UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA
(AB-2014-7 / DS436)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Before the Panel, India raised a host of claims under 27 separate WTO provisions; its first written submission was over 200 pages long. The majority of India's claims were rejected by the Panel. Now on appeal, India appeals nearly every one of these losses, usually on multiple grounds. At 176 pages, India's appellant submission is nearly as long as its first submission to the Panel (which also would have contained all of its factual assertions) and longer than the Panel Report. India identifies 67 separate claims in its Request for Findings – more than twice the number included in the same section of its first written submission – and its appellant submission contains an additional 24 challenges[1] under Article 11 of the DSU.

2. In other words, India would like a do-over. Rather than an opportunity for the appellant to identify precise and material alleged legal errors made by the Panel, India sees this appeal as a chance to re-air its many grievances, to seek a different appreciation of the evidence, and to seek a different outcome on the same case in front of a different audience. This is not the function of the Appellate Body, however; an appeal is not for India a clean slate in which a party seeks to have the Appellate Body substitute its views for the panel's wholesale.

3. As it did before the Panel, India attempts on appeal to shield financial contributions made by the Government of India from the market-based disciplines of the SCM Agreement. India's alternative interpretations of the core subsidy disciplines at issue in this dispute would undermine the ability of Members and the WTO to identify government subsidies and discipline their use.

4. In this vein, India challenges the Panel's findings on "public body" in an effort to significantly narrow the scope of governmental activity that would warrant WTO review. Under India's proposed interpretation, only public bodies that wield regulatory or supervisory powers could provide financial contributions on behalf of a government. Beyond this, a Member would need to demonstrate entrustment or direction, as it would for actions taken by a private body. India therefore would treat as private even an entity wholly-owned and controlled by the government, so long as that entity did not have the authority to "supervise individuals". The extent of India's misapprehension of the SCM disciplines can be seen in one of India's few abandoned claims on appeal. India has chosen not to appeal its rejected claim that the SDF Managing Committee was not a public body, despite its having comprised exclusively Indian government officials acting in their official capacity. The fact that India ever attempted such a claim, however, illustrates how India's approach could serve to limit WTO disciplines dramatically.

5. India also challenges the U.S. measures governing the use of benchmarks and the calculation of benefit, as well as their application in the underlying proceedings. In each case, the U.S. measures and Commerce's determinations sought to measure benefit by looking at what market price the recipient otherwise would have paid, as provided under Article 14 of the SCM Agreement and in accordance with previous panel and Appellate Body reports regarding benefit and the provision of goods. India in its appeal would contradict the benefit to recipient standard of Article 14, as well as past reports applying this standard. Such a change would fatally undermine the subsidies disciplines agreed to by Members. The more government intervention

[1] Because it is not always clear from India's submission whether it is making an Article 11 DSU challenge, this is an approximation only.

there is in a market, the less capable other Members or the WTO would be in identifying a subsidy.

6. India also seeks to undermine the ability of Members' investigating authorities to fully identify and respond to allegations of government subsidization that is injuring a domestic industry. In its continued challenge to the U.S. facts available provisions, India seeks to prevent an authority from using an "adverse inference" in making determinations on the basis of facts available, even where a determination is supported by a factual foundation, and the facts used "reasonably replace" the missing facts. That is, where a responding party impedes an investigation by refusing to participate, India would further inhibit an investigating authority's ability to countervail injurious subsidization by requiring it to use those facts available that are less adverse to the non-cooperating party's interests. If this were indeed the rule, the more a responding party benefitted from government subsidization, the less incentive that party would have to cooperate with an investigation.

7. An investigating authority would be similarly curtailed in its ability to countervail injurious subsidization if India were to succeed in preventing new subsidies from being examined in the context of review proceedings. According to India, an investigating authority must initiate a *new* investigation every time a government provides a new subsidy, despite its already having found injurious subsidization in an original investigation of the same product from the same Member. India's interpretation of the SCM Agreement in this respect would add layers of administrative burden to the already challenging task of evaluating subsidization and administering countervailing duties. The United States can imagine no better way to undermine the protections provided for in the SCM Agreement than to adopt such rules as India proposes.

8. Just as an appeal is not an appropriate avenue for re-arguing all of India's original claims before the Panel, nor is it a platform to rebuke the Panel for not adjudicating the dispute in precisely the manner India desired. Calling into question the Panel's objectivity with respect to multiple facets of the Panel's reasoning on nearly every issue suggests that the Panel has not heard this dispute in good faith. That is not a fair reading of the Panel Report or representation of the Panel's efforts to address the massive and often vague and confusing dispute brought forward by India. And if this is not India's intention, then India has simply recast its arguments before the Panel in the guise Article 11 DSU claims before the Appellate Body. Such a strategy is not only legally flawed, it is not an appropriate use of the dispute settlement system and would tend to diminish the perception of the WTO dispute settlement system, to the detriment of all WTO Members.

9. Indiscriminate use of the appellate process strains the resources of the Appellate Body, as well as the other participants and third participants involved in a dispute. It is not envisioned that the Appellate Body would review every factual and interpretive finding made by a panel. Such an appellate process would not be "in keeping with the objective of the prompt settlement of disputes, and the requirement in Article 3.7 of the DSU that Members exercise judgement in deciding whether action under the WTO dispute settlement procedures would be fruitful."[2] That is why claims under Article 11 of the DSU, for example, will only succeed in limited circumstances in which a lack of objectivity undermines the adjudicative process; and why they should be dealt with fairly, but judiciously, by the Appellate Body. Where India has failed to

[2] *China – Rare Earths (AB)*, para. 5.228.

articulate an appropriate claim under Article 11 of the DSU, India's claims should be rejected outright.

10. In the sections that follow, the United States will demonstrate why India's claims, both under the substantive provisions of the SCM Agreement and under the DSU, must fail. We will first address India's claims regarding the 2013 sunset review in section II, followed by India's appeals of the Panel's findings on Commerce's benchmarks regulation "as such" in sections III and IV. In section V, we will discuss India's appeals regarding the application of the challenged benchmarks provisions with respect to NMDC, and in section VI, India's appeals regarding the application of the delivered prices portion of Commerce's regulation. Section VII covers specificity, followed by India's other "as applied" claims regarding captive mining rights for iron ore and coal in section VIII. Next, in sections IX and X, we address India's appeal of the Panel's findings with respect to the SDF Program, under Articles 1.1(a)(1)(i) and 14(d) of the SCM Agreement, respectively. In sections XI and XII, we respond to India's appeal of the Panel's "as such" and "as applied" claims, respectively, regarding the U.S. facts available provisions. Next, in section XIII, we discuss the Panel's findings regarding "public body" under Article 1.1(a)(1), followed by a response to India's appeal with respect to new subsidy allegations examined by Commerce in the context of administrative review proceedings in section XIV. Finally, in section XV we address India's appeal of the Panel's preliminary ruling.

II. INDIA'S REQUEST FOR FINDINGS ON THE 2013 SUNSET REVIEW OUTSIDE THE CONTEXT OF ARTICLE 12.7 OF THE SCM AGREEMENT SHOULD BE REJECTED BECAUSE SUCH CLAIMS WERE NOT BEFORE THE PANEL

11. Before addressing India's arguments on appeal, the United States notes that India has included references to the 2013 sunset review proceeding under numerous claims, but India did not raise those claims before the Panel. The United States acknowledges that the Panel found that the 2013 sunset review is within the terms of reference of this dispute, and the United States has not appealed this finding by the Panel.[3] However, before the Panel, India made reference to the 2013 sunset review only in the context of its Article 12.7 claim and with regard to Commerce's application of the U.S. facts available measures.[4] India advanced no other claims regarding the 2013 sunset review proceeding under other provisions of the WTO agreements, and therefore no such claims were before the Panel.

12. Article 17.6 of the DSU limits an appeal to "issues of law covered in the panel report and legal interpretations developed by the panel." That is, the Appellate Body may not hear new claims or arguments that make out a new case on appeal.[5] Therefore, any claims not raised before the Panel are not properly before the Appellate Body on appeal.

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[3] *See* Panel Report, paras. 1.39-1.41.

[4] India First Written Submission, para. 576.

[5] *See, e.g., Canada – Aircraft (AB)*, para. 211 (where the Appellate Body found that Article 17.6 of the DSU "manifestly preclude[d]" it from making findings on an argument that was not before the panel, where that argument would require it to solicit, receive and review new facts that were not before the panel.); *US – FSC (AB)*, para. 103 (where the Appellate Body found that an issue not raised before the panel "would be outside the scope of [its] mandate under Article 17.6", because the new argument would require the review of different issues from those which confronted the panel, and "may well require proof of new facts.")

13. In addition, we note that the 2013 sunset review, which was not in existence at the time of the consultation or panel request, was found by the Panel to be within the terms of reference in large part due to the specific identification of the 2007 sunset review, which allegedly "indicate[d] that sunset reviews were of interest to India." Therefore, the claims with respect to the 2013 sunset review must also be limited to those claims set out with respect to the 2007 sunset review. Without such limitation, a complaining party would be obligated under Article 6.2 of the DSU to set out the legal basis of its complaint with respect to a measure *in existence* sufficient to present the problem clearly, and to ensure that such measure is "plainly connected" to each relevant claim;[6] but that party would not be similarly obligated to "plainly connect" a measure *not in existence* to each relevant claim. There is no basis in Article 6.2 of the DSU for such a disparate treatment of measures.

14. For all these reasons, the United States respectfully requests the Appellate Body to reject India's requests for findings regarding the 2013 sunset review in paragraphs 161, 206, 289, 299, 369, 379, 458, 459, 460, 478, 577 and 591 of its appellant submission.

III. THE PANEL DID NOT ERR IN FINDING THAT COMMERCE'S BENCHMARK REGULATION, SECTION 351.511(a)(2)(i) - (iv), WAS NOT "AS SUCH" INCONSISTENT WITH ARTICLE 14(d) OF THE SCM AGREEMENT

15. The Panel correctly found that that Commerce's "benchmark" regulation, 19 CFR **§** 351.511(a)(2)(i) – (iv), was not "as such" inconsistent with Article 14(d) of the SCM Agreement. The Panel rejected India's claims as follows:

- The Panel **rejected** India's claim that Section 351.511(a)(2)(i)-(iii) "as such" is inconsistent with Article 14(d) because it fails to require that the adequacy of remuneration be assessed from the perspective of the government provider before assessing benefit to the recipient.[7] The Panel correctly found that the adequacy of remuneration is assessed from the perspective of the recipient of the benefit.

- The Panel **rejected** India's argument that the benchmark regulation is 'as such" inconsistent with Article 14(d) because it excludes the use of government prices as preferred price benchmarks.[8] The Panel correctly found that there is no presumption under Article 14(d) that such prices reflect prevailing market conditions.

- The Panel **rejected** India's claim that the use of world market prices, provided for in Section 353.511(a)(2)(ii), was inconsistent with Article 14(d).[9] The Panel correctly found that the use of out-of-country benchmarks is not *per se* excluded under Article 14(d).

[6] *China – Raw Materials (AB)*, para. 220.
[7] Panel Report, paras. 7.26 – 7.35.
[8] Panel Report, paras. 7.38 – 7.46.
[9] Panel Report, paras. 7.49 – 7.52.

- The Panel **rejected** India's claim that Section 353.511(a)(2)(ii) was inconsistent with Article 14(d) because it failed to require "adjustments" to world market prices to reflect prevailing market conditions.[10] The Panel correctly found that there was no basis for India's claim that Tier II benchmarks do not reflect "prevailing market conditions" in accordance with Article 14(d).

- The Panel **rejected** India's claim that Commerce's method of measuring adequacy of remuneration through a comparison of "delivered" prices, as described in Section 353.511(a)(2)(iv), was inconsistent with the guidelines set forth in Article 14(d).[11] The Panel correctly found that there was no basis for India's argument that delivered prices do not reflect "prevailing market conditions" in accordance with Article 14(d).

16. The United States does not appeal these findings. India, however, appeals each of the Panel's findings in respect of Commerce's benchmark regulations. For example, India's Notice of Appeal contains four "as such" claims of error under Article 14(d) and five claims of error under Article 11 of the DSU concerning Section 351.511(a)(2)(i) – (iii) in particular.[12]

17. On this basis, India asks the Appellate Body to reverse the Panel's findings and find that Commerce's benchmark regulation contained in Section 351.511(a)(2)(i) – (iii) is "as such" inconsistent with Article 14(d). The United States observes that these are the same seven arguments that India unsuccessfully advanced before the Panel. The United States will demonstrate that each of these alleged claims of error is flawed and should be rejected. At the outset, however, we note that India's approach to Article 14(d) is fundamentally flawed because it is premised on the incorrect assumption that benefit must be viewed from the perspective of the government provider, instead of from the perspective of the recipient. This fundamental error is reflected in all of India's arguments on benchmarks.

18. India also appeals the Panel's findings in respect of Section 351.511(a)(2)(iv) of Commerce's benchmark regulation, which requires the use of delivered prices in calculating benefit, alleging that the Panel made three claims of error under Article 14(d) and four claims of error under Article 11 of the DSU.[13] But India's appeal is misguided -- the Panel correctly found that the use of delivered prices is not inconsistent with Article 14(d) because such prices reflect the prevailing market conditions in the country of provision and permit an appropriate comparison to be made to determine if the recipient has been made better off.

19. Finally, the United States notes that India's "as applied" challenge to the determinations of benefit in the provision of iron ore by NMDC and the benchmark determination in the captive mining programs is contingent on the Appellate Body finding that Sections 351.511(a)(2)(i) – (iv) of Commerce's benchmark regulation are "as such" inconsistent with Article 14(d) of the SCM Agreement. For the same reasons as India's "as such" challenge should be rejected, so too should India's "as applied" challenge be rejected.

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[10] Panel Report, paras. 7.51.
[11] Panel Report, paras. 7.59 – 7.64.
[12] India Notice of Appeal, para. 5.
[13] India Appellant Submission, paras. 162-206.

20. As the United States demonstrates below, India's appeal with regard to each of these issues is without merit. The United States will address each of these arguments in turn beginning, however, with a brief explanation of Commerce's benchmark regulation at issue and the relevant guidelines set forth in Article 14(d) of the SCM Agreement.

A. Commerce's Benchmark Regulation is Consistent with Article 14(d) of the SCM Agreement

21. After discussing the U.S. regulation and the proper interpretation of Article 14(d), the United States will address each of India's arguments, and explain why the Panel did not err in its findings.

1. The U.S. Regulation for Determining the Benefit When Goods or Services Are Provided by a Government for Less Than Adequate Remuneration (19 C.F.R. § 351.511(a)(2)(i)-(iv))

22. The U.S. regulation challenged by India, 19 C.F.R. § 351.511(a)(2)(i)–(iv), implements U.S. statutory provisions set out at 19 U.S.C. § 1677(5)(E). The provisions were included as part of the Uruguay Round Agreement Act, 19 U.S.C. § 1677(5)(E), and were to make U.S. law consistent with Article 14 of the recently concluded SCM Agreement. In relevant part, 19 U.S.C. § 1677(5)(E) provides:

> **(E) Benefit conferred**
>
> A benefit shall normally be treated as conferred where there is a benefit to the recipient, including …
>
> (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.
>
> For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.[14]

23. This statutory language is nearly identical to Article 14(d) of the SCM Agreement: in short, the statute requires that Commerce determine whether a financial contribution in the form of government provision of goods confers a benefit by determining whether the provision was made for less than adequate remuneration, as determined in relation to prevailing market conditions, including price, quality, availability, marketability, transportation, and other conditions of purchase or sale.[15]

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[14] 19 U.S.C. § 1677(5)(E) (Exhibit USA-4).

[15] In this regard, the United States recalls the Appellate Body's statement that it would "expect that measures subject to 'as such' challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in

24. The benchmark regulation at Section 351.511 implements this statutory provision. Section 351.511 provides, in relevant part, that where goods or services are provided by a government, a benefit is conferred on the recipient to the extent that such goods are provided for less than adequate remuneration. Section 351.511(a)(2) defines "adequate remuneration" and provides:

> (2) "Adequate Remuneration" defined -
>
> (i) *In general.* [Commerce] will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price from actual transactions in the country in question. Such a price could include prices stemming from actual imports or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, [Commerce] will consider product similarity; quantities sold, imported or auctioned; and other factors affecting comparability.
>
> (ii) *Actual market determined prices unavailable.* If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, [Commerce] will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, [Commerce] will average such prices to the extent practicable, making due allowance for factors affecting comparability.
>
> (iii) *World market prices unavailable.* If there is no world market price available to purchasers in the country in question, [Commerce] will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.
>
> (iv) *Use of delivered prices.* In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section, [Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.[16]

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the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations." (*US – OCTG (AB)*, para. 173). That observation is particularly apt in this instance where the statute and the regulation at issue were both adopted to implement the results of the Uruguay Round, including Article 14 of the SCM Agreement. *See Uruguay Round Agreement Act – Statement of Administrative Action: Agreement on Subsidies and Countervailing Measures*, H.R. Rep. 103-316, at 927 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4240 (Exhibit USA-1): ("With respect to the provision of goods or services, current law relies on a standard of 'preferentiality' to determine the existence and amount of a benefit. Section 771(5)(E)(iv) [which became 19 U.S.C. § 1677(5)(E)] replaces this standard with the standards from Article 14 of the Subsidies Agreement – 'less than adequate remuneration' (in the case of the provision of goods or services) and 'more than adequate remuneration' (in the case of the procurement of goods."); s*ee also Countervailing Duties (Final Rule)*, 63 F.R. 65348, 65377 (November 25, 1998) (Exhibit USA-2).

[16] 19 C.F.R. § 351.511(a)(2) (Exhibit USA-3).

25. The U.S. benchmark regulation establishes a "three tier" hierarchy in determining whether remuneration for government provision of goods is adequate. "Tier I" involves the comparison of the "government price to a market-determined price of actual transactions in the country in question."[17] Tier I does not restrict the selection of a benchmark to a *private* price, and includes an example of a non-private price (a price based on a "competitively run government auction") which could be used as a benchmark because it is market-determined.[18] The regulation requires that the benchmark be "in relation to prevailing market conditions" by making the comparison on the basis of prices from actual transactions, in light of product similarity, quantities sold, and other factors affecting comparability.[19]

26. "Tier II" of the benchmark regulation provides for situations in which there are no internal market-determined prices (*e.g.*, domestic sales, auctions, or imports) for the good in the country in question. The regulation provides that in the absence of any useable actual market-determined prices, Commerce may compare the government price to a "world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question."[20] The use of a world market price reflects prevailing market conditions because world market prices are generally available in any country, particularly when the input at issue is a commodity product like iron ore or coal.

27. Finally, under "Tier III," in situations where there are neither actual nor world market prices to use as benchmarks, the benchmark regulation provides that Commerce may analyze the government price by conducting an analysis of whether the government price is consistent with market principles.[21]

28. At Section 351.511(a)(2)(iv), the regulation addresses the adjustments appropriate to ensure that both the benchmark price and the government price reflect all of the costs associated with getting the input to the factory for use in production of the product in question. These adjustments ensure that the benchmark price and the government price are compared at the same point in the distribution chain and reflect the actual cost in the country in question to the producer of obtaining the input for use in production.

2. The Article 14(d) Guidelines for the Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

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

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

[17] 19 C.F.R. § 351.511(a)(2)(i) (Exhibit USA-3).
[18] *Id.*
[19] *Id.*
[20] 19 C.F.R. § 351.511(a)(2)(ii) (Exhibit USA-3).
[21] 19 C.F.R. § 351.511(a)(2)(iii) (Exhibit USA-3).

* * *

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

30. The *chapeau* of Article 14 refers to "any method" used by an investigating authority "to calculate the benefit to the recipient," and describes the subparagraphs of Article 14 as "guidelines." The Appellate Body has explained that "[t]he reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[22] Moreover, the Appellate Body has emphasized that the provisions of Article 14 are "guidelines," and has stated that "the use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'."[23]

31. The guidelines in Article 14 are to be used in calculating the "benefit" conferred pursuant to Article 1.1 of the SCM Agreement. It is well-established that the term "benefit" as used in the SCM Agreement refers to an advantage or something that "makes the recipient 'better off' than it would otherwise have been, absent that [financial] contribution."[24] The Appellate Body has explained that to determine whether a financial contribution makes a recipient "better off," it is necessary to look to the market: "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[25] In other words, as the Panel explained, "since benefit is assessed by reference to the market, so too must be the adequacy of remuneration.[26]

32. Concerning the "adequacy of remuneration" standard that applies to benefit calculations with respect to the government provision of goods, the Appellate Body has stated that "private prices" are the preferred benchmark:

> Although Article 14(d) does not dictate that private prices are to be used as the exclusive benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. [Thus,] . . . the starting-point, when determining adequacy of remuneration, is the

[22] *US – Softwood Lumber IV (AB)*, para. 91.
[23] *US – Softwood Lumber IV (AB)*, para. 92.
[24] *Canada – Aircraft (AB)*, para. 157.
[25] *Canada – Aircraft (AB)*, para. 157.
[26] Panel Report, para. 7.30.

> prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods."[27]

33. As noted, Article 14 requires that the method (or methods) used to calculate benefit be set out in law or regulation and be consistent with the guidelines set out in Article 14(a)-(d). In the context of an "as such" claim, India must demonstrate that Section 351.511(a)(2)(i)-(iii) of the U.S. regulations result in conduct that "will *necessarily* be inconsistent" with Article 14(d).[28] As explained below, India fails to make this demonstration because the U.S. regulations do appropriately reflect the guidelines in Article 14. Consequently, the Panel properly found that Commerce's benchmark regulation was not inconsistent with Article 14(d) of the SCM Agreement.

3. The Panel Correctly Found That Article 14(d) Does Not Require that Adequacy of Remuneration Be Determined From the Perspective of the Government Provider, Contrary to India's Assertions

34. The Panel found that under the Article 14(d) guidelines, whether goods or services are provided for less than adequate remuneration is determined by calculating benefit to the recipient. In so finding, the Panel correctly rejected India's key argument under Article 14(d) that the benefit calculation is a two-step process whereby the adequacy of "remuneration" is to be assessed separately from the calculation of benefit. Rather, the Panel found that assessing the adequacy of remuneration is part of the process of determining whether a benefit exists, which is gauged from the perspective of the recipient.[29] The Panel also rejected India's flawed suggestion that one might assess the adequacy of remuneration and the existence of benefit in respect of different entities. On this basis, the Panel rejected all of India's claims that Section 351.511(a)(2)(i)-(iii) is inconsistent "as such" with Article 14(d). These findings are further described below.

35. On appeal, India argues that the Appellate Body's legal interpretation of Article 14(d) is incorrect for the same reasons that India advanced before the Panel: Based on India's mistaken interpretation of the first sentence of Article 14(d), India claims that "[t]he text and context . . . require the assessment of 'adequacy of remuneration" from the perspective of the government provider[30] before considering whether a benefit has been conferred (from the perspective of the recipient).[31] This argument has no merit; indeed, an approach that first would examine adequacy of remuneration from the government provider's perspective would contradict the core approach to "benefit" in the SCM Agreement. Furthermore, India's arguments promote a cost-

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[27] *US – Softwood Lumber IV (AB)*, para. 90 (emphasis added).
[28] *US – OCTG (AB)*, para. 172 ("an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will *necessarily* be inconsistent with that Member's WTO obligations.") (emphasis added).
[29] Panel Report, para. 7.28-7.29.
[30] India Appellant Submission, para. 29.
[31] India Appellant Submission, para. 22-41.

to-government analysis already considered and rejected by the Appellate Body in *Canada – Aircraft* and numerous other reports.[32] .

a) The Panel Found that Section 351.511(a)(2)(i)-(iii) is Not "As Such" Inconsistent With Article 14(d) of the SCM Agreement

36. In its report, the Panel correctly found that under the first sentence of Article 14(d) there is a "clear textual connection" between the existence of benefit on the one hand and the adequacy of remuneration on the other such that:

> If remuneration is found to be inadequate, the subsidy may be considered to confer a benefit. If remuneration is found to be adequate, the subsidy may not be considered to confer a benefit. There is nothing in the text of Article 14(d) to suggest that the question of the adequacy of remuneration is a separate threshold issue, such that the question of benefit only arises – as a separate and subsequent matter – after the question of adequacy of remuneration has been resolved.[33]

37. The Panel further reasoned that "assessing the adequacy of remuneration is part of the process of determining whether a benefit exists" and that the terms benefit and remuneration are "connected by the concept of adequacy".[34] Having found that the calculation of benefit under Article 14(d) is therefore a single analytical assessment, the Panel went on to reject India's argument that the adequacy of remuneration should be assessed from the perspective of the government provider while benefit should be assessed from the recipient, noting that this argument is premised entirely on India's argument that Article 14(d) contains two separate assessments.[35]

38. The Panel took note that India did not dispute that the existence of "benefit" is assessed from the perspective of the recipient. Similarly, India did not dispute the well-established principle in WTO dispute settlement that benefit is conferred when a financial contribution makes the recipient better off than it would have been relative to what is available through the market. On this basis, the Panel reasoned:

> Since benefit is established from the perspective of the recipient, and since the adequacy of remuneration forms part of the assessment of benefit, the adequacy of remuneration must also, in our view, be established from the perspective of the recipient. Furthermore since benefit is assessed in reference to the market, so too must be the adequacy of remuneration.[36]

39. Next, the Panel considered India's multiple arguments in respect of the second sentence of Article 14(d), which the Panel noted were similarly premised on India's argument that the adequacy of remuneration be assessed from the perspective of the government provider. First the Panel considered India's position that alleged structural differences between subparagraphs 14(a)-(c) and 14(d) demonstrate that the adequacy of remuneration is not determined simply by

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[32] *Canada – Aircraft (AB)*, paras. 154-155
[33] Panel Report, para. 7.26.
[34] Panel Report, para. 7.28.
[35] Panel Report, para. 7.29.
[36] Panel Report, para. 7.30.

comparing the government price to a benchmark price. In India's view, Article 14(d) requires a "more comprehensive framework" than the other subparts of Article 14, which allow an investigating authority to find benefit whenever there is a difference between the government price and the benchmark price. The Panel did not find this persuasive because the first sentence of Article 14(d) provides for a comparative analysis in the same way that subparagraphs (b) and (c) of Article 14 provide.[37] Although Article 14(d) does not use the term "difference", the Panel found that its use of the term "less than" is comparative in nature, requiring a comparison between the government price and a price that is representative of adequate remuneration in the market.

40. Second, the Panel expressed its agreement with the Appellate Body in *US – Softwood Lumber IV*, which recognized that "private prices in the market of provision will generally represent an appropriate measure of 'adequacy of remuneration' for the provision of goods."[38] The Panel considered that the Appellate Body agreed that the structure of Article 14(d) allows Members to assess the adequacy of remuneration and therefore the existence of benefit by comparing the government price to a market benchmark, assessed in relation to prevailing market conditions. The Panel rejected India's argument that the text of Article 14(d) somehow required more.[39]

41. Third, the Panel rejected India's argument that because the list of prevailing market conditions enumerated in Article 14(d) match the list of factors contained in Article XVII:1(b) GATT that this somehow implies that the adequacy of remuneration should be assessed in accordance with "commercial considerations." In footnote 195 of its Report, the Panel found:

42. The fact that the government price may have been set according to "commercial considerations" is then irrelevant, for the adequacy of remuneration is not assessed from the perspective of the government provider. For this reason, it is not necessary for us to examine India's "commercial considerations" argument – including in particular its reliance on case law concerning the interpretation of Article XVII:1(b) of the GATT 1994 – in any detail.[40]

43. Fourth, the Panel observed that India's interpretation contravenes the plain text of the title and *chapeau* of Article 14, which concerns the "Calculation of the Amount of a Subsidy *in Terms of the Benefit to the Recipient*."[41] In this regard, the Panel found that it would be "incongruous" to find that the United States breached a provision of Article 14 by doing exactly what the title suggests – calculating benefit in terms of benefit to the recipient.[42]

44. For all of these reasons the Panel rejected India's claim that Section 351.511(a)(2)(i) – (iii) is inconsistent "as such" with Article 14(d) of the SCM Agreement because the regulation fails to require that the adequacy of remuneration be assessed from the perspective of the

[37] Panel Report, para. 7.32.
[38] Panel Report, para. 7.33 (quoting *US – Softwood Lumber IV* (AB), para. 90).
[39] Panel Report, para. 7.33.
[40] Panel Report, FN 195.
[41] Panel Report, para. 7.34.
[42] Panel Report, para. 7.34.

government provider before assessing benefit to the recipient.[43] India's extensive appeal with respect to these findings is discussed below.

b) India's Argument That the Adequacy of Remuneration under Article 14(d) Should be Assessed From the Perspective of the Government Provider is Contrary to the Text of Article 14(d)

45. India's first basis for appeal is its claim that the Panel incorrectly interpreted Article 14(d) in finding that Article 14(d) does not require an assessment as to the 'adequacy' of remuneration actually received by the 'government' provider of goods prior to determining the quantum of benefit.[44] In response to these findings, India takes issue with three aspects of the Panel's legal interpretation, which India argues are "contradictory." India's argument is based on a misreading of the Panel Report and moreover, are contrary to the text of Article 14(d). In its appeal, India also repeats the submissions that it made before the Panel in respect of a two-step "cost-to-government" analysis. For the reasons discussed herein, India's claims are without merit and should be rejected by the Appellate Body, just as they were rejected by the Panel.

