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

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS

FOLLOWING THE SECOND SUBSTANTIVE MEETING

November 1, 2013

TABLE OF REPORTS

Short Form	Full Citation
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
US – Antidumping and Countervailing Duties (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr. 1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R

TABLE OF EXHIBITS

Exhibit No.: USA-	Description
32a	GOI 2008 Initial Questionnaire Response, April 23, 2009 (in full)
109	2004 Administrative Review Questionnaire to GOI, February 3, 2005
110	2004 Administrative Review New Subsidies Questionnaire, July 19, 2005
111	2006 Administrative Review Questionnaire to GOI, February 2, 2007
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1 Questions for the United States and Both Parties

1.1 Public Body

78. Please comment on India's argument, at para. 137 of its second written submission, that the independence of NMDC board members was guaranteed by Clause 49 of the Listing Agreement with Stock Exchanges.

1. We first draw to the Panel's attention the fact that the document referred to in this question was never submitted to the U.S. Department of Commerce ("Commerce") during the proceeding at issue, and therefore did not form part of the administrative record in that proceeding. India has provided these documents for the first time in Exhibits IND – 75 and IND – 76. A panel does not conduct a *de novo* review of underlying countervailing duty proceedings, but determines "whether the explanations given disclose how the investigating authority treated the facts and evidence *in the record* and whether there was positive information *before it* to support the inferences made and conclusions reached by it".[1] Therefore, documents not forming part of the record before the investigating authority should not be included in the Panel's review of the relevant determinations.

2. India argued during the second panel meeting that the Government of India ("GOI") had put this information on the record by including a website address in its questionnaire response. However, the listing of a website does not transfer all the data included on that site to the record. Websites are not static, and it is reasonable for an investigating authority to require the submission of an actual copy of the relevant information contained on the website in order for it to be considered part of the record of a proceeding.

3. Even if this information had been before Commerce, however, it would not have been sufficient to refute information given to Commerce by India regarding the GOI's control over NMDC. To the contrary, the information contained in the exhibits supports the finding by Commerce that the GOI has control over the NMDC through its appointment of 2 directors and its approval of other directors, which together constitute a majority of the board of directors. That is, both the 2004-05 and the 20006-07 annual report excerpts state that [t]he terms, conditions and tenure of appointment of Directors both Executive and Non-Executive Directors including Chairman-cum-Managing Director are decided by Government of India, Ministry of Steel".[2] The 2006-07 excerpt adds that three non-executive director vacancies "are yet to be filled up by the Government of India".[3] Regarding Clause 49 of the Listing Agreement, the excerpt of the 2004-05 annual report in fact indicates that NMDC *did not* comply with Clause 49 during the year[4], while the 2006-07 annual report excerpt says nothing regarding NMDC's compliance with Clause 49.

4. Please also see the U.S response to question 79 from the Panel.

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[1] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 379 (citing *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 93).
[2] NMDC Annual Report Excerpts, pp. 2 and 4 (Exhibit IND-75).
[3] NMDC Annual Report Excerpts, p. 4 (Exhibit IND-75).
[4] NMDC Annual Report Excerpts, p. 2 (Exhibit IND-75).

79. Please comment on India's assertion, at para. 26 of its oral statement at the second substantive meeting, that the USDOC's determination that NMDC is a public body in the 2004 administrative review was based exclusively on the GOI's shareholding in that entity.

5. India is incorrect and continues to misrepresent Commerce's findings. Commerce explicitly made findings of both government control and government ownership in the 2004 administrative review: "During verification the Department 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*. See GOI Verification Report at page 5. Accordingly, we preliminarily determine that the NMDC is a part of the GOI."[5] And while India claims in paragraph 137 of its second written submission that the Ministry of Steel only appoints two directors out of 13, it conveniently omits the record fact that in the 2004 Administrative Review, Indian officials explained at verification, that, in addition to the Ministry of Steel directors, the five full time directors, consisting of the chairman and four other full-time directors, are "selected by a board within the Department of Public Enterprises ("DPE") that is part of the GOI."[6] This gives the GOI control over a majority of the directors and, importantly, all of the full time directors. India claims this is "irrelevant", but fails to provide any explanation to support that assertion, much less one grounded in the evidence on the record of the investigation.[7] The United States disagrees with India's assertion, and submits that the appointment of a majority of directors, including all of the full time directors, of the NMDC is directly relevant to the government's meaningful control over an entity.

1.2 Benefit

80. We note the United States' argument (second written submission, para. 53) that "none of the parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks". The relevant price information appears to have been requested in a supplemental questionnaire from USDOC (Exhibit IND-61: "Please provide information, if any is available to the GOI, regarding market prices in India for iron that is available to consumers in India").

a. Had the USDOC already requested domestic price information from interested parties? Please explain.

6. Yes, Commerce requested domestic price information in its initial questionnaire. As part of its standard questionnaire concerning the provision of goods and services, Commerce asks the following questions:

> Are there trade publications which specify the prices of the good/service within India and on the world market? Provide a list of these publications,

[5] 2004 Preliminary Results, 71 FR 1512 at 1516 (Exhibit IND-17) (emphasis added).
[6] 2004 Administrative Review GOI Verification Report, at 5 (Exhibit USA-66).
[7] *See* India Second Written Submission, para 137.

> along with sample pages from these publications listing the prices of the good/service within India and in world markets during the period of review.[8]

7. Once Commerce learned of the existence of Tex Reports, and had found the provision of iron ore to provide a countervailable benefit, it included in the 2006 Administrative Review questionnaire additional questions other than the standard questions in the questions for provision of goods and services:[9]

> 2. Please provide calendar year 2006 prices for high-grade iron-ore **fines**, as reported by The Tex Report, a Japanese subscriber-based publication that reports on annual world-wide price negotiations for iron ore between steel makers and iron ore suppliers. Please note, these data were supplied on the record of the most recently completed administrative review of this order. If you are unable to provide this information or have questions concerning the Tex Report, please contact the officials in charge. Please indicate whether these prices are f.o.b. or ex-mine.
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> 3. Please provide calendar year 2006 prices for high-grade iron-ore **lumps**, as reported by The Tex Report. If you unable to provide this information or have questions concerning the Tex Report, please contact the officials in charge. Please indicate whether these prices are f.o.b. or ex-mine.
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> 4. Please provide any other price information available to the GOI regarding the price of high-grade iron ore lumps and fines during calendar year 2006. Please indicate the source of the information and the unit of measure and currency in which the prices are expressed. Please indicate whether these prices are f.o.b. or ex-mine.

b. For what purpose did USDOC request this supplemental domestic price data?

8. Commerce requested domestic price information in an attempt to collect information for benchmarking purposes. Commerce was unable to use the data submitted by the respondents, however, because it did not identify the relevant sellers and did not identify whether the prices were price quotes, price lists or from actual transactions.

[8] *See, e.g.*, 2004 Administrative Review Questionnaire to GOI, February 3, 2005, at pp. II-21, III-27 (Exhibit USA-109); 2004 Administrative Review New Subsidies Questionnaire, July 19, 2005, at 10 (Exhibit USA-110); and 2006 Administrative Review Questionnaire to GOI, February 2, 2007, at II-14, II-33 and II-34 (Exhibit USA-111); 2007 Administrative Review Questionnaire to GOI, February 28, 2008, pp. II-13, II-14, and II-48 (Exhibit USA-115).

[9] *See* 2006 Administrative Review Questionnaire to GOI, February 2, 2007, at 2 (Exhibit USA-111).

c. If USDOC requested this supplemental domestic price data with the purpose of establishing Tier I price benchmarks, would it not be reasonable to consider that respondents providing price data in response to this question were doing so in order that it could be used for this purpose?

9. Tier-I of the U.S. regulation states that a Tier I benchmark will be established on the basis of "a market-determined price from actual transactions in the country in question."[10] This is fully consistent with what the Appellate Body stated in *US – Softwood Lumber IV*, when it said that "the starting point, when determining adequacy of remuneration, is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision."[11] Irrespective of the purpose for which the information may or may not have been submitted, information that does not identify the relevant seller or provide any indication of whether a price is from an actual sale or merely a quote cannot be used for the purposes of establishing a price at which "the same or similar goods *are sold … in arm's length transactions"*, or Tier I benchmark, which similarly requires that benchmarks be calculated using "a market-determined price from actual transactions." The United States requested that the respondents submit prices from actual transactions, not just once but twice in issuing its supplemental questionnaire. The respondents were aware of the standard used by Commerce – prices from actual transactions – and despite having multiple opportunities to do so, did not submit this data.

d. At para. 37 of its oral statement at the second substantive meeting, the United States asserts that none of the parties argued that USDOC should have used "the price list described in paragraphs 192-193 of India's second written submission" as a Tier I price benchmark. Does the United States make the same argument in respect of the price quote (submitted to USDOC by Tata) referred to at para. 194 of India's second written submission?

10. Yes, the reference to India's second written submission was intended to encompass the price quote referred to at paragraph 194. Just as with the referenced price list, during the course of the underlying proceeding none of the parties argued that the association chart prices or Tata's price quote should be used in the calculation of an iron ore benchmark.

81. Please comment on India's argument (para. 196, second written submission) that the USDOC should have sought further clarification from interested parties before rejecting price information submitted by GOI and Tata as Tier I price benchmarks.

11. Commerce fully understood the information submitted by the GOI and Tata but was not able to use this information for the purposes of calculating a Tier I benchmark. As explained in response to question 80, price quotes are not sufficient for demonstrating market prices and the pricing information submitted by the GOI and Tata were not prices "sold by private suppliers in

[10] Section 351.511(a)(2)(i).
[11] *US – Softwood Lumber IV (AB)*, para. 90.

arm's length transactions in the country of provision." Moreover, India submitted this deficient information in response to both the questionnaire and then again, for a second time, in response to the supplemental questionnaire, which specifically asked for more precise information. In paragraph 196 of its second written submission, India appears to be arguing that Commerce has a burden to keep requesting information from an interested party until it finally supplies useable data. Article 12.2 of the SCM Agreement does not require an authority to issue a questionnaire, much less a supplemental questionnaire to the supplemental questionnaire where the respondent, again, fails to provide meaningful information. Article 12.2 affords an interested party the right to provide information, but India and Tata failed to make use of their rights to provide relevant information, despite an explicit indication by the United States that the information provided was deficient. India cannot now blame the United States for India's own failure to provide useful pricing data.

12. India's argument confuses the treatment of two different types of data. The first type of data is company and government data which are required to determine the price that the company paid to the government. This type of data is generally within the sole control of the company and the government. If it is not provided by the company and government, there is no other source for the information. If the information is provided is deficient, before the investigating authority rejects that information, it may need to identify the deficiencies in the submission and provide a chance to remedy the deficiency before the administrating authority may apply facts available under Article 12, the selection of which may not be favorable to the company under the SCM Agreement.

13. The other type of data is the data that is used for benchmarks. This data is not in the exclusive control of and does not have to come from a company or the government. In other words, unlike the government prices paid by a company, which only the government and the company would generally speaking, have direct knowledge and control over, benchmark prices may be from many sources not within the control of the government or company. Pursuant to the SCM Agreement and consistent with past Appellate Body findings, these benchmark prices should reflect a private, arms-length, market price in the country of provision, to the extent available. The decision not to use data submitted by one interested party as a benchmark and rather to use other data on the record is based on an analysis that the interested party's data does not meet the SCM Agreement benchmark standards. It is not a facts available determination and thus the investigating authority need not seek further clarification relating to any deficiencies in order to employ other data found to be more suitable. If a party wishes to submit data to be considered for use as benchmark data, the Member's obligation is to ensure the party has "ample opportunity to present in writing all evidence which [it] consider[s] relevant in respect of the investigation in question."[12] In other words, if the submitting party wishes to submit information that could be used for establishing a benchmark, it should strive to provide information that meets the SCM Agreement benchmark standards. The Member's obligation under the SCM Agreement when selecting benchmarks is to use the best benchmark data that meets the SCM Agreement standards.

14. Finally, the United States takes issue with India's apparent new argument that Article 12.1 of the SCM Agreement requires an investigating authority to affirmatively use all

[12] SCM Agreement, Article 12.1.

information submitted by interested parties in calculating a benchmark, regardless of that information's veracity or usability.[13] In addition to being incorrect, the United States notes that India did not raise an Article 12.1 claim in its panel request. This claim therefore is outside the Panel's terms of reference.

