not static. Investigating authorities should not be required to trawl through websites, and ascertain what parts of such websites may or not remain unchanged, particularly given the risk that changes may be made at any time by the host, and websites may even disappear.

6.3.20 Paragraph 7.87: consideration of the record (paragraph 7.86 of the Final Report)

6.107. India refers to the Panel's finding that the listing agreement has been submitted only before this Panel and is not part of the records of the USDOC. India requests the Panel to fully consider the records of this case, record India's submissions, and review the relevant Panel's findings.¹²⁰

6.108. The United States disagrees with India's requests. The United States submits that India has no basis for its argument, particularly because India does not point to any record evidence in which the listing agreement was contained or even mentioned.¹²¹

6.109. We have decided not to accommodate India's request. At paragraph 210 of its first written submission, India asserted that "Essar submitted that NMDC is not a government authority or a public body since the GOI was not involved in the daily operations of NMDC and that NMDC's operations are managed by an independent board consisting of 13 members". There is nothing in India's first written submission to suggest that, in making its argument, Essar was specifically referring to Clause 49 of the Listing Agreement.

6.3.21 Paragraph 7.87: government involvement (paragraph 7.86 of the Final Report)

6.110. India requests the Panel to clarify whether it is the Panel's view that any degree of government involvement in the appointment of NMDC's directors will suffice in concluding that NMDC is a public body. Alternatively, India requests that the relevant statement by the Panel be struck from the Report.¹²²

6.111. The United States disagrees with India's clarification request, because this paragraph should not be modified on the basis of the relevance of Clause 49 of the Listing Agreement. While the Interim Report contains an interpretation of Article 1.1(a)(1) of the SCM Agreement, the statement regarding the Listing Agreement does not amount to a general articulation of this

¹¹⁸ India's requests to review precise aspects of the Interim Report, para. 71.

¹¹⁹ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 80-81.

¹²⁰ India's requests to review precise aspects of the Interim Report, paras. 72-73.

¹²¹ United States' comments on India's requests to review precise aspects of the Interim Report, para. 82.

¹²² India's requests to review precise aspects of the Interim Report, paras. 74-75.

provision. However, the United States also requests that the relevant part in paragraph 7.87 identified by India be struck from the Report.¹²³

6.112. As both parties agree on the deletion of the relevant part of the Interim Report, we have amended this paragraph accordingly.

6.3.22 Paragraphs 7.87-7.89 (paragraphs 7.86-7.88 of the Final Report)

6.113. India requests the Panel to (i) accurately reflect India's arguments; (ii) record that the United States admitted before the Panel that the alleged "administrative control" was never a factor used by the United States in its determinations; and (iii) delete certain findings in paragraphs 7.87-7.89 because they are not aligned with the proper standard of review of the Panel.¹²⁴

6.114. The United States disagrees with India's requests. The United States fails to see how India's arguments were misrepresented by the Panel. In addition, the United States has never made the admission indicated by India. Finally, the United States submits that India has no basis for arguing that the Panel should delete paragraphs 7.87-7.89 in their entirety.¹²⁵

6.115. We have decided not to accommodate India's requests. The Panel simply addressed Clause 49 and the issue of Navatna/Miniratna status in its findings in response to arguments presented by India. The fact that such evidence was not on the USDOC's record does not mean that India's arguments should simply have been disregarded by the Panel. Furthermore, India has provided no basis for concluding that the relevant evidence should have been on the USDOC's record. Regarding the issue of whether the United States admitted that "administrative control" was never a factor relied on by the USDOC, the United States' response to Panel question No. 42 speaks for itself.

6.3.23 Paragraph 7.88 (paragraph 7.87 of the Final Report)

6.116. India requests the Panel to clarify the meaning of the expression "administrative control" as used by the Panel.¹²⁶

6.117. The United States disagrees with India's clarification request, because this expression is used by NMDC on its own website. The United States submits that the Panel made use of this expression as used by the entity in question, and was not seeking to identify its own characterization of the entity.¹²⁷

6.118. For the sake of clarity, we have amended the beginning of the second sentence of paragraph 7.88.

6.3.24 Paragraph 7.147 (paragraph 7.146 of the Final Report)

6.119. India asks the Panel to review its "as applied" findings in light of India's comments on the Panel's "as such" findings.¹²⁸

6.120. The United States asks us to reject India's request, on the basis of the United States' objections to India's comments regarding the Panel's "as such" findings.¹²⁹

¹²³ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 83-84. See also United States' requests to review precise aspects of the Interim Report, para. 7.

¹²⁴ India's requests to review precise aspects of the Interim Report, paras. 77-79.

¹²⁵ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 86-89.

¹²⁶ India's requests to review precise aspects of the Interim Report, para. 76.

¹²⁷ United States' comments on India's requests to review precise aspects of the Interim Report, para. 85.

¹²⁸ India's requests to review precise aspects of the Interim Report, para. 81.

¹²⁹ United States' comments on India's requests to review precise aspects of the Interim Report, para. 90.

6.121. We have already explained that there is no need for us to amend our "as such" findings pursuant to India's comments. Accordingly, there is similarly no need for us to amend our "as applied" findings.

6.3.25 Paragraph 7.160-7.166 (paragraphs 7.159-7.165 of the Final Report)

6.122. India contends that the Panel has committed an error by ruling on matters (in the form of *ex post* rationalizations) that are not before it.¹³⁰

6.123. The United States considers that the Panel is cautious with respect to its finding of *ex post* rationalization. According to the United States, it is therefore appropriate for the Panel to opine on the justification offered by the United States.¹³¹

6.124. We do not believe it is necessary to amend our findings. Paragraph 7.160 provides ample explanation of the reasons why we consider it appropriate to include the relevant considerations in our Report.

6.3.26 Paragraph 7.183 (paragraph 7.182 of the Final Report)

6.125. India asserts that the Panel has failed to provide any referencing for the relevant statements of the NMDC officials.¹³² India also asserts that those statements relate to the setting of export/international prices, rather than domestic prices.¹³³

6.126. The United States notes that referencing has been provided by the Panel in footnote 248 (footnote 366 of the Final Report). The United States also asserts that the relevant statements also relate to prices in the domestic market.¹³⁴

6.127. We observe that the references to the relevant statements are already included in footnote 248 of the Interim Report (footnote 366 of the Final Report). Furthermore, the relevant statements make it clear that domestic prices are set in light of "the negotiated international price".

6.3.27 Section 7.4.1.3

6.128. India asks the Panel to include certain factual evidence in its findings.¹³⁵

6.129. The United States asserts that India provides no rationale or explanation for why this information should be included.¹³⁶

6.130. We decline India's request. It is not evident to us, and India has not explained, why the evidence referred to by India is relevant to the Panel's findings.

6.3.28 Section 7.4.3.4

6.131. India asked the Panel to include the fact that the royalty paid for the grant accounts for only a certain percentage of the costs borne by the miner. India also asks the Panel to delete its observation in footnote 310 (footnote 429 of the Final Report) regarding an apparent contradiction in India's position. India denies that there is any contradiction in its position. India also asks the

¹³⁰ India's requests to review precise aspects of the Interim Report, paras. 82-86.

¹³¹ United States' comments on India's requests to review precise aspects of the Interim Report, para. 92.

¹³² India's requests to review precise aspects of the Interim Report, para. 88.

¹³³ Ibid. para. 89.

¹³⁴ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 96-98.

¹³⁵ India's requests to review precise aspects of the Interim Report, para. 90.

¹³⁶ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 99-101.

Panel to record India's submission that GOI has no control over how much and in what manner the iron ore is mined.¹³⁷

6.132. The United States asserts that India provides no rationale or explanation for why the proportion of royalty payable should be included in the Panel's findings. The United States asserts that the Panel's evaluation makes it clear that the amount of royalty is irrelevant. Regarding footnote 310 (footnote 429 of the Final Report), the United States contends that the Panel's reference to an inconsistency in India's position is fully supported by the record. The United States also contends that India provides no basis or justification for the Panel to include any reference to India's lack of control over the amount and manner of iron ore mined. The United States asserts that the Panel already rejected India's argument regarding uncertainty, risk and control at paragraphs 7.237-7.238 (paragraphs 7.236-7.237 of the Final Report).¹³⁸

6.133. We decline India's requests. Concerning the amount of royalty and GOI's lack of control over the extraction, India has not explained – and it is not evident to us – why these issues are necessary for, or relevant to, the Panel's findings. Regarding footnote 310 (footnote 429 of the Final Report), we consider that the inconsistency referred to therein is plain. India's assertion to the contrary is unpersuasive.

6.3.29 Paragraph 7.247 (paragraph 7.246 of the Final Report)

6.134. India asks the Panel to exclude certain information which, in its view, is confidential.¹³⁹

6.135. The United States denies that the relevant information is confidential. The United States observes that the relevant information was included in non-confidential submissions to the USDOC, and treated as non-confidential by the USDOC, during the underlying proceedings.¹⁴⁰

6.136. We have deleted the quotation containing the information referred to by India. The information was included in a quote which, in light of changes reflecting the scope of the Coal Mining Nationalization Act, need no longer be included in the Panel's findings.

6.3.30 Paragraph 7.261 (paragraph 7.260 of the Final Report)

6.137. India asks the Panel to amend its findings to reflect India's argument¹⁴¹ that remuneration received by a government can only be actual, rather than notional.¹⁴²

6.138. The United States asserts that the Panel already considered and rejected India's argument that government prices be actual as opposed to notional. According to the United States, the question of whether the remuneration received by the government is actual or notional is equivalent to whether remuneration is assessed from the perspective of the government-provider in the first place.¹⁴³

6.139. We decline to make the change proposed by India. India's argument that the government's remuneration can only be actual, rather than notional, is necessarily premised on its view that the adequacy of remuneration is first assessed from the perspective of the government provider. We have already rejected this view in our findings.

¹³⁷ India's requests to review precise aspects of the Interim Report, paras. 91-93.

¹³⁸ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 102-113.

¹³⁹ India's requests to review precise aspects of the Interim Report, para. 94.

¹⁴⁰ United States' comments on India's requests to review precise aspects of the Interim Report, para. 114.

¹⁴¹ India refers to para. 389 of its first written submission and para. 231 of its second written submission.

¹⁴² India's requests to review precise aspects of the Interim Report, para. 95.

¹⁴³ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 115-118.

6.3.31 Paragraph 7.262 (paragraph 7.261 of the Final Report)

6.140. India asks the Panel to review its finding that India's "good faith" claim is outside the Panel's terms of reference. India notes that its request for consultation and request for establishment refer to the nullification or impairment of benefits. India also observes that Article 27 of the *Vienna Convention* indicates that parties to a treaty are required to interpret and apply treaty obligations in good faith. India also refers to various findings of the Appellate Body in support.¹⁴⁴

6.141. The United States asks the Panel to reject India's request. The United States observes that India's request for establishment contains no "good faith" claim. The United States asserts that an allegation of nullification or impairment is not a reference to "good faith".¹⁴⁵

6.142. We reject India's request. India has not established that the Panel should address a claim that is not within the Panel's terms of reference, as determined by India's request for establishment. Furthermore, an allegation of nullification or impairment does not amount to an allegation of violation of the principle of "good faith".

6.3.32 Paragraph 7.264 (paragraph 7.263 of the Final Report)

6.143. India asks the Panel to correct an error regarding the scope of its findings in respect of the USDOC's rejection of certain domestic price information submitted by GOI and Tata.¹⁴⁶

6.144. The United States contends that India's comment fails to address the Panel's explanation for its finding, or the connection between the relevant claims. The United States suggests that the scope of the Panel's findings is explained by the scope of India's claims.¹⁴⁷

6.145. We acknowledge the inconsistency in our findings, and have amended them accordingly. We have also amended the relevant parts of paragraph 7.266 (paragraph 7.265 of the Final Report), and the Section 8.1 on Conclusions.

6.3.33 Paragraphs 7.404-7.407 (paragraphs 7.403-7.406 of the Final Report)

6.146. India requests the Panel to clarify a number of legal questions relating to the Panel's assessment of whether certain economic factors were evaluated by the USITC in its injury determination. Recalling certain points listed in the Panel's reasoning, India contends that the only relevant point is the evaluation of factors which are closely related to "growth", "return on investment" and "ability to raise capital". Thus, India requests the Panel to "clarify whether it is of the view that as a matter of law, the USITC complies with Article 15.4 [of the SCM Agreement] simply because it evaluates other factors 'closely related' to 'growth', 'return on investment' and 'ability to raise capital', without actually evaluating these factors themselves."¹⁴⁸

6.147. Second, India contends that "return on investment" requires an analysis of profitability in relation to the capital employed during the relevant period. Thus, India requests the Panel to "clarify whether as matter of law, investigating authorities are entitled to skip separate evaluation of 'return on investment', merely because they have separately analyzed capital expenses, without correlating the same with profitability."¹⁴⁹

6.148. Finally, India contends that the evaluation of "ability to raise capital" requires a much broader analysis than mere profitability, as it depends on the creditworthiness of a firm and its promoters, other products dealt with by the firm, future outlook of the firm and market, and overall state of affairs of the firm over a certain period of time. Thus, India requests the Panel to

¹⁴⁴ India's requests to review precise aspects of the Interim Report, paras. 96-100.

¹⁴⁵ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 119-120.

¹⁴⁶ India's requests to review precise aspects of the Interim Report, paras. 101-102.

¹⁴⁷ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 121-122.

¹⁴⁸ India's requests to review precise aspects of the Interim Report, paras. 104-105.

¹⁴⁹ Ibid. para. 106.

"clarify whether as matter of law, investigating authorities are entitled to skip separate evaluation of 'ability to raise capital' by merely analyzing 'profitability'".¹⁵⁰

6.149. The United States submits that India's comments on the Interim Report do not identify any specific issues that require clarification, but rather amount to repetition of India's arguments, which the Panel has already rejected.¹⁵¹

6.150. We have decided not to accommodate India's requests. The Appellate Body in *EC – Tube or Pipe Fittings* stated that the *particular facts of each case* will determine whether a panel is able to find in the record "sufficient and credible evidence" that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made.¹⁵² After examining the particular facts of this case, the Panel identified in the record sufficient and credible evidence that the factors at issue were evaluated.¹⁵³ On this basis, we refrain from addressing India's queries "as a matter of law".

6.3.34 Paragraph 7.407 (paragraph 7.406 of the Final Report)

6.151. India notes that the USITC has not provided indexed figures or its analysis with regard to information included in Appendix E, and requests that this be recorded in the Panel's Report.¹⁵⁴

6.152. The United States recalls that the information contained in Appendix E was a compilation of the confidential responses of certain domestic producers, and notes that the redacted individual firm data was provided in aggregate form in the USITC's determination at Table VI-8, among other places.¹⁵⁵

6.153. We have decided to partly accommodate India's requests. As explained by the United States, Table VI-8 provides in aggregate form the data redacted from Appendix E. For the sake of clarity, however, we have modified footnote 551 (footnote 676 of the Final Report) to address India's request.

6.3.35 Paragraph 7.440 (paragraph 7.439 of the Final Report) and Section 7.5.5.2.1

6.154. India requests the Panel to correct certain alleged errors and re-evaluate independently all three distinct arguments raised by India. First, India contends that the correct reference to India's argument relating to the punitive application of "facts available" should refer to paragraphs 173-174, and 188 of its first written submission. Second, India contends that the Panel incorrectly stated that India's arguments relating to the punitive application of "facts available", and the "evaluative, comparative approach" are "inter-dependent". Third, India asks the Panel to examine its argument relating to the United States' consistent application of the challenged provision within the context of India's alternative argument.¹⁵⁶ Finally, on the basis of the above, India requests the Panel to review its findings regarding India's "as applied" claims.¹⁵⁷

6.155. According to the United States, India's requests fundamentally relate to whether the Panel has separately and independently recorded and examined India's punitive application argument. The United States submits that the Panel has fully recorded and addressed this argument. In addition, the United States recalls that India challenged the US laws themselves, and not the USDOC's "practice" with respect to the application of "facts available". Thus, the United States

¹⁵⁰ India's requests to review precise aspects of the Interim Report, para. 107.

¹⁵¹ United States' comments on India's requests to review precise aspects of the Interim Report, para. 123.

¹⁵² See paragraph 7.401 of the interim report, citing the Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

¹⁵³ See paragraphs 7.402-7.409 of the Interim Report (paragraphs 7.401-7.408 of the Final Report).

¹⁵⁴ India's requests to review precise aspects of the Interim Report, para. 108.

¹⁵⁵ United States' comments on India's requests to review precise aspects of the Interim Report, para. 124.

¹⁵⁶ India's requests to review precise aspects of the Interim Report, paras. 109-115.

¹⁵⁷ Ibid. para. 116.

asks the Panel to reject India's requests relating to both India's "as such" and "as applied" claims.¹⁵⁸

6.156. We have decided not to accommodate India's requests. First, paragraphs 173-174 of India's first written submission do not refer to India's argument, but rather to India's description of the United States' Statement of Administrative Action, and the understanding of the United States' Court of Appeals for the Federal Circuit. Moreover, paragraph 188 of India's first written submission refers to India's alternative argument relating to the WTO compatibility of discretionary provisions. However, paragraph 7.440 of the Interim Report does not refer to India's alternative argument, and thus should not include a reference to this part of India's first written submission.

6.157. Second, the Panel has not stated that the arguments at issue are "inter-dependent" in paragraph 7.440. India's punitive application argument is summarized at paragraph 7.416 (paragraph 7.415 of the Final Report) as a separate argument, and we specifically addressed it under Section 7.7.5.1.2, which is entitled "adverse conclusions". However, for the sake of clarity, we have modified footnote 608 (footnote 733 of the Final Report), and added a quote from India's first written submission.

6.158. Third, India's alternative argument at issue relates to whether discretionary measures may be found WTO inconsistent. We have explained at footnote 597 (footnote 722 of the Final Report) that our examination is limited to the US provisions "as such", and not the USDOC's "approach" as a "measure", because India's claims related to the US law "as such". In addition, we have found that the measure at issue is not inconsistent with Article 12.7 of the SCM Agreement. Consequently, as explained at footnote 617 (footnote 742 of the Final Report), we need not address whether the United States' measure at issue is not mandatory and thus cannot breach the United States' obligations under the WTO covered agreements.

6.159. Finally, having decided not to accommodate India's requests discussed above, we also decide not to accommodate India's corresponding requests relating to its "as applied" claims.

6.3.36 Paragraph 7.465 (paragraph 7.464 of the Final Report)

6.160. India requests the Panel to explain how the determination in the 2008 administrative review is not contrary to the "facts available" from the 2006 administrative review, taking into account the uncontested definition of "new industrial unit" and that Tata could not fall within this definition.¹⁵⁹ In addition, India requests the Panel to explain whether the determination of 6.06% subsidy margin against Tata for the alleged benefit under certain subsidy programmes was justified under Article 12.7 of the SCM Agreement, when the maximum benefit under the pollution control equipment subsidy and the feasibility study and project report cost reimbursement programme was respectively INR 2 million and INR 0.05 million.¹⁶⁰

6.161. The United States asks the Panel to reject India's requests because information from a prior administrative review cannot be used as facts available for a later review when interested parties have not provided, as requested, any relevant information pertaining to the later period.¹⁶¹

6.162. We have decided not to accommodate India's requests. With respect to the subsidy programmes on exemption of electricity duty, capital power generating subsidy, interest subsidy, and stamp duty and registration, and the pollution control equipment subsidy, we have found at paragraph 7.465 that there was a sufficient factual foundation for USDOC's determination, and the information used by USDOC was a reasonable replacement for the missing information in the record of the 2008 administrative review. We recall the United States' arguments, summarized at paragraph 7.463 (paragraph 7.462 of the Final Report), that the USDOC could not have automatically relied on the information submitted in the 2006 administrative review, without any relevant information being provided by interested parties in the 2008 administrative review. In

¹⁵⁸ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 125-131.

¹⁵⁹ India's requests to review precise aspects of the Interim Report, paras. 117-120.

¹⁶⁰ Ibid. paras. 121-124.

¹⁶¹ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 132-137.

addition, with regard to the 6.06% subsidy rate for the pollution control equipment subsidy, the United States submitted that the USDOC "applied the benefit rate of a cooperating company for a similar program."¹⁶² Finally, at paragraph 7.466 (paragraph 7.465 of the Final Report), we have already upheld India's claim under Article 12.7 of the SCM Agreement regarding the programme on feasibility study and project report cost reimbursement, and thus need not address India's additional argument.

6.3.37 Section 7.7.5.2.9

6.163. India requests the Panel to consider that the 2013 sunset review determinations are also inconsistent with Article 12.7 of the SCM Agreement to the extent they repeat those instances held inconsistent with this provision in the 2006, 2007 and 2008 administrative reviews.¹⁶³

6.164. The United States submits that the interim review stage is not an appropriate time to raise new arguments, and that the Panel has already addressed the relevant arguments and evidence submitted by India.¹⁶⁴

6.165. We have decided not to accommodate India's request, because it does not change the reasons that led us to conclude, at paragraph 7.480 (paragraph 7.479), that we are unable to evaluate India's claims.

6.3.38 Paragraphs 7.501-7.509 (paragraphs 7.500-7.508 of the Final Report)

6.166. India requests the Panel to clarify whether the Panel intended to exercise judicial economy with regard to India's claims under Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement. India also requests that the Panel make a specific finding on whether the United States has complied with these provisions. India argues that its claims under these provisions were entirely independent from India's other claims relating to new subsidy allegations.¹⁶⁵

6.167. The United States submits that the Panel has correctly addressed India's claims, and asks the Panel to reject India's requests.¹⁶⁶

6.168. We have decided not to accommodate India's request. The Panel has not exercised judicial economy with regard to India's claims under Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement. Rather, at paragraphs 7.502-7.508, we explained that as the USDOC was entitled, under Articles 21.1 and 21.2 of the SCM Agreement, to examine new subsidy allegations in the administrative reviews at issue, there was no need to examine the provisions at issue regulating investigations.

7 FINDINGS

7.1. This case concerns the imposition by the United States of countervailing duties on imports of certain hot-rolled carbon steel flat products from India. India challenges certain provisions of the United States Tariff Act, 1930 "as such" and "as applied" in the context of the relevant countervailing duties investigations. India's claims pertain to various procedural and substantive provisions of the SCM Agreement and, consequently, to Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement. The United States denies India's claims.

7.2. We shall begin by examining India's substantive claims. Thereafter, we shall turn to India's procedural claims. Before reviewing India's claims, though, we recall a number of general principles regarding treaty interpretation, standard of review and burden of proof in WTO dispute settlement proceedings.

¹⁶² United States' response to India's question No. 10(d)(ii), para. 23.

¹⁶³ India's requests to review precise aspects of the Interim Report, para. 128.

¹⁶⁴ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 138-140.

¹⁶⁵ India's requests to review precise aspects of the Interim Report, paras. 129-133.

¹⁶⁶ United States' comments on India's requests to review precise aspects of the Interim Report, paras. 141-142.

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

7.1.1 Treaty Interpretation

7.3. Article 3.2 of the DSU provides that the 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 are such customary rules.

7.1.2 Standard of Review

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

[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. (emphasis added)

7.5. 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 agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination.¹⁶⁷

7.6. The Appellate Body has also commented that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.¹⁶⁸ 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".¹⁶⁹

7.1.3 Burden of Proof

7.7. 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.¹⁷⁰ Therefore, as the complaining party, India bears the burden of demonstrating that the measures at issue from the United States are inconsistent with the WTO agreements invoked by India. The Appellate Body has stated that 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.¹⁷¹ Finally, it is generally for each party asserting a fact to provide proof thereof.¹⁷²

7.2 The United States' benchmarking mechanism

7.8. India challenges US Regulation Section 351.511(a)(2)(i) to (iv) "as such". Section 351.511(a)(2)(i) to (iii) contains the price benchmarking mechanism to be applied by the USDOC when determining whether or not the provision of goods by a government or public body confers a benefit on the recipient. Section 351.511(a)(2)(iv) provides that price comparisons shall be made at the delivered level.

¹⁶⁷ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

¹⁶⁸ *Ibid.* para. 187.

¹⁶⁹ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 93.

¹⁷⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

¹⁷¹ Appellate Body Report, *EC – Hormones*, para. 104.

¹⁷² Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

7.9. India makes a number of claims regarding the consistency of Section 351.511(a)(2)(i)-(iii) with Article 14(d) of the SCM Agreement. First, India claims that the hierarchical preference provided for in the US benchmarking mechanism conflates two separate issues, namely (i) the adequacy of remuneration paid for the good and (ii) benefit. India claims that, by focusing on the issue of benefit to the recipient, the United States fails to determine the threshold issue of whether or not the remuneration is adequate for the government provider of the good. India contends that there can be no benefit to the recipient of the good if the remuneration is adequate for the government provider, even if the price paid by the recipient is lower than a market benchmark. Second, India claims that prices set by the government provider of goods should be included as part of the "prevailing market conditions" referred to in the second sentence of Article 14(d). Third, India claims that the use of world market prices under Tier II of the benchmarking mechanism is inconsistent with Article 14(d).

7.10. India submits that Section 351.511(a)(2)(iv) is inconsistent with Article 14(d) and, consequently with Articles 19.3 and 19.4, because the requirement to use delivered prices means that the price benchmark will not relate to prevailing market conditions in the country of provision in all cases.

7.11. The United States asks the Panel to reject India's claims.

7.2.1 Relevant WTO provision

7.12. Article 14(d) of the SCM Agreement provides that:

the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more 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).

7.13. Article 19.3 of the SCM Agreement provides 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.

7.14. Article 19.4 of the SCM Agreement provides that:

No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product. (footnote omitted)

7.2.2 Relevant US provision

7.15. The text of Section 351.511(a)(2)(i) to (iv) is reproduced below:

§ 351.511 Provision of goods or services.

(a) Benefit—(1) In general. In the case where goods or services are provided, a benefit exists to the extent that such goods or services are provided for less than adequate remuneration. See section 771(5)(E)(iv) of the Act.

(2) "Adequate Remuneration" defined—

(i) In general. The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for

the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

(ii) Actual market-determined price unavailable. If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

(iii) World market price unavailable. If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

(iv) Use of delivered prices. In measuring the adequacy of remuneration under Paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.

7.16. We begin by assessing India's claim regarding the hierarchical preference provided for in Section 351.511(a)(2)(i) to (iii).

7.2.3 Whether Section 351.511(a)(2)(i) to (iii) is inconsistent with Article 14(d) because it fails to assess the adequacy of remuneration from the perspective of the government provider, before assessing whether there is benefit to the recipient

7.2.3.1 Main arguments of the parties

7.2.3.1.1 India

7.17. India considers that (i) adequacy of remuneration for the government provider of a good and (ii) benefit to the recipient are distinct issues. For India, the adequacy of remuneration for the government provider of goods is a "threshold condition to be answered prior to going into the question of benefit".¹⁷³ India submits that "unless the remuneration is less than adequate, the question of calculating benefit does not arise within the meaning of Article 14(d)".¹⁷⁴ India submits that the United States' benchmarking mechanism fails to address the adequacy of remuneration prior to an examination of benefit¹⁷⁵, since it contains a preference for determining benefit using Tier I and Tier II price benchmarks, and only provides for a Tier III analysis of the adequacy of remuneration for the government provider when Tier I and II price benchmarks are not available. India submits that, to the extent that adequacy of 'remuneration' to the provider of the goods is not evaluated in every case, the relevant US provisions are inconsistent with the two-pronged approach provided for in the first sentence of Article 14(d).¹⁷⁶

7.18. India submits that the fact that Article 14(d) distinguishes between the terms "remuneration" and "benefit" indicates that the concepts are different. India suggests that to argue otherwise would result in a circular provision. According to India, measuring the adequacy of "remuneration" seems to be the pre-requisite for calculating the "benefit" to the recipient. India contends that the verb "remunerate" means "pay (someone) for services rendered or work

¹⁷³ India's second written submission, para. 10.

¹⁷⁴ India's response to Panel question No. 4.

¹⁷⁵ India's second written submission, para. 14.

¹⁷⁶ India's first written submission, para. 32.

done"¹⁷⁷ and the noun "remuneration" refers to the "money paid for work or a service".¹⁷⁸ India suggests that this ordinary meaning implies that there is someone who is being remunerated for the work done or services rendered. India notes that, in the case of provision of goods or services, the structure of Article 1.1(b) and Article 14(d) refers to only two entities – the *receiver of the goods* and the *provider of the goods*. India asserts that since "benefit" is anyway being assessed from the perspective of the *receiver of the goods*, the term "remuneration" is to be seen from the perspective of the *provider of the goods*. In making this argument, India submits that it is not seeking to redefine the term "benefit" using a cost-to-government standard. Indeed, India does not dispute that, once the question of benefit arises, it is "to be measured from the perspective of the recipient of the goods".¹⁷⁹ According to India, though, the adequacy of remuneration for the government provider of the good must be examined before considering whether there is any benefit to the recipient.

7.19. India considers that its position is supported by differences in the structure of the various sub-paragraphs to Article 14.¹⁸⁰ According to India, sub-paragraphs (b) and (c) clearly state that the method to calculate benefit is by reference to a "comparable", such that benefit is calculated using a comparative benchmark. India submits that sub-paragraph (d), by contrast, uses a different structure, providing that no benefit may be found unless – and therefore as a threshold issue – remuneration for the government provider is inadequate. India contends that, unlike the structure of sub-paragraphs (b) and (c), Article 14(d) does not specify that benefit shall be established using a comparative benchmark. In particular, Article 14(d) does not state that the provision of goods would confer a benefit as soon as there is a difference in the amount paid by the recipient for the goods provided by the government and the amount the recipient would have to pay to obtain the same goods on the market.

7.20. India submits that remuneration may be adequate for the government provider of goods even though the price paid by the recipient may be less than a market benchmark.¹⁸¹ According to India, remuneration paid by the recipient will be adequate for government providers of goods if it is based on commercial considerations, irrespective of the results of comparisons with the price that the recipient would have to pay on the market. India asserts that a price based on commercial considerations will necessarily relate to "prevailing market conditions", as required by the second sentence of Article 14(d). India notes in this regard that Article XVII:1(b) of the GATT 1994 requires state trading enterprises to make any purchases or sales solely in accordance with "commercial considerations", and states that such considerations include "price, quality, availability, marketability, transportation and other conditions of purchase or sale". India contends that the fact that the "commercial considerations" enumerated in Article XVII:1(b) of the GATT 1994 are the same as the "prevailing market conditions" set forth in Article 14(d) of the SCM Agreement must be given meaning. India also refers to WTO case law regarding the interpretation and application of Article XVII:1(b) of the GATT 1994.¹⁸²

7.2.3.1.2 United States

7.21. The United States asserts that its benchmarking mechanism properly assesses the adequacy of remuneration. The United States submits that Article 14(d) defines "benefit" by reference to the concept "adequacy of remuneration".¹⁸³ The United States contends that the essence of the benefit determination under the SCM Agreement is to determine whether the recipient is better off in light of the government financial contribution than if the recipient had relied on the market, a determination which involves assessing whether the recipient obtained something "on terms more favorable than those available in the market."¹⁸⁴ The United States submits that, to do this, an investigating authority must compare the difference between the government price and a private, arm's-length benchmark price. To the extent that the government price is less than the market benchmark price, the remuneration for the government is not adequate, and a benefit is conferred

¹⁷⁷ *The Oxford Dictionary of English*, 3rd ed., A. Stevenson (ed.) (Oxford University Press, 2010), p. 1503.

¹⁷⁸ *Ibid.*

¹⁷⁹ India's second written submission, paras. 12 and 13.

¹⁸⁰ India's first written submission, paras. 49 and 50.

¹⁸¹ *Ibid.* para. 50.

¹⁸² *Ibid.* paras. 34-47.

¹⁸³ United States' first written submission, para. 44.

¹⁸⁴ United States' second written submission, para. 7, citing to *Canada – Aircraft (Panel)*, para. 9.112.

on the recipient. The United States submits that the analysis under Article 14(d) is therefore not the two-step process suggested by India, but rather a (single) comparative exercise.¹⁸⁵

7.22. The United States argues that the structure of Article 14(d) is no different from that of Article 14(b) or (c). The United States asserts that a consistent structure is employed throughout these provisions, since each provision identifies a condition that must be satisfied in order to establish that a benefit has been conferred.¹⁸⁶ The United States contends that each subparagraph of Article 14 provides for a determination of the existence of a benefit based on some deviation between what a recipient has actually paid and what they would otherwise have paid according to a benchmark price. For loans, subparagraph (b) prescribes that a benefit exists if there is a "difference" in the price of a governmental loan versus a "comparable commercial loan." For loan guarantees, subparagraph (c) similarly identifies a benefit if there is a "difference" between the amounts a firm pays for a loan with a government guarantee compared with what a "firm would pay on a comparable commercial loan absent the government guarantee." For the provision of goods and services, subparagraph (d) states that a benefit exists if the government provides the goods or services in exchange for "less than adequate remuneration" or if the government purchases such goods or services for "more than adequate remuneration." The United States contends that terms such as "less than" or "more than" are comparative in nature, just like the term "difference" in Article 14(b) and (c).

7.23. The United States rejects India's argument that remuneration will necessarily be adequate in relation to the prevailing market conditions if it is based on commercial considerations. The United States contends that nothing in the text of Article 14(d) states or implies that "prevailing market conditions" means "in accordance with commercial considerations."

7.2.3.2 Main arguments of the third parties

7.2.3.2.1 European Union

7.24. The European Union asserts that India's claims appear to be based on flawed interpretations of Article 14(d) of the SCM Agreement. The European Union contends that the perspective of the provider of the goods or services, in the sense of whether the government makes a reasonable return when providing the goods or services in question, is not dispositive in determining the existence of "benefit" under Article 1.1(b) or its amount in accordance with Article 14(d) of the SCM Agreement. The perspective of the provider advocated by India is similar to the "cost to the government" approach that has already been rejected to determine the existence of "benefit" under Article 1.1(b) of the SCM Agreement. According to the European Union, the Appellate Body Report in *Canada – Aircraft* stands for the proposition that a "benefit" is to be determined, not by reference to whether the transaction imposes a net cost on the government, but rather by reference to whether the terms of the financial contribution are more favourable to what is available to the recipient on the market.

7.2.3.2.2 Saudi Arabia

7.25. Saudi Arabia submits that, in determining whether the government provision of a good confers a benefit, an investigating authority may use a benchmark other than private, in-country prices in "very limited" circumstances. Article 14(d) of the SCM Agreement establishes domestic market prices as the principal standard for determining whether and to what extent a benefit is conferred by the provision of a good. Price is foremost among the "prevailing market conditions" enumerated in Article 14(d) and it should be the first reference point used by an investigating authority to determine benefit. Saudi Arabia asserts that in order to reject private, in-country benchmarks when determining whether a government-provided good confers a benefit, an investigating authority must establish that domestic prices of that good are "distorted". The government's predominant role in the domestic market might support an investigating authority's finding that private prices are distorted, but it may not serve as a *per se* proxy for price distortion. Saudi Arabia contends that although external benchmarks may be used in very limited situations, they should be avoided because they are inherently incapable of reflecting prevailing in-country market conditions, and because they negate comparative advantages. Saudi Arabia contends that

¹⁸⁵ United States' second written submission, para. 8.

¹⁸⁶ Ibid. para. 11.

where an investigating authority has established price distortion, it should use in-country, cost-based benchmarks instead of external benchmarks.

7.2.3.3 Evaluation

7.26. The first sentence of Article 14(d) provides that the government provision of a good "shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration". In our view, the word "unless" in the first sentence of Article 14(d) establishes a clear textual connection between the existence of benefit on the one hand, and the adequacy of remuneration on the other. If remuneration is found to be inadequate, the subsidy may be considered to confer a benefit. If the remuneration is found to be adequate, the subsidy may not be considered to confer a benefit. There is nothing in the text of Article 14(d) to suggest that the question of the adequacy of remuneration is a separate threshold issue, such that the question of benefit only arises – as a separate and subsequent matter – after the question of adequacy of remuneration has been resolved.

7.27. India asserts that "in explaining how ... 'benefit' is to be calculated, Article 14(d) refers to a second term 'remuneration'".¹⁸⁷ India's statement is consistent with our view that the first sentence of Article 14(d) establishes a clear textual connection between the issues of benefit and adequacy of remuneration. Indeed, it is precisely for this reason that, as acknowledged by India, Article 14(d) refers to the term "remuneration" in explaining how "benefit" is to be calculated.

7.28. India goes on to argue that the use of different terms – "benefit" and "remuneration" – "suggests that the word 'remuneration' is not intended to be the same as 'benefit' and to argue otherwise, would only result in a circular provision".¹⁸⁸ In our view, the circularity alluded to by India would only arise if the issues of adequacy of remuneration and benefit were assessed separately, but on the basis of the same standard. As explained above, though, we do not consider that Article 14(d) envisages the issues of adequacy of remuneration and benefit being assessed separately. Rather, assessing the adequacy of remuneration is part of the process of determining whether a benefit exists. Our understanding is not affected by the use of the distinct terms "remuneration" and "benefit" in Article 14(d). The term "remuneration" relates to the sum that is paid for the good provided by the government. The term "benefit", by contrast, relates to the notion that the recipient received the good on terms more favourable than it could have obtained that good from the market. These terms are necessarily different, since they relate to different notions, and thereby allow for the possibility that the level of remuneration will not confer a benefit in all cases. However, although the terms "remuneration" and "benefit" are different, they are nevertheless connected by the concept of adequacy, establishing that a given amount of "remuneration" may be considered to confer a "benefit" if it is not adequate.

7.29. As for the perspective from which the adequacy of remuneration should be assessed, we note India's argument that since "benefit" is determined from the perspective of the receiver of the goods, "remuneration" should be assessed from the perspective of the provider of the goods.¹⁸⁹ India's argument that the adequacy of remuneration and benefit may be assessed in respect of different entities is based on its argument that the adequacy of remuneration and benefit should be assessed separately. Since we have rejected this argument, and find that determining the adequacy of remuneration is part of the process of determining whether benefit exists, we also exclude the possibility of assessing the adequacy of remuneration and existence of benefit in respect of different entities.

7.30. We note that India does not dispute the United States' argument that "benefit" should be assessed by reference to the recipient.¹⁹⁰ It is well established in WTO dispute settlement that this is the case, and that a benefit is conferred when a financial contribution makes the recipient better off than it would have been relative to what is available through the market. Since benefit is established from the perspective of the recipient, and since the adequacy of remuneration forms part of the assessment of benefit, the adequacy of remuneration must also, in our view, be

¹⁸⁷ India's first written submission, para. 23.

¹⁸⁸ Ibid. para. 23.

¹⁸⁹ Ibid. paras. 24 and 25.

¹⁹⁰ India's second written submission, paras. 12 and 13.

established from the perspective of the recipient. Furthermore, since benefit is assessed by reference to the market, so too must be the adequacy of remuneration.¹⁹¹

7.31. India suggests that an assessment of the adequacy of remuneration from the perspective of the recipient, by reference to the market, ignores relevant context concerning the alleged decision by the drafters of Article 14 to adopt a different structure for sub-paragraph (d) than for sub-paragraphs (a), (b) and (c). India notes in this regard that Article 14(a) provides that no benefit shall be conferred unless the provision of equity capital is "inconsistent" with usual investment practice. India also notes that sub-paragraphs (b) and (c) provide that no benefit shall be conferred unless there is a "difference" between the amount paid by the recipient (for the loan and loan guarantee, respectively) and the amount that the recipient would have to pay on the market. India contends that sub-paragraph (d) of Article 14, by contrast, provides for a "more comprehensive framework". India notes that the drafters of Article 14(d) did not specify that benefit would be conferred once there is a difference between the amount paid by the recipient to the government and the amount that the recipient would have paid on the market. According to India, this means that the adequacy of remuneration is not determined by simply comparing the government price to a market benchmark.

7.32. We are not persuaded by India's reliance on alleged structural differences in Article 14. We agree with the United States¹⁹² that the first sentence of Article 14(d) provides for a comparative analysis in the same way that sub-paragraphs (b) and (c) of Article 14 do. In the context of the provision of goods, the comparative analysis envisaged by Article 14(d) concerns the question of whether the remuneration is "less than" adequate. The phrase "less than" is comparative in nature, requiring a comparison between the government price and a price that is representative of adequate remuneration in the market, as determined in relation to the prevailing market conditions. The fact that Article 14(d) does not use the term "difference" does not detract from the comparative nature of the analysis inherent in the first sentence of Article 14(d).¹⁹³

7.33. Furthermore, the second sentence of Article 14(d) provides that the adequacy of remuneration shall be assessed in relation to the prevailing market conditions. This textual consideration prompted the Appellate Body to state in *US – Softwood Lumber IV* that "private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods".¹⁹⁴ Thus, the Appellate Body has also accepted that the structure of Article 14(d) allows Members to assess the adequacy of remuneration, and therefore existence of benefit, by comparing the government price to a market benchmark. Once it is established that the price paid to the government provider is less than the price that would be required by the market, assessed in relation to prevailing market conditions, the remuneration afforded by the government price is inadequate, and a benefit is conferred.¹⁹⁵

7.34. Finally, we observe that India's claims are brought under Article 14(d) of the SCM Agreement. The title of Article 14 explains that Article 14 is concerned with the "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient". Even India acknowledges that "all the guidelines present in Article 14 have been provided in the context of determining the

¹⁹¹ This approach is consistent with the finding by the Appellate Body in *US – Softwood Lumber IV* (para. 90) that "private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods". In our view, this finding confirms that the adequacy of remuneration is established by reference to the market.

¹⁹² See, for example, United States' second written submission, paras. 10-15.

¹⁹³ The comparative analysis required by Article 14(d) is similar to that required by Article 14(a) which, while not using the term "difference", nevertheless requires a comparison of the "investment decision" with "usual investment practice".

¹⁹⁴ Appellate Body Report, *US – Softwood Lumber IV*, para. 90. The issue before the Appellate Body was not whether or not Article 14(d) could be applied on the basis of benchmarking *per se*. The issue before the Appellate Body was rather whether or not external benchmarks could be used instead of domestic benchmarks (i.e. those prevailing in the country of provision). In concluding that external benchmarks could be used in certain circumstances, the Appellate Body necessarily accepted the use of benchmarking mechanisms in the application of Article 14(d).

¹⁹⁵ The fact that the government price may have been set according to "commercial considerations" is then irrelevant, for the adequacy of remuneration is not assessed from the perspective of the government provider. For this reason, it is not necessary for us to examine India's "commercial considerations" argument – including in particular its reliance on case law concerning the interpretation of Article XVII:1(b) of the GATT 1994 – in any detail.

benefit conferred on the recipient".¹⁹⁶ In this context, it would be incongruous to find that the United States has violated a provision of Article 14 by doing precisely what Article 14 is concerned with, namely calculating benefit in terms of benefit to the recipient, simply because it did not first, as a separate matter, determine the adequacy of remuneration to the government provider of the good.

7.35. For the above reasons, we reject India's claim that Section 351.511(a)(2)(i) to (iii) "as such" is inconsistent with Article 14(d) of the SCM Agreement because it fails to require that the adequacy of remuneration be assessed from the perspective of the government provider before assessing benefit to the recipient.

7.2.4 The exclusion of government prices from Tier I and II benchmarks

7.2.4.1 Main arguments of the parties

7.36. India claims that the United States' benchmarking mechanism is inconsistent with Article 14(d) of the SCM Agreement because the mechanism excludes the use of government prices as Tier I or II benchmarks. India submits that this is contrary to the requirement in Article 14(d) that benchmarks for the government provision of goods should be determined in relation to "prevailing market conditions" in the country of provision. According to India, government prices form part of the "prevailing market conditions".

7.37. The United States contends that its benchmarking mechanism does not, in fact, exclude government prices in all cases.¹⁹⁷ The United States asserts that Section 351.511(a)(2)(i) allows for the inclusion of prices from government sales where those prices are market-determined, such as through competitively run government auctions. Where this is not the case, the United States submits that government prices for the provision of goods must be excluded from the Article 14(d) benchmarks because, according to established WTO case law, the term "benefit" requires a comparison of the financial contribution received by the recipient to what it would otherwise receive on the market.

7.2.4.2 Evaluation

7.38. As a factual matter, we observe that India does not dispute the United States' assertion that government prices are not excluded from the benchmarking mechanism in all cases. The factual premise for India's claim is therefore undermined.

7.39. Furthermore, we consider that it would be circular, and therefore uninformative, to include the government price for the good provided by the government in the establishment of the market benchmark when assessing whether such governmental provision confers a benefit. In addition, as noted above, benefit is assessed in relation to the market. Since governments may set prices in order to pursue public policy objectives, rather than market-based profit maximization, we see no basis for requiring investigating authorities to include government prices when determining market benchmarks in the context of Article 14(d). In particular, we do not consider that investigating authorities should be required to treat government prices as being representative of "prevailing market conditions" within the meaning of the second sentence of that provision.

7.40. Our approach to this issue is consistent with the following findings by the Appellate Body in *US – Softwood Lumber IV*:

Although Article 14(d) does not dictate that private prices are to be used as the exclusive benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. In this case, both participants and the third participants agree that the starting-point, when determining adequacy of remuneration, is the prices at which the same or similar

¹⁹⁶ India's first written submission, para. 49.

¹⁹⁷ United States' first written submission, para. 67.

goods are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods. However, this may not always be the case. As will be explained below, 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.¹⁹⁸

7.41. We consider it noteworthy that the Appellate Body consistently refers to *private* prices in the above extract. It is *private* prices in the country of provision that are the "primary benchmark" for assessing the adequacy of remuneration.

7.42. According to India, the above findings by the Appellate Body mean that the government price may only be rejected as a price benchmark in situations where the government is the sole or dominant provider of the goods.¹⁹⁹ We disagree. Because governments are generally not profit-maximizers, but instead often pursue public policy objectives when providing goods to recipients in their territory, government prices need not be presumed to reflect market principles. When the government is not dominant in a market, the non-market aspect of government pricing will generally not distort private prices in that market. In such cases, those domestic private prices may serve as a benchmark for the purpose of Article 14(d). When the government is dominant in a market, as was the case in *US – Softwood Lumber IV*, the non-market aspect of government prices may distort private prices in the domestic market, such that those domestic prices may not then be used as an Article 14(d) benchmark. In such cases, private prices in other markets may be used as benchmarks, provided they are properly adjusted to reflect the prevailing market conditions in the country of provision. Thus, the fact that a government is not dominant in its domestic market does not mean (as argued by India) that the government's prices are likely to reflect market principles, and therefore be indicative of prevailing market conditions. It simply means that those government prices, which in any event need not be presumed to reflect market principles (because the government's pricing may be determined by policy objectives other than profit-maximization), would likely not have distorted *private* prices in that market, such that those *private* prices may serve as benchmarks for the purpose of Article 14(d).

7.43. India also relies²⁰⁰ on the following findings by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*:

Although the Panel did not explicitly rule on the issue, it stated that one possible interpretation of "commercial" could be that any loan made by the government would *ipso facto* not be "commercial". In our view, it would not be correct to conclude that any loan made by the government (or by private lenders in a market dominated by the government) would *ipso facto* not be "commercial". We see nothing to suggest that the notion of "commercial" is *per se* incompatible with the supply of financial services by a government. Therefore, the mere fact that loans are supplied by a government is not in itself sufficient to establish that such loans are not "commercial" and thus incapable of being used as benchmarks under Article 14(b) of the *SCM Agreement*. An investigating authority would have to establish that the government presence or influence in the market causes distortions that render interest rates unusable as benchmarks.²⁰¹

7.44. India refers in particular to the Appellate Body's statement that "it would not be correct to conclude that any loan made by the government (or by private lenders in a market dominated by the government) would *ipso facto* not be 'commercial'". We do not understand this statement to mean that government prices should necessarily be used as market benchmarks for the purpose of Article 14(d). Noting in particular the last sentence in the above extract, which refers to potential distortions caused by government presence or influence in the market, we understand the Appellate Body to be repeating, for the purpose of Article 14(b), the approach that it took in *US –*

¹⁹⁸ Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

¹⁹⁹ India's response to Panel question No. 10, and fn. 255 to India's second written submission.

²⁰⁰ India's second written submission, para. 192.

²⁰¹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 479.

Softwood Lumber IV in respect of Article 14(d), as outlined above. Indeed, we observe that in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body subsequently referred expressly to the issue of distortion caused by government intervention:

notwithstanding the differences between Article 14(b) and (d) ... [r]eading Article 14(b) as always requiring a comparison with loans denominated in the same currency as the investigated loans, even in circumstances where all loans in the same currency are distorted by government intervention, would lead to a comparison with government distorted loans, thus frustrating the purpose of Article 14(b). If loans in a given market and in a given currency are distorted by government intervention, an investigating authority should be permitted, in certain circumstances also under Article 14(b), to use a benchmark other than "a comparable commercial loan which the firm could actually obtain on the market".²⁰²

7.45. We are therefore not persuaded by India's reliance on the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

7.46. For the above reasons, we reject India's claim that the United States' benchmarking mechanism is "as such" inconsistent with Article 14(d) of the SCM Agreement because it excludes the use of government prices as Tier I and II price benchmarks.

7.2.5 The use of world market prices as Tier II price benchmarks

7.2.5.1 Main arguments of the parties

7.47. India claims that the United States' benchmarking mechanism violates Article 14(d) because it provides for the use of world market (Tier II) price benchmarks whenever Tier I in-country benchmarks are not available. There are three components to India's claim. First, India submits that the text of Article 14(d) *per se* excludes the use of out-of-country benchmarks.²⁰³ Second, India submits that out-of-country benchmarks may in any event only be used in situations where the market of the country of provision is distorted because of the predominant role of the government provider.²⁰⁴ Third, India submits that the United States' benchmarking mechanism fails to require that the conditions prevailing in the country from which the Tier II benchmark is taken relate to the market conditions prevailing in the country of provision.²⁰⁵

7.48. The United States²⁰⁶ rejects India's assertion that the text of Article 14(d) precludes out-of-country benchmarks. The United States asserts that the Appellate Body has confirmed that out-of-country prices may be used. The United States contends that a contrary interpretation would mean that where in-country prices do not exist or are not useable, the rights and obligations contained in the SCM Agreement would cease to apply.

7.2.5.2 Evaluation

7.49. We are not persuaded by India's assertion that Article 14(d) *per se* excludes the use of out-of-country benchmarks. The fact that out-of-country benchmarks may be applied in the context of Article 14(d) was clarified by the Appellate Body in *US – Softwood Lumber IV*. We are guided by the findings of that case, and therefore conclude that the use of out-of-country benchmarks in appropriate circumstances is not inconsistent with Article 14(d).

7.50. Nor are we persuaded by India's assertion that out-of-country benchmarks may only be used in the context of Article 14(d) of the SCM Agreement in situations where the market in the country of provision is distorted because of the predominant role of the government provider. There is nothing in the text of that provision to support India's assertion. Furthermore, while India relies on the findings of the Appellate Body in *US – Softwood Lumber IV*, we note that the Appellate Body's findings in that case were necessarily circumscribed by the facts of that case.

²⁰² Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 484.

²⁰³ India's first written submission, para. 77.

²⁰⁴ Ibid. para. 79.

²⁰⁵ Ibid. para. 82.

²⁰⁶ United States' first written submission, paras. 68-70.

Since that case concerned a situation in which the government provider of goods did, in fact, play a predominant role in the market, the Appellate Body only addressed the application of out-of-country benchmarks in that situation. Indeed, the Appellate Body expressly stated that "[c]onsidering that the situation of government predominance in the market, as a provider of certain goods, is the only one raised on appeal by the United States, we will limit our examination to whether an investigating authority may use a benchmark other than private prices in the country of provision in that particular situation".²⁰⁷ However, this does not mean that the reasoning underlying the Appellate Body's findings in that case can not apply, with equal force, in other situations, in which the government is not a predominant provider.

7.51. We next consider India's assertion that the United States' benchmarking mechanism fails to require that Tier II benchmarks must relate to the prevailing market conditions in the country of provision. In this regard, we note that the benchmarking mechanism implements 19 U.S.C. § 1677(5)(E), which provides that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review".²⁰⁸ Since the overarching statutory provision requires that the adequacy of remuneration must in all cases be assessed in relation to the prevailing market conditions in the country of provision, in law Tier II benchmarks applied pursuant to the implementing regulation (i.e. Section 351.511(a)(2)(ii)) must also relate to the prevailing market conditions in the country of provision. Accordingly, there is no basis for India's claim that the United States' benchmarking mechanism "as such" provides for the use of Tier II benchmarks that do not reflect prevailing market conditions in the country of provision.²⁰⁹

7.52. For these reasons, we reject India's claim that the use of world market prices as Tier II benchmarks provided for in Section 351.511(a)(2)(ii) "as such" is inconsistent with Article 14(d) of the SCM Agreement.

7.2.6 Whether Section 351.511(a)(2)(iv) is inconsistent with Article 14(d) because it requires the use of delivered prices for benchmarking

7.53. India submits that Section 351.511(a)(2)(iv) "as such" is inconsistent with Article 14(d), and consequently also Articles 19.3 and 19.4²¹⁰, of the SCM Agreement because it mandates that the government provider price and the benchmark price be compared on a delivered basis.

7.2.6.1 Main arguments of the parties

7.2.6.1.1 India

7.54. India contends that the mandatory use of delivered prices in the benchmarking mechanism ignores the Article 14(d) requirement that the adequacy of remuneration is to be determined in "relation to the prevailing market conditions", including conditions of sale, in the country of provision. India submits that the second sentence of Article 14(d) requires that consideration of the prevailing market conditions for the goods in question in the country of provision includes an assessment of the "conditions of ... sale" prevailing in the country of provision, for the goods in question. India contends that the use of delivered prices is a legal fiction contrary to Article 14(d) in cases where the conditions of sale prevailing in the country of provision do not include delivery.²¹¹ India contends that, in such cases, the mandatory inclusion of delivery charges (including import duties where relevant) eliminates the possibility of adjustments for the terms and conditions of sale prevailing in the country of provision²¹². India submits that Section 351.511(a)(2)(iv) is inconsistent with Articles 19.3 and 19.4 for "substantially the same reasons".²¹³

²⁰⁷ Appellate Body Report, *US – Softwood Lumber IV*, para. 99.

²⁰⁸ 19 U.S.C. § 1677(5), Exhibit USA-4, internal page 344.

²⁰⁹ We also note that we reject India's comparative advantage argument at para. 7.62 below.

²¹⁰ India contends that Section 351.511(a)(2)(iv) is inconsistent with Articles 19.3 and 19.4 "to the extent that" there is an inconsistency with Article 14(d) (India's first written submission, para. 99).

²¹¹ India's first written submission, paras. 88-89.

²¹² India's second written submission, para. 36.

²¹³ India's first written submission, para. 104.

7.2.6.1.2 United States

7.55. The United States submits that India's objection to adjustments for delivery costs is based on its flawed position that the adequacy of remuneration under Article 14(d) of the SCM Agreement should be a determination with respect to the provider of the goods, using a cost-to-government analysis. The United States contends that the adequacy of remuneration should rather be assessed with respect to the recipient. The United States also contends that the Article 14(d) guidelines contemplate adjustments for prevailing market conditions, conditions which explicitly include transportation.

7.56. The United States asserts that an ex-works price does not include the cost incurred by the purchaser for getting a purchased input to its factory door; an ex-works price therefore is not reflective of the prevailing market conditions from the perspective of the recipient. Prevailing market conditions are such that a private purchaser (in making a purchasing decision) and a private seller (in setting a price at which to sell the good) would consider all of the costs associated with getting the good to the purchaser's factory in establishing the market negotiated price. The United States asserts that India's interpretation would artificially isolate delivery costs from the price of a good and therefore shield it from the actual prevailing market conditions. According to the United States, such an interpretation would not fulfil the purpose of the Article 14(d) benchmark comparison – which is to assess whether the recipient is better off than it would have been absent that financial contribution.