46. The first "contradiction" alleged by India is the Panel's finding that the terms "benefit" and "remuneration" are "different notions" is somehow at odds with the Panel's conclusion that the analysis under Article 14(d) of the SCM Agreement is singular.[45]

47. The United States submits that India is attempted to create contradiction out of consistency. With respect to the meaning of "benefit" and "remuneration" the Panel stated:

> These terms are necessarily different, since they relate to different notions, and thereby allow for the possibility that the level of remuneration will not confer a benefit in all cases. However, although the terms "remuneration" and "benefit" are different, *they are nevertheless connected by the concept of adequacy*, establishing that a given amount of "remuneration" may be considered to confer a "benefit" if it is not adequate.[46]

48. The Panel finds that terms "benefit" and "remuneration" are different terms connected by the concept of adequacy, notwithstanding their differences[47]. There is nothing contradictory about different terms being connected in a single analysis.

49. In addition, with respect to the Panel's comments in respect to India's argument regarding supposed "circularity," India has misquoted the Panel. The Panel states:

> In our view, the circularity alluded to by India would only arise if the issues of adequacy of remuneration and benefit were assessed separately, but on the basis of the same standard.[48]

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[43] Panel Report, para. 7.35.
[44] India Notice of Appeal, para. 5.
[45] India Appellant Submission, para. 33.
[46] Panel Report, para. 7.28.
[47] Panel Report, para. 7.28.
[48] Panel Report, para. 7.28.

50. The Panel states exactly the opposite of what India alleges—the Panel found that the terms "remuneration" and "benefit" will only be circular if they are assessed separately. This is why, in the Panel's view, the terms require a single assessment.

51. For its second point, India takes issue with the Panel's finding that the term "remuneration" relates to the sum that is paid for the good provided by the government. India argues that this is at odds with the proposition that the adequacy of remuneration should be assessed from the perspective of the beneficiary.[49] India asks rhetorically, "How can one logically assess the 'adequacy' of this sum paid to the government from the perspective of any person other than the government provider?"[50] The United States submits that India has overlooked the most obvious answer: one can look from the perspective of the other party in the transaction, i.e., the beneficiary. While India takes the position that remuneration should be assessed from the party receiving the remuneration, the government, the Panel correctly found the adequacy of remuneration should be assessed under Article 14 from the perspective of the remunerating party, the potential recipient of a benefit. There is nothing contradictory about that proposition.

52. India further argues that the Panel has failed to consider the contextual placement of the word "remuneration" in Article 14(d). India argues that because, in the first sentence of Article 14(d), the phrases "the provision of goods … *by* a government" and "the provision is *made* for … " precede the phrase "adequate remuneration," the adequacy of the remuneration is to be determined with respect to the provider. India again misreads Article 14. The phrases referred to by India do not describe "remuneration." Rather, the phrases set out the type of financial contribution – "the provision of goods or services or purchases of goods by a government" – to which the guidelines in paragraph (d) apply.[51] As the Appellate Body has stated, describing the type of financial contribution is necessarily done by reference to "the action of the granting authority."[52] It does not, therefore, "naturally follow"[53] – as India argues – that because the agreement defines the type of financial contribution by reference to the action of a granting authority (*i.e.*, "the provision of goods made by a government"), that the adequacy of remuneration (the benefit standard for that type of financial contribution) is likewise to be determined by reference to the provider, rather than the recipient, of the good. In short, India misreads the text of Article 14(d).

53. The third alleged logical inconsistency is related to the first. India asks how the use of a competitor's price as a benchmark for determining both the adequacy of remuneration and benefit square with the Panel's statement that use of the same standard in respect of assessing the adequacy of remuneration and the existence of benefit will result in circularity.[54] As discussed, above, India has misread the Panel's report. The Panel found that the terms "remuneration" and

[49] Panel Report, para. 7.28.
[50] India Appellant Submission, para. 35.
[51] The four paragraphs of Article 14 all begin in a similar manner: Article 14(a) ("government provision of equity capital … "); Article 14(b) ("a loan by a government … "); Article 14(c) ("a loan guarantee by a government … "); Article 14(d) ("the provision of goods or services or purchases of goods by a government … ").
[52] *Canada – Aircraft (AB)*, para. 156.
[53] India First Written Submission, para. 25.
[54] Panel Report, para. 7.28.

"benefit" will only be circular if they are assessed separately, which is why the Panel found that the benefit analysis under Article 14(d) requires a single assessment. [55]

54. The rest of India's submission in respect of this claim are repetitive of its submissions before the Panel. The United States notes that in its Appellant Submission, India fails to offer answers to the concerns raised by the Panel regarding India's interpretive approach, such as how a two-step approach reconciles with the title of Article 14 or squares with prior panel and Appellate Body reports. The text of Article 14(d) makes clear that when the financial contribution at issue is the provision or purchase of goods by a government, "benefit" is defined by the concept of "adequacy of remuneration." It is not "circular," as India states, for Article 14(d) to define "benefit" in terms of adequacy of remuneration.[56] Since the terms can and should be interpreted as "related" – that is "adequate remuneration" as a guideline for the calculation of "benefit" – without being considered "the same," the premise of India's argument fails.

55. India also argues the word "unless" in Article 14(d) does not imply that a benefit is conferred each and every time the remuneration is inadequate.[57] Rather, India envisions that there will be situations in which an investigating authority finds that remuneration to the government provider is adequate, notwithstanding the existence of a benefit. According to India, in such instances a Member would not be authorized to impose countervailing measures.[58] In making this argument, India neatly expresses how its argument contradicts the notion of benefit in Article 14 and would undermine the subsidy disciplines of the SCM Agreement.

56. The United States submits that India's interpretation contravenes the text, particularly the title and *chapeau* of Article 14. The title of Article 14 states that the provision concerns "calculation of the amount of a subsidy *in terms of the benefit to the recipient*."[59] As the *chapeau* to Article 14 makes clear, an investigating authority must provide for a methodology in law or regulation that allows it to calculate "the benefit to the recipient." India, in contrast, argues for a methodology of calculating benefit based on "cost to government"[60] – a proposition already considered and rejected by the Appellate Body.[61]

57. Moreover, India's interpretation of "less than adequate remuneration" as referring to the cost to the government of providing the good in question would mean Article 14 has no language to describe how benefit to the recipient should be calculated. Such a result is clearly inconsistent with the title and *chapeau* of Article 14.

58. Finally, India's interpretation is inconsistent with Article 1.1 of the SCM Agreement. India suggests that an investigating authority (or a panel) must assess the price-setting behavior of the government as a criterion additional to financial contribution and benefit before finding

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[55] Panel Report, para. 7.28.
[56] *See*, *US – Softwood Lumber IV (AB)*, para. 84.
[57] India Appellant Submission, para. 27.
[58] India's Appellant Submission, para. 26-27. ("Further the extent of inadequacy of remuneration to the provider of the goods may or may not be equal to the quantum of benefit conferred on the recipient. Referring to the same example, the difference between the government's cost and its price on the one hand, may be higher than the difference between the government price and a private party price, on the other hand, i.e., the extent of inadequacy may be lesser than the extent of benefit.")
[59] SCM Agreement, Art. 14 (emphasis added).
[60] *See*, *e.g.*, India First Written Submission, para. 27.
[61] *Canada – Aircraft (AB)*, paras. 154-155.

the existence of a subsidy. In contrast, Article 1.1 states that "a subsidy shall be deemed to exist" where there is "a financial contribution by a government or any public body" and "a benefit is thereby conferred."[62] There is not an additional prong of the analysis focused on cost to government.[63]

59. The United States considers that the Panel properly considered and rejected India's alleged textual arguments in respect of "remuneration." As discussed above, the Panel found:

> We do not consider that Article 14(d) envisages the issues of adequacy of remuneration and benefit being assessed separately. Rather, assessing the adequacy of remuneration is part of the process of determining whether a benefit exists.[64]

60. India's challenge to Section 351.511(a)(2)(i)-(ii) of the U.S. regulation and appeal of the Panel's findings is premised on Article 14(d) requiring something other than analyzing the benefit from the provision of goods by a government by determining adequacy of remuneration with respect to the recipient. India's interpretation is erroneous, and the United States respectfully requests that the Appellate Body reject India's claim that this part of the U.S. regulation is inconsistent with the first sentence of Article 14(d).

4. The Panel Did Not Err in its Interpretation of Article 14(d) of the SCM Agreement In Respect of Government Prices

61. India appeals the Panel's rejection of its claim under Article 14(d) of the SCM Agreement that the U.S. benchmark mechanism in Section 351.511(a)(2)(i)-(ii) is inconsistent with Article 14(d) because it excludes the use of government prices under Tiers I and II. In India's view, government prices form part of the "prevailing market conditions" and, as such, their exclusion is contrary to Article 14(d). India's claims are based on a flawed interpretation of Article 14(d) and are contrary to the Appellate Body's finding in *US – Softwood Lumber IV* that private prices are the preferred benchmark. Furthermore, as the Panel found as a factual matter, India has not made out the factual premise for its "as such" claims.

a) The Panel Correctly Found that Section 351.511(a)(2)(i)-(ii) is Not "As Such" Inconsistent With Article 14(d) of the SCM Agreement

62. The Panel correctly rejected India's argument that the U.S. benchmark regulation is "as such" inconsistent with Article 14(d) on the basis that it excludes the use of government prices under Tiers I and II of the methodology. The Panel found, "as a factual matter", that Tiers I and

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[62] *See also*, *EC – LCA (AB)*, para. 708.

[63] Additionally, it is instructive to compare India's analytical structure for determining benefit to the analysis of the Appellate Body in *EC – LCA (AB)*, para. 834. While the Appellate Body conducts that analysis under Article 14(b), rather than Article 14(d), the arguments India makes in favor of a "cost to government" standard would apply to Article 14(a)-(d) equally. Nowhere in the Appellate Body's analysis under Article 14(b) does it suggest that a panel is to consider whether the cost to the government or public body of making a loan is more or less than the return it received on the loan. Rather, the Appellate Body states "[t]here is a benefit—and therefore a subsidy—where the amount that the recipient pays on the government loan is less than what the recipient would have paid on a comparable commercial loan that the recipient could have obtained on the market."

[64] Panel Report, para. 7.28.

II of the U.S. regulation do not exclude the use of government prices. Therefore, the premise of India's "as such" claim was "undermined."[65] The United States notes that it was for India to establish the meaning of the U.S. regulation as a matter of fact, bringing forward evidence such as the text of the measure, judicial pronouncements, or evidence of its application.[66] However, the Panel found that "India does not dispute the United States' assertion that government prices are not excluded from the benchmarking mechanism in all cases."[67] Therefore, India has not established the factual premise that underlies its claim – that is, that the regulation excludes the use of government prices under Tiers I and II.[68]

63. In this appeal, India has not challenged the Panel's rejection of India's argument that the U.S. benchmark regulation excludes the use of government prices under Tiers I and II. On this basis alone, the Appellate Body should reject India's appeal, and does not need to reach the issues of legal interpretation raised by India.

64. Nonetheless, for the sake of completeness, the United States will further explains that the Panel correctly interpreted and Article 14(d). Before turning to India's arguments, the United States will first summarize the Panel's findings on whether government prices need necessarily be included in a benchmark under Article 14(d).

65. The Panel found:

> Furthermore, we consider that it would be circular, and therefore uninformative, to include the government price for the good provided by the government in the establishment of the market benchmark when assessing whether such governmental provision confers a benefit. In addition, as noted above, benefit is assessed in relation to the market. Since governments may set prices in order to pursue public policy objectives, rather than market-based profit maximization, we see no basis for requiring investigating authorities to include government prices when determining market benchmarks in the context of Article 14(d). In particular, we do not consider that investigating authorities should be required to treat government prices as being representative of "prevailing market conditions" within the meaning of the second sentence of that provision.[69]

66. The Panel explained that its approach was consistent with the Appellate Body's in *US – Softwood Lumber IV*, noting that the Appellate Body consistently refers to "private prices" as the appropriate measure of adequacy of remuneration. The Panel further noted that "it is private prices in the country of provision that are the 'primary benchmark' for assessing the adequacy of remuneration."[70]

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[65] Panel Report, para. 7.38.
[66] *US – Carbon Steel (AB)*, para. 157.
[67] Panel Report, para. 7.38 (the Panel found "[a]s a factual matter, we observe that India does not dispute the United States' assertion that government prices are not excluded from the benchmarking mechanism in all cases. The factual premise for India's claim is therefore undermined.").
[68] Panel Report, para. 7.38 (the Panel found "[a]s a factual matter, we observe that India does not dispute the United States' assertion that government prices are not excluded from the benchmarking mechanism in all cases. The factual premise for India's claim is therefore undermined.").
[69] Panel Report, para. 7.39.
[70] Panel Report, paras. 7.40-7.41.

67. The Panel went on to reject India's argument that government prices may only be excluded from the benchmark price where the government is the sole or dominant provider of the goods, noting again that governments are generally not profit-maximizers and often pursue public policy objectives. In the Panel's view "government prices need not be presumed to reflect market principles."[71] Moreover, the Panel disagreed with India's attempted reliance on *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*, finding, for example, that *US – Softwood Lumber IV* does not stand for the principle that where a government is not dominant in a market, government prices are likely to reflect market principles. Rather, the Panel found *US – Softwood Lumber IV* to mean that where a government is not dominant in a market, those government prices are unlikely to have distorted *private* prices in the market, such that those *private* prices may serve as a benchmark for purposes of Article 14(d).

68. In respect of *US – Anti-Dumping and Countervailing Duties (China)*, the Panel found that the passage quoted by India did not support the proposition that that government prices should necessarily be used as a benchmark for purposes of Article 14(d). Rather, the Panel found that the Appellate Body's approach was consistent with the approach outlined in *US – Softwood IV* with respect to distortion caused by government intervention.[72] The Panel therefore was not persuaded by India's reliance on the Appellate Body's findings.

69. For these reasons the Panel rejected India's claim that the U.S. benchmark regulation is "as such" inconsistent with Article 14(d) of the SCM Agreement because it excludes the use of government prices under Tiers I and II.[73]

70. On appeal, India argues that the Panel "incorrectly interpreted Article 14(d) in finding that government transactions can be completely ignored by investigating authorities in assessing 'prevailing market conditions' under Article 14(d) and instead, can be presumptively rejected."[74] India makes three arguments: that the Panel erred in its interpretation of the text of Article 14(d); the Panel erred in its understanding of *US – Softwood Lumber IV*; and the Panel failed to appreciate the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*. The United States addresses India's three arguments below.[75]

71. As an initial matter, the United States notes that India misrepresents the Panel's findings in respect of government prices not only here but throughout its Appellant Submission. In

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[71] Panel Report, para. 7.42.
[72] Panel Report, paras. 7.43-7.45.
[73] Panel Report, para. 7.46.
[74] *See* India Notice of Appeal, para. 5.
[75] Panel Report, para. 7.38. The United States also takes note of India's statement in paragraph 43 of India's Appellant Submission, in which India argues that:

> Under the Measure in question, the United States simply rejects the government prices set not in accordance with competitive-bidding prices. It was India's claim that 19 CFR 351.511(a)(2)(i), i.e., Tier I method is inconsistent with Article 14(d) for this reason alone.

As the Panel correctly found, this was not India's claim before the Panel. India made an "as such" challenge to the U.S. benchmark regulation on the basis that Tiers I and II excluded government prices all together. As this is not the case, the United States agrees with the Panel that the factual basis of India's "as such" claim is undermined. India cannot change its argument now on appeal.

paragraph 42 of India's Appellant Submission, for example, India asserts that the Panel "rules that government transactions and prices can be presumptively and conclusively ignored in the assessment of the prevailing market conditions under Article 14(d)."[76] This is incorrect. Rather, the Panel found, and India did not dispute that government prices are not "presumptively and conclusively" excluded from the benchmark regulation in all cases (for example, Section 351.511(a)(2)(i) specifies that prices from competitively run government auctions could be included in the benchmark comparison). In other words, the Panel found that an investigating authority is not required to presume that a government price reflects market principles or prevailing market conditions in accordance with Article 14(d).[77] Indeed, the Panel itself cautioned against presumptions:

> Because governments are generally not profit-maximizers, but instead often pursue public policy objectives when providing goods to recipients in their territory, government prices need not be presumed to reflect market principles.[78] (Panel Report, para. 7.42)

72. Thus, India's assertion that the Panel found that an investigating authority must presumptively exclude government prices simply is incorrect.

73. Turning back to the substance of India's appeal, first, India argues that the Panel's finding that investigating authorities are not required to include government prices when determining market benchmarks under Article 14(d) is at odds with the words "shall not" and "unless" in the text of Article 14(d). Contrary to India's assertion, however, there is no apparent connection between the text of Article 14(d) and India's assertion that government prices must be presumed to be market driven. The benchmark analysis under Article 14(d) assesses whether a provision is made for less than adequate remuneration. India has not explained why the terms "shall not" and "unless" in Article 14(d) require an investigating authority to use government prices in calculating that benchmark. Rather, the United States agrees with the Panel that "it would be circular, and therefore uninformative, to include the government price for the good provided by the government in establishment of the market benchmark when assessing *whether such* governmental provision confers a benefit."[79] That is, it would be circular to compare the government's price for the good to a benchmark established by the government's price.

74. Second, India argues that the Appellate Body in *US – Softwood Lumber IV* considered that the text of Article 14(d) does not explicitly refer to a market undistorted by government intervention or a pure market.[80] India argues on this basis that, "Article 14(d) is associated with the market on an 'as is' basis and does not permit prices set by government players to be disregarded in the analysis."[81] India, however, ignores the Appellate Body's findings in *US – Softwood Lumber IV* that "*private suppliers* in the country of provision are the *primary benchmark* that investigating authorities *must use* when determining whether goods have been

[76] India Appellant Submission, para. 42.
[77] Panel Report, para. 7.39 ("In particular, we do not consider that investigating authorities should be required to treat government prices as being representative of 'prevailing market conditions' within the second sentence of that provision.").
[78] Panel Report, para. 7.42.
[79] Panel Report, para. 7.39.
[80] India Appellant Submission, para. 47.
[81] India Appellant Submission, para. 47.

provided by a government for less than adequate remuneration."[82] In fact, India does not explain in its appeal how its position that government prices must presumptively be used in an investigating authority's benchmark analysis can be squared with the text of the Agreement or the Appellate Body's findings. Moreover, to the extent that India believes that *US – Softwood Lumber IV* does not speak to the issue of distortion, India has ignored paragraph 103 of the Appellate Body's report, where the Appellate Body considers that where in-country private prices are distorted, out-of-country benchmarks may be used.[83]

75. Third, India argues that because the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* found that "government loans cannot be *ipso facto* rejected as non-commercial under Article 14(b)," it follows that "similarly, the [sic] government price of goods cannot be treated in a different manner under Article 14(d)."[84] The Panel properly rejected this argument, finding that this statement does not mean that government prices necessarily must be used as market benchmarks and that the Appellate Body's analysis in *US – Anti-Dumping and Countervailing Duties (China)* of distortions caused by government presence was essentially the same as in *Softwood Lumber IV*.

76. For these reasons, The United States respectfully requests that the Appellate Body reject India's "as such" challenge to Tiers I and II of the U.S. benchmark regulation. First, as explained, India has not established the factual premise for its claim that the U.S. regulation excludes the use of government prices. Second, India has not shown that the Panel erred in its analysis of Article 14(d). India has not addressed the Panel's findings that the mandatory inclusion of government prices in the benchmark would be circular and has failed to reconcile its position with the Appellate Body's findings in *US – Softwood Lumber IV*, that private prices in the country of provision are the "primary benchmark" for assessing the adequacy of remuneration. For all of the foregoing reasons, the United States further requests that the Appellate Body reject India's "as applied" claims under Article 14(d).

5. The Panel Did Not Err in Finding That the Use of World Market Prices to Determine Adequacy of Remuneration, as Reflected in Section 351.511(a)(2)(ii) is Not "As Such" Inconsistent With Article 14(d)

77. Section 351.511(a)(2)(ii) of Commerce's benchmark regulation (or "Tier II") permits Commerce, in the absence of actual domestic private prices, to use world market prices as the benchmark "where it is reasonable to conclude that such price would be available to purchases in the country in question."[85] The Panel rejected each of India's arguments and correctly found that the use of world market prices under Tier II of the regulation is not "as such" inconsistent with Article 14(d) of the SCM Agreement. The Panel rejected India's misplaced reliance on *US – Softwood Lumber IV* and correctly found that the U.S. regulation, in operation with the

[82] *US – Softwood Lumber IV (AB)*, para. 90.
[83] *US – Softwood Lumber IV*, para. 103.
[84] India Appellant Submission, para. 48.
[85] 19 CFR 351.511(a)(2)(ii) (Exhibit USA-3).

provision's overarching statutory provision, requires that the adequacy of remuneration be assessed in relation to the prevailing market conditions.[86]

78. India appeals these findings on three grounds. First, India argues that the Panel failed to make an objective assessment of the matter before it, in accordance with Article 11 of the DSU, by failing to evaluate one of India's sub-claims, that Section 351.511(a)(2)(ii) is inconsistent with Article 14(d) for requiring the use of out-of-country benchmarks without first exhausting all possible sources of in-country benchmarks.[87] Second, India argues that the Panel failed to make an objective assessment of the matter before it by failing to provide a basic rationale as required under Article 12.7 of the DSU, as to the manner in which out-of-country benchmarks may be resorted to even in situations other than governmental influence in the market.[88] Third, India argues that the Panel incorrectly interpreted Article 14(d) in finding that investigating authorities can use out-of-country benchmarks without first finding that the market is distorted by governmental interference or influence.[89]

79. India's claims are based on a misreading of the Panel report, a misunderstanding of Commerce's regulation and U.S. law, and an incorrect interpretation of Article 14(d). Before turning to India's arguments, however, the United States will first summarize the Panel's findings regarding India's claims related to out-of-country benchmarks, and will then describe the standard that India would need to meet in order to present a valid claim under Article 11 of the DSU.

a) The Panel Correctly Found that Tier II of Commerce's Benchmark Regulation is Not "As Such" Inconsistent With Article 14(d) of the SCM Agreement

80. The Panel correctly found that Tier II of Commerce's benchmark regulation was not "as such" inconsistent with Article 14(d). In considering India's three claims, first, the Panel found that the Appellate Body's finding in *US – Softwood Lumber IV* clarified that the use of out-of-country benchmarks are consistent with Article 14(d). On this basis, the Panel rejected India's contention that the text of Article 14(d) excludes the use of out-of-country benchmarks *per se*.[90]

81. Second, the Panel rejected India's argument that the text of Article 14(d) requires that out-of-country benchmarks *only* be considered in situations where the market of the country of provision is distorted due to the predominant role of the government provider. The Panel rejected India's reliance on *US – Softwood Lumber IV,* on the basis that the Appellate Body's findings were circumscribed to the facts of that case.[91] The Panel found persuasive that in its report, the Appellate Body itself said that its examination of "whether an investigating authority may use a benchmark other than private prices in the country of provision" was specific to "that particular situation".[92] The Panel concluded that this did not mean that the reasoning underlying

[86] Panel Report, paras. 7.49-7.52.
[87] India Notice of Appeal, para. 5.
[88] India Notice of Appeal, para. 5
[89] India Notice of Appeal, para. 5.
[90] Panel Report, para. 7.49.
[91] Panel Report, para. 7.50.
[92] Appellate Body Report, *US – Softwood Lumber IV*, para. 99.

the Appellate Body's finding could not apply "with equal force, in other situations, in which the government is not a predominant provider."[93]

82. Finally, the Panel rejected India's argument that Tier II of Commerce's benchmark regulation does not relate to "prevailing market conditions" in the country of provision in accordance with Article 14(d). The Panel correctly found:

> [T]he benchmarking mechanism implements 19 U.S.C. §1677(5)(E), which provides that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review."[94] Since the overarching statutory provision requires that the adequacy of remuneration must in all cases be assessed in relation to the prevailing market conditions in the country of provision, in law Tier II benchmarks applied pursuant to the implementing regulation (i.e., Section 351.511(a)(2)(ii)) must also relate to the prevailing market conditions in the country of provision.

83. Thus, the Panel concluded that there was no basis for India's claim that Tier II world price benchmarks do not reflect prevailing market conditions in the country of provision and therefore rejected India's "as such" challenge to Section 351.511(a)(2)(ii) under Article 14(d) of the SCM Agreement.[95]

b) The Standard to be Applied in Assessing Claims of Error Under Article 11 of the DSU Article 11 of the DUS provides that:

> The functioning of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[96]

84. As India has advanced several Article 11 challenges in its appeal, the United States briefly recalls that the standard under Article 11, as consistently articulated by the Appellate Body, requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[97]

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[93] Panel Report, para. 7.50.
[94] 19 U.S.C. § 1677(5) (Exhibit USA-4).
[95] Panel Report, para. 7.51.
[96] Article 11 of the DSU.
[97] *China Rare Earths* (AB), para. 5.178 (citing to *Brazil – Retreaded Tyres*, para. 185 (referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133). See also Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141 and 142; *Korea – Alcoholic Beverages*, paras. 161 and 162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; and *EC – Selected Customs Matters*, para. 258.).

The Appellate Body has found that a panel may not "make affirmative findings that lack a basis in the evidence contained in the panel record" but that, within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."[98]

85. Panels have a wide breadth of discretion in weighing both the evidence and arguments presented by the parties. As explained by the Appellate Body in its most recent report:

> [The Appellate Body] will not "interfere lightly" with a panel's fact-finding authority. Rather, for a claim under Article 11 to succeed, the Appellate Body "must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts." In other words, "not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU", but only those that are so material that, "taken together or singly", they undermine the objectivity of the panel's assessment of the matter before it.[99]

86. Article 11 challenges should not be taken lightly or raised merely as a claim in the alternative to other substantive appeals, which the United States notes India has done extensively throughout its appeal. The United States recalls that an allegation by a party that a panel has failed to make an objective assessment of a matter before it is "very serious".[100] As such, the Appellate Body has held parties alleging such violations to a high evidentiary standard. Article 11 challenges must be clearly articulated and substantiated with specific arguments, including an explanation of why the alleged error has a bearing on the objectivity of the panel's assessment. A complaint premised primarily on a party's disagreement with the Panel's reasoning and weighing of evidence, for example, does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU.[101]

87. Moreover, the fact that a Panel does not refer to specific evidence presented by a party in its report also is not sufficient to establish a Panel's failure to undertake an objective assessment of that evidence.[102] Very likely, such omissions indicate that the Panel did not consider it relevant to the specific issue before it, or did not attribute to it the weight or significance that a party considers it should have.[103] Where evidence that a party considers to be relevant is not addressed in a panel's report, the Appellate Body has said that an appellant must explain why such evidence is so material to its case that the panel's failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment.[104]

88. The fact that a panel does not address an argument presented by a party also does not rise to the level of an Article 11 violation.[105] As the Appellate Body has consistently held, a panel has no obligation under Article 11 to address in its report every argument raised by a party.[106]

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[98] *EC – Hormones (AB)*, para. 135; *China Rare Earths* (AB), para. 5.178.
[99] *China Rare Earths (AB)*, para. 5.79 (citations omitted).
[100] *China Rare Earths* (AB), para. 5.203.
[101] *China Rare Earths* (AB), para. 5.203.
[102] *China Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.
[103] *China Rare Earths* (AB), para. 5.221.
[104] *China Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), para. 442.
[105] *China Rare Earths* (AB), para. 5.224.

89. Finally, the United States recalls that the Appellate Body considers it unacceptable for an appellant to simply recast factual arguments that it made before the panel in the guise of an Article 11 claim appeal. Instead, an appellant must identify specific errors regarding the objectivity of the panel's assessment.[107] As the Appellate Body has explained, it is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error *meets* the standard of review under that provision.[108]

90. The United States will address each of India's Article 11 claims in the U.S. Appellee Submission below with this framing in mind.

c) India's Claim Under Article 11 of the DSU with regard to the Panel's Findings on the Tier II Methodology Is Without Merit

91. In paragraphs 61 through 64 of India's Appellant Submission, India argues that the Panel improperly recorded India's argument in paragraph 7.47 of the Panel's Report when it observed: "India submits that out-of-country benchmarks may in any event only be used in situations where the market of the country of provision is distorted because of the predominant role of the government provider."[109] In India's view, the Panel also should have recorded its statement that the Tier II methodology of the United States does not exhaust all possible sources of in-country benchmarks and that the measure under challenge permits the United States to use out-of-country benchmarks without exhausting all possible sources of in-country benchmarks.[110]

92. India's claim is without merit. Under Article 11 of the DSU, a failure to "record and assess" an argument by a party does not give rise to a violation. Moreover, a recording of this argument would not have affected the Panel's material findings that Tier II of Commerce's regulation is not inconsistent with Article 14(d) of the SCM Agreement. India's assertion that Tier I benchmarks do not exhaust all possible sources of in-country benchmarks is factually inaccurate.[111] As has already been described, Commerce's benchmark regulation uses a hierarchy in which actual private prices in the domestic market are preferred. Only where actual private prices in the domestic market *are not available* does the benchmark regulation provide that the government price will be compared to a world market price under Tier II. In other words, it is not until all possible sources of in-country benchmarks are exhausted that the regulation proceeds to world market prices.