82. Please comment on India's argument (para. 193, second written submission) that the USDOC's decision not to use certain domestic price information as Tier I benchmarks because it may not relate to actual transactions is inconsistent with USDOC's use of price "negotiation" information from the Tex Reports as Tier II benchmarks.

15. In paragraph 193 of its second written submission, India accuses the United States of employing a double standard in its benchmark calculations because the U.S. rejected price lists in calculating a Tier I in-country benchmark but accepted them in calculating a benchmark under Tier II. India's accusations ignore the facts of this case and, more generally, evince a lack of understanding of the appropriate basis for selecting a benchmark under the SCM Agreement and the application of those principles in the U.S. regulation.

16. First, India's characterization of the prices that Commerce used from the Tex Report in paragraph 193 of India's second written submission is inaccurate. The prices used by Commerce were not, as India alleges, a price list; rather, they were prices resulting from actual negotiations between Japanese purchasers and private companies. In other words, as explained below, the Tex Report prices used by Commerce in its Tier II benchmark for the 2006 and 2007 Administrative Reviews are the prices that Japanese steel mills actually paid during those years. India therefore has no factual basis for a claim that the United States applies a double standard with respect to the type of information it used in respect of the 2006 and 2007 administrative reviews at issue in this dispute. Commerce did not accept less probative data in one instance and reject it in an analogous instance.

17. Specifically, the Tex Report charts used for the 2006 and 2007 Administrative Reviews are public and contain historic prices negotiated with the Japanese steel mills for the years 2002 through 2007 from the locations identified, including Hamersley, Australia.[14] The Tex Reports indicate that the Hamersley prices are from a company named Hamersley Iron Inc., a wholly owned subsidiary of the multinational mining corporation Rio Tinto.[15] The prices listed are those that the Japanese companies agreed to pay for all transactions in a given year; whether there was one transaction or many, the price of each transaction in that year was the same. The "price negotiations" notation at the top of the chart means that these prices were based on price negotiations with the Japanese steel mills which resulted in actual transactions and show the

[13] India Second Written Submission, para. 197.

[14] *GOI's Supplemental Questionnaire Response 2006 Administrative Review*, February 12, 2008, at Exhibit 1 (Exhibit IND-61); *Tata's Supplemental Questionnaire Response*, February 8, 2008 (Exhibit IND-67).

[15] *See* Tex Report (April 4, 2005) at p. 20; Tex Report (May 11, 2005) at p.5; Tex Report (July 4, 2005) at p.3; Tex Report (July 26, 2005) at p.3 (which contains information concerning Rio Tinto and its worldwide production and ownership of Hamersley Iron Inc.) (these were submitted in the *GOI's 2006 Administrative Review Supplemental Questionnaire Response, November 15, 2007* (Exhibit USA-113).

agreed to percentage changes in ore price from the most recent year's data.[16] It does not mean, as India claims, uncompleted transaction prices. Moreover, Essar and the GOI submitted these same charts as prices at which the NMDC sold iron ore lumps and fines to Japan.[17]

18. With respect to the evidence of domestic pricing that India did submit, Commerce was unable to use this evidence in its calculation of a Tier I benchmark because it did not meet the standard as evidence of actual transactions. For example, the association chart data to which India refers is a single page document with no explanation from the GOI or Tata with respect to what the prices contained therein represent or any way to determine whether they were from actual transactions between private parties. Indeed, as explained in the U.S. first written submission, of the companies that are identified, most are state-owned.[18]

19. Further, the price quote from Tata contained in the chart, that does identify the party, is just a price quote.[19] As price quotes and price lists are not evidence of actual transactions, they cannot be used as Tier I benchmarks.[20]

20. The Tex Report prices, on the other hand, are evidence of actual arms-length transactions and, as such, reflect market conditions for iron ore. The Tex Reports are a daily report of prices which the Japanese steel mills pay for iron ore from around the world and, in some instances, also include information such as percentage of iron, which allows Commerce to calculate a meaningful benchmark for comparison.[21] For example, during the 2004 Administrative Review,

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[16] The Tex Reports are daily reports which, in addition to other news concerning world iron ore production, give regular status reports on negotiations of iron ore prices between Japanese steel mills and world market suppliers including Hamersley Iron, Inc. They reflect prices which Japanese steel mills agreed to pay. *See, GOI's 2006 Administrative Review Supplemental Questionnaire Response, November 15, 2007* (Exhibit USA-113) (The attached exhibit contains a few of the relevant portions of the Tex Reports such as the Tex Report (November 9, 2005) at p.4 and Tex Report (December 13, 2005) at p.4, identifying the specific Japanese steel mills and negotiating official for Hamersley Iron Inc. for the 2006 price negotiations; *see also* Tex Report (April 1, 2005) at p.12, which demonstrates the agreement reached on 2005 prices for iron ore between the Japanese steel mills and Hamersley Iron, Inc.; Tex Report (May 22, 2006) at p.1, demonstrating that Japanese steel mills and Hamersley Iron, Inc. reach agreement on 2006 fine prices; and Tex Report (May 29, 2006) p.2, showing Nippon Steel settled iron ore price with Hamersley Iron, Inc.).

[17] *GOI's Supplemental Questionnaire Response 2006 Administrative Review*, February 12, 2008, at Exhibit 1 (Exhibit IND-61); *Tata's Supplemental Questionnaire Response*, February 8, 2008 (Exhibit IND-67).

[18] U.S. First Written Submission, para. 442.

[19] India argued in its Second Oral Statement that the Tata price quote was public because it had no brackets or proprietary stamps. The reason that the document had no brackets or stamps is that it was not submitted to Commerce by Tata or the GOI. Commerce collected this business document at verification. Unless a party submits the document in a different submission as a public document, Commerce treats all business documents of the company being verified as proprietary. During verification, there is simply not enough time for Commerce officials to go through a company's vast records, select sample documents to support the verifications results, and have them properly bracketed and stamped by the end of verification. Further, India's argument that the Indian laws which were included in the verification exhibits would then have to be treated as proprietary even though they were public is incorrect. First, the laws had already been submitted as public documents in other submissions on the record. Second, the public laws of a country would not be treated as proprietary because they are public. The company could not claim proprietary treatment for public laws only its own business records. The business records including documents from price offers would all be treated as proprietary unless the party, during the proceeding, submitted them as public or, on the record, specifically agreed that they could be treated as public, neither of which Tata or Essar did in the proceedings at issue.

[20] U.S. First Written Submission, paras. 444-445.

[21] Tex Reports (Exhibit USA-112).

Tex Report data was provided at Essar's verification as proprietary data and showed transactions between identified Japanese steel mills and a company in Hamersley, Australia on a percentage iron content basis. However, as Essar claimed proprietary status for the Tex Reports as sourced from a paid subscription service, the United States cannot further elaborate on the content of the document.

21. Second, and more fundamentally, India's allegations evince a significant mischaracterization of Tiers I and II of the U.S. regulation. Under Tier I, benchmarks are calculated using prices from actual transactions in the country in question. Under Tier II, where actual in-country prices are not available, benchmarks are calculated using evidence of actual transactions from out of country sales. In neither instance does Commerce accept price lists or price quotes as the basis for a Tier I or Tier II benchmark. Rather, Tier II benchmarks are based on actual, private, arm's-length transactions for the goods or services in question—not price lists or price quotes. India's claim is without merit as Commerce does not prohibit the use of price lists or price quotes under Tier I but allow them under Tier II as India so alleges.

22. As explained in paragraphs 25 through 27 of the U.S. second written submission, the regulation contains an explicit preference for in-country prices, consistent with the SCM Agreement. The use of data from actual in-country transactions (Tier I) results in the most probative determination of a benchmark based on the prevailing market conditions in the country of provision. Absent such preferred benchmark data, however, the investigating authority still must make a determination of the adequacy of remuneration. The United States thus moves from using empirical evidence of actual sales in the country of provision (Tier I) to using empirical evidence of out of country private transactions (Tier II), adjusted to reflect prevailing market condition in the country in question. While such evidence may be less probative of the prevailing market conditions in the country of provision, they are the next best alternatives. In this way, the U.S. regulations mirror the evidentiary preferences established by the Appellate Body in *US – Softwood Lumber IV* by giving priority to actual, in-country private prices (Tier I) and, in their absence, to world market prices, which reasonably would be available to purchasers in the country in question (Tier II).[22]

> **83. We note that the prices applied by USDOC were subsequently averaged, converted and adjusted (Exhibit IND-17, page 6, second column). Is it necessary, for the purpose of Article 14(d) of the SCM Agreement, to insist on the use of actual prices when they will subsequently be averaged, converted and adjusted? Please explain.**

23. We recall that the Appellate Body has said that the starting point for determining the adequacy of remuneration for goods under the Article 14(d) guidelines is a comparison of the government price to "prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision".[23] As explained above in response to question 81, Commerce endeavors to use prices from actual transactions in the country of provision in setting a benchmark, which it determines from evidence on the record. As observed by the Panel in its question, where there are several actual usable prices on the record,

[22] 19 C.F.R. § 351.511(a)(2)(i) and (ii) (Exhibit USA-3).
[23] *US – Softwood Lumber IV (AB)*, para. 90

Commerce typically averages them to create the benchmark. Whether or not an average price or a single transaction is used as a benchmark under the U.S. regulation depends on what data the record contains.

24. However, a decision by Commerce to average individual prices on the record in order to create the benchmark does not mean that it would be appropriate for Commerce to simply collect any average pricing data from respondents and use these averages in its own calculations. As evidenced by page 6 of Exhibit IND-17, in addition to averaging actual prices, Commerce must make additional conversions and adjustments to raw prices in order to make an apples-to-apples comparison. To simply compare the price of a wet metric ton sale with dry metric ton sale, for example, would render a meaningless result because the measurement would be on different bases. Without the underlying data for the individual sales, it is impossible for Commerce to make such adjustments and determine whether the benchmark reflects the prevailing market conditions in the country of provision. Absent such adjustments to reflect prevailing market conditions, such a comparison would be meaningless. This is why Article 14(d) of the SCM Agreement explicitly provides that the adequacy of remuneration be assessed with respect to prevailing market conditions, including price, quality, availability, marketability, and transportation. However, where prices submitted by an interested party are not supported by sufficient data and explanation, as happened with respect to the association chart in this proceeding, it is impossible for an investigating authority to ensure that the proposed benchmark price adequately reflects such prevailing market conditions, consistent with Article 14(d).

84. At para. 32 of its second written submission, the United States contends that "[f]or a company to actually import an input, the prevailing market conditions in the country of provision must be such that it is economically rational to purchase the input from a foreign supplier, including any associated transportation and delivery charges".

a. Regarding USDOC's use of prices from Hamersley, Australia as Tier II benchmarks, did USDOC examine whether it was "economically rational" for Indian purchasers to buy iron ore from Hamersley, and incur the cost of shipping iron ore from Australia to their facilities in India? Please explain.

b. Did the USDOC otherwise confirm that it was appropriate to use Hamersley's prices as Tier II benchmarks? Please explain.

c. Why did USDOC use Australian prices, as opposed to prices from some other country?

25. To be clear, Commerce does not impose a theoretical "economically rational" test for benchmarks. A particular transaction is useful as a benchmark if market actors actually engaged in that transaction. Where prices are reflective of actual transactions, Commerce need not further evaluate the rationality behind that transaction. Rather, in paragraph 32 of the U.S. second written submission, the U.S. comments with regard to what is "economically rational" were made to rebut India's arguments in this proceeding. Namely, India argued that ocean freight should not be included in the calculation of a benchmark because no steel mill in India would ever purchase iron ore from a foreign supplier and pay ocean freight if they had the option of

purchasing from a local supplier. India, as a matter of fact, is incorrect because such a purchase actually happened. The facts on the record demonstrate that an India steel producer purchased iron ore from Brazil, which is why the United States used the term quoted by the Panel. Theoretical discussions of what may or may not be "economically rational" are not part of the process of selecting benchmarks. Instead of theory, Commerce relies on actual data.