7.57. The United States submits that as India has not demonstrated that Section 351.511(a)(2)(iv) is inconsistent with Article 14(d), it also has not demonstrated any inconsistency with Articles 19.3 and 19.4.

7.2.6.2 Main arguments of the third parties

7.2.6.2.1 European Union

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

7.2.6.3 Evaluation

7.59. We begin by evaluating India's Article 14(d) claim. India contends that the mandatory use of delivered prices means that price benchmarks will not relate to prevailing market conditions in the country of provision "even if the government price in question does not include such delivery charges"²¹⁴, such as in situations where the government provider sells the relevant good ex-works or, in the case of minerals, ex-mine.²¹⁵

²¹⁴ India's opening statement at the first meeting of the Panel, para. 15.

²¹⁵ We observe that India's claim is not based on any difference in the levels of trade at which the government price and the Tier I or II benchmarks are set. In response to a question from the Panel, India

7.60. We consider that India's argument is flawed, for it conflates the "prevailing market conditions" referred to in the second sentence of Article 14(d) with the contractual terms and conditions of the government provision under investigation. As explained above, investigating authorities are entitled to assess the adequacy of remuneration from the perspective of the recipient, using market benchmarks that relate to the "prevailing market conditions" in the country of provision.²¹⁶ We do not consider that such market benchmarks need mirror the contractual terms on which the government provider sells its good, since government prices are not an indicator of the prevailing market conditions.²¹⁷ In this regard, we agree with the United States that the terms "prevailing market conditions" and "conditions of sale" in the second sentence of Article 14(d) do not relate to the specific contractual terms on which the government provides goods. Instead, these terms relate to the general conditions of the relevant market, in the context of which market operators engage in sales transactions. It is for this reason that Article 14(d) includes such factors as "availability" and "marketability", even though these factors could not properly be considered as contractual terms.

7.61. Furthermore, we recall that we have rejected India's claim that the United States' benchmarking mechanism is inconsistent with Article 14(d) of the SCM Agreement because it excludes the use of government prices as Tier I and II price benchmarks. Consistent with this finding, we also reject the notion that the contractual terms on which a government provides goods must necessarily be considered to establish or reflect prevailing "market" conditions in the country of provision. Because of the propensity for governments to pursue public policy objectives in providing goods to recipients in their territory, it is possible that contractual terms set by governments are not set in accordance with "market" principles, and therefore do not reflect prevailing "market" conditions.

7.62. We also reject India's argument that the use of delivered price benchmarks "nullifies the comparative advantage of the country of provision in terms of being able to provide the goods in question locally".²¹⁸ To the extent that a delivered price benchmark relates to the prevailing market conditions in the country of provision, it will reflect any comparative advantage that such country might have. In this regard, we note the following finding by the Appellate Body in *US – Softwood Lumber IV*:

It is clear, in the abstract, that different factors can result in one country having a comparative advantage over another with respect to the production of certain goods. In any event, any comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision.²¹⁹

As discussed above, import transactions occur even in situations where minerals may be sourced locally, and such import transactions necessarily relate to prevailing market conditions in India because they are made by entities in India operating subject to Indian market conditions.

7.63. For the above reasons, we reject India's claim that Section 351.511(a)(2)(iv) "as such" is inconsistent with Article 14(d) of the SCM Agreement. For the same reasons, we also reject India's consequent claims under Articles 19.3 and 19.4 of the SCM Agreement.

expressly accepted the United States' contention that the delivered price adjustment is made to both the government price and the Tier I or II benchmark.

²¹⁶ India also submits that, in cases where the government sells ex works, transportation and other delivery charges can never be considered as "remuneration" to the government provider of the goods (India's first written submission, para. 89). This argument is premised on the adequacy of remuneration being assessed from the perspective of the government provider, rather than the recipient. We dealt extensively with this issue above.

²¹⁷ If the price benchmark had to match all the terms applied by the government provider, including presumably price, the resultant comparison with the government price would be meaningless.

²¹⁸ India's first written submission, para. 97.

²¹⁹ Appellate Body Report, *US – Softwood Lumber IV*, para. 109.

7.2.7 Conclusion

7.64. In light of the foregoing, we reject India's claim that Section 351.511(a)(2)(i)-(iv) "as such" is inconsistent with Article 14(d) of the SCM Agreement. We also reject India's claim that Section 351.511(a)(2)(iv) "as such" is inconsistent with Articles 19.3 and 19.4 of the SCM Agreement.

7.3 Claims regarding the imposition of countervailing duties in respect of iron ore supplied by NMDC

7.65. India raises a number of claims regarding the USDOC's determinations, in the 2004, 2006, 2007 and 2008 administrative reviews, that NMDC provided specific subsidies to Essar, ISPAT, JSW and Tata in the form of iron ore sold for less than adequate remuneration. India's claims concern: USDOC's treatment of NMDC as a public body; USDOC's finding of *de facto* specificity; and USDOC's determination of the existence and quantum of benefit.

7.3.1 The treatment of NMDC as a public body: Article 1.1(a)(1)

7.3.1.1 Relevant WTO provision

7.66. Article 1.1(a)(1) of the SCM Agreement provides:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
- (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
- (iii) a government provides goods or services other than general infrastructure, or purchases goods;
- (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

7.3.1.2 Main arguments of the parties

7.3.1.2.1 India

7.67. India claims that the USDOC improperly focused on the GOI's 98% shareholding in NMDC, contrary to Article 1.1(a)(1) of the SCM Agreement. According to India, the USDOC failed to consider whether NMDC fulfilled two essential public body criteria: (i) the carrying out of governmental functions, and (ii) the exercise of governmental power or authority.

7.68. India's arguments concerning the alleged deficiencies in the USDOC's determination that NMDC is a public body rely heavily on findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. India begins by noting the finding by the Appellate Body that the essence of 'government' is that it enjoys the effective power to "regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."²²⁰ According to India, the Appellate Body reiterated that this finding was derived, in part, from the

²²⁰ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.

functions performed by a government and, in part, from the government having the powers and authority to perform those functions. According to India, therefore, an entity only constitutes a public body if it performs a governmental function, and has the powers and authority to perform that function.²²¹

7.69. India contends that the USDOC failed to conduct the analysis described by the Appellate Body.²²² India states that the USDOC focused instead on the fact that GOI held a 98% shareholding in NMDC.²²³ According to India, such an approach was condemned by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* in the following terms:

the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the 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.²²⁴

7.70. India claims that, in focusing on the GOI shareholding in NMDC, the USDOC failed to examine whether NMDC has been vested with the power and authority to perform governmental functions; whether NMDC has the power and authority to direct or entrust a private body; and whether NMDC is, in fact, exercising governmental functions, i.e. regulate, control, or supervise individuals, or otherwise restrain conduct.²²⁵ India also contends that the USDOC made no attempt to cite any evidence or undertake any analysis as to whether the "indicia of government control" was manifold, over and above the mere majority holding of the government, as well as whether this control was exercised in any meaningful way. India submits that, as a result, the USDOC's determination that NMDC constitutes a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.3.1.2.2 United States

7.71. The United States' disputes the interpretation of the term "public body" adopted by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, on which India's claim is based. The United States contends that neither India nor the Appellate Body explain why the interpretation of the term public body should be based on the issue of whether an entity performs governmental functions, or is vested with, and exercises, the authority to perform such functions. The United States submits that, when interpreted according to the customary rules of treaty interpretation of public international law pursuant to Article 3.2 of the DSU²²⁶, the term "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own. The United States contends that the USDOC's treatment of NMDC as a public body is consistent with this approach.

7.72. In the alternative, the United States contends that the USDOC's treatment of the NMDC as a public body is in any event consistent with the interpretation by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. The United States rejects India's argument that the USDOC's determination that the NMDC is a public body was based solely on a determination that India owned over 98% of the NMDC.²²⁷ According to the United States, record evidence also indicates that NMDC has the authority to perform Indian government functions. The United States notes in this regard that the USDOC also found that the NMDC, as a state-owned mining company, was governed by the GOI's Ministry of Steel.²²⁸ The United States points in this regard to record

²²¹ India's first written submission, para. 222.

²²² Ibid. para. 222.

²²³ Ibid. paras. 232 and 234.

²²⁴ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

²²⁵ India's first written submission, para. 234.

²²⁶ The United States is referring to Articles 31 and 32 of the *Vienna Convention*.

²²⁷ India's first written submission, para. 232.

²²⁸ Notice of preliminary results of countervailing duty administrative review, 10 January 2006, 71 Fed. Reg. 1512 ("2004 Preliminary Results"), Exhibit IND-17, p. 8, internal page 1516; Notice of preliminary results of countervailing duty administrative review, 9 January 2008, 73 Fed. Reg. 1578 ("2006 Preliminary Results"), Exhibit IND-32, pp. 9-10, internal pages 1586-1587; Issues and decision

evidence of NMDC's own website, which declared that the "NMDC was established as a fully owned Government of India Corporation in 1958 with the objective of developing all minerals other than coal, petroleum oil and atomic minerals. NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel, Government of India."²²⁹ The United States also asserts that during the 2004 review verification, Indian and NMDC officials explained that the GOI was heavily involved in the selection of the directors of the NMDC, a few of whom were directly appointed by the Ministry of Steel.²³⁰ Furthermore, during the 2007 review, GOI further explained that it appoints 2 directors and had approval power over an additional 7 directors out of a total of 13 directors. According to the United States, the USDOC explicitly found that this evidence supported its determinations that the NMDC was "part of the GOI".²³¹

7.73. In addition, the United States notes that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* stated that "the legal order of the relevant Member may be a relevant consideration whether or not a specific entity is a public body."²³² The United States submits that, in the legal order of India, the NMDC performs a government function. The United States maintains that record evidence in the relevant reviews shows that the Indian government, i.e., the state and federal governments, owns all the mineral resources on behalf of the Indian public²³³, and that the Indian federal government has the final approval of the granting of mining leases for iron ore.²³⁴ According to the United States, therefore, it is a function of the government of India to arrange for the exploitation of public assets, in this case iron ore. The United States asserts that the GOI specifically established the NMDC to perform part of this function, i.e., "developing all minerals other than coal, petroleum oil and atomic minerals."²³⁵ The United States also asserts that, during the USDOC's verification in the 2004 administrative review, an official from the Indian Ministry of Steel identified the NMDC as a strategic company which was monitored and reviewed by the government because it provided a specific service to the Indian public. The United States submits that, because the NMDC is exploiting public resources on behalf of the Indian government, the owner of the resources, the NMDC is performing a government function in India.

7.3.1.3 Main arguments of the third parties

7.3.1.3.1 Australia

7.74. Australia asserts that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* concluded that a public body is an entity that possesses, exercises or is vested with governmental authority, which is to be determined on a case-by-case basis having regard to all the relevant facts, which may point in different directions. Australia considers that the Appellate Body's conclusion suggests that a public body must meet one of three descriptions – an entity that possesses governmental authority, an entity that exercises governmental authority, or an entity that is vested with governmental authority. In Australia's view, these descriptions are alternatives to one another and are not cumulative. Australia further submits that one relevant criterion for examining a "public body" under Article 1.1(a)(1) of the SCM Agreement should be to what extent the government controls the entity.

memorandum: final results and partial recession of administrative review, 29 April 2009 ("2007 Issues and Decision Memorandum"), Exhibit IND-38, pp. 43-45, comment 10; and Notice of preliminary results of countervailing duty administrative review, 11 January 2010, 75 Fed. Reg. 1496 ("2008 Preliminary Results"), Exhibit IND-40), p. 8, internal page 1503.

²²⁹ New subsidy allegations, 2 May 2005 ("2004 New Subsidy Allegations"), Exhibit USA-69, p. 8, internal exhibit 6, page 2.

²³⁰ Verification of the questionnaire responses submitted by the Government of India, 3 January 2006 ("2004 Verification India"), Exhibit USA-66, pp. 5-6.

²³¹ 2007 Issues and Decision Memorandum, Exhibit IND-38, pp. 43-45, comment 10.

²³² Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297.

²³³ The report of the "expert group" on preferential grant of mining leases for iron ore, manganese ore and chrome ore, attached to the New subsidy allegations (JSW), 23 May 2007 ("DANG Report attached to 2006 New Subsidy Allegations (JSW)"), Exhibit USA-50, internal page 79. (Under Indian law, the state governments owns the minerals in the land, however, for iron ore, which is listed a Schedule 1 mineral, the federal Indian government must approve all mining leases.)

²³⁴ DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal page 79.

²³⁵ 2004 New Subsidy Allegations, Exhibit USA-69, internal exhibit 6, p. 2.

7.3.1.3.2 Canada

7.75. Canada contends that the appropriate interpretation of the term "public body" is that it is an entity controlled by the government. According to Canada, such an interpretation is consistent with the context of Article 1.1(a)(1) and the object and purpose of the SCM Agreement.

7.3.1.3.3 China

7.76. China submits that the legal interpretation regarding public body developed by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* should be followed by the Panel in this case and should serve as the foundation for any findings regarding the public body determination at issue.

7.3.1.3.4 European Union

7.77. The European Union submits that the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* had to be unconditionally accepted by the parties to that dispute and is now part of the *acquis* of the WTO dispute settlement system, implying that, absent cogent reasons, the same legal question will be resolved in the same way in a subsequent case. The European Union asserts that, in that case, the Appellate Body sought a balance between the US approach, with its emphasis on ownership and control in general terms and China's approach, with its emphasis on governmental authority and function.

7.3.1.3.5 Saudi Arabia

7.78. Saudi Arabia submits that, for the purposes of finding the existence of a financial contribution under Article 1.1(a)(i) of the SCM Agreement, a public body must possess, exercise or be vested with "governmental authority", which is the power of an entity to command or compel a private body. The unique "defining elements" of the term "government" – "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority" – also define the term "public body". Saudi Arabia contends that possessing or exercising governmental authority is distinct from being owned or controlled by the government, and the two concepts are not interchangeable. Saudi Arabia asserts that a government-owned or controlled entity might be a public body, but only where the government has delegated to the entity the ability to "control or govern the actions of a private body". According to Saudi Arabia, the government's delegation of authority, not its ownership or control, thus dictates the entity's status as a public body.

7.3.1.4 Evaluation

7.79. India's claim is brought under Article 1.1(a)(1) of the SCM Agreement. That provision refers to financial contributions that are provided by any government or "public body". India's claim challenges the determination by the USDOC that the NMDC constitutes a "public body". The term "public body" was interpreted by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body issued its report in that case in March 2011, after the relevant USDOC determinations that the NMDC is a public body. India's arguments rely heavily on the findings of the Appellate Body in that case, to the point that India asserts that the USDOC's analysis "falls short of the test specified by the Appellate Body"²³⁶ in that case. While we are required by Article 11 of the DSU to make our own objective assessment of the matter before us, the Appellate Body has affirmed that "[f]ollowing the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same".²³⁷ We therefore begin by reviewing what we consider to be the most relevant findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, in order to consider the extent to which they may offer relevant guidance for our objective assessment of India's claim challenging the USDOC's determination that the NMDC is a "public body" in this case. In this regard, we observe the following findings made by the Appellate Body:

²³⁶ India's first written submission, para. 237.

²³⁷ Appellate Body Report, *US – Continued Zeroing*, para. 362.

288. As we see it, the juxtaposition of the collective term "government" on the one side and "private body" on the other side, as well as the joining under the collective term "government" of both a "government" in the narrow sense and "any public body" in Article 1.1(a)(1) of the *SCM Agreement*, suggests certain commonalities in the meaning of the term "government" in the narrow sense and the term "public body" and a nexus between these two concepts. When Article 1.1(a)(1) stipulates that "a government" and "any public body" are referred to in the *SCM Agreement* as "government", the collective term "government" is used as a superordinate, including, *inter alia*, "any public body" as one hyponym. Joining together the two terms under the collective term "government" thus implies a sufficient degree of commonality or overlap in their essential characteristics that the entity in question is properly understood as one that is governmental in nature and whose conduct will, when it falls within the categories listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv), constitute a "financial contribution" for purposes of the *SCM Agreement*.

...

290. ... As we see it, the[] defining elements of the word "government" inform the meaning of the term "public body". This suggests that the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body.

...

317. Having completed our analysis of the interpretative elements prescribed by Article 31 of the *Vienna Convention*, we reach the following conclusions. We see the concept of "public body" as sharing certain attributes with the concept of "government". A public body within the meaning of Article 1.1(a)(1) of the *SCM Agreement* must be an entity that possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels 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.

318. In some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise. In others, the picture may be more mixed, and the challenge more complex. The same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body. We do not, for example, consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body. What matters is *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved. There are many different ways in which government in the narrow sense could provide entities with authority. Accordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity. Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, 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. We 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. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises

meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the 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.

319. In all instances, panels and investigating authorities are called upon to engage in a careful evaluation of the entity in question and to identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government. An investigating authority must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant.²³⁸

7.80. We understand the Appellate Body to have found that the critical consideration in identifying a public body is the question of governmental authority, i.e. the authority to perform governmental functions. In the Appellate Body's own words, "being vested with governmental authority is the key feature of a public body".²³⁹ The relevant entity must be shown to have been vested with such authority, or to have actually exercised such authority through the performance of governmental functions. To determine whether an entity has governmental authority, an investigating authority must evaluate the core features of the entity and its relationship to government. Governmental control of the entity is relevant if that control is "meaningful". Indeed, the Appellate Body explicitly stated 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".²⁴⁰

7.81. India contends that the USDOC's determination that NMDC constitutes a public body is based solely on the fact that GOI holds 98%²⁴¹ of the shares in NMDC and asserts that to be inadequate, referring to the Appellate Body's statement that "the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity".²⁴² We do not agree with India's understanding of the USDOC's determination. In reviewing the USDOC's 2004 administrative review determination, we observe that the USDOC found that "the NMDC is a mining company governed by the GOI's Ministry of Steel and that the GOI holds 98 percent of its shares".²⁴³ This language in the USDOC's determination indicates that the USDOC's public body determination is not based solely on the GOI's shareholding in NMDC²⁴⁴, for it makes clear that the USDOC's determination is also based on NMDC being "governed by" GOI. To us, this indicates that the USDOC looked to the question of control of NMDC, and thus we consider that the USDOC's determination that the NMDC constitutes a public body was based on considerations of government control as well as government ownership. In this regard, we agree with the Appellate Body that, in certain circumstances, a body may be found to be public in nature when it is subject to "meaningful control" by governmental, and therefore public, authorities. We also agree with the Appellate Body

²³⁸ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 288, 290 and 317-319. (footnotes omitted)

²³⁹ Ibid. para. 310.

²⁴⁰ Ibid. para. 318.

²⁴¹ India does not contest the USDOC's determination that the GOI held just over 98% of the shares in the NMDC.

²⁴² Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

²⁴³ 2004 Preliminary Results, Exhibit IND-17, p. 5.

²⁴⁴ We acknowledge that, during the 2007 administrative review, the USDOC stated in its issues and decision memorandum that "majority ownership of an input supplier qualifies [NMDC] as a government authority within the meaning of [Section 1677(5)(D)(i)]," and that "[a]nalyzing additional factors is not necessary absent information that calls into question whether government ownership does not mean government control" (2007 Issues and Decision Memorandum, Exhibit IND-38, p. 45). That statement was made, though, in light of an earlier assertion that "[t]he NMDC is governed by the Ministry of Steel and the GOI holds the vast majority of its shares" (2007 Issues and Decision Memorandum, Exhibit IND-38, p. 14).

that "meaningful control" may not be established on the basis of government shareholding alone, but a combination of government shareholding plus other factors indicative of control may suffice. We shall therefore examine whether the USDOC's determination amounts to a proper finding that the NMDC is subject to "meaningful control" by the GOI.

7.82. The United States submits that²⁴⁵, in addition to GOI's shareholding in NMDC, the USDOC's determination that NMDC is "governed by" the GOI²⁴⁶ is based on record evidence demonstrating that: (i) the GOI was heavily involved in the selection of directors of the NMDC, some of whom were directly appointed by the Ministry of Steel; and (ii) the NMDC's own website stated that NMDC is under the "administrative control" of GOI. The United States also refers to evidence in the 2007 administrative review that the GOI had reported in a questionnaire response that it appointed two directors and had approval power over an additional seven out of 13 total directors.

7.83. In respect of GOI involvement in the appointment of NMDC's directors, we note that there was evidence on the USDOC's record indicating that GOI officials informed USDOC at verification for the 2004²⁴⁷ administrative review that the NMDC's chairman, or managing director, and four functional directors are full-time directors selected by a Board that is part of the GOI. GOI officials also informed the USDOC that there are two part-time directors from, and appointed by, the Ministry of Steel.²⁴⁸ In addition, the USDOC stated in its Issues and Decision Memorandum for the 2007 administrative review:

The information on the record of the instant review only further bolsters the Department's prior determinations that the NMDC is a GOI authority capable of providing a financial contribution within the meaning of section 771(5)(D)(iii) of the Act. For example, with regard to the NMDC's 13 board members, information from the GOI indicates that it directly appoints two members and approves the appointments of an additional seven members.²⁴⁹

7.84. India contends that the fact that GOI approves the nomination of NMDC directors "is irrelevant to the determination of whether NMDC is a public body or not".²⁵⁰ According to India, "shareholding and appointment of directors are merely two sides of the same coin". India suggests that just as an entity is not a public body simply because of government shareholding, an entity is also not a public body simply because of government involvement in the appointment of its directors.

7.85. We disagree with India. In our view, government involvement in the appointment of an entity's directors (involving both nomination and direct appointment) is extremely relevant to the issue of whether that entity is meaningfully controlled by the government, because government involvement in the appointment of an entity's directors suggests that the relationship between the

²⁴⁵ United States' second written submission, paras. 104 and 105. India contends that the United States' explanation of the USDOC's determination constitutes *ex post* rationalization (India's second written submission, paras. 128-138). We disagree. The USDOC's "rationalization" for its public body determination, namely government ownership and the NMDC being "governed by" the GOI, is expressly set forth in the USDOC's determinations. The United States merely refers to evidence on the USDOC's record to explain that rationalization. India also contends that there is no evidence that the "government directions or policies have influenced the transactions or pricing of the products sold by NMDC" (India's second written submission, para. 138). We do not consider that evidence of such influence is required in order for an investigating authority to determine that the status of an entity is public rather than private. While such evidence may be relevant in instances of alleged entrustment or direction of a private body by a government or public body, such considerations did not form the basis of the USDOC's finding of financial contribution.

²⁴⁶ 2004 Preliminary Results, Exhibit IND-17, p. 8, internal page 1516; 2006 Preliminary Results, Exhibit IND-32, pp. 9-10, internal pages 1586-1587; and Notice of preliminary results and partial recession of countervailing duty administrative review, 20 December 2008, 73 Fed. Reg. 79791 ("2007 Preliminary Results"), Exhibit IND-37, p. 6, internal page 79796.

²⁴⁷ We note India's argument that the USDOC referred to government involvement in the composition of NMDC's board for the first time in the 2007 administrative review (India's opening statement at the second meeting of the Panel, para. 26). On the basis of record evidence regarding the USDOC's reference to this issue in the 2004 administrative review (2004 Verification India, Exhibit USA-66, pp. 5-6), we reject India's argument.

²⁴⁸ 2004 Verification India, Exhibit USA-66, pp. 5-6.

²⁴⁹ 2007 Issues and Decision Memorandum, Exhibit IND-38, p. 45.

²⁵⁰ India's second written submission, para. 137.

government and that entity is closer than it would be if the government simply held a shareholding in that entity. While a government shareholding indicates that there are formal links between the government and the relevant entity, government involvement in the appointment of individuals – including serving government officials – to the governing board of an entity suggests that the links between the government and the entity are more substantive, or "meaningful", in nature. Indeed, we observe that in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body implicitly accepted that an investigating authority's determination that certain entities constitute public bodies could be based on evidence indicating that the chief executives of those entities were "government appointed", and "the party retain[ed] significant influence in their choice".²⁵¹

7.86. India also argues²⁵² that the relevance of certain directors being appointed or nominated by the GOI is reduced by the fact that in India the independence of non-governmental directors is guaranteed by Clause 49 of the Listing Agreement with Stock Exchanges. The United States contends that the Listing Agreement had not been submitted to the USDOC, and should therefore not be considered by the Panel. We note that the Listing Agreement is contained in an Annexure to NMDC's Annual Report.²⁵³ While GOI informed the USDOC that all financial details of the NMDC are available at its website, and provided USDOC with NMDC's website address, GOI did not provide the USDOC with hard copies or screen-prints of any financial documentation posted on that website, including the NMDC's Annual Report or any Annexures thereto.²⁵⁴ Since websites are not static, it is not reasonable to expect investigating authorities to base their determinations on the contents of a website on any given day.²⁵⁵ In our view, investigating authorities are entitled to require interested parties wishing to refer to website material to submit hard copies thereof. Furthermore, although GOI did refer to NMDC's financial details being available on NMDC's website in response to a request for NMDC's financial report²⁵⁶, GOI made no specific reference to NMDC's Annual Report generally, or Clause 49 of the Listing Agreement in particular, when responding to USDOC's questions regarding the role of GOI in NMDC's operations.²⁵⁷ For these reasons, we are not persuaded that the USDOC should have taken account of Clause 49 when considering GOI involvement in the appointment of directors.

7.87. Regarding the issue of the "administrative control" of the NMDC, we note that petitioners submitted hard copies of material taken from the NMDC's own website stating that "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India."²⁵⁸ Although the NMDC website does not specify what precisely is meant by "administrative control", the fact that an entity is under the "administrative control" of the government suggests that the relationship between that entity and the government is very different from the relationship that would normally prevail between a private body and the government. Accordingly, in the context of government ownership and government involvement in the appointment of directors, such evidence provides additional support for a finding that an entity is under the "meaningful control" of the government.

7.88. India contends that NMDC in fact enjoyed a "significant amount of autonomy" from GOI, as a result of having been granted either "Miniratna" or "Navratna" status during the relevant review periods.²⁵⁹ India refers in this regard to certain notifications set forth in Exhibits IND-72 1(2) and 72 2(1). We note that the first paragraph of the GOI document set forth in Exhibit IND-72 1(2) refers to the GOI "[t]urning selected public sector enterprises into global

²⁵¹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 350.

²⁵² India's second written submission, para. 137.

²⁵³ Ibid. fn. 189.

²⁵⁴ Ibid.

²⁵⁵ We observe India's argument that the relevant annual reports are part of the static portion of the website, and such published annual reports are not changed. We are not persuaded by this argument, since investigating authorities should not have to trawl through websites in order to ascertain what parts may or may not be subject to change. Websites, or documents linked thereto, may generally be changed at any time, and may even disappear.

²⁵⁶ Administrative review for the period 01/01/2006 to 31/12/2006, supplemental questionnaire response from the Government of India, 2 September 2007 ("2007 Supplemental Questionnaire Response from the GOI for 2006 AR"), Exhibit IND-58, p. 6, concerning GOI's response to Question 2e of USDOC's questionnaire.

²⁵⁷ 2007 Supplemental Questionnaire Response from the GOI for 2006 AR, Exhibit IND-58, p. 4, concerning GOI's response to Question 2a of USDOC's questionnaire.

²⁵⁸ 2004 New Subsidy Allegations, Exhibit USA-69, Exhibit 6, p. 2.

²⁵⁹ India's second written submission, para. 138.

giants". We also note that the first paragraph of the GOI document set forth in Exhibit IND-72 2(1) explains that the greater autonomy referred to by India is granted "to make the public sector more efficient and competitive". So long as public sector enterprises are involved, we are not persuaded that the grant of a greater degree of autonomy is necessarily at odds with a determination that such public sector enterprises constitute public bodies. India has not suggested that "Miniratna" or "Navratna" companies are effectively private in nature.

7.89. We recall our assessment that, in certain circumstances, a body may be found to be public in nature when it is subject to "meaningful control" by the government. We further recall that government shareholding, when combined with other factors, may well be indicative of the government's "meaningful control" of an entity. We 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"²⁶⁰ of GOI.²⁶¹ Accordingly, we reject India's claim that the USDOC's determination that NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.3.2 USDOC's finding of *de facto* specificity

7.90. By virtue of Article 1.2 of the SCM Agreement, the Agreement only applies to subsidies that are specific. Accordingly, countervailing duties may only be levied on imports that benefit from specific subsidies. According to Article 2 of the SCM Agreement, subsidies may be *de jure* (Article 2.1(a) & (b)) or *de facto* (Article 2.1(c)) specific.

7.91. The USDOC determined in the 2004 administrative review that the NMDC's provision of high-grade iron ore is *de facto* specific "because the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number".²⁶² India challenges the USDOC's determination of *de facto* specificity. The United States asks the Panel to reject India's claim.

7.3.2.1 Relevant WTO provision

7.92. Article 2 provides in relevant part:

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately

²⁶⁰ To avoid any uncertainty, we affirm that this conclusion is not based on the United States' proposal to define a "public body" as an entity that is controlled by the government such that the government can use that entity's resources as its own. (United States' first written submission, para. 286)

²⁶¹ Taking 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. See para. 7.73 above.

²⁶² 2004 Preliminary Results, Exhibit IND-17, internal page 1516.

large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. 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.

...

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

7.3.2.2 Main arguments of the parties

7.3.2.2.1 India

7.93. India claims that the USDOC's determination of *de facto* specificity is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement because: the USDOC failed to show that the subsidy discriminated in favour of "certain enterprises" over a comparative set of other, similarly-situated enterprises; the USDOC based its determination of specificity on limitations inherent in the nature of the product; the USDOC failed to establish that the subsidy was used by a limited number of certain enterprises; the USDOC failed to examine all the mandatory factors listed in Article 2.1(c); and the USDOC failed to determine *de facto* specificity on the basis of positive evidence.

7.3.2.2.1.1 Discrimination in favour of certain enterprises

7.94. Noting the reference to "certain enterprises" in the chapeau of Article 2.1, India submits that, in order to demonstrate specificity under any of the three paragraphs of Article 2.1, it is necessary to show that the subsidy is available to certain known and particularized enterprises, as opposed to all entities in general.²⁶³ India submits in particular that an investigating authority must demonstrate that the subsidy favours certain enterprises over a comparative set of other entities that are similarly-situated with regard to their potential/capability to receive the subsidy in question.²⁶⁴ According to India, there must be a showing of discrimination against a comparative set of other entities that would, but for the governmental instrument or conduct, also have had access to the subsidy in question.²⁶⁵

7.95. India claims that the USDOC failed to identify any comparative set of entities that had been discriminated against in terms of eligibility for the alleged subsidy provided by NMDC.²⁶⁶ India contends that the USDOC's finding of specificity was not based on any action on the part of NMDC or GOI to restrict the sale of iron ore to a limited set of industries.²⁶⁷ India contends that no such restrictions were in place, and that the sale of iron ore from NMDC is open to any person willing to pay the market price sought by NMDC.²⁶⁸ India denies that NMDC or GOI directly or indirectly influences the nature and type of enterprises that may purchase iron ore from NMDC.²⁶⁹

7.96. India also submits that the USDOC should have examined specificity under Articles 2.1(a) and (b) of the SCM Agreement before proceeding to apply Article 2.1(c).²⁷⁰

7.3.2.2.1.2 Limitations inherent in the nature of the product

7.97. India submits that, rather than establishing that a comparative set of entities had been discriminated against, the USDOC simply relied on the inherent characteristics/attributes of the

²⁶³ India's first written submission, para. 243.

²⁶⁴ Ibid. para. 246.

²⁶⁵ Ibid. para. 248.

²⁶⁶ Ibid. para. 263.

²⁶⁷ Ibid. para. 262.

²⁶⁸ Ibid. para. 264.

²⁶⁹ Ibid. para. 264.

²⁷⁰ India's opening statement at the second meeting of the Panel, para. 34.

product at issue.²⁷¹ India asserts that as a matter of basic common sense, because of the nature of the product, a given raw material may be capable of being used only by certain types of industries, depending on the nature and use of the raw material involved.²⁷² India contends that such inherent limitations concerning the nature of the product cannot directly be changed or influenced by government actions.

7.3.2.2.1.3 USDOC's alleged failure to demonstrate that the subsidy was used by a limited number of certain enterprises

7.98. India notes that, according to Article 2.1(c) of the SCM Agreement, a subsidy may in fact be specific notwithstanding any appearance of (*de jure*) non-specificity when, *inter alia*, there is "use of a subsidy programme by a limited number of certain enterprises". India contends that the USDOC should have shown that the "limited number" of entities benefiting from the subsidy was part of a broader set of "certain enterprises".²⁷³ According to India, because the term "certain enterprises" is shorthand for the beneficiaries in question, what the United States needs to prove is that the programme in question was being used by only a limited number of users within the set of beneficiaries. India contends that it is not relevant whether the entire set of beneficiaries was limited in number.²⁷⁴

7.99. India submits that the USDOC's determination was unclear as to the subsidy being obtained by a "limited number" of entities within a broader set of "certain enterprises".²⁷⁵ In particular, India contends that it is unclear whether the USDOC considered: (i) that the users of iron ore were the "certain enterprises", and that the subsidy was only made available to a "limited number" of users within that set; or (ii) that (all) the users of iron ore constitute the "limited number" of entities within some broader, but undefined, category of "certain enterprises".²⁷⁶ India submits that, as a result of such uncertainty, the USDOC's determination is inconsistent with Article 2.1(c).

7.3.2.2.1.4 USDOC's alleged failure to examine all mandatory factors listed in Article 2.1(c)

7.100. India notes that, according to Article 2.1(c) of the SCM Agreement, a finding of *de facto* specificity must take into account "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".²⁷⁷ India contends that the USDOC failed to take account of these two mandatory factors, contrary to Articles 1.2 and 2.1(c).

7.3.2.2.1.5 USDOC's alleged failure to base its finding of specificity on positive evidence

7.101. India notes that, pursuant to Article 2.4 of the SCM Agreement, "[a]ny determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence".

7.102. India submits that, although the USDOC determined that the sale of iron ore by NMDC was *de facto* specific since the actual receipt of the subsidy would only be "limited to industries that use iron ore, including the steel industry, and is thus limited in number", there is no evidence on record indicating that NMDC only made iron ore available to users of iron ore, or that only users of iron ore purchased from NMDC.²⁷⁸ India asserts that the USDOC rather assumed that iron ore was being purchased from NMDC only by users of iron ore. India submits that the USDOC's determination was devoid of positive evidence, contrary to Article 2.4.

²⁷¹ India's first written submission, para. 262.

²⁷² Ibid. para. 264.

²⁷³ Ibid. para. 272.

²⁷⁴ India's second written submission, para. 182.

²⁷⁵ India's first written submission, paras. 271-272.

²⁷⁶ Ibid. paras. 272-273.

²⁷⁷ Ibid. paras. 274-276.

²⁷⁸ Ibid. para. 278.

7.3.2.2.2 United States

7.103. As an initial matter, the United States submits that India errs in requesting the Panel to find a U.S. measure inconsistent with Article 2.1.²⁷⁹ According to the United States, Articles 2.1(a) and 2.1(c) of the SCM Agreement are definitional provisions that do not contain obligations.

7.3.2.2.2.1 Discrimination in favour of certain enterprises

7.104. The United States rejects India's argument that a determination of specificity can only be made with reference to a "comparative set" of "similarly-situated" entities²⁸⁰, with consideration of whether the actual use of the subsidy is limited to certain enterprises, i.e., a subset of that group.²⁸¹ The United States submits that Article 2.1(c) of the SCM Agreement does not state that specificity can only be found if a subset of similarly situated entities receives the subsidy. Rather, the United States submits that Article 2.1(c) provides that *de facto* specificity may be found in light of the "use of a subsidy programme by a limited number of certain enterprises."²⁸² The United States asserts that if a limited number of enterprises use the programme, this fact supports a finding of specificity. For the United States, the question a panel or investigating authority must answer when considering whether a subsidy programme is used by "a limited number of certain enterprises" is whether the "certain enterprises" constitute a discrete segment of the economy.²⁸³ According to the United States, this assessment is made with respect to the economy of the Member concerned (rather than with respect to a broader category of similarly-situated enterprises, as alleged by India). In addition, the United States rejects India's argument that specificity should be examined under Articles 2.1(a) and (b) of the SCM Agreement before proceeding to apply Article 2.1(c).²⁸⁴

7.3.2.2.2.2 Limitations inherent in the nature of the good

7.105. The United States also disagrees with India's argument that if the inherent characteristics of a good, rather than the government programme, limits the uses of that good to certain enterprises, the programme cannot be found to be specific.²⁸⁵ The United States submits that a similar argument was rejected by the panel in *US – Softwood Lumber IV*, when Canada argued that the provision of standing timber was not specific because it was the inherent characteristics of the standing timber, rather than the Government of Canada, that limited the number of enterprises that uses standing timber.²⁸⁶ According to the United States, the panel found that Article 2 permits a specificity finding precisely because the use of the good is limited to certain enterprises.

7.3.2.2.2.3 USDOC's alleged failure to demonstrate that the subsidy was used by a limited number of certain enterprises

7.106. The United States contends that the positive evidence supporting the USDOC's determination that the iron ore programme was used by a limited number of certain enterprises consists of a list of 43 NMDC customers identified on the NMDC website, most of which were iron and steel companies.²⁸⁷ The United States also contends that the Dang Report demonstrates that the total Indian domestic consumption of iron ore was accounted for by steel producers and pig and sponge iron producers²⁸⁸, with the overwhelming majority, approximately 76%, being used by steel producers.²⁸⁹

²⁷⁹ India's first written submission, para. 641(f)(ii), (g)(iii), and (h)(ii).

²⁸⁰ Ibid. para. 245-261.

²⁸¹ Ibid. para. 261.

²⁸² SCM Agreement, Art. 2.1(c).

²⁸³ United States' first written submission, para. 402.

²⁸⁴ United States' response to Panel question No. 70, paras. 109-111; and opening statement at the second meeting of the Panel, para. 30.

²⁸⁵ India's first written submission, paras. 239-279.

²⁸⁶ The United States refers in this regard to the Panel Report in *US – Softwood Lumber IV*, para. 7.116.

²⁸⁷ 2004 New Subsidy Allegations, Exhibit USA-69, p. 4, Exhibit 7.

²⁸⁸ DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal exhibit 31.

²⁸⁹ Ibid.

7.3.2.2.2.4 USDOC's alleged failure to examine all mandatory factors listed in Article 2.1(c)

7.107. The United States submits that USDOC did account for India's economic diversification and the length of time during which the subsidy programme operated. According to the United States, the USDOC considered that the facts and circumstances of the challenged specificity determination demonstrated that neither of these factors would affect the conclusion that the provision of iron ore was specific.²⁹⁰ The United States denies that the USDOC was required to address these factors explicitly.

7.108. The United States contends that the USDOC accounted for the fact that India's economy is highly diverse by specifically recognizing a variety of Indian industries such as polyethylene terephthalate film and resin in the challenged investigation.²⁹¹ The United States asserts that the USDOC also determined that only a limited number of enterprises use iron ore, in contrast to the large number of industries in the Indian economy.

7.109. The United States submits 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"²⁹², no additional analysis of the duration of the subsidy was necessary. This is because the only industries that could receive the subsidy over time would still be defined as part of the original, limited group of beneficiaries – those that use iron ore.

7.110. According to the United States, when record evidence and the circumstances of an investigation demonstrate that the issues of diversification and duration of the subsidy would not affect the specificity analysis, and no party argues to the contrary, USDOC is not required to make explicit determinations as to those aspects of the *de facto* analysis. The United States relies in this regard on the finding by the panel in *EC – Countervailing Measures on DRAM Chips* that an investigating authority need not make explicit findings regarding these considerations when other parties fail to raise the issue: "[t]he record does not indicate that the parties ever raised the issue that the disproportionate use of the Programme's funds ... was somehow to be explained by the lack of diversification of the Korean economy or the length of time the programme had been in operation. We therefore do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters."²⁹³ The United States contends that no party challenged USDOC's specificity findings with respect to the sale of high-grade iron ore, and no party suggested that either limited economic diversification or the duration of the subsidy programme was relevant to the limited number of industries benefiting from that programme.²⁹⁴

7.3.2.2.2.5 USDOC's alleged failure to base its finding of specificity on positive evidence

7.111. The United States submits that the USDOC's determination of specificity was based on positive evidence. The United States refers in this regard to the above-mentioned evidence (taken from the NMDC website and Dang Report) regarding the use of domestic iron ore by iron and steel producers.

²⁹⁰ See, Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.975 ("[T]he relevance of the[] two factors to understanding whether there has been 'predominant use {of a subsidy programme} by certain enterprises' will depend on the particular facts" at issue.)

²⁹¹ See, e.g., 2004 Preliminary Results, Exhibit IND-17 (citing *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 34950 (16 May 2002) and *Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from India*, 70 FR 13460 (21 March 2005)).

²⁹² 2004 Preliminary Results, Exhibit IND-17, internal page 1516, unchanged in the final results of countervailing duty administrative review, 17 May 2006, 71 Fed. Reg. 28665 ("2004 Review Final Results"), Exhibit IND-19, internal page 28667.

²⁹³ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.229.

²⁹⁴ 2004 Review Final Results, Exhibit IND-19, 28667; and issues and decision memorandum: final results of administrative review, 10 May 2006 ("2004 Issues and Decision Memorandum"), Exhibit IND-18, II. Analysis of Programs, 4. Sale of High-Grade Iron Ore for Less than Adequate Remuneration and IV. Analysis of Comments.

7.3.2.3 Main arguments of the third parties

7.3.2.3.1 Canada

7.112. Canada disagrees with the interpretation of Article 2.1 of the SCM Agreement suggested by India. Canada submits that the ordinary meaning of the text of Article 2.1 does not require the use of "comparative sets" of "similarly-situated entities" in order to determine specificity. According to Canada, Article 2.1 is not a non-discrimination obligation, as India seems to suggest.

7.3.2.3.2 China

7.113. China submits that Article 2.1 contemplates an analysis in a manner that the assessment of *de facto* specificity under Article 2.1(c) must follow the initial appearance of non-specificity concluded as a result of the analysis under Article 2.1 subparagraphs (a) and (b). According to China, an investigating authority is therefore obliged first to consider the principles set out in subparagraphs (a) and (b), and may proceed to the "other factors" under subparagraph (c) only if the application of the prior principles under subparagraphs (a) and (b) has led to an appearance of non-specificity. China also considers that a "subsidy programme" must have been identified and substantiated when an investigating authority evaluates specificity under the first two "other factors" under Article 2.1(c).

7.3.2.3.3 European Union

7.114. The European Union disagrees with India's argument that Article 2.1(c) pre-supposes an appropriate "comparative set" of "similarly situated" firms. Contrary to what India asserts, Article 2.1 is not addressed towards an issue of *discrimination*: rather, it addresses the issue of *specificity*.

7.3.2.3.4 Saudi Arabia

7.115. Saudi Arabia submits that, when determining *de facto* specificity under Article 2.1(c) of the SCM Agreement, investigating authorities must take into account the level of diversification of economic activities in the exporting country. The explicit diversification requirement of Article 2.1(c) obligates investigating authorities to consider the broader economic context in which a subsidy programme operates. Saudi Arabia asserts that *de facto* specificity cannot be applied in the same way to less diversified developing countries as it would be applied to a fully developed, diversified economy. Such an approach would penalize less diversified, developing economies for seeking to diversify and develop in a WTO-consistent manner. That is exactly what the diversification requirement of Article 2.1(c) was designed to prevent. Saudi Arabia further submits that *de facto* specificity may not be determined solely on the basis of the inherent characteristics of a good or service. First, there is nothing in the text of the SCM Agreement that permits a finding of specificity on this basis. Second, investigating authorities have an affirmative obligation under the SCM Agreement to "clearly substantiate" determinations of *de facto* specificity on the basis of positive evidence relating to the four factors found in Article 2.1(c). Authorities may not avoid this obligation by simply referring to the "inherent characteristics" of a good. Third, this expansive interpretation could also render the specificity determination under Article 2 redundant – the investigating authority need only determine (under Article 1) the nature of the "good" which is provided, and that determination would often automatically justify a finding of *de facto* specificity. Finally, any decision on whether *de facto* specificity may be based solely on a good's inherent characteristics may not penalize less diversified economies in express violation of Article 2.1(c).

7.3.2.4 Evaluation

7.116. Before examining India's claims, we consider the United States' argument that Articles 2.1(a) and 2.1(c) are merely definitional provisions, devoid of any legal obligations.²⁹⁵ We

²⁹⁵ United States' first written submission, para. 389.

also consider India's argument that the USDOC should have examined specificity under Articles 2.1(a) and (b) of the SCM Agreement before applying Article 2.1(c).²⁹⁶

7.3.2.4.1 Are Articles 2.1(a) and (c) merely definitional?

7.117. The United States submits that Article 2.1 is definitional, and does not contain obligations. The United States submits, therefore, that there can be no finding of inconsistency with that provision.

7.118. We acknowledge that Article 2 defines the scope of subsidies that are subject to the disciplines of the SCM Agreement. We also acknowledge that the Appellate Body emphasised that Article 2.1 imposes "principles" rather than "rules".²⁹⁷ That being said, we note that Article 2.4 refers to a "determination" of specificity being made under the provisions of Article 2. Except in situations envisaged by Article 2.3, such determination is made – explicitly or implicitly – every time that a Member finds that a subsidy falls within the scope of the SCM Agreement. In our view, a panel may reasonably find that such "determination" is either consistent, or inconsistent, with the principles set forth in Article 2.1(a)-(c). We note that, consistent with this approach, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*²⁹⁸ upheld the panel's finding that the United States had not acted inconsistently with its obligations under Article 2.1(a). Implicit in the Appellate Body's finding is a determination that Article 2.1(c) does contain legal obligations that a Member may be found not to have complied with.

7.3.2.4.2 Sequential application of sub-paragraphs (a), (b) and (c) of Article 2.1

7.119. Regarding India's argument that the USDOC should have examined specificity under Articles 2.1(a) and (b) of the SCM Agreement before applying Article 2.1(c), we observe that, the Appellate Body has stated that the sub-paragraphs of Article 2.1 need not be applied sequentially in all cases. The Appellate Body explicitly "recognize[s] that there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary".²⁹⁹ We note that there is no suggestion in the USDOC's determinations that the provision of iron ore by the NMDC was restricted by law. Nor has India suggested that this would have been a relevant consideration. Accordingly, we consider that the USDOC was entitled to proceed directly to consider, in the context of Article 2.1(c), whether the provision of the NMDC's iron ore was restricted in fact.

7.3.2.4.3 Discrimination in favour of certain enterprises

7.120. India submits that a subsidy can only be specific if it discriminates, in terms of access or eligibility, between similarly-situated entities. India's discrimination argument is based on a statement by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that the principles set forth in Articles 2.1(a) and (b) concern the issue of whether the "conduct or instruments of the granting authority discriminate or not".³⁰⁰ India contends that there cannot be discrimination "unless there are entities other than the 'certain enterprises' that would have, but for the governmental instrument or conduct, had access to the subsidy in question".³⁰¹ India contends that "a conclusion that a program is specific to 'certain enterprises' under Articles 2.1(a) and (b) can only be reached in the context of a 'comparative set', whereby an investigating authority can determine that the subsidy only benefits 'certain enterprises' over this 'comparative set'". According to India, this "comparative set" "must consist of 'similarly-situated' entities, i.e. entities that share a mutual or common relation/degree of similarity as the 'certain enterprises' in question, such that entities covered thereby would have otherwise been capable of receiving the subsidy in question".³⁰² India contends that the same approach must also apply to *de facto*

²⁹⁶ India's opening statement at the second meeting of the Panel, para. 34.

²⁹⁷ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366.

²⁹⁸ Ibid. para. 401.

²⁹⁹ Ibid. para. 371.

³⁰⁰ Ibid. para. 367.

³⁰¹ India's first written submission, para. 248.

³⁰² Ibid. para. 250.

specificity under Article 2.1(c), since all three sub-paragraphs of Article 2.1 are all concerned with the same issue, namely specificity.³⁰³

7.121. We are not persuaded by India's argument. Article 2.1(a), which deals with *de jure* specificity, provides that a subsidy shall be specific when the granting authority or relevant legal instrument "explicitly limits access to a subsidy to certain enterprises". Article 2.1(c), in respect of *de facto* specificity, similarly provides that a subsidy shall be specific *inter alia* when a subsidy programme is "use[d] ... by a limited number of certain enterprises". These two provisions complement one another. Article 2.1(a) concerns limitations on access to subsidies that exist in law. Article 2.1(c) concerns limitations on access that are not expressly provided for in legal instruments, but whose existence may nevertheless be determined by reference to facts. In both cases, what matters is the existence of a restriction on access to the subsidy, in the sense that the subsidy is available to certain enterprises, industries, or groups of enterprises or industries, but not to others. The entities with access to the subsidy are referred to in the chapeau to Article 2.1 as "certain enterprises". Once access to the subsidy is shown to be limited to those "certain enterprises" (either *de jure* or *de facto*), the subsidy is specific. There is no requirement to show that the subsidy is at the same time *not* available to other, *undefined* – but similarly situated – entities. Article 2.1 simply makes no provision for such requirement. The focus of Article 2.1 is on the "certain enterprises", and their limited access to the subsidy. Article 2.1 is not concerned with other enterprises, and whether or not such other enterprises have been discriminated against.

7.122. By limiting access to a subsidy to certain enterprises, a Member will necessarily prevent other enterprises from also accessing that subsidy. This goes without saying, since any restriction on access to a subsidy implies that access will be denied to other enterprises. If other enterprises were not deprived access to the subsidy, that subsidy would be generally available, and therefore not "specific" within the meaning of Article 2.1 of the SCM Agreement. The point, though, is that Article 2 is not concerned with the identity or nature of the excluded entities. Thus, if a law limits access to a subsidy to steel producers, specificity may be established pursuant to Article 2.1. Article 2.1 is not concerned with the entities that are implicitly excluded from access to that subsidy. In particular, Article 2.1 is not concerned with whether the excluded entities are aluminium producers, refrigerator producers or farmers. Nor is Article 2.1 concerned with the issue of whether the excluded entities are like, or similarly situated, to the steel producers who do have access.

7.123. Although India states that "a finding of specificity cannot arise simply because a subsidy is made available to certain enterprises rather than the entire economy", this is precisely what the text of Article 2.1 provides. Let us recall in this regard that Article 2.1(a) applies when a legal instrument "explicitly limits access to a subsidy to certain enterprises". Thus, once the subsidy is made available to certain enterprises only, the text of Article 2.1(a) requires that such a subsidy shall be found to be specific.³⁰⁴ There is no requirement in Article 2.1(a) to conduct any further analysis regarding the nature of the entities to which the subsidy is not made available. As explained above, the same applies in respect of specificity established pursuant to Article 2.1(c).

7.124. Furthermore, we observe that Article 2 contains no reference to the notion of "discrimination". The basis for India's argument regarding discrimination reposes rather on a statement made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* to the effect that the principles set forth in Articles 2.1(a) and (b) concern the issue of whether the "conduct or instruments of the granting authority discriminate or not".³⁰⁵ Given our review of the text of Article 2.1, we are not persuaded that the Appellate Body's solitary³⁰⁶ use of the term "discriminate" suggests that Article 2.1 should be interpreted in the manner suggested by India. This is because there is no suggestion in the Appellate Body's analysis or findings that, having determined that access to a subsidy is limited to certain enterprises, an investigating authority must also determine that access is denied to other, similarly situated entities. Thus, when

³⁰³ India's first written submission, para. 258.

³⁰⁴ We observe that India itself states that the question addressed by all sub-paragraphs of Article 2.1 is "whether a given subsidy is specific to certain enterprises" (India's second written submission, para. 172). Thus, even India acknowledges that specificity is determined in relation to "certain enterprises", rather than some sub-category thereof.

³⁰⁵ Appellate Body Report, para. 367.

³⁰⁶ Having made the above-mentioned statement, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* makes no further reference to the concept of discrimination.

interpreting Article 2.1(a), the Appellate Body found that "a subsidy is specific under Article 2.1(a) of the *SCM Agreement* when the explicit limitation reserves access to that subsidy to 'certain enterprises'".³⁰⁷ The Appellate Body did not state that a subsidy is specific when access is reserved to "certain enterprises", *and access is denied to other similarly situated entities*. Furthermore, when reviewing the panel's evaluation of the investigating authority's determination of specificity, the Appellate Body concluded that the panel's acknowledgment that the investigating authority's determination "that the alleged subsidy was explicitly limited" by certain documents was "a proper and a sufficient basis for the Panel to conclude that the USDOC had not acted inconsistently with Article 2.1(a) of the *SCM Agreement* in determining [that the relevant programme] was *de jure* specific".³⁰⁸ Again, there is no suggestion by the Appellate Body that, in addition to determining that access to the subsidy was limited to "certain enterprises", the investigating authority should also have determined that access was denied to other, similarly situated entities. Thus, there is no meaningful support for India's discrimination argument in the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

7.125. Further, in cases where the "certain enterprises" represent the totality of an industry, a requirement that the recipient of a financial contribution must be compared to a "comparative set" of "similarly situated entities" would make little, if any, sense. Assuming the industry is defined by the products it produces, there will generally be no "similarly-situated" entities that the relevant industry could be part of. In such cases, the "similarly-situated" entities and the "certain enterprises" would be the same, such that it would not be possible to establish that similarly situated entities were excluded from the subsidy. While India's approach to specificity would suggest that specificity could not be established in such circumstances, such approach is clearly at odds with the plain language of Article 2.1 as discussed above.

7.126. For all of the above reasons, we reject India's argument that specificity under Article 2 must be established on the basis of discrimination in favour of "certain enterprises" against a broader category of other, similarly situated entities.

7.3.2.4.4 Limitations inherent in the nature of the product

7.127. India contends that the USDOC's determination of *de facto* specificity, based on entities that use iron ore being limited in number, can only be justified if the 'comparative set' of excluded entities comprises the entire economy of India. According to India, "considering the entire economy as the 'comparative set', including industries and enterprises that are inherently incapable of using iron ore, results in the automatic and mechanistic application of the specificity requirement, thereby robbing it of its value and purpose", since it "will result in an affirmative finding of *de facto* specificity in all cases where the government is involved in providing raw materials".³⁰⁹ India submits that specificity should not be established on the basis of limited use under Article 2.1(c) in cases where, because of the nature of the subsidized product, the use of that product is necessarily restricted to a limited number of entities.

7.128. In accordance with Article 32 of the Vienna Convention, supplementary material may be used to assist in interpretation of the terms of a treaty "to confirm the meaning resulting from the application of Article 31" or to determine the meaning if the interpretation according to Article 31 "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result with is manifestly absurd or unreasonable." In this context, India refers to the Second Cartland Draft circulated in the Negotiating Group on Subsidies and Countervailing Measures in September 1990, in which the concept of *de facto* specificity was enunciated in draft Articles 4.1(c) and (d):

(c) Where discretion is exercised in the course of the administration of a subsidy, specificity shall not be deemed to exist if there is a clear indication, substantiated on the basis of positive evidence, that discretion has not been exercised so as to limit access to the subsidy to certain enterprises or to award amounts of subsidy so as to direct the subsidy to certain enterprises. In this regard, information on the frequency with which applications for the subsidy are refused and the reasons for such refusal shall, in particular, be considered.

³⁰⁷ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373.

³⁰⁸ *Ibid.* para. 393.

³⁰⁹ India's first written submission, para. 264.

(d) A subsidy may be specific in fact if it can be demonstrated, on the basis of facts which were known - or should have been known - to the granting authority at the time of establishment of the subsidy programme, that the subsidy would be limited to certain enterprises.***

****It remains for signatories to address the issue of limited access as a result of the inherent characteristics of goods, services or extraction or harvesting rights provided by a government.*³¹⁰

7.129. According to India, the absence of the asterisked footnote in the final text of the SCM Agreement shows that "there was no consensus among the negotiating members on the issue of determining specificity based solely on the inherent characteristics of the goods". According to India, Article 2.1(c) of the SCM Agreement cannot be interpreted in a manner that would indirectly incorporate into the treaty what the negotiators could not originally agree on.