93. The underlying rationale behind the benchmark hierarchy in Commerce's regulations is that, in determining the adequacy of remuneration, the methodology applied should result in the most probative determination of a benchmark price based on the prevailing market conditions in the country of provision—*i.e.*, the market value the recipient would have paid for the good or service in question, in the country under investigation. Thus, the preference for one type of data over another reflects the probative value of the data. As the Appellate Body confirmed, the most probative evidence of prevailing market conditions in the country of provision is actual, arm's-

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[106] *China Rare Earths* (AB), para. 5.224.
[107] *EC – Fasteners (China)* (AB), para. 442; *China Rare Earths* (AB), para. 5.178.
[108] *China Rare Earths* (AB), para. 5.178 (quoting *EC – Fasteners (China*) (AB), para. 442 (emphasis original)).
[109] India's Appellant Submission, paras. 59 and 61.
[110] India's Appellant Submission, para. 62.
[111] India's Appellant Submission, para. 62.

length prices between private parties in the market of the country of provision.[112] Such pricing evidence is used in a Tier I analysis under Section 351.511(2)(a)(i).

94. In the absence of preferred benchmark data, however, the investigating authority still must make a determination of the adequacy of remuneration. The hierarchy thus moves from empirical evidence of actual sales in the country of provision (Tier I), which includes actual imports, to out of country private transactions (Tier II), which—while less probative of the prevailing market conditions in the country of provision—is the next best alternative, as it is based on actual, private, arm's-length transactions for the goods or services in question. The U.S. regulations mirror the approach of 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).[113] In accordance with the hierarchy of the regulations, Commerce's preference is always:

> to measure the adequacy of remuneration by comparing the government price to a *market-determined price* for the good or service resulting from *actual transactions in the country in question*.

95. 19 C.F.R. § 351.511(a)(2)(i) (emphasis added). As Commerce explained in the Preamble to the regulations:

> [o]ur preference is to compare the government price to market-determined prices stemming from *actual* transactions within the country. Such market-determined prices include actual sales involving private sellers and actual imports. They may also include, in certain circumstances, actual sales from government-run competitive bidding.[114]

96. Commerce has further explained why this evidence is normally the most probative of the adequacy of remuneration in the country under investigation:

> The most direct means of determining whether the government required adequate remuneration is by comparison with private transactions for a comparable good or service in the country. Thus, the preferred benchmark in the hierarchy is an *observed market price* for a good, in the country under investigation, *from a private supplier (or in some cases, from a competitive government auction) located either within the country, or outside the country (the latter transaction would be in the form of an import).* This is because such prices generally would be expected to reflect most closely the commercial environment of the purchaser under investigation.[115]

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[112] *US – Softwood Lumber IV (AB)*, para. 90.
[113] 19 C.F.R. § 351.511(a)(2)(i) and (ii) (Exhibit USA-3).
[114] *Countervailing Duties (Final Rule)*, 63 Fed. Reg. 65348, 65377 ("Preamble") (Nov. 25, 1998) (Exhibit USA-2). (Emphasis in original.)
[115] *Certain Softwood Lumber Products from Canada, Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 67 Fed. Reg. 15,545 (Apr. 2, 2002), Issues and Decision Memorandum at Section "Analysis of Programs, I, Benefit, The Regulatory Hierarchy" (internal exhibit pp. 44-46) (Exhibit USA-108).

97. The nature and operation of Commerce's regulation were before the Panel, and there is no basis in the record to conclude anything other than that under Tier I, Commerce is required to exhaust all available in-country benchmarks before turning to out-of-country benchmarks under Tier II. In fact, the Panel recorded India's argument that the U.S. regulation "provides for the use of world market (Tier II) price benchmarks whenever Tier I in-country benchmarks *are not available*" (report, para 7.47), reflecting that it was uncontested that Tier I in-country benchmarks are used whenever available. There was thus no need to further explain this issue. For these reasons, the United States submits that India has failed to demonstrate that the Panel failed to make an objective assessment under Article 11 of the DSU.

d) The Panel Did Not Fail to Make an Objective Assessment of the Matter Before it by Failing to Provide a Basic Rationale as Required Under Article 12.7 of the DSU with Regard to Its Findings on "Other Situations"

98. India argues that the Panel failed to make an objective assessment of the matter before it in accordance with Article 11 *and* failed to provide basic rationale as required under Article 12.7 of the DSU in finding that there could be "other situations" in which an investigating authority could resort to out-of-country benchmarks.[116] India argues that in recognizing that there were other situations the Panel failed to explain what these "other situations" could be, leaving its "findings vague and unclear." India's claims under both Article 11 and Article 12.7 are without merit.

99. As an initial matter, India's Article 11 claim should be rejected because it does not stand on its own. If India disagrees with the Panel's interpretation of Article 14(d) that there could be "other situations" in which an investigating authority could resort to out-of-country benchmarks, then India should have challenged that legal interpretation directly. An Article 11 claim cannot be made simply as a subsidiary claim to what is in reality a disagreement on an issue of law or legal interpretation.[117] Even an erroneous legal interpretation does not amount to a failure by a Panel to make an objective assessment of the matter before it. Therefore, India's Article 11 claim is not appropriate.

100. In relation to India's DSU Article 12.7 claim, the United States submits that India's claim is based on a misunderstanding of what the Panel found. The United States recalls the Panel's discussion of *US – Softwood Lumber IV* in paragraph 7.50 of the Panel Report:

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

[116] India Appellant Submission, para. 64.
[117] *China – Rare Earths (AB)*, para. 5.173.

> not apply, with equal force, *in other situations, in which the government is not a predominant provider*.[118] (citation omitted)

101. First, the United States observes that the Panel did define "other situations" as situations "in which the government is not a predominant provider."[119] This was in contrast to the Appellate Body's finding in *US – Softwood Lumber* IV, which were circumscribed to situations in which the government was a predominant provider. The United States therefore does not understand the basis for India's challenge. Moreover, to the extent that India believes that the Panel found that the use of out-of-country benchmarks would be appropriate in any and all "other situations", India misunderstands the Panel. Rather, the Panel found that the approach of *US – Softwood Lumber IV* did not limit the use of out-of-country benchmarks to situations in which the government is the predominant provider. The Panel did not purport to define the entire universe of scenarios in which out-of-country benchmarks can be used. In sum, India's claim that the Panel has failed to provide a basic rationale for its findings under Article 12.7 of the DSU is based on India's misunderstanding of what the Panel found. The Panel very clearly explained that "other situations" are those "in which the government is not a predominant provider."

102. The United States respectfully requests that the Appellate Body reject both of India's challenges under Article 11 and Article 12.7 of the DSU.

e) The Panel Correctly Interpreted Article 14(d) in Finding That Investigating Authorities Can Use Out-of-Country Benchmarks Without First Finding That The Market is Distorted By Governmental Interference or Influence

103. India requests that the Appellate Body reverse the Panel's findings and further find that Section 351.511(a)(2)(ii) is "as such" inconsistent with Article 14(d) "because it presumes that world market prices *ipso facto* relates to prevailing market conditions and does not require adjustments to be made in each and every case."[120] India makes two argument in support of its appeal. First, India argues that the Panel's interpretation of Article 14(d) dilutes the "limited circumstances" in which the Appellate Body found that it was acceptable for investigating authorities to resort to out-of-country benchmarks. Second, India argues that the text of Article 14(d) prevents an investigating authority from presuming that market conditions outside of a Member's economy are related to the prevailing market conditions in that Member.[121] Both of India's arguments are erroneous and should be rejected.

104. With respect to India's first argument, India has based its positions on an incorrect reading of both *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*. With respect to India's second argument, this argument is repeated in paragraphs 85 through 94 of India's Appellant Submission. The United States therefore will address this argument fully in the next section.

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[118] Panel Report, para. 7.50.
[119] Panel Report, para. 7.50.
[120] India Appellant Submission, para. 71.
[121] India Appellant Submission, paras. 65-73.

105. As discussed in respect of India's Article 11 appeal, above, India misinterprets the Appellate Body's findings in *US – Softwood Lumber IV*. India argues that if extracts from the report "are read closely", the circumstances permitting an investigating authority to use out-of-country benchmarks "ought to be something akin to government predominance in the market."[122] India's line of reasoning is in error. Rather, the Panel was correct in observing that the Appellate Body meant what it said: that its examination was limited to that particular situation.[123]

106. As Commerce's benchmark regulation exhaust all possible sources of in-country benchmarks, the United States submits that even India would appear to agree that the U.S. regulation is not inconsistent with Article 14(d) of the SCM Agreement. The United States requests that the Appellate Body reject India's claims that the Panel misinterpreted Article 14(d) and reject India's requests that the Appellate Body find Section 351.511(a)(2)(ii) "as such" inconsistent and every determination in the underlying investigation applying Tier II of Commerce's regulation "as applied" inconsistent with Article 14(d).

6. The Panel Did Not Err in Finding That Section 351.511(a)(2)(ii) (Tier II) Is Not "As Such" Inconsistent with Article 14(d) Where Tier II Does Not "Adjust" World Market Prices to Reflect Prevailing Market Conditions

107. India further appeals the Panel's findings that Tier II of Commerce's regulation is not "as such" inconsistent with Article 14(d) of the SCM Agreement, above, for two additional reasons. First, India argues that the Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU by ignoring evidence on the record. Second India argues that the Panel made a legal error under Article 14(d) in finding that Tier II of Commerce's benchmark relates to the prevailing market conditions in the country of provision. As discussed below, these claims are without merit: contrary to India's first argument, the Panel did consider record evidence, and with India's second argument is based on an unsupportable interpretation of the U.S. regulation.

a) The Panel Did Not Fail To Make An Objective Assessment of the Matter Before It In Accordance With Article 11 of the DSU

108. Beginning with India's challenge under Article 11 of the DSU, India argues that the Panel breached its Article 11 obligations by "ignoring material evidence on record in the form of the plain text and meaning of the Measure under challenge".[124] According to India, the Panel was not permitted to consider the language of 19 U.S.C. 1677(5)(E)(iv), in assessing the consistency of Tier-II with Article 14(d) but, rather, should have restricted its assessment to the plain text of Section 351.511(a)(2)(ii) or "relevant domestic interpretive tools." India's arguments are inconsistent and without merit.

109. On the one hand India argues that the Panel should have assessed Tier II of the U.S. regulation with respect to "relevant domestic interpretive tools" that form part of "the effective

[122] India Appellant Submission, para. 68.
[123] Appellate Body Report, *US – Softwood Lumber IV*, para. 99. The United States further observes that the passage in *US – Anti-Dumping and Countervailing Duties (China)* cites to the Appellate Body's finding in *US – Softwood Lumber IV* in this respect.
[124] India Appellant Submission, para. 84.

operationalization" of the regulation.[125] On the other, India argues that the Panel erred in considering a relevant domestic interpretive tool (the text of statute -- 19 U.S.C. 1677(5)(E)(iv)) – which the regulation implements) and should only have considered the plain text of the Tier II regulation. India cannot have it both ways.

110. Moreover, the relevant legislative provision is exactly the type of context that forms part of the "effective operationalization" envisioned by the Panel in *US – 1916 Act (EC)*. Indeed, the regulation operates in connection with its legal authority, 19 U.S.C. 1677(5)(E)(iv).[126]

111. A complaint premised primarily on a party's disagreement with the Panel's reasoning and weighing of evidence does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU and the fact that a Panel does not refer to specific evidence presented by a party in its report also is not sufficient to establish and Article 11 violation.[127] India may disagree with the outcome of the Panel's conclusions but India has no basis to assert that the Panel did not rely on any evidence "whatsoever" when the Panel in fact considered the type of evidence that India suggests. For these reasons, the Appellate Body should reject India's challenge under Article 11 of the DSU.

b) Tier II of Commerce's Regulation Relates to the Prevailing Market Conditions In Accordance With Article 14(d) of the SCM Agreement

112. India argues that the Panel erred in finding that Tier II of Commerce's regulation is not "as such" inconsistent with Article 14(d) of the SCM Agreement because the regulation does not, in India's view, require adjustments to reflect prevailing market conditions in the country of provision *in every case*.[128] With respect to Tier II, the Panel correctly explained:

113. We next consider India's assertion that the United States' benchmarking mechanism fails to require that Tier II benchmarks must relate to the prevailing market conditions in the country of provision. In this regard we note that the benchmarking mechanism implements 19 U.S.C. §1677(5)(E), which provides that "the adequacy of remuneration *shall be determined in relation to* prevailing market conditions for the good or service being provided or the goods being purchased *in the country* which is subject to the investigation or review."[129] Since the overarching statutory provision requires that the adequacy of remuneration must *in all cases* be

[125] India Appellant Submission, para. 84.

[126] The relationship between 19 U.S.C. 1677(5)(E) and its implementing regulations is captured in the text of Section 351.511(a)(1) through explicit reference to "section 771(5)(E)(iv) of the Act." To clarify, the referenced provision is codified in U.S. law as 19 U.S.C. 1677(5)(E)(iv). Section 351.511(a)(1) is a general provision that applies to all three "tiers" of the U.S. regulatory hierarchy for benchmarks, including Section 351.511(a)(2)(ii). Based on this explicit reference to the statute, it is clear that the purpose of the regulations contained in Sections 351.511(a)(1) and 351.511(a)(2) is to give effect to the text of the statute, including its mandate to assess remuneration in relation to the "price, quality, availability, marketability, transportation, and other conditions of purchase or sale" in the country subject to the investigation—the very definition of prevailing market conditions contained in Article 14(d) of the SCM Agreement.

[127] *China Rare Earths* (AB), para. 5.178 and 5.203; *EC – Fasteners* (AB), paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.

[128] India Appellant Submission, para. 90.

[129] 19 U.S.C. § 1677(5) (Exhibit USA-4).

assessed in relation to the prevailing market conditions in the country of provision, in law Tier II benchmarks applied pursuant to the implementing regulation (i.e., Section 351.511(a)(2)(ii)) must also relate to the prevailing market conditions in the country of provision. [italics added]

114. The Panel's finding that the statute and regulation "require[] that the adequacy of remuneration must in all cases be assessed in relation to the prevailing market conditions in the country of provision" is based on the text of those measures. India has not contested the Panel's finding that "the statutory provision requires that the adequacy of remuneration must in all cases be assessed in relation to the prevailing market conditions."[130] India has not made out the factual premise underlying its claim – that the regulation does not require adjustments to reflect prevailing market conditions in the country of provision in every case. As noted previously, in the context of an "as such" challenge, it is for India to demonstrate that Section 351.511(a)(2)(ii) will *necessarily* be applied in a manner inconsistent with Article 14(d) – but India has not done so.

115. Moreover, as the U.S. explained in its submissions before the Panel, India is incorrect in its characterization of U.S. law. The structure and operation of the U.S. statute 19 U.S.C. 1977(5)(E) and its implementing regulations, contained in Sections 351.511(a)(1) and 351.511(a)(2), are designed to ensure that Commerce evaluates the adequacy of remuneration in accordance with the guideline provided in Article 14(d) of the SCM Agreement.

116. Section 19 U.S.C. 1677(5)(E) gives effect to the Article 14(d) guidelines nearly word-for-word. The statute provides that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale."[131]

117. The relationship between 19 U.S.C. 1677(5)(E) and its implementing regulations is captured in the text of Section 351.511(a)(1) through explicit reference to "section 771(5)(E)(iv) of the Act [that is, 19 U.S.C. 1677(5)(E)(iv)]". Section 351.511(a)(1) is a general provision that applies to all three "tiers" of the U.S. regulatory hierarchy for benchmarks, including Section 351.511(a)(2)(ii). Based on this explicit reference to the statute, it is clear that the purpose of the regulations contained in Sections 351.511(a)(1) and 351.511(a)(2) is to give effect to the text of the statute, including its mandate to assess remuneration in relation to the "price, quality, availability, marketability, transportation, and other conditions of purchase or sale" in the country subject to the investigation—the very definition of prevailing market conditions contained in Article 14(d) of the SCM Agreement.

118. India misunderstands Section 351.511(a)(2)(ii) when it asserts that the regulation does "not even contemplate adjustments that would ensure that the benchmark is in relation" to such conditions. Quite the contrary, the U.S. regulation was created to do just that. In applying Section 351.511(a)(2)(ii) the United States views the factors identified in 19 U.S.C. 1677(5)(E)(iv)—namely, "price, quality, availability, marketability, transportation, and other conditions of purchase or sale" in the country subject to the investigation—as a non-exhaustive

[130] Panel Report, para. 7.51.
[131] 19 U.S.C. § 1677(5)(E)(iv) (Exhibit USA-87).

list of market conditions that can be taken into account to ensure that the benchmark price is adjusted to reflect prevailing market conditions, specifically in the country of provision.

119. Moreover, the text of Section 351.511(a)(2)(ii) itself, which provides that "the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price *where it is reasonable to conclude that such price would be available to purchasers in the country in question*"[132], contemplates an evaluation by Commerce as to whether a given price would be available in the country subject to the investigation. The nature of that assessment clearly envisions that the prevailing market conditions will be considered in accordance with Section 351.511(a)(1) and 19 U.S.C. 1677(5)(E)(iv). By determining that such prices would be available to purchasers in the country of provision (e.g., Commerce would need to determine that a commodity such as iron ore is available on the open market), there is no further need for adjustments.[133] India's assertions about 351.511(a)(2)(ii) reflect a misunderstanding of the text as well as the regulatory scheme.

120. The text of the regulation and the statute were on the record before the Panel, as was the United States understanding of both the regulation and overarching legislation. India did not contest those explanations.

121. For the reasons provided, the United States requests that the Appellate Body reject India's claim that the Panel erred in finding that Tier II of Commerce's regulation is not "as such" inconsistent with Article 14(d) of the SCM Agreement and further reject India's "as applied" challenges to Commerce's benefit determinations under Tier II in respect of the sale of high grade iron ore and the captive mining programs for coal and iron ore. India further has not provided any additional reasons to support its "as applied" claims in the context of these determinations.

7. The Panel Did Not Fail to Objectively Assess The Matters Before It In Accordance With Article 11 of the DSU

122. In considering all of the Panel's "as such" findings in respect of the consistency of Commerce's benchmark regulation with Article 14(d), India further claims that the Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU by failing to evaluate two of the six arguments that India advanced. For the reasons discussed below, India's claims are without merit as the Panel in fact did consider, and reject, all of India's arguments, including the second and third. The United States further recalls that a panel has no obligation under Article 11 to address in its report every argument raised by a party.[134]

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[132] 19 C.F.R. § 351.511(a)(2)(ii) (Exhibit USA-3) (emphasis added).

[133] Nor is there any additional need to account for an alleged comparative advantage as India claims in paragraph 93 of its Appellant Submission. As the Panel correctly explained in paragraph 7.63 of its report, "[t]o the extent that a delivered price benchmark relates to the prevailing market conditions in the country of provision, it will reflect any comparative advantage that such country might have."

[134] *China Rare Earths* (AB), para. 5.224.

a) The Panel Did Not Fail to Address India's "Commercial Considerations" Argument

123. First, India argues that the Panel both failed to evaluate its second ground of argument—that an investigating authority, in assessing whether or not there is a benefit to the recipient, must also consider whether the price was based on "commercial considerations"—and also incorrectly recorded one of India's submission inconsistently with Article 11 of the DSU.[135] India's claims are without merit.

124. Before the Panel, India argued that the term "in relation to prevailing market conditions" in Article 14(d) is equivalent to the term "in accordance with commercial considerations" – a term contained in Article XVII:1 of the GATT 1994.[136] India's argument with respect to Article XVII of the GATT 1994 relied on the observation that the inclusive list of factors an investigating authority is required to consider as part of "prevailing market conditions" under Article 14(d) is the same as the inclusive list of factors relevant to a Member's obligation to ensure its state trading enterprises ("STE") make purchases or sales in accordance with "commercial considerations."[137] On this basis, India argued that Section 351.511(a)(2)(i)-(iii) of the U.S. regulations are inconsistent with text taken from Article XVII:1(b) of the GATT 1994 and, therefore, inconsistent with Article 14(d) of the SCM Agreement.

125. In considering India's argument, the Panel found in footnote 195 of the report that:

> The fact that the government price may have been set according to "commercial considerations" is then irrelevant, for the adequacy of remuneration is not assessed from the perspective of the government provider. For this reason, it is not necessary for us to examine India's "commercial considerations" argument – including in particular its reliance on case law concerning the interpretation of Article XVII:1(b) of the GATT 1994 – in any detail.[138]

126. India argues that this statement by the Panel demonstrates that the Panel did not appreciate that India's second argument—that an investigating authority's obligation to assess whether the difference in government price and a market price is justified by "commercial considerations"—applies "irrespective of whether adequacy of remuneration is being assessed from the perspective of the government provider."[139] India also appears to argue that the Panel's brief discussion of India's argument was inappropriate given the extent of India's submissions on this point.[140]

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[135] India Appellant Submission, paras. 105-110.
[136] India First Written Submission, paras. 36-37. The United States argued that India's position reflected its mistaken theory that the terms used in Article XVII of GATT 1994 may be substituted for those in Article 14(d) of the SCM Agreement. The United States further noted that had Members intended that benefit be calculated on the basis of "commercial considerations" they would have used that term, a term which has been available since 1947. U.S. First Written Submission, para. 33; U.S. Second Written Submission, para. 17-21.
[137] India First Written Submission, paras. 36-37, 44. In both articles, the inclusive list of factors is "price, quality, availability, marketability, transportation, and other conditions of purchase or sale."
[138] Panel Report, FN 195.
[139] India Appellant Submission, para. 105.
[140] India Appellant Submission, paras. 105.

127. The United States recalls that the fact that a panel does not address an argument presented by a party does not give rise to an Article 11 violation.[141] Moreover, there is no obligation under Article 11 for a panel to allocate its consideration of a party's argument in proportion to the amount of pages used in making the argument. Contrary to India's assertion, footnote 195 shows that the Panel did not fail to make an objective assessment under Article 11. The Panel not only considered India's argument but also explained in its report why India's argument was not relevant.

128. To the extent that India argues that the Panel failed to understand India's second argument and therefore failed to make an objective assessment, India has not demonstrated that this argument was so material to its claim that failing to appreciate it fully would amount to an Article 11 claim.[142] And even aside from that failure, in substance, while India may believe that its "commercial considerations" claim is fully independent from its first, this simply is not the case. As the Panel found, whether Article 14(d) requires an investigating authority to assess the adequacy of remuneration from the perspective of the government provider is akin to asking whether the pricing behavior of the government provider can be attributed to "commercial considerations". Whether this analysis take place as a first step (India's first ground of argumentation) or as a second step (India's second ground of argumentation), these exercises are the same and under either approach India advocates two discrete steps in respect of the benefit calculation. The Panel considered that the adequacy of remuneration and existence of benefit should not be assessed from the perspective of different entities and, moreover, rejected the possibility of a second step in the assessment.[143] In that light, there was no further need to consider what additional assessments may be required.

129. Second, India claims that the Panel misrepresented India's submissions in paragraph 7.20 of its report in violation of Article 11. This claim also is without merit. In paragraph 7.20, the Panel found:

> India submits that ***remuneration may be adequate for the government provider of goods even though the price paid by the recipient may be less than a market benchmark***.[144]

130. India argues that the Panel's statements bear "no correlation" to India's actual statements contained in paragraph 50 of India's First Written Submission. India provides the relevant paragraph of that submission, which states:

> India submits that the substantial difference in structure, language and approaches of paragraphs (a) – (c) of Article 14 as compared to paragraph (d) of Article 14 of the SCM Agreement suggest that ***a given 'remuneration' may be 'adequate' under Article 14(d) even if there is a difference between the price in question and the price for the similar goods transacted between private parties in the market concerned.***[145]

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[141] *China Rare Earths* (AB), para. 5.224.
[142] *China Rare Earths* (AB), para. 5.178 (quoting *EC – Fasteners (China)* (AB), para. 442 (emphasis original)).
[143] Panel Report, para. 7.29.
[144] India's Appellant Submission, para. 107
[145] India's First Written Submission, para. 108 (emphasis added).

131. The United States is confused by India's assertions as these passages are nearly identical. Moreover, the United States notes that India fails to explain any relevant distinctions between them. As India has not articulated and substantiated with specific arguments the reasons why the Panel's statement in paragraph 7.20 rises to the level of an Article 11 challenge—including an explanation of why the alleged error has a bearing on the objectivity of the panel's assessment—India's claim must be rejected.

b) The Panel Did Not Fail to Address India's "Adequacy of Renumeration" Argument

132. India further appeals the Panel's findings under Article 11 of the DSU, alleging that the Panel improperly conflated India's third argument—that a price that is adequate under any method of calculation consistent with Article 14(d) cannot be found to be inadequate by any other method of calculation—with the Panel's assessment of India's first argument that the adequacy of remuneration should be assessed from the perspective of the government provider. India further alleges that the Panel misrepresented two statements from India's submissions. On these bases, India argues that the Panel has "gravely failed to fulfill its mandate under Article 11 of the DSU" and requests that the Appellate Body reverse the Panel's findings in respect of the consistency of 19 CFR 351.511(a)(2)(i) – (iii) with Article 14(d). These allegations are without merit. As explained, below, the Panel fully considered India's arguments and accurately reflected these arguments in its Report. India has failed to show that the Panel erred pursuant to Article 11 of the DSU.

133. First, in its submissions before the Panel, India argued that the hierarchical structure of Commerce's regulations is "as such" inconsistent with Article 14(d) to the extent that a price which is adequate under the Tier III market principles methodology can still be rejected on the basis of a Tier I or Tier II benchmark analysis. India argued that such an outcome is inconsistent with Article 14(d). In India's view, the Article 14(d) guidelines bar an investigating authority from finding that a government price is inadequate if that price also could be considered adequate under any other method of calculating a benchmark. In other words, even if an investigating authority determines that a government price is inadequate using a method fully consistent with Article 14(d), India submits that an investigating authority must fully exhaust all possible methods of calculating a benchmark before concluding that such a price is, in fact, inadequate. Insofar as Commerce's regulations do not also mandate an assessment under Tier III for every benchmark, India argued that the regulations are "as such" inconsistent with Article 14(d).

134. On appeal, India argues that the Panel failed to specifically consider this claim.[146] The United States submits that this simply is not correct. In paragraph 7.17, for example, the Panel notes:

> India submits that the United States' benchmark mechanism fails to address the adequacy of remuneration prior to an examination of benefit, since it contains a preference for determining benefit using Tier I and Tier II benchmarks, *and only*

[146] India Appellant Submission, para. 111.

> *provides for a Tier III analysis of adequacy of remuneration for the government provider when Tier I and Tier II price benchmarks are not available*.[147]

135. Moreover, in response to India's comments on the interim report expressing concern that the Panel failed to address its argument and requesting additional findings in this regard, the Panel responded as follows:

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

136. The third ground identified by India relates, in India's words, to the "hierarchical approach" provided for in Section 351.511(a)(2)(i)-(iii). This is evident from paragraphs 71 and 72 of India's first written submission. We addressed the issue of "hierarchical preference" in Section 7.2.3. In further support of its third ground, India also argues in its first written submission that "without the United States proving that the 'provision [of goods] is made for less than adequate remuneration', there is no benefit conferred by providing the goods".[148] This issue again relates to the substance of Section 7.2.3. The overlap with matters raised in Section 7.2.3 is further evidenced by the opening phrase of paragraph 67 of India's first written submission, which refers the reader to a previous section of India's submission. In that section, India argues that the "adequacy of remuneration referred to in Article 14(d) must be assessed from the perspective of whether the remuneration is adequate to the provider of the goods or not".[149] Again, this is precisely the matter addressed in Section 7.2.3.[150]

137. The Panel's response further underscores India's own confusion.[151] Once the Panel found that under Article 14(d) the adequacy of remuneration is assessed from the perspective of the recipient and not the government provider, the question of whether an investigating authority also would need to undertake an analysis of the government provider's price-setting behavior was not legally relevant.[152] In this way, both India's second and third arguments are variations on India's first.

138. Moreover, the United States notes that in paragraph 121 of India's Appellant Submission even India agrees that "each of the six independent grounds all relate to challenging this

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[147] Panel Report, para. 7.17.
[148] India first written submission, para. 64.
[149] India first written submission, para. 23.
[150] Panel Report, paras. 6.50 – 6.51.
[151] The United States notes that in paragraph 153 of India's Appellant Submission, India correctly observes that: "Article 14(d) does not prescribe any actual *method* to calculate benefit. The reference to 'any' in the chapeau of Article 14(d) indicates that multiple methods could be consistent with Article 14(d) of the SCM Agreement. The text of Article 14(d) also does not give preference to any one method over another, so long as the guideline in question is complied with."
[152] In paragraph 121 of India's Appellant Submission even India agrees that "each of the six independent grounds all relate to challenging this 'hierarchical approach.'" It is India's position that "merely because all grounds may lead towards one claim does not permit the Panel to paint all these independent grounds in one broad stroke." The United States submits, however, that once the Panel rejects the legal basis underlying all six claims, it is not necessary for the Panel to explain the reasons for its rejection of India's claim six separate times.

'hierarchical approach.'"[153] It is India's position that "merely because all grounds may lead towards one claim does not permit the Panel to paint all these independent grounds in one broad stroke." The United States submits, however, that once the Panel rejects the legal basis underlying all six claims, it is not necessary for the Panel to explain the reasons for its rejection of India's claims six separate times. For these reasons, India's claim that "absolutely nothing in section 7.2.3 of the Panel Report relates to issues raised by India in its third ground" is incorrect.

139. In respect of India's additional claims that the Panel misrepresented India's submissions twice in paragraph 6.51 of its report, the United States submits that India is incorrect. The Panel's statements accurately reflect India's positions on both accounts. In this regard, the United States notes that paragraph 67 of India's First Written Submission does, in fact, refer readers to the previous section and paragraphs 71 and 72 of India's First Written submission use the term "hierarchical approach."[154] India therefore seriously errs when it asserts that the Panel has "misrepresented" India's submissions.