26. With respect to Commerce's decision to use prices from Hamersley, Australia, it is important to recall that Commerce's goal is to find actual market-based prices to be used as benchmarks. As there were no available in-country market-based prices that could be used as a Tier I benchmark, the Australia purchases, which were out-of-country market-based prices, were appropriate to use in Commerce's Tier II benchmark calculation. Commerce chose the Australian prices for several reasons: First, the prevailing market conditions in the Indian market for iron ore were such that steel producers did purchase and import iron ore from foreign supplier located on the other side of the globe. This was evidenced by the Essar purchase of iron ore from Brazil, a country geographically located even further away from India than Australia.[24] Second, the actual price Essar paid for iron ore from Brazil was BCI and therefore could not be used as a benchmark without breaching confidentiality under Article 12.4 of the SCM Agreement. Third, the Tex Report data for Hamersley, Australia was the only world market price data on the record that identified the specific iron content of the iron ore. Fourth, as explained in paragraph 432 of the U.S. first written submission, the record contained shipping data for a bulk natural resource – coal– for Hamersley, Australia, which could be used to properly transform the Australian ex mine price to a benchmark price for iron ore available in India. Moreover, there was no public shipping information for any other iron ore provider in the Tex Report data. For these reasons, there was no other world market price on the record that Commerce could have more appropriately used as a Tier II benchmark price and Commerce appropriately chose to use prices from Australia.

85. Please provide a copy of the "GOI Verification Report" referred to in USDOC's 2004 preliminary determination (Exhibit IND-17, page 6 of 8, first column).

27. Attached at Exhibit USA-114 is a complete copy of 2004 GOI Verification Report.[25]

[24] *See* U.S. Responses to First Panel Questions, Question 44 ("An example of an adjustment where Commerce did include import duties and delivery costs under Section 351.511(a)(2)(iv) can be found in paragraphs 434, 435, and 455 of the U.S. first written submission, where Commerce used an actual sale of DR-CLO from Brazil to Essar, an Indian steel company, as the Tier I in-country benchmark price. (U.S. First Written Submission, para. 455.) To summarize, in its 2006 and 2007 administrative reviews, Commerce adjusted the delivered price from Brazil to include all costs actually paid by Essar to import high grade iron ore lumps from the mine in Brazil to Essar's steel mill in India. These costs included taxes, import duties, and other charges, which record evidence showed were actually paid by Essar in order to acquire the iron ore lumps. Commerce adjusted the benchmark to include all of the actual costs necessary to get the NMDC ore to its factory, which did not include import duties, to ensure that the price reflected the actual prices paid by Essar in the country of provision, India. (2006 Issues and Decision Memorandum, at Section I.A.4 (Exhibit IND-33) and 2007 Issues and Decision Memorandum, at Section IV.A.3 (Exhibit IND-38))"). *See also* U.S. Second Written Submission, para. 34.

[25] Exhibit USA-114.

86. The USDOC states that the Tex Report was provided by NMDC and MMTC officials during verification (Exhibit IND-17, page 6 of 8, first column).

a. Did those officials propose that USDOC should use the price data set forth in the Tex Report?

28. No, the government officials mentioned the Tex Report to Commerce in a discussion during verification about how the NMDC prices for iron ore are set.[26] They did not suggest that the Tex Report should be used as a benchmark at verification. As reflected in the GOI 2004 Administrative Review Verification Report, the government officials also stated that they did not have any copies of the Tex Report with them and suggested that Commerce obtain them from Essar.[27] The preliminary determination for the 2004 Administrative Review contained in Exhibit IND-17 contains an error; the Tex Reports were not obtained from the government officials. Rather, they were obtained by Commerce from Essar during Essar's verification.

b. Please provide the relevant extracts of the Tex Reports dated 16 February 2004 and 24 February 2005 (referred to in Exhibit IND-17, page 6 of 8, first column).

29. The United States cannot provide copies of the indicated Tex Reports because they were collected from Essar as part of a verification exhibit and are BCI. India, however, would be in a position to provide these extracts with the consent of Essar.

87. At para. 59 of its second written submission, the United States asserts that "the use of one party's BCI for another party's calculations would mean that the calculations can be reversed and the data revealed".

a. If USDOC had used Ispat's BCI to determine benchmarks for Essar and JSW, please explain exactly how Essar and JSW could have reverse calculated Ispat's BCI.

30. The calculation of the benefit is a comparison between the benchmark price with the government price. Where only one or two parties submit pricing information, a party merely has to take the calculated benefit and add it to the known government price in order to reconstruct the benchmark price. In this case, because Ispat provided the only usable Indian BCI benchmark pricing data, Essar and JSW would have been able to add the calculated benefit to the government price and easily arrive at the price provided by Ispat. Similarly, the same calculation could be done in respect of Essar's BCI price from Brazil. Unless there are at least three separate data points to average together to use at the benchmark, the one or two parties whose data are used can reverse the calculations to determine the benchmark price of the other party.

[26] 2004 Administrative Review GOI Verification Report, at p.6, (Exhibit USA-114).
[27] 2004 Administrative Review GOI Verification Report, at p.7 (Exhibit USA-114).

b. Would the BCI have been provided to Essar and JSW directly, or to their counsel under an administrative protection order?

31. The BCI was available to any parties' counsel which had applied for and received an administrative protective order ("APO"). Under the APO, counsel could not have provided the information to their clients directly. If, however, Commerce had used the information as a benchmark, the United States would have violated the confidentiality of Ispat because the clients, Essar and JSW, could have discovered the benchmark price by reversing the calculation.

c. Would the USDOC have been required by the SCM Agreement to disclose the relevant BCI to Essar and JSW? Please explain.

32. No, the SCM Agreement would not require the release of Ispat's BCI to Essar and JSW. Rather, Article 12.4 of the SCM Agreement requires that information which is confidential by nature "shall not be disclosed without specific permission of the party submitting it."[28] Commerce's protection of Ispat's pricing information was fully consistent with the provisions of the SCM Agreement.

d. Would Essar and JSW necessarily have known, or been able to establish, that the relevant price data had been submitted by Ispat? Please explain.

33. Yes, Essar and JSW would have been able to establish the relevant price data submitted by Ispat through a simple process of elimination. The 2006 Administrative Review at issue involved only 4 companies: Tata, Essar, Ispat, and JSW. It is clear from the public questionnaire responses and supplemental questionnaires and responses that JSW failed to respond to the new subsidy allegation. It therefore would have been clear to both Essar and Tata that JSW did not provide pricing data. Further, as Tata had its own captive mining production it also would have been clear that Tata did not provide any pricing data. Of the two remaining companies, Essar and Ispat, Essar provided an actual private market BCI price for its purchase of DRCLO iron ore from Brazil, which Commerce used as a benchmark for Essar's DRCLO purchases. The only other company to provide data was ISPAT. Through a simple process of elimination, if Commerce had used Ispat's data, Ispat's identity would have been clear to both Essar and JSW.

90. Regarding the USDOC's decision not to use NMDC's export prices as a Tier II benchmark, is there any reason to suspect that a public body selling goods may subsidize its export customers, or set its export prices so as to pursue policy objectives other than long-term profit maximization?

34. The question's phrasing seems to imply that there needs to be evidence that a government price is not a market price before the government price may be rejected as a benchmark. Such an approach is not consistent with the Article 14 guidelines for calculating benefit. As noted in response to question 83, the Appellate Body has said that the starting point for determining the adequacy of remuneration for goods under the Article 14(d) guidelines is a comparison of the government price to "prices at which the same or similar goods are sold by *private suppliers* in

[28] SCM Agreement, Article 12.4

arm's length transactions in the country of provision."[29] This is not to say that government prices could never be considered for benchmark purposes. As explained in our previous submissions, Tier I of the regulation, for example, allows for actual sales from competitively run government auctions in certain circumstances, provided the government prices reflect market principles. Rather, *US – Softwood Lumber IV* confirms the basic principles that using prices of private suppliers makes sense in constructing a benchmark because if one were to compare a government price to itself, there would be no way to tell where that price fell in relation to prevailing market conditions. The comparative exercise would be meaningless.

35. With respect to the motivation of a government or public body to engage in a particular transaction, such motivation is not relevant for evaluating whether the government price is acceptable. In response to the Panel's question, one could speculate that the motivation would be the same as the reason that a government grants any sort of subsidies—i.e., to promote economic activity in certain sectors. Here, by selling iron ore at below market prices, the government would be maintaining economic activity in the iron ore sector, thereby maintaining jobs for its citizens. As a government, it would have both the revenue and ability to subsidize the industry and sustain it. In this scenario, the foreign private purchaser would be an indirect beneficiary of the government's policy. A private company, on the other hand, would not take the same factors into consideration as a profit maximizer.

2.1 Specificity

92. In respect of the 2008 administrative review, page 20 of Exhibit IND-33 (USDOC's IDM) refers to a finding of *de jure* specificity in respect of "Captive Mining Rights of Coal". The document also refers the reader to Comments 24-29 for further details of the USDOC's analysis. At Comment 25 (page 63), USDOC refers to a finding of *de facto* specificity in respect of the "Provision of iron Ore and Coal Under the Captive Mining Rights Programs". Please explain why USDOC appears to refer to findings of both *de facto* and *de jure* specificity in respect of the same programme.

36. Commerce found that the captive mining rights of coal was *de jure* specific to three industries and that captive mining of iron ore was *de facto* specific to four companies. The words "and Coal" was inadvertently included during the editing process but should not have been included in the sentence noted by the Panel in comment 25 at page 63.

93. Comment 25 at page 63 of Exhibit IND-33 also contains a statement by the USDOC that "the captive mining programs for iron ore and coal are subject to their own separate governing regulations".

a. Please explain the basis for this statement, indicating precisely the regulations at issue.

37. Commerce found that the captive mining program for coal was subject to its own governing regulations and therefore was *de jure* specific, while the captive mining program for

[29] *US – Softwood Lumber IV (AB)*, para. 90

iron ore was *de facto* specific. The specific statement highlighted by the Panel in Comment 25 contained in Exhibit IND-33 was the result of an editing error and should read: "the captive mining program for coal is subject to its own separate governing regulations." Its intended meaning is confirmed by the words that followed: Commerce went on to explain its specificity determination with regard to both programs, making clear the distinction between findings of *de jure* specificity for the captive mining of coal and *de facto* for the captive mining of iron ore.

38. For example, regarding the captive mining program for coal, Commerce stated: "[W]e find that the GOI limited its provision of captive mining for coal to steel, power, and cement companies."[30] As explained in paragraph 509 of the U.S. first written submission, Indian Law and the Ministry of Coal Guidelines limit the grant of captive mining right for coal to three industries:

> The Coal Mines Nationalization Act was amended two times, in 1976 and 1993, to provide that iron and steel companies and power companies, respectively, were permitted to mine coal for captive use.[31] In 1996, the law was again modified to include the cement industry.[32] The Ministry of Coal's guidelines for the allocation of captive coal blocks provide that "[p]reference will be accorded to the power and steel sectors."[33]

39. With respect to the GOI's captive mining program for iron ore, in Comment 25, Commerce stated: "[R]ecord evidence indicates that the GOI limited its provision of captive mining rights for iron ore to only four steel producers."[34] The specific factual basis for this determination was laid out in detail in paragraphs 68 through 73 of the U.S. Second Written Submission. These facts included: first, the Dang Report, which specifically identifies the existence of a captive iron ore mining policy in stating that the "[p]olicy of captive mining leases should continue . . ."[35]

40. Second, both the Dang Report and Hoda Report as well as several Indian newspaper articles, identified the four steel companies which have been granted captive mining rights under the GOI's captive mining rights policy for iron ore. Specifically, the Dang Report states that four Indian steel companies, SAIL, TISCO (now known as Tata), JSPL and JVSL (now known as JSW), have captive mines for iron ore.[36] The article in the Times of India identifies SAIL and Tata Steel as having captive mines.[37] In an article entitled "India's Iron Ore Rush," the Financial Express identifies Tata Steel, SAIL, JSW and JSPL as having captive iron ore mines. [38] Finally,

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[30] Exhibit IND-33, at Comment 25, p.63

[31] *2006 New Subsidies Allegation (Tata)*, at 11 and Exhibits 18 (Coal Mines Amendment Act 1976 at section 3) and 19 (Coal Mines Amendment Act 1993 at section1) (May 23, 2007) (Exhibit USA-71).

[32] *2006 New Subsidies Allegation (Tata)*, Exhibit 20 (Ministry of Coal, Notification S.O. 199(E) March 15, 1996) (Exhibit USA-71).

[33] *2006 New Subsidies Allegation (Tata)*, Exhibit 23, at A.9 (Guidelines for Allocation of Captive Blocks) (Exhibit USA-71).

[34] Exhibit IND-33 at Comment 25, p.63.

[35] *Dang* Report, p. 52 (attached to 2006 New Subsidies Allegation (JSW) at internal Exhibit 3 (Exhibit USA-50).