7.130. We are not persuaded by India's arguments. Regarding India's reliance on the above-mentioned negotiating history, we first note that such negotiating history would only become relevant if the Panel were to conclude that the interpretation set out in the preceding sub-section "(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." This is not the case here. As explained above, our interpretation of Article 2.1(c), based on the text, in its context and in view of the object and purpose of the provision, is clear and is contrary to India's position. Second, the fact that negotiators reserved the right to consider "the issue of limited access as a result of the inherent characteristics of goods", but ultimately did not include any provisions regarding this issue in the final version of the SCM Agreement, does not, as India argues, require the conclusion that negotiators could not agree to include a provision concerning specificity based on the inherent characteristics of goods. It, in our view, may suggest that negotiators addressed the issue, and concluded that no such provision was necessary. What is clear, is that the SCM Agreement, as agreed by Members, does not provide for any special regime in cases where access to a subsidy is limited by the inherent characteristics of goods.

7.131. In terms of India's broader argument, we recall our earlier findings to the effect that once it is established that access to the subsidy is limited, that subsidy is specific within the meaning of Article 2. Thus, if access is limited by virtue of the fact that only certain enterprises may use the subsidized product, the subsidy is specific. As explained above, there is no need for a further consideration regarding the nature of the excluded entities. Similarly, there is no need, in such cases, to establish that the excluded entities would also have been able to use the subsidized product. We note that a similar issue was addressed by the panel in *US – Softwood Lumber IV*, reaching essentially the same conclusion:

We first address Canada's argument that a subsidy is specific only when the authority deliberately limits access of this subsidy to certain enterprises within the group of enterprises eligible or naturally apt to use the subsidy. In our view, Article 2 SCM Agreement is concerned with the distortion that is created by a subsidy which either in law or in fact is not broadly available. While deliberate action by a government to restrict access to a subsidy that is in principle broadly available, through the use of discretion, could well be the basis for a finding of *de facto* specificity, we see no basis in the text of Article 2, and 2.1 (c) SCM Agreement in particular, for Canada's argument that if the inherent characteristics of the good provided limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is limited to a sub-set of this industry, i.e. to certain enterprises within the potential users of the subsidy engaged in the manufacture of similar products. Article 2 speaks of the use by a limited number of certain enterprises or the predominant use by certain enterprises, not of the use by a limited number of certain *eligible* enterprises. **In the case of a good that is provided by the government - and not just money, which is fungible - and that has utility only for certain enterprises (because of its inherent characteristics), it is all the more likely that a subsidy conferred via the provision of that good is specifically provided to certain enterprises only.** We

³¹⁰ Document MTN/GNG/NG10/W/38/Rev.1, 4 September 1990. (emphasis added)

do not consider that this would imply that any provision of a good in the form of a natural resource automatically would be specific, precisely because in some cases, the goods provided (such as for example oil, gas, water, etc.) may be used by an indefinite number of industries. This is not the situation before us. As Canada acknowledges, the inherent characteristics of the good provided, standing timber, limit its possible use to "certain enterprises" only.³¹¹

7.132. We agree with this reasoning, which we consider to be consistent with our approach outlined above.

7.133. For the above reasons, we reject India's argument that if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is further limited to a sub-set of this industry.

7.3.2.4.5 USDOC's alleged failure to demonstrate that the subsidy was used by a limited number of certain enterprises

7.134. India submits that because the term "certain enterprises" is shorthand for the beneficiaries in question, the USDOC needed to prove that the programme was being used by only a limited number of users within this set of beneficiaries.³¹² India submits that it is not relevant whether the entire set of "certain enterprises" was limited in number.

7.135. India's argument is based on a proposed distinction between "users" and "beneficiaries" that is not provided for in Article 2.1(c) of the SCM Agreement. As we explain above, Article 2.1 refers to "certain enterprises". Article 2.1 does not refer to other "users" of the relevant subsidy programme. Nor does it refer to "certain enterprises" as "beneficiaries". Furthermore, as explained above, Articles 2.1(a) and (c) are concerned with situations where access to a subsidy is limited to the same category of "certain enterprises". An authority may determine that a subsidy is specific – in the sense that access to that subsidy is limited to "certain enterprises" – pursuant to Article 2.1(c) by relying on the fact that the number of "certain enterprises" using the subsidy is limited. It is the category of "certain enterprises" that is relevant for this numerical exercise, just as it is the category of "certain enterprises" that is relevant for the purpose of Article 2.1(a). Accordingly, there was no obligation on the USDOC to establish that only a "limited number" within the set of "certain enterprises" actually used the programme.

7.3.2.4.6 USDOC's alleged failure to examine all mandatory factors listed in Article 2.1(c)

7.136. The text of Article 2.1(c) expressly requires that, in the context of a determination of *de facto* specificity, "account shall be taken" of the extent of diversification of the relevant economy and the length of time that the relevant programme has been in operation. Our evaluation of the USDOC's compliance with that requirement must be based on the USDOC's determinations, and other contemporaneous USDOC documents. In reviewing USDOC's determinations, we see nothing to indicate that the USDOC did actually take account of the two factors identified by India. Nor has the United States pointed us to any other contemporaneous document in which the USDOC did so. Accordingly, we find that the USDOC failed to comply with the Article 2.1(c) requirement to take those factors into account when determining whether the provision of goods by NMDC is *de facto* specific.

7.137. We note the United States' argument that the USDOC accounted for the fact that India's economy is highly diverse by specifically recognizing a variety of Indian industries such as polyethylene terephthalate film and resin in the challenged investigation.³¹³ However, this argument merely alludes to a number of references made by the USDOC to prior proceedings in which the United States imposed trade remedies on imports from India. The USDOC referred to

³¹¹ Panel Report, *US – Softwood Lumber IV*, para. 7.116. (bold emphasis added)

³¹² India's second written submission, para. 182.

³¹³ See, e.g., 2004 Preliminary Results, Exhibit IND-17, internal pages 1513-14 (citing *Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 34950 (16 May 2002) and *Final Affirmative Countervailing Duty Determination: Bottle-Grade Polyethylene Terephthalate (PET) Resin from India*, 70 FR 13460 (21 March 2005)).

these proceedings in order to address issues totally unrelated to its determination of *de facto* specificity.³¹⁴ Furthermore, we do not consider that isolated references to a limited number of prior trade remedy proceedings involving imports from a Member is necessarily sufficient to establish the economic diversity of that Member. Accordingly, we are unable to accept that such references suffice to demonstrate that the USDOC took into account the economic diversification of India for the purpose of Article 2.1(c).

7.138. 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"³¹⁵, 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).

7.3.2.4.7 USDOC's reliance on positive evidence

7.139. We recall that the USDOC determined that the provision of iron ore by the NMDC is specific because provision is "limited to industries that use iron ore, including the steel industry".³¹⁶ India claims that there was no evidentiary basis for the USDOC's finding that NMDC only made iron ore available to users of iron ore, or that only users of iron ore purchased from NMDC.

7.140. In response to India's argument, the United States refers to evidence on the USDOC's record regarding NMDC's customer base. This evidence is set forth in Exhibit USA-69, and concerns a list of 43 customers enumerated in a document posted on the NMDC's website.³¹⁷ The United States contends that most of these customers are iron and steel companies. India does not dispute this. Our own review of the evidence referred to by the United States indicates, on the basis of the relevant companies' names, that many of the companies enumerated in the above-mentioned list are indeed concerned with the iron and steel business. Accordingly, and particularly in light of India's failure to dispute the United States' categorization of the NMDC's customers, we find that there is no factual basis for India's Article 2.4 claim that the USDOC's determination of *de facto* specificity was not based on positive evidence.

7.3.3 USDOC's determination of the existence and quantum of benefit: Article 14

7.141. India's claims relate to the USDOC's determinations that, by providing iron ore for less than adequate remuneration, the NMDC conferred a benefit on its customers. India submits that, in assessing the existence and quantum of benefit in the 2006, 2007 and 2008 administrative reviews, the USDOC violated Articles 1.1(b) and 14(d) of the SCM Agreement because: the USDOC used price benchmarks to assess benefit to the recipient, without first considering the adequacy of the remuneration for NMDC; the USDOC failed to apply certain Tier I benchmarks; the USDOC used benchmark prices adjusted for delivery charges; and the USDOC excluded NMDC export prices from the world benchmark price. The United States asks the Panel to reject India's claims.

7.3.3.1 Relevant WTO provision

7.142. Article 14(d) of the SCM Agreement is set forth above.³¹⁸ Article 1.1(b) of the SCM Agreement provides that a subsidy may only be deemed to exist if "a benefit is ... conferred" by the relevant financial contribution.

7.143. Our evaluation of India's claims also requires us to consider Article 12.4 of the SCM, which provides:

³¹⁴ 2004 Preliminary Results, Exhibit IND-17, internal pages 1513-14.

³¹⁵ Ibid. internal pages 1516, unchanged in 2004 Review Final Results; and Exhibit IND-19, internal page 28667.

³¹⁶ 2004 Preliminary Results, Exhibit IND-17, internal page 1516.

³¹⁷ 2004 New Subsidy Allegations, Exhibit USA-69, p. 4, internal exhibit 7.

³¹⁸ See para. 7.12 above.

Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

7.3.3.2 USDOC's use of benchmark price comparisons to assess benefit to the recipient, without first considering the adequacy of the remuneration for NMDC

7.3.3.2.1 Main arguments of the parties

7.144. India submits that, because of the hierarchical preference for using Tier I and II benchmark comparisons set forth in Section 351.511(a)(2)(i)-(iii), the USDOC acted inconsistently with Article 14(d) by failing to determine whether the price charged by NMDC was adequate for NMDC itself, prior to applying the Tier I and II benchmarks to determine benefit to the recipient. India submits that USDOC ignored record evidence indicating that NMDC's prices were based on commercial considerations, such that the revenue received by NMDC was adequate.

7.145. The United States asks³¹⁹ the Panel to reject India's claim, for the same reasons that it asks the Panel to reject India's "as such" claim discussed above.

7.3.3.2.2 Evaluation

7.146. We recall that we have already rejected India's claim of inconsistency of Section 351.511(a)(2)(i)-(iii) "as such". India's present claim concerns Section 351.511(a)(2)(i)-(iii) "as applied". India's present claim is dependent on its "as such" claim.³²⁰ For the same reasons that we rejected India's "as such" claim, we also reject India's claim against Section 351.511(a)(2)(i)-(iii) "as applied".

7.3.3.3 USDOC's treatment of Tier I benchmarks

7.147. India claims that the USDOC acted inconsistently with Article 14(d) by failing to apply certain Tier I, i.e. in-country, benchmarks to assess sales by the NMDC of high grade iron ore lumps and fines, despite a preference for in-country benchmarks being set forth in Article 14(d). There are two elements to India's claim. First, India claims that the USDOC failed, in the 2006, 2007 and 2008 administrative reviews, to consider the use of domestic price information submitted by Tata and GOI during the 2006 administrative review. Second, India challenges the USDOC's refusal to apply the in-country benchmark it determined for ISPAT to other Indian steel producers.

7.3.3.3.1 USDOC's alleged failure to consider domestic price information submitted by Tata and GOI

7.3.3.3.1.1 Main arguments of the parties

7.148. India's claim concerns (i) price charts submitted by GOI and Tata, that were compiled by the Mine Owners/Goa Mineral Ore Exporters Association, and (ii) a letter submitted by Tata in which a private iron ore supplier quotes existing and revised prices for sales of high grade iron ore to Tata.³²¹

³¹⁹ United States' first written submission, para. 438.

³²⁰ India's first written submission, para. 283.

³²¹ Ibid. para. 287. The price charts submitted by GOI and Tata are set forth in Administrative review for the period 01/01/2006 to 31/12/2006, Government of India's questionnaire response to supplemental questionnaire, 8 February 2008 ("2008 Supplemental Questionnaire Response from the GOI for 2006 AR"), Exhibit IND-61; Tata's responses for questionnaires issued on 11 January 2008 and 18 January 2008 ("2008 Questionnaire Responses from Tata"), Exhibit IND-67; and Certification of service of verification exhibits and

7.149. India claims that the USDOC improperly failed to use the above-mentioned price charts and price quote as Tier I benchmarks, and opted to use Tier II (out-of-country) benchmarks instead. India submits that the USDOC simply failed to consider the use of the relevant domestic price information as potential Tier I benchmarks, and failed to provide the reasons for doing so.³²² India contends that the United States' attempts to justify USDOC's rejection of this data during the Panel proceedings constitute *ex post* rationalizations that should be rejected *in limine*.

7.150. The United States rejects India's assertion that the USDOC should have used the price data submitted by GOI and Tata as Tier I benchmarks. With respect to the price charts, the United States contends that, because the parties involved in the transactions are generally not identified in the charts, there was no way to determine if the prices were in fact private or governmental. The United States asserts that, of the three parties that are identified in the charts, two are state-owned companies (MML and Orissa). The United States also contends that there was no record evidence or explanation provided in or accompanying the charts to demonstrate that the prices represented actual private market transactions, as required by US law. Further, the United States contends that the specific percentage of iron ore content is not identified in the data. The United States asserts that this is an important factor in assessing the value of iron ore.

7.151. With respect to the price quote provided by Tata, the United States submits that this could not be used as a Tier I benchmark because it is a proprietary document containing confidential information. The United States asserts that the price quote provided by Tata was "easily susceptible to disclosure"³²³, since the data were so limited in scope that if USDOC used it as a benchmark, the proprietary numbers provided in the quote could be reverse calculated by the companies to which that benchmark was subsequently applied.

7.152. The United States denies that it is relying on *ex post* rationalizations to defend the USDOC's rejection of relevant domestic price information. The United States contends that the USDOC was not required to make any determination regarding the potential use of the price data as Tier I benchmarks as "none of the parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks".³²⁴ The United States further contends that the arguments now characterized by India as *ex post* rationalizations were merely made by the United States in response to arguments raised by India in its first written submission.

7.3.3.3.1.2 Evaluation

7.153. Before addressing the parties' substantive arguments, we first address India's argument that the rationalization provided by the United States for the USDOC not using the price information proffered should be rejected by the Panel because it was provided *ex post*.

Whether the United States' arguments constitute *ex post* rationalization

7.154. It is well established that a Member may not offer during dispute settlement proceedings a new rationale for its investigating authority's determinations. For example, the Appellate Body noted in *US – Tyres (China)* that it "has previously clarified that a panel's examination of the conclusions of an investigating authority 'must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report.' The Appellate Body has also clarified that during panel proceedings a Member is precluded from providing an *ex post* rationale to justify the investigating authority's determination".³²⁵ An investigating authority's determinations must be evaluated in light of the rationale provided contemporaneously by that investigating authority. We note, in this regard, that there is no reference to the domestic price data at issue in the USDOC's preliminary or final determinations, or in any other contemporaneous USDOC document, even though (as acknowledged by the

minor corrections, 17 March 2008 ("Tata Verification Exhibits"), Exhibit IND-70, p. 24. The price quote submitted by Tata is set forth in Tata Verification, Exhibit IND-70, p. 23.

³²² India's first written submission, paras. 288 and 289.

³²³ United States' first written submission, para. 445.

³²⁴ United States' second written submission, para. 53.

³²⁵ Appellate Body Report, *US – Tyres (China)*, para. 329. (footnotes omitted)

United States³²⁶) domestic prices "are the primary benchmark"³²⁷ for assessing the adequacy of remuneration. Nor is there any explanation by the USDOC of why it applied Tier II instead of Tier I benchmarks. Indeed, there is nothing contemporaneous with the determinations to suggest that the USDOC actually rejected the domestic price data for the reasons presented by the United States during these proceedings.

7.155. The United States contends that the USDOC was not required to make any determination regarding the potential use of the price data as Tier I benchmarks as "none of the parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks".³²⁸ In considering this argument, we note that the United States acknowledges that domestic price information was requested by the USDOC for benchmarking purposes.³²⁹ Given the context in which the information was requested, and supplied by interested Indian parties, we consider that those parties submitting that information could reasonably have expected that it would be used, or at least considered, for the purpose of establishing Tier I benchmarks. In this context, the United States' argument that interested parties did not expressly assert that the relevant information should be used for benchmarking purposes is unpersuasive.

7.156. For these reasons, we find that the United States' explanation of the USDOC's rejection of certain domestic price information for Tier I benchmarking purposes constitutes *ex post* rationalization, which we are bound not to consider when evaluating India's claim.

Whether India has established a *prima facie* case in support of its claim

7.157. Our finding that the United States has advanced *ex post* rationalizations in support of USDOC's actions does not, however, resolve the matter before us. In order for India's claim to prevail, India must first establish a *prima facie* case in support of that claim, before we turn to substantive consideration of the United States' defence of USDOC's actions.

7.158. We recall that private domestic prices are the "primary benchmark" for assessing benefit under Article 14(d) of the SCM Agreement.³³⁰ According to India, the domestic price information submitted by GOI and Tata "contained the market prices of iron ore in India".³³¹ Our review of the information in question shows that it does relate to domestic prices in India. In our view, therefore, it should have been considered for potential use as price benchmarks by the United States. Accordingly, we find that India has established a *prima facie* case in support of its claim. Since India's *prima facie* case is not rebutted by any contemporaneous rationale or justification in the USDOC's determinations, we uphold India's claim that the USDOC's failure to consider the relevant domestic price information for use as Tier I benchmarks is inconsistent with Article 14(d), and therefore Article 1.1(b), of the SCM Agreement.

7.159. Notwithstanding the above finding, we believe that the United States' implementation of a DSB recommendation to bring its measures into conformity in this regard may be facilitated if we consider the rationale provided by the United States to justify the USDOC's rejection of the domestic sales information as Tier I benchmarks. Such consideration may also be relevant in the event that the Appellate Body reverses our finding that the United States has advanced *ex post* rationalization, and wishes to complete the analysis of India's claim. For these reasons, we will go on to address the United States' arguments in this regard.

³²⁶ United States' first written submission, para. 40.

³²⁷ Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

³²⁸ United States' second written submission, para. 53. We note that the United States does not invoke this argument in respect of the price quote submitted by Tata.

³²⁹ United States' response to Panel question No. 80(b).

³³⁰ Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

³³¹ India's first written submission, para. 287.

Consideration of the rationale provided by the United States

7.160. We begin with the United States' assertion that the USDOC was entitled to reject price information concerning sales identified as having been made by government-owned entities.³³² We recall that we have already found that Article 14(d) does not require an investigating authority to rely on a government's domestic prices when determining market benchmarks.³³³ Accordingly, and for the same reasons, we consider that the USDOC would have been entitled to reject government price information when determining its price benchmarks.

7.161. Regarding the United States' argument that the USDOC had no means of knowing whether or not the relevant price information concerned government or private suppliers, we agree with the United States that an investigating authority is not required to determine price benchmarks on the basis of price information pertaining to unidentified entities.

7.162. We also agree with the United States that an investigating authority is not required to determine price benchmarks on the basis of information that is not shown to pertain to actual transactions. We consider that Article 14(d) allows sufficient discretion³³⁴ to allow Members to require actual transaction data for purposes of determining a benchmark if they choose. That being said, we note India's contention that the USDOC's alleged insistence on actual transaction price data for Tier I benchmarks is inconsistent with the USDOC's use of price "negotiation" information as Tier II benchmarks.³³⁵ Upon reviewing the price information used by the USDOC as Tier II benchmarks³³⁶, we note that it is taken from charts entitled "Iron Ore Prices in the Japanese Market".³³⁷ The United States has explained that the data in the charts concerns actual pricing. While this may indeed be the case, we are not persuaded that the price charts submitted by the GOI and Tata should be treated any differently, particularly since they are similarly entitled "Prices of Iron Ore".³³⁸ In the absence of any compelling explanation to the contrary, we see no reason why information labelled "Prices of Iron Ore" should not be treated as actual transaction prices, in the absence of any factual basis for concluding that the information is not, in fact actual transaction price data.

7.163. Regarding the price quote submitted by Tata, we consider that the USDOC was entitled to reject that quote on the basis that it did not specify the exact percentage of iron ore content, but rather only indicated whether it was low grade or high grade. Although the designation of low or high grade would have indicated whether the iron content was above or below 64%, the precise percentage of iron content is important in determining prices, because iron ore is priced per unit of iron content, and the USDOC made adjustments to reflect this.³³⁹ It would not have been appropriate for the USDOC to determine price benchmarks based on information that did not reflect the precise iron content of the iron ore involved.

7.164. India contends³⁴⁰ that the USDOC should have sought additional clarification from the GOI and/or Tata before rejecting the domestic price information submitted by them. The United States submits that the USDOC was not required to seek additional clarification, since it had not made a facts available determination. According to the United States, the USDOC was not required to seek

³³² The relevant entities are MML and Orissa. The USDOC determined that both of these entities constitute public bodies. India has not challenged these determinations under Article 1.1(a)(1) of the SCM Agreement.

³³³ See paras. 7.38 *et seq.* above.

³³⁴ We observe the finding by the Appellate Body in *US – Softwood Lumber IV* (para. 92) that Article 14 does not determine "the precise detailed method of calculation" of benefit. India also accepts that investigating authorities enjoy discretion under Article 14 (India's second written submission, para. 11).

³³⁵ India's second written submission, para. 193.

³³⁶ Tex Reports of 2006 and 2007 iron ore prices from foreign suppliers paid by purchasers in Japan (respectively Response of Essar Steel Ltd. to supplemental questionnaire, 14 November 2007 ("2007 Supplemental Questionnaire Response from Essar for the 2006 AR"), Exhibit USA 118; and Response of Essar Steel Ltd. to supplemental questionnaire, 21 November 2008 ("2008 Supplemental Questionnaire Response from Essar for the 2007 AR"), Exhibit USA-119).

³³⁷ 2007 Supplemental Questionnaire Response from Essar for the 2006 AR, Exhibit USA-118; and 2008 Supplemental Questionnaire Response from Essar for the 2007 AR, Exhibit USA-119.

³³⁸ See, for example, 2008 Supplemental Questionnaire Response from the GOI for 2006 AR, Exhibit IND-61.

³³⁹ 2006 Preliminary Results, Exhibit IND-32, internal page 1587.

³⁴⁰ India's second written submission, para. 196.

further clarification relating to any deficiencies in order to employ other benchmark data found to be more suitable.³⁴¹ The United States notes that, in any event, the USDOC had informed GOI and Tata that their information was deficient, and yet neither interested party chose to remedy that deficiency.³⁴² India has also clarified that it "is not arguing that the United States must continuously seek the same information again and again".³⁴³ Bearing in mind the USDOC did not apply Tier II benchmarks on the basis of facts available, and considering that India does not deny that the USDOC had already sought additional clarification from GOI and Tata, we are not persuaded by India's argument that the USDOC should have sought further clarification before rejecting the domestic price information submitted by them.

7.165. With respect to the price quote provided by Tata, the United States also submits that this information could not be used as a Tier I benchmark because it is a proprietary document containing confidential information that was easily susceptible to disclosure. In response to this argument, India contests the confidentiality of the relevant document.³⁴⁴ However, India does not deny that Tata requested confidential treatment for that document.³⁴⁵ While India might consider that the USDOC's treatment of the price quote as confidential is misplaced, this is not a matter that we are required to address in this dispute. Since India does not contest that the information was submitted and treated as confidential but is easily susceptible to disclosure (through reverse calculation), we see no basis to consider that the USDOC should have used the price quote as a Tier I benchmark to assess NMDC's sales to other purchasers.

7.3.3.3.2 USDOC's non-application of the ISPAT Tier I price benchmark to other producers

7.3.3.3.2.1 Main arguments of the parties

7.166. India claims that, during the 2006 administrative review, the USDOC improperly declined to use the in-country benchmark that it had established for ISPAT when considering whether NMDC had provided Essar and JSW with iron ore for less than adequate remuneration. India contends that the USDOC improperly relied on the fact that the ISPAT benchmark was based on confidential information regarding the price at which that steel producer had purchased iron ore from another supplier. India claims that the USDOC's improper reliance on the confidentiality of the information was inconsistent with Article 14(d) of the SCM Agreement, because of that provision's preference for the use of domestic price benchmarks.

7.167. India acknowledges that, by virtue of Article 12.4 of the SCM Agreement, confidential information submitted to an investigating authority "shall not be disclosed without specific permission of the party submitting it." Nevertheless, India denies that Article 12.4 justified the non-use of the ISPAT benchmark in respect of Essar and JSW.³⁴⁶ India submits that, whereas Article 12.4 prohibits the disclosure of confidential information, that provision does not prohibit the use of such information by the investigating authority (in respect of other interested parties). In response to a question from the Panel, India contends that the USDOC could have used the information without disclosing "the nature and source of such information".³⁴⁷

7.168. The United States submits that the USDOC properly declined to use certain ISPAT price benchmark for Essar and JSW, because to do so would have resulted in the unauthorized disclosure of confidential information to those entities. The United States refers in this regard to the ability of those two entities to reverse calculate the underlying confidential information on the basis of their rate of subsidization. The United States submits that the fact that the USDOC could not ensure the data would not be used by other parties once disclosed reinforces that the USDOC could not disclose the data under Article 12.4.

³⁴¹ United States' response to Panel question No. 81, para. 13.

³⁴² Ibid. para. 11.

³⁴³ India's comments on the United States' response to Panel question No. 81.

³⁴⁴ See, for example, India's opening statement at the second meeting of the Panel, paras. 32 and 33.

³⁴⁵ India's response to Panel question No. 88.

³⁴⁶ India's first written submission, para. 292.

³⁴⁷ India's response to Panel question No. 27.

7.3.3.3.2 Evaluation

7.169. We note that Article 12.4 of the SCM Agreement obliges an investigating authority not to "disclose" confidential information provided to it. India's claim hinges on the issue of whether or not the USDOC could have *used* the confidential domestic price information submitted by ISPAT (and used by the USDOC to determine a Tier I benchmark price for ISPAT) as a Tier I benchmark to assess sales of iron ore by NMDC to Essar and JSW, without *disclosing* that confidential information to those entities.

7.170. The confidential information in question concerns the price at which another domestic mine sold iron ore to ISPAT. India has not contested the confidentiality of this information. The United States has demonstrated to our satisfaction³⁴⁸ that, if the USDOC had used that confidential information as a Tier I benchmark for Essar or JSW, those entities would have been able to reverse calculate – using the rate of subsidization determined by USDOC, and the price at which they purchased iron ore from NMDC – the price at which ISPAT had purchased iron ore from the other domestic supplier. In other words, the USDOC's use of the relevant confidential information to determine price benchmarks for Essar and JSW would necessarily have disclosed that information to those entities, contrary to the requirements of Article 12.4. While India contends that the USDOC could have used the relevant information without disclosing the "nature and source" thereof³⁴⁹, India has failed to provide any details as to how this might have been achieved by the USDOC.

7.171. We decline to interpret Article 14(d) in a manner that would require an investigating authority to breach the confidentiality obligation provided for in Article 12.4 of the SCM Agreement. Accordingly, we reject India's claim that the USDOC violated Articles 1.1(b) and 14(d) by failing to apply the ISPAT Tier I benchmark price to assess sales of iron ore by NMDC to Essar and JSW in the 2006 administrative review.

7.3.3.4 Claims against the USDOC's use of "as delivered" price benchmarks

7.172. In the 2006, 2007 and 2008 administrative reviews, the USDOC compared the NMDC price for certain types of iron ore with the price charged by an Australian producer of iron, adjusted for import duties and ocean freight from Australia to India. The USDOC compared the NMDC price for other types of iron ore with the delivered price paid by an Indian producer for iron ore from Brazil (including ocean freight and import duties). India claims that the USDOC's use of such "as delivered" benchmark prices is inconsistent with Article 14(d) of the SCM Agreement.

7.3.3.4.1 Main arguments of the parties

7.173. India submits that the benchmarks should have been assessed at the ex-mine level, to reflect the prevailing market conditions in India which, according to India, included the ex-mine sales made by NMDC. India notes that, in requiring that the adequacy of remuneration be assessed in relation to the prevailing market conditions, Article 14(d) includes "price" as one such condition. According to India, the prices in the Indian market include both private and government/NMDC prices. India submits that the USDOC's use of delivered prices precluded any adjustment of the price benchmarks to the ex-mine level, even though NMDC prices were set at that level.

7.174. India submits that the USDOC failed to determine, in applying these benchmarks, whether the prevailing market conditions in Australia and Brazil reflected the market conditions prevailing in India. India submits that the USDOC merely presumed that this was so, without undertaking any comparison between the market conditions prevailing in Australia and Brazil, and those prevailing in India.³⁵⁰

7.175. India also submits that the inclusion of all delivery charges in the relevant benchmarks nullifies the comparative advantage that India has in being able to locally source iron ore for Indian steel producers. India argues that it is a comparative advantage for a country that users of

³⁴⁸ United States' response to Panel question No. 87.

³⁴⁹ India's response to Panel question No. 27.

³⁵⁰ India's first written submission, para. 302.

the natural resources can procure it locally without having to suffer the costs and risks associated with their import from a different country.³⁵¹ India contends that the benchmarks used by the United States, which are under challenge, relate to iron ore sourced from outside India that were inflated to include delivery charges in all cases (including ocean freight). According to India, these benchmarks effectively represent the cost incurred by an Indian steel maker, in the event it is forced to procure iron ore by way of import. India argues that this method is built on the artificial premise that iron ore is otherwise not available in India forcing Indian steel makers to import iron and bear the costs and risks associated with international trade. India, therefore, argues that adopting benchmark prices that include all delivery charges on imported iron ore nullifies the comparative advantage that India has in being able to locally source iron ore for Indian steel makers.³⁵²

7.176. The United States rejects India's argument that the USDOC improperly presumed that the Australian and Brazilian market conditions were identical to the prevailing Indian market conditions. The United States asserts, as an initial matter, that the Brazilian price relied on by the USDOC represents the price at which an Indian steel company, Essar, actually purchased iron ore from Brazil and had it delivered to its facility in India. The United States contends that the Brazilian delivered price, therefore, is not an out-of-country price, but is rather an in-country price between private parties.³⁵³ Concerning the USDOC's use of certain Australian prices, the United States submits that such prices do relate to the prevailing market conditions in India. The United States contends in this regard that iron ore is a highly traded commodity, and that Australian iron ore can be imported into India. The United States also recalls that the Article 14(d) guidelines require that the benchmark price be determined based upon "the prevailing market conditions ... in the country of provision." The United States submits that, unless the delivery charges are included in a world market benchmark, the world market benchmark does not satisfy the Article 14(d) guideline that the price be based on market conditions in the country of provision. According to the United States, the use of an ex-mine price in Australia would be a pure Australian price, and not the price of Australian iron in relation to the prevailing market conditions in the Indian market.

7.177. The United States also disagrees with India that the "prevailing market conditions" should be determined in light of NMDC sales at the ex-mine level. The United States denies that the phrase "prevailing market conditions" must be interpreted to refer to the specific terms of the government sales in question.³⁵⁴ The United States asserts that the term "prevailing market conditions" should not be read so narrowly, since Article 14(d) does not direct that the benchmark must be limited to the specific terms of the government price being compared for benchmark purposes. According to the United States, to limit the comparison to the specific terms of the government sale would be to force a Member to ignore the actual more general prevailing market conditions, such as the fact that the true cost of an input to a producer includes all of the delivery charges to get the input to the producer's facility for use.³⁵⁵ The United States notes in this regard that a producer cannot use an input which is not delivered to the factory. The United States also submits that the essence of the benefit analysis under Article 14 of the SCM Agreement is to determine whether the recipient is better off than it would have been absent the government action. The United States asserts that the only way to make that determination is to assess whether the recipient obtained something "on terms more favourable than those available in the market"³⁵⁶, to the exclusion of government prices. The United States suggests that comparing the government price with a benchmark price that includes government prices (be they domestic or export prices), would result in a circular comparison.³⁵⁷ The United States notes in this regard that the Appellate Body has stated that the "primary benchmark" for determining the benefit for goods sold at less than adequate remuneration is "prices of similar goods sold by private suppliers in the country of provision."³⁵⁸ The United States submits that, by specifically using the term "private"

³⁵¹ India's first written submission, para. 305.

³⁵² Ibid. paras. 306-308.

³⁵³ United States' first written submission, para. 455.

³⁵⁴ Ibid. paras. 462 and 463.

³⁵⁵ Ibid. para. 464.

³⁵⁶ Panel Report, *Canada – Aircraft*, para. 9.112.

³⁵⁷ United States' first written submission, para. 469.

³⁵⁸ Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

suppliers, which means the opposite of public³⁵⁹, the Appellate Body recognized that the preferred benchmark prices are private prices rather than government prices.³⁶⁰

7.178. The United States submits that India has not provided any evidence of the existence of comparative advantage.³⁶¹ The United States notes India's reference to India having "certain raw materials" and the ability to extract and use those materials.³⁶² The United States contends that India does not explain why this gives India a comparative advantage over, for instance, Australia, which also has the same materials and the ability to extract and use (including export) them. The United States asserts that, because the Dang Report demonstrates that Australia has more iron ore reserves and exports more iron ore than India³⁶³, any adjustment for comparative advantage would in fact not be in India's favour.³⁶⁴ Moreover, the United States notes that India misuses the macroeconomic concept of "comparative advantage" in its arguments. The United States asserts that India offers no source to support the proposition that "the risk and expense of international transactions" has anything to do with comparative advantage. Rather, according to the United States, "comparative advantage" - as opposed to "competitive advantage" - is the advantage one country has over another in the production of a particular good relative to other goods if, as compared with the other country, it produces that good less inefficiently than it produces other goods. It is the United States' contention that India appears to confuse these terms.³⁶⁵

7.3.3.4.2 Evaluation

7.179. India makes three distinct arguments in support of its Article 14(d) claim against the world price benchmarks used by the USDOC. First, India challenges the USDOC's use of benchmark prices set at the delivered level, despite the fact that prices were set by the NMDC at the ex-mine level. Second, India asserts that the USDOC failed to make the adjustments necessary to ensure that the Australian and Brazilian delivered price benchmarks reflected prevailing market conditions in India. Third, India contends that the world benchmark price applied by the USDOC countervailed India's comparative advantage.

7.3.3.4.2.1 Whether the USDOC's price benchmarks should have been set at the ex-mine level

7.180. India's argument is based on its claim against Section 351.511(a)(2)(iv) "as such". In both cases, India contends that the use of delivered prices means that price benchmarks do not relate to prevailing market conditions in India which, according to India, should be determined by reference to the fact that the NMDC provided iron ore at the ex-mine level. For the same reasons that we rejected India's "as such" claim, we also reject the present argument.

7.3.3.4.2.2 Whether the Australian and Brazilian prices used by the USDOC reflect prevailing market conditions in India

7.181. We begin by considering the USDOC's Brazilian price benchmark in isolation. We observe that this benchmark was based on an actual transaction in which an Indian steel producer purchased iron ore from a Brazilian mine on a delivered (and therefore imported) basis. Since the transaction was made by an Indian steel producer established in India, the transaction necessarily related to the prevailing market conditions in India. It was in light of those prevailing market conditions that the Indian steel producer engaged in the transaction, notwithstanding the cost of transporting the iron ore from the Brazilian mine to its facility in India. As a result, the Brazilian transaction, including delivery charges, reflects and relates to the prevailing market conditions in India, consistent with the second sentence of Article 14(d).

³⁵⁹ The New Shorter Oxford English Dictionary, 1993 ("Oxford Dictionary"), Exhibit USA-64, internal page 2359 (defines "private" as "[o]f a service, business, etc.: provided or owned by an individual rather than the State or public body").

³⁶⁰ Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

³⁶¹ United States' first written submission, para. 459.

³⁶² India's first written submission, para. 305.

³⁶³ DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal exhibit 31, internal pages 37-38, 39 and 41-43.

³⁶⁴ United States' first written submission, para. 459.

³⁶⁵ United States' second written submission, para. 44 and fn. 60.

7.182. Regarding the USDOC's use of Australian and Brazilian prices more generally, we note that, upon verification, NMDC officials explained that "international prices ... end up becoming the international benchmark prices for their own contract negotiations". Those officials also explained that "India must compete with Australia, Brazil and other countries so it must follow the Tex Report's prices to remain competitive". NMDC officials further stated that, "[i]n setting the price in the domestic market, ... NMDC reviews the negotiated international price when determining how much the purchaser would be willing to pay to import".³⁶⁶ Since NMDC sets its domestic prices in light of competition from Australia and Brazil, and therefore in light of how much an Indian steel producer "would be willing to pay to import" iron ore from mines in those countries, we are not persuaded by India's assertion that Australian and Brazilian prices, adjusted for delivery to steel producers in India, do not relate to the prevailing market conditions in India. Since such prices indicate what an Indian steel producer would be "willing to pay", they necessarily relate to the prevailing market conditions in India.

7.183. Given the existence of record evidence establishing the relationship between the delivered Australian and Brazilian iron ore prices used by the USDOC and prevailing market conditions in India, we reject India's argument that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to adjust those delivered prices to reflect the market conditions prevailing in India.

7.3.3.4.2.3 Whether the USDOC's actions nullified India's comparative advantage

7.184. India's argument regarding comparative advantage is based on the existence of iron ore in India. According to India, "the comparative advantage for [a country with natural resources] lies in the fact that users of the natural resources can procure it without having to suffer the costs and risks associated with their import from a different country".³⁶⁷

7.185. Expressed in these terms, we consider that India's comparative advantage argument is essentially resolved by our findings regarding the USDOC's use of Australian and Brazilian price benchmarks, discussed above. In light of record evidence that Indian steel producers actually imported iron ore from overseas, and that NMDC set its domestic prices in light of import competition, there is no factual basis for the argument that India's comparative advantage was such that users of iron ore had no need to engage in import transactions. Accordingly, we reject India's argument that the price benchmarks applied by the USDOC nullified India's comparative advantage.

7.3.3.5 The inconsistent treatment of NMDC export prices

7.3.3.5.1 Main arguments of the parties

7.186. India asserts that NMDC's export prices to Japan were excluded from the world benchmark price in the 2006, 2007 and 2008 administrative reviews, even though they had been included in the world benchmark price in the 2004 administrative review (and in the preliminary determination for the 2006 review). India claims that, to avoid inconsistency, the USDOC should also have taken NMDC's export prices into account when determining the Tier II benchmark prices for the 2006, 2007 and 2008 reviews. India contends that there was no risk that NMDC's export prices would be subsidized, since NMDC would have no desire to confer any benefit on Japanese steel-makers. India also claims that the USDOC was in any event required by the chapeau of Article 14 to explain why, in those reviews, it departed from the approach it had adopted in the 2004 review.

7.187. The United States disagrees with India's argument that the USDOC should have included certain NMDC export prices in its world benchmark price. The United States suggests that comparing the government price with a benchmark price that includes government prices (be they domestic or export prices), would result in a circular comparison.³⁶⁸ The United States notes in this regard that the Appellate Body has stated that the "primary benchmark" for determining the benefit for goods sold at less than adequate remuneration is "prices of similar goods sold by

³⁶⁶ 2004 GOI Verification Report, Exhibit USA-114, pp. 6 and 7.

³⁶⁷ India's first written submission, para. 305.

³⁶⁸ United States' first written submission, para. 469.

private suppliers in the county of provision."³⁶⁹ The United States submits that, by specifically using the term "private" suppliers, the Appellate Body recognized that the preferred benchmark prices are private prices rather than government prices.³⁷⁰

7.188. Regarding the use of the NMDC export price in calculating the world market price benchmark in the 2004 review and not in the 2006, 2007 and 2008 reviews, the United States contends that the exclusion of the export price from the world benchmark price in these subsequent reviews was merely correcting the mistaken inclusion of that price in the 2004 review.³⁷¹

7.3.3.5.2 Evaluation

7.189. We recall that we have already found that Article 14(d) does not require an investigating authority to rely on a government's domestic prices when determining market benchmarks.³⁷² This is because a government may set prices on the basis of public policy considerations rather than market principles. We consider that the same risk arises in respect of a government's export pricing. For example, a government might provide goods to export customers for less than adequate remuneration in order to promote domestic production and employment. For this reason, we reject India's claim that the USDOC should have used NMDC's export prices to determine Tier II benchmark prices in the 2006, 2007 and 2008 administrative reviews.

7.190. India also claims that the USDOC failed to comply with the obligation in the chapeau of Article 14 to "adequately explain[]" why it did not apply the same approach in the later reviews as it did in the 2004 review. India contends that the USDOC was required "in the event the method employed or the benchmark used was modified during the course of the proceedings, [to] provide a sufficient/good enough reason or justification as to how and why such modification was made".³⁷³

7.191. The chapeau of Article 14 requires that the application of the "method used by the investigating authority to calculate the benefit to the recipient ... to each particular case shall be transparent and adequately explained". The requirement in the chapeau of Article 14 that the application of a benefit methodology be "transparent" conveys the sense that such application should be set out in such a fashion that it can be easily understood or discerned. The obligation to "adequately explain[]" conveys the sense of making clear or intelligible, and giving details of how the methodology was applied.³⁷⁴ We agree with the United States that the adequacy of an investigating authority's explanation should be assessed on a case-by-case basis.³⁷⁵

7.192. We observe that, in its preliminary determination for the 2006 administrative review, the USDOC continued to apply the Tex Report benchmarks that it had applied in previous reviews.³⁷⁶ Thus, in its preliminary determination for the 2006 administrative review, the USDOC applied benchmarks based in part on NMDC's export prices (reported in the Tex Report), just as the USDOC had done in the 2004 administrative review. In its subsequent Issues and Decision Memorandum for the 2006 administrative review, though, the USDOC explained that it had revised the benchmark used in its preliminary determination by excluding the NMDC prices that had been reported in the Tex Report. The USDOC explained that it did so because the NMDC prices pertain to "the very government provider at issue".³⁷⁷ In our view, the USDOC's explanation of its change in approach in respect of the NMDC export prices is clear and intelligible, and is easily understood

³⁶⁹ Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

³⁷⁰ *Ibid.*

³⁷¹ United States' first written submission, para. 471.

³⁷² See paras. 7.38 *et seq.* above.

³⁷³ India's first written submission, para. 315.

³⁷⁴ According to the Fifth Edition of the Shorter Oxford English Dictionary, the verb "explain" in relevant context means to "make clear or intelligible (a meaning, difficulty, etc.); ... Give details of (a matter, *how*, etc.)" (emphasis original). The term "transparent", when used figuratively, means "easily seen through or understood; easily discerned; evident; obvious".

³⁷⁵ United States' response to Panel question No. 104, para. 60.

³⁷⁶ 2006 Preliminary Results, Exhibit IND-32, p. 10 of 22.

³⁷⁷ Issues and decision memorandum: final results of administrative review, 7 July 2008 ("2006 Issues and Decision Memorandum"), Exhibit IND-33, p. 33 of 98.

and discerned. Accordingly, we reject India's claim that the USDOC's explanation of this matter is inconsistent with the requirements of the chapeau of Article 14 of the SCM Agreement.

7.3.4 Conclusion

7.193. For the reasons set forth above, we reject India's claims that the USDOC's treatment of the NMDC as a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement. We uphold India's claim that the USDOC's determination of *de facto* specificity is inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC failed to take account of all the mandatory factors set forth in that provision. However, we reject India's claim that the USDOC violated the Article 2.4 requirement to base its determination of specificity on positive evidence.

7.194. We reject most elements of India's claim that the USDOC's determination of the existence and quantum of benefit is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement and the chapeau of Article 14. However, we uphold that claim in respect of the USDOC's treatment of domestic price information submitted by GOI and Tata, in respect of which the United States sought to rely on *ex post* rationalization.

7.4 The USDOC's findings regarding the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme: Articles 1.1, 2, 12.5 and 14 of the SCM Agreement

7.195. In its 2006 administrative review, the USDOC investigated new subsidy allegations regarding captive mining rights for iron ore and coal. The USDOC found that GOI provided financial contributions to steel producers by providing them with iron ore and coal through the grant of captive mining rights (i.e. rights that allowed steel producers to mine iron ore and coal for their own internal use). The USDOC found that such captive mining rights were provided under the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme.³⁷⁸ The USDOC found that the Captive Mining of Iron Ore Programme was *de facto* specific because "the provision of captive iron ore mining rights is limited to certain enterprises, such as steel producers".³⁷⁹ The USDOC found that the Captive Mining of Coal Programme was *de jure* specific because "preference is given in the allocation of coal blocks to steel producers whose annual production capacity exceeds one millions tons".³⁸⁰ The USDOC found that the captive mining programmes conferred a benefit on steel producers after (i) constructing a notional price for the extracted iron ore and coal and (ii) comparing that notional price to a Tier I/II benchmark price.

7.196. India makes a number of challenges against the USDOC's findings. India's claims concern: the existence of any Captive Mining of Iron Ore Programme (Article 12.5); the *de facto* specificity of any Captive Mining of Iron Ore Programme (Article 2.1(c)); the USDOC's determination that steel producers were provided with goods by GOI through the grant of mining rights (Article 1.1(a)(1)); the USDOC's finding that GOI granted Tata coal mining rights (Article 1.1(a)(1)); the USDOC's finding that the Captive Mining of Coal Programme is *de jure* specific (Articles 2.1(a) and (b)); and the USDOC's assessment of benefit using a notional price for the extracted iron ore and coal (Articles 1.1(b) and 14).

7.4.1 The existence of the Captive Mining of Iron Ore Programme (Article 12.5)

7.197. India claims that the USDOC violated Article 12.5 of the SCM Agreement by failing to satisfy itself as to the accuracy of information on the basis of which it determined the existence of the Captive Mining of Iron Ore Programme.³⁸¹ India submits that such programme does not exist.

³⁷⁸ We note that the USDOC refers variously to a "Captive Mining Rights program" (2006 Preliminary Results, Exhibit IND-32, p. 14 of 22), a "captive mining rights of iron ore program" (2006 Issues and Decision Memorandum, Exhibit IND-33, p. 19 of 98), and a "Captive Mining of Iron Ore" programme (Final results of countervailing duty administrative review, 14 July 2008, 73 Fed. Reg. 40295 ("2006 Review Final Results"), Exhibit IND-34, p. 3 of 5). For coal, the USDOC refers to a "Captive Mining Rights program" (2006 Preliminary Results, Exhibit IND-32, p. 15 of 22). We shall refer to the relevant programmes as the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme.

³⁷⁹ 2006 Preliminary Results, Exhibit IND-32, internal page 1591.

³⁸⁰ Ibid.

³⁸¹ India's first written submission, paras. 353-357.

7.198. The United States asks the Panel to reject India's claims. The United States asserts that the USDOC satisfied itself as to the accuracy of information, consistent with Article 12.5, by finding that the information on which it relied was from official reports commissioned by the GOI, to which members of the Indian steel industry contributed, and newspaper articles by independent press sources.

7.4.1.1 Relevant WTO provision

7.199. Article 12.5 provides in relevant part:

the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

7.4.1.2 Main arguments of the parties

7.200. India contends that, rather than satisfying itself of the accuracy of the information supplied by interested parties (as required by Article 12.5), the USDOC simply relied on bare assertions by the petitioner³⁸² that the GOI operated a Captive Mining of Iron Ore Programme. India asserts that, in doing so, the USDOC overlooked information on the record, including supporting documents relied upon by the US domestic industry, clearly showing that the GOI scheme granted mining rights *simpliciter*, and that there was no specific GOI programme allocating captive mining rights.

7.201. India submits that the USDOC's determination regarding the alleged Captive Mining of Iron Ore Programme is factually incorrect since record evidence shows that India granted mining rights for iron ore on a first-come-first-served basis, without regard to whether the applicants were engaged in captive mining (i.e. whether they were integrated steel producers or stand-alone miners). India contends that "the GOI scheme granted mining rights *simpliciter* and there was no specific GOI program allotting captive mining rights".³⁸³ According to India, the GOI "only grants 'mining leases' for iron ore. Whereas some of the licensees may be using it for captive consumption, others may only be engaged in selling the extracted iron ore".³⁸⁴ Furthermore, India contends that "all the lessees ... are granted concessions on the same terms and conditions".³⁸⁵ India also refers to statements made by Tata to the USDOC indicating "that GOI does not favour steel producers over independent miners of iron ore either in terms of allocation of rights or payment of royalty".³⁸⁶ India further refers to expert evidence submitted to the USDOC indicating that "there is no provision in the Indian mining law that allows captive mines to pay a reduced or special rate".³⁸⁷

7.202. The United States submits that the USDOC properly determined that the GOI provided captive mining rights for iron ore based on information on the record. The United States contends that India's focus on its mining laws suggests that the USDOC determined that there is a *de jure* captive mining programme, whereas the USDOC actually determined that there is a *de facto* programme. The United States acknowledges that the alleged policy is not provided for in India's mining laws, but claims that the existence of such policy is nevertheless "widely known".³⁸⁸ According to the United States, India's arguments regarding Indian mining law are inconsistent with evidence on the USDOC's record indicating that GOI "has a captive iron ore mining policy under which it has granted captive mining rights to four steel companies".³⁸⁹ The United States refers in this regard to two reports commissioned by GOI, and a series of press clippings.

³⁸² India relies in this regard on Panel Report, *EC - Countervailing Measures on DRAM Chips*, para. 7.368 and fn. 268.

³⁸³ India's first written submission, para. 354.

³⁸⁴ India's response to Panel question No. 29.

³⁸⁵ India's second written submission, para. 226.

³⁸⁶ India's first written submission, para. 342.

³⁸⁷ *Ibid.* paras. 343 and 354.

³⁸⁸ United States' second written submission, para. 482.

³⁸⁹ United States' first written submission, para. 480.

7.203. The first report relied on by the United States is the "Dang Report". The United States observes that the Dang Report envisages that the "[p]olicy of captive mining leases should continue".³⁹⁰ The second report relied on by the United States is the "Hoda Report". The United States observes that the Hoda Report contains a section entitled "Allocation of Captive Mines to Steel Makers"³⁹¹ which, according to the United States, "contains a discussion of whether the captive mining policy should be expanded".³⁹² The United States also observes that the Hoda Report identifies one of the interested groups in the discussion as "steel mill owners with captive mines".³⁹³

7.204. Regarding press clippings, the United States notes that an article from the *Times of India* suggests that if the recommendations of the Hoda Report are followed, captive mining may be eliminated. The United States also observes that other press clippings refer to four Indian steel producers as having captive mines.

7.4.1.3 Evaluation

7.205. This claim concerns the USDOC's determination of the existence of the Captive Mining of Iron Ore Programme. The United States does not claim that the Captive Mining of Iron Ore Programme is contained in any Indian law or regulation, or otherwise set forth in writing. Rather, the United States submits that the existence of the Captive Mining of Iron Ore Programme was properly ascertained by the USDOC by reference to record evidence.

7.206. We do not exclude the possibility that Members might opt to provide specific subsidies pursuant to programmes or policies that are not expressed in writing. If the existence of such programme or policy is properly established (and assuming the other requirements of the SCM Agreement are met), an investigating authority may impose countervailing duties on imports benefiting from such programme or policy. We emphasise, though, that the existence of such a subsidy programme or policy must be properly established by the relevant investigating authority. In this regard, we observe that Article 12.5 of the SCM Agreement requires that an investigating authority must satisfy itself as to the accuracy of the information on which its findings – including those concerning the existence of countervailed subsidy programmes – are based.

7.207. We shall review all of the record evidence cited by the United States as supporting the USDOC's determination of the existence of the Captive Mining of Iron Ore Programme. We shall also consider the probative value of that evidence viewed in its totality. In this way, we shall evaluate whether the USDOC properly established the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information, as required by Article 12.5.

7.208. The first piece of record evidence cited by the United States is the Dang Report. The United States notes that the Dang Report refers to the GOI's "[p]olicy of captive mining leases". We observe that the Dang Report was prepared by an Expert Group commissioned by GOI to "formulat[e] guidelines for preferential grant of mining leases" for *inter alia* iron ore "by state governments".³⁹⁴ The GOI took this initiative because state governments had "shown inclination to accord preference to applicants who agree to put up mineral based downstream industry within the State boundaries", even though the MMDR Act "does not appear to provide any legitimacy for such stipulation".³⁹⁵ The Dang Report explains that "[a]gainst this background, Ministry of Steel constituted a Group of Experts to undertake an in-depth examination and frame a set of uniform National Guidelines for a System of Preference to be followed in grant of leases for iron ore, manganese and chrome ore".³⁹⁶

³⁹⁰ DANG Report attached to 2006 New Subsidy Allegations (JSW), p. 52, Exhibit USA-50.

³⁹¹ National Mineral Policy, Report of the High Level Committee (Hoda Report), attached to the New subsidy allegations (Tata), 23 May 2007 ("Hoda Report attached to 2006 New Subsidy Allegations (Tata)", Exhibit USA-71, internal page 143).

³⁹² United States' second written submission, para. 70.

³⁹³ Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 143.

³⁹⁴ DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal exhibit 31, p. 1.

³⁹⁵ Ibid. p. 4.

³⁹⁶ Ibid. p. 4.

7.209. The Dang Report confirms the existence of captive mining in the Indian industry. Thus, in describing the structure of the Indian iron ore industry, the Dang Report states that iron ore "[m]ining is undertaken both by steel companies, who operate captive mines, and exclusively mining companies".³⁹⁷ However, the mere fact that captive iron ore mining exists does not mean *ipso facto* that there is a Captive Mining of Iron Ore Programme, or any other policy to favour captive miners. It simply means that mining licences have been provided to steel producers, which then engage in mining and consume the minerals they extract. Of greater significance, in our view, is that despite referring to the factual existence of captive mining, the Dang Report does not refer to captive mining leases being provided pursuant to any Captive Mining of Iron Ore Programme. Nor, indeed, is there reference to any such programme or policy in the very section of the Dang Report that purports to describe the "policy and regulatory frame work for the grant and operation of leases".³⁹⁸

7.210. As part of its Conclusion, the Dang Report states that it is necessary "to encourage and involve larger integrated steel plants ... to safeguard their raw material security".³⁹⁹ Such encouragement in the future could benefit captive mining. However, there is nothing in the Dang Report to suggest that such encouragement of captive iron ore mining already existed at the time it was drafted.

7.211. In light of the above observations, we are not persuaded that the single reference in the Dang Report to the "[p]olicy of captive mining leases"⁴⁰⁰ provides support for determining the existence of a Captive Mining of Iron Ore Programme. We consider it highly relevant that, although the Dang Report describes the Indian iron ore industry, and the policies applicable to that industry, there is no reference to any programme or policy benefiting captive mining. Nor is there any suggestion that mining leases were provided to steel producers on terms any different than those provided to other miners. Indeed, it is entirely possible that the reference to a "[p]olicy of captive mining leases", on which the United States relies, was merely intended to refer back to the fact that mining leases are provided to steel companies, and to suggest that mining leases should continue to be provided to steel producers.

7.212. The next piece of evidence referred to by the United States is the Hoda Report. The United States refers in particular to a section of that Report entitled "Allocation of Captive Mines to Steel Makers"⁴⁰¹ which, according to the United States, "contains a discussion of whether the captive mining policy should be expanded".⁴⁰² We observe, though, that the United States does not identify any reference in the Hoda Report to any captive mining policy or programme. Although the Hoda Report again confirms the existence of captive mines, like the Dang Report, it does not identify any Captive Mining of Iron Ore Programme, or any GOI policy in favour of such mines. Moreover, the Hoda Report does not, in fact, refer to the possibility of "expanding" such policy, as alleged by the United States. While the Hoda Report does consider whether, as a matter of future policy, iron ore mining licences should be awarded "exclusively" to captive miners⁴⁰³, the Hoda Report does not indicate that the exclusive award of iron ore mining licences to captive miners would constitute an "extension" of any existing policy in their favour.

7.213. The United States points to the statement in the Hoda Report that "[s]tand alone mining and captive mining should continue to exist".⁴⁰⁴ The United States also emphasises that one of the groups interested in the Hoda process was "steel mill owners with captive mines".⁴⁰⁵ We recall, though, that the factual existence of captive mining does not demonstrate *ipso facto* that a Captive Mining of Iron Ore Programme, or any policy in favour of captive mining, also exist. It simply means that mining licences have been awarded to steel producers that consume the minerals they extract.