140. An allegation by a party that a panel has failed to make an objective assessment of a matter before it is "very serious". [155] The fact that a panel does not address an argument presented by a party does not give rise to an Article 11 violation.[156] In any event, the Panel fully considered and addressed India's arguments in its Report. As such, there is no Article 11 violation. To the extent that India believes the Panel misunderstood India's third argument, the United States submits that it is India who has misunderstood its own argument. While India may disagree with the Panel's reasoning and weighing of that argument, this does not suffice to establish that the Panel acted inconsistently with Article 11 of the DSU.[157]

8. As The Panel Did Not Fail to Evaluate India's Arguments, The Appellate Body Need Not Complete The Analysis

141. Should the Appellate Body find that the Panel acted inconsistently with Article 11 of the DSU with respect to India's second and third arguments, discussed above, India asks that the Appellate Body to complete the analysis and find that Section 351.511(a)(2)(i) – (iii) is "as such" inconsistent with Article 14(d) in two respects: First India asks that the Appellate Body find that in calculating benefit under Article 14(d), and investigating authority is required to assess whether the government price in question was set in accordance with "commercial considerations" and, second, to find that an investigating authority cannot find benefit under one method of calculation if that price may be considered adequate under any other method consistent with Article 14(d).[158]

142. The United States requests that the Appellate Body decline to complete the analysis with respect to either of these claims as the condition – a finding that the Panel erred in failing to make an objective assessment under Article 11 of the DSU – has not been met. Moreover, the United States submits that the Panel did not err with respect to any of its findings regarding the consistency of Section 351.511(a)(2)(i) – (iii) with Article 14(d) of the SCM Agreement. While

[153] India Appellant Submission, para. 121.
[154] India First Written Submission, paras. 67, 71-72.
[155] *China Rare Earths* (AB), para. 5.203.
[156] *China Rare Earths* (AB), para. 5.224.
[157] *China Rare Earths* (AB), para. 5.203.
[158] India Appellant Submission, para. 125.

India may believe that these are separate and independent claims, the United States submits (and the Panel found) that because the adequacy of remuneration is assessed from the perspective of the recipient and not the government provider, India's arguments are not legally relevant.

143. Nevertheless, should the Appellate Body wish to consider India's claims, the United States offers the following views.

a) There is No Support for Equating the Phrase "Commercial Considerations" in GATT Article XVII with "Prevailing Market Conditions" in Article 14(d)

144. India's arguments in that the term "in relation to prevailing market conditions" in Article 14(d) is equivalent with "in accordance with commercial considerations" – a term contained in Article XVII:1 of the GATT 1994[159], is premised on its observation that the inclusive list of factors an investigating authority is required to consider as part of "prevailing market conditions" under Article 14(d) is the same as the inclusive list of factors relevant to a Member's obligation to ensure its state trading enterprises ("STE") make purchases or sales in accordance with "commercial considerations."[160] On this basis, India requests that the Appellate Body find that Section 351.511(a)(2)(i)-(iii) of the U.S. regulations are inconsistent with text taken from Article XVII:1(b) of the GATT 1994 and, therefore, inconsistent with Article 14(d) of the SCM Agreement. In this way, India request that the Appellate Body find that Article 14(d) requires something more than a benchmark comparison from the perspective of the recipient. India argues that an alleged distinction amount the Article 14(d) subpart as well as India's flawed understanding of the Appellate Body's findings in *Canada – Wheat Export Grain Import* support its view. India argument are misplaced.

145. Moreover, India further argues that the concept of "commercial considerations" is equivalent to the term "market principles" contained in Tier III in the U.S. regulation. While India does not challenge the consistency of Commerce's Tier III benchmark regulation with Article 14(d), India does argue that the U.S. regulation is "as such" inconsistent with Article 14(d) to the extent that it does not provide for a Tier III assessment for every determination. India's claims are without merit and should be rejected. While the United States has addressed these arguments thoroughly in our submissions before the Panel, for the sake of completeness, these submissions are summarized below:

146. First, as noted at the outset, several of India's challenges to the U.S. regulations are premised on India's misinterpretation of the text of Article 14(d) and, primarily, India's unsupportable argument that adequacy of remuneration must first be assessed from the perspective of the provider of the goods, *i.e.*, the government. This challenge is no different. Under the Article 14(d) guidelines, where an investigating authority determines that a financial contribution by a government has been conferred and that the adequacy of remuneration is

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[159] India First Written Submission, paras. 36-37. The United States argued that India's position reflected its mistaken theory that the terms used in Article XVII of GATT 1994 may be substituted for those in Article 14(d) of the SCM Agreement. The United States further noted that had Members intended that benefit be calculated on the basis of "commercial considerations" they would have used that term, a term which has been available since 1947. U.S. First Written Submission, para. 33; U.S. Second Written Submission, para. 17-21.

[160] India First Written Submission, paras. 36-37, 44. In both articles, the inclusive list of factors is "price, quality, availability, marketability, transportation, and other conditions of purchase or sale."

insufficient, an investigating authority *may* find that the amount by which the private, arm's-length benchmark price exceeds the government price is a benefit under the SCM Agreement. In short, the analysis under Article 14(d) is not the two-step process whereby an investigating authority must also consider the price-setting considerations of the government provider, as argued by India but, rather, a comparative exercise in which the adequacy of remuneration is assessed from the perspective of the recipient.

147. One of the ways in which India attempted to support its incorrect interpretation of Article 14(d) before the Panel and, again here, on appeal, is through a flawed textual distinction between Article 14(b)-(c) and 14(d). India argues—incorrectly— that the term "in relation to" contained in Article 14(d) means that the benchmark analysis under Article 14(d) is somehow fundamentally different from that under Articles 14(b) or (c)[161]:

148. India submits that the substantial difference in the structure, language and approaches of paragraphs (b)-(c) of Article 14 as compared to paragraph (d) of Article 14 of the SCM Agreement suggests that a given 'remuneration' may be 'adequate' under Article 14(d) even if there is a difference between the price in question and the price for the similar goods transacted between private parties in the market concerned.[162]

149. In making this argument, India ignores the parallel structure of subparagraphs 14 (b), (c) and (d), while drawing fictional links between dissimilar parts of the subparagraphs. For example, in its written submission, India begins by correctly noting that benefit determinations under Articles 14(b) and (c) "have to be made using a . . . comparison with certain things and the existence of a benefit is concluded the moment there is a difference in the amounts being compared."[163] India's argument deteriorates, however, once it claims that Article 14(d) has a substantially different "structure, language, and approach" compared to Article 14(b) and (c).[164] To the contrary, Article 14 of the SCM agreement clearly employs a consistent structure throughout each of its subparagraphs.

150. India argues that while under subparagraphs 14(b) and (c) the investigating authority will find the existence of a benefit "the moment there is a difference in the amounts being compared," Article 14(d), on the other hand, employs a "much broader and more comprehensive framework."[165] India's claim, however, is inconsistent with the text. Rather, in a manner equivalent to 14(b) and (c), the text of the Article 14(d) guidelines provide that an investigating authority can find benefit as soon as it finds that remuneration for the provision of goods is less than adequate. In this vein, a comparative exercise is found in each of Articles 14(b), (c), and (d): the Article 14(d) guidelines envision a comparative exercise between the government price and a benchmark. Where the government price is more favorable than the benchmark, a benefit has been conferred. Indeed, even India acknowledges the comparative nature of the exercise. In response to the Panel's question asking India how it would calculate the amount of benefit under Article 14(d) India offered only one suggestion: by "using an appropriate benchmark."[166]

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[161] India Appellant Submission, para. 129-134.
[162] India Appellant Submission, para. 131.
[163] India Appellant Submission, para. 130.
[164] India Appellant Submission, para. 131.
[165] India Appellant Submission, para. 131.
[166] India Responses to First Panel Questions, Question 23.

151. If Article 14(d) is textually distinct from the other paragraphs of Article 14, it is because the second sentence in Article 14(d) exists as guidance for how to determine what constitutes adequate remuneration. To the extent there are differences among the subparagraphs, the term "adequate remuneration" is a more involved comparison than the corresponding benchmarks under subparagraphs (b) and (c). It is in *that* context that the phrases "in relation to" and "prevailing market conditions" become relevant. Article 14(d) is the only sub-paragraph for which the text provides a list of factors that a Member must consider in determining the benchmark—terms which include such factors as "transportation," a factor which must be taken into account to ensure a meaningful, apples-to-apples comparison.

152. India's reliance on a supposed connection to Article XVII of the GATT 1994 also fails to support its proposed interpretation of Article 14(d). India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation are inconsistent with Article 14(d) because those provisions do not allow for determinations of benefit to be made "in relation to prevailing market conditions."[167] India argues that "in relation to prevailing market conditions" actually means "in accordance with commercial considerations."[168]

153. India, however, has no basis for this argument – in the text of the agreement, or otherwise. The second sentence of Article 14(d) states:

> The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).[169]

Nothing in this text states or implies that "prevailing market conditions" means "in accordance with commercial considerations."

154. Rather than basing its argument on the actual text of Article 14(d), however, India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation are inconsistent with text taken from Article XVII:1(b) of the GATT 1994: "in accordance with commercial considerations."[170] India's argument with respect to Article XVII of the GATT 1994 turns on the observation that the inclusive list of factors an investigating authority is to consider as part of "prevailing market conditions" under Article 14(d) is the same as the inclusive list of factors relevant to a Member's obligation to ensure its state trading enterprises ("STE") make purchases or sales in accordance with "commercial considerations."[171] India's interpretation is incorrect and should be rejected.

155. The text of Article 14(d) establishes the guidelines an investigating authority must follow when calculating a subsidy in terms of benefit. The Appellate Body has cautioned against

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[167] India Appellant Submission, para. 125..
[168] India Appellant Submission, para. 125..
[169] Article 14(d) of the SCM Agreement.
[170] *See*, *e.g.*, India First Written Submission, para. 58 ("the evaluation as to whether a price is adequate in relation to the prevailing market conditions will involve a study as to whether the price in question is based on commercial considerations.") and India Appellant Submission, paras. 133-134.
[171] India First Written Submission, paras. 36-37, 44. In both articles, the inclusive list of factors is "price, quality, availability, marketability, transportation, and other conditions of purchase or sale."

assuming that the *same terms* in different agreements be given the same meaning.[172] It cannot, therefore, be assumed that *different terms* in different agreements are to be given the same meaning simply because some of the factors relevant to both are the same. The Appellate Body has also cautioned panels and parties against reading words into the agreement that are not there.[173] India has nevertheless asked the Panel to do just that. In contrast to India's interpretation, the correct interpretation of Article 14(d) will rely on the actual text contained in that article.

156. All terms to the treaty must be given meaning, and where separate terms are used, these different terms must be given different effect. Clearly, "prevailing market conditions" are not the same as "commercial considerations." To suggest, as India does[174], that the terms should be given the same meaning because the negotiators of the SCM Agreement included the same list of factors for Article 14(d) as for Article XVII:1(b) is implausible: had Members intended that benefit be calculated on the basis of "commercial considerations" they would have used that term (available since 1947). Instead, Members used a different term – "prevailing market conditions" – and that is the term that must be interpreted by the Panel.

157. The choice to use different terms was, of course, not accidental. Rather, reflecting that Part V of the SCM Agreement is focused on addressing the harm to domestic industry of competing against imports from firms receiving subsidies, Article 14 "sets forth guidelines for calculating the amount of a subsidy in terms of 'benefit to the recipient,'" and accordingly the "focus" of a benefit inquiry "should be on the recipient and not on the granting authority."[175] In contrast, Article XVII:1 imposes an obligation on Members to regulate the conduct of STEs so that they operate in a manner that is non-discriminatory and so that they make purchases and sales solely in accordance with commercial considerations.[176] Article XVII does not address subsidies or the calculation of subsidy benefits. Thus, while the inclusive list of factors in Article 14(d) of the SCM Agreement and Article XVII:1(b) is the same, the focus of the inquiry – the benefit received through a financial contribution as compared to the conduct of an STE – is necessarily different.

158. India's additional assertion, that the Panel's findings in *Canada – Wheat* support the substitution of these terms also is without merit. In fact, the panel and Appellate Body reports in *Canada – Wheat* are clear in stating that WTO subsidy disciplines and the conduct covered by Article XVII are separate matters. And more specifically, the phrase "commercial considerations" has nothing to do with prevailing market conditions under the SCM Agreement.

159. A key panel finding in the dispute, upheld by the Appellate Body, was as follows:

> In our view, the circumstance that STEs are not inherently "commercial actors" does not necessarily lead to the conclusion that the "commercial considerations"

[172] *EC – Asbestos (AB)*, para. 89.
[173] *See*, *e.g.*, *India – Quantitative Restrictions (AB)*, para. 94 ("To interpret the sentence as proposed by India would require us to read into the text words which are simply not there. Neither a panel nor the Appellate Body is allowed to do so."). The Appellate Body has also stated that, where provisions have "different functions and contain different obligations," the text cannot have the same meaning. (*China – Raw Materials (AB)*, para. 337).
[174] India Appellant Submission, paras. 133-135.
[175] *Canada – Aircraft (AB)*, paras. 154-155.
[176] *See*, *Korea – Beef (Panel)*, para. 757 (on the purpose of the inquiry under Article XVII(a) and (b)).

> requirement is intended to make STEs behave like "commercial" actors. Indeed, we think it should lead to a different conclusion, namely, that the requirement in question is simply intended to prevent STEs from behaving like "political" actors.[177]

160. Thus, for the purpose of an Article XVII inquiry, the language about "commercial considerations" is not aimed at making the STE into a private market actor. Accordingly, the "commercial considerations" language in Article XVII of the GATT 1994 has no relation to the setting of market benchmarks.

161. Furthermore, the findings of *Canada – Wheat* are clear in that Article XVII is aimed at discrimination, and is not aimed at preventing an STE from using its government-provided advantages.[178] In contrast, the SCM Agreement is aimed at disciplining government benefits provided to private market actors. Indeed, the Appellate Body explicitly approved the panel finding that the concerns addressed by Article XVII are different than those addressed by the SCM Agreement. In rejecting an argument that Article XVII should prevent an STE from using its government-provided advantages, the Appellate Body stated:

> Such an interpretation, which attributes a very broad scope to Article XVII:1, takes no account of the disciplines that apply to the behaviour of STEs ***elsewhere*** in the covered agreements. The Panel referred, in this regard, to the provisions of **the *SCM Agreement***, Article VI of the GATT 1994 and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, and the *Agreement on Agriculture*.[179]

162. Thus, the *Canada – Wheat* findings – which India cites to show a linkage between the SCM Agreement and Article XVII of the GATT 1994 – show exactly the opposite. India's attempts to conflate the terms "commercial considerations" and "prevailing market conditions" on the basis of the text of Article 14 and the Appellate Body report in *Canada – Wheat* are without merit and evince India's effort to advance a cost-to-government analysis under Article 14(d). India's claims should be rejected.

163. Finally, the United States submits that India's arguments in respect of the hierarchical approach of Section 351.511(a)(2)(i)-(iii)—that,\ by reserving an analysis of whether the government price is based on "market principles" to Tier III, prevents an analysis of whether the government price is based on "market principles" if there is a first or second tier market price available—are also without merit.[180] "Market principles" is a term India takes from Tier III of the U.S. regulation.[181] While Tier III is consistent with Article 14(d), it is not treaty text: "market principles" is not the standard *all* methodologies for calculating benefit must meet. As discussed, the relevant guideline is "prevailing market conditions."

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[177] *Canada – Wheat (AB)*, para. 137.
[178] *See, e.g.*, *Canada – Wheat (AB)*, para. 100 ("For all these reasons, we are of the view that subparagraph (a) of Article XVII:1 of the GATT 1994 sets out an obligation of non-discrimination, and that subparagraph (b) clarifies the scope of that obligation.).
[179] *Canada – Wheat (AB)*, para. 150 (emphasis added).
[180] India Appellant Submission, paras. 150-151.
[181] *See*, 19 C.F.R. § 351.511(a)(2)(iii) (directing the Secretary to "measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.") (Exhibit USA-3).

164. The U.S. regulation, including each of the three tiers and the order of these tiers, is fully consistent with the guideline in Article 14(d) that the adequacy of remuneration is to be determined in relation to prevailing market conditions. Tier I (domestic market prices) and Tier II (world market prices) of the U.S. regulation are market-determined prices that relate to prevailing market conditions. Where domestic market or world market prices are available for use, the comparison of those benchmark prices to the government price is, as is required by Article 14(d), an analysis based on prevailing market conditions. In situations where there are neither useable actual nor world market, Commerce may then analyze the government price by conducting an analysis of whether the government price is consistent with market principles. The hierarchy of section 351.511(a)(2)(i)-(iii) is therefore consistent with the Article 14(d) guidelines.[182]

b) The Article 14(d) Guidelines Do Not Require That An Investigating Authority Perform Multiple Assessments of Benefit

165. Second, although similarly, India argues that Section 351.511(a)(2)(i) – (iii) is inconsistent with Article 14(d) because the hierarchical structure of the regulation permits an investigating authority to find benefit "even where government prices are actually 'adequate' as per Article 14(d) and asks that the Appellate Body find the same.[183] The United States submits that India's claim is without merit as it is premised India's misinterpretation of the text of Article 14(d) and India's adequacy of remuneration must first be assessed from the perspective of the provider of the goods, *i.e.*, the government.

166. India begins by correctly observing that:

> Article 14(d) does not prescribe any actual method to calculate benefit. The reference to 'any' method in the chapeau of Article 14(d) indicates that multiple methods could be consistent with Article 14(d) of the SCM Agreement. ***The text of Article 14(d) also does not give preference to any one method over another***, so long as the guidelines in question is complied with.[184]

167. India's argument, however, quickly descends into contradiction. India argues that the Article 14(d) guidelines bar an investigating authority from finding that a government price is inadequate if that price could be considered adequate under any other method of benchmark calculation consistent with Article 14(d). In other words, even if an investigating authority were to find that a government price was inadequate using a method consistent with Article 14(d),

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[182] *See*, *US – Softwood Lumber IV (AB)*, para. 90. As stated by the Appellate Body, Article 14(d) "emphasize[s] by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration" since "private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods." The Appellate Body also noted that, where in-country private prices are distorted, an out-of-country benchmark may be used. (*US – Softwood Lumber IV (AB)*, para. 103).

[183] India Appellant Submission, para. 152.

[184] India Appellant Submission, para. 153.

India submits that such a finding would not be permitted if the application of another method could find the government price adequate.[185]

168. As discussed above, the Panel fully considered each of these claims and was persuaded that Article 14(d) contained no such obligations. The United States fully addressed each of India's arguments in respect of both "commercial considerations" and the regulation's hierarchy in its submissions before the Panel. To the extent that they are useful for the Appellate Body, the United States once again addresses these arguments below.

169. India argues that Article 14(d) establishes an affirmative sovereign right to provide goods for 'adequate' remuneration without products originating from its territory having to face the prospect of CVD measures.[186] India misinterprets the text. Article 14 establishes procedural guidelines for Members' investigating authorities to follow when calculating the amount of subsidy in terms of benefit. It can be said that Article 14 establishes that a Member's products, when subject to a CVD investigation, will have the existence and amount of benefit analyzed using a methodology consistent with the parameters set out in Article 14. To the extent the methodology or methodologies employed by an investigating authority are consistent with Article 14, this obligation has been satisfied; there is no additional "affirmative sovereign right" set out in the agreement. As discussed above, Section 351.511(a)(2)(i)-(iii) of the U.S. regulations is consistent with Article 14(d).

170. India also appears to argue that an investigating authority must employ multiple methodologies for determining benefit for each financial contribution.[187] Article 14 contains no such requirement. The requirement in Article 14 is that "any … method" used by an investigating authority must be consistent with the guidelines listed in Article 14. As the Appellate Body has stated, "[t]he reference to '*any*' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[188] Since India has not demonstrated that either Tier I or Tier II are inconsistent "as such" with Article 14(d), there is no basis for concluding that the United States has an obligation to apply Tier III in every investigation.

171. For these reasons, the United States respectfully requests that the Appellate Body reject India's legal interpretation of Article 14(d) and find that Commerce's regulation is not "as such" inconsistent with Article 14(d). The United States further requests that the Appellate Body find that the United States acted consistently with Article 14(d) in connection with the underlying determinations at issue.

[185] India Appellant Submission, paras. 153 – 158.
[186] India Appellant Submission, para. 157.
[187] India Appellant Submission, paras. 152-158.
[188] *US – Softwood Lumber IV (AB)*, para. 91 (emphasis original).

IV. COMMERCE'S BENCHMARK REGULATION IS NOT INCONSISTENT WITH ARTICLE 14(D) OF THE SCM AGREEMENT BECAUSE THE USE OF DELIVERED PRICES ENSURES THAT ANY BENEFIT IS MEASURED FROM THE PERSPECTIVE OF THE RECIPIENT

172. In this section of the U.S. Appellee Submission, the United States addresses India's "as such" claims in respect of the use of delivered prices under Section 351.511(a)(2)(iv).

173. The United States submits that the Panel correctly found that the use of a "delivered price" comparison in Section 351.511(a)(2)(iv) was not "as such" inconsistent with Article 14(d) of the SCM Agreement. The crux of India's flawed argument was that where a government provider sells the relevant good ex-works or, in the case of minerals, on an ex-mines basis, the benchmark not only will not relate to the prevailing market conditions but also, will be inflated by the price of delivery charges. The Panel, however, correctly reasoned that India's argument was not supported by the text of Article 14(d) and would permit use of a benchmark that would not reflect the benefit, if any, from the perspective of the recipient. From that perspective, what matters is what alternative source and price would the recipient have in that market and is the price offered by the government better. The use of "delivered prices" (the constructed price reflecting the delivery of an internationally traded good to that market) provides a basis to determine whether the recipient is receiving any benefit from paying instead what the government charges.

174. In the remainder of this introduction, we set out a summary of the Panel's careful analysis and India's claims of error. The Panel began its analysis by considering India's claims that the use of delivered prices means that the price benchmarks will not relate to prevailing market conditions in the country of provision where the government price in question does not include such delivery charges.[189] In considering India's arguments, the Panel found:

> We consider that India's argument is flawed, for it conflates the "prevailing market conditions" referred to in the second sentence of Article 14(d) with the contractual terms and conditions of the government provision under investigation. As explained above, investigating authorities are entitled to assess the adequacy of remuneration from the perspective of the recipient, using market benchmarks that relate to the "prevailing market conditions" in the country of provision. We do not consider that such market benchmarks need mirror the contractual terms on which the government provider sells its good, since government prices are not an indicator of the prevailing market conditions. In this regard, we agree with the United States that the terms "prevailing market conditions" and "conditions of sale" in the second sentence of Article 14(d) do not relate to the specific contractual terms on which the government provides goods. Instead, these terms relate to the general conditions of the relevant market, in the context of which market operators engage in sales transactions. It is for this reason that Article 14(d) includes such factors as "availability" and "marketability", even though these factors could not properly be considered as contractual terms.[190]

[189] Panel Report, para. 7.59.
[190] Panel Report, para. 7.60.

175. The Panel rejected India's argument that the regulation is inconsistent with Article 14(d) because it does not take into account the contractual terms by which the government provides the goods. India considered that these terms (i.e., whether the good is sold at *ex works* or delivered prices) must be taken into account in order to establish or reflect prevailing market conditions in the country of provision in accordance with Article 14(d). In rejecting India's argument, the Panel drew special attention to the word "market" in the phrase "prevailing market conditions" and recalled its earlier finding that Commerce's benchmark regulation is not inconsistent with Article 14(d) on the basis that it excludes some government prices under Tiers I and II. Consistent with this reasoning, the Panel rejected the notion that the contractual terms on which a government provides goods must necessarily reflect prevailing "market" conditions in the country of provision.[191]

176. The Panel also rejected India's argument that the use of delivered prices somehow nullifies the comparative advantage of the country of provision. Rather, the Panel found that "to the extent that a delivered price benchmark relates to the prevailing market conditions in the country of provision, it will reflect any comparative advantage that such country might have."[192] The Panel further noted the Appellate Body's similar finding in *US – Softwood Lumber IV*, that:

> [A]ny comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have been taken into account and reflected in adjustments made to any method used for determination of the adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision.[193]

177. Finally, the Panel observed that this understanding also made sense in the context of the present dispute: that import transactions occur, even where minerals may be sourced locally, and that such import transactions necessarily relate to the prevailing market conditions in India because they are made by entities in India operating subject to Indian market conditions.[194] For all of these reasons, the Panel rejected India's claim that the mandatory use of delivered prices in Commerce's benchmark regulation was "as such" inconsistent with Article 14(d).

178. India appeals these findings on six grounds, including two claims that the panel erred in its interpretation of Article 14(d), and three claims that the Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU, as well as claims in respect of Article 12 of the DSU. As discussed below, these claims are without merit and, what's more, demonstrate India's proclivity to misuse Article 11 of the DSU. On the basis of these claims, India requests that the Appellate Body reverse the Panel's findings and complete the analysis in respect of three of the Panel's findings. Finally, India requests that the Appellate Body also find that all determinations by the United States in the underlying investigations are inconsistent with Article 14(d). As considered, below, India uses the appeal as an opportunity to change what it argued before the Panel and then, unfairly, blame the Panel for failing to make findings on an issue that simply was not before it. Even when considered in light of India's revised claim, the premise of India's arguments – that the use of delivered prices does not reflect

[191] Panel Report, para. 7.61.
[192] Panel Report, para. 7.62.
[193] Panel Report, para. 7.62 (quoting *US – Softwood Lumber IV*, para. 7.62).
[194] Panel Report, para. 7.62.

prevailing market conditions from the perspective of the government provider –is at odds with both the text and purpose of Article 14(d). For the reasons set out below, the United States respectfully requests the Appellate Body to reject India's claims in their entirety as they do not demonstrate any breach of Article 11 and continue to misconstrue Article 14(d).

A. The U.S. Regulation for the Use of Delivered Prices (19 C.F.R. § 351.511(a)(2)(iv))

179. Section 351.511(a)(2)(iv) of the U.S. regulation provides that:

> [i]n measuring adequate remuneration . . . [Commerce] will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties. [195]

180. In short, the regulation provides that the administering authority, when comparing the price of the government-provided good to the benchmark price, must include all delivery costs in *both* prices. The regulation therefore ensures an "apples-to-apples" comparison of the government price to the benchmark price, recognizing that a good that is being provided by the government as a production input (i.e., iron ore and coal) cannot be used unless it is delivered to the producer's factory.

B. The Panel Correctly Found That Section 351.511(a)(2)(iv) is Not Inconsistent With Article 14(d) of the SCM Agreement

1. The Panel Did Not Fail To Make An Objective Assessment Under Article 11 of the DSU in Characterizing What India Actually Argued

181. India begins its appeal of the Panel's finding in respect of delivered prices with two Article 11 claims. First, India argues that it never equated the term "conditions of sale" contained in the second sentence of Article 14(d) with the contractual terms and conditions of the government provider in its submissions before the Panel and that the Panel incorrectly attributed this argument to India based on an "isolated" sentence from India's first oral statement.[196] According to India, the Panel's "acontextual" reading of the arguments contained in India's submission, "completely changed the very claim raised by India" and that, as a result, the Panel has "clearly failed in its function" mandated under Article 11.[197] The United States submits that India's Article 11 challenge is a thinly veiled attempt to amend its argument on appeal. It was not the Panel who changed India's argument but rather, India, who now asserts that what it really meant to say was that the term "conditions of sale" refers to "general or common stipulation" present in contracts for the provision of the subject goods in the country in question.[198] But contrary to this assertion, what India actually argued before the panel was that "conditions of sale" refer to the contractual terms of sale of the government transaction in question.

182. The Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment' of the matter before it' required by Article 11 of the DSU is a very

[195] 19 C.F.R. §351.511(a)(2)(iv) (Exhibit USA-3).
[196] India Appellant Submission, para. 168.
[197] India Appellant Submission, para. 173.
[198] India Appellant Submission, para. 168.

serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself."[199] The burden for demonstrating such failure is accordingly high, because an allegation that a panel has acted inconsistently with Article 11 of the DSU "impl[ies] not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel."[200]

183. India has no factual basis to assert that the Panel failed to make an objective assessment of its argument under Article 11 of the DSU. In several of its submission before the Panel, India did, in fact, argue that the contractual terms and conditions of the subject transaction are part of the prevailing market conditions under Article 14(d). The United States takes note of the Panel's findings in paragraphs 6.78 through 6.81:

> India submits that the Panel has taken India's arguments out of context, and requests the Panel to (i) review its findings in paragraph 7.60 and Section 7.2.6.3 accordingly, and (ii) delete paragraph 7.61 (paragraph 7.61 of the Final Report).[201]
>
> The United States disagrees with India's requests, because contrary to India's assertions the Panel has accurately captured India's arguments.[202]
>
> We have decided not to accommodate India's requests. We do not agree with India that the Panel has considered an extract from India's oral statement at the first substantive meeting out of context. Paragraph 15 of India's first oral statement expresses the concern that the delivered price will be applied "even if the government price in question does not include such delivery charges". India then refers to the application of this mandatory requirement in cases "where the price under challenge" is *ex works*. At paragraph 16 of its oral statement, India asserts that the delivered price adjustment is made "[e]ven where the prevailing 'conditions of sale' for the **transaction** of the goods **in question** do not include transportation or other delivery charges, such as when goods are being transacted on an *ex-works* basis" (bold emphasis added). India then explains that "this method allows the United States to consider something more than the actual *remuneration* received **by the provider of the goods**, which disregards the plain words of Article 14(d)" (bold emphasis added). These subsequent references to the "transaction in question" and the "remuneration received by the provider of the goods" confirm the Panel's understanding of India's argument, and make it clear that the reference in paragraph 15 of India's oral statement was not an isolated case taken out of context by the Panel. The argument is also made at paragraph 8 of India's first written submission, where India indicates that "[e]ven if the *government price* is at ex-factory level, ocean freight, delivery charges and import duties are included in the benchmark price to arrive at delivered prices".