[36] *Dang Report*, p. 48 (Exhibit USA-50); *Hoda Report*, p.143 and 158, fn 4 (Exhibit USA-71).

[37] 2006 New Subsidies Allegation (Tata), internal Exhibit 11, p. 1 (Exhibit USA-71).

[38] 2006 New Subsidies Allegation (Tata), internal Exhibit 14 (Exhibit USA-71).

in another article, the Financial Express identifies Tata Steel as getting "all of its iron ore and two-thirds of its coal supplies from captive mines."[39]

41. Third, the Hoda Report contains an extensive discussion of whether more mining leases should be allocated to captive mining.[40] The first recommendation of the report confirms the existence of a captive mining program by stating that:

> Stand alone mining and captive mining should continue to co-exist in the country. The position should be reviewed in 2016-17 in light of emerging situation of establishment of steel capacity in the country, on the one hand, and accretions to the level of iron ore resources in the country, on the other. A view can be taken at that time on whether the balance of advantage in the grant of LAPL/PL/ML should be changed in favor of steel mills.[41]

42. India's policy of granting captive mining leases for iron ore to four specific Indian Steel companies was amply reflected in the information examined by Commerce. While it may have been clearer for Commerce to have divided Comment 25 into two separate comments—one addressing the captive mining leases for iron ore and the other captive mining leases for coal—the summarized comments of the parties as well as Commerce's full responses explain the basis for Commerce's determinations. That is, India's policy of granting captive mining leases for iron ore to four specific Indian Steel companies was amply reflected in the record evidence examined by Commerce and demonstrated that this subsidy was *de facto* specific. Further, the record evidence examined by Commerce demonstrated that India's Coal Mines Nationalization Act gave captive mining rights for coal to three industries, rendering the subsidy *de jure* specific.

b. Please also explain how the alleged existence of "separate governing regulations" impacted USDOC's determinations of specificity for both programmes.

43. As explained above in response to part (a), Commerce made a *de facto* determination in accordance with Article 2.1(c) of the SCM Agreement concerning the captive mining program for iron ore. There are no separate governing regulations to consider. With respect to Commerce's determination of a captive mining program for coal, as explained above, India's Coal Mines Nationalization Act along with its subsequent amendments and the Ministry of Coal's Guidelines served as the basis for Commerce determinations of *de jure* specificity in accordance with Articles 2.1(a) and (b) of the SCM Agreement.[42]

[39] 2006 New Subsidies Allegation (Tata), internal Exhibit 13 (Exhibit USA-71).
[40] Hoda Report, p. 143-160 (Exhibit USA-71).
[41] Hoda Report, p. 159 (Exhibit USA-71).
[42] 2006 New Subsidies Allegation (Tata), internal Exhibit 13 (Exhibit USA-71).

94. Para. 7.15 of the Hoda Report refers to the "debate on whether captive mining should receive priority in the allocation of iron ore mines vis-à-vis stand alone mines". In addition, at para. 7.46 "the committee concludes that a case has not been made for allocation of iron ore mines to the steel plants for captive mining". Furthermore, at para. 7.21, the Hoda Committee states that "the current dispensation … treats all miners alike". These statements seem to suggest that, at the time of the Hoda Report, no policy of prioritizing captive iron ore mining had been introduced, and none was recommended by the Hoda Committee. Please comment, in light of the USDOC's finding that a government policy of captive iron ore mining does (already) exist, and the USDOC's reference to the Hoda Report as part of the basis for this finding (Exhibit IND-32, page 14).

44. As explained in paragraphs 481 through 482 of the U.S. First Written Submission in greater detail in paragraphs 64 through 74 of the U.S. Second Written Submission, Commerce determined that the GOI has a *de facto* captive mining policy for iron ore on the basis of the evidence contained in the Hoda Report and the Dang Report. We refer to the Panel to the relevant excerpts of the reports cited in out submissions and contained in USA-50 and USA-70.

45. For example, the Hoda Report, at page 144 draws on the Dang Report's conclusions at page 52 that the "policy of captive mining *should remain in place*." Specifically, the Hoda Report at pages 143-160 discusses whether the GOI's captive mining policy for iron ore should be expanded beyond the four big companies, such as Tata which has a captive mining lease under this policy.[43] This entire section of the Hoda Report is dedicated to a discussion of whether the captive mining policy should be *expanded*, demonstrating that a policy is already in place.

46. With respect to the conclusions of the Hoda Report cited by the Panel in paragraph 7.46, the Report's recommendation not to expand the captive mining policy reflects the purpose of the Report, to provide recommendations. Rather than suggesting that no such policy exists, the passage cited by the Panel confirms the view of the Committee that it should not be expanded. While the conclusions of the Hoda Report, taken in the context of the entire discussion, do state that the case for allocation of more leases for captive mining had not been made, we recall that the first recommendation of the report clearly states:

> Stand alone mining and ***captive mining should continue to co-exist in the country***. The position should be reviewed in 2016-17 in light of emerging situation of establishment of steel capacity in the country, on the one hand, and accretions to the level of iron ore resources in the country, on the other. A view can be taken at that time on whether the balance of advantage in the grant of LAPL/PL/ML should be changed in favor of steel mills.[44]

47. Moreover, nothing in the Report indicates that the existing captive mining policy under which Tata, SAIL, JSW and JSPL operate their mines was eliminated as the result of the

[43] Hoda Report, p. 143 (Exhibit USA-71).
[44] Hoda Report, p. 159 (Exhibit USA-71).

recommendations. The record facts amply demonstrate that India has a *de facto* policy of captive mining with regard to the four identified steel companies.

48. Similarly, the passage contained in paragraph 7.21 of the Hoda Report that "the current dispensation . . . treats all miners alike", refers to the laws which do not identify a *de jure* captive mining program. While the laws for the granting of mining leases are not de jure specific in that they do not expressly reference a captive mining program, the record facts amply demonstrate that India has a *de facto* policy of captive mining with regard to the four identified steel companies.

95. Suppose a Member provides free electricity to all companies in its territory, and suppose that such companies include producers of steel. Would an investigating authority be entitled, simply on the basis of the use of free electricity by steel producers, to identify a specific "Free Electricity for Steel Producers" program? Or would the investigating authority need to demonstrate the existence of such specific subsidy program on the basis of something more than the mere use of a generally available free electricity by steel producers? Please explain.

49. The purpose of the specificity analysis is to determine whether a financial contribution conferring a benefit is broadly available throughout a Member's economy or specific to certain enterprises. Whether a subsidy is specific to certain enterprises as compared to broadly available throughout a Member's economy is assessed on a case-by-case basis.[45]

50. With respect to the Panel's hypothetical, it is difficult to say whether an investigating authority would be entitled to find that there is a specific "Free Electricity for Steel Producers" program in accordance with Article 2 of the SCM Agreement. If, in the Panel's hypothetical for example, the government provides all companies in its territory free electricity, and that law satisfied criteria for indicating non-specificity set out in Article 2.1(a) and (b), the investigating authority would not be entitled to find that there is a *de jure* specific program for steel producers. Even under such facts, it may be the case, however, that an investigating authority could find "mere use" to be sufficient evidence of a *de facto* specific program under Article 2.1(c), depending on the facts.

51. Under Article 2.1(c), if notwithstanding the appearance of non-specificity under Articles 2.1(a) and (b) there are reasons to believe that a subsidy may in fact be specific, an investigating authority can consider: use of a subsidy program by a limited number of certain enterprises, predominate use by certain enterprises, the granting of disproportionately 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.[46]

52. In looking at the Panel's hypothetical, "mere use" of a generally available subsidy by one industry may or may not be enough facts to result in a specificity determination in and of itself

[45] *US – Upland Cotton (Panel)*, paras. 7.1142 ("The plain words of Article 2.1 indicate that specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis"); *US – Upland Cotton (Panel)*, paras. 7.1151; *US – Antidumping and Countervailing Duties (AB)*, paras. 386, 400.

[46] SCM Agreement, Article 2.1(c).

but, could, for example, evince predominate use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, or questionable discretion of a granting authority. An investigating authority may be entitled to find specificity under Article 2.1(c) based on such evidence depending on the facts. The simple answer to the Panel's question is that given the case-by-case nature of the specificity determination, it is not possible to forecast whether a finding of specificity will be made on the basis of usage alone without additional facts than those provided in the question.

3.1 Public Body

99. At para. 111 of its second written submission, the United States asserts that "under the direction of the SDF Managing Committee, the JPC determined the amounts to be levied and sequestered the resulting funds". With reference to evidence on the USDOC's record, and bearing in mind that there is no determination by USDOC that JPC is a public body, please explain the basis for the assertion that the JPC collected SDF levies "under the direction of" the SDF Managing Committee.

53. The clause "under the direction of the SDF Managing Committee" was meant to refer to the SDF Managing Committee functions described in the latter part of that sentence – namely the redistribution of the SDF Funds in accordance with GOI goals for the steel sector.

54. To be clear, Commerce determined that while the JPC collected the levies[47], the SDF Managing Committee made all final decisions on the issuance, terms and waivers of all SDF loans.[48] Moreover, the Managing Committee ensured that these funds were distributed in accordance with the larger development goals that the GOI set for the steel sector.[49] Thus, while JPC was an instrument of levying and disbursing funds, the decisions on loans and distributions which constitute subsidies were taken by the SDF Managing Committee.

55. We note separately that the evidence presented to Commerce revealed that the JPC was subject to *GOI* control.[50] First, the JPC was formed pursuant to the GOI's administrative orders. Second, the GOI assigned the specific tasks and functions that the JPC was to perform, revising them as needed over time. Finally, the GOI noted in its 1978 administrative order that the JPC was responsible for carrying out these functions, "in accordance with and subject to such regulations or directions as may be issued by the Central Government from time to time."[51] This

[47] *See* U.S. First Written Submission, para. 537; Investigation Final Determination, 66 Fed. Reg. at 49,637 (Exhibit IND-8); *see also* GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at pp. 2-3 (Exhibit USA-75).
[48] *See* U.S. First Written Submission, para. 533; Investigation Verification Report of GOI Responses at p. 3 (Exhibit USA-74).
[49] *See* U.S. First Written Submission, para. 538; Investigation Verification Report of GOI Responses at p. 2, 4 (Exhibit USA-74).
[50] *See* U.S. First Written Submission, paras. 530-534 and 537-539; GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at pp. 1-3, Exhibit 20: "Ministry of Steel Notification of 1978", and Exhibit 21: "Ministry of Steel Notification of 1992" (Exhibit USA-75).
[51] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 20: "Ministry of Steel Notification of 1978." (Exhibit USA-75).

was reiterated in the GOI's 1992 administrative order.[52] Thus, far from being a private entity, the JPC was formed by the GOI, performed functions dictated by the GOI, and was subject to GOI control as it did so. Its collection of levies and disbursing of funds at the direction of the SDF Managing Committee was therefore consistent with and pursuant to GOI policies and regulations.

100. Please comment on India's assertion, at para. 42 of its oral statement at the second substantive meeting, that the USDOC had determined that the "collection of funds was attributed only to JPC and not to the SDF Managing Committee".

56. As explained in detail in our first written submission and again in our oral statement at the second substantive meeting, Commerce determined that the JPC handled much of the day-to-day operations of the SDF program – including collecting the mandatory SDF levies. However, Commerce found, and the GOI confirmed at verification, that the SDF Managing Committee made all final decisions on the issuance, terms and waivers of all SDF loans.[53] Because the SDF Managing Committee controlled all aspects of the distribution of SDF funds, Commerce found that it was responsible for making the financial contributions in this case.

101. Please explain the basis for the USDOC's determination that SDF funds are collected from consumers "as mandated by the GOI" (IDM dated 21 September 2001, Exhibit IND-7, page 10 of 27). Please provide any supporting documentation.

57. As explained in our first written submission at paragraphs 531-532, the GOI mandated that SDF funds were to be collected from consumers and used for further development in the steel sector, as detailed in administrative orders that the GOI issued between 1971 and 1992. Specifically, in 1971, the GOI issued an administrative order setting up the JPC "for the purpose of giving effect to the provisions of" the Iron and Steel (Control) Order, 1956.[54] Subsequently, in 1978, the GOI issued an amendment to the 1971 order, which authorized the JPC to increase prices charged to consumers of certain steel products, and to levy monies for the creation of "a fund for modernisation, research and development with the object of ensuring the production of iron and steel in the desired categories and grades by the main steel plants."[55] Similarly, the GOI issued an amendment on January 16, 1992, reiterating that the JPC was authorized to levy funds "towards the Steel Development Fund for financing schemes and projects and other capital expenditures."[56] The Notification further explained that the Committee "shall perform its functions relating to the Steel Development Fund in accordance with and subject to such

[52] The GOI stated that the JPC "shall perform its functions relating to the Steel Development Fund in accordance with and subject to such orders or directions as may be issued by the Central government in this behalf from time to time." GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 21: "Ministry of Steel Notification of 1992." (Exhibit USA-75).