³⁹⁷ DANG Report attached to 2006 New Subsidy Allegations (JSW), Exhibit USA-50, internal exhibit 31, p. 50.

³⁹⁸ Ibid. p. 50.

³⁹⁹ Ibid. p. 58.

⁴⁰⁰ Ibid. p. 52.

⁴⁰¹ Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 143.

⁴⁰² United States' second written submission, para. 70.

⁴⁰³ Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 149.

⁴⁰⁴ Ibid. p. 159.

⁴⁰⁵ Ibid. p. 143.

7.214. Given the absence of any reference in the Hoda Report to any Captive Mining of Iron Ore Programme, or any policy in favour of captive mining, we do not consider that the Hoda Report provides support for determining the existence of a Captive Mining of Iron Ore Programme. Indeed, the Hoda Report actually states that "under the current dispensation ... all miners [are treated] alike".⁴⁰⁶ On its face, this statement would seem to exclude the possibility that any policy or programme in favour of captive mining of iron ore might exist. This apparent inconsistency was not addressed by the USDOC.

7.215. Regarding the *Times of India* article relied on by the United States, we note that this is merely a report on the contents of the Hoda Report.⁴⁰⁷ We therefore do not consider that the article provides any additional support for the alleged existence of the Captive Mining of Iron Ore Programme than the Hoda Report itself. The United States refers to other press articles identifying four Indian steel producers as having captive mines.⁴⁰⁸ Again, however, the fact that steel producers hold mining leases does not mean *ipso facto* that there is a distinct programme for captive mining.

7.216. We acknowledge that, in principle, the existence of a subsidy programme that is not expressed in writing might be established on the basis of evidence which, although not particularly instructive when viewed individually, becomes more insightful and probative when viewed as a whole. We do not consider that this is one of those cases. We see nothing in the evidence reviewed above to suggest that, even when viewed together, they provide a sufficient basis to establish the existence of a Captive Mining of Iron Ore Programme. Nor has the United States explained how the existence of the Captive Mining of Iron Ore Programme might be established on the basis of the ensemble of the evidence.

7.217. For the above reasons, we find that the USDOC did not have sufficient basis to properly determine the existence of the Captive Mining of Iron Ore Programme. We therefore uphold India's claim that the USDOC failed to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information, as required by Article 12.5.

7.4.2 Specificity of the Captive Mining of Iron Ore Programme (Article 2.1)

7.218. India claims that the USDOC's determination that the Captive Mining of Iron Ore Programme is *de facto* specific is inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement. The United States asks the Panel to reject India's claim. The United States submits that, because India has a Captive Mining of Iron Ore Programme which is limited to four steel companies, the programme is *de facto* specific within the meaning of Article 2.1(c) because the captive mining rights are provided to a limited group of enterprises.

7.219. In light of our finding that the evidence relied upon by the United States does not suffice to support USDOC's determination that a Captive Mining of Iron Ore Programme exists, which is therefore inconsistent with Article 12.5 of the SCM Agreement, there is little if any sense in our evaluating whether or not the USDOC properly found the purported programme to be *de facto* specific. We therefore exercise judicial economy in respect of India's Article 2.1 and 2.4 claims in respect of the Captive Mining of Iron Ore Programme.

7.4.3 The provision of goods through the grant of mining rights

7.220. The USDOC determined that the grant of mining licences under the Captive Mining of Iron Ore and Captive Mining of Coal Programmes constituted a financial contribution in the form of the provision of a good⁴⁰⁹ (i.e. iron ore and coal). India claims that the USDOC's determination that the grant of the mining rights for iron ore and coal amounts to the provision of goods is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.⁴¹⁰ The United States asks the Panel to reject India's claim.

⁴⁰⁶ Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 149.

⁴⁰⁷ 2006 New Subsidy Allegations (Tata), Exhibit USA-71, internal exhibit 11, internal page 1.

⁴⁰⁸ United States' first written submission, para. 482.

⁴⁰⁹ 2006 Preliminary Results, Exhibit IND-32, p. 14 of 22.

⁴¹⁰ India's first written submission, paras. 358-371.

7.221. In light of our finding that the evidence relied upon by the United States does not suffice to support USDOC's determination that a Captive Mining of Iron Ore Programme exists, we considered exercising judicial economy in respect of the part of India's claim regarding the provision of iron ore. However, since we must in any event address India's claim regarding the provision of coal, we evaluate India's claim in full.

7.4.3.1 Relevant WTO provision

7.222. Article 1.1(a)(1)(iii) of the SCM Agreement is set forth above.⁴¹¹

7.4.3.2 Main arguments of the parties

7.223. India acknowledges that the panel and Appellate Body in *US – Softwood Lumber IV* accepted that the grant of stumpage rights, i.e. the right to fell standing trees, constitutes the provision of a good within the meaning of Article 1.1(a)(1)(iii). However, India contends that not every governmental action that may ultimately result in goods being made available would amount to a financial contribution. India submits that merely making goods available does not amount to "provid[ing]" goods within the meaning of Article 1.1(a)(1)(iii). India refers⁴¹² to findings by the Appellate Body in *US – Softwood Lumber IV* to argue that, for the government to be providing a good, not only must the government have control over the availability of that specific good, but there must also be a "reasonably proximate relationship" between what has been "provided" by government on the one hand and the 'good' in question on the other.⁴¹³ According to India, it is the governmental action itself that should directly result in the provision of the goods, and not the intervening acts of non-governmental bodies.⁴¹⁴

7.224. India submits that, unlike the grant of a right to fell trees, there is no "reasonably proximate relationship" between the grant of mining rights and the availability of the extracted iron ore or coal.⁴¹⁵ India asserts that in the case of the stumpage programmes covered in the *US – Softwood Lumber IV* case, the undisputed factual findings were that at the time of granting the right to harvest standing timber, the amount of standing timber actually available was already known, and the right to harvest granted through the stumpage contract also transferred ownership over the timber. According to India, therefore, there was an absolute and direct link between the rights granted by the government and the 'good' in question. India submits that a "reasonably proximate relationship" arose in that case because there was no intervening act between the right to harvest "standing timber" (governmental action) and the extracted "standing timber" (the good in question). India contends that this is not the case in respect of the grant of mining rights.

7.225. India notes that the panel in *US – Softwood Lumber IV* recognized the difficulty of building a "reasonably proximate relationship" between the grant of mining rights and the provision of the extracted minerals in the following footnote to its Report. India refers in particular to the panel's statement that "there is a clear difference between tenure agreements concerning standing timber and the granting of extraction rights in the case of minerals or oil, or fishing rights where the owner of the right is not at all certain what and how much of it he will find, and what he pays for is the right to explore a particular site and the chance of finding something."⁴¹⁶

7.226. According to India, the licence to mine does not lead to a guaranteed transfer of marketable minerals. India submits that the uncertainty inherent in mining activities (regarding what and how much will be found), as well as the need for significant intervention (between the grant of the mining licence and the extraction of minerals) through private conduct, make the link between the grant of mining rights by the government and the actual iron ore or coal extracted too remote to fulfil the "reasonably proximate relationship"⁴¹⁷ standard applied by the Appellate Body.

⁴¹¹ See para. 7.66 above.

⁴¹² India's first written submission, para. 362.

⁴¹³ India refers in this regard to Appellate Body Report, *Softwood Lumber IV*, para. 71.

⁴¹⁴ India's first written submission, para. 365.

⁴¹⁵ Ibid. para. 366.

⁴¹⁶ Panel Report, *Softwood Lumber IV*, para. 7.18 and fn. 99.

⁴¹⁷ India's first written submission, para. 369.

7.227. The United States submits that the USDOC properly determined that the provision of the right to mine iron ore constitutes the provision of goods as set out in Article 1.1(a)(1)(iii) of the SCM Agreement, and therefore is a financial contribution under Article 1.1(a)(1) of the SCM Agreement.

7.228. Regarding India's argument that the GOI did not "provide" iron ore and coal to steel producers, because there is no "reasonably proximate relationship" between the provision of mining rights and the provision of the minerals themselves⁴¹⁸, the United States contends that India's suggested interpretation is not supported by the text of the SCM Agreement. According to the United States, the ordinary meaning of "provides" is to "make available," in addition to "supply or furnish for use" and "to put at the disposal of."⁴¹⁹ The United States suggests that India does not appear to contest this interpretation⁴²⁰, even though a mining lease makes available, supplies and furnishes for use, and puts at the disposal of the owner, the good that is covered by the lease.

7.229. The United States understands India to rather argue that the ordinary meaning of "provides" is somehow limited or circumscribed, in the sense that "there must ... be a 'reasonably proximate relationship' between what has been provided by government on the one hand and the 'good' in question on the other."⁴²¹ The United States understands that the basis for India's "reasonably proximate relationship" test appears to be a phrase from the Appellate Body report in *US – Softwood Lumber IV*. According to the United States, India quotes a passage from that report in which the Appellate Body considered an argument by Canada that the provision of rights to a good by a government cannot be considered the provision of a good because, in that case, the term "would capture every property law in a jurisdiction."⁴²² The United States notes that, in rejecting that contention, the Appellate Body stated that it could not see "how ... general governmental acts" of the type referred to by Canada would fall within the Appellate Body's interpretation of "provides a good," since such acts would be "too remote" from the act of provision.⁴²³ Rather, the "government must have some control over the availability of a specific thing being 'made available.'"⁴²⁴ The United States suggests that, viewed in its entire context, the Appellate Body's reference to "reasonably proximate relationship" is intended to distinguish "general acts" of government from those where the government controls the good in question and then makes those goods available to a recipient. The United States submits that the GOI act in question – the provision of mining rights for iron ore and coal – is not "general" (like a property law), but rather is a specific provision of rights to goods over which the government has control.

7.230. The United States notes India's suggestion that while the provision of rights to some goods, such as the right to harvest a stand of timber, may constitute the provision of a good under Article 1.1(a)(1)(iii), the right to *in situ* mineral deposits does not constitute the provision of goods because the provision of the minerals is "too remote" from the government action of providing a good. The United States submits that Article 1.1(a)(1)(iii) provides for no distinction on the basis that it takes more effort to find and mine minerals than it does to harvest a stand of trees.⁴²⁵ The United States contends that India erroneously relies on a footnote from the panel report in *US - Softwood Lumber IV* in which the panel indicated that, in deciding that harvesting rights to timber constituted the provision of goods, it was not deciding whether the provision of rights to *in situ* minerals constituted the provision of goods.⁴²⁶ The United States asserts that the panel explicitly stated that it was not expressing a view as to whether extraction rights did or did not constitute the provision of goods within the meaning of Article 1.1(a)(1)(iii). Furthermore, the United States contends that the panel actually suggested that the distinction it might draw was not on the basis of the nature of the good to which rights were provided, but rather the nature of the right. Thus, the panel stated that if the right at issue in that dispute had consisted of "the right to explore a particular site and the chance of finding something," the panel might have viewed the provision of rights differently. The United States contends that the rights at issue in this case are

⁴¹⁸ India's first written submission, para. 366.

⁴¹⁹ Appellate Body Report, *US – Softwood Lumber IV*, para. 69.

⁴²⁰ See India's first written submission, paras. 360-361.

⁴²¹ India's first written submission, para. 362.

⁴²² Appellate Body Report, *US – Softwood Lumber IV*, para. 70.

⁴²³ *Ibid.* para. 71.

⁴²⁴ *Ibid.* para. 70.

⁴²⁵ India's first written submission, para. 371.

⁴²⁶ *Ibid.* para. 368 (citing Panel Report, *US – Softwood Lumber IV*, fn. 99).

not mere rights of exploration, but rather rights to mine iron ore and coal that is known to exist, and for which the recipients only pay if they actually extract the good.

7.4.3.3 Main arguments of the third parties

7.4.3.3.1 European Union

7.231. The European Union agrees with the United States that, taking into account the facts and circumstances of this case, the grant of mining rights for iron ore and coal does amount to the "provision" of a good within the meaning of Article 1 of the SCM Agreement. In the opinion of the European Union, India has not established any meaningful distinction between the facts of *US – Softwood Lumber IV* and the facts of this case.

7.4.3.3.2 Saudi Arabia

7.232. Saudi Arabia submits that a government's granting of extraction rights is not covered by the definition of a "financial contribution" in Article 1.1(a)(1) of the SCM Agreement. In particular, extraction rights are intangible assets that do not constitute "goods" under Article 1.1(a)(1)(iii). Panel and Appellate Body rulings support the distinction between goods and intangible extraction rights. The Appellate Body has stated that government acts do not constitute the provision of a good unless (i) the government has control over the availability of the good in question and (ii) there is a reasonably proximate relationship between the government action and the enjoyment of the tangible goods by the recipient. Saudi Arabia contends that neither of these requirements is met where the government grants intangible extraction rights. Saudi Arabia submits that the granting of a right to exploit a nation's *in situ* natural resources is a sovereign function that the Panel should distinguish from the government's actual provision of those resources.

7.4.3.4 Evaluation

7.233. Article 1.1(a)(1)(iii) of the SCM Agreement states that there is a financial contribution when a government or public body "provides" goods for less than adequate remuneration. India disputes the USDOC's determination that the GOI "provided" iron ore and coal through the grant of rights to mine those minerals.⁴²⁷ India's claim is based on the alleged lack of proximity between the provision of the right to mine and the extracted iron ore and coal.

7.234. The concept of goods being "provided" through the grant of rights to those goods was addressed by the Appellate Body in *US – Softwood Lumber IV*. The Appellate Body found in relevant part:

68. Having considered the meaning of the term "goods", we now turn to consider what it means to "provide" goods, for purposes of Article 1.1(a)(1)(iii) of the *SCM Agreement*. Canada argues that stumpage arrangements do not "provide" standing timber. According to Canada, all that is provided by these arrangements is an intangible right to harvest. At best, this intangible right "makes available" standing timber. But, in Canada's submission, the connotation "makes available" is not an appropriate reading of the term "provides" in Article 1.1(a)(1)(iii). In contrast, the United States argues that the Panel's interpretation that stumpage arrangements "provide" standing timber is correct. The United States contends that, where a government transfers ownership in goods by giving enterprises a right to take them, the government "provides" those goods, within the meaning of Article 1.1(a)(1)(iii).

69. Again, we begin with the ordinary meaning of the term. Before the Panel, the United States pointed to a definition of the term "provides", which suggested that the term means, *inter alia*, to "supply or furnish for use; make available". This definition is the same as that relied upon by USDOC in making its determination that "regardless of whether the Provinces are supplying timber or making it available through a right of

⁴²⁷ India does not dispute the USDOC's determination that iron ore and coal are "goods" within the meaning of Article 1.1(a)(1)(iii).

access, they are providing timber" within the meaning of the provision of United States countervailing duty law that corresponds to Article 1.1(a)(1)(iii) of the *SCM Agreement*. We note that another definition of "provides" is "to put at the disposal of".

70. Notwithstanding these definitions, Canada submits that the meaning of the term "provides" in Article 1.1(a)(1)(iii) of the *SCM Agreement* should be limited to the supplying or giving of goods or services. Canada raises two arguments to support this view. First, Canada suggests that the terms "provides goods" and "provides services" cannot be read to include the mere "making available" of goods or services, because "[t]o 'make available services' ... would include any circumstance in which a government action makes possible a later receipt of services and to 'make available goods' would capture every property law in a jurisdiction". Secondly, Canada points to the use of the term "provide" in Articles 3.2 and 8 of the *Agreement on Agriculture* and in Article XV:1 of the *General Agreement on Trade in Services* (the "GATS") to suggest that "provides", when used in the context of the granting of subsidies, requires the actual *giving* of a subsidy.

71. With respect to Canada's first argument, we do not see how the general governmental acts referred to by Canada would necessarily fall within the concept of a government "making available" services or goods. In our view, such actions would be too remote from the concept of "making available" or "putting at the disposal of", which requires there to be a reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other. Indeed, a government must have some control over the *availability* of a specific thing being "made available".⁴²⁸

7.235. We agree with these findings by the Appellate Body, and are guided by them. As explained below, we consider that, in certain circumstances, a government might properly be determined to have provided goods by making them available through the grant of extraction rights.

7.236. India submits that, because of the uncertainties involved in mining operations, and because of the amount of work required by the mining entity to extract the iron ore and coal once the lease has been granted, the grant of the mining lease by the GOI is too remote from the extracted minerals to be treated as the "provision" of a good within the meaning of Article 1.1(a)(1)(iii).

7.237. We are not persuaded by India's argument. As a preliminary matter, we observe that India's approach lacks legal certainty, for it would lead to different results, depending on the complexity of the process required to extract the relevant mineral, or the uncertainty regarding the amount of mineral to be extracted.

7.238. More fundamentally, India's approach is at odds with the meaning of the term "provides". We agree with the Appellate Body in *US – Softwood Lumber IV* that to "provide" means to "make available", or "put at the disposal of". Given the GOI's direct control over the availability of the relevant minerals, the GOI's grant of rights to mine those minerals essentially made those minerals available to, and placed them at the disposal of, the beneficiaries of those rights. The grant of a mining lease is more than a mere "general governmental act" that simply facilitates the mining operation. The grant of the right to mine allows the beneficiary to extract government-owned minerals from the ground, and then use those minerals for its own purposes, such as in the production of steel. In our view, this means that the GOI's grant of the right to mine is "reasonably proximate" to the use or enjoyment of the minerals by the mining entity for the grant of a mining right to be treated as the provision of a good within the meaning of Article 1.1(1)(a)(iii) of the *SCM Agreement*.⁴²⁹

⁴²⁸ Appellate Body Report, *US – Softwood Lumber IV*, paras. 68-71.

⁴²⁹ We note some inconsistency in India's position during these proceedings. In the context of its claim against the USDOC's determination that the SDF Managing Committee provided direct transfers of funds, India accepts that the term "provides" means to "make available", or "put at the disposal of" (India's first written

7.239. We acknowledge that the panel in *US – Softwood Lumber IV* seems to have expressed some doubts about treating the grant of certain rights as the provision of a good under Article 1.1(a)(1)(iii):

we note that there is a clear difference between tenure agreements concerning standing timber and the granting of extraction rights in the case of minerals or oil, or fishing rights where the owner of the right is not at all certain what and how much of it he will find, and what he pays for is the right to explore a particular site and the chance of finding something. In so noting, we do not mean to express a view as to what extent, if at all, this uncertainty would be relevant to a determination whether the granting of such extraction rights represented the provision of goods within the meaning of Article 1.1 (a) (1) (iii) SCM Agreement, an issue which is not before us.⁴³⁰

7.240. This statement does not affect our conclusion. First, we observe that the panel expressly refrained from making any findings on the matter at hand. Second, and more importantly, in our view, the panel's statement refers to a possibly relevant difference between rights to extract goods, and rights to explore and, if anything is found, extract the goods. The present case concerns the provision of mining rights, that is the right to extract minerals from known sites, rather than the right to explore or prospect, and, if anything is found, extract it.⁴³¹ By acquiring mining rights, steel companies have paid for more than "the right to explore a particular site and the chance of finding something".⁴³² This is further confirmed by the fact that, according to evidence on the USDOC's record, miners pay royalties under the relevant mining leases per unit of extracted mineral.⁴³³ In these circumstances, we consider that the obiter statement of the panel in *US – Softwood Lumber IV* is not in any event pertinent to our decision, and does not require us to change our views.

7.241. For the above reasons, we reject India's claim that the USDOC's determination that the GOI provided goods through the grant of mining rights for iron ore and coal is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.

7.4.4 Whether Tata was provided captive coal mining rights by the GOI under the Coal Mines Nationalization Act/Captive Mining of Coal Programme

7.242. The USDOC imposed countervailing duties on imports of steel produced by Tata. The USDOC determined that the GOI had provided Tata with a good, coal, through the grant of captive coal mining rights⁴³⁴ under the Coal Mines Nationalization Act, which USDOC also refers to as the Captive Mining of Coal Programme.⁴³⁵ India claims that Tata was not provided any coal mining rights by the GOI under the Coal Mines Nationalization Act (or indeed any other instrument), and thus the USDOC's determination is inconsistent with Article 1.1(a)(1)(iii).

submission, para. 441). Furthermore, India contends that the term "transfer" is narrower than the term "provides", and yet accepts that the term "transfer" still covers the situation where the rights or interest in an asset are transferred (India's first written submission, paras. 441 and 443).

⁴³⁰ Panel Report, *US – Softwood Lumber IV*, fn. 99.

⁴³¹ The USDOC's determinations concern the grant of mining licences, rather than reconnaissance permits or prospecting licences. The different types of rights associated with mining in India are identified in the Hoda Report attached to 2006 New Subsidy Allegations (Tata), Exhibit USA-71, p. 2.

⁴³² Although the panel subsequently referred to "extraction rights", the earlier reference to exploring a site with "the chance of finding something" suggests that the rights envisaged by that panel were markedly different from the rights at issue in the present case.

⁴³³ 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, pp. 12 and 16. India has not disputed the United States' assertion that this evidence is proof that miners pay a per unit extraction fee (United States' first written submission, para. 494).

⁴³⁴ 2006 Preliminary Results, Exhibit IND-32, p. 15 of 22.

⁴³⁵ The fact that the USDOC's determination concerned the Coal Mines Nationalization Act is demonstrated by the reference to that Act in the USDOC's preliminary determination. Furthermore, India stated in response to Panel question No. 96 that "[t]he program identified and countervailed by the United States in this case is the coal mining rights granted under the Coal Mining Nationalization Act". This was not disputed by the United States in its comments on India's response to Panel question No. 96. Instead, the United States' comments sought to establish that "Tata is a beneficiary under the [Coal Mining Nationalization] Act and therefore a recipient of the subsidy" (United States' comments on India's response to Panel question No. 96, para. 10). This confirms that the USDOC countervailed subsidies allegedly provided to Tata under the Coal Mines Nationalization Act.

7.4.4.1 Main arguments of the parties

7.243. India asserts that Tata was granted a coal mining licence in 1907 by the Raja of Ramgarh, i.e. prior to India attaining independence, and therefore independent of the GOI. India contends that the lease was renewed from time to time, and extended for a term of 999 years in 1946 (still prior to Indian independence and thus independent of the GOI). India submits that Tata continues to mine coal under the said lease, rather than any lease granted by GOI.⁴³⁶ India denies that Tata was granted any coal mining lease by the GOI under the Coal Mining Nationalization Act, or any amendment thereto. India contends that Tata's coal mines were expressly exempted from that Act.⁴³⁷ Furthermore, India submits that Tata did not, and was not required to, obtain any additional or new lease from the GOI once the MMDR Act entered into force.⁴³⁸ Furthermore, India denies that any lease granted to Tata required that producer to captively consume the extracted coal. According to India, the concept of captive mining rights was non-existent in any policy/law existing at the time that Tata's lease was granted or extended.⁴³⁹

7.244. The United States⁴⁴⁰ asserts that there is no evidence for India's assertion that the requirement in the Coal Mines Nationalization Act, as amended in 1976, that leases for coal mining be restricted to captive mining by public companies, steel companies and power companies does not apply to Tata Steel's lease. The United States maintains that India acknowledges that "in 1976 GOI introduced a condition that coal mining rights will be restricted to companies in the public sector, companies engaged in the production of steel and power, washing of coal and such other uses the GOI may prescribe."⁴⁴¹ The United States submits that India does not identify any specific language in the amended law that exempts Tata Steel's mining lease from restrictions in the law. The United States contends that India fails to recognize that while Tata Steel's "mining facilities" may have been exempt from the nationalization law, the coal that Tata Steel is mining was not. According to the United States, Tata Steel pays the GOI a royalty under the coal mining laws to extract the coal. For the United States, therefore, even though Tata's lease has not been reissued by GOI, Tata is clearly required by the coal law to pay the GOI the royalties established by the law.

7.4.4.2 Evaluation

7.245. India's claim concerns the USDOC's factual determination that Tata was granted captive coal mining rights by the GOI under the Coal Mining Nationalization Act, which the USDOC also refers to as the Captive Coal Mining Programme.⁴⁴² In determining that GOI granted Tata captive coal mining rights under the Coal Mining Nationalization Act, the USDOC observed that "in its questionnaire response, Tata acknowledged that the GOI and the State Government of Jharkhand (GOJ) granted it captive coal mining rights".⁴⁴³ India submits that the USDOC's observation is incorrect and contrary to record evidence.⁴⁴⁴ The United States defends the USDOC's observation by referring to Tata's 1 November 2007 Questionnaire Response. According to the United States, in its Questionnaire Response Tata "explicitly notes the existence of 'captive mining operations' as well as its obligations to 'pay the mining royalty in terms of the MMDR Act'".⁴⁴⁵

7.246. Looking at Tata's 1 November 2007 Questionnaire Response, we note that Tata informed the USDOC that "Tata was operating two coking coal mines".⁴⁴⁶ Tata further explained that GOI "took over the management of 214 coking coal mines and 12 coke oven plants" in October 1971,

⁴³⁶ India's first written submission, para. 372.

⁴³⁷ Ibid. para. 375, referring to Section 36 of the Coal Mines Nationalization Act.

⁴³⁸ Ibid. para. 374.

⁴³⁹ Ibid. para. 375.

⁴⁴⁰ United States' first written submission, paras. 510-511.

⁴⁴¹ India's first written submission, para. 375.

⁴⁴² Since only the Coal Mining Nationalization Act was found by the USDOC to be *de jure* specific, the possibility that Tata could be found to have been granted a coal mining lease by the GOI or a State Government under some other statutory regime is legally not relevant.

⁴⁴³ 2006 Preliminary Results, Exhibit IND-32, internal page 1591.

⁴⁴⁴ India's response to Panel question No. 28.

⁴⁴⁵ United States' second written submission, para. 79, referring to 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, p. 20 of 27.

⁴⁴⁶ 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, p. 20 of 27.

but not those owned and/or managed by Tata.⁴⁴⁷ Tata also explained that when coking coal mines were nationalized by the GOI in May 1972, pursuant to the Coking Coal (Nationalization) Act, Section 36 of that Act excluded entities, including Tata, that were engaged in the production of iron and steel. Tata also explained that the 1973 Coal Mining Nationalization Act covered non-coking coal mines, and that it "is not required to obtain any licence or a mining lease for these coal mines either under the Coal Mines (nationalization) Act or under the MMDR Act".⁴⁴⁸

7.247. We also note Tata's explanation that upon Indian independence in 1947, the mining leases it had been granted by the Raja of Ramgur were transferred to the State Government of Bihar, pursuant to the Bihar Land Reforms Act of 1950. Tata explains that the State Government will continue to hold this lease until it expires in 2945. Tata also explains that the MMDR Act specifies the royalties that it must pay to the State Government to operate under that lease.⁴⁴⁹

7.248. Having reviewed Tata's Questionnaire Responses in full, we do not consider that there was a sufficient evidentiary basis for the USDOC's statement that Tata had "acknowledged that the GOI ... granted it captive coal mining rights" under the Coal Mining Nationalization Act. There is no reference in Tata's Questionnaire Responses to any lease having been provided by the GOI under the Coal Mining Nationalization Act, or indeed any other instrument. Rather, Tata stated unequivocally in its original Questionnaire Response that it "is not required to obtain any licence or a mining lease for these coal mines either under the Coal Mines (nationalization) Act or under the MMDR Act".⁴⁵⁰ Tata also stated in its Supplemental Questionnaire Response that "it has neither applied for nor obtained any coal mining licence from [GOI]".⁴⁵¹

7.249. We recall the United States' argument that Tata notes the existence of its captive mining operations in its original Questionnaire Response. However, the fact that Tata has captive coal mining operations says nothing about the legal basis of any lease or licence under which those operations are carried out. Regarding the United States' argument that Tata acknowledged that it pays royalties under the MMDR Act, we recall that the countervailed programme is the Coal Mining Nationalization Act. The United States has not established that Tata's obligation to pay royalties under the MMDR Act somehow depends on a lease having been granted under the Coal Mining Nationalization Act. Furthermore, because Tata explained that royalties under the MMDR Act are paid to the State Government rather than the GOI⁴⁵², the fact that Tata pays royalties under the MMDR Act does not establish that Tata was granted any mining lease by the GOI.

7.250. The United States further defends the USDOC's determination in these proceedings by arguing that in 1976 GOI amended the 1973 Coal Mining Nationalization Act to provide that coal mining rights will be restricted to companies in the public sector, companies engaged in the production of steel and power, washing of coal and such other uses the GOI may prescribe. The United States submits that India does not identify any specific language in the amended law that exempts Tata Steel's mining lease from this restriction. While we recognize that India has not identified any provision exempting Tata from the restriction that coal mining rights will be restricted to *inter alia* steel companies, we observe that the USDOC failed to establish that Tata's coking coal mines were covered by the original enactment of the 1973 Coal Mining Nationalization Act (which, according to record evidence⁴⁵³, concerns non-coking coal mines). In these circumstances, we believe that the onus is on the United States to identify evidence on the USDOC's record that would support a conclusion that, notwithstanding the initial exemption of Tata's coking coal mining operations from the scope of the (non-coking) Coal Mining Nationalization Act, the 1976 Amendment reversed that exemption and brought those coking coal operations within the scope of that Act. The United States has failed to identify any provision in the

⁴⁴⁷ 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, p. 19 of 27.

⁴⁴⁸ Ibid. p. 20 of 27.

⁴⁴⁹ See footnote 452 below.

⁴⁵⁰ 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, p. 20 of 27.

⁴⁵¹ 2008 Questionnaire Responses from Tata, Exhibit IND-67, p. 8 of 17.

⁴⁵² In its response to Panel question No. 97, India explained that any failure by Tata to pay the relevant royalties could result in Tata being sued by the State Government, rather than the GOI, in its capacity as successor to the Raja of Ramgarh. The United States did not challenge or otherwise comment on India's response to this question.

⁴⁵³ 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, discussed above. We also observe that there is no reference to Tata's mines (or TISCO's, as Tata was then known) in the Schedule to that Act (Exhibit IND-52A).

1976 Amendment, or any other instrument or evidence, that would have this effect. Moreover, there is nothing before us to suggest that USDOC actually considered this matter in making its determination.

7.251. The United States suggests that the Coal Mining Nationalization Act would apply to Tata because although Tata's mines may have been exempted from nationalization, "the coal that Tata Steel is mining was not".⁴⁵⁴ The United States supports this argument with the statement that Tata "pays the GOI a royalty under the coal mining laws to extract the coal, the rights to which it is purchasing on a per unit basis from the GOI for internal consumption".⁴⁵⁵ The United States further asserts that India's response to Panel question No. 97 "confirms that if Tata failed to pay royalties under the Coal Mining Nationalization Act, the State Government would be permitted to sue Tata to reclaim these royalties. This legal obligation to pay royalties under the Act confirms that Tata is a beneficiary under the Act".⁴⁵⁶ We are unable to accept the factual premise of the United States' arguments, because India has established that Tata's obligation to pay royalties derives from the MMDR Act, rather than the Coal Mining Nationalization Act.⁴⁵⁷ As explained above, this was also made clear to the USDOC by Tata during the course of the 2006 administrative review.

7.252. In light of the above considerations, we conclude that the USDOC's determination that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the countervailed programme, i.e. the Captive Mining of Coal Programme/Coal Mining Nationalization Act, lacks a sufficient evidentiary basis. We therefore uphold India's Article 1.1(a)(1)(iii) claim against this determination.⁴⁵⁸

7.4.5 Whether the USDOC properly determined that the Captive Mining of Coal Programme/Coal Mining Nationalization Act is *de jure* specific

7.253. In light of our above finding upholding India's claim against the USDOC's determination that GOI granted Tata captive mining rights under the Coal Mining Nationalization Act, it is not necessary for us to resolve India's claim regarding the USDOC's determination that the Captive Mining of Coal Programme/Coal Mining Nationalization Act is *de jure* specific. We therefore exercise judicial economy in respect of this claim.

7.4.6 USDOC's determination of benefit regarding the iron ore and coal programmes

7.254. India makes a number of claims regarding the USDOC's determination that the Captive Mining of Iron Ore and Coal Programmes conferred a benefit by providing goods for less than adequate remuneration. The USDOC determined benefit by constructing notional government prices, and then comparing those prices with Tier I and Tier II benchmarks. The USDOC constructed the notional government prices by calculating a per unit price for the captive mining fees paid to GOI, and then adding per unit operational mining costs, which consisted of materials, labour, depreciation, overhead, and royalties.

7.255. India submits that the USDOC's constructed notional government price methodology is inconsistent with Articles 1.1(b) and 14 of the SCM Agreement, and the principle of good faith. India also submits that the USDOC's use of the relevant Tier I and Tier II benchmarks is inconsistent with Article 14(d) of the SCM Agreement. The United States asks the Panel to reject India's claims.

⁴⁵⁴ United States' first written submission, para. 511.

⁴⁵⁵ Ibid.

⁴⁵⁶ United States' Comments on India's response to Panel question No. 96, para. 10.

⁴⁵⁷ India's response to Panel question No. 26.

⁴⁵⁸ 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.

7.4.6.1 India's claims against the USDOC's notional government price methodology

7.4.6.1.1 Main arguments of the parties

7.256. India contends that because GOI only provided the rights to mine minerals, rather than the extracted minerals themselves, the USDOC violated Articles 1.1(b) and 14(d) of the SCM Agreement by applying a methodology for determining benefit that compared a notional government price for extracted minerals to benchmark prices.⁴⁵⁹ India submits that the costs incurred by an Indian miner in extracting the mineral and the reasonable profit, if any, that a miner may obtain upon using/selling such extracted mineral does not devolve on the GOI and cannot form part of the 'remuneration' to be received by the GOI.

7.257. India also recalls its earlier argument that the term 'remuneration' as used in Article 14(d) of the SCM Agreement relates to the compensation receivable by the provider and is independent of the benefit, if any, that may be conferred on the receiver.⁴⁶⁰ According to India, the USDOC should have assessed the adequacy of the remuneration for the GOI before assessing whether there was any benefit to the recipient. India contends that the USDOC could have assessed the adequacy of remuneration for the GOI by analysing the royalty rate charged by GOI in comparison to royalty rates in other countries.⁴⁶¹

7.258. The United States submits that India erroneously argues that the existence of benefit should be determined by reference to the cost to the government of the financial contribution. The United States contends that the Article 14 guidelines for determining benefit state that a benefit calculation shall be based on the benefit to the recipient.

7.259. The United States disagrees with India's argument that USDOC was required to compare the mining rights at issue to a benchmark based on royalty rates in other countries. The United States asserts that the benefit potentially provided by a mining rights programme is the mineral that is obtained by the producer taking advantage of the programme. The United States contends that it would be inappropriate in this case to use the price of mining rights in other countries as a benchmark, because the mining rights at third country prices are not available in the Indian market. The United States asserts that the use of such a price would not reflect the prevailing market conditions in India, as required by the guidelines in Article 14(d).

7.4.6.1.2 Evaluation

7.260. India's claim against the USDOC's notional price methodology is premised on two arguments that, for reasons already addressed, we do not accept. First, we recall our finding that the USDOC was entitled to treat the provision of mining leases as the provision of a good within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Thus, we reject India's argument that the steel producers were only provided the right to mine minerals, rather than the extracted minerals themselves. Second, we recall our earlier rejection of India's argument that the adequacy of remuneration should be assessed from the perspective of the government, before assessing whether there is any benefit to the recipient. In our view, the USDOC was entitled to assess adequacy of remuneration as part of its benefit analysis, and to make that assessment from the perspective of the recipient, using a benchmarking methodology. Since the USDOC needed a government price for the provided "good" against which to compare the relevant benchmarks, we consider that it was reasonable for the USDOC to construct a notional government price for the extracted minerals. We note that, apart from challenging the USDOC's basic methodology, India has not challenged the manner in which the relevant notional government prices were constructed by the USDOC. For these reasons, we reject India's claim that such methodology is inconsistent with Article 1.1(b) and 14(d) of the SCM Agreement.

7.261. We note that India has also alleged that the USDOC's notional government price methodology is inconsistent with the principle of good faith. We agree with the United States'

⁴⁵⁹ India's first written submission, para. 388.

⁴⁶⁰ See section II.B.1 of India's first written submission.

⁴⁶¹ India's first written submission, para. 389.

argument⁴⁶² that India's good faith claim falls outside the Panel's terms of reference, since it is not provided for in India's panel request.⁴⁶³

7.4.6.2 India's claims against the Tier I and Tier II price benchmarks applied by the USDOC

7.262. India challenges certain aspects of the Tier I and Tier II price benchmarks against which the notional government prices for iron ore and coal were compared.

7.263. For iron ore, the USDOC compared the notional government price benchmarks with the same Tier II benchmarks that it used to determine benefit in respect of sales of iron ore by the NMDC. India repeats the claims it made against those benchmarks in the context of the NMDC.⁴⁶⁴ We recall that we have already upheld India's claim regarding the USDOC's rejection of certain domestic price information submitted by GOI and Tata when assessing benefit in the context of the NMDC. That information was also rejected by the USDOC when assessing benefit in the context of the Captive Mining of Iron Ore. For the same reasons, we uphold India's Article 14(d) claim regarding the USDOC's rejection of the relevant domestic price information when assessing benefit in the present context also.

7.264. For coal, the USDOC applied a Tier I benchmark based on actual delivered prices paid by an Indian company for importing coal from a private supplier in Australia. We understand India to claim that the USDOC's use of a delivered price is inconsistent with Article 14(d) of the SCM Agreement.⁴⁶⁵ We recall that we have already rejected a very similar argument made in the context of India's claims concerning the NMDC.⁴⁶⁶ As we explained, an actual import transaction price, as delivered, necessarily relates to the prevailing market conditions in the country of import. Accordingly, and for the same reasons, we reject the present claim also.

7.4.7 Conclusion

7.265. For the reasons set forth above, we uphold India's claims that (i) the United States acted inconsistently with Article 12.5 of the SCM Agreement by failing to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information, and (ii) the United States acted inconsistently with Article 1.1(a)(1)(iii) of the SCM Agreement by determining without sufficient evidentiary basis that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the Captive Mining of Coal Programme/Coal Mining Nationalization Act. We also uphold India's Article 14(d) claim regarding the USDOC's rejection of certain domestic price information when assessing benefit under the Captive Mining of Iron Ore Programme. We reject India's remaining claim in connection with the Captive Mining of Coal Programme.

7.5 Alleged inconsistencies with respect to the USDOC's treatment of loans provided under the Steel Development Fund

7.266. India challenges the USDOC's determination that loans provided under the Steel Development Fund (SDF) constitute direct transfers of funds by a public body. India also challenges the USDOC's determination that such loans conferred any benefit on the recipient steel producers. The United States asks the Panel to reject India's claims.

7.5.1 The USDOC's determination that direct transfers of funds were provided by a public body: Article 1.1(a)(1)

7.267. India's claims concern the USDOC's determination that the SDF loans are provided by a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement; various aspects of

⁴⁶² United States' first written submission, para. 521.

⁴⁶³ WT/DS436/3.

⁴⁶⁴ India's first written submission, para. 403.

⁴⁶⁵ Our understanding of India's claim is based on para. 404 of India's first written submission, and fn. 423 thereto. Fn. 423 refers simply to Sections III and VII.D of India's first written submission, without providing any additional explanation of the substance of India's claim. We observe that the common factor challenged in those Sections concerns the use of delivered price benchmarks.

⁴⁶⁶ See para. 7.181 above.

the USDOC's determination that there were "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i); and the USDOC's determination in the 2008 administrative review, on the basis of facts available, that "potential direct transfers of funds" were provided, within the meaning of Article 1.1(a)(1)(ii).

7.268. Article 1.1(a)(1) of the SCM Agreement is set forth above.⁴⁶⁷

7.5.1.1 Whether SDF loans are provided by a public body

7.5.1.1.1 Factual clarification by the Panel

7.269. We begin by clarifying the precise scope of the relevant USDOC determinations. In particular, we consider it necessary to clarify which entity was determined by the USDOC to provide the financial contributions at issue. We also consider it necessary to clarify whether that entity was determined to be part of the Indian government, or a public body.

7.270. In its preliminary determination in the original investigation, the USDOC found:

We preliminarily determine that the GOI directed the contribution of funds for the SDF within the meaning of section 771(5)(B) of the Act, by levying price increases on steel products which were routed into the SDF. Furthermore, because the Secretary of the Ministry of Steel has a major leadership role in the JPC and the SDF Managing Committee, the bodies that issue and administer loans under the SDF, we preliminarily determine that the GOI exercises control over the way in which funding is disbursed under this program. Therefore, we preliminarily determine that loans under the SDF constitute a financial contribution within the meaning of section 771(5)(D)(i) of the Act.⁴⁶⁸

7.271. In its Issues and Decision Memorandum preceding the final determination in the original investigation, the USDOC stated:

As discussed in the Preliminary Determination and in more detail below, the Department has determined in this proceeding that the SDF Management Committee is a government body.

...

[T]he SDF operates as a government entity, that all lending decisions are decisions ultimately made by the GOI, and that the decision to forgive SDF loans is also a decision made by the GOI.⁴⁶⁹

7.272. The references by the USDOC to a "governmental body" raise the issue of whether the USDOC determined that the financial contributions at issue were provided by the GOI, or whether they were provided by a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. If provided by a public body, the question arises whether both the JPC and SDF Managing Committee were found to have provided the financial contributions, or only the latter entity.

7.273. In its first written submission, India proceeded on the basis that the USDOC had found that SDF loans were provided by JPC and the SDF Managing Committee, and challenged the USDOC's designation of these entities as "public bodies".⁴⁷⁰ In response to a question from the Panel, the

⁴⁶⁷ See para. 7.66 above.

⁴⁶⁸ Notice of preliminary affirmative countervailing duty determination and alignment of final countervailing determination with final antidumping duty determinations, 20 April 2001, 66 Fed. Reg. 20240 ("2001 Preliminary Determination"), Exhibit IND-6, p. 9.

⁴⁶⁹ Issues and decision memorandum: final results of the countervailing duty investigation, 21 September 2001 ("2001 Issues and Decision Memorandum"), Exhibit IND-7, pp. 9 and 10.

⁴⁷⁰ India stated that "at no point in time has the United States made an explicit determination that the JPC and / or the SDF Managing Committee is 'government' and not a 'public body' within the meaning of Article 1.1(a)(1) of the SCM Agreement." (India's first written submission, para. 416)

United States asserted that the USDOC determined that "the SDF Managing Committee in particular was a public body that made all final decisions on SDF loans, including setting the terms and approving waivers".⁴⁷¹ We understand this to mean that the phrase "government body" used by the USDOC is synonymous with the phrase "public body" in the SCM Agreement. We also understand the United States' response to have clarified that the USDOC determined that the SDF loans were provided by the SDF Managing Committee, a public body, rather than by the GOI itself. Furthermore, since the United States made no reference to any determination by the USDOC that the JPC constituted a public body, or provided any financial contributions, we understand that the USDOC did not determine that the JPC Committee provided the SDF loans. We observe that India had not challenged the United States' description of the USDOC's determination.

7.274. In light of the above clarifications, we proceed with our analysis on the basis that the USDOC determined that SDF loans were provided by the SDF Managing Committee, in its capacity as a public body. We shall now examine whether the USDOC's determination that the SDF Managing Committee is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement, as alleged by India.

7.5.1.1.2 The USDOC's determination that the SDF Managing Committee constitutes a public body

7.275. Like India's claim regarding the NMDC, India's claim against the USDOC's determination that the SDF Managing Committee is a public body is based primarily on the findings of the Appellate Body in the *US – Anti-Dumping and Countervailing Duties (China)* proceedings. We recall that the Appellate Body issued its report in that case in March 2011, after the relevant USDOC determinations that the SDF Managing Committee is a public body. India submits that, because the USDOC failed to establish that the SDF Managing Committee performs governmental functions, or has the authority to do so, the USDOC failed to comply with the standard laid down by the Appellate Body in that case.⁴⁷² India contends that the USDOC's determination was based rather on governmental control allegedly resulting from the fact that the members of the SDF Managing Committee are officials of the GOI.⁴⁷³ India suggests that such a determination is akin to a determination of public body status based on majority government ownership which, India recalls, was condemned by the Appellate Body in the above-mentioned case.

7.276. Consistent with our evaluation of India's claim against the USDOC's determination that the NMDC is a public body, we do not accept India's argument that a determination of public body status may not be based on a finding of governmental control. Provided an investigating authority finds that a government's control of an entity is "meaningful", we consider that such finding may suffice to support a determination that the entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. Furthermore, while "meaningful control" may not be established on the basis of government shareholding alone, a combination of government shareholding plus other factors indicative of such control may suffice. We shall therefore examine whether the USDOC's determination in respect of the SDF Managing Committee can be understood as a finding that the SDF Managing Committee is subject to "meaningful control" by the GOI.

7.277. In respect of its 2001 determination, the USDOC explained in its Issues and Decision Memorandum that:

the Secretary of the Ministry of Steel, an official one level removed from the Minister of Steel, is the Chairman of the SDF Managing Committee. We further learned that the other three members on the SDF Managing Committee consist of the following GOI officials: the Secretary of Expenditure, the Secretary of the Planning Commission, and the Development Commissioner for Iron and Steel. In addition, during verification we reviewed numerous notes and minutes from SDF Management Committee meetings. The documents from the meetings demonstrate the SDF Management Committee's ability to control and direct loan approvals, interest payments on SDF loans, and SDF loan waivers. See page 5 and Exhibits 11 and 12 of the GOI Verification Report. Therefore, based on the evidence on the record of this proceeding, we determine that

⁴⁷¹ United States' response to Panel question No. 40, para. 7.

⁴⁷² India's first written submission, para. 426.

⁴⁷³ Ibid. para. 424.

the SDF operates as a government entity, that all lending decisions are decisions ultimately made by the GOI, and that the decision to forgive SDF loans is also a decision made by the GOI.⁴⁷⁴

7.278. We recall our earlier finding that government involvement in the appointment of an entity's directors is one factor that might indicate meaningful government control. We consider that the relationship between the government and the entity is even closer when the management of the entity is composed exclusively of serving government officials. In our view, India is mistaken in arguing that government appointment of serving government officials is akin, in terms of control, to government shareholding. While government shareholding indicates formal links of ownership between the government and the relevant entity, which may or may not entail a degree of control, the appointment by the government of serving government officials to actually manage an entity in itself demonstrates a degree of control, as the individuals making the decisions for the entity, i.e., exercising control, are public officials acting in their official capacity.⁴⁷⁵ Thus, in this situation, the links between the government and the entity will be more substantive, or "meaningful", in nature. We recall in this regard that the SDF Managing Committee was composed of the Secretary of the Ministry of Steel, the Secretary of Expenditure, the Secretary of the Planning Commission, and the Development Commissioner for Iron and Steel. The USDOC found explicitly that the Secretary of the Ministry of Steel served on the SDF Managing Committee in his capacity as head of the Commission for Iron and Steel.⁴⁷⁶ In our view, the United States is correct to argue that, as a result of its composition, the SDF Managing Committee was under the "complete control" of the GOI.⁴⁷⁷ For this reason, we reject India's claim that the USDOC's determination that the SDF Managing Committee constitutes a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.279. Having established that the USDOC properly determined that the SDF Managing Committee constitutes a public body, we now examine whether the USDOC properly determined that the SDF Managing Committee provided "direct transfers of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.5.1.2 Whether the USDOC properly determined that SDF Managing Committee provided "direct" "transfers" of funds

7.280. India challenges two aspects of the USDOC's determination that the SDF Managing Committee provided direct transfers of funds. First, India claims that the SDF Management Committee was not *directly* involved in any transfer of funds under the SDF loan programme, such that the SDF Management Committee could not be found to have made any "direct" transfers of funds within the meaning of Article 1.1(a)(1)(i).⁴⁷⁸ Second, India submits that SDF loans do not constitute *transfers* of funds falling within the scope of Article 1.1(a)(1)(i), since the relevant funds were neither public in nature, nor resulted in any charge on the public account.⁴⁷⁹

7.5.1.2.1 Main arguments of the parties

7.281. India notes that Article 1.1(a)(1)(i) covers only "direct", rather than indirect, transfers of funds.⁴⁸⁰ India contends that the SDF Managing Committee did not *directly* transfer any funds.⁴⁸¹ India contends that funds were instead disbursed by an intervening private agency, namely the JPC. India submits that the SDF Managing Committee played only an indirect role in this process⁴⁸², as the loan agreements were executed by JPC with the participating steel plants, and it is JPC that had access to the funds. According to India, the SDF Managing Committee only had a supervisory role over the JPC. India submits that mere regulation of the actions of another funding agency cannot be considered as involving the *direct* transfer of funds in the sense of

⁴⁷⁴ 2001 Issues and Decision Memorandum, Exhibit IND-7, pp. 9 and 10.

⁴⁷⁵ In response to Panel question No. 102, India stated that there is no evidence on the USDOC's record to suggest that GOI officials served on the SDF Managing Committee in their private capacity.

⁴⁷⁶ 2001 Preliminary Determination, Exhibit IND-6, p. 9.

⁴⁷⁷ United States' second written submission, para. 97.

⁴⁷⁸ India's first written submission, paras. 429-438.

⁴⁷⁹ Ibid. paras. 443-448.

⁴⁸⁰ Ibid. para. 434.

⁴⁸¹ Ibid. para. 435.

⁴⁸² Ibid. para. 436.

Article 1.1(a)(1)(i). India submits that no evidence on record indicates that the SDF Managing Committee itself disbursed any funds.

7.282. India further submits that a direct *transfer* of funds within the meaning of Article 1.1(a)(1)(i) can occur only where a government or public body has title over the funds being transferred or, in the alternative, where the disbursement results in a charge on the public account.⁴⁸³ India contends that the ordinary meaning of the phrase "*transfer* of funds" would require a person to convey the title over money or financial resources to another person.⁴⁸⁴ Thus, the requirement of 'transfer of funds' would only be satisfied if the government or public body is the owner of the funds in question, since it is only the owner of the funds who can transfer the funds to another person. According to India⁴⁸⁵, the use of the term "transfer" in Article 1.1(a)(1)(i) can be contrasted with the use of the term "provides" in Article 1.1(a)(1)(iii) of the SCM Agreement. India contends that the term "provides" is much broader, and means to "make available" or "put at the disposal of".⁴⁸⁶ Furthermore, recalling that the SCM Agreement covers financial contributions "by" governments or public bodies, India submits that if a person other than the government or public body in question gives the monetary resources or contribution, it would ordinarily not be covered within the scope of the chapeau.

7.283. As an alternative argument, India contends that the term "transfer" requires a charge on the public account.⁴⁸⁷ According to India, the essence of a "transfer" involves a situation where, as a result of the "transfer", something originally in the hands of the transferor is moved to the transferee: the rights or interest in the asset in question is terminated in the hands of the transferor and simultaneously created in the hands of the transferee. India submits that, when viewed from this perspective, unless the government incurs a financial charge on its account – such that the funds being transferred would have otherwise been at the disposal of the government – there cannot be a direct "transfer" of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.

7.284. India submits that the USDOC's determination that the SDF Managing Committee made direct transfers of funds is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement, because the SDF funds were derived from private levies on steel producers, such that title to those funds was not held by GOI, and disbursement of those funds did not result in any charge on the public account. India asserts that the USDOC erred in holding that the funds constituting the SDF were not the steel producers' own funds, but were rather analogous to tax revenues collected from the consumers as mandated by the GOI.⁴⁸⁸

7.285. The United States submits that the facts demonstrate that the USDOC reasonably concluded that the SDF levy operated as a tax imposed on consumers, over which the GOI, through the SDF Managing Committee, had complete control. The United States submits that the USDOC properly found that the loans provided using these funds constituted a "direct transfer" within the meaning of Article 1.1(a)(1)(i).

7.286. According to the United States, the Appellate Body has interpreted Article 1.1(a)(1)(i) to cover any government practice the effect of which is to improve the financial position of the recipient. The United States refers in this regard to the findings of the Appellate Body in *Japan – DRAMS (Korea)*.⁴⁸⁹ The United States also refers to the finding of the Appellate Body in *US – Large Civil Aircraft (Second Complaint)* that "[t]he direct transfer of funds in subparagraph (i) therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are *made available* to a recipient."⁴⁹⁰

7.287. The United States submits that the GOI mandated that an additional price element be included in the sale of steel, and also mandated that the amounts collected be transferred to the

⁴⁸³ India's first written submission, paras. 440-453.

⁴⁸⁴ Ibid. para. 440.

⁴⁸⁵ Ibid. para. 441.

⁴⁸⁶ Appellate Body Report, *US – Softwood Lumber IV*, para. 69

⁴⁸⁷ India's first written submission, para. 443.

⁴⁸⁸ Ibid. para. 454.

⁴⁸⁹ Appellate Body Report, *Japan – DRAMS (Korea)*, para. 251.

⁴⁹⁰ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614. (emphasis added)

JPC. The JPC then recommends distributing these funds in the form of better-than-market rate loans to steel companies, and the SDF Managing Committee makes a final decision as to the disbursement of such loans. The United States contends that, through the consumer levy and the JPC, these resources are therefore "made available" to recipient companies by the SDF Managing Committee.

7.288. The United States also disputes India's argument that the disbursement of SDF funds as loans cannot constitute a "direct transfer of funds," because a direct transfer may only be provided where the "public body itself owns the 'financial contribution' in question." According to the United States, the Appellate Body has not required that any direct transfer of funds be accomplished through the transfer of ownership of the relevant funds from the government to the recipient. The United States notes that the Appellate Body has simply found that a direct transfer of funds may be found whenever there is "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient."⁴⁹¹

7.5.1.2.2 Main arguments of the third parties

7.5.1.2.2.1 European Union

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

7.5.1.2.3 Evaluation

7.290. India's claim raises the issue of whether SDF loans are "direct transfers of funds" within the meaning and coverage of Article 1.1(a)(1)(i) of the SCM Agreement. India asserts that, because of the private status of the entity that actually disbursed the funds (the JPC), and the private source or ownership of the relevant funds, SDF loans are private transfers falling outside the scope of the SCM Agreement. According to India, the SDF Managing Committee did not "directly" transfer any funds itself, such that the USDOC could not properly have determined that "direct" transfers of funds were made by a public body. In addition, India contends that the funds were neither owned by nor sourced from the government, such that the USDOC could not properly have determined that the public body at issue, the SDF Managing Committee, made any direct "transfers" of funds.

7.291. We note that the USDOC did not determine that the JPC is a public body. The USDOC only found that the SDF Managing Committee is a public body. Thus, if SDF loans are not "direct transfers of funds" by the SDF Managing Committee, but rather by the JPC, such loans fall outside the scope of a finding that they constitute countervailable subsidies as direct transfers of funds by a public body. The USDOC made the following observations regarding the role of the SDF Managing Committee in providing SDF loans:

We asked the GOI officials to describe the role of the SDF Managing Committee. ... They stated that the SDF Managing Committee considers and grants the ultimate approval of the proposals put forth by the [JPC]. The JPC handles the day-to-day affairs of the SDF, such as overseeing and administering the SDF loans. GOI officials stated that the SDF Managing Committee handles all decisions regarding the issuance, terms, and waivers of SDF loans.⁴⁹²

7.292. India does not deny that the SDF Managing Committee was the decision-maker regarding the issuance, terms and waivers of the SDF loans. However, India considers that this is

⁴⁹¹ The United States refers to Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614.

⁴⁹² 2001 Investigation Verification Report of GOI Responses, Exhibit USA-74, p. 3.