[199] *EC – Poultry (AB)*, para. 133.
[200] *EC – Hormones (AB)*, para. 133.
[201] India's requests to review precise aspects of the Interim Report, paras. 41-44.
[202] United States' comments on India's requests to review precise aspects of the Interim Report, paras. 49-52.

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

184. In contrast to the long list of citations provided by the Panel, the United States considers it telling that in its Appellant Submission India cites to only one instance (paragraph 88 of India's First Written Submission) in which India used the term "general" before the Panel. Rather, India's request that the Appellate Body find that the Panel failed to make an objective assessment is really an effort to change its argument on appeal to more closely mirror the language used by the Panel. Yet, as is clear from the Panel's findings in paragraph 6.78 through 6.71, the Panel did not consider that it was making the same argument as India. In paragraph 7.60 of its Report, the Panel noted that the terms "prevailing market conditions" and "conditions of sale" relate "to the general conditions of the relevant market" to explain the reasons why it was *rejecting* India's arguments.[203]

185. India's claim under Article 11 of the DSU has no merit and the Panel properly considered and rejected India's arguments. A complaint premised primarily on a party's disagreement with the Panel's reasoning and weighing of evidence, for example, does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU.[204]

186. In addition to this Article 11 challenge, India *also* asks the Appellate Body to find that the Panel violated Article 11 separately in failing to make findings as to "whether goods being sold on an ex works or delivered basis is indeed one of the 'general conditions of the relevant market, in the context of which market operators engage in sales transactions.'"[205] India argues that "a finding on this specific issue would have materially affected the Panel's decision to reject India's claim."[206] The United States submits that India cannot fault the Panel under Article 11 of the DSU for failing to make an objective assessment of an argument that was never before it because India did not present it. The question of whether ex works or any other term of sale for the provision of iron ore was the prevailing market conditions in India, generally, was simply not put before the Panel. India raises this argument for the first time on appeal.[207] India's Article 11 claim has no merit.

187. Following these two misplaced Article 11 challenges, in Part IV.E of India's Appellant Submission India argues that, because the Panel failed in its duties under Article 11 of the DSU by "misrepresenting" India's arguments and failing to make findings in respect of the legal

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[203] Panel Report, para. 7.60.
[204] *China – Rare Earths* (AB), para. 5.203.
[205] India Appellant Submission, para. 176.
[206] India Appellant Submission, para. 176.
[207] The United States recalls that the Appellate Body has stated that it is unacceptable for an appellant to simply recast factual arguments that it made before the panel in the guise of an Article 11 claim appeal. *EC – Fasteners (China)* (AB), para. 442; *China – Rare Earths* (AB), para. 5.178.

standard advanced by India, the Appellate Body should reverse the Panel's findings in respect of Section 351.511(a)(2)(iv) and complete the analysis to find that Commerce's regulation is "as such" inconsistent with Article 14(d).[208] India's request under Part IV.E for reversal and completion of the analysis is discussed further below.

188. The United States submits that these alleged claims of error and requests are another example of India's misuse of Article 11 of the DSU in this appeal. The United States recalls that the Appellate Body has stated that it is unacceptable for an appellant to simply recast factual arguments that it made before the panel in the guise of an Article 11 claim appeal.[209] Further, the Appellate Body has said that "a claim that a panel failed to comply with its duties under Article 11 of the DSU 'must stand by itself' and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.[210] India's Article 11 challenges do not stand on their own; rather, they are merely subsidiary arguments made to bolster its subsequent challenge to the Panel's legal interpretation and application of Article 14(d) in respect of delivered prices. This is a further reason India's Article 11 challenges must fail.

189. For all of these reasons, the United States requests that the Appellate Body reject India's claims that the Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU in relation to delivered prices.

2. The Panel Correctly Rejected India's Argument That Terms and Conditions of the Government Transaction Must Be Considered "Prevailing Market Conditions"

190. India further appeals the Panel's finding that Section 351.511(a)(2)(iv) is consistent with Article 14(d) insomuch as the Panel relied on its earlier findings that Commerce's benchmark regulation is not "as such" inconsistent with Article 14(d) because it excludes the use of government prices.[211] The United States recalls that in Section 7.2.4.2 of the Panel Report, the Panel did not consider that investigating authorities should be required to treat government prices as being representative of "prevailing market conditions" under Article 14(d).[212] With respect to Section 351.511(a)(2)(iv), India similarly argued that Commerce's regulation is "as such" inconsistent with Article 14(d) because the regulation does not require an investigating authority to consider the terms and conditions of the government transaction (whether goods were sold on an *ex works* or delivered basis, etc.) as "prevailing market conditions." The Panel reasoned:

> Furthermore, we recall that we have rejected India's claim that the United States' benchmarking mechanism is inconsistent with Article 14(d) of the SCM Agreement because it excludes the use of government prices as Tier I and II price benchmarks. Consistent with this finding, we also reject the notion that the contractual terms on which a government provides goods must necessarily be considered to establish or reflect prevailing "market" conditions in the country of

[208] India Appellant Submission, para. 191.
[209] *EC – Fasteners (China)* (AB), para. 442; *China – Rare Earths* (AB), para. 5.178.
[210] *China – Rare Earths (AB)*, para. 5.173.
[211] Panel Report, para. 7.46.
[212] The Panel's findings in this respect are contained in paragraphs 7.38 – 7.46 of the Panel Report.

> provision. Because of the propensity for governments to pursue public policy objectives in providing goods to recipients in their territory, it is possible that contractual terms set by governments are not set in accordance with "market" principles, and therefore do not reflect prevailing "market" conditions.[213]

191. In its appeal, India notes that the Panel's findings with respect to Section 351.511(a)(2)(iv) are "partly based" on the Panel's earlier findings in respect of government prices. To the extent that these findings overlap, India asks the Appellate Body reverse the Panel's findings here for the same reasons that it argued in Part III.C of its Appellant Submission.

192. The United States has responded to India's arguments in full at section III.A of the U.S. Appellee Submission, and refers the Appellate Body to those arguments. Briefly, the United States notes that the Panel correctly found that comparing government prices to government prices is circular and uninformative because it does not indicate whether government price is at or below the prevailing market conditions in the country of provision.[214] Moreover, the Panel observed that the Appellate Body in *US – Softwood Lumber IV* found that private prices are the preferred benchmark. The United States submits that the Panel's legal analysis in this regard is correct and should not be reversed. [215]

3. The Panel Correctly Found That 19 CFR §351.511(a)(2)(iv) Does Not Countervail 'Comparative Advantages'

a) The Panel Did Not Fail To Make An Objective Assessment Under Article 11 of the DSU and Did Not Fail To Provide A Basic Rationale Under Article 12.7 of the DSU

193. For its third challenge to the Panel's findings in respect of Article 11 of the DSU, India argues that the Panel failed to make an objective assessment of the matter before it and to provide a basic rationale under both Articles 11 and 12.7 of the DSU in its assessment of India's claims under Article 14(d) with regard to "comparative advantage." According to India, "the Panel Report fails to provide *any reasoning at all* to reject India's claim based on 'comparative advantage.'"[216] India appears to challenge the Panel's mistaken reference to a "discussion above"—a discussion which was not included in the Panel's Final Report but rather was amended during the interim stage. In India's view, this missing passage, in which the Panel considered the fact that there were imports of iron ore from Brazil to India, inclusive of international shipping costs, was the crux of the Panel's rejection of India's "as such" claims. India therefore asks the Appellate Body to find that the Panel "has failed to provide a 'basic rationale' to justify its rejection of India's 'as such' claim based on 'comparative advantages.'" India's claims under both Article 11 and 12.7 are without merit.

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[213] Panel Report, para. 7.61.
[214] Panel Report, para. 7.39.
[215] The United States further notes that India only challenges the Panel's legal interpretation of Article 14(d) to the extent that it overlaps with the Panel's interpretation contained in paragraphs 7.38 through 7.46 of the Panel Report.
[216] India Appellant Submission, para. 182.

194. As noted above, "[a]n allegation that a panel has failed to conduct the 'objective assessment' of the matter before it' required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself."[217] The burden for demonstrating such failure is accordingly high, because an allegation that a panel has acted inconsistently with Article 11 of the DSU "impl[ies] not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel."[218]

195. The United States submits that the only error is India's misrepresentation of the Panel Report. Contrary to India's assertion, the Panel provided more than one rationale for rejecting India's "as such" claims in respect of comparative advantage. Specifically, at paragraph 7.62 of its report, the Panel considers:

> We also reject India's argument that the use of delivered price benchmarks "nullifies the comparative advantage of the country of provision in terms of being able to provide the goods in question locally".[219] To the extent that a delivered price benchmark relates to the prevailing market conditions in the country of provision, it will reflect any comparative advantage that such country might have. In this regard, we note the following finding by the Appellate Body in *US – Softwood Lumber IV*:
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> > It is clear, in the abstract, that different factors can result in one country having a comparative advantage over another with respect to the production of certain goods. In any event, any comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision.[220]
>
> As discussed above, import transactions occur even in situations where minerals may be sourced locally, and such import transactions necessarily relate to prevailing market conditions in India because they are made by entities in India operating subject to Indian market conditions.
>
> For the above reasons, we reject India's claim that Section 351.511(a)(2)(iv) "as such" is inconsistent with Article 14(d) of the SCM Agreement. For the same reasons, we also reject India's consequent claims under Articles 19.3 and 19.4 of the SCM Agreement.[221]

196. The crux of the Panel's argument is not that a single import transaction from Brazil, inclusive of delivery charges, reflects the prevailing market conditions of India. Rather, the

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[217] *EC – Poultry (AB)*, para. 133.
[218] *EC – Hormones (AB)*, para. 133.
[219] India's First Written Submission, para. 97.
[220] *US – Softwood Lumber IV (AB)*, para. 109.
[221] Panel Report, para. 7.62.

Panel finds that, "to the extent that a delivered price benchmark relates to the prevailing market conditions in the country of provision, it will reflect any comparative advantage that such country might have."[222] In other words, the Panel found that if a benchmark price relates to prevailing market conditions in the country of provision, it already will reflect any comparative advantages. There is no additional requirement under Article 14(d) of the SCM Agreement that an investigating authority undertake a comprehensive qualitative and quantitative analysis of a Member's alleged comparative advantage.[223] The Panel further observed that this reasoning was consistent with the Appellate Body's approach in *US – Softwood Lumber IV*.

197. The Panel then considered import transactions in India as illustrative of the general point that a benchmark set in relation to prevailing market conditions, naturally will reflect any comparative advantages in that country. The Panel notes that the fact that a Member may source minerals locally does not mean that the delivered prices do not reflect the prevailing market conditions in that Member's economy. The Panel has provided ample explanation for its findings, consistent with its duties under both Articles 11 and 12.7 of the DSU. India's claims are without merit.

198. Moreover, the United States notes that India once again has brought an Article 11 challenge as a subsidiary claim to India's subsequent claim under Article 14(d) of the SCM Agreement, discussed below. As the Appellate Body has made clear, a claim that a panel failed to comply with its duties under Article 11 of the DSU "must stand by itself" and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."[224] For all these reasons, the United States requests that the Appellate Body reject India's challenge under Articles 11 and 12.7 of the DSU.

b) The Panel Correctly Rejected India's "As Such" Claim Under Article 14(d) In Respect of Alleged Comparative Advantages

199. In its second challenge in respect of the Panel's interpretation of Article 14(d), India argues that the Panel's finding in paragraph 7.62, that a benchmark price set in accordance with prevailing market conditions will necessarily account for "comparative advantage", ignores the ordinary understanding of Article 14(d). India attacks what it believes to be the Panel's underlying premise and argues that the Panel inappropriately conflates the term "prevailing market conditions" with "import transactions".[225] India further argues that in so doing, the Panel places an inappropriate emphasis on import transactions when, according to India, Article 14(d) demands an examination of the entire market, which accounts for both sides of the transaction—supply and demand.[226] On this basis, India concludes that the "Panel's premise is fundamentally flawed in that it ignores the ordinary understanding of Article 14(d)."[227] India also argues that

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[222] Panel Report, para. 7.62.
[223] India argues elsewhere in its submissions that under Article 14(d) and investigating authority is required to engage in a "comprehensive" qualitative and quantitative analysis of both imports and exports in the subject country to ensure that any duties imposed do not countervail a Member's comparative advantage. *See for e.g.,* para. 188 of India Appellant Submission. The United States submits that there is no such requirement in Article 14(d).
[224] *China – Rare Earths (AB)*, para. 5.173 (footnotes omitted).
[225] India Appellant Submission, para. 186.
[226] India Appellant Submission, para. 186.
[227] India Appellant Submission, para. 189.

the Panel's rejection of India's "as such" claim in respect of comparative advantage is "erroneous and self-contradictory."[228] On this basis, India requests the Appellate Body to reverse the Panel's findings that Section 351.511(a)(2)(iv) is not "as such" inconsistent with Article 14(d) for countervailing comparative advantages.[229]

200. The United States submits that India's arguments are not clear. What is clear, however, is that India continues to either misunderstand or misrepresent the Panel. The Panel did not, as India argues, reject India's argument that Commerce's regulation is inconsistent with Article 14(d) for countervailing 'comparative advantages' merely because it observed that there are import transactions in India's economy. As discussed, above, the Panel rejected India's "as such" challenge because "to the extent that a delivered price benchmark relates to the prevailing market conditions in the country of provision, it will reflect any comparative advantage that such country might have."[230] Similarly, if a benchmark price relates to prevailing market conditions in the country of provision, it will account for both supply and demand. Supply and demand will be reflected in the price as well as other factors an investigating authority will account for in the second sentence of Article 14(d).[231] There is no additional requirement under Article 14(d) of the SCM Agreement that an investigating authority undertake a comprehensive qualitative and quantitative analysis of a Member's alleged comparative advantage or of supply and demand.[232]

201. For these reasons, the United States respectfully requests that the Appellate Body reject India's claim that Section 351.511(a)(iv) is "as such" inconsistent with Article 14(d).

C. The Appellate Body Should Not Complete The Analysis, As The Panel Correctly Rejected All of India's "As Such" Claims in Respect of the Commerce's Use of Delivered Prices

202. Next, India argues that the Panel's errors under Article 11 of the DSU in misrepresenting India's argument (as conflating the terms "conditions of sale" contained in the second sentence of Article 14(d) with the contractual terms and conditions of the government's provision of the good) and in failing to apply the correct legal standard under Article 14(d) to the facts of this case, require the Appellate Body to reverse the Panel's findings and complete the analysis in accordance with the legal standard advanced by India. In requesting completion of the analysis, India states that the legal question "before the Appellate Body is a proper interpretation of Article 14(d) and the question of whether goods ***generally*** being sold in the market in question on *ex works* or "delivered" basis is one of the "prevailing market conditions."[233] India argues that if the answer is yes, then the Appellate Body should find that Section 351.511(a)(2)(iv) is "as such" inconsistent with Article 14(d).[234] Thus, India requests that the Appellate Body complete the analysis in accordance with a legal interpretation of Article 14(d) that was never before the Panel.

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[228] India Appellant Submission, para. 189.
[229] India Appellant Submission, para. 190.
[230] Panel Report, para. 7.62.
[231] *EC – Large Civil Aircraft (AB)*, para. 981 (As the Appellate Body has noted, "the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both buyers and sellers in that market.").
[232] India Appellant Submission, para. 187-188.
[233] India Appellant Submission, paras. 191-192 (emphasis added).
[234] India Appellant Submission, para. 98.

203. As discussed above, the United States recalls that in its submissions before the Panel India argued that under Article 14(d) of the SCM Agreement, the terms of sale of a *government* transactions must be presumed to reflect prevailing market conditions.[235] The United States submits that the question of whether "goods *generally* being sold in the market in question on *ex works* or 'delivered' basis is one of the 'prevailing market conditions'" was never before the Panel. It is striking that India should seek to change a core argument, on which it believes the entire Article 14(d) analysis should turn, only at the appellate stage. Whatever the reason for this late change of perspective, the result is that there are no panel interpretive findings on this precise issue. As the Appellate Body has previously reasoned, it may not be appropriate to take up a legal argument for the first time on appeal where the issue was not sufficiently developed before the panel. As this issue was not before the Panel, the United States respectfully requests the Appellate Body to reject India's request.[236] Moreover, because the parties were not able to make submissions or to submit evidence in this regard, there are no undisputed facts on the record or panel factual findings to demonstrate whether contractual terms are generally on an *ex works* or delivered basis in India's economy.[237] On this basis, the United States requests that the Appellate Body reject India's request and to uphold the Panel's finding that Section 351.511(a)(2)(iv) is not "as such" inconsistent with Article 14(d) of the SCM Agreement.

204. The Appellate Body may stop its analysis at this point, but for the sake of completeness, the United States has addressed India's claims below and will show that India's arguments are without merit, as they are premised on India's misplaced view that under Article 14(d), the adequacy of remuneration is assessed from the perspective of the government provider. Moreover, India further misreads both the text of Article 14(d) and the Appellate Body's findings in *US – Softwood Lumber IV* to the extent that India considers that in addition to assessing the adequacy of remuneration an investigating authority also is required to engage in a comprehensive quantitative and qualitative analysis of supply and demand in order to ensure that it does not countervail an abstract concept of "comparative advantage." Article 14(d) contains no such requirement. India's three requests for the Appellate Body to complete the analysis on the basis of these flawed arguments are discussed below.

1. The Use of Delivered Prices is Not "As Such" Inconsistent With the Term "Prevailing Market Conditions" Under Article 14(d)

205. First, India argues that "inasmuch as the United States' provision mandates that in every case the adequacy of remuneration shall be determined at the 'delivered price' level, the provision seeks to disregard and in fact, artificially assumes certain "conditions of sale."[238] In India's view, mandatory inclusion of delivery charges forecloses the possibility of an ex-works comparison even where the prevailing market conditions of sale is ex-works, in contradiction to the ordinary meaning of the second sentence of Article 14(d).[239] For these reasons India asks the Appellate Body to complete the analysis under Article 14(d) and find that that Section 351.511(a)(2)(iv) is "as such" inconsistent with Article 14(d).

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[235] Panel Report, para. 7.61

[236] *US – FSC (AB)*, para. 101 and *Canada – Aircraft (AB)*, para. 211 (where the Appellate Body declined to consider new arguments on appeal).

[237] Article 17.6 of the DSU does not permit the Appellate Body to make factual findings.

[238] India Appellant Submission, para. 196.

[239] India Appellant Submission, para. 197.

206. The United States observes that despite altering its claim to focus on the *general* contractual terms of sale for a given good – as opposed to the contractual terms of sale specific to the government's provision of that good – India's arguments regarding prevailing market conditions are largely repetitive of its submissions before the Panel. In other words, India argues that the term "conditions of sale" in the second sentence of Article 14(d) means the contractual terms of sale for transactions of that good generally.[240] In India's view, where goods are not transacted on a delivered basis, transportation charges should not be included in the benchmark price or they will not be reflective of the set of factors included in second sentence of Article 14(d). Inasmuch as Section 351.511(a)(2)(iv) mandates that in every case the adequacy of remuneration be determined at the 'delivered price' level, "the provision seeks to disregard and, in fact, artificially assumes certain 'conditions of sale.'"[241]

207. The United States submits that these are the same arguments that were considered and rejected by the Panel.

208. The second sentence of Article 14(d) states: "The adequacy of remuneration shall be determined in relation to the prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)."[242]

209. As an initial observation, the United States notes that India mischaracterizes the second sentence of Article 14(d). In ignoring the word "purchase" India argues that "conditions of sale" can only mean the contractual terms of sale, whether on an *ex works*, CIF, or other basis from the perspective of the government provider. While India argues that the U.S. measure reads out the term "conditions of sale" from the second sentence of Article 14(d), India's approach completely ignores the term "conditions of purchase." The United States submits that India's approach makes perfect sense when viewed in the context of its argument that the adequacy of remuneration should be assessed from the perspective of the government provider. This is why in paragraph 196 of India's Appellant Submission, India stresses "where the goods being transacted on 'delivered' basis is not a condition of sale, transportation and other delivery charges are ***not*** part of the transaction price between the government provider and the beneficiary."[243]

210. Yet, as discussed in detail above, this is not what the Panel found nor is it what the text of Article 14(d) provides. The adequacy of remuneration is assessed from the perspective of the recipient and not the government provider. As such, it makes sense for an investigating authority also to consider the conditions of purchase, transportation, and availability, for example, from the perspective of the beneficiary or purchaser. Moreover, the United States considers that to the extent that the Panel found that prevailing market conditions "relate to the general conditions of the relevant market, in the context of which market operators engage in sales transactions", such conditions should also be assessed from the perspective of the recipient.

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[240] India Appellant Submission, paras. 193. ("Therefore, contextually, the term 'conditions of sale' as it appears in Article 14(d), refers to the general or common stipulation present in contracts for the provision of goods in question, in the country of provision.").
[241] India Appellant Submission, para. 196.
[242] Article 14(d) of the SCM Agreement.
[243] India Appellant Submission, para. 196.

211. The United States further submits that whether or not a subsidy exists does not depend on whether the terms of sale are ex-works or delivered. An ex-works price does not include the cost incurred by the purchaser for getting a purchased input to its factory door; an ex-works price therefore is not reflective of the prevailing market conditions from the perspective of the recipient. Prevailing market conditions are such that a private purchaser (in making a purchasing decision) and a private seller (in setting a price at which to sell the good) would consider all of the costs associated with getting the good to the factory in setting the market negotiated price. To accept India's interpretation would artificially isolate delivery costs from the price of a good and therefore shield it from the actual prevailing market conditions. Such an interpretation would not fulfil the purpose of the Article 14(d) benchmark comparison—which is to assess whether the recipient is better off than it would have been absent that financial contribution.[244]

212. The United States submits that for these reason, the inclusion of delivery costs helps the investigating authority to determine a market benchmark in relation to the prevailing market conditions. Other than its assertion that "conditions of sale" must mean the general contractual terms of sale from the perspective of the government provider, India has provided no textual basis for its argument that the Article 14(d) guidelines prevent a Member from assessing the adequacy of remuneration on a delivered basis.

213. The United States respectfully requests that the Appellate Body reject India's request. The Panel did not err in finding that the term "prevailing market conditions" in the Article 14(d) guidelines does not prohibit an investigating authority for establishing a benchmark on the basis of delivered prices. India's interpretation is in error and there is no basis for India's claim that Section 351.5119(a)(2)(iv) is "as such" inconsistent with Article 14(d).

2. The Use of Delivered Prices Does Not Countervail Transportation Costs or A Member's Comparative Advantage

a) The Use of Delivered Prices Does Not Countervail Transportation Costs

214. Second, India argues that application of Section 351.511(a)(2)(iv) results in the affirmative finding of a benefit in every case where out-of-country benchmarks are used. India further argues that the use of delivered prices countervails ocean freight, which India states is not a reasonable and good faith understanding of Article 14(d) under the principle of *abus de droit*.[245] For these reasons India asks the Appellate Body to complete the analysis under Article 14(d) and find that that Section 351.511(a)(2)(iv) is "as such" inconsistent with Article 14(d).

215. First, the United States takes note of India's assertion in paragraph 198 of its Appellant Submission that both Tier I import prices and Tier II world market prices "are certainly out of country benchmarks for the purposes of Article 14(d) of the SCM Agreement."[246] This assertion is factually incorrect. With regard to Tier I import prices, prices for imported goods, which are paid by domestic purchasers are in fact in-country prices; it is for this reason that under the U.S. regulation an actual import price is considered a Tier I price—a price, which emanates in the

[244] *Canada – Aircraft (Panel),* para. 9.112.
[245] India Appellant Submission, paras. 198-201.
[246] India Appellant Submission, para. 198.

"country in question."[247] India's contention that import prices automatically are Tier II or out-of-country prices (to use the language in *US — Softwood Lumber IV (AB)*) is both factually incorrect and inconsistent with the realities of domestic markets.

216. With respect to both the use of import prices, and the appropriateness of taking account of delivery charges in the benchmark and government prices, consider the following hypothetical[248]: Indian-government Mine A is located next to Factory A, and ten private mines in India are situated much farther away from Factory A. The ten private mines all sell at the same price, and have equal transportation costs, which are much higher than those from Mine A to Factory A. The price from the ten private mines to Factory A, including the transport costs, would establish the private-party, arm's length benchmark applicable to Factory A. This benchmark reflects prevailing market conditions because that is what the recipient of the good considers in making a purchase and what the private seller considers in negotiating the price. If the government mine were a private party, it would take advantage of its proximity to Factory A, and maximize its profits by charging the same delivered price (including transportation costs) as the market price (including transportation costs) that Factory A would have to pay to obtain ore from any of the 10 private mines. Thus, the price (including transportation costs) that Factory A would have to pay for ore from any of the 10 private mines is the appropriate economic benchmark for determining whether or not the price (including transportation costs) charged by government Mine A confers a benefit. That is, if the government mine does not charge the prevailing market price for the ore it sells to Factory A, it is giving up economic value it otherwise could have obtained, and thereby conferring a benefit on Factory A.

217. The considerations are exactly the same for actual import prices. If the above hypothetical is modified to reflect a situation in which the information from the 10 private mines were unavailable for use, but an actual private price for the imported input was the only usable price available, once again using the fully delivered price—including the ocean freight and all charges necessary to get the input to the recipient's factory—would be appropriate. For 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.

218. A prime example of this, discussed in the United States response to Panel question 44, is the fully delivered price that Essar paid for Brazilian iron ore shipped to its mill in India from Brazil, which was a price between two private parties for a good that actually entered and competed in the Indian market.[249] This record evidence demonstrates that market conditions in

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[247] *See* 19 C.F.R. § 351.511(a)(2)(i) (Exhibit USA-3).

[248] *See also* U.S. Responses to First Panel Questions, Question 48.

[249] *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

India were such that an Indian company actually paid to have Brazilian iron ore to be shipped and imported into India rather than buying it from an Indian producer. The fully delivered cost represents the actual cost to Essar of the foreign iron ore it purchased to use in its steel making process and, as such, reflects the prevailing market conditions in the Indian market.

219. If the transportation charges were excluded from the Essar price, the benchmark would not reflect the prevailing market conditions in India but, rather, a hypothetical undelivered price in Brazil. Using a price based on the Brazilian market conditions would contravene the logic that the actual cost to the buyer of an input includes all of the charges necessary to get the input to the factory for use. Moreover, it would be inappropriate to compare the fully delivered Essar benchmark price to the NMDC ex-mine price; the ex-mine price must also be adjusted, as provided in Article 14(d), to be a delivered price, in order to make an apples-to-apples comparison based on prevailing market conditions in India.

220. This same logic is no different for the Tier II world market prices where Tier I prices are unavailable.

221. India's assertion that "the sole objective of adjustments under Section 351.511(a)(2)(iv) "is to arbitrarily increase the benchmark price to a higher level so that benefit is established even in situations where no benefit is conferred" in violation of *abus de droit* is similarly without basis. The purpose of the benchmark calculation is to assess whether a recipient is better off than it would have been absent the financial contribution. From that perspective, what matters is what alternative source and price would the recipient have in that market and is the price offered by the government better. The use of "delivered prices" (the constructed price reflecting the delivery of an internationally traded good to that market) provides a basis to determine whether the recipient is receiving any benefit from paying instead what the government charges.

222. For these reasons, the United States respectfully requests that the Appellate Body reject India's second request for completion of the analysis, as the Panel correctly found that Section 351.511(a)(2)(iv) is not inconsistent with Article 14(d) of the SCM Agreement.

b) The Use of Delivered Prices Does Not Countervail a Member's Comparative Advantage

223. Third, India argues that the use of delivered prices under Section 351.511(a)(2)(iv) countervails comparative advantages where out-of-country benchmarks are used. In India's view Article 14(d) requires an investigating authority to undertake a "comprehensive analysis of the actual supply-demand matrix covering both domestic and import transactions for a good in question" in order to ensure that a selected benchmark does not nullify a Member's comparative advantage. Because Section 351.511(a)(2)(iv) does not require that Commerce undertaken such an analysis, India argues that the regulation is "as such" inconsistent with Article 14(d).[250] For these reasons India asks the Appellate Body to complete the analysis under Article 14(d) and find that that Section 351.511(a)(2)(iv) is "as such" inconsistent with Article 14(d). India's claims are without merit.

Memorandum, at Section I.A.4 (Exhibit IND-33) and 2007 Issues and Decision Memorandum, at Section IV.A.3 (Exhibit IND-38))")

[250] India Appellant Submission, paras. 202-204.

224. As it did before the Panel, India continues to make vague and unsupported allegations that India has a "comparative advantage" with respect to unidentified countries and on this basis objects to both the use of a Tier II analysis under Section 351.511(a)(2)(ii) and the use of "delivered prices" under Section 351.511(a)(2)(iv).[251] India has failed to provide any evidence of such an alleged comparative advantage or to further explain what this principle means. Rather, India inappropriately relies on the Appellate Body report in *US – Softwood Lumber IV* and appears to confuse the terms "comparative advantage" with "competitive advantage".[252] The United States notes that India reiterates the same arguments on appeal that it did in its submissions before the Panel. The United States therefore has summarized its rebuttal points below.