[53] U.S. First Written Submission, para. 533; Investigation Verification Report of GOI Responses at p. 3 (Exhibit USA-74).

[54] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 22: "Ministry of Steel Notification of 1971" (Exhibit USA-75).

[55] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 20: "Ministry of Steel Notification of 1978". (Exhibit USA-75).

[56] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 21: "Ministry of Steel Notification of 1992" (Exhibit USA-75).

regulations or directions as may be issued by the Central Government from time to time."[57] Accordingly, the administrative orders issued by the GOI were the basis for Commerce's determination that the GOI had mandated the collection of SDF funds, to be redistributed for further development in the steel sector.

4.1 Article 14 Transparency

104. We note that the chapeau of Article 14 of the SCM Agreement requires that the application of a Member's benefit calculation methodology "to each particular case" must be "adequately explained".

a. With reference to the meaning of the term "explain", is it enough that an investigating authority describes how it determined any benchmarks used for assessing benefit, or should an authority also explain why it determined the relevant benchmarks in that particular manner?

b. We note that the chapeau of Article 14 of the SCM Agreement also requires that the application of a Member's benefit calculation methodology to each particular case "shall be transparent". Does the inclusion in the chapeau of a transparency requirement suggest that the "adequate expla[nation]" must do more than describe how the relevant benchmarks were determined?

c. How should an investigating authority comply with the requirements of the chapeau of Article 14? Should it include the relevant information in its Article 22 public notice, disclose the relevant information as part of the Article 12.8 disclosure of essential facts, or use some other procedural mechanism?

58. As this question relates to India's claims in respect of the SDF loan program and, specifically, whether Commerce's benefit calculation was transparent in accordance with the chapeau of Article 14, we refer to those determinations in responding to the Panel's questions below.

59. The chapeau of Article 14 sets out three requirements: The first is that "any method used" by an investigating authority to calculate the amount of a subsidy in terms of benefit to the recipient shall be provided for in the national legislation or implementing regulations of the Member concerned. The second requirement is that the "application" of that method in each particular case shall be transparent and adequately explained. The third requirement is that "any such method" shall be consistent with the guidelines contained in paragraphs (a)-(d) of Article 14.[58]

[57] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 21: "Ministry of Steel Notification of 1992." (Exhibit USA-75).

[58] The panel in *EC – DRAMs* has explained that the investigating authority is afforded flexibility in its benefit calculations: "In the absence of a comparable commercial loan, it may well be difficult to apply for example Article 14(b) dealing with loans and referring the investigating authority to a comparable commercial loan that could

60. With respect to the second requirement—that the application of the calculation method be adequately explained—the chapeau provides no further guidance with respect to what, specifically, constitutes "adequate" explanation, or whether an investigating authority need explain "how" or "why" a particular benchmark was determined. Rather, the United States understands this provision as a general transparency requirement, obligating the Member to explain to interested parties the basis for a particular determination so as to permit those parties to understand the application of the method. The inclusion of "shall" in the chapeau reinforces that the provision of such an explanation is mandatory. The adequacy or contents of that explanation, however, should be assessed on a case-by-case basis.

61. In the challenged determinations, Commerce was fully transparent in explaining both how and why it determined the relevant benchmark in the manner that it did. Specifically, with regard to the interest rate benchmark, Commerce explained its decision to use the "Prime Lending Rates" (PLRs) published by the Reserve Bank of India, on the basis that there were no company-specific comparable commercial loans for the year in question or the immediately preceding year. Commerce further explained how it calculated the benchmark by constructing a benchmark interest rate that took into account the currency (i.e. rupee denominated loans), the structure (i.e. interest rate specific to the year to account for the variability of rates), and the maturity (i.e. long term) of the SDF loans.[59]

62. Regarding India's request that Commerce provide credits in its benefit calculation for alleged producer expenses, as explained in paragraphs 571 through 577 of the U.S. first written submission, the Article 14(b) guidelines state that a benefit may be determined 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."[60] Article 14 of the SCM Agreement does not provide for any credits or adjustments for alleged expenses by producers. Commerce was transparent in explaining why it used the interest rate that it did in calculating the benchmark and clearly explained that its method for determining benefit did not ascribe an effect of the subsidy on a particular firm, including the fact that the subsidy may not fully offset the firm's total costs.

63. Moreover, the chapeau of Article 14 of the SCM Agreement does not specify how an investigating authority should make such explanations available to respondents, whether through an Article 22 public notice, through the Article 12.8 disclosure of essential facts, or use of some other procedural mechanism. An investigating authority can comply with this requirement in a number of ways. Here, Commerce disclosed information relevant to its benefit calculations in the Issues and Decision Memorandum for the challenged determinations.[61] For some of the calculations, such as the calculation of the interest rate benchmark, further detail was provided in a benchmark calculation memorandum,[62] which was available to all interested parties, providing

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actually be obtained on the market. . . . In light of these problems dealing with the prescribed methodology for calculating benefit in Article 14 of the SCM Agreement, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology." (*EC – DRAMS*, para. 7.213.)

[59] U.S. First Written Submission, paras. 565-570.

[60] Article 14(b) of the SCM Agreement.

[61] *2006 Issues and Decisions Memorandum*, at section "B- Long-Term Benchmarks and Discount Rates." (Exhibit IND-33).

[62] Memorandum to the File re: India's Prime Lending Rate (2006 AR) (November 28, 2007) (Exhibit USA-77).

them ample opportunity to submit argument and comments to Commerce and "defend their interests," as provided for in Article 12.8 of the SCM Agreement.

5.2 Facts Available

108. With respect to each of the following determinations on the basis of "facts available", please explain its exact factual foundation and provide a specific reference to (i) where the factual foundation is found in the relevant determinations and evidence on the record of the 2006 administrative review, and (ii) where does the USDOC refer to this factual foundation in each particular instance of reliance on "facts available":

a. JSW received iron ore from NMDC for free during the period of review; and

64. With respect to the determination that JSW received iron ore from NMDC but did not pay for such iron ore during the period of review – *i.e.* that JSW received such iron ore for free, Commerce addressed this issue in its preliminary results of review[63] and final results of review[64] for the 2006 Administrative Review.

65. In its preliminary results, Commerce stated that it "previously determined that the GOI provides high-grade iron ore to steel producers for less than adequate remuneration through the government-owned National Mineral Development Corporation (NMCD)."[65] Commerce specifically referred to its determination in the final results of the administrative review pertaining to the 2004 period of review (also referred to as the "Second HRC Review").[66] In its preliminary results of the 2006 Administrative Review, Commerce stated that "No new information has been provided to the Department by the GOI to warrant reconsideration of our finding. Therefore, for this review, we preliminarily find that the GOI directly, through the government-owned NMDC, continues to provide a financial contribution as defined under section 771(5)(D)(iii) of the Act and that the GOI's provision of high-grade ore is specific under section 771(5A)(D)(iii)(I) of the Act 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. Essar,

[63] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. 1578, 1586-1587.
[64] *Issues & Decision Memorandum for 2006 Administrative Review*, (July 7, 2008), (Exhibit IND-33), at internal page 16, and comment 39 at internal pages 93-94.
[65] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1586.
[66] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1586, referencing *Notice of Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 Fed. Reg. 28665 (May 17, 2006), and accompanying Issues and Decision Memorandum, at "Sale of High-Grade Iron Ore for Less Than Adequate Remuneration." Commerce also referenced *Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 Fed. Reg. 1512, 1516 (Jan. 10, 2006).

Ispat, and JSW reported that they purchased high-grade ore lumps and fines (*i.e.*, iron ore with Fe content of 64 percent or above) from the NMDC during the POR."[67]

66. Commerce preliminarily determined that the cooperating companies in the 2006 Administrative Review, Essar and Ispat, received benefits under the program of 6.11 percent and 0.54 percent.[68]

67. For JSW, Commerce stated in its preliminary results:

> "As noted, JSW reported that it purchased high-grade iron ore fines and lumps from NMDC during the POR. JSW, however, submitted incomplete information to the Department's questions concerning the purchases. In particular, JSW submitted only the quantity of iron ore purchased from NMDC and no associated pricing data. *See* JSW's November 19, 2007, Supplemental Questionnaire Response at Table A. Therefore, as AFA, for these preliminary results, we find that JSW received the iron ore from NMDC at no charge during the POR."[69]

68. The facts on the record that support Commerce's determination for this subsidy program were as follows: (1) the subsidy program was demonstrated to exist;[70] (2) the program was found to provide a countervailable subsidy in the 2nd Administrative Review of the program (*i.e.*, financial contribution, benefit, and specificity);[71] (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;[72] (4) hot-rolled steel producers, Ispat and Essar, in the current review at issue were found to have received a benefit from this same subsidy program during the 2006 period of review;[73] (5) JSW is a hot-rolled steel producer;[74] (6) on three separate occasions, Commerce requested, and JSW was given the opportunity to provide, necessary purchase price data;[75] and (7) that JSW reported quantity information, but repeatedly refused to

[67] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1586-1587.
[68] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1587.
[69] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1587.
[70] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1586.
[71] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1586.
[72] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1586.
[73] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1586-1587.
[74] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1579.
[75] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1587.

provide the purchase price information that corresponded to its reported quantity information, as requested by Commerce.[76]

69. In the final analysis, the available facts for Commerce's determination are limited because the party refused to provide the specific information necessary for that determination. India's arguments rest on the premise that an investigating authority can only make an affirmative determination where it has the precise information sought – *i.e.*, evidence of actual prices paid by the non-cooperating company that would permit a finding on whether a benefit had been conferred.[77] India's analysis, however, fails to recognize that without the requested information, Commerce must draw an inference: for example, infer that JSW paid the price that was reported in the Tex Report despite the fact that JSW repeatedly refused to provide its own pricing information to Commerce; or infer that JSW had not made a payment for the iron ore it received from NMDC during calendar year 2006. JSW's refusal to provide the necessary information, taken together with the above facts, 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.

b. VMPL used and benefited from:

i. the 1993 KIP,

ii. the 1996 KIP,

iii. the 2001 KIP, and

iv. the 2006 KIP.

70. Commerce explained in its preliminary[78] and final results issued for the 2006 administrative review that JSW and Vijayanagar Minerals Private Limited (VMPL) are cross-owned companies.[79] Based upon that undisputed finding, Commerce issued VMPL a questionnaire regarding the assistance it received from the state government of Karnataka. VMPL did not provide a response to Commerce's request for information for the subsidy programs administered by the state government of Karnataka. Therefore, Commerce determined that VMPL failed to cooperate to the best of its ability and based its determination upon facts available.

[76] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1587.
[77] *See, e.g.*, India Second Written Submission, para. 275, 4th bullet (requiring evidence that Tata actually received a benefit, despite Tata's refusal to provide any of such requested information).
[78] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. 1586-1587.
[79] *Issues & Decision Memorandum for 2006 Administrative Review*, (Exhibit IND-33), Section C.1.a, n.6., at internal pages 22-25.

71. Although not specifically detailed in Commerce's final determination, as no party raised the specific issue of benefits to VMPL through the KIP subsidy programs for purposes of the final determination, the facts on the record that support Commerce's determination that VMPL benefitted from these programs are as follows: (1) all subsidy programs under 1993 KIP, 1996 KIP, 2001 KIP, and 2006 KIP were demonstrated to exist;[80] (2) VMPL received subsidies from the state government of Karnataka through MML;[81] (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 (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;[82] (4) VMPL was operated as a vehicle for the state government of Karnataka to subsidize JSW;[83] (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;[84] (6) VMPL did not provide any information specifically requested by Commerce concerning the KIP subsidy programs;[85] and (7) the GOI did not provide any information concerning these subsidy programs, as requested by Commerce.[86] Thus, given VMPL's refusal to cooperate and the facts cited above, it was reasonable to infer that VMPL used and benefitted from the KIP programs.