"immaterial for the purposes of present dispute because the disbursement and collection of funds was the responsibility of the JPC".⁴⁹³ India also contends that the authority to operate the fund is vested only in the JPC, and "the function of management and operation of the corpus of the SDF was with JPC."⁴⁹⁴ India also asserts that the SDF loan agreements were executed between the JPC and the member steel plants, with the recitals to the said agreement clearly providing that JPC was constituted with the power to maintain and disburse loans out of the SDF. India also submits that the issuance and administration of loans under the SDF programme was supervised by the JPC.⁴⁹⁵

7.293. We consider that although the JPC may formally have administered the disbursement and collection of funds, and the day-to-day operations of the SDF, the USDOC could reasonably have determined that the SDF Managing Committee was "directly" involved in the issuance of SDF loans. This is because evidence on the USDOC's record indicates that the SDF Managing Committee made the decision whether or not loans should be issued, and on what terms. Thus, while funds were actually disbursed by the JPC, such disbursements were only made following an affirmative decision by the SCM Managing Committee as to the issuance, terms, and conditions of the loans.⁴⁹⁶ In this way, it is clear to us that the SCM Managing Committee was "directly" involved in the provision of SDF loans. We recall that India does not deny that the SDF Managing Committee was the decision-maker regarding the issuance, terms and waivers of the SDF loans.

7.294. Regarding the issue of whether or not the USDOC could reasonably have found that the SDF Managing Committee "transfer[red]" the relevant funds, there is nothing in the text of Article 1.1(a)(1)(i) to suggest that the relevant government or public body must have title over the funds being transferred, or that there must be a charge on the public account, in order for a direct "transfer" of funds to occur.

7.295. In the present case, SDF levies are collected by the JPC. The parties have argued extensively whether or not such levies are imposed on consumers pursuant to a government mandate, such that they may be similar to government taxation, or whether they are rather voluntary contributions made by the steel producers. We consider important the GOI's assertion that, once collected, the funds are "remitted to the Fund".⁴⁹⁷ We understand that once the funds are remitted to the SDF, the funds are no longer held by either the steel producers or the JPC. They are instead held by the SDF, and disposed of pursuant to the instructions of the SDF Managing Committee. In these factual circumstances, we consider that the USDOC was entitled to find that SDF funds had been "transfer[red]" by the SDF Managing Committee within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement. Even though the SDF Managing Committee may not have taken title over the funds, or imposed a charge on the public account when releasing those funds as loans, the SDF Managing Committee was instrumental (because of its role as decision-maker regarding the issuance, terms and waivers of SDF loans) in "transfer[ring]" those funds from the SDF to the loan beneficiaries.

7.296. Furthermore, we note the finding of the Appellate Body in *US – Large Civil Aircraft (Second Complaint)* that "[t]he direct transfer of funds in subparagraph (i) therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are *made available* to a recipient".⁴⁹⁸ Even if the SDF Managing Committee could not be said to have "transfer[red]" funds to the SDF loan beneficiaries, at the very least the SDF Managing Committee made those funds available to beneficiaries once it provided the requisite loan authorizations.

⁴⁹³ India's second written submission, para. 236.

⁴⁹⁴ Ibid. para. 241.

⁴⁹⁵ Ibid.

⁴⁹⁶ We also note in this regard the USDOC's finding that "numerous notes and minutes from SDF Management Committee meetings ... demonstrate the SDF Management Committee's ability to control and direct loan approvals, interest payments on SDF loans, and SDF loan waivers" (2001 Issues and Decision Memorandum, Exhibit IND-7, pp. 9 and 10, quoted above at para. 7.277).

⁴⁹⁷ Government of India's response to supplemental questionnaire, 20 March 2001 ("GOI's 2001 supplemental questionnaire response"), Exhibit USA-75, p. 3.

⁴⁹⁸ Appellate Body Report, *US – Large Civil Aircraft (Second Complaint)*, para. 614. (emphasis added)

7.5.1.2.3.1 Conclusion

7.297. For the above reasons, we reject India's claim that the USDOC's determination that the SDF Managing Committee provided direct transfers of funds is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.

7.5.1.3 The USDOC's determination that SDF loans constitute potential direct transfers of funds

7.298. This claim concerns the results of the 2008 administrative review conducted by the USDOC. As a result of a failure by interested parties to provide necessary information, the USDOC performed its assessment of the SDF loans on the basis of facts available. The USDOC found, "as AFA [adverse facts available], that the GOI's provision of SDF loans under this program provide a financial contribution in the form of a potential direct transfer of funds...."⁴⁹⁹

7.5.1.3.1 Main arguments of the parties

7.299. India submits that the USDOC's determination that SDF loans are potential direct transfers of funds is inconsistent with Article 1.1(a)(1)(i). India submits that, for a potential direct transfer of funds to exist, there has to be a government practice that involves: (i) an obligation to make a direct transfer of funds (ii) at some point in the future.⁵⁰⁰ According to India, there is no reference in the USDOC's determination to any such future obligation.⁵⁰¹ India further submits that, in view of its earlier treatment of SDF loans as (actual rather than potential) direct transfers of funds, the determination made by the United States is bereft of any form of reasoning and is *ex facie* illogical and unsubstantiated.⁵⁰²

7.300. The United States contends that India's concern that this language was intended to address "an obligation on the GOI to provide funds in the future"⁵⁰³ is misplaced.⁵⁰⁴ According to the United States, the USDOC's reference to the term "potential" was simply meant to convey the potential benefit for the 2008 period as there was no specific information on SDF provided by the company during the 2008 Administrative Review.

7.5.1.3.2 Evaluation

7.301. We recall that the USDOC's reference to a "potential direct transfer of funds" was made in applying facts available. In applying facts available, the USDOC explicitly stated that "no new information or evidence of changed circumstances has been submitted in this proceeding to warrant reconsideration" of its earlier determination regarding SDF loans.⁵⁰⁵ That earlier determination had treated SDF loans as "direct transfers of funds".⁵⁰⁶ The USDOC also stated that, in applying facts available, it "continue[d] to find, as AFA, that the GOI's provision of SDF loans under this program provide a financial contribution ..."⁵⁰⁷ In our view, consideration of the broader context of the USDOC's determination makes it clear that, in reality, the USDOC was merely *continuing* to apply its earlier determination that SDF loans constitute direct transfers of funds. The USDOC explained that the *continued* application of its previous determination to this effect was appropriate because there had been no changed circumstances to warrant reconsideration of that determination. In this context, we accept the United States' argument that the USDOC used the term "potential" to highlight the fact that the USDOC did not have concrete evidence regarding the actual provision of loans during the relevant period. While the USDOC might have avoided confusion by choosing a different textual formulation, the general sense of the USDOC's determination is clear enough. Accordingly, we reject India's claim that the USDOC's reference to

⁴⁹⁹ 2008 Preliminary Results, Exhibit IND-40, internal page 1501.

⁵⁰⁰ India's first written submission, para. 464.

⁵⁰¹ Ibid. para. 464.

⁵⁰² Ibid. para. 465.

⁵⁰³ Ibid. para. 575.

⁵⁰⁴ United States' first written submission, para. 252 (the United States made this argument in the context of India's Article 12.7 claim concerning this matter).

⁵⁰⁵ 2008 Preliminary Results, Exhibit IND-40, internal page 1501.

⁵⁰⁶ At para. 465 of its first written submission, India acknowledges that SDF loans had previously been determined to be direct transfers of funds.

⁵⁰⁷ 2008 Preliminary Results, Exhibit IND-40, internal page 1501.

SDF loans as "potential direct transfers of funds" in the 2008 administrative review is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.

7.5.2 Alleged inconsistencies with respect to the USDOC's determination of benefit

7.302. India challenges the manner in which the USDOC determined the benefit conferred by SDF loans in the 2006 and 2008 administrative reviews. The USDOC did so by comparing the rates at which SDF loans were provided with the Prime Lending Rate (PLR) as published by the Reserve Bank of India (RBI).

7.5.2.1 Main arguments of the parties

7.303. India's claims regarding the USDOC's use of PLRs are based on the chapeau to Article 14, and Article 14(b). In respect of the chapeau to Article 14, India notes that investigating authorities are required to explain in any given case the method used to calculate the benefit to the recipient.⁵⁰⁸ India further notes that, pursuant to Article 14(b), the investigating authority must compare the terms of the government loan with the terms of a "comparable commercial loan which the firm could actually obtain on the market".⁵⁰⁹ India submits that the United States violated its obligations under Article 14(b) and the chapeau to Article 14 by not adequately explaining⁵¹⁰ how the PLRs indicate the amount that an SDF loan recipient would pay on a comparable commercial loan which that recipient could actually obtain on the market.⁵¹¹ India submits that the PLRs used by the USDOC are interest rates for banks, rather than rates for loans actually disbursed.⁵¹²

7.304. India also claims that the USDOC's determination of benefit in the 2006 administrative review is inconsistent with the chapeau of Article 14, and Article 14(b), because the USDOC did not take into account the costs incurred by exporters to participate in the SDF Programme and obtain SDF loans, or provide any explanation of its treatment of such costs.⁵¹³ India submits that the USDOC similarly violated Article 1.1(b) by finding benefit even though the overall scheme of price controls under the SDF actually made producers worse off.

7.305. The United States submits that, during the 2006 administrative review, the USDOC properly used an average of certain PLRs as a commercial benchmark interest rate. The United States contends that the PLRs were compiled and published by the RBI, for loans similar to the SDF loans in currency, structure and maturity. The United States contends that the rate calculated by the USDOC was "comparable" within the meaning of Article 14(b) of the SCM Agreement.⁵¹⁴

7.306. The United States also submits that Article 14(b) clearly states that a benefit is conferred where there is a "difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market." The United States contends that no credits or adjustments are provided for in the SCM Agreement. The United States contends that there is also no requirement to consider that the recipient of a subsidy is required separately to adhere to certain price controls.⁵¹⁵

7.5.2.2 Evaluation

7.307. We begin by addressing India's claim that the USDOC failed to adequately explain how the PLRs applied by the USDOC represent the amount that the firm would pay on a "comparable

⁵⁰⁸ India's first written submission, para. 469.

⁵⁰⁹ Ibid. para. 470.

⁵¹⁰ Ibid. para. 475.

⁵¹¹ Ibid. para. 473.

⁵¹² India's second written submission, para. 255.

⁵¹³ India's first written submission, para. 476.

⁵¹⁴ 2006 Issues and Decision Memorandum, Exhibit IND-33, section "B- Long-Term Benchmarks and Discount Rates."

⁵¹⁵ United States' first written submission, para. 574.

commercial loan which the firm could actually obtain on the market", contrary to the chapeau of Article 14, and Article 14(b), of the SCM Agreement.⁵¹⁶

7.308. The chapeau of Article 14 requires that the application of the "method used by the investigating authority to calculate the benefit to the recipient ... to each particular case shall be transparent and adequately explained". We have already explained that the requirement in the chapeau of Article 14 that the application of a benefit methodology be "transparent" conveys the sense that such application should be set out in such a fashion that it can be easily understood or discerned. The obligation to "adequately explain[]" conveys the sense of making clear or intelligible, and giving details of how the methodology was applied.⁵¹⁷ We also agree with the United States that the adequacy of an investigating authority's explanation should be assessed on a case-by-case basis.⁵¹⁸

7.309. In the present case, we are not persuaded that, having explained that it would determine benefit by comparing SDF loan rates with PLRs, and how it proceeded to apply those PLRs⁵¹⁹, the USDOC was also required by the chapeau of Article 14 to indicate the reasons why it chose to determine benefit on that basis. In our view, its explanation was such that the application of its benefit methodology was clear and intelligible, and could be easily understood and discerned.

7.310. Regarding the USDOC's obligations under Article 14(b), we understand India to argue that the USDOC's use of PLRs was inappropriate because PLRs are bank rates, rather than rates for loans actually disbursed, i.e. loans "which the firm could actually obtain on the market".⁵²⁰ In this regard, we note the finding by the Appellate Body that "Article 14(b) does not preclude the possibility of using as benchmarks interest rates on commercial loans that are not actually available in the market where the firm is located, such as, for instance, loans in other markets or constructed proxies".⁵²¹ We agree with this finding, and similarly consider that an investigating authority is entitled to rely on constructed interest rate proxies where actual comparable commercial loan rates are not available. Contrary to India's claim, the USDOC was not prevented from applying the PLRs simply because they did not represent rates that SDF loan recipients could actually obtain. India's approach to Article 14(b) would be excessively formalistic, and would ignore the flexibility found in the Article 14(b) guideline.⁵²² We observe that India has not argued that the PLRs used by the USDOC are otherwise not meaningful proxies for comparable commercial loan rates that SDF loan recipients could have obtained on the market.⁵²³

7.311. We next turn to India's claim that the USDOC violated Article 14(b), and the chapeau of Article 14, by failing to account, in applying the comparable commercial loan rate, for the costs incurred by steel producers in participating in the SDF scheme. India refers in this regard to the fact that steel producers "contributed their own funds to the SDF Program and as a result, lost the interest that they could otherwise obtain on their own funds had it been invested elsewhere."⁵²⁴ Further, India argues that there were various other "administrative expenses" and charges incurred by the steel producers participating in the SDF Programme.⁵²⁵ As a factual matter, we do not agree that SDF levies should have been treated as the producers' own funds. SDF levies were

⁵¹⁶ It is unclear whether India's claim under Article 14(b) is dependent on its claim under the chapeau to Article 14, or whether India is also challenging the USDOC's use of PLRs independent of its transparency claim. We shall cover both issues, for the sake of completeness.

⁵¹⁷ According to the Fifth Edition of the Shorter Oxford English Dictionary, the verb "explain" in relevant context means to "make clear or intelligible (a meaning, difficulty, etc.); Give details of (a matter, *how*, etc.)" (emphasis original). The term "transparent", when used figuratively, means "easily seen through or understood; easily discerned; evident; obvious".

⁵¹⁸ United States' response to Panel question No. 104, para. 60.

⁵¹⁹ The relevant explanation is provided in Memorandum to the File regarding India's prime lending rate, 28 November 2007 ("India's Prime Lending Rate"), Exhibit USA-77, pp. 4-5. This is a public document that was expressly referred to in fn. 14 of the USDOC's 2006 Preliminary Results, Exhibit IND-32, p. 6 of 22.

⁵²⁰ India's second written submission, para. 255.

⁵²¹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 480.

⁵²² We are guided in this respect by the findings set forth at paras. 480-490 of the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)*.

⁵²³ It is also undisputed that the PLRs were the only interest rates on record that were comparable to SDF loans examined in the 2006 administrative review (United States' first written submission, paras. 568-569).

⁵²⁴ India First Written Submission, para. 477.

⁵²⁵ Ibid. para. 478.

rather collected from consumers, through an addition to the steel producers' ex-works prices, and then remitted⁵²⁶ 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. As a legal matter, we do not consider 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. We note in this regard that the text of Article 14(b) provides for a comparison "between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan". Article 14(b) states that the benefit "shall" be the difference between those amounts. The focus of Article 14(b) is therefore on the difference between the amounts paid "on" the relevant loans. There is no reference in Article 14(b) to the amount of any cost incurred in obtaining the loans. Furthermore, while Article 14(c) provides that the amount of benefit in respect of loan guarantees shall be "adjusted for any differences in fees", there is no such requirement in Article 14(b). Accordingly, Article 14(b) does not require the USDOC to take into account the costs incurred by SDF loan recipients in obtaining SDF loans. Furthermore, since Article 14(b) does not contain any such requirement, there is no basis to conclude that the chapeau of Article 14 required the USDOC to adequately explain how it had complied with that requirement.

7.312. Regarding India's Article 1.1(b) claim, we note that the basis for that claim is essentially the same as the basis for India's Article 14(b) claim discussed in the preceding paragraph. Thus, India's Article 1.1(b) claim is again concerned with the fact that steel producers allegedly had to contribute their own funds, and lost interest that they would otherwise have earned on those funds.⁵²⁷ Article 14 contains guidelines for calculating the benefit to the recipient under Article 1.1(b). Since India has failed to establish that the USDOC's failure to take account of costs incurred by SDF loan recipients is inconsistent with the Article 14(b) guideline for calculating benefit within the meaning of Article 1.1(b), its claim that the very same conduct is inconsistent with Article 1.1(b) must also fail. By complying with the Article 14(b) guideline in respect of loan recipients' costs, the USDOC necessarily complied with Article 1.1(b) in respect of that same matter.

7.5.3 Conclusion

7.313. For 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.

7.6 USITC's injury assessment

7.314. India claims that certain US provisions relating to injury assessment are "as such" and "as applied" inconsistent with a number of provisions of the SCM Agreement. In addition, India claims that the USITC's injury determination in the CVD investigation of the imports from India is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement.

7.315. We begin by addressing issues concerning cumulation in original investigations, and then in reviews. Thereafter, we turn to the issue of whether or not the USITC considered all of the mandatory economic factors in its injury determination.

7.6.1 Whether the SCM Agreement permits "cross-cumulation" in original investigations

7.316. India claims that Section 1677(7)(G) is inconsistent with Article 15.3 of the SCM Agreement "as such" and "as applied" in the original investigation because, in certain situations, this provision requires the cumulative assessment of the effects of subsidized imports

⁵²⁶ See para. 7.295 above. India contends that the SDF levy, even if derived from customers, "cannot be considered as materially different from the manner in which any commercial company would make profits" (India's response to Panel question No. 3). We disagree. The SDF levy is not akin to profit, since profits derived from sales to customers would not be remitted to the SDF for disbursement pursuant to the instructions of a public body.

⁵²⁷ India's first written submission, para. 483. Furthermore, the Article 1.1(b) and Article 14(b) claims are both addressed in the same paragraph, and on the basis of the same reasoning, at para. 256 of India's second written submission.

with the effects of imports not subject to simultaneous countervailing duty investigations.⁵²⁸ Moreover, India claims that Section 1677(7)(G) is inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement "as such" and "as applied" in the original investigation because, in certain situations, this provision requires the assessment of injury based on *inter alia* the volume, effects and impact of non-subsidized, dumped imports.⁵²⁹

7.6.1.1 Relevant WTO provisions

7.317. Article 15.1 of the SCM Agreement provides:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products⁴⁶ and (b) the consequent impact of these imports on the domestic producers of such products.

⁴⁶ Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

7.318. Article 15.2 of the SCM Agreement provides:

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.

7.319. Article 15.3 of the SCM Agreement provides:

Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

7.320. Article 15.4 of the SCM Agreement provides:

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

⁵²⁸ India's first written submission, paras. 109-115 and 497-499; opening statement at the first meeting of the Panel, paras. 21 and 41-42; second written submission, paras. 52 and 56; and opening statement at the second meeting of the Panel, para. 18.

⁵²⁹ India's first written submission, paras. 128-132, 500-506 and 510-517; opening statement at the first meeting of the Panel, paras. 22-23 and 44; and second written submission, paras. 54 and 260.

burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.321. Finally, Article 15.5 of the SCM Agreement provides:

It must be demonstrated that the subsidized imports are, through the effects⁴⁷ of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. 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.

⁴⁷ As set forth in paragraphs 2 and 4.

7.6.1.2 Factual background

7.322. India's claims with respect to original investigations concern Section 1677(7)(G) which requires the USITC to cumulatively assess, for purposes of determining material injury, the effects of dumped and subsidized imports on the domestic industry when certain conditions are met. The US provision provides in relevant part:

(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—

(I) petitions were filed under section 1671a(b) or 1673a(b) of this title on the same day,

(II) investigations were initiated under section 1671a(a) or 1673a(a) of this title on the same day, or

(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.⁵³⁰

7.323. In its injury assessment in the original CVD investigations, the USITC cumulated the effects of subsidized imports from India with those of imports from ten other countries. Imports from Argentina, India, Indonesia, South Africa and Thailand were subject to simultaneous CVD investigations and parallel AD investigations. Imports from the remaining six countries (China, Kazakhstan, Netherlands, Romania, Taiwan, and Ukraine) were only subject to parallel AD investigations.⁵³¹

⁵³⁰ Title 19, Customs Duties, USC, Exhibit IND-1, p. 34, internal page 343.

⁵³¹ USITC Preliminary Determinations, pp. 8-11, as quoted in United States' first written submission, para. 97; and hot-rolled steel products from Argentina and South Africa, Investigation No. 701-TA-404 (final) and Investigations Nos. 731-TA-898 and 905 (final), August 2001, publication 3446 ("USITC Final

7.6.1.3 Main arguments of the parties

7.6.1.3.1 India

7.6.1.3.1.1 Article 15.3 of the SCM Agreement

7.324. India submits that in cases where only a sub-set of countries subject to AD investigations are subject to simultaneous CVD investigations, Section 1677(7)(G) requires the cumulative assessment of the effects of subsidized imports with the effects of imports not subject to simultaneous CVD investigations.⁵³² India contends that "the US investigating authority inherently increases the probability of reaching a positive injury finding."⁵³³ India recalls that in the CVD investigation at issue here, the USITC cumulated the effects of imports from India with those of imports from ten other countries, emphasizing that imports from only four of those other countries were also subject to simultaneous CVD investigations.⁵³⁴

7.325. India argues that imports from a country that is subject only to an AD investigation should not be cumulated under Article 15.3 of the SCM Agreement, as the plain words of this provision permit a cumulative assessment only of imports from countries that are simultaneously subject to CVD investigations.⁵³⁵ India submits that the term "imports" in Article 15.3 must be understood in the context provided by Article 15 of the SCM Agreement. India contends that the expression "subsidized imports" in Articles 15.1 and 15.2 of the SCM Agreement refers only to imports for which the subsidy margin is more than *de minimis*, which would exclude imports that are not subsidized or that are not even alleged to be subsidized.⁵³⁶

7.326. Moreover, India submits that Article 15.3 of the SCM Agreement allows a cumulative assessment of subsidized imports only when three conditions are satisfied: (i) the amount of subsidization from each country is more than *de minimis*, (ii) the volume of imports from each country is not negligible, and (iii) there is competition amongst imports and between imports and the like domestic product. With respect to the first two conditions, India argues that these must be satisfied for "each country", i.e. a separate and independent country-by-country assessment.⁵³⁷ India contends that the measure at issue requires cumulation without examining whether (i) the amount of subsidization for imports from "each" country is above *de minimis*, and (ii) the volume of imports from "each" country is individually not negligible.⁵³⁸

7.6.1.3.1.2 Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement

7.327. India contends that the plain meaning of Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement requires consideration of "subsidized imports" for the determination of injury because of the repeated reference to "subsidized imports".⁵³⁹ Thus, India argues that (i) the "effects" analysis under Article 15.2, (ii) the "impact" analysis under Article 15.4, and (iii) the "causal link" analysis under Article 15.5 shall be limited only to subsidized imports.⁵⁴⁰ India recalls its arguments that "subsidized imports" under Article 15 of the SCM Agreement means only imports for which the subsidy margin is above *de minimis*. India argues that imports from

Determinations"), Exhibit IND-9, pp. 16-21, internal pages 9-14. See also United States' response to Panel question No. 117, para. 95.

⁵³² India's first written submission, paras. 109-115 and 497-499; opening statement at the first meeting of the Panel, paras. 21 and 41-42; second written submission, paras. 52 and 56; and opening statement at the second meeting of the Panel, para. 18.

⁵³³ India's first written submission, paras. 108 and 113. See also India's opening statement at the first meeting of the Panel, para. 23.

⁵³⁴ India's first written submission, para. 499.

⁵³⁵ Ibid. para. 111; and opening statement at the first meeting of the Panel, para. 22.

⁵³⁶ India's first written submission, paras. 112, 114 and 498-499; second written submission, para. 54.

⁵³⁷ India's first written submission, paras. 116-117 and 121; opening statement at the first meeting of the Panel, para. 22; second written submission, paras. 56 and 72-73; and closing statement at the second meeting of the Panel, para. 4.

⁵³⁸ India's first written submission, paras. 119-120, 123-127 and 497-499.

⁵³⁹ Ibid. para. 128, citing the Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.2116. See also India's second written submission, para. 63.

⁵⁴⁰ India's first written submission, para. 128; opening statement at the first meeting of the Panel, para. 22; and second written submission, paras. 57-58 and 61.

countries subject solely to AD investigations are not "subsidized imports", because the lack of any finding relating to the SCM Agreement means their subsidy margin is zero.⁵⁴¹

7.328. According to India, Section 1677(7)(G) requires the USITC to cumulatively assess the effects of subsidized imports with the effects of imports subject only to AD investigations. India contends that Section 1677(7)(G) results in the inclusion of non-subsidized imports in the assessment of (i) the increase in volume of subsidized imports as well as their effect on domestic prices, under Article 15.2, and (ii) the impact of subsidized imports on the domestic industry, under Article 15.4.⁵⁴² India recalls that, in the CVD investigation at issue, the USITC cumulatively assessed the volume and effects of allegedly subsidized imports with the volume and effects of imports from six countries not subject to simultaneous CVD investigations, which imports must therefore be considered non-subsidized.⁵⁴³

7.329. As a result of the cumulative assessment mandated by Section 1677(7)(G), India contends that the causal link between subsidized imports and injury under Article 15.5 of the SCM Agreement is seriously disturbed because the volume, effects and impact of non-subsidized imports are taken into account.⁵⁴⁴ India recalls that Article 15.5 mandates investigating authorities to not attribute to the subsidized imports injury caused by any known factor other than the subsidized imports. In this respect, Article 15.5 lists as a possibly relevant factor "the volume and prices of non-subsidized imports of the product in question".⁵⁴⁵ In the CVD investigation at issue, India contends that the existence of non-subsidized imports was "known" to the USITC at the time of the injury investigation.⁵⁴⁶ However, according to India, the United States failed even to "identify individual shares of the subsidized imports from the total imports, leave alone the volume and price effects, and the consequential impact of such imports."⁵⁴⁷

7.6.1.3.2 United States

7.6.1.3.2.1 Article 15.3 of the SCM Agreement

7.330. The United States makes two main arguments seeking to demonstrate that Section 1677(7)(G) is not "as such" or "as applied" inconsistent with Article 15.3 of the SCM Agreement.⁵⁴⁸

7.331. First, the United States argues that Article 15.3 only addresses the conditions for cumulation of the effects of imports from multiple countries that are subject to simultaneous countervailing duty investigations. Thus, according to the United States, as this provision is silent concerning whether an investigating authority may cumulate the effects of *dumped* and *subsidized* imports in original investigations, it cannot be said to prohibit such practice.⁵⁴⁹ The United States also contends that the *de minimis* subsidy limitation on cumulation raised by India only applies to imports that are "simultaneously subject to countervailing duty investigations". Consequently, it does not limit the types of other unfairly traded imports that may be cumulated with the subsidized imports.⁵⁵⁰ With regard to the country-specific "negligibility" requirement posited by India, the United States submits that Article 15.3 does not define the term "negligibility" in the

⁵⁴¹ India's first written submission, para. 129.

⁵⁴² Ibid. para. 130. See also India's first written submission, paras. 128-132, and 500-501; opening statement at the first meeting of the Panel, paras. 22-23; and second written submission, para. 54.

⁵⁴³ India's first written submission, para. 502. See also India's first written submission, paras. 502-506; and opening statement at the first meeting of the Panel, para. 44.

⁵⁴⁴ India's first written submission, para. 131; closing statement at the first meeting of the Panel, para. 3; and second written submission, paras. 57-58 and 61.

⁵⁴⁵ India's first written submission, paras. 131 and 514.

⁵⁴⁶ Ibid. para. 514.

⁵⁴⁷ Ibid. paras. 513-514. See also India's second written submission, para. 61.

⁵⁴⁸ United States' first written submission, paras. 117, 129 and 147; opening statement at the first meeting of the Panel, para. 20; second written submission, para. 81; and opening statement at the second meeting of the Panel, para. 51.

⁵⁴⁹ United States' first written submission, paras. 83 and 117-120; opening statement at the first meeting of the Panel, para. 20; second written submission, para. 90; and opening statement at the second meeting of the Panel, para. 52.

⁵⁵⁰ United States' first written submission, para. 130.

manner proposed by India, and argues that the type of aggregated analysis provided for by the US statute is not inconsistent with this provision.⁵⁵¹

7.332. Second, the United States asserts that the relevant context of Article 15.3 of the SCM Agreement, and the object and purpose of the SCM Agreement and AD Agreement support the proposition that cumulation of the effects of dumped and subsidized imports is permitted.⁵⁵² With respect to the relevant context, the United States notes that the AD Agreement and the SCM Agreement contain nearly identical provisions on injury analysis, including cumulation. The United States recalls that provisions in both agreements allow investigating authorities to consider the cumulative effect of unfairly traded imports from multiple sources, given that imports can have a cumulative injurious impact on the domestic industry. The United States submits that Article 15.3 of the SCM Agreement should be read in the context of the WTO Agreement as a whole, including in particular the AD Agreement.⁵⁵³ In addition, the United States notes that Article VI:6(a) of the GATT 1994 is referred to by Article 15.1 of the SCM Agreement and Article 3.1 of the AD Agreement.⁵⁵⁴ The United States argues that Article VI:6(a) supports the view that "cross-cumulation" is permitted because it refers to "injury" in the singular when addressing "the effect of the dumping or subsidization".⁵⁵⁵

7.333. Turning to the object and purpose of the Agreements, the United States refers to the Appellate Body's reports in *EC – Tube or Pipe Fittings* and *US – Oil Country Tubular Goods Sunset Reviews* which reflect the view that cumulation of the effects of imports from multiple countries is a critical component of the injury analysis authorized in the AD Agreement. The United States argues that the same reasoning is applicable to a situation where dumped *and* subsidized imports are having a simultaneous injurious impact on an industry.⁵⁵⁶ The United States contends that an analysis focused solely on the effects of either dumped or subsidized imports alone would necessarily prevent the investigating authority from adequately taking into account the injurious effects of all unfairly traded imports, and consequently frustrate the purpose of both the SCM Agreement and the AD Agreement.⁵⁵⁷

7.6.1.3.2.2 Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement

7.334. The United States submits that there is no basis for India's "as such" and "as applied" claims under these provisions for several reasons.⁵⁵⁸ First, "to the extent that the Panel agrees [that] the cumulation of subsidized and dumped imports is not inconsistent with Article 15.3, it would necessarily be reasonable for an investigating authority to analyze the volume and price effects of subsidized and dumped imports on the industry, as provided under Articles 15.1, 15.2, 15.3 and 15.4."⁵⁵⁹ Second, the phrase "subsidized imports" in these provisions does not limit the scope of an authority's injury investigation. If an investigating authority assesses the larger group of unfairly traded imports, which includes all subsidized imports, such assessment will necessarily address the effects of subsidized imports.⁵⁶⁰ Third, the United States argues that the injury assessments cannot be limited to "subsidized imports" because of practical difficulties for investigating authorities to disentangle the effects of dumped imports from those of subsidized

⁵⁵¹ The United States submits that the definition of "negligibility" contained in Article 5.8 of the AD Agreement is relevant context to interpret Article 15.3 of the SCM Agreement. The United States contends that Article 5.8 permits the type of aggregated analysis provided in the US statute. United States' first written submission, para. 132 and fn. 222. See also opening statement at the second meeting of the Panel, paras. 64-65.

⁵⁵² United States' first written submission, paras. 83 and 126; and opening statement at the second meeting of the Panel, paras. 51 and 57.

⁵⁵³ United States' first written submission, paras. 125 and 127; opening statement at the first meeting of the Panel, paras. 21-23; and opening statement at the second meeting of the Panel, paras. 53 and 57-58.

⁵⁵⁴ United States' response to Panel question Nos. 57, paras. 54-55; and 60, para. 69.

⁵⁵⁵ United States' response to Panel question No. 57, para. 54; and opening statement at the second meeting of the Panel, para. 58.

⁵⁵⁶ United States' first written submission, paras. 123-125; and second written submission, para. 93, fn. 164.

⁵⁵⁷ United States' first written submission, paras. 122 and 126; and opening statement at the second meeting of the Panel, para. 56.

⁵⁵⁸ United States' first written submission, para. 147.

⁵⁵⁹ Ibid. para. 133.

⁵⁶⁰ United States' response to Panel question No. 57, paras. 54-57.

imports.⁵⁶¹ In addition, the United States submits two separate arguments referring respectively to Articles 15.4 and 15.5 of the SCM Agreement. The United States contends that the existence of dumped imports in the marketplace is a "relevant factor", for purposes of Article 15.4 of the SCM Agreement, and argues that it would be anomalous for the Panel to find that an authority could not cumulatively assess both sets of unfairly traded imports.⁵⁶² The United States also argues that, because an authority may cumulate the injurious effects of all unfairly traded imports that are simultaneously affecting the industry, the authority need not perform a non-attribution analysis for unfairly traded imports that are cumulated in its analysis.⁵⁶³

7.335. Finally, the United States submits that, contrary to India's assertion, the record of the CVD investigation at issue does not show that the USITC's cumulative analysis made it more likely that it would find injury caused by the subsidized imports than if it had not cumulated them with dumped imports.⁵⁶⁴

7.6.1.4 Main arguments of the third parties

7.6.1.4.1 European Union

7.336. The European Union submits that Article 15.3 of the SCM Agreement only permits the cumulation of subsidized imports if three conditions are met. First, the amount of subsidization from each country must be more than *de minimis*, otherwise imports cannot be considered as "subsidized imports". Second, the volume of imports from each country must not be negligible. If either of these two conditions is not met, the investigation with respect to imports from that particular country must be terminated pursuant to Article 11.9 of the SCM Agreement. Third, the cumulative assessment must be appropriate in light of the conditions of competition between imported products and between imported products and the like domestic product.⁵⁶⁵

7.337. The European Union contends that the inclusion of non-subsidized dumped imports in the volume of subsidized imports for purposes of injury assessment in a CVD investigation "would not be based on any provision of the SCM Agreement and would be illogical."⁵⁶⁶ The European Union argues that "cumulation of imports makes sense in the context of investigation of the *same* phenomenon (dumping or subsidies), where the objective is to determine the total impact of the imports at issue on the domestic industry."⁵⁶⁷

7.6.1.5 Evaluation

7.338. India submits two sets of closely related claims relating to Section 1677(7)(G). First, India claims that Section 1677(7)(G) is "as such" and "as applied" inconsistent with Article 15.3 of the SCM Agreement. India argues that, in certain situations, the US provision requires the cumulative assessment of the effects of subsidized imports with the effects of imports not subject to simultaneous countervailing duty investigations.⁵⁶⁸ Second, India claims that Section 1677(7)(G) is "as such" and "as applied" inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, because, in certain situations, the US provision requires that the assessment of injury be based on *inter alia* the volume, effects and impact of non-subsidized, dumped imports.⁵⁶⁹

⁵⁶¹ United States' response to Panel question No. 56, paras. 49-53; second written submission, paras. 90-91; and opening statement at the second meeting of the Panel, paras. 55-56.

⁵⁶² United States' first written submission, para. 134.

⁵⁶³ United States' response to Panel question No. 58, para. 59.

⁵⁶⁴ United States' first written submission, paras. 148-149.

⁵⁶⁵ European Union's third-party submission, paras. 63, 65-66, 70-72.

⁵⁶⁶ Ibid. para. 67.

⁵⁶⁷ Ibid. para. 69. (emphasis original)

⁵⁶⁸ India's first written submission, paras. 109-115 and 497-499; opening statement at the first meeting of the Panel, paras. 21 and 41-42; second written submission, paras. 52 and 56; and opening statement at the second meeting of the Panel, para. 18.

⁵⁶⁹ India's first written submission, paras. 128-132, 500-506 and 510-517; opening statement at the first meeting of the Panel, paras. 22-23 and 44; and second written submission, paras. 54 and 260.

7.6.1.5.1 Whether Section 1677(7)(G) is "as such" and "as applied" inconsistent with Article 15.3 of the SCM Agreement

7.339. The issue before the Panel is whether the SCM Agreement permits the cumulative assessment of the effects of imports that are subject to a CVD investigation with the effects of imports that are subject only to a parallel AD investigation ("cross-cumulation"). Conceptually, this issue relates to whether the SCM Agreement only allows an investigating authority to consider cumulatively, that is, together or as a whole, the effects of one set of imports of a product (those subject to simultaneous CVD investigations), or whether it also allows an investigating authority to consider together or as a whole the effects of two sets of imports of the same product (those subject to simultaneous CVD investigations *and* those subject only to parallel, simultaneous AD investigations).⁵⁷⁰ This issue arises because, pursuant to Section 1677(7)(G), the United States shall undertake, in certain situations, a single injury assessment for "unfairly traded imports"⁵⁷¹, that is, subsidized imports and dumped imports when there are simultaneous countervailing and anti-dumping investigations of the same product from different countries.⁵⁷² The SCM and AD Agreements regulate investigations for subsidized and dumped imports – including injury determinations – separately.

7.340. In our view, Section 1677(7)(G) requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports.

7.6.1.5.1.1 The text of Article 15.3 of the SCM Agreement

7.341. We begin our examination with the text of Article 15.3 of the SCM Agreement. This provision starts with the phrase:

Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if

We agree with India that the term "simultaneously" suggests that imports under consideration must all be subject to CVD investigations at the same time.⁵⁷³ In our view, the plain text of Article 15.3 only allows a cumulative assessment of the effects of imports which are *simultaneously subject to countervailing duty investigations*.⁵⁷⁴ We consider that this fact, that imports are subject to simultaneous CVD investigations, is a necessary pre-condition for a cumulative assessment to be undertaken consistently with Article 15.3.⁵⁷⁵ Imports which are only the subject of a parallel, simultaneous anti-dumping duty investigation plainly do not satisfy this requirement as a matter of fact. Thus, we agree with India both that the requirement that imports be subject to a CVD investigation is a threshold requirement for cumulation, and that under Article 15.3 the effects of imports which are not subject to CVD investigation cannot be cumulatively assessed with those of imports which are subject to CVD investigation.⁵⁷⁶

⁵⁷⁰ India clarified that its challenges are limited to "[c]umulation of subsidized imports with dumped imports, where all the dumped imports are not subsidized". India expresses no opinion on the cumulation of subsidized imports, where all imports are also simultaneously dumped. India's second written submission, paras. 48-49; and response to Panel question No. 32. Thus, our examination and findings are limited to the "cross-cumulation" of the effects of subsidized imports with the effects of non-subsidized, dumped imports. We need not and do not examine any other type or form of cumulative assessment involving subsidized and dumped imports in this report.

⁵⁷¹ We note that, although this expression is not found in the US provision at issue, it is repeatedly used by the United States in its arguments. See, e.g., United States' first written submission, paras. 83, 121-122, 125-126, 130, and 134.

⁵⁷² United States' response to Panel question No. 61, para. 70.

⁵⁷³ India's first written submission, para. 111.

⁵⁷⁴ We note that, although the expression "subsidized imports" is not explicitly used in Article 15.3, both parties agree that Article 15.3 only refers to imports that are "simultaneously subject to countervailing duty investigations". India's first written submission, para. 111; United States' first written submission, para. 117; and second written submission, para. 90.

⁵⁷⁵ We note that the text of Article 15.3 also lists a number of conditions that must be fulfilled for an investigating authority to cumulatively assess the effects of the imports at issue.

⁵⁷⁶ India's first written submission, para. 111; and opening statement at the second meeting of the Panel, para. 18.

7.342. The United States argues that Article 15.3 of the SCM Agreement does not regulate "cross-cumulation", because this provision only addresses the conditions for cumulation of the effects of imports from multiple countries that are *subject to simultaneous CVD investigations*, but does not address the possibility of "cross-cumulation" of other imports that are not subject to CVD investigation. Thus, the United States contends that Article 15.3 does not prohibit the cumulation of the effects of subsidized imports with the effects of other unfairly traded imports, namely non-subsidized, dumped imports.⁵⁷⁷ We understand the United States' argument to be anchored in its view that Article 15.3 does not regulate the type of "cross-cumulation" at issue here because its *scope of application* is limited by the expression "simultaneously subject to countervailing duty investigations". In other words, for the United States, Article 15.3 simply does not address the question whether a cumulative assessment of the effects of imports which are not subject to simultaneous CVD investigations is permissible.

7.343. We are unable to reconcile the United States' position with the text of Article 15.3 in the overall context of Article 15 of the SCM Agreement. As noted above, Article 15.3 only refers to imports that are "simultaneously subject to countervailing duty investigations". In addition, as discussed further below, all the provisions in Article 15 refer only to "subsidized imports" in setting out the requirements for injury determinations. It is clear to us that the *object* of the analysis to be made under Article 15 is injury caused by "subsidized imports", and not injury caused by "unfairly traded imports". In our view, it would not be reasonable to conclude that Article 15, in specifying criteria for an examination of injury based on the effects of subsidized imports, would nevertheless allow – or at least not prevent – the inclusion of non-subsidized imports in that analysis without at least an indication in the text to that effect. While imports subject to an anti-dumping investigation may be unfairly traded, they are clearly not subsidized imports, and the United States does not contend otherwise. We decline to read into the text of Article 15.3 an implicit authorization to consider non-subsidized imports in assessing injury caused by subsidized imports. As stated above, in our view, the expression "simultaneously subject to countervailing duty investigations" in Article 15.3 establishes a necessary pre-condition for cumulative assessment of the effects of the imports in question – i.e. that they must be subject to countervailing duty investigations – rather than a limitation on the scope of application of Article 15.3.⁵⁷⁸

7.344. Thus, we consider that Article 15.3 does not authorize investigating authorities to cumulatively assess the effects of imports that are not subject to simultaneous CVD investigations with the effects of imports which are subject to CVD investigation, for purposes of making an injury determination in a countervailing duty investigation.

7.6.1.5.1.2 The relevant context of Article 15.3 of the SCM Agreement

7.345. We consider that the whole of Article 15 of the SCM Agreement and Article VI:6(a) of the GATT 1994 provide relevant context for our understanding of Article 15.3, which supports our view that only the effects of imports subject to simultaneous CVD investigations may be assessed cumulatively for purposes of an injury analysis in a countervailing duty investigation.

7.346. Article 15.3 is the only provision of the SCM Agreement that specifically addresses cumulation, and it allows for such analysis only if certain specific criteria are satisfied. Moreover, there is nothing in Article 15.3, or in the rest of Article 15, that suggests that there is any possibility for cumulation in circumstances other than those provided for in Article 15.3, i.e. where imports are simultaneously subject to CVD investigations and the criteria in that provision are satisfied. Articles 15.1, 15.2, 15.4 and 15.5, which set out the different elements required for injury analysis, consistently refer to "subsidized imports". There is no mention in any of these

⁵⁷⁷ United States' first written submission, paras. 83 and 117-120; opening statement at the first meeting of the Panel, para. 20; second written submission, para. 90; and opening statement at the second meeting of the Panel, para. 52.

⁵⁷⁸ Taking this view, we need not and do not address India's additional arguments relating to whether (i) the amount of subsidization from each country is more than *de minimis*, and (ii) the volume of imports from each country is not negligible. India's first written submission, paras. 116-127 and 497-499; opening statement at the first meeting of the Panel, para. 22; second written submission, paras. 72-73; and closing statement at the second meeting of the Panel, para. 4.

provisions of other "unfairly traded" imports.⁵⁷⁹ This express limitation of the imports to be considered under Article 15 suggests to us that, in an injury analysis under that provision, the effects of other "unfairly traded" imports is not a relevant consideration because such imports are not "subsidized imports".

7.347. Turning to Article VI of the GATT 1994, we first note that this provision is referred to in Article 15.1 of the SCM Agreement.⁵⁸⁰ Article VI:6(a) provides in relevant part:

No contracting party shall levy any anti-dumping or countervailing duty ... 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 ... (emphasis added)

As Article VI of the GATT 1994 concerns both anti-dumping and countervailing duties, Article VI:6(a) specifically refers to both types of duties. However, the text of Article VI:6(a) refers to the "effect of the dumping or subsidization, as the case may be". The United States argues that this phrase indicates that "the injury investigation may involve an examination of the injurious effects of dumped imports, subsidized imports, or dumped and subsidized imports."⁵⁸¹ However, the United States appears to read an additional alternative into the text of Article VI:6(a). We agree with India that this phrase suggests that injury may be caused by either the effect of the subsidy (one "case") or the effect of dumping (the other "case").⁵⁸² In our view, the phrase "as the case may be" more logically can be understood to refer to one of the two alternatives expressly listed in this provision. The third alternative posited by the United States – "dumped and subsidized imports", or "unfairly traded imports" – is not present in Article VI:6(a). In our view, this supports our understanding of Article 15.3 that, for purposes of injury analysis in a countervailing duty investigation, the effects of subsidized imports may not be "cross-cumulated" with the effects of non-subsidized, dumped imports, since to do so would create an additional third "case", the effect of dumping *and* subsidy, not envisaged by Article VI:6(a).

7.348. Moreover, we consider that the use of the conjunction "or" instead of "and" in this phrase suggests on its face that these effects are not to be considered cumulatively but rather separately. The United States submits that "or" should be read as "an inclusive 'or', meaning 'and/or'."⁵⁸³ In our view, the United States' view that Article VI:6(a) allows the consideration of the effects of both dumped imports and subsidized imports does not comport with the use of the word "effect" in the singular immediately before the reference to "dumping or subsidization". For Article VI:6(a) to be understood as the United States does, as referring to the effects of both dumping and subsidization on a cumulative basis, one would have expected to see the plural "effects" rather than the singular.

7.349. The United States also argues that the use in Article VI:6(a) of the term "injury" in the singular "points toward the assessment on a cumulated basis of the effects of the unfairly traded imports, whether subsidized or dumped."⁵⁸⁴ However, in our view, the use of the term "injury" in the singular does not support the United States' view. If anything, it suggests the opposite, as it relates logically to a single injury determination as a result of the "effect" of the dumping, or the "effect" of the subsidization, "as the case may be".

⁵⁷⁹ Article 15.5 does require investigating authorities to not attribute to the subsidized imports any injury caused by, *inter alia*, the volumes and prices of non-subsidized imports of the product in question. In our view, this does not lend any support to the United States' arguments. First, it seems to us that this non-attribution analysis is not a part of the affirmative determination whether subsidized imports are causing injury, but is a possible circumstance that would undermine or detract from such a determination. In addition, and more importantly, "non-subsidized imports" in this context may be fairly traded or unfairly traded. If the latter, the analysis under Article 15.5 would not lead to a finding of injury by such imports, but rather a possible finding that the injurious effects of such imports are such as to preclude or undermine a finding of injury by the subsidized imports under investigation. We cannot, in this context, agree with the United States that such non-subsidized imports can be affirmatively considered in the assessment of injury in a cumulative analysis.

⁵⁸⁰ United States' response to Panel question Nos. 57, paras. 54-55, and 60, para. 69; and opening statement at the second meeting of the Panel, para. 58.

⁵⁸¹ United States' response to Panel question No. 60, paras. 66-68.

⁵⁸² India's second written submission, para. 65.

⁵⁸³ United States' response to Panel question No. 60, para. 68.

⁵⁸⁴ United States' responses to Panel questions Nos. 57, para. 54; and 61, para. 72.

7.350. We note that the United States' arguments relating to Article VI:6(a) place emphasis on the fact that this provision regulates both anti-dumping and countervailing duties. However, the United States has not explained why Article VI:6(a) would support the conclusion that "cross-cumulation" is permitted, when the relevant provisions on injury determination in the SCM and AD Agreements – which implement the provisions of Article VI of the GATT 1994 in the application of anti-dumping and countervailing measures⁵⁸⁵ – do not refer to "subsidized and/or dumped imports". Rather, Articles 15 of the SCM Agreement and Article 3 of the AD Agreement refer only to "subsidized imports" and "dumped imports" respectively.⁵⁸⁶

7.351. Finally, we note that the United States argues that Article 15.3 of the SCM Agreement should be interpreted in light of Article 3.3 of the AD Agreement; the parallel provision regulating cumulation in AD investigations. According to the United States, "cross-cumulation" is permitted because both Article 15.3 and Article 3.3 allow investigating authorities to consider the cumulative effect of unfairly traded imports from multiple sources.⁵⁸⁷ Thus, according to the United States, an investigating authority may "cross-cumulate" the effects of dumped imports in a CVD investigation because dumped imports are unfairly traded imports.⁵⁸⁸ However, we note that Article 15.3 and Article 3.3 do not refer to "unfairly traded imports". Article 15.3 allows, under certain conditions, the cumulative assessment of the effects of imports subject to simultaneous CVD investigations. Article 3.3 allows, under certain conditions, the cumulative assessment of the effects of imports subject to simultaneous AD investigations. Since neither provision refers to "cross-cumulation", it is unclear to us why the authorization to cumulate in each type of investigation would, in addition, allow investigating authorities to "cross-cumulate" the effects of non-subsidized but dumped imports in CVD investigations.

7.6.1.5.1.3 Object and purpose of the SCM Agreement

7.352. Relying on the Appellate Body reports in *EC – Tube or Pipe Fittings* and *US – Oil Country Tubular Goods Sunset Reviews*, the United States also refers to the object and purpose of the SCM Agreement to support its position regarding "cross-cumulation". The United States submits that the Appellate Body recognized that the ability to cumulate the injurious effects of unfairly traded imports from multiple countries is a critical component of the injury analysis authorized in the AD and SCM Agreements.⁵⁸⁹ The United States contends that an analysis focused solely on the effects of either dumped or subsidized imports alone would necessarily prevent the investigating authority from adequately taking into account the injurious effects of all unfairly traded imports, and consequently frustrate the purpose of both the SCM Agreement and the AD Agreement.⁵⁹⁰

7.353. In *EC – Tube or Pipe Fittings*, the Appellate Body examined whether an investigating authority must first analyse the volumes and prices of dumped imports on a country-by-country basis under Article 3.2 of the AD Agreement as a pre-condition to cumulatively assessing the effects of the dumped imports under Article 3.3 of the AD Agreement. *EC – Tube or Pipe Fittings* concerned a cumulative assessment of the effects of imports from multiple countries subject to simultaneous AD investigations, and did not raise issues relating to "cross-cumulation". The

⁵⁸⁵ Article 10 of the SCM Agreement and Article 1 of the AD Agreement.

⁵⁸⁶ See fn. 579 above. Our comments concerning Article 15.5 of the SCM Agreement relate equally to the parallel provision of the AD Agreement, Article 3.5.

⁵⁸⁷ United States' first written submission, paras. 125 and 127; and opening statement at the first meeting of the Panel, paras. 21-23.

⁵⁸⁸ The United States compares two scenarios to support its rationale. In the first scenario, imports from five countries are found to be subsidized. When considered separately, the subsidized imports from country A do not cause material injury to the domestic industry. However, when the effects of such imports are cumulated with the effects of the subsidized imports from the other four countries, the subsidized imports are found to be causing injury to the domestic industry. In the second scenario, imports from the same five countries are found to be dumped, but only the imports from country A are found to be subsidized. The unfairly traded imports have the same volume and price effects on the domestic industry as in the first scenario. The United States argues that in both scenarios imports from all five countries are unfairly traded and injuring the industry in exactly the same manner. However, if "cross-cumulation" is not permitted, the subsidized imports from country A would only be subject to countervailing duties in the first scenario. United States' opening statement at the first meeting of the Panel, paras. 22-24. See also United States' opening statement at the second meeting of the Panel, para. 57.

⁵⁸⁹ United States' first written submission, paras. 121 and 124-125.

⁵⁹⁰ Ibid. paras. 122 and 126; and opening statement at the second meeting of the Panel, para. 56.

Appellate Body explained the rationale for cumulation of the effects of dumped imports, the only issue that was before it, as follows:

A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. ... In our view, therefore, by expressly providing for cumulation in Article 3.3 of the *Anti-Dumping Agreement*, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.⁵⁹¹

In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body addressed whether a cumulative analysis of the effects of dumped imports is permissible in sunset reviews under Article 11.3 of the AD Agreement. *US – Oil Country Tubular Goods Sunset Reviews* did not include issues relating to "cross-cumulation". The Appellate Body stated that:

Although *EC – Tube or Pipe Fittings* concerned an original investigation, we are of the view that this rationale is equally applicable to likelihood-of-injury determinations in sunset reviews. Both an original investigation and a sunset review must consider possible sources of injury ... Injury to the domestic industry—whether *existing* injury or *likely future* injury—might come from several sources simultaneously, and the cumulative impact of those imports would need to be analyzed for an injury determination.

Therefore, notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination as to whether to impose—or continue to impose—anti-dumping duties on products from those sources.⁵⁹²

7.354. Both Appellate Body reports highlight the usefulness of cumulation for examining the impact of imports from all sources of dumped, or likely to be dumped, imports in assessing injury or the need for continuation of an anti-dumping measure. Although these reports refer only to dumped imports, the United States submits that they are equally relevant to investigations involving both subsidized and dumped imports.⁵⁹³ However, the United States does not clearly explain why the Appellate Body's understanding of the rationale for cumulation of the effects of dumped or subsidized imports justifies the "cross-cumulation" of the effects of both types of imports. In these reports, the Appellate Body only considered cumulation in the context of investigations and reviews under the AD Agreement, and thus was concerned only with cumulation of the effects of one type of unfairly traded imports, dumped or likely dumped imports. Reading both passages together, it is clear that the Appellate Body's reference to "all sources of injury" is simply a rejection of a country-specific analysis, and does not address the possibility of "cross-cumulation", an issue which, as noted, was not before it. Nothing in these passages suggests, as the United States argues, that a conclusion that "cross-cumulation" is not provided for in Article 15.3 of the SCM Agreement would prevent an investigating authority from taking into account the injurious effect of all unfairly traded imports which are *relevant* under the SCM Agreement – subsidized imports. Therefore, in our view, the Appellate Body's views, which were made in the context of analysis of the AD Agreement, do not give any support for the United States' understanding.

7.355. As for the object and purpose of the SCM Agreement, the United States appears to understand from these Appellate Body reports that "the object and purpose of the SCM and

⁵⁹¹ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 116.

⁵⁹² Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 296-297.

⁵⁹³ United States' first written submission, para. 125; opening statement at the first meeting of the Panel, para. 21; response to Panel question No. 59, para. 64; second written submission, para. 93; and opening statement at the second meeting of the Panel, para. 53.

AD Agreements ... authorize Members to provide relief to industries that are being injured by unfairly traded imports from a variety of sources."⁵⁹⁴ However, it is unclear to us that this is an accurate reflection of the object and purpose of these Agreements.⁵⁹⁵ Indeed, the United States does not identify an actual object and purpose of the SCM Agreement that could assist the Panel in interpreting Article 15.3 of the SCM Agreement. In addition, as seen above, the United States' understanding of "sources of injury" does not comport with our understanding of the views expressed in the Appellate Body reports on which the United States relies. Given that our understanding of Article 15.3 is based squarely on the text of that provision, in its context, we fail to see anything in the United States' arguments concerning object and purpose of the SCM Agreement that would outweigh that understanding so as to authorize "cross-cumulation" in CVD investigations.

7.6.1.5.1.4 Conclusion

7.356. Therefore, in light of the above, the Panel upholds India's claims that Section 1677(7)(G) is inconsistent with Article 15.3 of the SCM Agreement "as such" and "as applied" in the original investigation at issue.⁵⁹⁶

7.6.1.5.2 Whether Section 1677(7)(G) is "as such" and "as applied" inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement

7.357. Turning to India's claims under Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, the main question before the Panel is whether the use of the expression "subsidized imports" in these provisions limits the scope of the investigating authority's injury assessment only to subsidized imports.

7.358. It is clear to us that Section 1677(7)(G) requires, in certain situations, the USITC to cumulatively assess the effects of subsidized imports with the effects of dumped, non-subsidized imports. In our view, this results in an assessment of injury based on *inter alia* the volume, effect and impact of non-subsidized, dumped imports.

7.359. India's claims relating to Article 15.3 of the SCM Agreement, which we have upheld, are closely related to its claims under Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement. Indeed, we have already considered the latter provisions as relevant context in our consideration of the meaning of Article 15.3. We will follow a consistent approach examining this set of claims.

7.360. We recall our conclusion that the *object* of the analysis to be made under Article 15 of the SCM Agreement is injury caused by "subsidized imports", and not injury caused by "unfairly traded imports". Indeed, we recall that Articles 15.1, 15.2, 15.4 and 15.5, which set out the different

⁵⁹⁴ United States' first written submission, para. 83.