225. First, India's reliance on *US – Softwood Lumber IV* is misplaced. India relies on the statement that "any comparative advantage . . . would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration."[253] For several reasons, this statement does not – as India asserts – provide support for India's claims in this dispute. First, in *US – Softwood Lumber IV*, the benchmark at issue was an out-of-country benchmark – that is, the price of the good in a country other than the Member (Canada) that provided the subsidy.[254] In this dispute, the benchmark price is not a price wholly within a foreign country but, rather, is either the actual or constructed price *in India* of an imported product. Therefore the prevailing market conditions in India are already reflected in the benchmark.

226. Second, the Appellate Body noted that its comments on "comparative advantage" were "in the abstract."[255] This is almost necessarily so because "comparative advantage" is an abstract macroeconomic concept, difficult or even impossible to calculate in the real world. In *US – Softwood Lumber IV*, the Appellate Body made no attempt to do so, and in fact did not uphold Canada's challenge to the out-of-country benchmark at issue.

227. Moreover, India's argument on appeal that the Appellate Body's findings somehow require that an investigating authority undertake a comprehensive quantitative and qualitative assessment of supply and demand of the subject country's economy is not supported by the Appellate Body's findings.

228. Rather, India appears to conflate two quite different economic concepts, the macroeconomic concept of "comparative advantage," and microeconomic ideas of a "competitive advantage."[256] This confusion is significant because while India relies on the

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[251] India First Written Submission, paras. 82 and 97; India Responses to First Panel Questions, Question 13.
[252] The United States notes that before the Panel, India argued that Article 14(d) required that an investigating authority not countervail against a Member's "competitive advantage." *See, e.g.,* India First Written Submission, para. 96 and India Reponses to First Panel questions, Question 13 (India states that it has "only relied on 'comparative advantage' and not on 'competitive advantage' in its FWS" but that it "believes that the difference between 'comparative advantage' and 'competitive advantage' is not material to the instant dispute").
[253] India First Written Submission, paragraph 109.
[254] In *US – Softwood Lumber IV*, the underlying prices used by Commerce in establishing a benchmark were the prices of stumpage in bordering states of the northern United States (cross-border stumpage prices), adjusted to take into account market conditions prevailing in Canada. *US – Softwood Lumber IV (AB)*, at. para. 107 and n. 103.
[255] *US – Softwood Lumber IV (AB)*, at. para. 109.
[256] "Comparative advantage"—as opposed to "competitive advantage"—is the advantage that one country has over another in the production of a particular good relative to other goods if it produces that good less inefficiently than it

mention of "comparative advantage" in *US – Softwood Lumber IV,* India's allegations (which are in any event unsupported by any evidence) seem to relate to a supposed competitive advantage for certain firms.[257]

229. Third, in arguing that India has a comparative advantage because it does not have to "bear the risk and expense of international transactions," India misuses the term "comparative advantage."[258] The United States is aware of no source that would support the proposition that "risk and expense of international transactions" has anything to do with the macroeconomic concept of comparative advantage, and India has cited to none.

230. Fourth, the SCM Agreement contains no mention of "comparative advantage," and thus there is no basis for any assertion that it is central to the interpretation or application of the agreement.

231. Finally, and perhaps most simply, on the specific facts of this dispute, there is no issue regarding some sort of hypothetical need to take account of comparative advantage. Other than making a vague and unsupported assertion that India has an alleged comparative advantage as compared to the world price of iron ore, India has provided no evidence to support such an argument. And, to the contrary, as the United States explained in its First Written Submission before the Panel, record evidence in the administrative proceeding showed, for example, that Australia, which was the source of the benchmarks at issue, has larger deposits of iron ore than India. In short, on the record of this dispute, there is no basis for India to assert a need to take account of any supposed comparative advantage in India's favor. [259]

1. The United States respectfully requests that the Appellate Body reject India's legal interpretation of Article 14(d) and find that Commerce's regulation is not "as such" inconsistent with Article 14(d). For the reasons set out above, India's critiques of the U.S. regulation and Commerce's determination on the basis of failing to account for some sort of alleged "comparative advantage" are baseless.

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produces other goods, as compared with the other country. Blinder, Alan and Baumol, William, "Economics: Principles and Policy," 11th ed., p.49. *See also*, Pugel, Thomas A., International Economics, International Edition, 12th Ed. 2004, at p. 39 (Exhibit USA-103) (explaining "the key word here is *comparative*, meaning 'relative' and 'not necessarily absolute.' Even if one country is absolutely more productive at producing everything and the other country is absolutely less productive, they both can gain by trading with each other as long as their relative (dis)advantages in making different goods are different. Each of these countries can benefit from trade by exporting products in which it has the greatest relative advantage (or least relative disadvantage), and importing products in which it has the least relative advantage (or the greatest relative disadvantage). Ricardo's approach is actually a double comparison—between countries and between products".) In other words, the concept of comparative advantage is about different *relative* efficiencies among countries. Competitive advantage, on the other hand, relates to a general advantage that a firm has over its competitors. Generally, one might consider competitive advantages as a broad range of things that explain why one firm is more competitive than another. Comparative advantage, on the other hand, could explain why France exports wine to England, while England exports cloth to France.

[257] India First Written Submission, para. 69.

[258] India First Opening Statement, para. 15.

[259] U.S. First Written Submission, para. 459.

V. COMMERCE'S BENEFIT CALCULATIONS IN RESPECT OF NMDC'S PROVISION OF HIGH GRADE IRON ORE ARE FULLY CONSISTENT WITH ARTICLE 14 OF THE SCM AGREEMENT

232. In addition to challenging Commerce's benchmark regulations contained at Section 351.511(a)(2)(i)-(iv) "as such" inconsistent with several provisions of the SCM Agreement, India further challenges the application of those measures "as applied" in Commerce's determinations in the 2004, 2006, 2007, and 2008 administrative reviews. In this section, the United States addresses India's "as applied" claims in respect of those determinations, in particular Commerce's determination of benefit in accordance with Articles 1.1 and 14 of the SCM Agreement.

A. The Appellate Body Should Reject India's Appeals of the Panel's Findings in Respect of Certain Domestic Price Information for Tier I In-Country Benchmarks

1. The Panel Did Not Violate Article 11 of the DSU

233. The Panel found that the United States failed comply with Articles 14(d) and 1.1(b) of the SCM Agreement by failing to consider certain relevant domestic price information.[260] India argued successfully before the Panel that Commerce should have considered this information for the purposes of a Tier I in-country benchmark to assess sales by NMDC of high grade iron ore lumps and fines in Commerce's 2006, 2007, and 2008 administrative reviews. The Panel found that Commerce's justification for rejecting this information constituted *ex post* rationale. The United States has not appealed these findings.

234. Notwithstanding this finding against the United States, India appeals the Panel's finding on the basis that the Panel failed to make an objective assessment of the matter before it, under Article 11 of the DSU. India alleges that after the Panel determined that Commerce's explanations were *ex post*, the Panel inappropriately went on to make additional findings on those explanations.[261] The Panel noted that such considerations could be useful in the event of an appeal or to help with U.S. implementation efforts. According to India, once the Panel rejected Commerce's explanations as *ex post* rationalizations, it was not appropriate for the Panel to offer its views on the explanations provided by Commerce. On this basis, India requests that the Appellate Body reverse the Panel's findings which address the justifications provided by the United States and declare moot the Panel's "findings and observations" with respect to the usability of the domestic price chart and price quote.[262]

235. The United States submits that the Appellate Body should decline to rule on India's Article 11 challenge, as India's challenge is predicated on the Panel having made findings in the first place. The United States further submits that the only findings in respect of the domestic pricing information are contained in paragraphs 7.156-7.158 and 8.2(b)(iii) of the Panel Report.

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[260] This information included a price chart submitted by the Government of India and Tata and a letter submitted by Tata containing a price quote for the sale of high grade iron ore by a private iron ore supplier (herein "certain domestic pricing information").
[261] India's Notice of Appeal, para. 25.
[262] India's Notice of Appeal, para. 25.

Specifically, the United States observes in the section entitled "Conclusions and Recommendations," the Panel found that the United States acted inconsistently with "Article 14(d) of the SCM Agreement in connection with the USDOC's rejection of certain domestic price information when assessing benefit in respect of mining rights for iron ore."[263] The Panel provides no further findings or conclusions with respect to the domestic pricing information or Commerce's reasons for rejecting that information. The views provided by the Panel in 7.159 through 7.165 of its report do not make up part of the Panel's findings and recommendations — rather, they are merely "considerations." The United States further notes that "consideration" is the term the Panel itself uses to describe its discussion contained in paragraphs 7.159 through 7.165 and not "findings" as India so alleges.[264]

236. The United States submits that the Panel's considerations in paragraphs 7.160 through 7.165 are not findings that, upon adoption of the report, would become part of the DSB's recommendations and rulings. To that extent, they are in a sense inherently moot and perhaps may be analogized to the considerations a panel would set out were it to exercise its discretion to provide "suggestions" under DSU Article 19.1. As there are no additional "findings" with respect to the domestic pricing information for the Appellate Body to modify, uphold, or reverse, the Appellate Body should decline to rule on India's claim.

2. The Appellate Body Should Reject India's Conditional Appeal in Respect of the Panel's Consideration of Certain Pricing Information

237. Conditioned on the Appellate Body rejecting its Article 11 claim, above (and the United States would argue, necessarily conditioned on the Appellate Body determining that the Panel's considerations in paragraphs 7.159 through 7.165 are actually findings), India appeals four discrete aspects of the Panel's "consideration" of the two pieces of domestic pricing information at issue. In its appeal, India argues that the Panel's considerations are inconsistent with Article 12.1, 12.7, and 14 of the SCM Agreement. The United State respectfully urges the Appellate Body to reject these claims as India's arguments are either claims which were not before the Panel, or are claims based on a misreading of the SCM Agreement or misrepresentations about the domestic pricing information itself. India's claims therefore are without merit. Following a brief description of the Panel's considerations, each of these claims is addressed below.

238. For the sake of completeness, the United States offers the following background and summary of the Panel's "considerations." In responding to India's claim that Commerce improperly rejected a price chart submitted by the GOI and Tata and a price quote submitted by Tata for the purposes of establishing a Tier I benchmark, the United State explained before the Panel that the alleged pricing information could not be used in a Tier I benchmark because the information contained was incomplete and did not specify the percentage of iron content necessary for a meaningful comparison.[265] With respect to the price chart, for example, the United States explained that the parties were not identified; therefore, there was no way to

[263] Panel Report, para. 8.2(b)(iii), "Conclusions and Recommendations".
[264] The Panels states "we believe that the United States' implementation of a DSB recommendation to bring its measures into conformity in this regard may be facilitated if we ***consider*** the rationale provided by the United States" and "Such ***considerations*** may also be relevant in the event that the Appellate Body reverses our findings". Panel Report, para. 7.159.
[265] U.S. First Written Submission, paras. 439-445.

determine if the prices were in fact private or government prices.[266] Of the few parties that were identified, Commerce observed that several were state-owned companies.[267] Further, there was no record evidence or explanation provided in or accompanying the chart to demonstrate whether the prices represented actual private market transactions, as opposed to quotes or estimates.[268]

239. With respect to the price quote submitted by Tata, the United States noted specifically that the specific percentage of iron ore content was not identified, an important factor in assessing the value of iron ore.[269] Moreover, this information was BCI and therefore could not be used to establish a benchmark in respect of other companies without revealing Tata's confidential information. While Tata submitted this information for the 2006 administrative review, Tata did not submit the BCI price in the context of any other reviews.

240. In considering these explanations, the Panel agreed with the United States that an investigating authority is not required to determine price benchmarks on the basis of government prices, price information pertaining to unidentified entities, or information that is not shown to pertain to actual transactions.[270] However, upon reviewing the price chart specifically, the Panel was not persuaded that the chart submitted by the GOI and Tata should be treated any differently than the price chart that Commerce actually used in establishing a Tier II benchmark, as both were labeled "prices of iron ore." Based on its review of the chart submitted by the GOI and Tata, the Panel presumed that the title referred to "actual transaction data."[271]

241. With respect to the price quote, the Panel considered that Commerce was entitled to reject it on the basis that it did not specify the exact percentage of iron ore content but only indicated whether it was low grade or high grade.[272] The Panel considered:

> Although the designation of low or high grade would have indicated whether the iron content was above or below 64%, the precise percentage of iron content is important in determining prices, because iron ore is priced per unit of iron content, and the USDOC made adjustments to reflect this. It would not have been appropriate for the USDOC to determine price benchmarks based on information that did not reflect the precise iron content of the iron ore involved.

242. The Panel further considered that Commerce was not required to use the price quote as a Tier I benchmark to assess NMDC's sales to other purchasers as the quote was confidential and susceptible to disclosure through reverse calculation. Moreover, the Panel considered that India did not deny that Tata had requested confidential treatment.[273] India appeals four discrete aspects of these considerations. Each of India's claims is without merit.

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[266] U.S. First Written Submission, paras. 441-442.
[267] U.S. First Written Submission, para. 442.
[268] U.S. First Written Submission, para. 440.
[269] U.S. First Written Submission, para. 443.
[270] Panel Report, paras. 7.160 - 7.162.
[271] Panel Report, para. 7.162.
[272] Panel Report, para. 7.163.
[273] Panel Report, para. 7.165.

a) The Panel's Considerations in Respect of Certain Domestic Price Information Were Correct

i. The Panel Correctly Found that the Use of Government Prices is Not Required under Article 14(d) of the SCM Agreement

243. First, India argues that the Panel erred under Article 14(d) in considering that an investigating authority is not required to determine price benchmarks on the basis of price information pertaining to unidentified entities. India considers that the Panel's view to this extent is based on the Panel's earlier finding in respect of India's "as such" claims regarding the mandatory use of government prices in benchmarks under Article 14(d).[274]

244. India argues that, for the same reasons it discussed in its submissions in respect of the Panel's findings in Section 7.2.4.2 of its report, the Panel erred in finding that government prices could be presumptively rejected.[275]

245. In this respect the United States similarly refers to our submissions in Section III.A, above, addressing the Panel's finding that Article 14(d) does not require that an investigating authority use government prices as benchmarks. There, the Panel correctly found that comparing government prices to government prices is circular and uninformative because it does not indicate whether a government price is at or below the prevailing market conditions in the country of provision.[276] Moreover, the United States further recalls that the Appellate Body in *US – Softwood Lumber IV* found that private prices are the primary benchmark.[277] There is no requirement under Article 14(d) that an investigating authority use government prices as the basis for calculating a benchmark; equally there is no requirement under the Article 14(d) guidelines that an investigating authority rely on pricing information that fails to identify whether the entities concerned are private or government suppliers.

ii. India Raises New Claims That Were Not Before the Panel and These Claims Should Be Rejected by the Appellate Body

246. Second, India argues that the Panel was incorrect to consider that Commerce was entitled to reject Tata's price quote because it did not specify the exact percentage of iron ore content but only indicated whether it was low grade or high grade.[278] Recalling that the content was only recorded in the chart as above or below 64%, India argues that the Panel's finding in respect of the usability of the price quote is inconsistent with Articles 14(d), 12.1, 12.4, and 12.7 of the SCM Agreement. In India's view, the Panel should have considered that even without the precise iron content:

> by harmoniously construing Article 14(d) with Article 12.7 of the SCM Agreement, the United States could have still used the same benchmarks,

[274] India Appellant Submission, paras. 424-245.
[275] India Appellant Submission, para. 425.
[276] Panel Report, para. 7.39.
[277] *US – Softwood Lumber IV (AB)*, para. 90.
[278] India Appellant Submission, para. 426.

> determining the exact iron ore content based on 'facts available'. India submits that a situation such as this is a classic example of why Article 12.7 of the SCM Agreement was created in the first place."[279]

247. First, the United States notes that India did not claim that a failure to consider Tata's price quote was inconsistent with Articles 12.1, 12.4, and 12.7 of the SCM Agreement before the Panel. In its panel request, for example, India only refers to Article 14(d) in connection with the availability of in-country benchmark information.[280] On appeal, India now argues that the Panel erred in not considering claims that were not before it. As India did not raise these claims before the Panel, there are no findings in respect of Articles 12.1, 12.4, and 12.7 for the Appellate Body to uphold, reverse, or modify. On this basis the United States submits that the Appellate Body should reject India's appeal.[281]

248. With respect to India's claim under Article 14(d), as the United States argued before the Panel and the Panel considered, "the precise percentage of iron ore content is important in determining prices, because iron ore is priced per unit of iron content, and [Commerce] made adjustments to reflect this."[282] Using prices without taking the percentage iron ore content into consideration would unnecessarily distort the benefit calculation, particularly when the record contains other private market prices which do specify a precise content. The United States respectfully requests that the Appellate Body reject India's appeal for these reasons.

iii. The Panel Did Not Place an Unreasonable Burden on Indian Companies

249. Third, India appeals the Panel's consideration that an investigating authority is not required to determine price benchmarks on the basis of information that is not shown to pertain to actual transactions.[283] India argues that, in the Indian steel market, all actual sale price data is proprietary and parties do not have access to each other's BCI data.[284] Therefore, India concludes where an interested steel company purchases all of its iron ore from NMDC, the Panel's interpretation places an unreasonable burden on that company as it has no access to other prices and, moreover, is an unreasonable interpretation of Article 14 of the SCM Agreement.[285]

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[279] India Appellant Submission, para. 426.
[280] India Request for Establishment of a Panel, Section B(a)(vi)(5).
[281] *See*, *Korea – Dairy* (AB), para. 139 (concerning new claims, the Appellate Body found: "[W]e agree with Korea that a party to a dispute settlement proceeding may not introduce a new claim during or after the rebuttal stage. Indeed, any claim that is not asserted in the request for the establishment of a panel may not be submitted at any time after submission and acceptance of that request. By 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a claim of violation must, as we have already noted, be distinguished from the arguments adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties").
[282] Panel Report, para. 7.163.
[283] India Appellant Submission, paras. 430-432.
[284] India Appellate Submission, para. 430.
[285] India Appellate Submission, paras. 430-432.

The United States submits that India's claims are without merit as the Appellate Body has found that private prices are the primary benchmark.[286]

250. The United States further submits that Commerce can and did use the few private BCI prices in the determinations at issue, including the Brazilian import price, at which steel companies in India purchased iron ore, in respect of those companies under review. Steel companies in the Indian economy who purchased iron ore from any private supplier would have access to such BCI prices. Where such price lists of actual transactions are not available, the United States further submits that Indian exporters are not at the "mercy of the administering authority."[287] Nor is the administering authority at the "mercy" of the exporter. The existence of actual sales means that the administering authority must look at actual transaction data if available pursuant to Article 14(d). Accordingly, the Appellate Body should reject this "unreasonable" claim.

iv. The Panel Correctly Considered That Tata's Price Quote Was Not a Relevant Tier I Price Benchmark

251. Fourth, India argues that the Panel erred under Articles 12.1, 12.4, and 14 of the SCM Agreement in considering that Tata's BCI price quote could not be used as a benchmark for the iron ore that Tata extracted under its GOI mining leases.[288] India's claims have no merit.

252. First, the United States observes, as it did above, that India did not raise any claims under Article 12.1 and 12.4 in respect of the domestic pricing information before the Panel. For this reason, the Appellate Body should reject India's claim.

253. Second, India's claim has no factual basis. The price quote submitted by Tata could not be used as a benchmark for iron ore with respect to Tata because it did not indicate the percentage iron content.[289] Indeed, it is for these reasons that the Panel stated:

> Regarding the price quote submitted by Tata, we consider that the USDOC was entitled to reject that quote on the basis that it did not specify the exact percentage of iron ore content, but rather only indicated whether it was low grade.[290]

254. India has not contested the Panel's factual finding that the quote did not specify the ore content. On that basis, the Panel was correct that it could not be used as a benchmark price for ore, the relevant attribute of the good for purchases by steel makers. Moreover, the United States submits that Commerce could not use the price quote as a Tier I benchmark it because was a price quote and not an actual transaction price.

255. With respect to India's claims regarding confidentiality, the United States further notes that Tata only submitted the BCI price in the context of the 2006 review. As Tata did not submit the price quote in the 2008 review or Sunset review, it would in any case not have been relevant for any later determination.

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[286] *US – Softwood Lumber IV (AB)*, para. 90.
[287] India Appellate Submission, para. 430.
[288] India Appellate Submission, paras. 433-435.
[289] Panel Report, para. 7.163.
[290] Panel Report, para. 7.163.

256. For these reasons, the United States respectfully requests that the Appellate Body reject India's claim related to the Tier-I BCI price quote under Articles 14, 12.1 and 12.4 of the SCM Agreement.

b) The Appellate Body Should Not Complete the Analysis as the Panel Correctly Interpreted Article 14 of the SCM Agreement and Article 12 of the SCM Agreement Was Not Before It

257. In addition to India's appeal under Article 11 of the DSU and India's conditional appeals in respect of four discrete issues under Articles 12 and 14 of the SCM Agreement, the United States submits that the Appellate Body should reject India's request to complete the analysis as the Panel correctly considered the four issues in the preceding section.[291]

258. Moreover, with respect to the 24 claims identified in India's Notice of Appeal pertaining to the Panel's findings in Section 7.3.3.3.1.2, the United States considers those claims which India has not discussed in its Appellant Submission to be abandoned. The United States request that the Appellate Body decline to rule on such claims.

B. The Panel Correctly Found That Commerce's Explanation Was "Clear and Intelligible" In Accordance With the *Chapeau* of Article 14

259. India appeals the Panel's finding that Commerce did not act inconsistently with the *chapeau* of Article 14 in excluding NMDC's export prices to Japan its 2006, 2007, and 2008 administrative review, even though they had been included in the world benchmark price in the 2004 review. The United States submits that the Panel did not err in finding that Commerce's explanation "was clear and intelligible, and is easily understood and discerned" and therefore, not contrary to the *chapeau* of Article 14.[292] The United States urges the Appellate Body to reject India's appeal under Article 11, which has no basis and also India's request for completion of the analysis, as the Panel objectively considered the matter before it.

260. The *chapeau* of Article 14 provides in relevant part:

> For the purposes of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the member concerned and its application to each particular case shall be transparent and adequately explained.[293]

261. In considering whether Commerce should have taken NMDC's export price into account when determining the Tier II benchmark prices for the 2006, 2007, and 2008 reviews, the Panel recalled its earlier finding that Article 14(d) does not require an investigating authority to rely on a government's domestic prices when determining a benchmark.[294] The Panel considered that

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[291] The United States submits, however, that the Panel erred in considering that the price chart contained actual prices. As the United States submitted to the Panel, the prices in the chart are quotes and not evidence of actual prices.
[292] Panel Report, para. 7.192.
[293] Article 14 of the SCM Agreement.
[294] Panel Report, para. 7.189.

the same risks arise in respect of a government's export prices and, on this basis, rejected India's Article 14(d) claim that Commerce was required to accept NMDC's export price in establishing a benchmark.[295]

262. With respect to India's claim that Commerce's exclusion of NMDC's export price violated the *chapeau* of Article 14, the Panel considered that:

> The requirement in the chapeau of Article 14 that the application of a benefit methodology be "transparent" conveys the sense that such application should be set out in such a fashion that it can be easily understood or discerned. The obligation to "adequately explain[]" conveys the sense of making clear or intelligible, and giving details of how the methodology was applied. We agree with the United States that the adequacy of an investigating authority's explanation should be assessed on a case-by-case basis.[296]

263. Moreover, the Panel found that in Commerce's 2006 Issues and Decision Memorandum, Commerce explained that it had revised the benchmark used in its preliminary determination by excluding the NMDC prices that had been reported in the Tex Report and, further, that it did so because the NMDC prices pertain to "the very government provider at issue."[297] The Panel found that this explanation for the changed approach was "clear and intelligible, and is easily understood and discerned."[298] For these reasons, the Panel correctly rejected India's claim that Commerce's explanation was inconsistent with the *chapeau* of Article 14 of the SCM Agreement.

1. The Panel Correctly Considered Whether Commerce "Adequately Explained" Its Findings and Did Not Violate Article 11 of the DSU

264. India challenges these finding under Article 11 of the DSU on the basis that the Panel did not define the term "adequately explained" in considering whether Commerce adequately explained its rejection of NMDC's export price, or describe how a "case-by-case" assessment of the adequacy of an explanation should be assessed.[299] The United States submits that India's claim is without merit because the Panel in fact did express its view of what the obligation to "adequately explain" is under the *chapeau*. The Panel found that "[t]he obligation to "adequately explain[]" ***conveys the sense of making clear or intelligible***, and giving details of how the methodology was applied."[300] The United States further notes that the Panel considered the definition of the word "explain" specifically in footnote 374, in which the Panel observed:

> According to the Fifth Edition of the Shorter Oxford English Dictionary, the verb "explain" in relevant context means to "make clear or intelligible (a meaning, difficulty, etc.); … Give details of (a matter, *how*, etc.)" (emphasis original). The

[295] Panel Report, para. 7.189.
[296] Panel Report, para. 7.191.
[297] Panel Report, para 7.192 (Exhibit IND-33, p. 33 of 98).
[298] Panel Report, para. 7.192.
[299] India Appellant Submission, para. 463.
[300] Panel Report, para. 7.191.

> term "transparent", when used figuratively, means "easily seen through or understood; easily discerned; evident; obvious".[301]

265. It was on this basis that the Panel made a case-by-case assessment of the explanation provided by Commerce and found that it was "clear and intelligible, and is easily understood and discerned"[302] in accordance the *chapeau* of Article 14.

266. As with other claims by India under DSU Article 11, this claim is not well-founded. India is not alleging in substance a lack of objectivity by the Panel in its examination of the matter that calls into question the good faith of the Panel.[303] Rather, India appears to be arguing that the Panel failed to interpret, and therefore misinterpreted, the *chapeau* to Article 14. Such a substantive challenge should be brought directly under that Article; a DSU Article 11 claim should not be made merely as a subsidiary argument. To the extent India's challenge is understood as a claim for a failure to explain, a failure to set out the "basic rationale" underlying a finding may be brought under DSU Article 12.7, which India has not made in relation to this alleged error by the Panel.

267. But even on its own terms, India's assertion that the Panel did not define the term "adequately explained" fails because, in fact, the Panel did in both the body of its report ("conveys a sense of making clear") and in a footnote ("the verb 'explain' in relevant context means to 'make clear or intelligible") set out its understanding of the meaning of that term. India's claim therefore has no factual basis. For all of these reasons, the United States requests that the Appellate Body reject India's claim under Article 11 of the DSU.

2. The Panel Did Not Act Inconsistently with Article 11 of the DSU By Failing To Read Into The *Chapeau* of Article 14 Language That Is Not There

268. India alleges a second Article 11 breach in respect of the Panel's finding under the *chapeau* of Article 14, arguing that the Panel failed to explain in its findings "whether the United States *clearly and intelligibly*, in a manner that can be *easily understood and discerned, **adequately*** explained why the NMDC export prices are not 'world market prices'."[304] India further argues that the burden of adequate explanation was "heightened" because Commerce accepted NMDC's export prices in the 2004 administrative review.[305] On this basis, India argues that the Panel failed to assess India's claim "as per the actual requirements of the *chapeau*" and that the Panel ignored the text of the provision and process.[306] India's claim is without merit.

269. In its Issues and Decision Memorandum for the 2006 AR Commerce made the following finding:

> We note that we have revised the iron ore benchmark calculation that was used in the Preliminary Results for fines by excluding the Bailadila and Donimalai prices

[301] Panel Report, FN 374.
[302] Panel Report, para. 7.192.
[303] *EC – Hormones (AB)*, para. 133.
[304] India Appellant Submission, para. 466.
[305] India Appellant Submission, para. 466 (emphasis original).
[306] India Appellant Submission, para. 467.

> that were reported in the Tex Report. Because these prices pertain to iron ore from NMDC, the very government provider of the good at issue, we used only the Hamersly prices listed in the Tex Report for benchmark purposes to measure the adequacy of renumeration of Essar's purchases of iron ore fines from NMDC.[307]

The Panel reviewed this information and found that Commerce's explanations for the changed approach was "clear and intelligible, and is easily understood and discerned" and, therefore, consistent with Article 14(d)[308]

270. The United States does not understand the basis for India's Article 11 claim. The United States submits that it is not the Panel who ignored the text of the *chapeau* but rather India. India's appears to assert that because the Panel did not assess Commerce's explanation on the basis of whether it was "intelligibly" stated and "easily understood and discerned" – a standard not articulated in the text of the chapeau or by the Panel – the Panel has failed in its Article 11 obligations to evaluate the consistency of Commerce's determinations. India further argues that the Panel was required to hold the United States to a heightened standard, yet does not provide any textual support or other basis for this assertion. It appears that India simply disagrees with the standard articulated by the Panel and / or the Panel's ultimate conclusion. A complaint premised primarily on a party's disagreement with the Panel's reasoning and weighing of evidence does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU.[309] The United States respectfully requests that the Appellate Body reject India's baseless challenge under Article 11.

C. The Appellate Body Should Reject India's Request to Complete the Analysis as the Panel Correctly Interpreted the *Chapeau* of Article 14

271. As discussed above, neither of India's Article 11 challenges to the Panel's finding that Commerce's explanation for its exclusion of NMDC's export price to Japan was not inconsistent with the *chapeau* of Article 14 are merited. Therefore, the United States submits that the Appellate Body should reject India's request for completion of the analysis, as the Panel made an objective assessment of the matter before it and there is no further analysis to complete.