109. With respect to the 2006 administrative review, please explain what evidence would be required by the USDOC in order for interested parties to demonstrate that a particular company did not use or benefit from a particular subsidy programme?

72. If a respondent company were to participate in the proceeding and provide a response to Commerce's questionnaire, stating for example that it did not use a particular subsidy program, Commerce considers the company's statement acceptable because it is verifiable. The company's books and records may be examined at verification. If the subsidy had been received, reliable company books and records would reflect the receipt of the subsidy at issue.

73. A different situation arises where the company chooses not to participate, however. In that case, the GOI could provide a list of companies that did receive benefits from the subsidy program at issue. If the name of the company subject to review did not appear on the GOI's list, for example, the logical question would be what documents or other government information did

[80] *Commerce's Memorandum "JSW Steel Limited New Subsidy Allegations"* (September 27, 2007) (Exhibit USA-59), citing evidence on the record provided by petitioner, at 3-10.
[81] *Commerce's Memorandum "JSW Steel Limited New Subsidy Allegations"* (September 27, 2007) (Exhibit USA-59), citing evidence on the record provided by petitioner, at 8.
[82] *Issues & Decision Memorandum for 2006 Administrative Review*, (Exhibit IND-33), Section C.1.a, n.6., at internal page 22.
[83] *Commerce's Memorandum "JSW Steel Limited New Subsidy Allegations"* (September 27, 2007) (Exhibit USA-59), citing evidence on the record provided by petitioner, at 8.
[84] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1593-1594.
[85] *Issues & Decision Memorandum for 2006 Administrative Review*, (Exhibit IND-33), at internal page 23 for 1993 KIP pertaining to VMPL; and see internal pages 24-25, addressing 1996 KIP, 2001 KIP, and 2006 KIP for VMPL.
[86] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008), (Exhibit IND-32), 73 Fed. Reg. at 1581, finding that "the GOI failed to submit responses to the new subsidies questionnaires pertaining to Essar, Ispat, and JSW." See also, *Issues & Decision Memorandum for 2006 Administrative Review*, (Exhibit IND-33), Section I, at internal page 5.

the government use to prepare the list of benefitting companies. Contrary to proving the negative as India asserts, this is a standard part of an effective verification process, as "the main purpose of the on-the-spot investigation is to verify information provided".[87] If a government can provide a list of companies that encompasses all beneficiaries of a program, then certainly it should be able to explain and document how it prepared such a list in order for an investigating authority to satisfy itself that the company at issue did not receive a benefit under the program. This is particularly the case where, as here, the company refuses to provide the information, as requested, for the investigating authority to make its determination. In that situation, the government of the exporting country becomes the sole source of such necessary information. To require that investigating authorities accept an unsupported statement, absent any further documentation, would mean that investigations and administrative reviews can be effectively shut down by a simple, unverifiable statement from the government of the exporting country that the company did not receive the subsidy in question. Under this constraint, companies would have no reason to participate in countervailing duty proceedings or to cooperate with authorities in providing necessary information.

110. At paragraph 542 of its first written submission, India contends that "in the entire approach followed by the United States there is an assumption that the alleged subsidies received by VMPL from MML are subsidies within the meaning of Article 1.1 of the SCM Agreement. … The determination made by the United States … does not contain any explanation or analysis as to the manner in which MML is a government or public body."

a. Please clarify whether the USDOC applied "facts available" in determining that MML is a government or public body. If so, please:

i. explain the exact factual foundation of this determination, and

ii. provide a specific reference to where in the relevant determination and evidence on the record it is stated that USDOC relied on this factual foundation.

74. Commerce did not rely upon, or apply, facts available for purposes of making its determination that Mysore Minerals Limited (MML) is a government or public body. This finding[88] was based on the undisputed evidence contained in the Report of the Comptroller and Auditor General of India, for the Government of Karnataka.[89]

[87] SCM Agreement, Annex VI, para. 7.

[88] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1581; and *Issues & Decision Memorandum for 2006 Administrative Review* (Exhibit IND-33), at internal page 24.

[89] Petitioner's May 23, 2007 New Subsidy Allegation for JSW (Exhibit IND-25), at exhibit 24, Report of the Comptroller and Auditor General of India, at 17-19, and 29.

111. At paragraph 543 of its first written submission, India contends that, with respect to the alleged payment of higher prices by MML for iron ore supplied by VMPL, "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." At paragraph 272 of its first written submission, the United States submits that the information contained in the petitioner's allegation provided the USDOC with the basis for making its determination using "facts available". 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" (Exhibit USA-59, p. 2, internal page 10). Please clarify whether the USDOC applied "facts available" in determining that MML paid more than adequate remuneration for iron ore supplied by VMPL.

75. Yes, Commerce applied facts available in determining that MML paid more than adequate remuneration for iron ore supplied by VMPL.[90] Commerce requested that VMPL submit a questionnaire response covering the State Government of Karnataka's incentives and concession packages.[91] VMPL did not respond to the questionnaire and provided no requested information.[92] Accordingly, Commerce resorted to the application of facts available in order to make its determination.[93]

112. The Panel refers to the determination, in the 2008 administrative review, that Tata used and benefited from 13 programmes[94] administered by the SGOJ. At paragraph 241 of its first written submission, 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." With respect to each of the 13 programmes, please provide a specific reference to (i) where in the relevant determination and evidence on the record this factual foundation is found, and (ii) where it is stated that the USDOC relied upon this information to determine that Tata used and benefited from each of these subsidy programmes.

a. Jharkhand State Industrial Policy of 2001 (2001 JSIP): exemption of electricity duty

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[90] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 FR at 1594-95, internal pages 17-18; and *Issues & Decision Memorandum, Final Results of Administrative Review*, (Exhibit IND-33), at internal page 24.

[91] *Issues & Decision Memorandum for 2006 Administrative Review* (Exhibit IND-33), at internal page 23 addressing 1993 KIP pertaining to VMPL; and internal pages 24-25 addressing 1996 KIP, 2001 KIP, and 2006 KIP for VMPL.

[92] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1594; and *Issues & Decision Memorandum for 2006 Administrative Review* (Exhibit IND-33), at internal page 23 addressing 1993 KIP pertaining to VMPL; and internal pages 24-25 addressing 1996 KIP, 2001 KIP, and 2006 KIP for VMPL.

[93] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1594; and *Issues & Decision Memorandum for 2006 Administrative Review*, (Exhibit IND-33), at internal page 23 addressing 1993 KIP pertaining to VMPL; and internal pages 24-25, addressing 1996 KIP, 2001 KIP, and 2006 KIP for VMPL.

[94] Exhibit IND-41, pp. 39-45; Exhibit USA-40, pp. 14-16, internal pages 1516-1518.

b. 2001 JSIP: offset of Jharkhand sales tax

c. 2001 JSIP: capital investment incentive

d. 2001 JSIP: capital power generating subsidy

e. 2001 JSIP: interest subsidy

f. 2001 JSIP: stamp duty and registration

g. 2001 JSIP: feasibility study and project report cost reimbursement

h. 2001 JSIP: pollution control equipment subsidy

i. 2001 JSIP: incentive for quality certification

j. 2001 JSIP: employment incentives

k. Infrastructure subsidies to mega projects: tax incentives

l. Infrastructure subsidies to mega projects: grants

m. Infrastructure subsidies to mega projects: loans

76. Commerce relied upon several available facts in making its determination for each program. The documents cited in the determination included the GOI's April 23, 2009 questionnaire response and Commerce's New Subsidies Allegation Memorandum for Tata, dated September 27, 2007. Commerce specifically referred to its New Subsidies Allegation Memorandum, internal page 23-24; 75 FR 1518 and 1519[95], which in turn relies upon the information provided in petitioner's allegation as to each of the programs. Although Commerce cited to its New Subsidies Allegation Memorandum of September 27, 2007 for specific subsidy programs, 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. All such documents are on the administrative record of the 2008 Administrative Review.

77. The following available facts supported Commerce's determinations: (1) each subsidy program has been demonstrated to exist;[96] (2) each subsidy program was found countervailable (*i.e.*, that it constituted a financial contribution, provided a benefit, and was specific);[97] (3) each subsidy was available to steel producers in the state of Jharkhand;[98] (4) Tata is a steel producer;[99]

[95] *See* Exhibit IND-40.
[96] *Commerce's Memorandum "JSW Steel Limited New Subsidy Allegations"* (September 27, 2007) (Exhibit USA-59).
[97] *Issues & Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41) Section II, F.1 – F.13, at internal pages 39-45.
[98] Commerce's *New Subsidy Allegation Memorandum for Tata* (*September 27, 2007)* (Exhibit IND-30).
[99] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 11, 2010) (Exhibit IND-40), 75 Fed. Reg. 1496, finding that Tata made sales of subject merchandise during the period of review. *See also*, *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at

and (5) Tata has facilities located in at least the state of Jharkhand;[100] (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;[101] (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"[102]; 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.[103]

113. The Panel refers to the determination, in the 2008 administrative review, that Tata used and benefited from six programmes administered by the SGOG; 8 programmes administered by the SGOM; 10 programmes administered by the SGAP; 9 programmes administered by the SGOC; and 22 programmes administered by the SGOK. At paragraph 245 of its first written submission, the United States contends that, due to the collective refusal of the GOI and Tata to provide the requested information, the USDOC "relied upon its previous determination that hot-rolled steel producers in India benefitted from countervailing subsidies provided by each of the state governments at issue here, including the state government of Gujurat and Maharashtra." With respect to each of the programmes mentioned above, please provide a specific reference to (i) where in the relevant determination and evidence on the record this factual foundation is found, and, (ii) where it is stated that the USDOC relied upon this information to determine that Tata used and benefited from each of these subsidy programmes.[104]

a. SGOG:

i. Sales tax exemptions of purchases of goods during the POR

ii. Deferrals on purchases of goods from prior years (as well as deferrals granted during the POR)

iii. Value added tax program established on 1 April 2006

iv. SGOG SEZ Act: stamp duty and registration fees for land transfers, loan agreements, credit deeds, and mortgages

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1579, stating that Tata submitted a request as a producer and exporter of the subject merchandise (hot-rolled carbon steel flat products from India).

[100] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Jan. 9, 2008) (Exhibit IND-32), 73 Fed. Reg. at 1579.

[101] *GOI's April 23, 2009 Response*, at 95 (Exhibit USA-32) (emphasis added). For example, Commerce requested that the GOI "provide copies of the SGOJ's records concerning benefits provided under clause 29.11 Mega units, that demonstrates that this subprogram was not used by Tata during the POR." *Commerce's August 21, 2009 supplemental questionnaire* (Exhibit USA-35), at II.2.

[102] *GOI's April 23, 2009 Response* (Exhibit USA-32), at 95.

[103] *Issues & Decision Memorandum for 2008 Administrative Review*, (July 19, 2010) (Exhibit IND-41), at section I.B, p. 4, citing phone conversation with Tata's representative indicating that Tata "would not participate in this administrative review."