⁵⁹⁵ While the SCM Agreement has no express indication of its object and purpose, the Appellate Body in *US – Carbon Steel* examined the object and purpose of the SCM Agreement and stated that "Part V of the *SCM Agreement* ... permit[s] Members to levy countervailing duties on imported products to offset the benefits of specific subsidies bestowed on the manufacture, production or export of those goods. However, Part V also conditions the right to apply such duties on the demonstrated existence of three substantive conditions (subsidization, injury, and a causal link between the two) and on compliance with its procedural and substantive rules, notably the requirement that the countervailing duty cannot exceed the amount of the subsidy." Appellate Body Report, *US – Carbon Steel*, para. 73. Referring to its report in *US – Carbon Steel*, the Appellate Body in *US – Softwood Lumber IV* stated that the object and purpose of the SCM Agreement is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions." Appellate Body Report, *US – Carbon Steel*, para. 64. Finally, the Appellate Body in *China – GOES* examined the objective of Article 3 of the AD Agreement and Article 15 of the SCM Agreement, and stated that "Articles 3 and 15 are intended to delineate the framework and relevant disciplines for the authority's analysis in reaching a final determination on the injury caused by subject imports, and to ensure that the analysis and the conclusion drawn therefrom is robust." Appellate Body Report, *China – GOES*, para. 153.

⁵⁹⁶ It is undisputed that, in the CVD investigation at issue, the USITC cumulated the effects of subsidized imports from India with the effects of non-subsidized, dumped imports from China, Kazakhstan, Netherlands, Romania, Taiwan, and Ukraine, which were only subject to parallel AD investigations. USITC Preliminary Determinations, pp. 8-11, as quoted in United States' first written submission, para. 97; and USITC Final Determinations, Exhibit IND-9, pp. 16-21, internal pages 9-14. See also United States' response to Panel question No. 117, para. 95.

elements required for injury analysis, consistently refer only to "subsidized imports". As explained above, the express limitation of the imports to be considered under Article 15 suggests to us that, in an injury analysis under that provision, the effects of other "unfairly traded" imports is not a relevant consideration because such imports are not "subsidized imports". Thus, in our view, the use of the term "subsidized imports" in these provisions limits the scope of the investigating authority's injury assessment only to subsidized imports. We also recall our consideration of Article VI:6(a) of the GATT 1994 as context for Article 15.3, and our conclusion that it supports our understanding that the effects of subsidized imports are not to be cumulatively assessed with the effects of non-subsidized, dumped imports. Thus, consistent with our views concerning Article 15.3, it would seem likely that Section 1677(7)(G) is inconsistent "as such" and "as applied" with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement.

7.361. The United States submits two general arguments in support of its views concerning the import of the use of the term "subsidized imports" in Articles 15.1, 15.2 and 15.4 of the SCM Agreement. First, while the United States accepts that the phrase "subsidized imports" "cover[s] imports that an authority has found to have received a subsidy"⁵⁹⁷, the United States submits that this phrase does not limit the scope of an authority's injury investigation. The United States argues that the investigating authority's assessment of a larger group of "unfairly traded" imports, which includes all subsidized imports, will necessarily address the effects of subsidized imports under Articles 15.1, 15.2, and 15.4.⁵⁹⁸ The United States' attempt to expand the coverage of the injury analysis implies that the phrase "subsidized imports" in the provisions at issue refers to the minimum group of imports that must be examined by an investigating authority. We do not accept this view. To us, the phrase "subsidized imports" as used in these provisions is more logically understood to describe with precision the group of imports that must be examined in an injury analysis under those provisions, and not merely the necessary minimum subset of some undefined larger group of "unfairly traded" imports that may be examined in that analysis. We recall, in this context, that the phrase "unfairly traded" imports does not appear in the SCM Agreement. Nor is it clear to us that "unfairly traded" imports would be limited to subsidized and dumped imports, as the United States seems to assume. It is not difficult to conceive of other circumstances in which imports might be considered "unfairly traded". In our view, it is far more likely that the SCM Agreement, in referring to "subsidized imports" in the provisions at issue, describes the entire group of imports to be considered in an injury analysis, and does not leave open the possibility of expanding that group as posited by the United States.

7.362. Second, the United States argues that the injury assessments under Articles 15.1, 15.2 and 15.4 of the SCM Agreement cannot be limited to "subsidized imports" because it is impossible, in practice, for an investigating authority to disentangle the effects of dumped imports from those of subsidized imports.⁵⁹⁹ The United States submits that when subsidized and dumped imports and dumped imports are both having injurious effects on the domestic industry, both groups of imports will have mutually reinforcing negative effects on the industry's pricing and sales levels.⁶⁰⁰

7.363. As an initial matter, we note that the United States' argument appears to have no relevance in respect of the obligation set out in Articles 15.1 and 15.2 of the SCM Agreement to assess the volume of subsidized imports. It is unclear to us why any alleged difficulty in practice to disentangle the *effects* of subsidized imports from the *effects* of dumped imports would affect the investigating authority's ability to examine the *volume* of subsidized imports, including considering whether there has been a significant increase in subsidized imports.

7.364. Articles 15.1, 15.2, and 15.4 further require that investigating authorities examine (i) the effect of the subsidized imports on prices, and (ii) the impact of the subsidized imports on the domestic industry. Again, we do not see the difficulty posited by the United States. The United States asserts that it is difficult to "disentangle" the effects of subsidized imports from those of dumped imports of the same product which may or may not also be subsidized. However, it is not clear to us, and the United States has not explained, how this alleged problem arises. The question before the Panel is whether an investigating authority may consider only subsidized

⁵⁹⁷ United States' response to Panel question No. 57, para. 54.

⁵⁹⁸ Ibid. para. 57.

⁵⁹⁹ United States' response to Panel question No. 56, paras. 49-56; and second written submission, paras. 90-91.

⁶⁰⁰ United States' response to Panel question No. 56, para. 50; and second written submission, para. 91.

imports (regardless of whether such subsidized imports are also dumped) in its injury assessment in countervailing duty investigation, or whether it can also include non-subsidized, dumped imports in that injury assessment. It seems clear to us that an investigating authority can examine the effects of a defined body of imports – subsidized imports – on prices, and the impact of that same body of imports on the domestic industry, consistently with the criteria set out in Articles 15.2 and 15.4, without in addition considering the effects and impact of dumped imports, whether or not those dumped imports are also subsidized.⁶⁰¹ We fail to see how including in the examination of the effects of subsidized imports an additional group of dumped imports which are not subsidized would add anything to the examination of the effects of the subsidized imports. Moreover, the United States appears to ignore that "fairly" traded imports – e.g. more efficiently produced imports – may also have injurious effects on the domestic industry. Thus, the same practical difficulties raised by the United States would appear to arise in this case as well, and yet we do not understand the United States to suggest that the effects of such imports should also be included in an investigating authority's examination of the effects and impact of subsidized imports.⁶⁰² Thus, the "practical difficulty" identified by the United States, to the extent it actually may arise, does not justify expanding the meaning of the term "subsidized imports" to also include dumped imports.

7.365. Finally, the United States submits two separate arguments referring respectively to Articles 15.4 and 15.5 of the SCM Agreement. With respect to Article 15.4, although the United States accepts that Article 15.4 does not contain a "non-attribution" obligation⁶⁰³, the United States contends that, when "subsidized and dumped imports are found to be simultaneously injuring the industry, the existence of the dumped imports in the marketplace is a 'relevant factor' that must be examined by an authority to assess whether those dumped but non-subsidized imports are exacerbating the injury being caused by the subsidized imports."⁶⁰⁴ The United States contends that the phrase "relevant economic factors and indices having a bearing on the state of the industry" in Article 15.4 encompasses factors and indices that are *indicative* of the state of the industry, as well as those that are *responsible* for the state of the industry.⁶⁰⁵

7.366. We are unable to reconcile the United States' argument with the text of Article 15.4 of the SCM Agreement. The introductory sentence of Article 15.4 states that "[t]he 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".⁶⁰⁶ We understand that dumped imports may have caused, or be causing, injury to the same domestic industry under consideration in a countervailing duty case. We also understand that this may be seen in the condition of the domestic industry as reflected in the data concerning the Article 15.4 criteria, and may be a relevant factor having a bearing on the state of the industry. However, we fail to understand how this fact justifies reading the reference to the "impact of the subsidized

⁶⁰¹ The fact that some of those subsidized imports may also be dumped does not affect this analysis, which is in our understanding an examination of the effect or impact of the imports, and not of the effects of the subsidization *per se*. In our view, the "disentangling" problem identified by the United States arises only if an investigating authority is required to examine the injurious effects of subsidization independently of the injurious effects of dumping. Article 15.5 makes clear that the "effects of subsidies" that are relevant to the analysis of injury in a countervailing duty investigation are those set out in paragraphs 2 and 4 of Article 15, both of which refer to the price effects and impact of subsidized imports alone. We do not understand the United States to be arguing to the contrary, and therefore this is not an issue we are required to address or resolve in this dispute. India has made clear that its claims are confined to the cumulation of the effects of subsidized imports with the effects of non-subsidized, dumped imports, and do not relate to the possible disentanglement of the effects of subsidization and dumping in the case of imports that are both subsidized and dumped. India's response to Panel question No. 32; and second written submission, paras. 48-49. In our view, the United States appears to rely on the alleged impossibility of disentangling the injurious effects of subsidization from the injurious effects of dumping in support of its view that cumulative analysis of the effects of subsidized imports with the effects of dumped imports is permissible. United States' response to Panel question No. 56, paras. 49-51; response to Panel question No. 58, para. 60; and second written submission, para. 90.

⁶⁰² Of course, as discussed above, in fns. 579 and 586, the injurious effects of such imports must not be attributed to the subsidized, or dumped, imports at issue in a countervailing or anti-dumping investigation under the SCM or AD Agreement, as the case may be.

⁶⁰³ United States' response to Panel question No. 116(a), para. 92.

⁶⁰⁴ United States' first written submission, para. 134.

⁶⁰⁵ United States' response to Panel question No 116(b), paras. 93-94.

⁶⁰⁶ Article 15.4 of the SCM Agreement. (emphasis added)

imports" in the first sentence of Article 15.4 to include consideration of the impact of dumped, non-subsidized imports on the domestic industry.

7.367. With respect to Article 15.5 of the SCM Agreement, the United States argues that "because an authority may cumulate the injurious effects of all unfairly traded imports that are simultaneously affecting the industry, the authority need not ... perform a non-attribution analysis for unfairly traded imports that are cumulated in its analysis."⁶⁰⁷ This element of the United States' submission fails because we have found above that an investigating authority may not cumulate the injurious effects of all "unfairly traded" imports that are simultaneously affecting the industry.

7.368. The United States also holds that a finding contrary to "cross-cumulation" would "negate the authority's cumulated analysis because it would require the authority to assess certain groups of cumulated imports as though they were not unfairly traded sources of injury."⁶⁰⁸ In our view, the United States' arguments import elements into Article 15.5 which are not found in the text of this provision. Article 15.5 of the SCM Agreement requires an investigating authority to "examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry", identifies "the volume and prices of non-subsidized imports of the product in question" as a factor which may be relevant in this respect, and requires the investigating authority to ensure that "the injuries caused by these other factors [are] not attributed to the subsidized imports."⁶⁰⁹ The United States contends that dumped imports are not an "other known factor" of injury.⁶¹⁰ We do not agree. In our view, the reference in Article 15.5 to "non-subsidized imports" as an "other known factor" would also include "non-subsidized, dumped imports". The text of this provision does not suggest that whether non-subsidized imports are "fairly" or "unfairly" traded must be determined, or, indeed, is even relevant. Rather, the relevant consideration in this respect is that the imports considered in a non-attribution analysis are not subsidized, so as to ensure that injury caused by other factors, including non-subsidized imports, is not attributed to *subsidized* imports.

7.6.1.5.2.1 Conclusion

7.369. Therefore, in light of the above, the Panel upholds India's claims that Section 1677(7)(G) is inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement "as such" and "as applied" in the original investigation at issue.⁶¹¹

7.6.2 Whether Article 15 of the SCM Agreement applies to sunset reviews

7.370. India claims that Sections 1675a(a)(7) and 1675b(e)(2) are "as such" inconsistent with Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement because they require a cumulative assessment of the effects of both subsidized and non-subsidized imports in sunset reviews.⁶¹² In addition, India claims that Section 1675a(a)(7), "as applied" in the sunset review at issue here, is inconsistent with Articles 15.1-15.5 and 21.3 of the SCM Agreement for essentially the same reasons.⁶¹³

7.6.2.1 Relevant WTO provisions

7.371. Article 21.3 of the SCM Agreement provides:

⁶⁰⁷ United States' response to Panel question No. 58, para. 59.

⁶⁰⁸ Ibid.

⁶⁰⁹ The Appellate Body has explained that the non-attribution language of Article 15.5 of the SCM Agreement requires that "an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the [subsidized] imports". Appellate Body Report, *China – GOES*, para. 150, quoting the Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

⁶¹⁰ United States' response to Panel question No. 58, para. 59.

⁶¹¹ It is undisputed that, in the CVD investigation at issue, the USITC cumulated the effects of subsidized imports from India with the effects of non-subsidized, dumped imports from China, Kazakhstan, Netherlands, Romania, Taiwan, and Ukraine, which were only subject to parallel AD investigations. USITC Preliminary Determinations, pp. 8-11, as quoted in United States' first written submission, para. 97; and USITC Final Determinations, Exhibit IND-9, pp. 16-21, internal pages 9-14. See also United States' response to Panel question No. 117, para. 95.

⁶¹² India's first written submission, paras. 136-137, 146, 148-149 and 152.

⁶¹³ Ibid. paras. 518-519 and 521.

Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.⁵² The duty may remain in force pending the outcome of such a review.

⁵² When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

7.372. Footnote 45 to Article 15 provides:

Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

7.373. Articles 15.1, 15.2, 15.3, 15.4, and 15.5 of the SCM Agreement are set forth above.⁶¹⁴

7.6.2.2 Factual background

7.374. India's claims relating to cumulative assessment in sunset reviews refer to two provisions: Sections 1675a(a)(7) and 1675b(e)(2). Section 1675a(a)(7) regulates cumulation with respect to the determination of likelihood of continuation or recurrence of material injury in sunset reviews (under Section 1675(c)).⁶¹⁵ It provides as follows:

For purposes of this subsection, the Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

7.375. Section 1675b(e)(2) regulates cumulation of the effects of imports in investigations concerning countries that were not GATT signatories⁶¹⁶ and simultaneous expedited sunset reviews (under Section 1675(c)). It provides as follows:

If a review under Section 1675(c) of this title is initiated under paragraph (1), such review shall be treated as having been initiated on the same day as the investigation under this Section, and the Commission may, in accordance with Section 1677(7)(G) of this title, cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which such investigations are treated as initiated on the same day.

7.376. In its likelihood-of-injury assessment for purposes of the sunset review in the case at hand, the USITC cumulated the effects of imports from India with those of imports from five other countries. Of these, imports from only two countries (Indonesia and Thailand) were subject to sunset reviews of the countervailing duty orders. Imports from the remaining three countries

⁶¹⁴ See paras. 7.317-7.321 above.

⁶¹⁵ The provision also regulates cumulation in changed circumstances reviews (under Section 1675(b)), which are not at issue in this dispute.

⁶¹⁶ Both parties agree that this provision does not apply to cumulation in changed circumstances review. See India's response to Panel question No. 31, and United States' first written submission, fn. 112.

(China, Taiwan, and Ukraine) were only subject to sunset reviews of the anti-dumping duty orders.⁶¹⁷

7.6.2.3 Main arguments of the parties

7.6.2.3.1 India

7.377. India notes that, although Article 21.3 of the SCM Agreement is silent on whether cumulation is permitted, this provision uses the term "injury" in regulating sunset reviews. India argues that this term has a specific meaning within the SCM Agreement flowing from footnote 45 to Article 15 of the SCM Agreement. According to India, unless otherwise specified, a reference to "injury" in the SCM Agreement means "injury" that has been determined in accordance with Article 15.⁶¹⁸ As Article 15.3 of the SCM Agreement is the sole provision dealing with cumulation, India contends that, for purposes of sunset reviews under Article 21.3, Article 15.3 results in an obligation to not cumulatively assess likely subsidized goods with non-subsidized goods when determining the "likelihood" of injury.⁶¹⁹ India refers to its arguments relating to the inconsistency of Section 1677(7)(G) with Articles 15.3 and 15.5 of the SCM Agreement in support of its argument. For essentially the same reasons, India claims that Section 1675a(a)(7) is inconsistent with Articles 15.3 and 15.5.⁶²⁰ Relying on the panel in *EU – Footwear (China)*, India further argues that a causal link analysis which is inconsistent with Article 15.5 during the original investigation will remain tainted and still inconsistent with Article 15.5 even during the sunset review.⁶²¹

7.378. Moreover, India notes that although Section 1675a(a)(7) contains the word "may", the consistent practice of the USITC over a long period of time reveals that it does not have any discretion in reality to choose not to cumulate non-subsidized imports.⁶²² Alternatively, even if the United States retains the discretion under Section 1675a(a)(7) to not cumulatively assess imports from non-subsidizing countries, India claims that Section 1675a(a)(7) would still be inconsistent with Articles 15.1-15.5 of the SCM Agreement.⁶²³ India argues that an interpretation of Article 15.3 in good faith should not allow the United States to enact legislation permitting cumulative assessment of imports where the conditions of Article 15.3 are not met, as it would reserve the right of the United States to perform an act which the United States had promised not to do.⁶²⁴

7.379. India also argues that Section 1675a(a)(7) is inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement because it mandates or, alternatively permits, the investigating authority to cumulate the effects of both subsidized and non-subsidized imports for purposes of determining injury.⁶²⁵

7.380. India recalls that, in the sunset review determination at issue, the USITC cumulatively assessed the likely volume, price effects and impact of subsidized imports with those of non-subsidized imports because it included imports from China, Taiwan and Ukraine in its analysis, even though no subsidies were alleged against these three countries.⁶²⁶ India contends that the United States determined the likelihood of continuation or recurrence of injury based on subsidized and non-subsidized imports.⁶²⁷ India claims that this application of Section 1675a(a)(7) was

⁶¹⁷ India's first written submission, para. 519; United States' first written submission, para. 108, and response to Panel question No. 63, fn. 62; and Hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine, Investigation Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (review), October 2007, publication 3956 ("USITC Sunset Determinations"), Exhibit USA-10, p. 18.

⁶¹⁸ India's first written submission, paras. 137-138.

⁶¹⁹ Ibid. paras. 139-141; and second written submission, paras. 75-78.

⁶²⁰ India's first written submission, paras. 141-142.

⁶²¹ Ibid. para. 142, citing the Panel Report, *EU – Footwear (China)*, para. 7.495; and response to Panel question No. 34.

⁶²² India's first written submission, paras. 134-135; and second written submission, paras. 83 and 86.

⁶²³ India's first written submission, paras. 143 and 146.

⁶²⁴ Ibid. paras. 144-145.

⁶²⁵ Ibid. paras. 146-149.

⁶²⁶ Ibid. para. 519.

⁶²⁷ Ibid. para. 520.

inconsistent with Articles 15.1-15.5 and 21.3 for the same reasons put forward with respect to its "as such" claims.⁶²⁸

7.381. Turning to Section 1675b(e)(2), India notes that it refers back to Section 1677(7)(G), which requires the cumulative assessment of subsidized and non-subsidized imports. India recalls its arguments that Section 1677(7)(G) is inconsistent with Articles 15.1-15.5 of the SCM Agreement, and for essentially the same reasons, India claims that Section 1675b(e)(2) is also "as such" inconsistent with these provisions of the SCM Agreement.⁶²⁹

7.6.2.3.2 United States

7.382. The United States submits that Section 1675a(a)(7) is not "as such", or "as applied" in the investigation at issue here, inconsistent with Articles 15.3, 15.5 and 21.3 of the SCM Agreement.⁶³⁰ The United States also submits that Section 1675b(e)(2) "has nothing to do with cumulation in changed circumstances reviews".⁶³¹

7.383. The United States submits that, as India has not raised an "as such" or "as applied" claim under Article 21.3 of the SCM Agreement in its panel request, any claim under this provision falls outside the Panel's terms of reference.⁶³²

7.384. In addition, the United States argues that the cumulation requirements in Article 15.3 of the SCM Agreement are not applicable to sunset reviews. The United States refers to Appellate Body's findings that the provisions governing injury determinations in original AD investigations, including cumulation requirements, do not apply to the likelihood of injury analysis in subsequent sunset reviews.⁶³³ Given that there are no pertinent differences between Article 11.3 of the AD Agreement and Article 21.3 of the SCM Agreement, the United States contends that Article 21.3 of the SCM Agreement "imposes no specific limitation on an investigating authority's cumulation decisions in a sunset review."⁶³⁴ In addition, the United States disagrees with India's argument based on the definition of the term "injury" in footnote 45 of the SCM Agreement, and recalls that the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* rejected the very same argument under the AD Agreement.⁶³⁵

7.385. The United States also submits two alternative arguments. First, the United States contends that, even if the provisions of Article 15.3 of the SCM Agreement were understood to apply to sunset reviews, for the same reasons it put forward with respect to India's Article 15.3 claims, this provision does not preclude the cumulation of subsidized and dumped imports in sunset reviews.⁶³⁶ Second, even if Article 15.3 were understood to prohibit cumulation in sunset reviews, the United States argues that India still has no basis for its claims because Section 1675a(a)(7) does not mandate cumulation in sunset reviews; rather it explicitly gives the USITC discretion not to cumulate even when the statutory standards are met.⁶³⁷

7.386. With respect to India's claims under Article 15.5 of the SCM Agreement, the United States points out that India fails to acknowledge that all imports found by USDOC to be subsidized in the original investigation, including those from India, were also found by USDOC to be dumped. Thus, the United States explains that under Article 3.3 of the AD Agreement, the USITC was authorized to cumulate the dumped and subsidized imports for purposes of its injury analysis.⁶³⁸ Moreover,

⁶²⁸ India's first written submission, paras. 518-519 and 521.

⁶²⁹ Ibid. para. 152.

⁶³⁰ United States' first written submission, paras. 137, 140, 147 and 150.

⁶³¹ Ibid. fns. 112 and 252.

⁶³² United States' second written submission, paras. 84-85; and response to Panel question Nos. 63, para. 75, and 64, para. 81.

⁶³³ United States' first written submission, paras. 83 and 137-139; response to Panel question No. 64, para. 83; second written submission, paras. 82-83 and 93; and opening statement at the second meeting of the Panel, paras. 51 and 59-62.

⁶³⁴ United States' first written submission, para. 140.

⁶³⁵ Ibid. para. 141.

⁶³⁶ Ibid. para. 142.

⁶³⁷ Ibid. paras. 89-90 and 143-144; response to Panel question No. 63, para. 77; and response to India's question No. 1, para. 1.

⁶³⁸ United States' first written submission, para. 150.

the United States contends that if the Panel were to conclude that cumulation of subsidized and dumped products is prohibited, "it would require an investigating authority to separate out the injurious effects of imports that result from their status as 'dumped imports' from the effects that are the result of their simultaneous status as 'subsidized imports', even though the imports would, by definition, have the exact same price and volume effects."⁶³⁹

7.6.2.4 Evaluation

7.6.2.4.1 The Panel's terms of reference: Article 21.3 of the SCM Agreement

7.387. Before turning to the substance of India's claims, we must address the issue raised by the United States regarding the Panel's terms of reference. As noted by the United States⁶⁴⁰, India has not raised any "as such" or "as applied" claims of inconsistency of Section 1675a(a)(7) with Article 21.3 of the SCM Agreement in its panel request. Thus, there is no claim in this respect before us, and India's arguments relating to an alleged "as applied" inconsistency of Section 1675a(a)(7) with Article 21.3 of the SCM Agreement relate to a claim that is not within the Panel's terms of reference. Therefore, we will not consider India's arguments in this respect, or make any rulings with respect to this putative claim.

7.6.2.4.2 Alleged inconsistency of US provisions regarding cumulative analysis in sunset reviews

7.388. Turning to the substance of India's challenges, India claims that US provisions on cumulative assessment in sunset reviews, as well as the sunset review determination at issue here, are inconsistent with a number of obligations in Article 15 of the SCM Agreement, which is the provision governing injury determinations in original investigations. The United States argues that Article 15 does not impose obligations with regard to sunset reviews.⁶⁴¹

7.389. In the context of the AD Agreement, the Appellate Body has explained that the AD Agreement distinguishes between *determinations of injury*, under Article 3 of the AD Agreement, and *determinations of likelihood of continuation or recurrence of injury*, under Article 11.3 of the AD Agreement.⁶⁴² After emphasizing the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand⁶⁴³, the Appellate Body concluded that:

Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.⁶⁴⁴

Article 21.3 of the SCM Agreement is substantially identical to Article 11.3 of the AD Agreement. In light of this, and the close parallels between the provisions of Article 3 of the AD Agreement and

⁶³⁹ United States' first written submission, para. 151.

⁶⁴⁰ United States' second written submission, paras. 84-85; and response to Panel question Nos. 63, para. 75, and 64, para. 81.

⁶⁴¹ United States' first written submission, paras. 83 and 137-139; response to Panel question No. 64, para. 83; and second written submission, paras. 82-83 and 93.

⁶⁴² Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 278.

⁶⁴³ The Appellate Body stated that "[o]riginal investigations require an investigating authority, in order to *impose* an anti-dumping duty, to make a determination of the existence of dumping in accordance with Article 2, and subsequently to determine, in accordance with Article 3, whether the domestic industry is facing injury or a threat thereof at the time of the original investigation. In contrast, Article 11.3 requires an investigating authority, in order to *maintain* an anti-dumping duty, to review an anti-dumping duty order that has already been established—following the prerequisite determinations of dumping and injury—so as to determine whether that order should be continued or revoked." Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279.

⁶⁴⁴ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 280.

Article 15 of the SCM Agreement⁶⁴⁵, we consider that the same rationale should apply in the context of the SCM Agreement. Thus, we are of the view that, to paraphrase the Appellate Body, for the "review" of a determination of injury that has already been established in accordance with Article 15, Article 21.3 does not require that injury again be determined in accordance with Article 15, and consequently investigating authorities are not *mandated* to follow the provisions of Article 15 when making a likelihood-of-injury determination under Article 21.3.⁶⁴⁶

7.390. India argues that the term "injury" in Article 21.3 of the SCM Agreement, as defined in footnote 45 of the SCM Agreement, should be understood as a reference to "injury" that has been determined in accordance with the provisions of Article 15 of the SCM Agreement, in particular Article 15.3 of the SCM Agreement.⁶⁴⁷ Essentially the same argument was addressed by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*. In that case, the Appellate Body examined the definition of "injury" in footnote 9 of the AD Agreement, which is identical to the definition of injury in footnote 45 of the SCM Agreement. While the Appellate Body understood that footnote 9 defines "injury" for the whole AD Agreement, the Appellate Body concluded that "[i]t does not follow ... from this single definition of 'injury', that all of the provisions of Article 3 are applicable in their entirety to sunset review determinations under Article 11.3."⁶⁴⁸ We agree, and consider that the mere use of the term "injury" in Article 21.3 does not alone require the application of the provisions of Article 15, including Article 15.3, to sunset reviews.

7.391. In addition, we note India's reliance on the finding by the panel in *EU – Footwear (China)* that a causal link analysis which is inconsistent with Article 15.5 of the SCM Agreement in the original investigation will remain tainted and still inconsistent with Article 15.5 during the sunset review.⁶⁴⁹ We fail to understand why India relies on this case, since in our view, this finding is not relevant to this dispute. First, the panel in *EU – Footwear (China)* only addressed the application of obligations relating to original investigations in the context of sunset reviews because the European Union had made a new injury determination in the context of a sunset review, and relied on that determination in finding a likelihood of continuation or recurrence of injury.⁶⁵⁰ However, the United States has clarified that the relevant US provision does not mandate the USITC to make new injury determinations in sunset reviews, and the USITC did not do so in the sunset review at issue here.⁶⁵¹ Second, the panel in *EU – Footwear (China)* considered that "a failure to examine relevant factors set out in the substantive provisions of Article 3 in the determination of likelihood of continuation or recurrence of injury could preclude an investigating authority from reaching a 'reasoned conclusion', which would result in a violation of Article 11.3 of the AD Agreement."⁶⁵² Thus, ultimately, the panel's analysis and determination concerned whether the determination of likelihood of continuation or recurrence of injury was consistent with Article 11.3, which is the provision in the AD Agreement dealing with sunset reviews. However, as we have found India's Article 21.3 claims to be outside the Panel's terms of reference above, no such analysis would be possible in this case, even assuming there were a new determination of injury by the USITC to be considered, which as noted, there is not.

7.6.2.4.3 Conclusion

7.392. Therefore, in light of the above, the Panel concludes that India has failed to establish a *prima facie* case that Sections 1675a(a)(7) and 1675b(e)(2) are "as such" inconsistent with

⁶⁴⁵ As noted by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, "Article 11.3 is textually identical to Article 21.3 of the *SCM Agreement*, except that, in Article 21.3, the word 'countervailing' is used in place of the word 'anti-dumping' and the word 'subsidization' is used in place of the word 'dumping'." The Appellate Body went on to conclude that "[g]iven the parallel wording of these two articles, we believe that the explanation, in our Report in *US – Carbon Steel*, of the nature of the sunset review provision in the *SCM Agreement* also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the *Anti-Dumping Agreement*." Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn. 114.

⁶⁴⁶ In light of this conclusion, we need not and do not address the disagreement between India and the United States relating to the relevance of Section 1675b(e)(2) to cumulation in sunset reviews. See India's first written submission, paras. 151-152; and response to Panel question No. 31; and United States' first written submission, fns. 112 and 252.

⁶⁴⁷ India's first written submission, paras. 137-141.

⁶⁴⁸ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 277.

⁶⁴⁹ India's first written submission, para. 142; and response to Panel question No. 17.

⁶⁵⁰ Panel Report, *EU – Footwear (China)*, paras. 7.333-7.334 and 7.495-7.496.

⁶⁵¹ United States' response to Panel question No. 63, paras. 78 and 80.

⁶⁵² Panel Report, *EU – Footwear (China)*, para. 7.333.

Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement, and that Section 1675a(a)(7), "as applied" in the sunset review at issue here, is inconsistent with the above provisions of the SCM Agreement. Finally, the Panel concludes that India's arguments relating to an alleged "as applied" inconsistency of Section 1675a(a)(7) with Article 21.3 of the SCM Agreement relate to a claim that is not within the Panel's terms of reference.

7.6.3 Whether certain economic factors were evaluated by the USITC in its injury determination

7.393. India claims that the injury determination in the original investigation at issue here is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement because the USITC failed to include all mandatory economic factors listed in Article 15.4.⁶⁵³

7.6.3.1 Relevant WTO Provisions

7.394. Articles 15.1 and 15.4 of the SCM Agreement are set forth above.⁶⁵⁴

7.6.3.2 Main arguments of the parties

7.6.3.2.1 India

7.395. India submits that, pursuant to 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 factors listed therein, including growth, return on investment, and ability to raise capital. India contends that there is no written record relating to these three factors in the USITC's determination of injury. India submits that the absence of evaluation of mandatory parameters is in itself sufficient to establish an inconsistency with Articles 15.1 and 15.4.⁶⁵⁵ In addition, India argues that the mere collection of data and responses from the domestic industry is not sufficient to fulfil the requirement in Article 15.4 to evaluate the information submitted by interested parties.⁶⁵⁶

7.6.3.2.2 United States

7.396. The United States recalls the Appellate Body's explanation in *EC – Tube or Pipe Fittings* that an authority is not required to make specific findings for each impact factor listed in Article 3.4 of the AD Agreement, which is nearly identical to Article 15.4 of the SCM Agreement. The United States explains that, pursuant to the Appellate Body, while it is mandatory to evaluate all fifteen factors listed⁶⁵⁷, Article 3.4 does not address the manner in which the results of the investigating authority's analysis of each injury factor are to be set out in the published document.⁶⁵⁸

7.397. The United States contends that, consistently with Article 15.4, the USITC evaluated the three factors identified by India. The United States submits that the USITC's evaluation of growth trends in the industry's condition is necessarily entailed in the USITC's assessment of the changes in the industry's production, production capacity, capacity utilization, shipments, employment levels, prices, operating profits and orders over the period.⁶⁵⁹ Turning to the industry's return on investment and ability to raise capital, the United States submits that the USITC (i) specifically stated that it considered all relevant economic factors, including these two factors; (ii) obtained detailed financial data from the industry; (iii) received from the industry a number of confidential

⁶⁵³ India's first written submission, para. 508.

⁶⁵⁴ See paras. 7.317 and 7.320 above.

⁶⁵⁵ India's first written submission, paras. 508-509.

⁶⁵⁶ India's second written submission, para. 263.

⁶⁵⁷ United States' first written submission, para. 154. However, we note that elsewhere the United States appears to suggest that the evaluation of all fifteen factors is not mandatory. The United States submits that "in addition to limiting the required evaluation to 'relevant' economic factors, the SCM Agreement includes the term 'or' rather than 'and' between the factors listed. ... Therefore, an authority is required to evaluate only those factors which are relevant to its analysis." United States' response to Panel question No. 118, fn. 139.

⁶⁵⁸ United States' first written submission, paras. 153-154.

⁶⁵⁹ Ibid. paras. 104 and 156.

comments on the negative effects of imports on the industry's growth, investment, ability to raise capital, and/or development efforts; and (iv) specifically addressed in its analysis the industry's profitability and returns on operations, the changes in productive capacity levels, and overall financial operations.⁶⁶⁰

7.6.3.3 Evaluation

7.398. The issue before the Panel is whether the USITC properly evaluated (i) growth, (ii) return on investment, and (iii) ability to raise capital as relevant economic factors under Article 15.4 of the SCM Agreement.

7.399. The Appellate Body in *US – Hot-Rolled Steel* stated that "Article 3.4 [of the AD Agreement] lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities."⁶⁶¹ Given the close identity of the texts, we consider that this understanding applies with equal force to Article 15.4⁶⁶² of the SCM Agreement.⁶⁶³

7.400. The Appellate Body in *EC – Tube or Pipe Fittings* stated that "because Articles 3.1 and 3.4 [of the AD Agreement] do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, ... it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4."⁶⁶⁴ The Appellate Body also stated that the particular facts of each case will determine whether a panel is able to find in the record "sufficient and credible evidence" that a factor has been *evaluated*, even though a separate record of the evaluation of that factor has not been made.⁶⁶⁵ Thus, we examine below the USITC's injury determination to assess whether it is possible, based on the determination itself, the underlying evidence, and the arguments present, to satisfy ourselves that the factors at issue were evaluated by the USITC as required by Article 15.4 of the SCM Agreement.

7.401. The USITC's injury determination states in relevant part:

Both commercial shipments and production for downstream processing by the domestic industry were higher in 2000 than in 1998. Capacity, production, and capacity utilization rates all rose from 1998 to 2000. Yet despite increased production and shipments, the domestic industry's financial performance was poor throughout most of the POI. The domestic industry had operating losses on commercial sales and total production in both 1999 and 2000. Several domestic producers entered Chapter 11 bankruptcy proceedings, and two ceased operations altogether. The number of production related workers declined throughout the POI, as did the number of hours worked and total wages paid. Total capital expenditures increased between 1998 and 2000 but expenditures on research and development dropped.

Undoubtedly, the industry's performance in the early portion of the POI reflected the adverse effects of unfairly traded hot-rolled steel imports from Brazil, Japan, and Russia. But quarterly data indicate that the domestic industry had gained some benefit from the import relief imposed on imports from Brazil, Japan, and Russia by mid-1999. For a brief time, shipments increased, prices increased, and the domestic industry's financial performance improved, although prices generally remained below pre-injury levels. ...

⁶⁶⁰ United States' first written submission, paras. 105 and 157. See also United States' response to Panel question No. 118, para. 102.

⁶⁶¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 194. See also Appellate Body Report, *Thailand – H-Beams*, para. 125.

⁶⁶² We note that Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement are similarly worded, and that the former includes all general factors listed in the latter.

⁶⁶³ With similar understanding, see Panel Reports, *EC – Countervailing Measures on DRAM Chips*, paras. 7.356 and 7.359; and *US – Softwood Lumber IV*, para. 7.123.

⁶⁶⁴ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

⁶⁶⁵ *Ibid.*

This improvement did not last. Virtually every financial and production indicator was lower in interim 2001 than in interim 2000. Shipments by the domestic industry to the merchant market in interim 2001 were 11.4 percent lower than in interim 2000. Total shipments, including internal consumption, were 16.5 percent lower in interim 2001 than in interim 2000. Operating loss per ton of net sales was \$50 in interim 2001, compared to a positive income per ton of \$16 in interim 2000. Operating loss per ton of total production was \$63 in interim 2001, compared to a positive income per ton of \$5 in interim 2000. Operating losses were widespread in the industry, affecting 17 of 21 reporting firms in 2000. Only 12 of 21 firms had reported losses in 1998, and only 13 of 21 firms had reported losses in 1999, when imports from Brazil, Japan, and Russia were adversely affecting the domestic industry. The number of production related workers was 29,123 in interim 2001, compared to 31,639 in interim 2000. Hours worked were 16.3 million in interim 2001, compared to 18.2 million in interim 2000.

The record indicates that the domestic industry's condition has been affected by a drop in consumption since the latter part of 2000. The industrial production index peaked in the third quarter of 2000 and declined thereafter. Similarly, total apparent domestic consumption of steel declined in the second half of 2000. We also note that, while the industry's internal transfers declined by only 5.3 percent from the first to the third quarter of 2000, commercial shipments fell by 19.2 percent. This is further evidence that the general drop in demand for hot-rolled steel did not begin until the end of 2000, and that the sharp drop in commercial shipments through the third quarter of 2000 was due primarily to subject imports. However, the weakening in the domestic industry's condition began before the decline in overall consumption. The order books of integrated producers peaked in the fourth quarter of 1999; minimill order books peaked a quarter earlier, in the third quarter of 1999. Domestic shipments to the merchant market peaked in the first quarter of 2000, as did total domestic shipments, including internal transfers. Domestic shipments to the merchant market declined by 7.8 percent from the first quarter of 2000 to the second. ...

We note that the volume of subject imports has declined since the second quarter of 2000, although the volume remained notably high compared to pre-1999 levels through the third quarter of 2000. We also note that some overselling by subject imports occurred in the second half of 2000 as import volume contracted. Nonetheless, we find present material injury by reason of subject imports. Domestic shipments and production contracted at a time when overall apparent domestic consumption was still strong, as shown by the rapid growth in subject imports. In contrast, subject import volume grew rapidly through most of the POI. Subject imports gained those sales from the domestic industry largely through underselling. ...

In sum, the record indicates there have been significant increases in the volume and market share of the subject imports, and that the subject imports have undersold the domestic like product and have had a significant suppressing and depressing effect on domestic prices. As a result, the overall condition of the industry declined during the period. Accordingly, we find that the subject imports are having a significant adverse impact on the domestic industry.⁶⁶⁶

7.402. In our view, the above excerpt clearly supports the conclusion that the USITC evaluated "growth" in the domestic industry, albeit implicitly. The determination identifies and discusses negative trends in the evaluation of certain injury factors – particularly profit; employment; wages; market share; shipments; and financial performance. Logically, these negative trends imply a lack of "growth" in the industry. India does not dispute the accuracy of the trend information, nor its relevance to a consideration of growth. Our reasoning is consistent with the understanding of the Appellate Body in *EC – Tube or Pipe Fittings*, where the Appellate Body stated:

Having regard to the nature of the factor "growth", we believe that an evaluation of that factor necessarily entails an analysis of certain other factors listed in Article 3.4.

⁶⁶⁶ USITC Final Determinations, Exhibit IND-9, pp. 23-26. (footnotes omitted)

Consequently, the evaluation of those factors could cover also the evaluation of the factor "growth".

...

From our perspective, the "declines" and "losses" observed with respect to several of the factors examined in this particular case necessarily relate to the issue of "growth" as well. To put it more precisely, the negative trends in these factors point to a lack of "growth". This, in turn, supports the conclusion that the European Commission evaluated this injury factor.⁶⁶⁷

7.403. We now turn to the factors "return on investment" and "ability to raise capital". With respect to the former, we note that the injury determination indicates that the USITC examined capital expenditures, and research and development expenditures.⁶⁶⁸ This part of the USITC's written analysis also refers to Table VI-8, which contains data, compiled from responses to USITC's questionnaires, on US producers' capital expenditures, research and development expenses, and assets utilized (including book value of production facilities).⁶⁶⁹ The table is preceded by the following written analysis:

Capital expenditures continuously increased from 1998 through 2000 and R&D expenses increased from 1998 to 1999 and decreased from 1999 to 2000. ... The original cost and book value of productive facilities increased continuously from 1998 through 2000. For the interim periods, capital expenditures decreased substantially while R&D expenses increased slightly from interim 2000 to interim 2001. ...⁶⁷⁰

At the same time, the injury determination indicates that the USITC evaluated profitability, and production.⁶⁷¹ This part of the USITC's written analysis includes references to Table VI-1, concerning US producers' commercial sales, and Table VI-5, concerning US producers' commercial sales, internal consumption and transfers. These tables present data, compiled from responses to USITC's questionnaires, on *inter alia* sales, gross profit, operating income and operating losses.⁶⁷² Furthermore, by gathering and examining information on capital and R&D expenditures and the book value of production facilities, on the one hand, and operating income and operating losses, on the other hand, we consider that the USITC had relevant information to evaluate "return on investment".

7.404. With regard to the factor "ability to raise capital", the injury determination indicates that the USITC evaluated profitability, as explained above, and the domestic industry's financial performance.⁶⁷³ This part of the USITC's written analysis includes a reference to Table VI-1, concerning US producers' commercial sales. This table contains data, compiled from responses to USITC's questionnaires, on *inter alia* the cash flow of US producers.⁶⁷⁴ Once again, in our view, the information on these factors is clearly relevant to an evaluation of an industry's "ability to raise capital". In our view, there is no basis to think that, having requested this information, compiled it, and presented it in its report, the USITC somehow ignored it in its analysis and determination. Thus, we consider that the USITC's determination and the underlying evidence support the conclusion that it did, in fact, evaluate both "return on investment" and "ability to raise capital".

7.405. In addition, with regard to both "return on investment" and "ability to raise capital", the United States submits that the USITC "requested the members of the industry to 'describe any actual or potential negative effects of imports of hot-rolled steel products from the subject countries on their growth, investment, ability to raise capital, and/or their development efforts,'

⁶⁶⁷ Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 162 and 165.

⁶⁶⁸ USITC Final Determinations, Exhibit IND-9, p. 24.

⁶⁶⁹ *Ibid.* p. VI-8.

⁶⁷⁰ *Ibid.* p. VI-7.

⁶⁷¹ *Ibid.* pp. 23-25.

⁶⁷² *Ibid.* pp. VI-2 and VI-5.

⁶⁷³ *Ibid.* pp. 23-24.

⁶⁷⁴ *Ibid.* p. VI-2.

receiving a significant number of comments from the producers, which were confidential."⁶⁷⁵ More specifically, the USITC asked domestic producers whether they had:

experienced any actual negative effects on its return on investment or its growth, investment, ability to raise capital, existing development and production efforts (including efforts to develop a derivative or more advanced version of the products), or the scale of capital investments as a result of imports of hot-rolled steel products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, and Ukraine.⁶⁷⁶

Again, the information requested was compiled and presented in the USITC's report, although it was redacted from the non-confidential version. We recall that the USITC specifically stated in its injury determination that it "considered all relevant economic factors that bear on the state of the industry in the United States. These factors include ... return on investment [and] ability to raise capital".⁶⁷⁷ We see no basis to conclude that the USITC nonetheless failed to do so.

7.406. India argues that mere collection of data and comments from the industry is not sufficient to fulfil the requirement in Article 15.4 to *evaluate* information submitted by interested parties.⁶⁷⁸ We agree with India that the mere fact that data were collected may not suffice to demonstrate that certain relevant factors were evaluated in making an injury determination, as required by Article 15.4. However, based on our review of the USITC's determination, and the underlying evidence on the record to which it refers, it is clear to us that the USITC went beyond the mere collection of data, and evaluated the factors at issue in making its decision, even though it did not explicitly discuss them in its written determination. First, the USITC did explicitly discuss its evaluation of factors which are closely related to "return on investment" and "ability to raise capital". Second, the information on assets (including book value of production facilities), capital expenditures, research and development expenditures, production, profitability (including operating income and operating losses), and the domestic industry's financial performance was explicitly requested, compiled and set out in its report, ensuring that the USITC had relevant information before it to evaluate "return on investment" and "ability to raise capital". Third, the USITC requested and received from domestic producers responses to specific questions relating to actual negative effects on "return on investment" and "ability to raise capital", which again are set out in its report, albeit not in the public version.⁶⁷⁹ Finally, the USITC specifically stated in its injury determination that it had considered all relevant economic factors that bear on the state of the domestic industry, including "return on investment" and "ability to raise capital". Given that relevant information on these factors was before it, and in view of the legal standard set out above, which does not require an explicit discussion of each Article 15.4 factor in order to be sufficient, we cannot conclude merely from the lack of explicit reference to these factors in the written determination that the USITC failed to evaluate them. Thus, we are satisfied that the USITC properly evaluated "return on investment" and "ability to raise capital", albeit implicitly, as required by Article 15.4 of the SCM Agreement.

7.407. Finally, India argues that, unlike in the investigation at issue, "the Appellate Body [in *EC – Tube or Pipe Fittings*] found that there was considerable analysis regarding the mandatory parameters in question, which satisfied the requirement under Article 15.4."⁶⁸⁰ We do not agree with India that the Appellate Body Report in *EC – Tube or Pipe Fittings* stands for the proposition

⁶⁷⁵ United States' first written submission, para. 157.

⁶⁷⁶ Appendix E: effect on imports on producers' existing development and production efforts, growth, investment, and ability to raise capital ("Appendix E"), Exhibit USA-117 (BCI), p. 3. We note that Appendix E contains a compilation of the confidential responses of various domestic producers and includes data on assets, capital expenditures, and research and development; and comments on the actual and negative effects on these issues. See United States' response to Panel question No. 118, para. 104. We also note that the USITC did not include in its determination a separate and specific record of its analysis of the information presented in Appendix E.

⁶⁷⁷ USITC Final Determinations, Exhibit IND-9, p. 23. See also United States' first written submission, para. 157.

⁶⁷⁸ India's second written submission, para. 263.

⁶⁷⁹ The confidential domestic industry comments and questionnaire responses in this regard are redacted, but are clearly part of the report that was before the decision makers.

⁶⁸⁰ India's opening statement at the second meeting of the Panel, para. 48. See also India's second written submission, para. 263.

that the requirements under Article 15.4 will be only satisfied if "considerable analysis" regarding the mandatory factor has been undertaken by the investigating authority. Rather, as explained above, we understand the Appellate Body to have taken the view that a panel must be able to find in the injury determination and the evidence on which it is based a sufficient and credible basis to satisfy itself that the factors at issue were evaluated by the investigating authority as required by Article 15.4. A panel's analysis in this regard will clearly depend on the particular facts of each case. In the investigation at issue, and explained above, we have been able to conclude, based on the record evidence and the USITC's injury determination, that (i) growth, (ii) return on investment, and (iii) ability to raise capital were evaluated by the USITC, even though a separate record of the evaluation of these factors has not been made.

7.408. Therefore, in light of the above, the Panel concludes that India has not established a *prima facie* case that the USITC's injury determination at issue is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement.

7.7 Whether the use of "facts available" is consistent with Article 12.7 of the SCM Agreement

7.409. India claims that Sections 1677e(b) of the USC and 351.308(a), (b) and (c) of the CFR (AFA Provisions) are "as such" inconsistent with Article 12.7 of the SCM Agreement⁶⁸¹, because, according to India, these Sections (i) do not require the use of facts that are most fitting or appropriate, and (ii) enable the use of "facts available" in a punitive manner.⁶⁸² In addition, India challenges 407 instances of application of the AFA Provisions in the proceedings at issue. India claims that the United States acted inconsistently with Article 12.7, because the USDOC applied "facts available" to penalize allegedly non-cooperating interested parties.⁶⁸³

7.7.1 Relevant WTO provisions

7.410. Article 12.7 of the SCM Agreement provides:

In 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, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.7.2 Factual background

7.411. Section 1677e(b) refers to adverse inferences in determinations on the basis of facts available. It provides:

If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

- (1) the petition,

⁶⁸¹ In its first written submission, India submitted that "the AFA provisions are 'as such' inconsistent with Articles 12.1 and 12.7 of the SCM Agreement". (India's first written submission, para. 156) The United States requested the Panel to find that India's claim under Article 12.1 is outside the Panel's terms of reference because India's panel request fails to comply with the requirements of Article 6.2 of the DSU. (United States' first written submission, para. 159) However, in its second written submission, India clarified that its claims relating to the AFA Provisions were only brought under Article 12.7, and that Article 12.1 was merely referred to as part of the relevant context to interpret Article 12.7. (India's second written submission, para. 87) In light of India's clarification, the Panel will not make any findings under Article 12.1.

⁶⁸² India's first written submission, paras. 172 and 175; and response to Panel question No. 36.

⁶⁸³ India's first written submission, paras. 525-576.

- (2) a final determination in the investigation under this subtitle,
- (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
- (4) any other information placed on the record.

7.412. The corresponding implementing regulation is found in Section 351.308, which also refers to determinations on the basis of facts available. Sections 351.308(a)-(e) provide:

(a) Introduction. The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. If the Secretary finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Secretary may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. This section lists some of the sources of information upon which the Secretary may base an adverse inference and explains the actions the Secretary will take with respect to corroboration of information.

(b) In general. The Secretary may make a determination under the Act and this part based on the facts otherwise available in accordance with section 776(a) of the Act.

(c) Adverse inferences. For purposes of section 776(b) of the Act, an adverse inference may include reliance on:

- (1) Secondary information, such as information derived from:
 - (i) The petition;
 - (ii) A final determination in a countervailing duty investigation or an antidumping investigation;
 - (iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or
- (2) Any other information placed on the record.

(d) Corroboration of secondary information. Under section 776(c) of the Act, when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary's disposal. Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review. Corroborate means that the Secretary will examine whether the secondary information to be used has probative value. The fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.

(e) Use of certain information. In reaching a determination under the Act and this part, the Secretary will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Secretary if the conditions listed under section 782(e) of the Act are met.

7.413. In the investigation at issue, the USDOC relied on "facts available" in a large number of instances where the USDOC considered interested parties to be non-cooperative.⁶⁸⁴

7.7.3 Main arguments of the parties

7.7.3.1 India

7.414. India makes two main arguments seeking to demonstrate that the AFA Provisions are, "as such" and "as applied" in the investigation at issue, inconsistent with Article 12.7 of the SCM Agreement. First, the AFA Provisions do not require the use of facts that are "most fitting" or "most appropriate" since they allow the investigating authority to use adverse facts without an evaluative, comparative assessment of all available evidence.⁶⁸⁵ Recalling the views of the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, India argues that the United States is under an obligation to engage in an evaluative, comparative assessment of the available evidence, and employ the best, most fitting or most appropriate information available.⁶⁸⁶

7.415. Second, India contends that the AFA Provisions grant the right to draw adverse conclusions, resulting in the punitive application of "facts available", because they do not require the investigating authority to comply with the standard in Article 12.7, and instead allow the investigating authority to use selected facts solely in view of the adverse consequences it would have against the party concerned.⁶⁸⁷ India notes that this use of "facts available" is not set out in Article 12.7 of the SCM Agreement. This silence means that Article 12.7 cannot be interpreted as granting the right to make determinations based on "adverse facts" or draw adverse inferences in all cases of non-cooperation.⁶⁸⁸ Consequently, the United States is prohibited from using "facts available" in a punitive manner. India contends that the purpose behind Article 12.7 is not to punish an allegedly non-cooperating Member, but to ensure that the failure of an interested party to provide necessary information does not hinder the investigation.⁶⁸⁹

7.416. India also submits that although the AFA Provisions appear not to mandate, but rather give discretion to draw adverse inferences, India can still bring an "as such" challenge. This is because the AFA Provisions are incompatible with the ordinary meaning of Article 12.7 of the SCM Agreement.⁶⁹⁰ India argues the AFA Provisions bulldoze the need for an assessment of the most appropriate information available, and explicitly allow the investigating authority to draw certain inferences solely because they are adverse to the party concerned.⁶⁹¹

7.417. Alternatively, in case the Panel concludes that only mandatory legislation can be challenged "as such", India argues that the consistent practice of the United States reveals that the AFA Provisions in fact *require* the investigating authority "to draw the worst possible inferences and choose the highest prior margin to ensure that the party concerned is penalized for non-cooperation."⁶⁹²

7.418. With respect to the "as applied" claims, India identifies a large number of instances where the USDOC allegedly used adverse "facts available" to penalize non-cooperating interested parties, including instances where more appropriate information was made available to the USDOC through other means, and where adverse inferences were taken without any factual foundation.⁶⁹³

⁶⁸⁴ See India's first written submission, paras. 524-576; and United States' first written submission, paras. 213-234 and 254-259, with references to the relevant Exhibits.

⁶⁸⁵ India's first written submission, paras. 172 and 175; and response to Panel question No. 36.

⁶⁸⁶ India's first written submission, paras. 161-164 and 166, referring to the Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.

⁶⁸⁷ India's first written submission, paras. 164-165, 172 and 175; second written submission, para. 113; and opening statement at the second meeting of the Panel, para. 23.

⁶⁸⁸ India's first written submission, paras. 158-160 and 165.

⁶⁸⁹ Ibid. paras. 157, 164 and 166.

⁶⁹⁰ Ibid. paras. 167, 169 and 178.

⁶⁹¹ Ibid. para. 178.

⁶⁹² Ibid. para. 187.

⁶⁹³ Ibid. paras. 525-576.

7.7.3.2 United States

7.419. As an initial matter, the United States points out that two aspects of India's claims are outside the Panel's terms of reference, because they were not included in India's requests for consultations and establishment of a panel: (i) the "as applied" claim under Article 12.7 of the SCM Agreement relating to the application of "facts available" concerning MML as a public body in the 2006 administrative review⁶⁹⁴; and (ii) the "as applied" claims under Article 12.7 relating to the 2013 sunset review.⁶⁹⁵ With respect to the claim that USDOC assumed without proper factual basis that MML purchased iron ore for more than adequate remuneration, the United States alternatively argues that the information contained in US Steel's petition was the factual basis for the USDOC's determination.⁶⁹⁶

7.420. Turning to India's "as such" claims under Article 12.7 of the SCM Agreement, the United States makes two main arguments. First, the United States contends that India may not bring "as such" claims against the US facts available provisions. The United States explains that the US facts available provisions do not mandate, but rather provide discretion for the USDOC to use an inference that is adverse to the interests of non-cooperating parties in selecting from among the facts otherwise available.⁶⁹⁷ Moreover, according to the United States, India's arguments relating to the USDOC's consistent practice cannot stand because India neither identified such practice in its panel request, nor demonstrated in its first written submission that the USDOC's practice amounts to a norm or rule of general and prospective application.⁶⁹⁸

7.421. Second, the United States argues that Article 12.7 of the SCM Agreement does not limit the application of "facts available" to those facts most favourable to the interests of a non-cooperating interested party, because the expression "facts available" does not speak to which facts should be selected.⁶⁹⁹ According to the United States, India fails to acknowledge that the USDOC's use of an adverse inference is based on the application of available facts, and that the "adverse" element is introduced when USDOC decides which available facts are appropriate to use when a responding party has not provided verifiable, substantiated information.⁷⁰⁰ The United States contends that Article 12.7 allows an investigating authority to incentivize responding Members and interested parties to participate in an investigation, ensuring that "an interested party may not evade the application of countervailing duties through non-cooperation, and may not obtain a duty margin *more* favorable to its interests for having not cooperated."⁷⁰¹

7.422. Turning to the "as applied" claims, the United States reiterates the above arguments that Article 12.7 of the SCM Agreement does not limit the application of "facts available" to those facts most favourable to the interests of a non-cooperating interested party.⁷⁰² The United States also submits arguments and evidence to show that USDOC's determination in each case reflected a reasoned analysis and was based upon a factual foundation.⁷⁰³

7.7.4 Main arguments of the third parties

7.7.4.1 Canada

7.423. Canada submits that the use of adverse facts and, under certain circumstances, drawing of adverse inferences, is consistent with Article 12.7 of the SCM Agreement.⁷⁰⁴ Noting that Article 12.7 does not distinguish between "facts available" that are favourable to a respondent and

⁶⁹⁴ United States' first written submission, para. 269.