VI. THE PANEL DID NOT ERR IN FINDING THAT COMMERCE'S USE OF DELIVERED PRICES IN RESPECT OF ITS CALCULATION OF BENEFIT IN THE CHALLENGED DETERMINATIONS WAS NOT INCONSISTENT WITH ARTICLE 14(D) OF THE SCM AGREEMENT

272. In this section of the U.S. Appellee Submission, the United States will now address India's appeals with respect to the Panel's findings that Section 351.5111(a)(2)(iv)—the use of delivered prices under Commerce's benchmark regulation— as applied in the challenged determinations was not inconsistent with Article 14(d) of the SCM Agreement.[310] India appeals the Panel's findings in three respects, including one Article 11 challenge and two claims that the Panel erred in its interpretation of Article 14(d) in finding that the use of delivered prices in

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[307] 2006 AR Issues and Decision Memorandum, Comment 2, at p. 33 of 98 (IND-33).
[308] Panel Report, para. 7.192.
[309] *China – Rare Earths* (AB), para. 5.203.
[310] *See* India Appellant Submission, paras. 436-460.

connection with Commerce's determinations was not inconsistent with Article 14(d). As discussed below, India's claims are based on misrepresentation of record evidence and the same flawed arguments that India advanced in respect of its "as such" challenges to Commerce's benchmark regulation. India's claims are without merit and should be rejected.

273. The Panel correctly rejected of all India's arguments in respect of the use of delivered prices under Section 351.511(a)(2)(iv) in the context of the determinations at issue. First, the Panel considered whether Commerce's use in each of the determinations of benchmark prices set at delivered levels, despite the fact that prices set by the NMDC were at the *ex-mine* level, was inconsistent with Article 14(d). Because India's arguments were based entirely on its earlier "as such" claims, having already rejected India's "as such" arguments, above, the Panel rejected India's "as applied" challenges for the same reasons.[311]

274. The Panel further found that the Australian Tier II (out-of-country world prices) and Brazilian Tier I (imports) benchmark prices used by Commerce in its determinations (inclusive of delivery charges) reflected and related to the prevailing market conditions in India and thus, their use was not inconsistent with Article 14(d). In considering the use of Tier II world price benchmarks generally, the Panel reasoned:

> [W]e note that, upon verification, NMDC officials explained that "international prices … end up becoming the international benchmark prices for their own [that is, NMDC's] contract negotiations". Those officials also explained that "India must compete with Australia, Brazil and other countries so it must follow the Tex Report's prices to remain competitive". NMDC officials further stated that, "[i]n setting the price in the domestic market, … NMDC reviews the negotiated international price when determining *how much the purchaser would be willing to pay to import*". Since NMDC sets its domestic prices in light of competition from Australia and Brazil, and therefore in light of how much an Indian steel producer "would be willing to pay to import" iron ore from mines in those countries, we are not persuaded by India's assertion that Australian and Brazilian prices, adjusted for delivery to steel producers in India, do not relate to the prevailing market conditions in India. Since such prices indicate what an Indian steel producer would be "willing to pay", they necessarily relate to the prevailing market conditions in India.[312]

275. The Panel further considered that this record evidence established the relationship between the delivered Australian and Brazilian iron ore prices and the "prevailing market conditions" in India.[313]

276. Finally, the Panel considered and rejected India's challenge to Commerce's determinations on the basis that the use of delivered prices nullified India's alleged comparative advantage. The Panel said that it could resolve this issue on the basis of its finding above, regarding Commerce's use of Australian and Brazilian price benchmarks.[314] Recalling that a

[311] India Appellant Submission, para. 180.
[312] Panel Report, para. 7.182 (italics added).
[313] Panel Report, para. 7.183.
[314] Panel Report, para. 7.185.

price that reflects prevailing market conditions in accordance with Article 14(d) will also reflect any comparative advantage, the Panel concluded:

> In light of record evidence that Indian steel producers actually imported iron ore from overseas, and that NMDC set its domestic prices in light of import competition, there is no factual basis for the argument that India's comparative advantage was such that users of iron ore had no need to engage in import transactions. Accordingly, we reject India's argument that the price benchmarks applied by the USDOC nullified India's comparative advantage.[315]

277. India's three appeals of the Panel's findings, under Article 11 of the DSU and Article 14(d) of the SCM Agreement, are discussed below.

A. The Panel Properly Considered Statements of NMDC Officials In Accordance With Article 11 of the DSU

278. First, India argues that the Panel failed to make an objective assessment in accordance with Article 11 of the DSU by relying on certain statements of NMDC officials and not considering other evidence before it. In particular, India argues that the Panel has assumed that the NMDC officials' reference to "willing to pay to import" necessarily implies a reference to the final payment for the import inclusive of ocean freight, import duties, and other delivery charges. India challenges the Panel's use of this statement on four grounds.[316] The crux of India's argument, however, is that the Panel failed to attribute proper weight to record evidence. The United States submits that this is not the basis for a valid claim under Article 11 of the DSU.

279. The United States recalls that Article 11 challenges must be clearly articulated and substantiated with specific arguments, including an explanation of why the alleged error has a bearing on the objectivity of the panel's assessment. A complaint premised primarily on a party's disagreement with the Panel's reasoning and weighing of evidence, for example, does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU.[317] Moreover, the fact that a Panel does not refer to specific evidence presented by a party in its report also is not sufficient to establish a Panel's failure to undertake an objective assessment of that

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[315] Panel Report, para. 7.185.

[316] First, India argues that the Panel stepped into the shoes of Commerce because Commerce never relied on this information in its determination. India argues that this same "error" was committed in Part VI.B.2 of its submission and considers that its submissions there apply mutatis mutandis. Second, India takes issue with the Panel's specific choice of evidence and argues that the evidence on record cuts the other way. According to India, "the statement by NMDC that it took into account what steel producers were willing to pay to import, *could have been* a reference not to the delivered import prices, but rather the ex mines or the FOB prices of imported iron ore" (italics added). Third, India asserts that the Panel's conclusions that domestic producers set their prices in light of foreign prices at the delivered level is "absolutely illogical" and would only make senses if NMDC was a monopolist. In support of this assertion, India quotes an excerpt from Exhibit USA-114 and argues that there is "clear evidence on record" that the number of import transactions were few and that NMDC was not catering to the entire market. In India's view, the fact that NMDC compete with other domestic entities means that the Panel erred in finding that NMDC's price was "solely regulated" by delivered prices of iron ore. Finally, India argues that NMDC's domestic prices were higher than the NMDC's export prices to Japan on an ex mines or FOB level and thus, NMDC's statement that it considered what steel producers "were willing to pay" must not be a reference to delivered import prices.

[317] *China – Rare Earths* (AB), para. 5.203.

evidence.[318] Very likely, such omissions indicate that the Panel did not consider it relevant to the specific issue before it, or did not attribute to it the weight or significance that a party considers it should have.[319] Where evidence that a party considers to be relevant is not addressed in a panel's report, the Appellate Body has said that an appellant must explain why such evidence is so material to its case that the panel's failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment.[320]

1. The Record Evidence Supports the Panel's Finding that NMDC Sets Prices In Accordance With What Domestic Purchasers Are "Willing to Pay to Import"

280. The United States submits that India has failed to explain what bearing competing evidence offered by India would have on the objectivity of the Panel's factual assessment in accordance with Article 11. India, for example, takes the position that the Panel has made an unreasonable assumption that the statement by NMDCs officials statement relates to delivered prices by foreign exporters and that the Panel has inappropriately focused on a single piece of evidence to conclude that delivered prices reflect prevailing market conditions in India.[321]

281. India argues that other evidence on the record suggests that NMDC official must have been referring to ex works prices and not delivered prices. Yet, India cannot point to a single piece of evidence that would demonstrate that the Panel erred. The best that India can do is suggest that, in light of competing evidence, the statement by the NMDC official "*could have been* a reference not to the delivered import prices, but rather the *ex-mines* or the FOB prices of imported iron ore."[322] That the Panel drew a different inference is not an Article 11 error.

282. India further argues that the most that could be inferred from the NMDC description of its pricing methodology is that the NMDC prices were F.O.B. and ex mine and that the NMDC export price was "indirectly comparable to the Australian price."[323] These facts do not advance India's argument. There is no dispute that the NMDC prices are reflected as F.O.B. and ex mine. However, that does not overcome the fact that, as India states in its Appellant Submission and the United States explained, above, that "[a]s a matter of common sense, every single market participant, including NMDC and iron purchasers, would obviously be aware of" the delivery costs associated with the delivery of iron ore when setting prices.[324] Therefore, even though the NMDC prices are expressed in F.O.B. and ex mine terms, as a general matter, the United States

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[318] *China – Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), paras. 441-442; *Brazil – Retreaded Tyres* (AB), para. 202.
[319] *China – Rare Earths* (AB), para. 5.221.
[320] *China – Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), para. 442.
[321] India Appellate Submission, paras. 442-448. The United States further notes that the Panel did not make its findings exclusively on the basis of a statement by the NMDC official, as India appears to believe. The Panel found separately, for example, that the import of iron ore from Brazil by an Indian mill reflected the prevailing market conditions in India.
[322] India Appellant Submission, para. 444.
[323] India Appellant Submission, para. 44.
[324] India Appellate Submission, para. 445.

submits that it is even more logical that these prices are set with all the delivery charges in mind – that is, the ultimate cost to the purchaser.

283. As a final note in respect of India's assertions with respect to record evidence, the United States cautions that the evidence actually cited by India is misleading. For example, India asserts that NMDC was not a "monopolist" in the Indian market, an assertion which it bases on production figures and the price chart discussed above.[325] India claims that this evidence "highlights that the NMDC competes with local players as well and that therefore, its pricing policy had to account for the prices charged by other domestic suppliers."[326] Yet, there is virtually no evidence of any such domestic competition in the record. Throughout all of the reviews in which the Indian steel producers participated—with one exception—the record shows that Tata, Essar, and Ispat either purchased all of their ore from the NMDC or obtained their ore under government mining leases from their captive mines.[327] The purchasing behavior of the companies, as reflected in the record, cuts against India's argument.

284. The Appellate Body has found that a panel may not "make affirmative findings that lack a basis in the evidence contained in the panel record" but that, within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."[328] The United States submits that the Panel was well within its discretion to rely on evidence by NMDC officials. While India may disagree with the Panel's weighing of the facts on record, this does not amount to an Article 11 breach.

2. The Panel Did Not Step into Commerce's Shoes

285. The United States notes India's argument that the Panel improperly stepped into the shoes of the investigating authority in considering the statement by NMDC officials. Indeed, India appears to be arguing that for disputes concerning trade remedies, the Panel is not permitted to consider any evidence presented by the responding party unless it is quoted in the determinations themselves. India misunderstands the role of the Panel.

286. Previous Appellate Body reports have explained that "the standard of review applicable to a panel reviewing a countervailing duty determination precludes a panel from engaging in a *de novo* review of the facts of the case 'or substitut[ing] its judgment for that of the competent authorities'." However, such concerns are not present here.[329] When Commerce compared the price at which NMDC provided iron ore to a benchmark, Commerce ensured that the comparison was made to reflect conditions in the Indian market, by including the cost of delivery, as set out in Article 14(d).

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[325] India Appellate Submission, para. 445.
[326] India Appellate Submission, para. 446.
[327] *2006 Issues and Decision Memorandum*, at Section I.A.4(Exhibit IND-33). The one exception was in the 2006 AR where ISPAT made a single domestic purchase of DR-CLO lumps which Commerce used as the as a Tier I benchmark for ISPAT's purchased of DR-CLO from NMDC.
[328] *EC – Hormones (AB)*, para. 135; *China – Rare Earths* (AB), para. 5.178.
[329] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 379; quoting *US – Steel Safeguards (AB)*, para. 299 (referring to *Argentina – Footwear (EC) (AB)*, para. 121).

287. India argued to the Panel that such delivered prices do not reflect prevailing market conditions in India, but the Panel found that India had not made out the basis of its assertion. The statement by the NMDC officials cited by the Panel was part of the 2004 GOI Verification Report, which was part of the record before both Commerce and the Panel.[330] This record evidence supported the approach of Commerce in the determinations to use delivered prices, which were (as the officials of the entity providing the goods confirmed) indicative of prevailing market conditions. There was no error in the Panel's citing to this evidence to find that India's assertion was, as a factual matter, not supported.

288. As India has not shown that the Panel's failure to evaluate certain evidence is material to the dispute or how such failure had a bearing on the Panel's objectivity, or that the Panel applied an erroneous standard of review, the United States respectfully requests that the Appellate Body reject India's claim that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU.

B. The Panel Correctly Found That Commerce's Use of Delivered Prices in the Subject Determinations Was Not Inconsistent With Article 14(d) of the SCM Agreement

289. Second, India appeals the Panel's findings on the basis that the Panel incorrectly interpreted Article 14(d) to the extent that the Panel did not find that Commerce was required to engage in a comprehensive qualitative and quantitative analysis "covering all aspects of supply and demand."[331] India argues that the Panel inappropriately relied on an "isolated transaction" from Brazil to an Indian importer, and a statement from NMDC that it prices its iron ore based on what steel producers are willing to pay to import, to conclude that Commerce did not err in presuming that delivered prices are the "prevailing market conditions" in India. In India's view, this information was not enough for the Panel to conclude that all suppliers of iron ore in India's market behave the same way.[332] India's appeal, which is based on the same arguments it advanced in respect of its "as such" claims, is without merit and should be rejected.

290. In this regard, the United States notes that India's arguments are based on an incorrect reading of Article 14(d) and the Appellate Body's report in *Softwood Lumber IV*. Article 14(d) does not, as India argues, require an investigating authority to engage in a comprehensive qualitative and quantitative analysis covering all aspects of a country's supply and demand in order to make a determination of benefit. Rather, Article 14(d) requires that an investigating authority assess the adequacy of remuneration, from the perspective of the recipient, in relation to prevailing market condition.

291. The United States has already addressed these arguments extensively in response to India's "as such" claims, in Section III.A, of the U.S. Appellee Submission. For all these reasons, the United States respectfully requests that the Appellate Body reject India's claim.

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[330] 2004 GOI Verification Report, pp. 6 and 7 (Exhibit USA-114).
[331] India Appellant Submission, para. 450.
[332] India Appellant Submission, paras. 449-454.

C. The Panel Correctly Rejected India's Claim of An Alleged "Comparative Advantage"

292. Third, India appeals the Panel's finding that Commerce's determinations are not "as applied" inconsistent with Article 14(d) to the extent that Commerce did not make additional adjustments for India's alleged comparative advantage. The crux of India's argument in respect of comparative advantage is that Commerce and the Panel did not engage in the appropriate "comprehensive" analysis under Article 14(d).[333] As the Panel found, Article 14(d) simply does not require an investigating authority to undertake an additional "comprehensive" analysis in calculating a benchmark consistent with Article 14(d). The United States respectfully requests that the Appellate Body reject India's appeal for the reasons expressed above, in response to India's "as such" challenge in Section IV.B of the U.S. Appellee Submission.

293. The United States further notes that India makes several factually inaccurate assertions regarding the nature of the Indian market for iron ore in respect of its "as applied" claim. For example, India asserts that Exhibit USA-114 demonstrates that the India's ports are so shallow that iron ore cannot be imported.[334] This evidence is in direct contradiction with other record evidence of actual imports of iron ore from Brazil as well as record evidence that NMDC exports 30 percent of its iron ore to Japan, China, and Korea. One would think that if a market has the physical capabilities to *export*, it similarly has the facilities to *import*.

294. As the United States argued before the Panel, one of the many deficiencies in India's submissions is that it never offered any evidence of an alleged comparative advantage in respect of iron ore. Before the Panel, India noted only that it has "certain raw materials" and the ability to extract and use those materials, which India seemed to regard as its comparative advantage.[335] Yet, India never explained why or how the possession of such raw materials provided India a comparative advantage over, for instance, Australia, a Member with the same materials and the ability to extract and use (including export) them. In fact, the *Dang Report* demonstrates that Australia has more iron ore reserves and exports more iron ore than India.[336] To the extent that record information exists that would be relevant to an adjustment on the basis of comparative advantage, it does not appear that such an adjustment would be in India's favor.

295. The United States further understands India's arguments concerning "comparative advantage" to relate to adjustments to the benchmark to reflect specific factors that may result in a country having a comparative advantage rather than arguing that Members have an obligation to calculate the amount of subsidy with respect to "comparative advantage" itself. The United States provided extensive submissions on the meaning of term "comparative advantage" before the Panel, which explain how India has misunderstood the economic concept in its submissions. The United States has referred to these arguments in Section IV.B of the U.S. Appellee Submission.

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[333] India Appellate Submission, para. 457.
[334] India Appellate Submission, para. 457.
[335] India First Written Submission, para. 305.
[336] *Dang Report,* at 37-38, 39 and 41-43 (attached to *2006 New Subsidies Allegation (JSW)),* at Exhibit 31 (Exhibit USA-50).

296. For these reasons, the United States submits that the Panel correctly found that Commerce's use of delivered prices was not inconsistent with Article 14 of the SCM Agreement and Article 11 of the DSU. The United States respectfully requests that the Appellate Body reject each of India's appeals.

D. The Panel Correctly Rejected India's Claims Regarding the Use of Delivered Prices for the Benchmark Calculations in Respect of Captive Mining of Iron Ore

297. The United States notes that Commerce applied the same benchmark in respect of its determinations for both NMDC's provision or iron ore and the GOI's provision of mining rights for iron ore. India also challenges the use of delivered prices "as applied" in respect of the captive mining program for iron ore, the United States respectfully requests the Appellate Body to reject those claims for the reasons discussed above.

VII. THE PANEL CORRECTLY FOUND THAT THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH ARTICLES 2.1(c) AND 2.4 OF THE SCM AGREEMENT IN DETERMINING THAT NMDC'S PROVISION OF HIGH GRADE IRON ORE WAS SPECIFIC

298. In the 2004, 2006, 2007, and 2008 administrative reviews, Commerce found that the GOI's provision of iron ore was *de facto* specific to the Indian steel industry because only a limited number of enterprises use iron ore.[337] Positive evidence supporting Commerce's determination that the iron ore program was used by a limited number of certain enterprises was a list of 43 NMDC customers identified on the NMDC website, most of which were iron and steel companies.[338] In addition, the Report of the "Expert Group" On Preferential Grant of Mining Leases For Iron Ore, Manganese Ore and Chrome Ore (*"Dang Report"*), demonstrated that iron ore is used for making steel, pig iron, and sponge iron.[339] The report identified the end use of all of India's domestic consumption for iron ore for 2003, showing that the entirety of Indian domestic consumption of iron ore was accounted for by steel producers and pig and sponge iron producers.[340] The overwhelming majority, approximately 76 percent, was used by steel producers.[341]

299. Commerce therefore determined that the steel industry and the pig and sponge iron industries constituted a limited number of certain enterprises and that the provision of iron ore was specific within the meaning of Article 2.1(c) of the SCM Agreement.

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[337] *2004 Preliminary Results*, 71 Fed. Reg. at 1516 (Exhibit IND-17); *2006 Preliminary Results*, 73 Fed. Reg. at 1587 (Exhibit IND-32); *2006 Issues and Decisions Memorandum*, Analysis of Programs, 1. Programs Determined to Be Countervailable, A. GOI Programs, 4. Sale of High Grade Iron Ore for Less Than Adequate Remuneration (Exhibit U.S.-30); *2007 Preliminary Results*, 73 Fed.Reg. at 79797 (Exhibit IND-37); *2007 Final Issues and Decision Memorandum*, IV. Analysis of Programs, A. Programs Administered By the Government of India, 3. Sales of High Grade Iron Ore for LTAR (Exhibit IND-39); *2008 Preliminary Results*, 75 Fed. Reg. at 1503 (Exhibit IND-40); *2008 Final Issues and Decision Memorandum*, II. Analysis of Programs, A. Programs Administered by the Government of India, 12. Sale of High Grade Iron Ore for Less Than Adequate Remuneration (Exhibit IND-41).

[338] *2004 New Subsidies Allegation*, p. 4, Exhibit 7 (May 2, 2005) (Exhibit USA-69).

[339] *Dang Report,* p. 48 (attached to *2006 New Subsidies Allegation (JSW)),* at Exhibit 31 (Exhibit US-50).

[340] *Dang Report,* p. 48 (attached to *2006 New Subsidies Allegation (JSW)),* at Exhibit 31 (Exhibit USA-50).

[341] *Dang Report,* p. 48 (attached to *2006 New Subsidies Allegation (JSW)),* at Exhibit 31 (Exhibit USA-50).

300. Before the Panel, India challenged "as applied" Commerce's specificity determination in respect of the sale of high grade iron ore by NMDC under both Articles 2.1(c) and 2.4 of the SCM Agreement. India advanced four arguments under Article 2.1(c) regarding the proper legal interpretation of that provision where a subsidy program is used by a limited number of certain enterprises. India's central argument is that, under Article 2.1(c), an investigating authority is not permitted to make a determination of *de facto* specificity without first identifying a comparative set of both "users" and "beneficiaries" of a subsidy program. India argued that the term "use of a subsidy programme by a limited number of certain enterprises" under Article 2.1(c) requires an investigating authority to determine that the number of users of a subsidy program is limited as compared to the universe of potential "like" (or "similarly situated") beneficiaries.[342]

301. The Panel rejected this argument, finding that it was at odds with the plain language of Article 2 of the SCM Agreement. As three of India's claims under Article 2.1(c) were premised on India's comparative subset argument, the Panel rejected these three claims and found that Commerce's determination of *de facto* specificity in respect of the provision of high grade iron ore was not inconsistent with Article 2.1(c) of the SCM Agreement. The Panel also rejected India's claim under Article 2.4 of the SCM Agreement, finding that it lacked a factual basis. Nevertheless, the Panel upheld India's final claim under Article 2.1(c) and found that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take account of the two mandatory factors—economic diversification and length of time of operation of the subsidy program—in its determination of *de facto* specificity.[343] The United States does not appeal this finding.

302. India, on the other hand, appeals essentially everything. Specifically, in its Notice of Appeal India alleges three claims of error in relation to the Panel's legal interpretation of Article 2.1(c), two claims that the Panel failed to make an objective assessment of India's arguments pursuant to Article 11 of the DSU, and one claim that the Panel erred in rejecting India's challenge under Article 2.4.[344] India further requests that the Appellate Body complete the analysis with respect to Commerce's determination regarding the provision of high grade iron ore by NMDC.

303. For the reasons discussed below, India's claims are without merit. The United States respectfully requests that the Appellate Body reject all of India's appeals related to Articles 1.2, 2.1, and 2.4 of the SCM Agreement, as well as both of India's Article 11 claims under the DSU.[345]

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[342] The United States refers to this argument as India's "comparative subset" argument throughout this submission.
[343] India Notice of Appeal, para. 21.
[344] India Notice of Appeal, para. 21.
[345] The United States notes that contrary to what India asserts in its Notice of Appeal and Appellant Submission, India did not raise an Article 1.2 claim in its original panel request, and the Panel did not make any findings with respect to Article 1.2 of the SCM Agreement. This claim, therefore, is outside the terms of reference of this dispute, and India's claim should be rejected on this basis.

A. The Panel Correctly Interpreted Article 2.1(c) as Not Requiring an Examination of Whether a Subsidy *De Facto* Discriminates Between "Certain Enterprises" and Other Similarly Situated Enterprises

304. The Panel correctly rejected India's argument that in order to make a finding of *de facto* specificity under Article 2.1, an investigating authority must establish that the program in question discriminates between certain enterprises and other "similarly situated" enterprises. Before the Panel, India argued that the principles set forth in Articles 2.1(a) and (b) as well as the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* "concern whether the conduct or instruments of the granting authority discriminate or not."[346] Focused on this alleged principle of discrimination, India argued that because discrimination was, in its view, central to the specificity analysis under both Articles 2.1(a) and (b), under all three subparts of Article 2.1, an investigating authority is required to identify both the subset of entities that received the subsidy and the set other "like" entities that were eligible for but did not receive the subsidy as a result of government intervention.[347]

305. The Panel rejected each of these contentions, beginning with India's characterization of Articles 2.1(a) and 2.1(c) as concerned with the principle of discrimination:

> Article 2.1(a) concerns limitations on access to subsidies that exist in law. Article 2.1(c) concerns limitations on access that are not expressly provided for in legal instruments, but whose existence may nevertheless be determined by reference to the facts. In both cases, what matters is the existence of a restriction on access to a subsidy, in the sense that a subsidy is available to certain enterprises, industries, or groups of enterprises or industries, but not to others. The entities with access to the subsidy are referred to in the chapeau to Article 2.1 as "certain enterprises". Once access to the subsidy is shown to be limited to those "certain enterprises" (either *de jure* or *de facto*), the subsidy is specific. There is no requirement to show that the subsidy is at the same time *not* available to other, *undefined* – but similarly situated – entities. Article 2.1 simply makes no provision for such requirement. The focus of Article 2.1 is on the "certain enterprises", and their limited access to the subsidy. Article 2.1 is not concerned with other enterprises, and whether or not such other enterprises have been discriminated against.[348]

306. The Panel went on to find that "Article 2 contains no reference to the notion of 'discrimination'".[349] With respect to India's argument that an investigating authority must identify all possible beneficiaries or "other enterprises", the Panel observed that limiting access to certain enterprises will necessarily prevent other enterprises from receiving that subsidy. In the Panel's view, there is no separate requirement under Article 2.1 that an investigating

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[346] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.
[347] India Notice of Appeal, para. 21.
[348] Panel Report, para. 7.121.
[349] Panel Report, para. 7.124.

authority first identify which enterprises were eligible for but denied a subsidy because this exclusion "goes without saying."[350]

307. To make its point clear with respect to the provision of iron ore by NMDC, the Panel found that:

> Article 2.1 is not concerned with whether the excluded entities are aluminium producers, refrigerator producers or farmers. Nor is Article 2.1 concerned with whether the excluded entities are like, or similarly situated, to the steel producers who do have access.[351]

308. Rather, the Panel agreed with the United States, that the relevant comparison for purposes of specificity is between the subsidized entity and a Member's economy:

> Although India states that "a finding of specificity cannot arise simply because a subsidy is made available to certain enterprises rather than the entire economy", this is precisely what the text of Article 2.1 provides. Let us recall in this regard that Article 2.1(a) applies when a legal instrument "explicitly limits access to a subsidy to certain enterprises". Thus, once the subsidy is made available to certain enterprises only, the text of Article 2.1(a) requires that such a subsidy shall be found to be specific. There is no requirement in Article 2.1(a) to conduct any further analysis regarding the nature of the entities to which the subsidy is not made available. As explained above, the same applies in respect of specificity established pursuant to Article 2.1(c).[352]

309. The Panel further rejected India's reliance on the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, noting that it was not persuaded that the Appellate Body's "solitary use of the term 'discriminate' suggests that Article 2.1 should be interpreted in the manner suggested by India."[353] In the Panel's view, there was nothing in the Appellate Body's report to suggest that an investigating authority need identify other similarly situated entities.[354] The Panel concluded that India's approach to specificity was "clearly at odds with the plain language of Article 2.1."[355]

310. India appeals the Panel's rejection of India's comparative subset argument on three grounds: First, India argues that the Panel's findings are self-contradictory to the extent that the Panel makes a comparison in the abstract but does not view the identity of "other" enterprises as relevant. India submits that any comparison requires like to be compared with like and that analogously, "other" entities must be "like" those enterprises receiving the subsidy in order for the comparison to be meaningful.[356]

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[350] Panel Report, para. 7.122.
[351] Panel Report, para. 7.122.
[352] Panel Report, para. 7.124.
[353] Panel Report, para. 7.124.
[354] Panel Report, para. 7.124.
[355] Panel Report, para. 7.125.
[356] India Appellant Submission, paras. 353-354.

311. Second, India argues that the Panel ignored the Appellate Body's report in *US – Large Civil Aircraft (2nd Complaint)*. India contends that the Appellate Body's findings support India's "comparative approach" to the specificity analysis, one that requires an examination of factors that would explain or justify why only a few entities *de facto* benefited from a subsidy. India further argues that in *US – Large Civil Aircraft (2nd Complaint)*, the respondent (the United States) could have negated a finding of *de facto* specificity had it only shown that the benefiting entities were not similarly situated or "like" the other entities who did not benefit. According to India "this approach cannot be anything but an analysis of whether there is *de facto* discrimination or not."[357]

312. Third, India argues that the Panel erred in its application of Article 2.1(c) by not finding that Commerce failed to demonstrate that the sale of iron ore was limited to only a few entities but not "others" who were similarly situated from an eligibility perspective but were not provided iron ore.[358] India requests that the Appellate Body complete the analysis.[359] India's claims, which are based on a flawed reading of Article 2 and the findings of the Appellate Body, are without merit and should be rejected.