[104] Internal footnotes omitted.

v. SGOG SEZ Act: sales tax, purchase tax, and other taxes payable on sales and transactions

vi. SGOG SEZ Act: sales and other state taxes on purchases of inputs (both goods and services) for the SEZ or a unit within the SEZ

b. SGOM

i. Sales tax program

ii. VAT tax refunds under the SGOM package scheme of incentives and the Maharashtra new package scheme of incentives

iii. Electricity duty exemption under the package scheme of incentives for 1993

iv. Refunds of octroi under the PSI of 1993, Maharashtra industrial policy (MIP of 2001), and Maharashtra industrial policy (MIP of 2006)

v. Loan guarantees based on octroi refunds by SGOM

vi. Infrastructure assistance of mega projects

vii. Land for less than adequate remuneration

viii. Investment subsidy

c. SGAP

i. Andhra Pradesh IP: 25 per cent reimbursement of cost of land in industrial estates and industrial development areas

ii. Andhra Pradesh IP: reimbursement of power at the rate of Rs. 0.75 per unit for the period beginning 1 April 2005 through 31 March 2006, and for the four years thereafter to be determined by SGAP

iii. Andhra Pradesh IP: 50 per cent subsidy for expenses incurred for quality certification up to Rs. 100 lakhs

iv. Andhra Pradesh IP: a 25 per cent subsidy on cleaner production measures up to Rs. 5 lakhs

v. Andhra Pradesh IP: a 50 per cent subsidy on expenses incurred in patent registration, up to Rs. 5 lakhs

vi. **Andhra Pradesh IP: 100 per cent reimbursement of stamp duty and transfer duty paid for the purchase of land and buildings and the obtaining of financial deeds and mortgages**

vii. **Andhra Pradesh IP: a grant of 25 per cent of the tax paid to SGAP, which is applied as a credit against the tax owed the following year, for a period of five years from the date of commencement of production**

viii. **Andhra Pradesh IP: exemption from the SGAP non-agricultural land assessment**

ix. **Andhra Pradesh IP: provision of infrastructure for industries located more than 10 kilometres from existing industrial estates or industrial development areas**

x. **Andhra Pradesh IP: guaranteed stable prices of municipal water for 3 years for industrial use and reservation of 10 per cent of water for industrial use for existing and future projects**

d. SGOC

i. **Industrial policy 2004-2009 (Chhattisgarh Industrial Policy): a direct subsidy of 35 per cent of total capital cost for the project, up to a maximum amount equivalent to the amount of commercial tax/central sales tax paid in a seven year period**

ii. **Chhattisgarh Industrial Policy: a direct subsidy of 40 per cent toward total interest paid for a period of 5 years on loans and working capital for upgrades in technology**

iii. **Chhattisgarh Industrial Policy: reimbursement of 50 per cent of expenses incurred for quality certification**

iv. **Chhattisgarh Industrial Policy: reimbursement of 50 per cent of expenses for obtaining patents**

v. **Chhattisgarh Industrial Policy: total exemption from electricity duties for a period of 15 years from the date of commencement of commercial production**

vi. **Chhattisgarh Industrial Policy: exemption from stamp duty on deeds executed for purchase or lease of land and buildings and deeds relating to loans and advances to be taken by the company for a period of three years from the date of registration**

vii. **Chhattisgarh Industrial Policy: exemption from payment of entry tax for 7 years**

viii. Chhattisgarh Industrial Policy: a 50 per cent reduction of the service charges for acquisition of private land by Chhattisgarh Industrial Development Corporation for use by the company

ix. Chhattisgarh Industrial Policy: land for less than adequate remuneration

e. SGOK

i. 1993 KIP: tax incentives

ii. 1993 KIP: land at less than adequate remuneration

iii. 1993 KIP: iron ore, limestone, and dolomite at less than adequate remuneration

iv. 1993 KIP: power/electricity at less than adequate remuneration

v. 1993 KIP: water at less than adequate remuneration

vi. 1993 KIP: roads and other infrastructure at less than adequate remuneration

vii. 1993 KIP: port facilities at less than adequate remuneration

viii. 1993 KIP: grants

ix. 1993 KIP: loans

x. 1993 KIP: tax incentives

xi. 1996 KIP: tax incentives

xii. 1996 KIP: loans

xiii. 1996 KIP: grants

xiv. 1996 KIP: provision of goods and services at less than adequate remuneration

xv. 2001 KIP: tax incentives

xvi. 2001 KIP: loans

xvii. 2001 KIP: grants

xviii. 2001 KIP: provision of goods and services at less than adequate remuneration

xix. 2006 KIP: loans

xx. 2006 KIP: tax incentives

xxi. 2006 KIP: provision of goods and services at less than adequate remuneration

xxii. 2006 KIP: grants

78. The Department determined based upon facts available that Tata used and benefited from the SGOM, SGAP, SGOK and SGOC subsidy programs listed above. As stated in the U.S. first written submission, Tata chose not to participate in the 2008 administrative review. Without Tata's participation in the review, the Department must rely on facts available to conduct its examination. The Department's facts available determination relied upon evidence provided by petitioners in previous reviews and on prior determinations. The information submitted by petitioners provided reasonable evidence to support the existence of the programs. Therefore, the Department initiated and examined the above programs and relied upon this factual foundation when applying facts available to Tata.

79. The following available facts support Commerce's determinations: (1) each subsidy program was demonstrated to exist;[105] (2) each subsidy program is countervailable (*i.e.,* each was based on a financial contribution that provides a benefit, and each program was specific);[106] (3) each subsidy is available to steel producers;[107] (4) Tata is a steel producer;[108] (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]"[109] 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.";[110] (6) Commerce specifically requested that Tata state the nature and locations of its facilities during

[105] Issues & Decision Memorandum for 2008 Administrative Review (Exhibit IND-41), at internal pages 21-39 and 45-55. For subsidy programs administered by the state government of Gujurat, Commerce relied upon the Final Results of 2nd Administrative Review, the Final Results of 4th Administrative Review and Final Results of 5th Administrative Review in hot-rolled carbon steel flat products from India; for the subsidy programs administered by the state government of Maharashtra, Commerce relied upon Final Results of 4th Administrative Review in hot-rolled carbon steel flat products from India; for the subsidy programs administered by the state government of Andhra Pradesh, Commerce relied upon the Final Results of 4th Administrative Review in hot-rolled carbon steel flat products from India; for the subsidy programs administered by the state government of Chhattisgarh, Commerce relied upon the Final Results of 4th Administrative Review in hot-rolled carbon steel flat products from India; and for the subsidy programs administered by the state government of Karnataka, Commerce relied upon the Final Results of 4th Administrative Review in hot-rolled carbon steel flat products from India.

[106] *Issues & Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal pages 21-39 and 45-55.

[107] *Issues & Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal pages 21-39 and 45-55.

[108] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, (Exhibit IND-40), 75 Fed. Reg. at 1496.

[109] *Commerce's August 21, 2009 supplemental questionnaire*, (Exhibit USA-35), at III.

[110] *GOI's September 4, 2009 response*, (Exhibit USA-36), at III.

the 2008 period;[111] and (7) Tata refused to participate in the review or provide any necessary information that Commerce requested to make its determination.[112]

114. The Panel refers to the determination, in the 2008 administrative review, that Tata used and benefited from certain subsidy programmes administered by the GOI ((i) the sale of high-grade iron ore by NMDC for less than adequate remuneration; (ii) the Market Development Assistance Programme; (iii) the Market Access Initiative Programme; and (iv) five sub-programmes of the SEZ Act). At paragraph 251 of its first written submission, the United States submits that in its application of "facts available", the USDOC "rel[ied] on prior determinations, placed on the record of the instant review, in which these particular subsidy programs were examined."

a. With respect to each of the programmes and sub-programmes mentioned above, please provide a specific reference to (i) where in the relevant determination and evidence on the record this factual foundation is found, and (ii) where it is stated that the USDOC relied upon this information to determine that Tata used and benefited from each of these subsidy programmes.

The sale of high-grade iron ore by NMDC for less than adequate remuneration

80. The facts on the record that support Commerce's determination for this subsidy program were as follows: (1) the subsidy program was demonstrated to exist;[113] (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);[114] (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;[115] (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;[116] (5) Tata is a hot-rolled steel producer;[117] (6) Commerce requested, and Tata was given the opportunity to provide, necessary information concerning any purchases of high-grade

[111] *2008 Initial Questionnaire*, (Exhibit USA-116), at internal pages III-1 – III-3.
[112] *Issues & Decision Memorandum for 2008 Administrative Review*, (Exhibit IND-41), at internal page 5.
[113] *Issues and Decision Memorandum for 2008 Administrative Review*, (Exhibit IND-41), at internal pages 13-14, relying upon *Final Results of Countervailing duty Administrative Review: Certain Hot-rolled Carbon Steel Flat Products from India*, 71 Fed. Reg. 28665 (May 17, 2006), in which Commerce determined that the GOI provides high-grade iron ore to steel producers for less than adequate remuneration through NMDC. Commerce also relied upon its determination in 4th Administrative Review of hot-rolled carbon steel flat products from India that NMDC is a government authority, see *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. at 1503.
[114] *Issues and Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal pages 13-14,
[115] No new information was provided with respect to the status of the subsidy program, see *GOI's Apr. 23, 2009 response* (Exhibit USA-32a), at 43-47.
[116] *Issues & Decision Memorandum for 2006 Administrative Review* (Exhibit IND-33), at internal pages 13-16.
[117] *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. at 1496.

iron ore from NMDC;[118] and (7) Tata refused to provide any information on this subsidy program, as requested by Commerce.[119]

81. Last, during the course of the 2008 administrative review, Commerce separately requested that the GOI provide information pertaining to the subsidy program on high-grade iron ore provided through NMDC.[120] The GOI submitted a response on August 10, 2009, providing a list of companies to which NMDC supplied high-grade ore during the period under review, but provided no support documentation.[121] Absent any supporting documentation, Commerce found that although the GOI's list of companies that purchased high-grade iron ore from NMDC during the POR did not include Tata, without Tata's cooperation, the list, standing alone, did not constitute complete and verifiable evidence.[122]

Market Development Assistance (MDA)

82. For MDA, Commerce relied upon its examination of the subsidy program in the administrative review on *Iron-Metal Castings from India*, referenced in the *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. 1496, 1503-1504; and *Issues and Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal page 14, but see answer to question 114.c. below.

Market Access Initiative

83. For MAI, Commerce relied upon its examination of the subsidy program in the administrative review on *Lined Paper Products from India*, referenced in the *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. 1496, 1504; and *Issues and Decision Memorandum for 2008 Administrative Review*, (Exhibit IND-41), at internal pages 14-15, but see answer to question 114.c. below.

The sub-programs of the SEZ Act

84. For each of the six sub-programs of the SEZ Act, Commerce relied upon its determinations in the 5th Administrative Review in this proceeding, *i.e.*, hot-rolled carbon steel flat products from India, covering the period calendar year 2007.[123]

85. The facts on the record that support Commerce's determination for these sub-programs were as follows: (1) each sub-program was demonstrated to exist;[124] (2) the program was found

[118] *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. at 1503.
[119] *Issues & Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal page 5.
[120] 2008 Initial Questionnaire (Exhibit USA-116), at 14, section II.F.
[121] GOI's Aug. 10, 2009 Supplemental Questionnaire Response (Exhibit USA-34), at I.A.
[122] *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. at 1503. *See also Issues & Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal page 13.
[123] *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. 1496, 1504-1506; and *Issues and Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal pages 15-19.
[124] *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. 1496, 1504-1506.

to be a countervailable subsidy in the 5th Administrative Review (*i.e.*, financial contribution, benefit, and specificity);[125] (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;[126] (4) these sub-programs were available to companies with SEZ units, including hot-rolled steel producers;[127] (5) Tata is a hot-rolled steel producer;[128] (6) Commerce requested, and Tata was given the opportunity to provide, necessary information pertaining to these sub-programs;[129] and (7) Tata refused to provide any information on this subsidy program as requested by Commerce.[130]

86. Last, during the course of the 2008 administrative review, Commerce separately requested that the GOI provide information pertaining to the sub-programs under the SEZ Act.[131] The GOI responded that Tata was not covered by the SEZ program, but provided no supporting documentation.[132] Absent any supporting documentation, Commerce found without Tata's cooperation, the GOI's statement, standing alone, did not constitute complete and verifiable evidence.[133]

b. Please clarify what does it mean to place prior determinations on the record of the instant review.

87. The reference to the determination is the published notice of preliminary results or the final results, which includes Commerce's issues and decision memoranda. These determinations are published and available to the public, as required under U.S. law. When Commerce makes a determination that it must resort to facts otherwise available, it may become necessary to use determinations from prior segments of the particular proceeding (such as a prior administrative review or the original investigation) as facts,[134] or perhaps determinations from different proceedings. In such cases, the determination from the prior segment or the other proceeding is the factual information that is incorporated into the record of the current review. This does not mean, however, that the underlying record of such prior segments or other proceedings is incorporated into the record of the instant administrative review. For example, responses to questionnaires submitted in a prior review are not part of the record of the current review, unless the party submits such information from the prior review onto the record of the current review. In this sense, parties are in charge of their own data and what they choose to place on the record

[125] *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. 1496, 1504-1506.
[126] *Issues and Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal pages 15-19.
[127] *Issues and Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal pages 15-19.
[128] *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. at 1496.
[129] *Notice of Preliminary Results of Countervailing Duty Administrative Review* (Exhibit IND-40), 75 Fed. Reg. at 1498.
[130] *Issues & Decision Memorandum for 2008 Administrative Review* (Exhibit IND-41), at internal page 5.
[131] *2008 Initial Questionnaire* (Exhibit USA-116), at 22, section II.Q.
[132] Issues and Decision Memorandum for 2008 Administrative Review (Exhibit IND-41), at internal pages 15-19.
[133] Issues and Decision Memorandum for 2008 Administrative Review (Exhibit IND-41), at internal pages 15-19.
[134] Commerce's regulations define a segment as follows: "An antidumping or countervailing duty proceeding consists of one or more segments. 'Segment of a proceeding' or 'segment of the proceeding' refers to a portion of the proceeding that is reviewable under section 516A of the Act." 19 C.F.R. § 351.102(47). Each segment, therefore, contains a separate record, allowing court review of the particular determination based upon the record of the segment that supports that determination.

of the ongoing segment of the proceeding. This is particularly the case where such data involves a company's business proprietary information, such as prices of sales for example.[135]

c. Please explain why (i) the United States did not include these subsidy programmes administered by the GOI in the 2006 administrative review relating to Tata, but (ii) did so in the 2008 administrative review. In your answer, please specify the relevant factor that made the USDOC change the scope of the review relating to Tata in the 2008 administrative review.