⁶⁹⁵ Ibid. paras. 24 and 274-275; and response to Panel question No. 62, para. 74.

⁶⁹⁶ United States' first written submission, paras. 270-272.

⁶⁹⁷ Ibid. paras. 161-163 and 167-168.

⁶⁹⁸ Ibid. paras. 197-210.

⁶⁹⁹ Ibid. para. 180.

⁷⁰⁰ Ibid. para. 190.

⁷⁰¹ Ibid. para. 189.

⁷⁰² Ibid. paras. 214-215.

⁷⁰³ Ibid. paras. 216-272.

⁷⁰⁴ Canada's third-party submission, paras. 22 and 25.

those that are not, Canada contends that this provision should be read in the context of Annex II to the AD Agreement.⁷⁰⁵

7.424. Canada submits that the investigating authority's discretion to choose among the available facts is not unlimited. First, an investigating authority must take into account all "substantiated facts" even where they constitute an incomplete response to a question. Second, "facts available" may only be used where they reasonably replace the information not provided by an interested party. Finally, a determination must have a factual foundation.⁷⁰⁶

7.425. However, Canada holds that if there are several sets of "facts available" on the record, a reasonable and objective investigating authority may choose facts unfavourable to a respondent because "a party should not benefit from a lack of cooperation" as it is "aware of the record evidence and [], if it had more favourable information, that party could certainly have provided it to the investigating authority in its own best interest."⁷⁰⁷ Canada argues that an investigating authority must have discretion in deciding what is necessary to conduct its investigation effectively and in a reasonable and objective way.⁷⁰⁸

7.7.4.2 China

7.426. China submits that Article 12.7 of the SCM Agreement permits only the use of "facts available", not "adverse facts available", let alone "adverse inferences".⁷⁰⁹

7.427. China considers that Annex II of the AD Agreement serves as relevant context to the interpretation of Article 12.7 of the SCM Agreement. China submits that under Article 12.7 (i) an investigating authority must, to the extent possible, take into account all substantiated facts provided by an interested party, even if they may not constitute the complete information requested from that party, and (ii) "facts available" are generally limited to those that may reasonably replace the information that an interested party failed to provide.⁷¹⁰ China submits that, pursuant to Article 12.7, an investigating authority must evaluate objectively the "facts available" on the record, and is precluded from using whatever evidence it wishes. Even in cases of non-cooperation, an investigating authority may only replace missing information with the most fitting and appropriate information available in order to arrive at an accurate subsidization or injury determination.⁷¹¹ Finally, China contends that an investigating authority must treat information from secondary sources "with special circumspection" by ascertaining "for itself the reliability and accuracy of such information."⁷¹²

7.428. China highlights that the more fundamental requirement under Article 12.7 of the SCM Agreement is that the investigating authority's determination be based on actual facts on the record. China contends that an investigating authority is allowed to use "facts available" to make a determination in the face of incomplete information, but it is prohibited from drawing adverse inferences that could not find factual foundations on the record. Otherwise, China argues that an investigating authority would have a vehicle to punish non-cooperation by reaching a result adverse to the interests of the responding party, in contradiction to the purpose of Article 12.7.⁷¹³

7.429. Finally, China notes that the United States includes China among the WTO Members that have "incorporated some role for 'adverse inferences' in their legislation governing the use of facts available." China submits that the United States' assertion is misplaced, and that China's legislation is in line with Article 12.7 of the SCM Agreement.⁷¹⁴

⁷⁰⁵ Canada's third-party submission, paras. 27 and 29-30.

⁷⁰⁶ Ibid. para. 32.

⁷⁰⁷ Ibid. para. 34.

⁷⁰⁸ Ibid. para. 38.

⁷⁰⁹ China's third-party submission, paras. 62 and 77.

⁷¹⁰ Ibid. paras. 66-67 and 70.

⁷¹¹ Ibid. paras. 65 and 68-70.

⁷¹² Ibid. paras. 68-70.

⁷¹³ Ibid. paras. 71-73.

⁷¹⁴ Ibid. para. 76 and fn. 78.

7.7.4.3 European Union

7.430. The European Union considers that Article 12.7 of the SCM Agreement is a vital tool to counteract non-cooperation and the withholding of information by interested parties in a countervailing duty investigation.⁷¹⁵

7.431. The European Union submits that "inference" is a routine and necessary part of all economic law determinations. "Inference" is also related to the concept of "facts available", and both are subject to the same principles. If there are two different equally possible inferences, the investigating authority is not permitted to select the inference that is more adverse to the interests of a particular interested party solely because it is more adverse. Rather, the investigating authority must draw the inference that best fits the facts that have been evidenced.⁷¹⁶ The European Union contends that there are no facts that are *per se* excluded from the set of facts to be taken into consideration by the investigating authority. These facts include the precise question that has been put, the procedural circumstances, the availability of evidence being sought, and all the circumstances surrounding the absence of the requested information from the record. In this context, the European Union argues that the behaviour of an interested party can colour the inference that may be reasonable to draw in a particular instance; "[t]he more uncooperative a party is in fact, the more attenuated and extensive the inferences that it may be reasonable to draw."⁷¹⁷

7.432. Thus, the European Union understands that the issue before the Panel depends less upon the particular label that has been used, and more upon a specific examination of all the surrounding facts and procedural context of the proceedings at issue. For this reason, the European Union considers that the issue "may be more amenable to resolution on an 'as applied' basis rather than an 'as such' basis."⁷¹⁸ The European Union is not persuaded that India has demonstrated that the US law is "as such" inconsistent with the SCM Agreement.⁷¹⁹

7.7.4.4 Turkey

7.433. Turkey submits that there is textual and conceptual parallelism between Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement. Turkey contends that Annex II to the AD Agreement should be considered as an integral part of Article 12.7 of the SCM Agreement. Turkey considers that it would be unreasonable to hold that investigating authorities are subject to "clear-cut and detailed rules and procedures" in AD investigations, while at the same time conclude that investigating authorities may "free-ride" in CVD investigations "for the simple reason that there is no legal discipline resembling the rules in Annex II."⁷²⁰ By accepting Annex II as an integral part of Article 12.7, Turkey contends that investigating authorities have the discretion to use "adverse facts available" in CVD investigations, subject to the same obligations found in Paragraph 7 of Annex II.⁷²¹

7.7.5 Evaluation

7.434. India claims that Sections 1677e(b) and 351.308(a), (b) and (c) are "as such" and "as applied" inconsistent with Article 12.7 of the SCM Agreement. We begin by addressing India's "as such" claims.

⁷¹⁵ European Union's third-party submission, para. 76.

⁷¹⁶ Ibid. paras. 77-79 and 81-82.

⁷¹⁷ Ibid. paras. 80-82.

⁷¹⁸ Ibid. para. 84.

⁷¹⁹ Ibid. paras. 86-87.

⁷²⁰ Turkey's third-party statement, paras. 12-16.

⁷²¹ Ibid. paras. 5-10 and 17.

7.7.5.1 India's "as such" claims of inconsistency with Article 12.7 of the SCM Agreement

7.435. The main issue before the Panel is whether Section 1677e(b) of the US statute and Sections 351.308(a), (b) and (c) of the US regulation⁷²² are "as such" inconsistent with Article 12.7 of the SCM Agreement, because (i) they provide for the use of "facts available" without an evaluative, comparative assessment of all evidence, and consequently do not require the use of "best information", i.e. facts that are "most fitting" or "most appropriate"; and (ii) they punish non-cooperation by granting the USDOC a right to draw adverse conclusions in all cases of non-cooperation.⁷²³ We turn to each of these aspects of India's claim below.

7.7.5.1.1 The use of "facts available" without an evaluative, comparative assessment of evidence for selecting the best information, i.e. the most fitting or most appropriate information available

7.436. India first argues that Article 12.7 of the SCM Agreement obligates investigating authorities to engage in an evaluative, comparative assessment of the available evidence, and employ the best, most fitting or most appropriate information available.⁷²⁴ India asserts that the US provisions at issue do not require the use of facts that are most fitting or most appropriate since they allow the investigating authority to use adverse facts without an evaluative, comparative assessment of all available evidence.⁷²⁵

7.437. The text of Article 12.7 of the SCM Agreement does not set out any express conditions for determining which and what type of "facts available" should be used by an investigating authority when necessary information is not provided. We note, however, that Article 12.7 refers to "*facts available*". Thus, we agree with the panel in *China – GOES* that "even when applying facts available, an investigating authority's determination must have a *factual foundation*."⁷²⁶

7.438. In addition, we recall that the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* examined the context of Article 12.7, and concluded that an investigating authority faces certain limits when using "facts available". The Appellate Body stated that "Article 12 of the *SCM Agreement* as a whole 'set[s] out evidentiary rules that apply *throughout* the course of the ... investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' *throughout* ... an investigation'."⁷²⁷ The Appellate Body also stated that the "due process obligation [in Article 12.1 of the *SCM Agreement*—that an interested party be permitted to present all the evidence it considers relevant—concomitantly requires the investigating authority, where appropriate, to take into account the information submitted by an interested party."⁷²⁸ The Appellate Body recalled the purpose of Article 12.7⁷²⁹, and concluded that:

⁷²² The United States submitted that India cannot challenge the USDOC's "approach" to making determinations "as such" because (i) such claim is not within the Panel's terms of reference, and (ii) India has not identified the USDOC's "approach" as a "measure" of general and prospective application that may be challenged "as such". (United States' first written submission, paras. 196-203; and second written submission, para. 121) India clarified that India does not challenge the USDOC's "practice" or "approach" as a "measure", and recalled that India's claims relate to US law "as such", i.e. Sections 1677e(b) and 351.308 (India's second written submission, para. 89) Thus, our examination is limited to the US provisions "as such". We need not and do not examine the USDOC's "approach" as a "measure".

⁷²³ India's first written submission, paras. 164-165, 172 and 175; and response to Panel question No. 36.

⁷²⁴ India's first written submission, paras. 161-164 and 166, referring to the Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.

⁷²⁵ India's first written submission, paras. 172 and 175; and response to Panel question No. 36.

⁷²⁶ Panel Report, *China – GOES*, para. 7.296. (emphasis added)

⁷²⁷ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292, quoting Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 138, and *EC – Bed Linen (Article 21.5 – India)*, para. 136.

⁷²⁸ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.

⁷²⁹ The Appellate Body stated that "Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. Thus, the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293.)

[R]ecourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. First, such recourse is not a licence to rely on only part of the evidence provided. To the extent possible, an investigating authority using the "facts available" in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. Secondly, the "facts available" to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain circumstances, this may include information from secondary sources.⁷³⁰

7.439. When referring to the "most fitting" or "most appropriate" facts and the "evaluative, comparative assessment of all available evidence", India relies on the findings of the panel in *Mexico – Anti-Dumping Measures on Rice* concerning Article 6.8 of the AD Agreement, read in light of Annex II to the AD Agreement. We are not convinced that these findings in *Mexico – Anti-Dumping Measures on Rice* support India's understanding of the obligations set forth in Article 12.7 of the SCM Agreement. We recall that the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* were requested to examine the consistency of certain Mexican legislation with both Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement, read in light of Annex II to the AD Agreement. Although the Appellate Body endorsed the panel's finding with regard to the legal standard applicable under Article 6.8 of the AD Agreement read in light of Annex II to that Agreement, the Appellate Body very clearly did not apply that same standard in respect of its findings pursuant to Article 12.7 of the SCM Agreement, noting expressly the lack of an equivalent to Annex II of the AD Agreement in the SCM Agreement.⁷³¹ Thus, as noted above, the Appellate Body concluded that, in the absence of more detailed conditions such as those in Annex II of the AD Agreement, Article 12.7 requires that (i) an investigating authority must, to the extent possible, take into account all the substantiated facts provided by an interested party, and that (ii) the use of "facts available" be generally limited to those that may reasonably replace the missing information.⁷³² In our view, India's argument seeks to import into the standard under Article 12.7 the specific requirements the Appellate Body found applicable under Article 6.8 of the AD Agreement read in light of Annex II of that Agreement. We do not consider this appropriate, given the lack of an equivalent to that Annex in the SCM Agreement. Thus, we reject India's assertion that the findings of the panel in *Mexico – Anti-Dumping Measures on Rice* establish that Article 12.7 of the SCM Agreement requires that investigating authorities engage in a comparative evaluation of all available evidence with a view to selecting the *best* information, i.e. the most fitting or most appropriate information available.

7.7.5.1.2 Adverse conclusions

7.440. India also argues that the US provisions at issue punish non-cooperation by granting the USDOC a right to draw adverse conclusions in all cases of non-cooperation, without regard to the requirements of Article 12.7 of the SCM Agreement. India accepts that adverse conclusions may be drawn under Article 12.7, but claims that adverse conclusions may only be drawn on the basis of

⁷³⁰ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.

⁷³¹ The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* began its examination of Article 12.7 of the SCM Agreement by observing that "there are important textual differences between the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*—namely, the absence in the *SCM Agreement* of an equivalent to Annex II to the *Anti-Dumping Agreement*." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 290) The Appellate Body also noted that "[u]nlike the *Anti-Dumping Agreement*, the *SCM Agreement* does not expressly set out in an annex the conditions for determining precisely which 'facts' might be 'available' for an agency to use when a respondent fails to provide necessary information. This does not mean, however, that no such conditions exist in the *SCM Agreement*." (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291)

⁷³² Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294. In addition, the Appellate Body considered that Annex II of the AD Agreement supported its Article 12.7 interpretation. ("This understanding of the limitations on an investigating authority's use of 'facts available' in countervailing duty investigations is further supported by the similar, limited recourse to 'facts available' permitted under Annex II to the *Anti-Dumping Agreement*. Indeed, in our view, it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.") (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295)

the "best information available", following an "evaluative, comparative assessment" of the evidence available.⁷³³

7.441. We have already rejected India's understanding that Article 12.7 of the SCM Agreement requires an investigating authority to employ the "best information available", following an "evaluative, comparative assessment" of the evidence available. As a result, we must also reject India's argument that adverse conclusions may only be drawn under Article 12.7 on the basis of the "best information available". Contrary to India's understanding, the standard in Article 12.7 of the SCM Agreement requires that all substantiated facts on the record be taken into account, that "facts available" determinations have a factual foundation, and that "facts available" be generally limited to those facts that may reasonably replace the missing information. Provided adverse conclusions are drawn on the basis of this standard, such conclusions will not be punitive.⁷³⁴

7.442. India has not argued that the US provisions at issue provide for the drawing of adverse conclusions in a manner inconsistent with the *proper* Article 12.7 standard, as detailed above. Furthermore, we note that Sections 1677e(b) and 351.308(a) provide that the USDOC may only use an inference that is adverse to the interests of a non-cooperating party "in selecting from among the facts otherwise available."⁷³⁵ This indicates that any adverse inference drawn by the USDOC will in fact be based on the facts available. Furthermore, there is nothing in the US provisions at issue to suggest that the USDOC is not required to take into account all substantiated facts on the record⁷³⁶ or to apply "facts available" that do not reasonably replace the missing information.⁷³⁷

7.443. Our understanding is consistent with the views of the panel in *EC – Countervailing Measures on DRAM Chips*. While emphasizing that Article 12.7 of the SCM Agreement does not allow investigating authorities to punish non-cooperation, particularly in the absence of a factual foundation, that panel considered that in certain circumstances an investigating authority may be justified in drawing adverse inferences from non-cooperation in selecting from and assessing "facts available":

In reviewing the findings of the investigating authority, the extent to which the interested parties cooperated with the authority is, of course, also a relevant element to be taken into account. In those cases where certain essential information which was clearly requested by the investigating authority is not provided, we consider that this uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it. The fact that certain information was withheld from the authority may be the element that tilts the balance in a certain

⁷³³ India's first written submission, para. 164 ("While the 'best information' may lead to a conclusion adverse to the party concerned, this is not necessarily true in all cases, since the *most fitting or most appropriate information* available in a given case may also be favourable to a party concerned.") See also India's first written submission, paras. 175.

⁷³⁴ In the case of non-cooperation by an interested party (where the investigating authority has not otherwise obtained the information requested, for instance, from another source), the investigating authority will not know the actual missing relevant information. Therefore, the investigating authority will also not know whether the application of "facts available", selected on the basis of "adverse inferences", will lead to a conclusion which is less favourable or more adverse to the interests of the uncooperative party. (See United States' response to Panel question No. 69(d), para. 103). It could well be that the most unfavourable "fact available", selected on the basis of "adverse inferences" as a result of non-cooperation, is still *more* favourable to the interests of the uncooperative party than the unknown missing information would be.

⁷³⁵ See United States' first written submission, para. 190. We also note that the United States submits that "[t]here is no intended difference between the term 'adverse' and the term 'less favourable' referenced in Annex II of the AD Agreement." (United States' response to Panel question No. 69(d), fn. 74) See also United States' response to Panel question No. 76, para. 131.

⁷³⁶ We note that Section 351.308(e) of the US regulation establishes that the investigating authority "will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements" if certain conditions are met. Pursuant to Section 782(e), these conditions are: (i) the information is submitted by the deadline established for its submission, (ii) the information can be verified, (iii) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (iv) the interested party has demonstrated that it acted to the best of its ability, and (v) the information can be used without undue difficulties.

⁷³⁷ Depending on the particular facts of the case, it may well be that an investigating authority acts inconsistently with Article 12.7 of the SCM Agreement in relying on "facts available". However, this would lead to an "as applied" inconsistency, and not an "as such" one.

direction. Depending on the circumstances of the cases, we consider that an authority may be justified in drawing certain inferences, which may be adverse, from the failure to cooperate with the investigating authority. ...

We wish to add that we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available. Ultimately, the determination has to be made on the basis of the available *facts*, and not on mere speculation. Therefore, and in the absence of such supporting facts, mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority.

...

[W]e are of the view that facts available should not be used as a punishment, and that non-cooperation does not allow an investigating authority to simply use the information available which leads to the worst possible result for the interested party that failed to provide such information. Ultimately, the determination still has to be based on the facts that are available, not on mere inferences. But it is not because facts available should not be used in a punitive manner that the failure to cooperate becomes completely irrelevant in weighing and assessing the information before the authority.⁷³⁸

7.444. Finally, we note India's reliance on the Panel Report in *China – GOES* to argue that Article 12.7 of the SCM Agreement does not grant the right to draw adverse inferences or consequences in all cases of non-cooperation.⁷³⁹ We recall that the panel in *China – GOES* concluded that "[w]hile non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences. Nor does non-cooperation justify determinations that are devoid of any factual foundation."⁷⁴⁰ It is unclear to us how this conclusion supports India's claims. The expression "adverse inferences" in *China – GOES* refers to determinations that were based on speculative "adverse inferences", and thus devoid of any factual foundation.⁷⁴¹ This is entirely different from the "adverse inferences" envisaged in Sections 1677e(b) and 351.308(a)-(e), which properly rest on factual foundations.

7.7.5.1.3 Conclusion

7.445. In light of the above, the Panel concludes that India has failed to establish a *prima facie* case that Sections 1677e(b) and 351.308(a), (b) and (c) are "as such" inconsistent with Article 12.7 of the SCM Agreement.⁷⁴²

7.7.5.2 India's "as applied" claims of inconsistency with Article 12.7 of the SCM Agreement

7.446. India challenges 407 instances of application of "facts available" in the proceedings at issue. India claims that the United States' determinations under Sections 1677e(b) and 351.308 were inconsistent with Article 12.7 of the SCM Agreement, because the USDOC used (i) "facts available" devoid of any factual foundation or (ii) adverse "facts available" to penalize allegedly

⁷³⁸ Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.60-7.61 and 7.80. See also para. 7.143.

⁷³⁹ See India's first written submission, para. 165, quoting Panel Report, *China – GOES*, para. 7.302.

⁷⁴⁰ Panel Report, *China – GOES*, para. 7.302

⁷⁴¹ The panel in *China – GOES* examined a situation where the investigating authority drew speculative adverse inferences from the failure to cooperate, and the breadth of such inferences grew commensurate with the level of non-cooperation.

⁷⁴² Taking this view, we need not and do not address the United States' argument that the US provisions at issue are not mandatory in nature and thus cannot breach the United States' obligations under the WTO Agreements. (United States' first written submission, paras. 161-169)

non-cooperating interested parties, not employing the most fitting or most appropriate information available.⁷⁴³ We examine the challenged instances below.

7.7.5.2.1 Use of the highest non-*de minimis* subsidy rate

7.447. India has identified 230 instances where, as "facts available", the USDOC applied the highest non-*de minimis* subsidy rate calculated in previous determinations. India asserts that the USDOC punished non-cooperation by assuming the worst possible consequence against the non-cooperating party, inconsistently with Article 12.7 of the SCM Agreement.⁷⁴⁴ India's claims concern what it terms the "rule"⁷⁴⁵ applied by the USDOC in selecting a subsidy rate on the basis of "facts available". According to India, pursuant to this "rule", the USDOC relies on "facts available" to select a calculated subsidy rate in the following manner:

- The USDOC first attempts to identify the highest non-*de minimis* subsidy rate calculated for the *identical* subsidy programme.
- Where any such rate is unavailable, the USDOC expands its consideration to a broader group to identify the highest non-*de minimis* subsidy rate calculated for a *similar* subsidy programme.
- Where any such rate is also unavailable, the USDOC further expands its consideration to identify the highest non-*de minimis* subsidy rate calculated for any programme in any CVD proceeding involving the same country, as long as the industry at issue could have used the programme for which these rates were calculated.⁷⁴⁶

7.448. Although India has presented these arguments under its "as applied" claims, India effectively challenges the USDOC's "rule" "as such". In our view, the US methodology on its face appears consistent with Article 12.7 of the SCM Agreement. The USDOC methodology explicitly requires that the investigating authority's determination have a factual foundation. First, it mandates that the investigating authority use subsidy rates previously calculated for a subsidy programme. Such rates, in our view, are by definition facts. Second, by requiring the investigating authority to use such subsidy rates in a progressive fashion – i.e. first using those calculated for the identical programme, then using those calculated for similar programmes, and only in the absence of either of these two using those calculated for any programme in any CVD proceeding involving the same country – we consider that the investigating authority is directed, in selecting "facts available", to use those facts which most reasonably replace the missing information, in light of all substantiated facts on record. In other words, pursuant to this alleged "rule", the USDOC is required to replace unknown facts with the most relevant known facts, and only move on to other known facts, in diminishing degrees of relevance, when more closely relevant facts are not available.

7.449. In our view, the question whether the highest non-*de minimis* subsidy rate does not reasonably replace the missing information or constitutes a punitive use of "facts available" can only be determined on a case-by-case basis. However, in challenging the USDOC's use of the highest non-*de minimis* subsidy rate calculated in a previous determination in specific instances, India has not explained how each specific use of that information does not, in each instance, reasonably replace the missing information, or is otherwise inconsistent with Article 12.7 of the

⁷⁴³ India's first written submission, paras. 524-576.

⁷⁴⁴ Ibid. paras. 526-528; opening statement at the first meeting of the Panel, paras. 46-47; and second written submission, para. 265.

⁷⁴⁵ See India's first written submission, paras. 526-528. We note that the United States has not contested India's use of the term "rule" with respect to the USDOC's selection of subsidy rates on the basis of "facts available". In its first written submission, the United States describes the USDOC's search for "proxies" to select subsidy rates in the proceedings at issue. (see United States' first written submission, paras. 218-222) In our findings, we refer to the term "rule", as used by India, for the sake of convenience. However, we wish to be clear that our use of this term is without any implications as to whether or not the USDOC's selection might be a measure of general application that can be challenged in WTO dispute settlement.

⁷⁴⁶ See India's first written submission, para. 526. See also United States' first written submission, paras. 218-221; and, for example, 2007 Issues and Decision Memorandum, Exhibit IND-38, p. 22 and, 2006 Issues and Decision Memorandum, Exhibit IND-33, p. 6.

SCM Agreement. Rather, India has generally referred to a large number of instances where the USDOC applied this alleged "rule".⁷⁴⁷ As stated above, however, we do not consider the "rule", on its face, inconsistent with Article 12.7. Thus, there is no basis to conclude that challenged application of that "rule" is inconsistent with that provision.

7.450. In light of the above, the Panel concludes that India has failed to establish a *prima facie* case that the USDOC's "rule", either in general or as applied in the 230 instances identified by India is inconsistent with Article 12.7 of the SCM Agreement.

7.7.5.2.2 JSW's purchase of iron ore from NMDC

7.451. India challenges one instance of application of "facts available" in the USDOC's determination (in the context of the USDOC's examination of the sale of high-grade iron ore for less than adequate remuneration) that JSW purchased iron ore from the NMDC at no charge during the period of review of the 2006 administrative review. India claims that this application of "facts available" is inconsistent with Article 12.7 of the SCM Agreement because the USDOC's determination was devoid of any factual foundation and contradicted the "facts available" from the 2006 administrative review.⁷⁴⁸ India submits that in its questionnaire response, "the GOI had specifically stated that JSW purchased iron ore from NMDC, *inter alia*, from its Donimalai mines and the response also contained information of the rates charged by NMDC to all domestic purchasers of iron ore."⁷⁴⁹ In addition, India contends that "the facts available before the United States during the 2006 AR itself included information as to the prices at which Essar and ISPAT purchased iron ore from NMDC."⁷⁵⁰

7.452. We consider that the record evidence referred to by India is sufficient to establish *prima facie* that the USDOC's finding that NMDC did not provide iron ore to JSW at no charge lacked a factual foundation. To rebut this *prima facie* case, the United States would have to identify record evidence sufficient to show that the USDOC's finding that NMDC actually provided iron ore to JSW at no charge had a factual foundation. The United States has failed to do so. Instead, the United States questions the relevance of the information submitted by the GOI relating to JSW. The United States contends that the single price point reported by the GOI was not a substantiated fact for JSW's actual pricing during the period of review.⁷⁵¹ The United States also submits that the following "facts available" supported the USDOC's determination that JSW received iron ore from NMDC at no charge during the period of time at issue:

- (1) the subsidy program was demonstrated to exist; (2) the program was found to provide a countervailable subsidy in the 2nd Administrative Review of the program ...;
- (3) no new information was provided, or was otherwise on the record, that would indicate a change to the subsidy program since the conclusion of the 2nd Administrative Review; (4) hot-rolled steel producers, Ispat and Essar, in the current

⁷⁴⁷ India's first written submission, paras. 526-528; opening statement at the first meeting of the Panel, paras. 46-47; and second written submission, para. 265.

⁷⁴⁸ India's first written submission, paras. 529-534; and second written submission, paras. 267-270.

⁷⁴⁹ India's first written submission, para. 530. (footnotes omitted, emphasis original) In its questionnaire response to USDOC, the GOI stated that "during the period under review (2006) NMDC supplied Iron ore to ... M/s JSW Steel (JSW) from its Donimalai and Kumarswamy mines. JSW was not supplied any quantity from Bailadila. ... Since NMDC supplied iron ore to the respondents, mentioned above, at the same price at which the company exports iron ore to Japanese Steel Mills and not at 'less than adequate remuneration' - the Standard Questionnaire and the Provision of Goods/Services Appendices are not applicable. ... The NMDC iron ore lump and fines prices published in the Tex Report are f.o.b. in US \$ per DLT (Dry long ton). For the purpose of supplies to domestic customers of NMDC including IIL and JSW, the FOB port prices applicable as 1st Apr'05 are converted for FOR (mine) prices in Rs. Per WMT (Wet metric tonne) after taking into consideration the expenses on account of rail freight, port charges etc. The derived prices were made applicable for supplies to the domestic buyers of NMDC from its Bailadila and Donimalai mines." In addition, the GOI included a table with the prices as published in the Tex Report for the fiscal years 2005-2006 and 2006-2007 in respect of NMDC iron ore on FOB basis. (Administrative review for the period 01/01/2006 to 31/12/2006, Government of India's response to USDOC's questionnaire, 23 April 2007 ("2007 Questionnaire Response from GOI for 2006 AR"), Exhibit IND-59, pp. 5-6, internal pages 40-41) (italics omitted)

⁷⁵⁰ India's first written submission, para. 530. See 2006 Preliminary Results, Exhibit IND-32, p. 10, internal page 1587.

⁷⁵¹ See also United States' first written submission, para. 264; and 2006 Issues and Decision Memorandum, Exhibit IND 33, pp. 92-94.

review at issue were found to have received a benefit from this same subsidy program during the 2006 period of review; (5) JSW is a hot-rolled steel producer.⁷⁵²

However, the United States has not referred to any evidence on the record that could establish a factual foundation for the USDOC's determination that JSW received iron ore from NMDC at no charge during the period covered by the 2006 administrative review. Thus, the Panel upholds India's claim that the application of "facts available" at issue is inconsistent with Article 12.7 of the SCM Agreement because it is devoid of any factual foundation.

7.7.5.2.3 VMPL's alleged benefit under certain KIP subsidy programmes administered by the SGOK

7.453. India challenges four instances of application of "facts available" in the USDOC's determination, in the context of the 2006 administrative review, that VMPL received benefits under the 1993 KIP, the 1996 KIP, the 2001 KIP, and the 2006 KIP. India claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations were devoid of any factual foundation.⁷⁵³

7.454. In the 2006 administrative review, the petitioner submitted new subsidy allegations against JSW, contending that JSW received benefits from the SGOK by virtue of its ownership and control over VMPL.⁷⁵⁴ India asserts that, while the petitioner alleged that VMPL received certain subsidies from the SGOK, the petitioner did not allege that VMPL received benefits under the KIP subsidy programmes at issue.⁷⁵⁵ Nevertheless, the USDOC included these new subsidies against VMPL in the 2006 administrative review. Noting that the VMPL did not submit a response to its questionnaire⁷⁵⁶, the USDOC applied "facts available" against VMPL "to address omissions for each type of assistance provided by the SGOK".⁷⁵⁷

7.455. The United States submits that the USDOC's determination at issue was not specifically detailed because "no party raised the specific issue of benefits to VMPL through the KIP subsidy programs for purposes of the final determination."⁷⁵⁸ Nevertheless, the United States contends that the following facts on the record allowed the USDOC to "reasonabl[y] infer that VMPL used and benefitted from the KIP programs":

- (1) all subsidy programs under 1993 KIP, 1996 KIP, 2001 KIP, and 2006 KIP were demonstrated to exist;
- (2) VMPL received subsidies from the state government of

⁷⁵² United States' response to Panel question No. 108, para. 68. (footnotes omitted) In addition, the United States submits that "JSW's refusal to provide the necessary information, taken together with the above factors, provides a reasonable basis for the inference relied upon in this case, consistent with Article 12.7 of the SCM Agreement. That is, had the price paid by JSW been at least as high as those reported in the Tex Report on the record, it would have had every reason to cooperate and supply those prices. The refusal to cooperate permitted a reasonable inference that JSW benefitted to the maximum extent possible under the program." United States' response to Panel question No. 108, para. 69. See also 2006 Preliminary Results, Exhibit IND-32, p. 10, internal page 1587; and 2006 Issues and Decision Memorandum, Exhibit IND-33, pp. 16 and 92-94.

⁷⁵³ India's first written submission, para. 540; and second written submission, paras. 271 and 274.

⁷⁵⁴ India's first written submission, para. 535; and New subsidy allegations, 23 May 2007 ("2007 New Subsidy Allegations (JSW) for 2006 AR"), Exhibit IND-25, pp. 20-30.

⁷⁵⁵ India's first written submission, paras. 536-537; and second written submission, paras. 272-274.

⁷⁵⁶ India contends that no separate questionnaire was provided to VMPL. (India's first written submission, para. 539) However, we note that the USDOC stated that in a "supplemental questionnaire covering the new subsidies, [the USDOC] asked VMPL, as iron ore supplier that is majority owned by JSW, to respond to the questions regarding its receipt of assistance under the 1993 KIP." (2006 Preliminary Results, Exhibit IND-32, p. 17, internal page 1594) In its response to Panel question No. 108, the United States submits that the USDOC issued VMPL a questionnaire regarding the assistance it received from the SGOK, to which VMPL did not provide a response. (United States' response to Panel question No. 108, para. 71) Referring to the fact that "India complains that the questionnaire was not directly delivered to VMPL, but was instead provided to JSW", the United States submits that India has not explained how this action is inconsistent with Article 12.7 of the SCM Agreement. (United States' first written submission, para. 268) In our view, India has not sufficiently explained whether it takes issue with the questionnaire delivery, including how this action could be inconsistent with Article 12.7. Thus, we do not address this matter in our Report.

⁷⁵⁷ 2006 Preliminary Results, Exhibit IND-32, p. 17, internal page 1594. See India's first written submission, paras. 538-539.

⁷⁵⁸ United States' response to Panel question No. 108, para. 71.

Karnataka through MML; (3) to the extent JSW provided any information on the KIP programs, it showed that JSW received benefits under the programs for those in which it chose to respond [to questionnaires] (namely, the 1993 KIP tax incentives and VAT refunds programs), which shows that these subsidy programs are available to and have been used by JSW; (4) VMPL was operated as a vehicle for the state government of Karnataka to subsidize JSW; (5) JSW stated that eligibility for the KIP subsidies was limited to industries located within designated regions of Karnataka, and VMPL was located in Karnataka; (6) VMPL did not provide any information specifically requested by Commerce concerning the KIP subsidy programs; and (7) the GOI did not provide any information concerning these subsidy programs, as requested by Commerce.⁷⁵⁹

7.456. After carefully reviewing the United States' arguments and the evidence cited, we conclude that the United States has failed to identify any evidence on the record that could establish a factual foundation for the USDOC's determinations that VMPL used and benefited from the KIP subsidy programmes at issue.⁷⁶⁰ Therefore, the Panel upholds India's claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.4 MML's alleged subsidies to JSW

7.457. India challenges two instances of application of "facts available" in which the USDOC allegedly assumed that (i) MML is a government or public body, and that (ii) the purchase of iron ore by MML was for more than adequate remuneration, in order for the USDOC to determine, in the context of the 2006 administrative review, that the alleged financial contribution by MML to JSW (through VMPL) is a subsidy within the meaning of Article 1.1 of the SCM Agreement.⁷⁶¹ India claims that the alleged applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations were devoid of any factual foundation.⁷⁶²

7.458. The United States submits that the USDOC did not rely upon or apply "facts available" in making its determination that MML is a government or public body.⁷⁶³ We agree that the USDOC's determination in this regard is based on evidence contained in the record and not on facts

⁷⁵⁹ United States' response to Panel question No. 108, para. 71. (footnotes omitted)

⁷⁶⁰ We note that the United States' assertions that "VMPL received subsidies from the state government of Karnataka through MML" (which we examine below), and that "VMPL was operated as a vehicle for the state government of Karnataka to subsidize JSW" refer to the petitioner's allegations, which India contends did not allege that VMPL received benefits under the KIP subsidy programmes at issue. (India's first written submission, paras. 536-537; and 2007 New Subsidy Allegations (JSW) for 2006 AR, Exhibit IND-25, pp. 20-30) We also note that, with respect to these assertions, the United States quotes the USDOC's memorandum on "JSW Steel Limited New Subsidy Allegations". However, the United States refers to page 8 of this document, which was not included in the USDOC's memorandum regarding new subsidy allegations for JSW Steel Limited, 27 September 2007 ("USDOC's memorandum on new subsidy allegations for JSW"), Exhibit USA-59.

⁷⁶¹ The United States requested the Panel to find that India's claim under Article 12.7 of the SCM Agreement relating to the treatment of MML as a public body falls outside the Panel's terms of reference because India's panel request fails to comply with the requirements of Article 6.2 of the DSU. (United States' first written submission, para. 269) In our view, the United States' request is based on the understanding that India claimed that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in treating MML as a public body. However, India's claims here refer to an alleged inconsistency with Article 12.7, which was included in India's panel request. (WT/DS436/3) Therefore, with respect to the alleged inconsistency with Article 12.7, we conclude that India's panel request complies with the requirements in Article 6.2 of the DSU. Consequently, India's arguments at issue relate to a claim that falls within the Panel's terms of reference. Therefore, we will consider these claim and arguments in our disposition of the issues in this case.

⁷⁶² India's first written submission, paras. 541-544.

⁷⁶³ United States' response to Panel question No. 110, para. 74.

available.⁷⁶⁴ As the USDOC did not apply "facts available" in making this determination, we see no factual basis for India's Article 12.7 claim.⁷⁶⁵ We reject that claim accordingly.

7.459. With respect to the alleged payment of more than adequate remuneration by MML for iron ore supplied by VMPL, India contends that "nothing on the record provided sufficient information or evidence for the United States to have assumed that the purchase of iron ore by MML was for more than adequate remuneration."⁷⁶⁶ The United States submits that the information contained in the petitioner's allegation served as the factual foundation for the USDOC's "facts available" determination at issue.⁷⁶⁷ In examining the petitioner's allegations, the USDOC found that "there is sufficient evidence to believe or suspect that MML's failure to enforce pre-existing agreements with VMPL that resulted in MML paying higher prices for iron ore constitutes a financial contribution ... because MML purchased a good from VMPL at more than adequate remuneration."⁷⁶⁸ India has not pointed to any record evidence demonstrating that MML failed to enforce pre-existing agreements with VMPL. In light of this, and the United States' explanations, we conclude that the new subsidy allegations provided a sufficient factual foundation for USDOC's determination, and the information used by USDOC was a reasonable replacement for the missing information.⁷⁶⁹ We therefore reject India's claim that the USDOC's determination that the purchase of iron ore by MML was for more than adequate remuneration is inconsistent with Article 12.7 of the SCM Agreement.

7.7.5.2.5 Tata's alleged benefit from programmes administered by the SGOJ

7.460. India challenges 13 instances of application of "facts available" in the USDOC's determination, in the context of the 2008 administrative review, that Tata used and benefited from certain subsidy programmes administered by the SGOJ.⁷⁷⁰ India claims that these applications of "facts available" are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations were devoid of any factual foundation and contradicted the "facts available" from the 2006 administrative review.⁷⁷¹

7.461. With respect to the programmes, under the 2001 JSIP, on exemption of electricity duty, capital power generating subsidy, interest subsidy, and stamp duty and registration, India contends that Tata declared itself ineligible in the 2006 administrative review (with the eligibility criterion being reiterated by the GOI), because these programmes were only available to "new industrial units".⁷⁷² With respect to the programmes, under the 2001 JSIP, on capital investment

⁷⁶⁴ We note that, in examining the petitioner's allegations, the USDOC "determined that the petitioner [by referencing the Report by the Comptroller and Auditor General of India] has supported its allegation that MML is a state-owned company and that VMPL is jointly owned by MML and JSW." USDOC's memorandum on new subsidy allegations for JSW, Exhibit USA-59, p. 2, internal page 10. See also United States' response to Panel question No. 110, para. 74.

⁷⁶⁵ We note that if India actually intended to challenge the USDOC's determination to consider MML as a government or public body, India would have brought a claim under Article 1.1(a)(1) of the SCM Agreement.

⁷⁶⁶ India's first written submission, para. 543.

⁷⁶⁷ United States' first written submission, para. 272. See also United States' response to Panel question No. 111, para. 75.

⁷⁶⁸ USDOC's memorandum on new subsidy allegations for JSW, Exhibit USA-59, p. 2, internal page 10.

⁷⁶⁹ We note that if India actually intended to challenge the USDOC's determination that MML paid more than adequate remuneration for iron ore supplied by VMPL, India would have brought a claim under Articles 1.1(a)(1) and 14(d) of the SCM Agreement.

⁷⁷⁰ These programmes included those under the 2001 JSIP ((i) exemption of electricity duty; (ii) offset of Jharkhand sales tax; (iii) capital investment incentive; (iv) capital power generating subsidy; (v) interest subsidy; (vi) stamp duty and registration; (vii) feasibility study and project report cost reimbursement; (viii) pollution control equipment subsidy; (ix) incentive for quality certification; and (x) employment incentives), and under the infrastructure subsidies to mega projects ((i) tax incentives; (ii) grants; and (iii) loans). (Issues and decision memorandum: final results and partial rescission of countervailing duty administrative review, 19 July 2010 ("2008 Issues and Decision Memorandum"), Exhibit IND-41, pp. 39-45; and 75 Fed. Reg. 1503-1518, 11 January 2010, Exhibit USA-40, pp. 14-16, internal pages 1516-1518)

⁷⁷¹ India's first written submission, para. 560.

⁷⁷² Ibid. paras. 547 and 550-552, second written submission, para. 275; and 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, pp. 7-8; and Administrative review for the period 01/01/2006 to 31/12/2006, questionnaire response from the Government of India regarding new subsidy allegations against Tata Steel Limited, 8 November 2007 ("2007 Questionnaire Response from the GOI re. Tata for 2006 AR"), Exhibit IND-60, pp. 8-9. India contends that these programmes had a cut-off date in 2005, and thus "[f]or obvious and logical reasons, if Tata was ineligible for these programs in 2006, this could not have changed in 2008." (India's second written submission, para. 275)

incentive, incentive for quality certification, and employment incentives, India contends that Tata declared itself ineligible in the 2006 administrative review (with the eligibility criteria being reiterated by the GOI), because these programmes were only available respectively to small or medium enterprises; small scale and ancillary industries; and Khadi and Village Industries, farm based industries and forest based industries.⁷⁷³ With respect to the offset of Jharkhand sales tax, feasibility study and project report cost reimbursement, and the pollution control equipment subsidy, under the 2001 JSIP, and the tax incentive, grants and loans programmes, under the infrastructure subsidies to mega projects, India contends that Tata declared, in the 2006 administrative review, that it had not benefited from these subsidies.⁷⁷⁴

7.462. The United States recalls that Tata did not provide any information in the 2008 administrative review. The United States asserts that the USDOC could not have relied on the information submitted to the 2006 administrative review, because (i) the fact that a company did not receive benefits in a prior period does not mean that the company will never receive benefits under a programme in the future, and (ii) to rely on the information submitted for a past review would defeat the purpose of having a review for the current period.⁷⁷⁵

7.463. The United States submits that "[i]n the 2008 Administrative Review, the factual foundation relied upon by [the USDOC] to make its determination was the factual information that provided the basis for initiating the investigation into these programs."⁷⁷⁶ The United States also submits that "the factual description of each of the 13 programs is drawn from both the GOI's April 23, 2009 response and the petitioners' subsidy allegation."⁷⁷⁷ In addition, the United States submits that the following "facts available" supported the USDOC's determinations:

(1) each subsidy program has been demonstrated to exist; (2) each subsidy program was found countervailable (*i.e.*, that it constituted a financial contribution, provided a benefit, and was specific); (3) each subsidy was available to steel producers in the state of Jharkhand; (4) Tata is a steel producer; and (5) Tata has facilities located in at least the state of Jharkhand; (6) the GOI provided a qualified statement that "GOI *understands* that Tata did not avail any benefits under this program", but did not provide any documentation to support that statement, as Commerce requested; (7) with respect to Infrastructure Subsidies to Mega Projects, referred to in items l. and m. above, the GOI stated: "For the benefits if any availed by Tata, please see the response filed by Tata"; and (8) that Tata refused to provide a response, and thus did not provide any of the necessary information requested by Commerce, including any information pertaining to the Infrastructure Subsidies to Mega Projects referenced by the GOI in its April 23, 2009 response.⁷⁷⁸

7.464. After examining the USDOC's new subsidy allegation memorandum of 27 September 2007⁷⁷⁹, and the petition dated 23 May 2007 (on which the memorandum is based)⁷⁸⁰, we conclude that, as contended by the United States, the petition establishes a

⁷⁷³ India's first written submission, paras. 549, 555 and 557, second written submission, para. 275; and 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, pp. 8-9; and 2007 Questionnaire Response from the GOI re. Tata for 2006 AR, Exhibit IND-60, pp. 9-10.

⁷⁷⁴ India's first written submission, paras. 548, 553-554 and 556, second written submission, para. 275; and 2007 Supplemental Questionnaire Response from Tata for 2006 AR, Exhibit IND-65, pp. 7-9.

⁷⁷⁵ United States' first written submission, paras. 236 and 240-241. See also fn. 790 below for the United States' explanation of incorporating record from prior segments of the particular proceeding or other proceedings into the record of a current review.

⁷⁷⁶ United States' first written submission, para. 241.

⁷⁷⁷ United States' response to Panel question No. 112, para. 76.

⁷⁷⁸ Ibid. para. 77. (footnotes omitted)

⁷⁷⁹ USDOC's memorandum regarding new subsidy allegations for Tata Steel Limited, 27 September 2007 ("USDOC's memorandum on new subsidy allegations for Tata"), Exhibit IND-30. We note that this memorandum is referred to in the USDOC's preliminary determination for the 2008 administrative review with respect to certain subsidy programmes (see 75 Fed. Reg. 1503-1518, Exhibit USA-40).

⁷⁸⁰ New subsidy allegations against Tata Steel Limited, 23 May 2007 ("2007 New Subsidy Allegations (Tata) for 2006 AR"), Exhibit IND-26. We note that although both documents (Exhibits IND-26 and IND-30) refer to the 2006 administrative review, the United States submits, and India has not contested, that they are on the administrative record of the 2008 administrative review. See United States' response to Panel question No. 112, para. 76.

sufficient factual foundation for the USDOC's determinations relating to the following subsidy programmes:

- (a) with respect the 2001 JSIP: (i) exemption of electricity duty; (ii) offset of Jharkhand sales tax; (iii) capital power generating subsidy; (iv) interest subsidy; (v) stamp duty and registration; and (vi) pollution control equipment subsidy.⁷⁸¹
- (b) with respect to the infrastructure subsidies to mega projects: (i) tax incentives; (ii) grants; and (iii) loans.⁷⁸²

Based on this evidence, and in light of the United States' explanations, we conclude that the new subsidy allegations provided a sufficient factual foundation for USDOC's determination, and the information used by USDOC was a reasonable replacement for the missing information. Thus, the Panel concludes that India has failed to establish that the USDOC's determinations with respect to these subsidy programmes are inconsistent with Article 12.7 of the SCM Agreement.

7.465. However, we note that the memorandum and the petition at issue do not refer to the following subsidy programmes under the 2001 JSIP: (i) capital investment incentive; (ii) feasibility study and project report cost reimbursement; (iii) incentive for quality certification; and (iv) employment incentives. The United States has not cited any other evidence on the record that could establish a factual foundation for the USDOC's determinations that Tata used and benefited from these 2001 JSIP subsidy programmes during the period covered by the 2008 administrative review. Thus, the Panel upholds India's claims that these applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.6 Tata's alleged benefit from certain programmes administered by the SGOG, SGOM, SGOK, SGAP and SGOC

7.466. India challenges 55 instances of application of "facts available" in the USDOC's determination, in the context of the 2008 administrative review, that Tata used and benefited from (i) six programmes administered by the SGOG⁷⁸³; (ii) eight programmes administered by the SGOM⁷⁸⁴; (iii) ten programmes administered by the SGAP⁷⁸⁵; (iv) nine programmes administered by the SGOC⁷⁸⁶; and (v) 22 programmes administered by the SGOK.⁷⁸⁷ India claims that these applications of "facts available" are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations were devoid of any factual foundation⁷⁸⁸ and, with respect to certain programmes, contradicted the "facts available" from the 2006 administered review.⁷⁸⁹

⁷⁸¹ 2007 New Subsidy Allegations (Tata) for 2006 AR, Exhibit IND-26, pp. 14-15. See also USDOC's memorandum on new subsidy allegations for Tata, Exhibit IND-30, pp. 4-5.

⁷⁸² 2007 New Subsidy Allegations (Tata) for 2006 AR, Exhibit IND-26, pp. 20-22. See also USDOC's memorandum on new subsidy allegations for Tata, Exhibit IND-30, pp. 5-6.

⁷⁸³ 2008 Preliminary Results, Exhibit IND-40, internal pages 1507-1509; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 21-25.

⁷⁸⁴ 2008 Preliminary Results, Exhibit IND-40, internal pages 1509-1511; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 25-29.

⁷⁸⁵ 2008 Preliminary Results, Exhibit IND-40, internal pages 1511-1514; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 29-34.

⁷⁸⁶ 2008 Preliminary Results, Exhibit IND-40, internal pages 1514-1519; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 34-39.

⁷⁸⁷ 2008 Preliminary Results, Exhibit IND-40, internal pages 1519-1524; and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 45-55.

⁷⁸⁸ India's first written submission, para. 563. India contends that "[a] perusal of the new subsid[y] allegation petitions would reveal that only programs administered by the SGOJ were alleged against Tata; no other programs administered by any other state government were alleged against Tata." India's first written submission, para. 563. (footnote omitted)

⁷⁸⁹ India submits that Tata had stated in the 2006 administrative review that "it was not located in the SGOG and that its manufacturing facility for the subject product was not located in the SGOM." (India's first written submission, para. 565) India also contends that this information was corroborated by the questionnaire response submitted by the GOI, since Tata was not listed as a party receiving any benefit from the SGOG and SGOM. (India's first written submission, para. 565)

7.467. The United States submits that the record of the 2006 administrative review is not automatically part of the record of the 2008 administrative review.⁷⁹⁰ In addition, the United States contends that, due to the collective refusal of the GOI and Tata to provide the requested information, the USDOC's determination "relied upon evidence provided by petitioners in previous reviews and on prior determinations" as available facts.⁷⁹¹ The United States also submits that the following "facts available" supported the USDOC's determinations:

(1) each subsidy program was demonstrated to exist; (2) each subsidy program is countervailable (*i.e.*, each was based on a financial contribution that provides a benefit, and each program was specific); (3) each subsidy is available to steel producers; (4) Tata is a steel producer; (5) Commerce specifically requested that the GOI "indicate the states in India in which Tata, the respondent company, had operations during the POR [period of review]" [to which] the GOI responded that "[n]o information is available with the Government of India in this regard" and that "USDOC may contact Tata Steel for a list of States in which they had operations during the POR."; (6) Commerce specifically requested that Tata state the nature and locations of its facilities during the 2008 period; and (7) Tata refused to participate in the review or provide any necessary information that Commerce requested to make its determination.⁷⁹²

7.468. After carefully reviewing the United States' arguments and the evidence cited, we conclude that the United States has failed to identify any evidence on the record that establishes a factual foundation for the USDOC's determinations that Tata used and benefited from the subsidy programmes at issue during the period covered by the 2008 administrative review. Although the United States generally contends that the USDOC's determinations were based on evidence provided by petitioners in previous reviews and on prior determinations, the United States has not identified which petitioner allegations and prior determinations, or which specific facts, it relies upon in this regard.⁷⁹³ Thus, the Panel upholds India's claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.7 Tata's alleged benefit from certain programmes administered by the GOI

7.469. India challenges nine instances of application of "facts available" in the USDOC's determination, in the context of the 2008 administrative review, that Tata used and benefited from certain subsidy programmes administered by the GOI. India claims that these applications of "facts available" are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC's determinations ignored evidence produced by the GOI in the 2008 administrative review and were devoid of any factual foundation.⁷⁹⁴

7.7.5.2.7.1 Purchase of high-grade iron ore from NMDC

7.470. It is undisputed that, in the 2008 administrative review, the GOI provided a list of companies that purchased high-grade iron ore from NMDC during the period of review, and that

⁷⁹⁰ United States' first written submission, para. 242. The United States submits that when the USDOC relies on a prior determination, from the same or different proceedings, as a fact available, such determination is incorporated into the record of the current review. However, this does not mean that the underlying record of such prior determination (including responses to questionnaires) is automatically incorporated into the record of the current review, unless the concerned party submits such information from the prior review onto the record of the current review. United States' response to Panel question No. 144, para. 87.

⁷⁹¹ United States' response to Panel question No. 113, para. 78. See also United States' first written submission, para. 245.

⁷⁹² United States' response to Panel question No. 113, para. 79. (footnotes omitted)

⁷⁹³ In addition, we accept India's argument that petitions in the 2006 administrative review could not have provided a factual foundation for the USDOC's determinations at issue, since India contends that none of the subsidy programmes at issue were alleged as new subsidies against Tata in the new subsidy allegation petitions for the 2006 and 2008 administrative reviews. India's first written submission, para. 563, and second written submission, para. 276.

⁷⁹⁴ India's first written submission, paras. 567-574; second written submission, paras. 278-279; and response to Panel question No. 115.

Tata was not included on that list.⁷⁹⁵ However, as India provided no supporting documentation, the United States contends that "the list, standing alone, did not constitute complete and verifiable evidence" that Tata did not purchase high-grade iron ore from NMDC during the period of review.⁷⁹⁶ The United States also submits that the following facts supported the USDOC's determination at issue:

(1) the subsidy program was demonstrated to exist; (2) the program was found to provide a countervailable subsidy in the 2nd, 4th, and 5th Administrative Reviews of hot-rolled carbon steel flat products from India (*i.e.*, financial contribution, benefit, and specificity); (3) no new information was provided, or was otherwise on the record, that would indicate a change to the subsidy program since the conclusion of the 5th Administrative Review; (4) hot-rolled steel producers, Ispat and Essar, in the 4th Administrative Review covering the 2006 period of review were found to have received a benefit from this subsidy program; (5) Tata is a hot-rolled steel producer; (6) Commerce requested, and Tata was given the opportunity to provide, necessary information concerning any purchases of high-grade iron ore from NMDC; and (7) Tata refused to provide any information on this subsidy program, as requested by Commerce.⁷⁹⁷

7.471. After carefully reviewing the United States' arguments and the evidence cited, we find that the United States has failed to identify any evidence on the record that establishes a factual foundation for the USDOC's determination that Tata used and benefited from the subsidy provided through the purchase of high-grade iron ore from NMDC during the period covered by the 2008 administrative review. Thus, the Panel upholds India's claims that the application of "facts available" at issue is inconsistent with Article 12.7 of the SCM Agreement because it is devoid of any factual foundation.

7.7.5.2.7.2 MDA and MAI Programmes

7.472. It is undisputed that, in the 2008 administrative review, the GOI stated that Tata did not benefit from the MDA and MAI subsidy programmes, and submitted certificates from the administering authority attesting to this fact.⁷⁹⁸ However, in the absence of Tata's cooperation, the USDOC considered that the GOI's submissions did not constitute complete and verifiable evidence that Tata did not benefit from the subsidy programmes at issue.⁷⁹⁹ The United States submits that, in its application of "facts available", the USDOC relied on its examination of the subsidy

⁷⁹⁵ Administrative review for the period 01/01/2008 to 31/12/2008, questionnaire response from the Government of India, 23 April 2009 ("2009 Questionnaire Response from the GOI for 2008 AR"), Exhibit USA-32a, p. 43; Administrative review for the period 01/01/2008 to 31/12/2008, supplemental questionnaire response from the Government of India, 10 August 2009 ("2009 Supplemental Questionnaire Response from the GOI for 2008 AR"), Exhibit USA-34, p. 5; 2008 Preliminary Results, Exhibit IND-40, p. 8, internal page 1503; United States' response to Panel question No. 113, para. 81; and India's first written submission, para. 567, second written submission, para. 278, and response to Panel question No. 107.

⁷⁹⁶ United States' response to Panel question No. 114, para. 81. See also 2008 Issues and Decision Memorandum, Exhibit IND-41, p. 13; and 2008 Preliminary Results, Exhibit IND-40, p. 8, internal page 1503 (including the USDOC's statement that "it cannot rely solely upon the government's statements to make a determination of non-use"); and United States' first written submission, para. 251.