88. Commerce examined the subsidy programs listed in a.1 and a.4 (the sale of high-grade iron ore and the sub-programs of the SEZ Act) in the 2006 administrative review based on the allegation made by petitioners, which provided the basis to examine such programs. Petitioners' allegations focused on a different company based upon an understanding of where each company was located during the period covered by the allegation. However, because it was not known whether a company constructed, purchased, or brought new facilities online in another state within India, or became affiliated with or obtained cross-owned companies in such states during the period being examined in the 2008 Administrative Review, Commerce requested that the GOI and Tata provide information concerning the location of Tata's facilities, and information pertaining to its cross-owned companies during the 2008 POR.

89. With respect to the subsidy programs listed in a.2 and a.3 (the Market Development Assistance ("MDA") and the Market Access Initiative ("MAI")), it is not clear from the record why Commerce examined these particular subsidy programs in the 2008 administrative review. Commerce typically examines those subsidy programs alleged by petitioner and which Commerce determines to initiate an examination based upon the evidence provided in the allegation.

d. Please provide a copy of (i) the questionnaire sent to the GOI in the 2008 administrative review relating to subsidy programmes allegedly used by Tata, and (ii) the answers submitted by the GOI. The Panel notes that Exhibit USA-32 does not contain all answers submitted by the GOI.

90. The initial questionnaire from Commerce to the GOI, dated February 6, 2009, is provided in Exhibit USA-116. The complete GOI response to the initial questionnaire, dated April 23, 2009, is provided in Exhibit USA-32a. Commerce also requested information in its first supplemental questionnaire, dated July 30, 2009; its second supplemental questionnaire, dated August 21, 2009; and its third supplemental questionnaire, dated September 10, 2009. The GOI made submissions on April 23, 2009; August 10, 2009, September 4, 2009; and September 24, 2009. A complete list of all questionnaires and GOI responses is provided below.

[135] *See, e.g.*, 19 C.F.R. 351.105(c)(5) of Commerce's regulations.

Questionnaires from Commerce	**GOI Submissions**
Feb. 6, 2009 questionnaire, Exh. USA-116.	Apr. 23, GOI Response, Exh. USA-32a.
1st Supp. questionnaire, Exh. USA-33.	Aug. 10, GOI Response, Exh. USA-34.
2nd Supp. questionnaire, Exh. USA-35.	Sep. 4, GOI Response, Exh. USA-36.
3rd Supp. questionnaire, Exh. USA-37.	Sep. 24, GOI Response, Exh. USA-38.

115. The Panel refers to the determination, in the 2008 administrative review, that Tata used and benefited from certain subsidy programmes administered by the GOI. In the light of non-cooperation of Tata (which may trigger the use of "facts available"), how would it be possible for the USDOC to verify the GOI's statement that Tata had not used and benefited from those programmes?

91. As noted in response to question 109 above, when a respondent company chooses not to participate, one option would be for the government of the exporting country to provide a list of companies that did receive benefits from the subsidy program at issue. If the name of the company subject to review did not appear on the GOI's list, for example, the logical question would be what documents or other government information did the government use to prepare the list of benefitting companies. Contrary to proving the negative as India asserts, this is a standard part of an effective verification process, as "the main purpose of the on-the-spot investigation is to verify information provided".[136] If a government can provide a list of companies that encompasses all beneficiaries of a program, then certainly it should be able to explain and document how it prepared such a list in order for an investigating authority to satisfy itself that the company at issue did not receive a benefit under the program. This is particularly the case where, as here, the company refuses to provide the information, as requested, for the investigating authority to make its determination. In that situation, the government of the exporting country becomes the sole source of such necessary information. To require that investigating authorities accept an unsupported statement, absent any further documentation, would mean that investigations and administrative reviews can be effectively shut down by a simple, unverifiable statement from the government of the exporting country that the company did not receive the subsidy in question. Under this constraint, companies would have no reason to participate in countervailing duty proceedings or to cooperate with authorities in providing necessary information.

[136] SCM Agreement, Annex VI, para. 7.

6.1 Cumulation

116. At paragraph 134 of its first written submission, the United States asserts that "in a situation in which 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' [within the meaning of Article 15.4 of the SCM Agreement] 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."

a. Does the United States understand that Article 15.4 contains a non-attribution requirement? If so, please explain where this obligation is found in Article 15.4.

92. No, the United States does not understand Article 15.4 to contain a "non-attribution" obligation. The "non-attribution" obligation is specified in Article 15.5 of the SCM Agreement. As the United States indicated in paragraph 134 of its first written submission, the "relevant factor" analysis set forth in Article 15.4 allows an authority to address whether dumped imports are "exacerbating" the injury caused by subsidized imports; it does not require an authority to "disentangle" the effects of the dumped and subsidized imports.

b. In addition, please clarify the meaning of the phrase "relevant economic factors and indices having a bearing on the state of the industry" in Article 15.4. In your answer, please explain how "the existence of the dumped imports in the marketplace" can be viewed as a factor *indicative* of the state of the industry (rather than *responsible* for the state of the industry).

93. Article 15.4 states that it shall include an evaluation of "all relevant factors… having a bearing on the state of the industry…"; it does not state that the examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all factors "indicative of the state of the industry". As defined in the New Shorter Oxford English Dictionary, the phrase all factors "bearing on" means all factors having a "practical relation or effect (up)on" or having an "influence" or "relevance" on. Thus, the text of Article 15.4 covers factors that may have an "influence on" or "practical relation" to the condition of the industry.

94. As the question implies, some of the factors specified in Article 15.4 are "indicative" of the state of the industry. Other factors concern not just the state of the industry, but also relate to how the industry reached that state. For example, certain factors (such as "factors affecting domestic prices") are not factors that are solely "indicative" of the industry's condition. A variety of factors not exclusive to the industry's operations or condition can "affect domestic prices." Given this, it cannot be said that only those factors "indicative" of the state of the industry are encompassed by the text of Article 15.4.

117. At paragraph 34 of its response to India's question No. 17, the United States contends that "the ITC did report price comparison data separately for imports from the individual subject countries that were both dumped and subsidized."

a. Please clarify whether the USITC examined the price effects of subsidized imports separately from the price effects of dumped, non-subsidized imports. If so, please indicate where this separate analysis can be found in the USITC's determination.

95. No, the USITC did not examine the price effects of subsidized and dumped imports separately from the price effects of imports that were only dumped. In its injury determination, the Commission determined it was appropriate to cumulate all dumped and dumped/subsidized imports and thus conducted its analysis of the volume and price effects of all such imports on a cumulated basis. As a result, the Commission did not perform a separate analysis of the volume and price effects of the dumped imports separate from the dumped and subsidized imports.

96. In responding to India's question 17, the United States did not indicate that it had performed such an analysis. In its response to India's question 17, the United States pointed out that its report included a chart showing comparison pricing data for imports from each of the individual subject countries, including those imports that were both dumped and subsidized. The United States did not purport to state that the charts contained data "disentangling" the pricing information for dumping and for subsidizing when a country has both unfair trade practices.[137]

97. The confusion about the USITC's analysis and the U.S. response to India's question 17 may stem from the U.S. discussion in paragraph 149 of its first written submission, which responded to India's partial portrayal of the record in India's first written submission. A review of the original claim by India and the U.S. response should put this issue in perspective and resolve any misunderstanding about the analysis conducted by the USITC in making its determination.

98. In paragraphs 502-504 of India's first written submission, India implied that the USITC's decision to cumulate dumped and subsidized imports with dumped imports in its original investigation made the USITC more likely to find the U.S. industry to be harmed by imports from India and other countries whose imports were subsidized. To support this assertion, India indicated that the record showed that imports from the five subsidized subject countries represented only 17.62 percent of the total volume of all cumulated imports, both subsidized and dumped. This percentage reflected imports for only the first year of the Commission's period of investigation (1998).

99. In paragraph 149 of the U.S. first written submission, the United States pointed out that India's claim that imports that were only dumped accounted for the bulk of the harm caused by subject imports conveniently ignores several facts and reflects a partial review of the record. The United States pointed out that the record showed that, by the final full year of the Commission's period of investigation (2000), the volume of cumulated subsidized imports became an

[137] Table V-13 of the USITC Staff Report contains pricing data for each individual country; it does not contain separate pricing information for dumping and for subsidizing when a country has both unfair trade practices and does not contain a price effects analysis by the Commission of these pricing data.

increasingly significant component of the volume of all cumulated subject imports, representing nearly 40 percent of the volume of all cumulated imports, dumped and subsidized, in that year.[138]

100. Therefore, the U.S. response in paragraph 147 of its first written submission and its response to India's question 17 followed from India's attempt to provide the Panel with only a partial review of the record; in contrast, the United States provided a complete review of the set of imports that India had used in making its claim. The USITC did not conduct a separate analysis of the volume or price effects of the subsidized imports from the effects of the dumped imports because it is not possible, as a practical matter, to disentangle the effects of the dumped imports from those that were dumped and subsidized.

b. In addition, in order for the Panel to fully understand the United States' argument, please clarify how this separate analysis would not contradict the United States' argument that it is impossible, in practice, to disentangle the effects of dumped imports from those of subsidized imports (United States' response to Panel question No. 56, paras. 49-53; and second written submission, paras. 92-93).

101. As indicated, the United States did not state that it had performed an analysis in its injury determination disentangling the effects of dumped imports from dumped and subsidized imports. There is, therefore, not an inconsistency in its statements on these issues.

7.1 Evaluation of Certain Economic Factors in the USITC'S Injury Determination

118. At paragraph 157 of its first written submission, the United States submits that "the Commission 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,' receiving a significant number of comments from the producers, which were confidential."

a. Please explain how the collection of comments from domestic producers would demonstrate the USITC's *evaluation* of the industry's "return on investment" and "ability to raise capital".

102. By collecting information on assets, capital expenditures and research and development, and the comments from domestic producers relating to the effect of the subject imports on their investment and ability to raise capital, the Commission made clear that it would consider and evaluate this information and comments in its analysis. Moreover, by including this information and these comments in its report, the Commission made clear that it had considered such information and comments and therefore made them part of its evaluation of the record on these issues.

[138] The United States notes that, in its discussion in paragraph 149 of its first written submission, when the United States used the term "subsidized" in this response it was providing the data for those imports that were both subsidized AND dumped, not only for a discussion of subsidized imports separate from the discussion of the same imports that were also dumped. The United States further notes that all subsidized imports were also dumped.

103. We would add that the Appellate Body has stated that an authority is not required to make specific findings for each impact factor set forth in Article 15.4.[139] In *EC – Tube or Pipe Fittings*, a case involving the nearly identical provisions of Article 3.4 of the AD Agreement, the Appellate Body rejected the argument that an authority was required to make specific findings on each of the factors set forth in Article 3.4. The Appellate Body explained that, under Article 3.4 of the AD Agreement, while it may be mandatory to "evaluate" all of the relevant factors and indicia set forth in Article 3.4, the text of the Article 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 documents.

b. In order for the Panel to fully understand the USITC's determination, please provide a copy (redacted, if necessary) of Appendix E, which was not included in Exhibit IND-9.

104. The information contained in Appendix E was a compilation of the confidential responses of various domestic producers (21 firms provided responses), including data on assets, capital expenditures, and research and development, and comments on the actual and negative effects on these issues. The United States is providing, as Exhibit USA-117, a copy of Appendix E with confidential business information (such as specific firm data on assets, capital expenditures, and R&D expenses, and company identification) redacted.

[139] Moreover, we point out 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. Article 15.4 states in relevant part: "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;…." (emphasis added). Therefore, an authority is required to evaluate only those factors which are relevant to its analysis.