⁷⁹⁷ United States' response to Panel question No. 114, para. 80. (footnotes omitted) See also United States' response to Panel question No. 114, para. 88.

⁷⁹⁸ 2009 Questionnaire Response from the GOI for 2008 AR, Exhibit USA-32a, pp. 59 and 67; Administrative review for the period 01/01/2008 to 31/12/2008, supplemental questionnaire response from the Government of India, 4 September 2009 ("2009 Other Supplemental Questionnaire Response from the GOI for 2008 AR"), Exhibit USA-36, pp. 6 and 11-12 (with copy of the certificates); 2008 Preliminary Results, Exhibit IND-40, pp. 8-9, internal pages 1503-1504; 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 14-15; India's first written submission, para. 568, and second written submission, para. 278; and United States' first written submission, paras. 248-250.

⁷⁹⁹ 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 14-15; 2008 Preliminary Results, Exhibit IND-40, p. 9, internal page 1504 (including the USDOC's statement that "it cannot rely solely upon the government's statements to make a determination of non-use"); United States' first written submission, para. 251, and response to India's question No. 14, para. 30.

programmes at issue in two prior determinations, relating to other proceedings, to determine that such programmes provided countervailable export subsidies.⁸⁰⁰

7.473. We note that the United States accepts that "it is not clear from the record why [the USDOC] examined these particular subsidy programs [with respect to Tata] in the 2008 administrative review."⁸⁰¹ Examining the USDOC's determinations at issue, we are unable to find any indication by the USDOC to the effect that it was relying on prior determinations that Tata had benefited from the subsidy programmes at issue.⁸⁰² We therefore conclude that the United States has not referred to any evidence on the record that establishes a factual foundation for the USDOC's determinations that Tata used and benefited from the subsidy programmes at issue during the period covered by the 2008 administrative review. Thus, the Panel upholds India's claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.7.3 Six sub-programmes of the SEZ Act

7.474. It is undisputed that, in the 2008 administrative review, the GOI stated that Tata did not benefit from the six sub-programmes of the SEZ Act⁸⁰³ at issue.⁸⁰⁴ However, in the absence of cooperation by Tata, and in view of the lack of any supporting documentation from the GOI, the USDOC considered that the GOI's submission did not constitute complete and verifiable evidence that Tata did not benefit from the subsidy programmes at issue.⁸⁰⁵ The United States contends that the following facts supported the USDOC's determinations at issue:

- (1) each sub-program was demonstrated to exist; (2) the program was found to be a countervailable subsidy in the 5th Administrative Review (*i.e.*, financial contribution, benefit, and specificity); (3) no new information was provided, or was otherwise on the record, that would indicate a change to the subsidy program since the conclusion of the 5th Administrative Review; (4) these sub-programs were available to companies with SEZ units, including hot-rolled steel producers; (5) Tata is a hot-rolled steel producer; (6) Commerce requested, and Tata was given the opportunity to

⁸⁰⁰ In its examination of the MDA programme and the MAI programme, the USDOC respectively relied on the administrative review on Iron-Metal Casting from India, and the administrative review on Lined Paper Products from India. See 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 14-15; 2008 Preliminary Results, Exhibit IND-40, pp. 8-9, internal pages 1503-1504; United States' first written submission, para. 251, and response to Panel question No. 114, paras. 82-83.

⁸⁰¹ United States' response to Panel question No. 114, para. 89.

⁸⁰² Although the USDOC refers respectively to the administrative review on Iron-Metal Casting from India, and the administrative review on Lined Paper Products from India in its determinations, it does not seem to us that such references relate to the USDOC's applications of "facts available" at issue. See 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 14-15; and 2008 Preliminary Results, Exhibit IND-40, pp. 8-9, internal pages 1503-1504.

⁸⁰³ The six sub-programmes of the SEZ Act are: (i) duty free import/domestic procurement of goods and services for development, operation, and maintenance of SEZ Units Programme; (ii) exemption from excise duties on goods machinery and capital goods brought from the domestic tariff area for use by an enterprise in the SEZ; (iii) drawback on goods brought or services provided from the domestic tariff area into a SEZ, or services provided in a SEZ by services providers located outside India; (iv) 100 per cent exemption from income taxes on export income from the first 5 years of operation, 50 per cent for the next 5 years, and a further 50 per cent exemption on export income reinvested in India for an additional 5 years; (v) exemption from the central sales tax (CST); and (vi) exemption from the national service tax. See 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 15-19; and 2008 Preliminary Results, Exhibit IND-40, pp. 9-11, internal pages 1504-1506. Although India occasionally referred to five sub-programmes of the SEZ Act in its submissions (India's first written submission, paras. 567-568; and second written submission, para. 278), India clarified that its claims refer to all six sub-programmes of the SEZ Act. (India's response to Panel question No. 106)

⁸⁰⁴ 2009 Questionnaire Response from the GOI for 2008 AR, Exhibit USA-32a, p. 68; 2008 Preliminary Results, Exhibit IND-40, pp. 9-11, internal pages 1504-1506, and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 15-18; India's first written submission, para. 568, and second written submission, para. 278; and United States' first written submission, para. 248, and response to Panel question No. 114, para. 86.

⁸⁰⁵ 2008 Preliminary Results, Exhibit IND-40, pp. 9-11, internal pages 1504-1506 (including the USDOC's statement that "it cannot rely solely upon the government's statements to make a determination of non-use"), and 2008 Issues and Decision Memorandum, Exhibit IND-41, pp. 15-18; United States' first written submission, para. 251, and response to Panel question No. 114, para. 86.

provide, necessary information pertaining to these sub-programs; and (7) Tata refused to provide any information on this subsidy program as requested by Commerce.⁸⁰⁶

7.475. After carefully reviewing the United States' arguments and the evidence cited, we conclude that the United States has failed to identify any evidence on the record that establishes a factual foundation for the USDOC's determinations that Tata used and benefited from the subsidy programmes at issue during the period covered by the 2008 administrative review. Thus, the Panel upholds India's claims that the applications of "facts available" at issue are inconsistent with Article 12.7 of the SCM Agreement because they are devoid of any factual foundation.

7.7.5.2.8 SDF loans as a "potential" direct transfer of funds

7.476. India challenges one instance of application of "facts available" in the USDOC's determination, in the 2008 administrative review, that the SDF loans provide a financial contribution in the form of a potential direct transfer of funds. India claims that this application of "facts available" is inconsistent with Article 12.7 of the SCM Agreement, because it is contrary to facts on the record.⁸⁰⁷

7.477. We recall our finding that the USDOC applied facts available in order to *confirm* its earlier determinations that SDF loans constitute "direct transfers of funds" in the meaning of Article 1.1(a)(1)(i).⁸⁰⁸ Thus, there was no determination by the USDOC in the 2008 administrative review that SDF loans constitute "potential direct transfers of funds". Since there is therefore no factual basis for India's Article 12.7 claim, we reject that claim accordingly.

7.7.5.2.9 2013 sunset review determination

7.478. India challenges 92 instances of application of "facts available" against Essar, ISPAT, SAIL and Tata in the USDOC's determinations, in the 2013 sunset review, that these companies benefited from a number of subsidy programmes. India claims that these applications of "facts available" are inconsistent with Article 12.7 of the SCM Agreement, because the USDOC assumed facts and applied "facts available" in a punitive fashion.⁸⁰⁹

7.479. We note that the presentation of India's Article 12.7 claims relating to these 92 instances of alleged improper application of facts available is limited to a single paragraph in its first written submission, with no further development of any substantive argument in subsequent submissions. Moreover, India did not adduce any evidence in support of its claims in its first written submission, or subsequently. India did not even specify the instances of alleged application of "facts available" or the particular subsidy programmes at issue. As a result, we are unable to evaluate India's claims, or to assess the consistency with Article 12.7 of any use of facts available by USDOC in the context of the 2013 sunset review.⁸¹⁰

7.480. Thus, the Panel concludes that India has failed to establish a *prima facie* case that the USDOC's determinations, in the 2013 sunset review, that Essar, ISPAT, SAIL and Tata benefited from a number of subsidy programmes are inconsistent with Article 12.7 of the SCM Agreement.

⁸⁰⁶ United States' response to Panel question No. 114, para. 85. (footnotes omitted) See also United States' response to Panel question No. 114, para. 88.

⁸⁰⁷ India's first written submission, para. 575.

⁸⁰⁸ See para. 7.301 above.

⁸⁰⁹ India's first written submission, para. 576.

⁸¹⁰ We note that, in its first written submission, the United States submitted a request for preliminary ruling that the Panel find that India's claims of inconsistency with Article 12.7 of the SCM Agreement relating to the 2013 sunset review determination fall outside the Panel's terms of reference. (United States' first written submission, paras. 274-283) However, we recall that in our preliminary ruling (see paras. 1.39-1.42 above), the Panel concluded that the 2013 sunset review claims are within the Panel's terms of reference. Thus, we were prepared to consider the substance of those claims, but India has failed to present evidence and arguments that would allow us to do so.

7.8 Whether new subsidy allegations may be examined in administrative reviews

7.481. India claims that the examination by the United States of new subsidy allegations in administrative reviews related to the imports at issue was inconsistent with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement.⁸¹¹ The expression "new subsidy" is used by India to refer to subsidy programmes not formally examined in the original investigation, but included and examined in subsequent reviews.

7.8.1 Relevant WTO provisions

7.482. Article 11.1 of the SCM Agreement provides:

Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

7.483. Article 11.2 of the SCM Agreement provides in relevant part:

An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

...

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

7.484. Article 11.9 of the SCM Agreement provides:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

7.485. Article 13.1 of the SCM Agreement provides:

As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

7.486. Article 21.1 of the SCM Agreement provides:

A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

7.487. Article 21.2 of the SCM Agreement provides:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has

⁸¹¹ India's first written submission, paras. 585-623.

elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

7.488. Article 22.1 of the SCM Agreement provides:

When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

7.489. Article 22.2 of the SCM Agreement provides in relevant part:

A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[], adequate information on the following:

- (i) the name of the exporting country or countries and the product involved;
- (ii) the date of initiation of the investigation;
- (iii) a description of the subsidy practice or practices to be investigated;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested Members and interested parties should be directed; and
- (vi) the time-limits allowed to interested Members and interested parties for making their views known.

7.8.2 Main arguments of the parties

7.8.2.1 India

7.490. India submits two sets of arguments seeking to demonstrate that, in investigating a number of new subsidy programmes in annual administrative reviews, the United States circumvented the obligations of Articles 11, 13 and 22 of the SCM Agreement, and inappropriately expanded the scope of a review proceeding under Article 21 of the SCM Agreement.⁸¹²

7.491. First, India argues that new subsidy allegations relating to the imports at issue could not have been examined by the United States in administrative reviews because (i) the United States did not receive a written application pursuant to Articles 11.1, 11.2 and 11.9 of the SCM Agreement⁸¹³; (ii) India was not invited for consultations with the aim of clarifying the existence, amount and nature of the newly alleged subsidies pursuant to Article 13.1 of the SCM Agreement⁸¹⁴; (iii) the United States did not "initiate" an investigation into the new subsidy allegations under Article 11.1 of the SCM Agreement⁸¹⁵; and (iv) the United States did not issue a

⁸¹² India's first written submission, paras. 596-597 and 623.

⁸¹³ Ibid. paras. 585-595, and 599-604.

⁸¹⁴ Ibid. paras. 585, 593, 595 and 605-607.

⁸¹⁵ Ibid. paras. 588-590, 595, and 608-615.

"public notice" covering the new subsidy allegations pursuant to Articles 22.1 and 22.2 of the SCM Agreement.⁸¹⁶

7.492. Second, India argues that reviews under Article 21 of the SCM Agreement are aimed at correcting or re-examining determinations relating to subsidization and injury that already exist; they concern the duration of countervailing measures once they have been imposed. India contends that a review "cannot be for something that was not in existence at all" at the time the measure being reviewed was imposed.⁸¹⁷ According to India, Article 21 is not intended to govern the imposition of duties *per se*, and does not cover a new examination into the existence, degree and effect of newly alleged subsidies. India emphasizes that "[t]he scheme of the SCM Agreement clearly suggests that different set[s] of procedural and substantive rules have been made for reviews and original investigations considering the inherent differences between these two proceedings."⁸¹⁸ Conflating original proceedings under Article 11 and review proceedings under Article 21 would "dilut[e] the contextual separation made in the SCM Agreement between both proceedings and upset[] the delicate balance of rights and obligations agreed upon by the Members."⁸¹⁹ Thus, India submits that the United States is not permitted to expand the scope of a review under Articles 21.1 and 21.2 so as to initiate new investigations against new subsidies.⁸²⁰

7.8.2.2 United States

7.493. The United States argues that India's claims rely on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programmes that were not examined in the original investigation. According to the United States, India's interpretation of the SCM Agreement "would create an absurd result, whereby multiple investigations, reviews and duty determinations would exist simultaneously with respect to a single product."⁸²¹

7.494. The United States submits that the USDOC only examined newly identified subsidies for which domestic parties submitted reasonably available evidence demonstrating that there is a financial contribution by a government or public body, conferring a benefit. The USDOC also required domestic parties to provide reasonably available evidence demonstrating that the alleged subsidy was specific.⁸²² The United States argues that Article 21 of the SCM Agreement neither requires that reviews be limited to the specific subsidy programmes in place at the time of the original investigation, nor imports into reviews the requirements of Article 11 of the SCM Agreement, which govern the initiation of an original investigation.⁸²³ The United States recalls that the purpose of subsequent reviews is to examine whether the continued imposition of a duty is necessary to offset subsidization which is causing injury. With this purpose in mind, it is necessary to examine allegations of additional subsidization programmes with respect to the same products and the same companies at issue in the original investigation.⁸²⁴

7.495. The United States contends that the text of each relevant provision and the overall structure of the SCM Agreement suggest that an *investigation* and a subsequent *review* of duties imposed pursuant to an investigation are "two separate and distinct processes, governed by separate provisions of the SCM Agreement."⁸²⁵ The United States argues that were the rules of another provision of the SCM Agreement to be incorporated into Article 21, those rules would be expressly incorporated by cross-reference, as in the case with respect to the evidentiary rules in Article 12, which are incorporated by cross-reference into Article 21.4.⁸²⁶ Moreover, the United States argues that the text of Articles 11, 13 and 22 of the SCM Agreement expressly limits their application to the original investigation.⁸²⁷ Finally, the United States refers to findings of

⁸¹⁶ India's first written submission, paras. 594-595 and 616-619.

⁸¹⁷ Ibid. para. 621.

⁸¹⁸ Ibid. para. 622.

⁸¹⁹ Ibid. para. 622.

⁸²⁰ Ibid. para. 623.

⁸²¹ United States' first written submission, paras. 578-579 and 604-607.

⁸²² Ibid. para. 582.

⁸²³ Ibid. paras. 588 and 608.

⁸²⁴ Ibid. para. 608.

⁸²⁵ Ibid. para. 584.

⁸²⁶ Ibid. para. 589.

⁸²⁷ Ibid. paras. 590-597.

panels and the Appellate Body confirming that "requirements found in provisions applicable to a countervailing duty or anti-dumping *investigation* will not automatically be read into those provisions expressly applying to proceedings that take place after the conclusion of an original investigation, such as administrative or sunset *reviews*."⁸²⁸

7.8.3 Main arguments of the third parties

7.8.3.1 Canada

7.496. Canada disagrees with India's argument that, where the same subsidized good is concerned, every new subsidy allegation requires initiation of a new investigation under Article 11 of the SCM Agreement. According to Canada, new subsidy allegations should be permitted during review proceedings where appropriate protection of due process rights is provided to interested parties.⁸²⁹

7.8.3.2 European Union

7.497. The European Union notes that the United States' administrative reviews combine both a prospective element, *i.e.* the rate of duty to be applied going forward, and a retrospective element, *i.e.* the amount of duty to be finally collected with respect to the past.⁸³⁰

7.498. The European Union submits that the prospective element is subject to Article 21 of the SCM Agreement. The European Union does not agree with India that Article 11 of the SCM Agreement applies to reviews initiated pursuant to Article 21.2 of the SCM Agreement. However, the European Union does not agree with the United States that the SCM Agreement is based on an absolute definitional distinction between the term "investigation" and the term "review".⁸³¹ The European Union notes that Article 21.1 of the SCM Agreement provides for the duty to remain in force only as long as necessary to counteract injurious subsidization. While the term "recur" in Article 21.2 captures the concept of *subsidization* that recurs or may recur, which supports the view that the review may relate to a new subsidy, the same term also suggests an element of commonality between what occurred previously and what occurred or may occur subsequently.⁸³² The European Union also notes that the general term "subsidization" used in Articles 21.1, 21.2 and 21.3 does not refer to individual subsidies or subsidy programmes. Finally, the European Union submits that the right of an investigating authority to initiate reviews under Article 21.2 is not unfettered, since such a review may only be initiated where it is "warranted" or if an interested party submits "positive evidence substantiating the need for a review". According to the European Union, whether or not the evidence of the alleged new subsidies amounted to positive evidence warranting the initiation of the review is for panels to decide on a case-by-case basis.⁸³³

7.499. Turning to the retrospective element, the European Union notes that the SCM Agreement does not contain a provision equivalent to Article 9.3 of the AD Agreement, which deals with final assessment proceedings. Thus, the European Union submits that the retrospective element is subject to the relevant disciplines of Article 19.3 of the SCM Agreement. Nevertheless, the European Union contends that WTO Members are entitled to operate final assessment proceedings of the type used by the United States. Finally, according to the European Union, whether or not new subsidies may be included in such final assessment proceedings depends on the facts of particular cases.⁸³⁴

7.8.4 Evaluation

7.500. The US measures at issue are administrative review determinations and the underlying proceedings, which the United States accepts were conducted under Article 21 of the

⁸²⁸ United States' first written submission, paras. 598-602.

⁸²⁹ Canada's third-party statement, para. 9.

⁸³⁰ European Union's third-party statement, para. 1.

⁸³¹ *Ibid.* paras. 1, 4 and 5.

⁸³² *Ibid.* paras. 6 and 7.

⁸³³ *Ibid.* paras. 7-14.

⁸³⁴ *Ibid.* paras. 1, 18 and 19.

SCM Agreement.⁸³⁵ It is undisputed that the examination of the new subsidy allegations involved the same product at issue in the original investigation. India points to no obligation in the text of Article 21 that was breached by the USDOC in its examination of the new subsidy allegations in administrative reviews.⁸³⁶ Rather, India contends that the new subsidy allegations should have been examined under Articles 11.1⁸³⁷, 13.1, 22.1 and 22.2 of the SCM Agreement, and that failure to do so was inconsistent with these latter provisions.⁸³⁸

7.501. Thus, the issue before the Panel is whether the USDOC was entitled, under Articles 21.1 and 21.2 of the SCM Agreement, to consider new subsidy allegations – i.e. subsidy programmes not formally examined in the original investigation – in the administrative reviews at issue, or whether, as India argues, new subsidy allegations could only be considered in the context of an investigation initiated under Article 11.1 of the SCM Agreement, and undertaken consistently with Articles 13.1, 22.1, and 22.2 of the SCM Agreement. In other words, we must decide whether the scope of USDOC's administrative reviews was necessarily circumscribed and limited to the particular subsidy programmes that had been formally examined in the original investigation. If the USDOC was authorized to examine new subsidy allegations under Articles 21.1 and 21.2, we need not further consider India's claims. Conversely, if we find that the USDOC was not authorized to consider new subsidy allegations in administrative reviews, we would have to go on to examine whether the USDOC acted consistently with Articles 11.1, 13.1, 22.1 and 22.2 in the investigation and reviews at issue. We understand that this is the first time a panel has been faced with this specific question.

7.502. Article 21.1 provides in pertinent part that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." Article 21.2 of the SCM Agreement refers to the "review" of the "need for the continued imposition of the duty" on the initiative of the investigating authority, where warranted, or upon a substantiated request by an interested party. Article 21.2 also sets out that interested parties have the right to request an examination of whether "the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both." Article 21.2 does not provide for a particular methodology with respect to the substantive determinations to be made in this type of review.

7.503. There is nothing in the text of Article 21.1 that could be understood to necessarily relate the term "subsidization" in this provision to specific programmes or limit the meaning of this term to *previously examined* subsidization, i.e. subsidization under programmes formally examined and found to constitute countervailable subsidies in the original investigation. In our view, nothing in Article 21.1 suggests that the term "subsidization" may not cover newly alleged subsidy programmes as well. Similarly, nothing in the text of Article 21.2 limits the review of the need for continued imposition of the duty to consideration of *already examined* subsidization. In our view, consideration of the need for the continued imposition of the duty may refer to both consideration in light of subsidy programmes formally examined in the original investigation, and consideration in light of subsidy programmes identified in new allegations in the context of a review. For us, new subsidy allegations are clearly relevant to the investigating authority's consideration of the need for continued imposition of the duty with respect to the particular subsidized imports, as continued imposition of the duty may be necessary in light of new subsidization, even if previously examined subsidization has expired.

7.504. Our reasoning is consistent with the understanding of the panel in *US – Carbon Steel*. In the context of sunset reviews, that panel found that Article 21.3 of the SCM Agreement requires an investigating authority to engage in an inherently prospective analysis of whether subsidisation is

⁸³⁵ United States' first written submission, para. 582; and response to Panel question No. 66, para. 88.

⁸³⁶ India does not raise any issue relating to whether the new subsidy allegations involved a financial contribution, which confers a benefit and is considered to be specific.

⁸³⁷ The reference to Article 11.1 of the SCM Agreement here only relates to India's claim under this provision regarding the alleged failure to initiate an investigation into new subsidies. We recall that the Panel found in its preliminary rulings that India's claims relating to the initiation of an investigation despite the insufficiency of evidence under Articles 11.1, 11.2 and 11.9 of the SCM Agreement fall outside the Panel's terms of reference. (see paras. 1.29-1.38 and 1.42-1.43 above)

⁸³⁸ See United States' response to Panel question No. 66, para. 87; and India's first written submission, paras. 621-623.

likely to continue or recur should the countervailing duty be revoked. That panel found that such analysis must have an adequate factual basis. In this context, that panel stated that:

[I]n assessing the likelihood of subsidisation in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidisation, any changes in the original subsidy programmes, **any new subsidy programmes introduced after the imposition of the original CVD**, any changes in governmental policy, and any changes in relevant socio-economic and political circumstances.⁸³⁹

7.505. India suggests that "reviews under Article 21 are aimed at correcting or re-examining determinations relating to subsidization and injury that already exist."⁸⁴⁰ India argues that a "[r]eview or continuation cannot be for something that was not in existence at all."⁸⁴¹ We find India's argument unclear. India's argument appears to rest on the view that the focus of the review under Article 21 is the original determination. However, Article 21.2 clearly establishes what is to be reviewed – not the original determination, but "the need for the continued imposition of the duty". The investigating authority's review under Article 21.2 concerns the continued imposition of a countervailing duty, which is a measure clearly "in existence" at the time of the review. The question to be answered in the review is whether the continued existence of that measure is justified. There is nothing in the text of Articles 21.1 or 21.2 that would limit an investigating authority to considering only whether the original basis for the measure is sufficient to justify its continued existence.

7.506. We consider that once a countervailing duty measure has been imposed, an investigating authority may review the correct amount of duty as well as the need for the continued imposition of such duty. To us, this is clear from the fact that Article 21.2 refers to consideration of possible continued imposition of the duty if it were varied, that is, if the amount of duty were changed. Therefore, if a subsidy programme, found in the original investigation to be countervailable, is decreased (in terms of the benefit) or is terminated, interested exporting parties may request that the countervailing duty imposed on the basis of that programme be reduced or terminated. In our view, it seems only logical and fair that, if there is an allegation that new subsidy programmes benefit the product that is the subject of the countervailing duty and are countervailable, interested domestic parties may request that the duty level be amended, and possibly increased, to take such subsidies into account. In order to do so, it will, of course, be necessary for the investigating authority to determine that such programmes are in fact countervailable subsidies benefitting imports of the same product, as well as the amount of such subsidies. As we understand it, that is precisely what the USDOC undertook to do with respect to the new subsidy allegations at issue here.⁸⁴²

7.507. Thus, we conclude that USDOC was entitled, under Articles 21.1 and 21.2 of the SCM Agreement, to examine new subsidy allegations in the administrative reviews at issue. Consequently, as mentioned above, we need not further consider India's claims under Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement.

7.508. Therefore, in light of the above, the Panel rejects India's claims that the examination by the United States of new subsidy allegations in administrative reviews related to the imports at issue was inconsistent with Articles 11.1, 13.1, 21.1, 21.2, 22.1 and 22.2 of the SCM Agreement.

⁸³⁹ Panel Report, *US – Carbon Steel*, para. 8.96. (bold added) In its report, the Appellate Body quoted this passage, but stated that it "is *not* called upon, in [the] particular appeal, to review the Panel's [] *interpretation* of Article 21.3 and the obligations it sets forth with respect to the determination to be made in a sunset review." (Appellate Body Report, *US – Carbon Steel*, para. 138))

⁸⁴⁰ India's first written submission, para. 621.

⁸⁴¹ *Ibid.*

⁸⁴² We note that, pursuant to Article 21.4 of the SCM Agreement, the evidentiary and procedural requirements of Article 12 of the SCM Agreement apply to reviews carried out under Article 21 of the SCM Agreement. India has not raised any claim under Article 12 in the context of the examination of new subsidy allegations in administrative reviews.

7.9 Alleged inconsistencies with respect to the USDOC's public notice: Article 22.5

7.509. India pursues a number of claims under Article 22.5 of the SCM Agreement. This provision requires investigating authorities to issue public notices explaining the legal and factual basis for their final determinations imposing countervailing duties. In the present case, USDOC gave public notice of its determination by publishing its final determination. India challenges the adequacy of USDOC's final determination. The United States asks the Panel to reject India's claims.

7.9.1 Relevant WTO provision

7.510. Article 22.5 of the SCM Agreement provides in relevant part:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

7.511. Article 22.4, which is referred to in Article 22.5, provides:

A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) the names of the suppliers or, when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;
- (iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;
- (iv) considerations relevant to the injury determination as set out in Article 15;
- (v) the main reasons leading to the determination.

7.512. As explained below, we also consider it relevant that the second sentence of Article 22.3, which requires public notice of any preliminary or final determination, provides that such notice shall set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".

7.9.2 Main arguments of the parties

7.9.2.1 India

7.513. India claims that the USDOC's public notice failed to properly explain its findings: (i) that the SDF Loan Programme is financed by mandatory consumer levies, rather than voluntary contributions by steel producers; that certain in-country price benchmarks should not have been used to assess benefit conferred by NMDC's sales of iron ore; (ii) that the GOI provided captive mining rights for coal to Tata; that the Captive Mining for Iron Ore Programme is *de facto* specific; and (iii) that NMDC export prices should have been used as a price benchmark.

7.9.2.1.1 In relation to the SDF programme

7.514. India submits that, during the original investigation, exporters argued that the SDF Loan Programme was similar to the ECSC programme. Exporters made this argument because, in a separate proceeding, the USDOC had found that financial pools created under the ECSC out of producer's own funds were not countervailable.⁸⁴³ India notes that the USDOC rejected this argument because under the SDF programme "steel consumers were compelled by the GOI to pay a levy, the proceeds of which were channeled back to a select group of steel producers."⁸⁴⁴ The USDOC concluded that the SDF levies "are analogous to tax revenues collected from consumers as mandated by the GOI."⁸⁴⁵

7.515. India submits that USDOC's explanation is inadequate for the purpose of Article 22.5, because it fails to adequately clarify the reasons for the rejection of the argument raised by the interested parties, and ignores material facts on the record regarding the similarities between the ECSC and the SDF Loan Programmes. According to India, the exporters' argument was rejected merely on the basis that unlike the ECSC programme, the SDF programme was compulsory and akin to a taxation programme. India contends that the USDOC failed to provide the material facts that led it to differentiate the SDF Loan Programme from the ECSC programme.⁸⁴⁶ India submits that the USDOC ignored numerous similarities between the ECSC and the SDF Loan programmes.

7.9.2.1.2 In relation to the USDOC's rejection of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore

7.516. This claim pertains to the facts surrounding India's Article 14(d) claim that the USDOC improperly rejected certain in-country price data, and improperly refused to determine price benchmarks for Essar and JSW on the basis of a confidential price quote provided by ISPAT. India submits that the availability of in-country benchmarks is a relevant and material fact that ought to have been taken into account by the USDOC as part of its findings, and should therefore have been reflected in its final determination.⁸⁴⁷ India contends that USDOC's failure to do so is in breach of Article 22.5.

7.9.2.1.3 In relation to USDOC's determination that GOI granted captive coal mining rights to Tata

7.517. This claim pertains to India's claim that the USDOC violated Article 1.1(a)(1) by finding that GOI had provided goods to Tata in the form of rights to (captively) mine coal. India contends that the USDOC failed to explain in sufficient detail the matters of fact and law leading to USDOC's conclusion that the GOI granted captive mining rights to Tata. India also contends that the USDOC failed to respond to the argument that GOI did not grant any mining rights to Tata.⁸⁴⁸

7.9.2.1.4 In relation to the *de facto* specificity of the Captive Mining of Iron Ore Programme

7.518. India also submits that the USDOC failed to properly consider Tata's arguments that the Captive Mining of Iron Ore Programme was not *de facto* specific to the four steel producers identified by the USDOC.⁸⁴⁹ India contends that the USDOC provided no basis or reasons for its factual determination regarding the existence of a separate governing regulation for mining rights for captive mining of iron ore.⁸⁵⁰

⁸⁴³ See, Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany, 62 FR 54990, 54993 (October 22, 1997) as cited in 2001 Issues and Decision Memorandum, Exhibit IND-7, Comment 1.

⁸⁴⁴ 2001 Issues and Decision Memorandum, Exhibit IND-7, Comment 1.

⁸⁴⁵ Ibid.

⁸⁴⁶ India's first written submission, para. 630.

⁸⁴⁷ Ibid. para. 631.

⁸⁴⁸ Ibid. para. 633.

⁸⁴⁹ Ibid. para. 635.

⁸⁵⁰ Ibid. para. 637.

7.9.2.1.5 In relation to NMDC's export prices

7.519. India submits⁸⁵¹ that the USDOC failed to explain why it rejected Essar's argument, during the 2007 administrative review, that an NMDC price to a foreign buyer could be considered as an appropriate Tier II benchmark since the NMDC would not be interested in subsidizing foreign buyers.⁸⁵² India contends that the USDOC determined that such a price is inappropriate because the issue of transnational subsidization is moot⁸⁵³, and because the price is set by the government provider of the financial contributions under investigation.⁸⁵⁴ According to India, USDOC failed to properly explain its rejection of the argument, as required by Article 22.5 of the SCM Agreement.

7.9.2.2 United States

7.9.2.2.1 In relation to the SDF Loan Programme

7.520. The United States submits that the USDOC explained in detail its reasons for rejecting exporters' argument that the SDF Loan Programme was similar to the ECSC Programme because SDF loans were allegedly funded from voluntary steel producer levies.⁸⁵⁵ Referring to the USDOC's final determination⁸⁵⁶, the United States contends that the USDOC clearly explained its reasons for finding that the SDF levies operated differently than the funds collected under the ECSC programme. The United States refers in this regard to the USDOC's finding that, unlike the ECSC funds, the SDF funds were collected from consumers, through mandatory price increases on certain steel products.

7.521. The United States notes India's reference to alleged similarities between the two programmes, such as the fact that both the SDF and ECSC programmes were initiated pursuant to government action, and that the High Authority of the ECSC was authorized to place levies on the production of steel and coal.⁸⁵⁷ According to the United States, neither of these alleged facts rebuts USDOC's explanation that unlike the ECSC levies imposed on producers, the SDF levies were the equivalent of a GOI-mandated tax imposed on and paid by consumers. The United States contends that India's argument (in the context of its Article 22.5 claim) that the SDF funds cannot be characterized as a tax because "the JPC was not controlled by the GOI"⁸⁵⁸ demonstrates that India's disagreement is not with the adequacy of Commerce's explanation for its decision, in accordance with Article 22.5 of the SCM Agreement, but rather with the substance of the decision itself.

7.9.2.2.2 In relation to the USDOC's rejection of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore

7.522. The United States refers to its arguments regarding the substance of India's Article 14(b) claim to rebut India's Article 22.5 claim that the USDOC failed to take into account material factual information.⁸⁵⁹

7.9.2.2.3 In relation to USDOC's determination that GOI granted captive coal mining rights to Tata

7.523. The United States refers to its arguments regarding the substance of India's Article 1.1(b) and 14(b) claims to rebut India's Article 22.5 claim that the USDOC failed to explain its determinations with regard to the GOI's grant of mining rights to Tata.⁸⁶⁰

⁸⁵¹ India's first written submission, para. 638.

⁸⁵² 2007 Issues and Decision Memorandum, Exhibit IND-38, Comment 11.

⁸⁵³ Ibid.

⁸⁵⁴ Ibid.

⁸⁵⁵ United States' first written submission, paras. 614-616.

⁸⁵⁶ 2001 Issues and Decision Memorandum, Exhibit IND-7, Comment 1.

⁸⁵⁷ India's first written submission, para. 629. (citations omitted)

⁸⁵⁸ Ibid. para. 630.

⁸⁵⁹ United States' first written submission, para. 617.

⁸⁶⁰ Ibid. para. 618.

7.9.2.2.4 In relation to the *de facto* specificity of the Captive Mining of Iron Ore Programme

7.524. The United States refers to its arguments regarding the substance of India's Article 2.1(c) claim to rebut India's Article 22.5 claim that the USDOC failed to take into account material factual information.⁸⁶¹

7.9.2.2.5 In relation to NMDC's export prices

7.525. The United States refers⁸⁶² to its arguments regarding the substance of India's Article 1.1(b) claim to rebut India's Article 22.5 claim that the USDOC failed to explain why it rejected Essar's argument, during the 2007 administrative review, that an NMDC price to a foreign buyer could be considered as an appropriate Tier II benchmark since the NMDC would not be interested in subsidizing foreign buyers.

7.9.3 Evaluation

7.526. Article 22.5 of the SCM Agreement is virtually identical to Article 12.2.2 of the AD Agreement, which was recently addressed by the panel in *China – X-ray Equipment*, with reference to the reports of the panels in *EU – Footwear (China)* and *EC – Tube or Pipe Fittings*, in the following terms:

In interpreting the scope of the obligation set forth in the first sentence of Article 12.2.2, we note that the text of Article 12.2.2 refers to Article 12.2.1. Accordingly, the information described in Article 12.2.1 must be included in public notices issued pursuant to Article 12.2.2. We consider that it is also appropriate to have regard to the contextual guidance afforded by Article 12.2, which applies to public notices of both preliminary and final determinations. Article 12.2 provides that such public notices shall set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". In considering the contextual guidance afforded by Article 12.2, we have regard to the following[] findings made by the panels in *EU – Footwear (China)* and *EC – Tube or Pipe Fittings*:

The chapeau of Article 12.2.2, Article 12.2, requires the publication of "findings and conclusions on all issues of fact and law considered material *by the investigating authorities*" (emphasis added). In our view, this is relevant context for a proper understanding of Article 12.2.2, and thus informs our understanding of what must be included in a public notice under that provision. China suggests that whether information and reasons for the acceptance or rejection of arguments must be provided in such a notice should be judged from the perspective of the interested parties. We do not agree. We consider that while an investigating authority must make innumerable decisions during the course of an anti-dumping investigation, with respect to procedural matters, investigating methods, factual considerations, and legal analysis, which may be of importance to individual interested parties, not all of these are "material" within the meaning of Article 12.2.2. In our view, what is "material" in this respect refers to an issue which must be resolved in the course of the investigation in order for the investigating authority to reach its determination whether to impose a definitive anti-dumping duty. We note in this regard the views of the panel in *EC – Tube or Pipe Fittings*:

Article 12.2 provides that the findings and conclusions on issues of fact and law which are to be included in the public notices, or separate report, are those considered "material"

⁸⁶¹ United States' first written submission, para. 617.

⁸⁶² See fn. 887 to the United States' first written submission, which refers to paras. 638-639 of India's first written submission. These paras. contain India's Article 22.5 claim regarding the USDOC's response to Essar's attempted reliance on NMDC prices to foreign buyers.

by the investigating authority. The ordinary meaning of the term of "material" is "important, essential, relevant".

We understand a "material" issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination. We observe that the list of topics in Article 12.2.1 is limited to matters associated with the determinations of dumping and injury, while Article 12.2.2 is more generally phrased ("all relevant information on matters of fact and law and reasons which have led to the imposition of final measures, or the acceptance of a price undertaking"). Nevertheless, the phrase "have led to", implies those matters on which a factual or legal determination must necessarily be made in connection with the decision to impose a definitive anti-dumping duty. ... contextual considerations also support this interpretation since, the only matters referred to "in particular" in subparagraph 12.2.2 are, in addition to the information described in subparagraph 2.1, the reasons for acceptance or rejection of relevant arguments or claims, and the basis for certain decisions.

We cannot conclude that every single decision of an investigating authority in the course of an investigation can be considered as having "led to" the imposition of the final measures, such that it must be described, together with the "information" relevant to the decision, in the published notice of the final determination. Not every question or issue which arises during an investigation, and which is resolved by the investigating authority, is necessarily considered material by the investigating authorities, and may be said to have "led to" the imposition of the anti-dumping duty, even though it may be of interest or significant to one or more interested parties. In our view, the notions of "material" and "relevant" in Article 12.2.2 must be judged primarily from the perspective of the actual final determination of which notice is being given, and not the entirety of the investigative process. Other provisions of the Dumping Agreement, notably Articles 6.1.2, 6.2, 6.4, and 6.9 address the obligations of the investigating authority to make information available to parties, disclose information, and provide opportunities for parties to defend their interests. In our view, Article 12.2.2 does not replicate these provisions, but rather, requires the investigating authority to explain its final determination, providing sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood.

We are in broad agreement with these findings. Consistent therewith, we consider that the first sentence of Article 12.2.2 requires an investigating authority to include in its public notice a description of its findings and conclusions on the issues of fact and law that it considered material to its decision to impose final measures. That description must include "sufficient detail". While the sufficiency of the detail of the description may depend on the precise nature of the findings made by the investigating authority, it should in any event be sufficient to ensure that the investigating authority's reasons for concluding as it did can be discerned and understood by the public. The ability of the public to understand the findings and conclusions of the investigating authority is important, for the concept of "public" is broad: it includes "interested parties" within the meaning of Article 6.11 of the Anti-Dumping Agreement and, for example, consumer organizations that might be expected to have an interest in the imposition of anti-dumping measures. Article 13 of the Anti-Dumping Agreement provides for judicial review of the final determinations referred to in Article 12.2.2. In our view, the level of detail of the description of the authority's findings and conclusions must be sufficient to allow the abovementioned entities to assess the conformity of those findings and conclusions with domestic law, and avail themselves of the Article 13 judicial review mechanism where they consider it necessary. In a similar vein, we also

consider that the level of detail should be sufficient to allow the relevant exporting Member to ascertain the conformity of the findings and conclusions with the provisions of the WTO Agreement, and to avail itself of the WTO dispute settlement procedures where it considers it necessary. Our approach is consistent with the following findings recently made by the Appellate Body in *China – GOES*:

Article[] 12.2.2 [...] capture[s] the principle that those parties whose interests are affected by the imposition of final anti-dumping and countervailing duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties. The obligation of disclosure under Article[] 12.2.2 ... is framed by the requirement of "relevance", which entails the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures. By requiring the disclosure of "all relevant information" regarding these categories of information, Article[] 12.2.2 ... seek[s] to guarantee that interested parties are able to pursue judicial review of a final determination as provided in Article 13 of the *Anti-Dumping Agreement* ...

...

The second sentence of Article 12.2.2 requires the inclusion in the public notice of "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". In light of our interpretation of the first sentence of Article 12.2.2, we consider that "relevant" arguments or claims are those that relate to the issues of fact and law considered material by the investigating authority. Since this provision concerns the arguments and claims made by exporters and importers, whose interests will be adversely affected by an affirmative determination, it is particularly important that the "reasons" for rejecting or accepting such arguments should be set forth in sufficient detail to allow those exporters and importers to understand why their arguments or claims were treated as they were, and to assess whether or not the investigating authority's treatment of the relevant issue was consistent with domestic law and/or the WTO Agreement.⁸⁶³

7.527. We agree with these views and shall be guided by them in examining India's Article 22.5 claims.

7.9.3.1 The USDOC's explanation of its treatment of SDF levies

7.528. Concerning India's claim that the USDOC failed to adequately clarify the reasons for the rejection of an argument raised by interested parties, we note the argument made by Indian respondents in the investigation that the USDOC's treatment of SDF loans as countervailable "contradict[s] the Department's precedent in other cases in which it found that loans from a pool of funds administered by an industry association, including those with government involvement, do not constitute countervailable subsidies".⁸⁶⁴ In this regard, the respondents referred to the USDOC's finding that "benefits received by producers from financial pools created from contributions of the producers' own funds under the [ECSC] program are not countervailable".

7.529. In response, the USDOC stated:

we do not agree with respondents' contention that the SDF levies, much like the ECSC program, represented the integrated steel producers' own money and, thus, cannot constitute a government financial contribution. Under the ECSC program, producers make voluntary contributions to a pool of money using their own funds. Under the SDF program steel consumers were compelled by the GOI to pay a levy, the proceeds of which were channeled back to a select group of steel producers. Thus, rather than

⁸⁶³ Panel Report, *China – X-ray Equipment*, paras. 7.458, 7.459 and 7.472.

⁸⁶⁴ 2001 Issues and Decision Memorandum, Exhibit IND-7, p. 8.

constituting the steel producers' own funds, the SDF levies, as noted by petitioners, are analogous to tax revenues collected from consumers as mandated by the GOI.⁸⁶⁵

7.530. We consider that the USDOC's statement adequately addressed the respondents' argument that SDF levies were derived from producers' own funds. The USDOC's statement was sufficient for respondents to understand why their argument had been rejected, and to assess whether the USDOC's approach was consistent with domestic law and/or the WTO Agreement. We reject India's claim accordingly.

7.531. We also observe that India's claim seems to be more concerned with the substance of the USDOC's determination than the explanation thereof. In this regard, we note India's contention that "[t]he aforesaid determination of United States is misplaced"⁸⁶⁶, and that the USDOC "ignored the material facts on record" in making its determination.⁸⁶⁷ Since Article 22.5 does not have any bearing on the substance of an investigating authority's determination, we decline to apply Article 22.5 in respect of such substantive matters.

7.9.3.2 In relation to the USDOC's rejection of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore

7.532. We recall our finding that, despite the absence of any explanation provided by the USDOC, the United States sought to justify the USDOC's treatment of the relevant domestic price information, using *ex post* rationalizations. As explained above⁸⁶⁸, private domestic prices are the "primary benchmark" for assessing benefit under Article 14(d) of the SCM Agreement.⁸⁶⁹ The assessment of domestic price information submitted for possible use as price benchmarks is therefore material to a determination imposing final measures. Since the USDOC failed to provide any explanation of any consideration of the relevant domestic price information, the USDOC necessarily failed to provide adequate public notice of its findings on this matter, contrary to the requirements of Article 22.5 of the SCM Agreement.

7.9.3.3 In relation to USDOC's determination that GOI granted captive coal mining rights to Tata

7.533. We recall that we have upheld India's Article 1.1(a)(i) claim that the USDOC improperly determined that Tata had been provided goods by the GOI in the form of a captive coal mining lease. In light of that finding, we see no need to address India's claim regarding the USDOC's treatment of that issue in its public notice. We therefore exercise judicial economy in respect of this claim.

7.9.3.4 In relation to the *de facto* specificity of the Captive Mining of Iron Ore Programme

7.534. Based on our finding that the USDOC's determination of the existence of a Captive Mining of Iron Ore Programme is inconsistent with Article 12.5, we see no need to address India's claim regarding the USDOC's treatment of that issue in its public notice. We therefore exercise judicial economy in respect of this claim.

7.9.3.5 In relation to NMDC export prices

7.535. This claim concerns Essar's argument that the USDOC should use NMDC export prices as a price benchmark because NMDC would not subsidize foreign purchasers. In its Issues and Decision Memorandum, the USDOC explained that it would not use NMDC price quotes as either Tier I or Tier II benchmarks "[b]ecause these price quotes pertain to the very government provider of the goods at issue".⁸⁷⁰ The USDOC also explained that, as a result of its decision not to use any NMDC price as a Tier I or II benchmark, the issue of whether or not NMDC would subsidize its export

⁸⁶⁵ 2001 Issues and Decision Memorandum, Exhibit IND-7, p. 10.

⁸⁶⁶ India's first written submission, para. 629.

⁸⁶⁷ Ibid. para. 630.

⁸⁶⁸ See para. 7.158 above.

⁸⁶⁹ Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

⁸⁷⁰ 2007 Issues and Decision Memorandum, Exhibit IND-38, p. 50 of 58, Comment 11.

customers was "moot". We consider that this explanation by the USDOC is sufficient for the purpose of Article 22.5 of the SCM Agreement. The USDOC's statement makes it clear that the USDOC did not use the NMDC export price quotes as a benchmark because they pertain to the very government provider under investigation. Interested parties could reasonably understand from this that the USDOC would not engage in price comparisons that would necessarily be circular. Interested parties could also reasonably understand that, because of the USDOC's decision not to engage in circular price comparisons using government price benchmarks, there was no need to consider whether or not a government would subsidize its export sales. We reject India's Article 22.5 claim accordingly.

7.10 Consequential claims under Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement

7.536. India notes that Articles 19.3 and 19.4 of the SCM Agreement mandate that countervailing duty in respect of any product shall be levied in the appropriate amount and not in excess of the amount of subsidy found to exist. In addition, India notes that Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement require that each WTO Member bring its laws, regulations and administrative procedures into conformity with the SCM Agreement. India submits that, to the extent the Panel finds that the determinations made by the United States in the underlying proceedings are in breach of Articles 1, 2 and 14 of the SCM Agreement or that the United States has failed to ensure conformity of its laws, regulations and administrative procedures identified by India with the SCM Agreement, the Panel should also find, respectively, that the said determinations result in the imposition of countervailing duty in inappropriate amount and in excess of the amount of subsidy found to exist, contrary to Articles 19.3 and 19.4, and that the United States has acted inconsistently with Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement. India also submits that to the extent the imposition of the countervailing duties at issue is not in accordance with the SCM Agreement, such imposition is *ipso facto* in breach of Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994.

7.537. We note that India's claims under Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement are purely consequential, in the sense that they depend on the outcome of other claims pursued by India under other provisions of the SCM Agreement. Since we have already resolved those claims, we see no need to address India's consequential claims under Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement. We therefore exercise judicial economy in respect of those claims.

8 CONCLUSIONS AND RECOMMENDATION

8.1 Conclusions

8.1. Having considered the United States' request for preliminary rulings regarding the scope of these proceedings, we conclude that:

- a. the 2013 sunset review is within the Panel's terms of reference;
- b. India's claim that the United States acted inconsistently with Article 11.1 of the SCM Agreement by failing to "initiate" an investigation into new subsidies is within the Panel's terms of reference; and
- c. India's claims that the United States acted inconsistently with Articles 11.1, 11.2 and 11.9 of the SCM Agreement in connection with the alleged initiation of an investigation, despite the insufficiency of evidence in the domestic industry's written application, fall outside the Panel's terms of reference.

8.2. In light of the findings set forth in this Report, the Panel concludes that the United States acted inconsistently with:

- a. in connection with the provision of high grade iron ore by the NMDC:

- i. Article 2.1(c) of the SCM Agreement by failing to take account of all the mandatory factors in its determination of *de facto* specificity regarding NMDC; and
- ii. Article 14(d) of the SCM Agreement by failing to consider the relevant domestic price information for use as Tier I benchmarks, in respect of which the United States sought to rely on *ex post* rationalization;
- b. in connection with the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme:
 - i. Article 12.5 of the SCM Agreement by failing to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information;
 - ii. Article 1.1(a)(1)(iii) of the SCM Agreement by determining without sufficient evidentiary basis that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the Captive Mining of Coal Programme/Coal Mining Nationalization Act; and
 - iii. Article 14(d) of the SCM Agreement in connection with the USDOC's rejection of certain domestic price information when assessing benefit in respect of mining rights for iron ore;
- c. Article 15.3 of the SCM Agreement, with respect to Section 1677(7)(G) "as such" and "as applied" in the original investigation at issue, in connection with the "cross-cumulation" of the effects of imports that are subject to a CVD investigation with the effects of imports that are not subject to simultaneous CVD investigations;
- d. Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, with respect to Section 1677(7)(G) "as such" and "as applied" in the original investigation at issue, in connection with injury assessments based on *inter alia* the volume, effects and impact of non-subsidized, dumped imports;
- e. Article 12.7 of the SCM Agreement by applying "facts available" devoid of any factual foundation in connection with the following determinations:
 - i. JSW received iron ore from NMDC at no charge during the period covered by the 2006 administrative review;
 - ii. VMPL used and benefited from the 1993 KIP, 1996 KIP, 2001 KIP and 2006 KIP subsidy programmes;
 - iii. Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes under the 2001 JSIP:
 - (1) capital investment incentive;
 - (2) feasibility study and project report cost reimbursement;
 - (3) incentive for quality certification; and
 - (4) employment incentives;
 - iv. Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes:
 - (1) 6 programmes at issue administered by the SGOG;
 - (2) 8 programmes at issue administered by the SGOM;
 - (3) 10 programmes at issue administered by the SGAP;
 - (4) 9 programmes at issue administered by the SGOC; and
 - (5) 22 programmes at issue administered by the SGOK;

- v. Tata used and benefited from the subsidy provided through the purchase of high-grade iron ore from NMDC during the period covered by the 2008 administrative review;
- vi. Tata used and benefited from the MDA and MAI subsidy programmes during the period covered by the 2008 administrative review; and
- vii. Tata used and benefited from the six sub-programmes of the SEZ Act at issue during the period covered by the 2008 administrative review;
- f. Article 22.5 of the SCM Agreement by failing to provide adequate notice of the USDOC's consideration of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore.

8.3. In light of the findings set forth in this Report, the Panel rejects India's claims that the United States acted inconsistently with:

- a. Article 14(d) of the SCM Agreement with respect to Section 351.511(a)(2)(i) to (iii) "as such";
- b. Articles 14(d), 19.3 and 19.4 of the SCM Agreement with respect to Section 351.511(a)(2)(iv) "as such";
- c. in connection with the provision of high grade iron ore by the NMDC:
 - i. Article 1.1(a)(1) of the SCM Agreement in connection with the USDOC's determination that NMDC is a public body;
 - ii. Article 2.4 of the SCM Agreement by determining *de facto* specificity without positive evidence;
 - iii. Articles 1.1(b) and 14(d) of the SCM Agreement by:
 - (1) failing to determine whether the price charged by NMDC was adequate for NMDC itself, prior to applying the Tier I and II benchmarks to determine benefit to the recipient, in connection with Sections 351.511(a)(2)(i) to (iii) "as applied";
 - (2) failing to apply the ISPAT Tier I benchmark price to assess sales of iron ore by NMDC to Essar and JSW in the 2006 administrative review;
 - (3) using benchmark prices adjusted for delivery charges; and
 - (4) failing to use NMDC's export prices to determine Tier II benchmark prices in the 2006, 2007 and 2008 administrative reviews;
 - iv. the chapeau of Article 14 of the SCM Agreement by failing to explain why it excluded NMDC's export prices from the 2006, 2007 and 2008 reviews;
- d. in connection with the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme:
 - i. Article 1.1(a)(1)(iii) of the SCM Agreement by determining that the GOI provided goods through the grant of mining rights for iron ore and coal;
 - ii. Articles 1.1(b) and 14(d) of the SCM Agreement in connection with the USDOC's notional price methodology for purposes of assessing benefit; and
 - iii. Article 14(d) of the SCM Agreement in connection with the USDOC's use of delivered prices to determine benefit in respect of mining rights for coal;

- e. in connection with SDF:
 - i. Article 1.1(a)(1) of the SCM Agreement in connection with the USDOC's determination that the SDF Managing Committee constitutes a public body;
 - ii. Article 1.1(a)(1)(i) of the SCM Agreement in connection with:
 - (1) the USDOC's determination that the SDF Managing Committee provided direct transfers of funds; and
 - (2) the USDOC's reference to SDF loans as "potential direct transfers of funds" in the 2008 administrative review;
 - iii. Article 1.1(b), the chapeau of Article 14 and Article 14(b) of the SCM Agreement in connection with the USDOC's determination of benefit conferred by SDF loans in the 2006 and 2008 administrative reviews;
- f. Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement in connection with Sections 1675a(a)(7) and 1675b(e)(2) "as such", and in connection with Section 1675a(a)(7) "as applied" in the sunset review at issue;
- g. Articles 15.1 and 15.4 of the SCM Agreement in connection with USITC's evaluation of certain economic factors in its injury determination;
- h. Article 12.7 of the SCM Agreement in connection with Sections 1677e(b) and 351.308(a), (b) and (c) "as such";
- i. Article 12.7 of the SCM Agreement in connection with the application of "facts available" concerning:
 - i. the USDOC's "rule" to use the highest non-*de minimis* subsidy rate; and
 - ii. the USDOC's determinations that:
 - (1) MML is a government or public body, in the context of the 2006 administrative review;
 - (2) the purchase of iron ore by MML was for more than adequate remuneration, in the context of the 2006 administrative review;
 - (3) Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes under the 2001 JSIP: (a) exemption of electricity duty; (b) offset of Jharkhand sales tax; (c) capital power generating subsidy; (d) interest subsidy; (e) stamp duty and registration; and (f) pollution control equipment subsidy;
 - (4) Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes under the infrastructure subsidies to mega projects: (a) tax incentives; (b) grants; and (c) loans;
 - (5) SDF loans provide a financial contribution in the form of a "potential direct transfer of funds", in the context of 2008 administrative review; and
 - (6) Essar, ISPAT, SAIL and Tata benefited from a number of subsidy programmes, in the context of the 2013 sunset review;
- j. Articles 11.1, 13.1, 21.1, 21.2, 22.1 and 22.2 of the SCM Agreement in connection with the examination of new subsidy allegations in the administrative reviews at issue; and

- k. Article 22.5 of the SCM Agreement by failing to properly explain in the public notices the reasons for rejecting:
 - i. the interested parties' argument relating to the treatment of SDF levies; and
 - ii. the use of NMDC export prices as a price benchmark.

8.4. In light of the findings set forth in paragraphs 8.2 and 8.3 of this Report, the Panel exercises judicial economy in respect of India's claims under:

- a. Articles 2.1(c) and 2.4 of the SCM Agreement in connection with the USDOC's determination that the Captive Mining of Iron Ore Programme is *de facto* specific;
- b. Articles 2.1(a) and (b) of the SCM Agreement in connection with the USDOC's determination that the Captive Mining of Coal Programme/Coal Mining Nationalization Act is *de jure* specific;
- c. Article 22.5 of the SCM Agreement in connection with the USDOC's public notice concerning:
 - i. the GOI's grant of captive coal mining rights to Tata; and
 - ii. the *de facto* specificity of the Captive Mining of Iron Ore Programme.
- d. Articles 10, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement in connection with India's consequential claims.

8.2 Recommendation

8.5. Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent the United States has acted inconsistently with certain provisions of the SCM Agreement, we conclude that the United States has nullified or impaired benefits accruing to India under that Agreement.

8.6. Pursuant to Article 19.1 of the DSU, having found that the United States acted inconsistently with certain provisions of the SCM Agreement, we recommend the United States bring its measures into conformity with its obligations under that Agreement. The second sentence of Article 19.1 provides the Panel with the discretion to suggest ways in which the United States might implement this recommendation. In this regard, India has proposed specific suggestions for us to make.⁸⁷¹ Given the complexities to which implementation may give rise, we decline to exercise our discretion under the second sentence of Article 19.1 in the manner proposed by India.

⁸⁷¹ India's first written submission, para. 642.