313. Fundamentally, India fails to appreciate that, to the extent that there is a comparison in the specificity analysis under Article 2.1(c), it is between "certain enterprises" receiving the subsidy and the rest of the subsidizing Member's economy. This principle is widely recognized in prior panel and Appellate Body reports. In *US – Antidumping and Countervailing Duties (China)*, for example, in a passage quoted by India in paragraph 363 of its own appellant submission, the Appellate Body explained:

> the specificity provisions establish that the subsidies deemed under the Agreement to be potentially trade distortive are those that are targeted in some way to a particular beneficiaries, ***rather than being broadly available throughout the economy of a Member***.[360]

314. The point of comparison is clear. 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.[361] Indeed, the United States takes note of footnote 304 of the Panel's report where the Panel observed "even India acknowledges that specificity is determined in relation to 'certain enterprises', rather than some sub-category thereof."[362] It is for this reason that the Panel

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[357] India Appellant Submission, para. 361.
[358] India Appellant Submission, para. 362.
[359] India Appellant Submission, para. 362.
[360] *US – Anti-Dumping and Countervailing Measures*, para. 9.21. *See also*, *US – Softwood Lumber IV (Panel)*, para. 7.116; *US – Upland Cotton (Panel)*, para. 7.1143.
[361] *US – Upland Cotton (Panel)*, para. 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)*, para. 7.1151; *US – Antidumping and Countervailing Duties (AB)*, paras. 386, 400.
[362] Panel Report, fn 304.

correctly found that "Article 2.1 is not concerned with other enterprises, and whether or not such other enterprises have been discriminated against."[363]

315. The United States further submits that India's approach would read out the plain text of the *chapeau* of Article 2.1, which collective refers to "an enterprise or industry or group of enterprises or industries" as "certain enterprises."[364] India's position that the recipient of a financial contribution must be compared to a comparative set of similarly situated entities would leave no recourse for investigating authorities in instances where "certain enterprises" is defined as an industry or a single unique enterprise. Indeed, as the Panel similarly found:

> Further, in cases where the "certain enterprises" represent the totality of an industry, a requirement that the recipient of a financial contribution must be compared to a "comparative set" of "similarly situated entities" would make little, if any, sense. Assuming the industry is defined by the products it produces, there will generally be no "similarly-situated" entities that the relevant industry could be part of. In such cases, the "similarly-situated" entities and the "certain enterprises" would be the same, such that it would not be possible to establish that similarly situated entities were excluded from the subsidy.[365]

316. India makes no attempt to rebut this fatal flaw in its arguments on appeal. Rather, India believes that this is precisely how Article 2.1(c) is meant to be interpreted. Because NMDC only sells iron ore to users of iron ore, and non-users of iron ore "are clearly not 'like' users of iron ore", India argues that Commerce was not entitled to make a finding of specificity.[366] In India's view, a subsidy that is provided to an entire industry could never be specific because there are no "like" entities which would have been eligible for but did not receive the subsidy.

317. To the extent that India would concede that a limitation on the face of a subsidy measure to an industry would be *de jure* specific, this would confirm that India's approach would create an easy means to circumvent the disciplines of the SCM Agreement. For example, under that approach, a grant that is expressly limited to iron ore users would be specific, but provision of iron ore to the same iron ore users would not. A government could then simply use its funds to purchase iron ore and then provide that iron ore to the users for a price that is less than what it paid in exactly the same amount it otherwise would have provided as a grant. The same benefit would be provided to the same recipients, but India's approach would mean that simply changing the form of contribution would prevent finding the contribution to be a subsidy. The United States agrees with the Panel that such an approach is clearly at odds with the plain language of Article 2.1.[367]

318. With respect to India's reliance on the *US – Large Civil Aircraft (2nd Complaint)* in support of its comparative subset approach, the question before the Appellate Body in that dispute was whether the grant of Industry Revenue Bonds (IRBs) were *de facto* specific due to

[363] Panel Report, para. 7.121.
[364] Article 2.1 of the SCM Agreement.
[365] Panel Report, para. 7.125.
[366] India Appellant Submission, para. 362.
[367] Panel Report, para. 7.125.

the "granting of disproportionately large amounts of subsidy to certain enterprises" under Article 2.1(c). There, the Appellate Body said that the relevant question for determining whether a financial contribution was granted in "disproportionately large" amounts to certain enterprises is "whether the actual distribution of a subsidy deviates materially from the expected distribution of that subsidy" and that "a panel's inquiry under Article 2.1(c) should focus on the reasons that explain any disparity between the actual and expected distributions of a subsidy."[368] By contrast, in the instant dispute Commerce determined that NMDC's provision of high grade iron ore was *de facto* specific to steel companies on the basis of "use of a subsidy program by a limited number of certain enterprises", a different factor in the Article 2.1(c) analysis.[369] The United States submits that where an investigating authority is examining whether "disproportionately large amounts" of the subsidy are being provided to certain enterprises under Article 2.1(c), this requires a comparison to determine the proportion of subsidies received by different enterprises. Identification of entities that might have been expected to receive the subsidy would be a step to enable comparison of expected and actual recipients and amounts received. By contrast, where the question before an investigating authority is whether the subsidy program is being used by a limited number of certain enterprises, there is no need to compare entities that might have been expected to receive a subsidy with those who actually received a subsidy. The relevant question is whether the certain enterprises who receive the subsidy are a discrete segment of the economy.

319. For these reasons, the United States respectfully requests that the Appellate Body reject India's claims in respect of the Panel's legal interpretation of Article 2.1(c), as well as India's request for the Appellate Body to complete the analysis in respect of the provision of high grade iron ore by NMDC. India has not demonstrated that the Panel's findings were in error.

B. The Panel Correctly Interpreted and Applied the Term of "Use of a Subsidy Programme by a Limited Number of Certain Enterprises" as it Appears in Article 2.1(c) of the SCM Agreement

320. Similarly, the Panel rejected India's arguments that under Article 2.1(c) that an investigating authority must establish that only a limited number of certain enterprises—within the set of certain enterprises eligible to use the subsidy program—actually received a subsidy in order to make a finding of *de facto* specificity.[370] The question before the Panel was whether the term "use of a subsidy programme by a limited number of certain enterprises" required an investigating authority to first identify the universe of potentially eligible recipients before determining whether a limited number of that subset of enterprises used the subsidy.[371]

321. In making out its claim before the Panel, India argued that term "certain enterprises" is shorthand for beneficiaries and that Commerce needed to prove that the subsidy program was being used by only a limited number of users within this set of beneficiaries. The Panel rejected

[368] *US – Large Civil Aircraft (2nd Complaint)*, paras. 883 and 886.
[369] India Appellant Submission, para. 359.
[370] Panel Report, para. 7.135.
[371] The United States notes that India's arguments regarding discrimination and comparative subset are nearly identical. Both form part of the same broad interpretive approach to Article 2.1(c), as advocated by India and, as such, are fully dependent on one another.

India's proposed distinction between "users" and "beneficiaries", noting that Article 2.1(c) does not refer to "users" of the relevant subsidy program nor does it refer to "certain enterprises" as "beneficiaries". Instead, the Panel found that Articles 2.1(a) and (c) are concerned with situations where access to a subsidy is limited to the same category of "certain enterprises". In the Panel's view, it is the category of certain enterprises that is relevant for determining *de facto* specificity in accordance with Article 2.1(c), just as it is the category of certain enterprises that is relevant for determining *de jure* specificity in accordance with Article 2.1(a).[372] The Panel further reasoned that an investigating authority may determine that a subsidy is specific "in the sense that access to the subsidy is limited *to* 'certain enterprises'", by relying on the fact that the total number of certain enterprises using the subsidy is limited.[373]

322. India appeals the Panel's finding that Article 2.1(c) does not require an investigating authority to identify a comparative subset on the basis of the text of Article 2.1(c). But the four reasons it sets out to argue its claim do not demonstrate that the text supports India's approach. First, India argues that the term "limited number" is preceded by the words "use . . . by . . .", which, in India's view, means that the focus of Article 2.1(c) is on the "users" of the program[374]

323. Second, India argues that term "limited number" followed by ". . . of certain enterprises" denotes a relationship between a part and the whole, meaning that there is a "sub-set – super-set" relationship between the term "limited number" and "certain enterprises".

324. Third, India argues that the definition of "certain enterprises" contained in the *chapeau* to Article 2.1 really means "person or persons / group of person to be benefitted from the subsidy program."[375] And fourth, India argues that the Panel has erroneously focused on India's Second Written Submission, in which India argued that the term "certain enterprises" is shorthand for beneficiaries.[376] India complains that the Panel chose to isolate and record one specific statement by India "that had no connection to the text of the treaty."[377]

325. The United States submits that each of these arguments appears to be nothing more than a convoluted attempt to redraft Article 2.1(c) in a way that could actually support India's flawed interpretation. For example, while India may believe that its points are clear (or even "more than evident"), there is no connection between the phrase "use . . . by . . ." and India's argument that Article 2.1(c) distinguishes between "users" and "beneficiaries". Nor has India explained why such a distinction would mean that Article 2.1(c) requires users to be a "subset" of potential beneficiaries.

326. India's second argument, however, appears to be contingent on the success of its first insofar as India argues that the phrase limited number of "users" should be read into the text of Article 2.1(c) in place of "limited number of certain enterprises". Without this amendment, India

[372] Panel Report, para. 7.135.
[373] Panel Report, para. 7.135.
[374] India Appellant Submission, para. 370.
[375] India Appellant Submission, para. 373.
[376] India Appellant Submission, para. 375.
[377] India Appellant Submission, para. 375.

has no basis for arguing that there must be a "subset" of certain eligible enterprises receiving the subsidy. As the Panel found, the plain text of Article 2.1 simply does not support the comparative subset argument advanced by India.

327. India's third argument that the phrase "certain enterprises" should be replaced by the word "persons" similarly does not withstand scrutiny. Even if the provision read "use of a subsidy program by a limited number of *persons*", as India would have it, this would still in no way imply the comparative subset argument advanced by India.

328. The United States agrees with India (in its fourth argument) to the extent that India now concedes that the phrase "certain enterprises" is not shorthand for "beneficiaries." However, the Panel certainly did not misunderstand India's argument, as India makes the same argument in the context of its third argument here, that the term "certain enterprises" should be shorthand for persons who benefitted.[378] And as noted above, whether the focus is on "persons" or "persons who benefitted", such terminology, in addition to not being found in Article 2.1(c), does not imply or support a view that an investigating authority must examine a "comparative subset" of actual to potential recipients.

329. India has provided no reasons to reject the Panel's findings other than to argue that the Panel's interpretation would be incorrect if Article 2.1(c) were drafted differently. Not only would India's proposed redrafting not support its understanding of Article 2.1(c), but that meaning is not supported by the actual text of Article 2.1(c). For the reasons provided herein, the United States respectfully requests that the Appellate Body find that the Panel did not err in interpreting or applying the term "use of a subsidy programme by a limited number of certain enterprises" in interpreting Article 2.1(c) of the SCM Agreement.

C. The Panel Correctly Interpreted Article 2.1(c) of the SCM Agreement in Finding That the Inherent Limitations in the Nature of Goods is Not a Bar to a Finding of Specificity

330. Before the Panel, India also argued that specificity may not be established under Article 2.1(c) in cases where, because of the inherent nature of the subsidized product, the subsidy is restricted to a limited number of entities.[379] The Panel rejected India's argument and found that there is no requirement under Article 2.1(c) which prevents an investigating authority from finding specificity where the inherent characteristics of the subsidized good limit the possible uses of that subsidy to certain enterprises. The Panel further rejected India's contention that a finding of specificity would only be permissible in such cases where the investigating authority determines that the subsidy is used by a subset of potential beneficiaries. The Panel reached its conclusion based largely on its earlier findings under Article 2 of the SCM Agreement. In so doing, the Panel also rejected India's arguments in respect of use of certain negotiating history and further noted its agreement with a similar panel's findings in *US – Softwood Lumber IV*. India appeals each of these findings under Article 2.1(c) of the SCM Agreement and Article 11 of the DSU.

[378] India Appellant Submission, paras. 372-373.
[379] Panel Report, paras. 7.127 and 7.133.

331. Both of India's Article 11 claims should be rejected, but for different reasons. First, India claims in its Notice of Appeal that the Panel did not make an objective assessment of the matter before it in accordance with Article 11 of the DSU "by limiting the circumstances in which negotiating history can be relied upon to interpret a treaty."[380] However, India appears to have abandoned that claim in its appellant submission, and this argument in any event does not amount to an Article 11 claim of error. Second, India claims that the Panel did not make an objective assessment of the matter before in accordance with Article 11 of the DSU it "by specifically relying upon the findings of the Panel in *US – Softwood Lumber IV*, without recording and assessing the 'cogent reasons' offered by India for not following said findings for subsidies covered under Article 1.1(a)(1)(iii) of the SCM Agreement."[381] A simple failure to "record and assess" an argument by a party does not rise to the level of an Article 11 error.

332. Finally, India claims that the Panel "incorrectly interpreted Article 2.1(c) in finding that an alleged subsidy under Article 1.1(a)(iii) can be *de facto* specific merely based on limitations inherent in the nature of the goods allegedly provided or purchased by the government."[382] It is India that errs as the "inherent" limitations in goods provided may in fact result in a subsidy being provided to "a limited number of certain enterprises."

1. The Panel Did Not Act Inconsistently with Article 11 of the DSU

a) India Has Abandoned its Claim, Which in any Event Does Not Amount to an Article 11 Error

333. At the outset the United States notes an inconsistency between India's Notice of Appeal and India's Appellant Submission. India's Notice of Appeal contains an Article 11 claim in which India states, "that in particular, the Panel erred because it did not make an objective assessment of the matter before it by limiting the circumstances in which negotiating history can be relied upon to interpret a treaty."[383] In India's Appellant Submission, however, India does not put forward arguments that the Panel failed to make an objective assessment under Article 11 of the DSU but rather, articulates the reasons why the Panel committed a "legal error" under Article 2.1(c) of the SCM Agreement for allegedly limiting the circumstances in which a Panel should rely on negotiating history.[384] Indeed, India concludes: "for the reasons set forth above, the Panel has committed significant legal errors in rejecting India's claim that the USDOC violated Article 2.1(c) of the SCM Agreement by finding the sale of high grade iron ore to be *de facto* merely based on the inherent limitations of iron ore being sold."[385]

334. It appears that India has abandoned its claim of error under DSU Article 11. In these circumstances, the United States will not address this claim further. The United States notes, in any event, that "limiting the circumstances in which negotiating history can be relied upon"

[380] India Notice of Appeal, para. 21.
[381] India Notice of Appeal, para. 21.
[382] India Notice of Appeal, para. 21.
[383] India Notice of Appeal, para. 21.
[384] India Appellant Submission, para. 392.
[385] India Appellant Submission, para. 399.

would not amount to an Article 11 error. Rather, if the Panel erred in resorting or not resorting to negotiating history under customary rules of interpretation of public international law, this issue would only be material if it affected the legal interpretation reached by the Panel. That legal interpretation is an issue of law that can be challenged in an appeal directly. Thus, an Article 11 claim relating to "the circumstances in which negotiating history can be relied upon" should be rejected because it is simply an effort to recast what can and should be a question of interpretation of a covered agreement.

b) The Panel Did Not Fail to Make an Objective Assessment In Expressing its Agreement With the Panel in US – Softwood Lumber IV

335. India argues that the Panel failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU by failing to record and evaluate the "cogent" reasons offered by India for departing from the findings in *US – Softwood Lumber IV*.[386] India contends that the Panel relied only on the findings in *US – Softwood Lumber IV* to reject India's claim that *de facto* specificity cannot be found merely based on the inherent limitations of the goods supplied by the government.[387] India's claim is without merit.

336. The United States recalls that a panel has no obligation under Article 11 to address every argument raised by a party[388] and that the fact that a panel does not refer to specific evidence or arguments presented by a party is not sufficient to establish a Panel's failure to make an objective assessment.[389] Such omission also indicates that the Panel did not consider it relevant to the specific issue before it, or did not attribute to it the weight or significance that a party considers it should have.[390] In order to make out a claim under Article 11 in relation to a panel's decision not to address a particular argument, a party would have to demonstrate that the argument was so significant that to have addressed it would have materially altered the outcome of the panel's analysis.[391] India has not given that explanation, and its Article 11 claim fails on that basis.

337. While India is correct in that the Panel did not include a discussion of India's alleged "cogent reasons" in its Report, the Panel report makes clear that the Panel did not consider these arguments significant to its determination. Contrary to what India contends, the Panel did not rely on *US – Softwood Lumber IV* "and nothing more" in reaching its conclusions.[392] In paragraph 7.131, the panel reasoned:

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[386] India Appellant Submission, para. 382. India further alleges that this error violated India's "due process rights . . . inherently created within the DSU" but provides no basis for this claim or any additional explanation. As India's Notice of Appeal contains only a claim under Article 11 in respect of the Panel's agreement with the panel in *US – Softwood Lumber IV*, the United States considers that India's claim is limited to Article 11 of the DSU.
[387] India Appellant Submission, para. 380.
[388] *China – Rare Earths* (AB), para. 5.224.
[389] *China – Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.
[390] *China – Rare Earths* (AB), para. 5.221.
[391] *China – Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), para. 442.
[392] India Appellant Submission, para. 380.

> In terms of India's broader argument, ***we recall our earlier findings*** to the effect that once it is established that access to the subsidy is limited, that subsidy is specific within the meaning of Article 2. Thus, if access is limited by virtue of the fact that only certain enterprises may use the subsidized product, the subsidy is specific. ***As explained above***, there is no need for a further consideration regarding the nature of the excluded entities. Similarly, there is no need, in such cases, to establish that the excluded entities would also have been able to use the subsidized product.[393]

338. Thus it is clear from this passage that the Panel relied on its *earlier findin*gs in respect of Article 2.1(c) to "reject India's argument that if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is further limited to a sub-set of this industry."[394] The Panel did not rely on *US – Softwood Lumber IV* as the basis for rejecting India's interpretation of Article 2.1(c), an interpretation that it rejected in the context of India's other claims under Article 2.1(c). What the Panel did note in relation to *US – Softwood Lumber IV*, however, was that the panel there addressed a similar issue and reached "essentially the same conclusion."[395] The Panel quoted the relevant findings in *US – Softwood Lumber IV*, and observed that the reasoning in that report was consisted with its own approach, as "***outlined above***."[396]

339. As the Panel already had reached its conclusion prior to addressing the panel's findings in *US – Softwood Lumber IV*, the United States submits that it would not have been useful to engage in an examination of India's alleged "cogent reasons", as those reasons would not have been material to the Panel's conclusion. The United States respectfully requests that the Appellate Body reject India's Article 11 claim, as India has not shown why the Panel's omission of these arguments bears on the objectivity of the Panel's factual findings.

2. The Panel Correctly Interpreted Article 2.1(c) of the SCM Agreement in Finding That the Inherent Limitations in the Nature of Goods is Not a Bar to a Finding of Specificity

340. Turning now to India's appeal of the Panel's legal interpretation of Article 2.1(c) of the SCM Agreement, the Panel correctly rejected India's argument that inherent limitations in the nature of goods serve as a bar to an investigating authority's determination of *de facto* specificity. In so doing, the Panel considered India's broader comparative subset argument and recalled its earlier findings under Article 2 of the SCM Agreement, that "once it is established that access to the subsidy is limited, that subsidy is specific within the meaning of Article 2" even if that access is "limited by virtue of the fact that only certain enterprise may use the subsidized product."[397] The Panel further recalled that there was no additional requirement for

[393] Panel Report, para. 7.131 (emphasis added).
[394] Panel Report, para. 7.133.
[395] Panel Report, para. 7.131.
[396] Panel Report, paras. 7.131-7.132.
[397] Panel Report, para. 7.130.

an investigating authority to consider the nature of excluded entities nor to establish that other excluded entities who would have been able to use the subsidized product did not.

341. On appeal, India argues that the real question is not whether Article 2.1(c) expressly prevents findings based on "inherent limitations" of goods but rather, whether whole or parts of the treaty are rendered redundant or ineffective if Article 2.1(c) is interpreted in a manner that permits a finding of *de facto* specificity based on the inherent limitations of the subsidized good.[398]

342. In support of its appeal, India argues that the Panel's interpretation of Article 2.1(c) breeds redundancy into the SCM Agreement. Although convoluted, India seems to be making the argument that the Panel's interpretation would somehow dilute the requirements in Articles 1.2 and 2.1 by allowing an investigating authority to make a determination of *de facto* specificity for the provision of any good that is not general infrastructure. India argues that the Panel's interpretation would strip the investigating authority of its obligation to both make a determination and also to clearly substantiate that determination on the basis of positive evidence, in accordance with Article 2 of the SCM Agreement.[399] India's view is premised on its argument that all goods are inherently limited in their use and therefore, can be said to be only available to "certain enterprises." India argues that a finding of *de facto* specificity is a foregone conclusion for the provision of any good by a government, other than general infrastructure, under the Panel's interpretation of Article 2.1(c).

343. India's concern that, under the Panel's interpretation of Article 2.1(c), every provision of good will be determined to be specific is unfounded. The United States notes that the Panel did not actually find that the provision of goods that are inherently limited in utility will *ipso facto* be determined to be specific, as India seems to allege. Rather, the Panel found that inherent limitations are not a bar to a finding of specificity. An investigating authority still must make a determination of specificity consistent with Article 2 of the SCM Agreement. Moreover, India appears to forget that a determination of specificity in and of itself is not enough for an investigating authority to find that the provision of goods by a government amounts to a countervailable subsidy. Under Article 1.1(b), for example, that provision must also confer a benefit.[400]

344. Even where India is correct in arguing that all goods are inherently limited in use, the United States submits that it is the interpretation advanced by India, which would create a loophole in the subsidies discipline for all goods. Consider what would happen if investigating authorities were barred from making a determination of *de facto* specificity on the basis of inherent limitations on use: the provision of all goods, which could be said to be inherently limited, would be exempt from a finding of de facto specificity. There simply is no basis in the text of Article 2 for such an interpretation. Rather, as previous panels have found correctly,

[398] India Appellant Submission, para. 385.
[399] India Appellant Submission, paras. 387-388.
[400] Article 1.1(b) of the SCM Agreement.

when what a government provides is of limited utility, it is all the more likely that a subsidy is conferred on certain enterprises.[401]

345. In advancing interpretations that are at odds with both the text and context of the SCM Agreement, India attempts to carve out a loophole in the subsidies discipline for its mining industry. Based on its interpretation, in India's view, NMDC should be able to provide iron ore to its steel industry at any price without being subject to the disciplines of the SCM Agreement because the entities that use iron ore are inherently limited in number. Article 2.1(c) does not support such an interpretation or result. The United States respectfully requests that the Appellate Body reject India's appeal and uphold the Panel's findings under Article 2.1(c) of the SCM Agreement.

3. The Panel Correctly Found that Commerce Relied on Positive Evidence in Determining That the Provision of Iron Ore Was Specific Under Article 2.4 of the SCM Agreement

346. The Panel found that Commerce had relied on positive evidence in determining that NMDC's provision of iron ore was specific because it was "limited to industries that use iron ore, including the steel industry."[402] Article 2.4 of the SCM Agreement requires that "any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence."[403] In considering India's claim that Commerce failed to act in accordance with Article 2.4, the Panel reviewed the evidence relied on by Commerce, a list of NMDC's customer base posted on NMDC's own website,[404] and found that the evidence in fact indicated that many of the customers enumerated on that list were iron and steel companies. In light of this evidence, and particularly in light of India's failure to dispute the U.S. categorization of NMDC's customers as mainly iron and steel companies, the Panel found that there was no factual basis for India's Article 2.4 claim.[405]

347. India appeals the Panel's finding under Article 2.4 of the SCM Agreement on the basis that the Panel improperly rejected its claim "solely" because such challenges under Article 2.4 are, in its view, consequential to the Panel's finding under Article 2.1(c). India does not disagree with the factual findings of the Panel or the Panel's legal interpretation or application of Article 2.4. India explains that "since the Panel disagreed with India on the requirements to be fulfilled under Article 2.1(c), the Panel consequently dismissed India's claim under Article 2.4."[406] India further contends that to the extent the Appellate Body finds that the United States acted inconsistently with Article 2.1(c), the Appellate Body "must necessarily rule that Article 2.4 is also violated".[407] India is of the mistaken view that these claims are the same.

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[401] U.S. First Written Submission, paras. 408 – 412 (citing to *U.S. – Softwood Lumber IV (Panel)*, para. 7.116).
[402] 2004 Preliminary Results, Exhibit IND-17, internal page 1516; Panel Report, paras. 7.139-7.140.
[403] Article 2.4 of the SCM Agreement.
[404] Exhibit USA-69.
[405] Panel Reports, para. 7.140.
[406] India Appellant Submission, para. 368.
[407] India Appellant Submission, para. 368.

348. Where a determination of specificity is made in accordance with Article 2.1, Article 2.4 further requires that such determination also be clearly substantiated on the basis of positive evidence. As the Appellate Body has explained, the term 'positive evidence' in Article 2.4 relates to "the quality of the evidence that authorities may rely upon in making a determination."[408] Further, the Appellate Body has stated that "[t]he word 'positive' means" "that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[409] Thus, where an investigating authority clearly substantiates, on the basis of positive evidence, that use of a subsidy is limited to "certain enterprises," then the determination of specificity made by that authority is consistent with the requirements of Article 2.4 of the SCM Agreement, based on the principles articulated in Article 2.1(c).

349. India has not challenged the veracity of NMDC's customer list, Commerce's classification of those customers, or the Panel's findings that the list contains iron and steel companies. Therefore, India has not shown a breach of Article 2.4 on the basis of a failure to "substantiate" a specificity finding on the basis of "positive evidence".[410] As India has not provided any argument independently supporting its claim, the United States respectfully requests that the Appellate Body reject India's appeal under Article 2.4 of the SCM Agreement.

VIII. THE APPELLATE BODY SHOULD REJECT INDIA'S "AS APPLIED' CHALLENGES TO COMMERCE'S DETERMINATIONS IN RESPECT OF THE GOI'S PROVISION OF CAPTIVE MINING RIGHTS FOR IRON ORE AND COAL

350. India challenges Commerce's determinations in respect of the GOI's provision of captive mining rights for iron ore and coal. The Panel found that: (1) the United States acted inconsistently with Article 12.5 of the SCM Agreement in failing to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information; (2) that the United States acted inconsistently with Article 1.1(a)(1)(iii) of the SCM Agreement by determining without sufficient evidentiary basis that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the Captive Mining of Coal Programme/Coal Mining Nationalization; and (3) that Commerce's rejection of certain domestic price information when assessing benefit under the Captive Mining of Iron Ore Programme was inconsistent with Article 14(d). The Panel rejected or exercised judicial economy in respect of all of India's remaining claims in connection a captive mining programs for iron ore and coal.

351. India appeals the Panel's findings in respect of two of these claims: First, India alleges that the GOI does not "provide" minerals through the grant of mining leases within the meaning of Article 1.1(a)(1)(iii). Second, India alleges that Commerce's benefit determinations in respect

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[408] *US – Hot-Rolled Steel (AB)*, para. 192; *see also*, *Thailand – H-Beams (AB)*, para. 107 ("the dictionary meaning of the term 'positive' suggests that 'positive evidence' is 'formally or explicitly stated; definite, unquestionable (positive proof)").

[409] *US – Hot-Rolled Steel (AB)*, para. 192.

[410] Where a panel determines that an investigating authority's specificity determination is in error under Article 2.1(c), for example, there is no need to further consider whether that determination was in accordance with Article 2.4 of the SCM Agreement. Such inquiry would be moot as there would not be a determination of "specificity under the provisions of [Article 2]".

of the captive mining rights programs are inconsistent with Articles 14(d) of the SCM Agreement and Article 11 of the DSU. India also appeals, conditionally, the Panel's exercise of specificity in respect of the captive mining program for iron ore under Article 2 of the SCM Agreement. As the condition of that appeal has not been met (the United States does not appeal the Panel's findings in respect of Article 12.5), that appeal is no longer part of this appeal. As discussed below, all of India's claims are without merit.

A. The Panel Correctly Found That India "Provided" Mining Rights In Accordance With Article 1.1(a)(1)(iii) of the SCM Agreement

352. Turning now to Commerce's determinations with respect to India's captive mining rights programs for iron ore and coal, India appeals the Panel's finding that Commerce determined that the GOI "provides" goods through the grant of mining rights for iron ore and coal within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. India appeals the Panel's findings under both Article 11 of the DSU and Article 1.1(a)(1)(iii) of the SCM Agreement. Moreover India requests that the Appellate Body complete the analysis and find that the GOI did not "provide" minerals through the grant of mining rights in accordance with Article 1.1(a)(1)(iii). India's claims, which are based on India's misrepresentation of both the Panel report and the Appellate Body's findings in *US – Softwood Lumber IV*, are without merit and should be rejected for the reasons described herein.

353. For the sake of completeness, the Panel's findings are described below.

354. Before the Panel, India argued that due to the uncertainties involved in mining operations, as well as large amounts of work and costs involved in extracting iron ore and coal once a lease has been granted, the GOI's grant of a mining lease lacks proximity (or is not "reasonably proximate") to the extracted minerals to be considered a "provision" of goods by the government within the meaning of Article 1.1(a)(1)(iii).[411]

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

> For the purpose of this Agreement, a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e., where a government ***provides*** goods or services other than general infrastructure, or purchases goods[412]

356. In considering the meaning of the word "provides" in Article 1.1(a)(1)(iii), the Panel found the principles articulated in *US – Softwood Lumber IV* persuasive, concluding that "in certain circumstances, a government might properly be determined to have provided goods by making them available through the grant of extraction rights."[413] The Panel was not persuaded by India's argument that the uncertainties, work and costs associated with extracting minerals meant that the grant of a right was too remote to be treated as the "provision" within Article 1.1(a)(1)(iii). Rather, the Panel noted that India's approach:

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[411] Panel Report, paras. 7.233 – 7.241.
[412] Article 1.1(a)(iii) of the SCM Agreement (emphasis added).
[413] Panel Report, para. 7.235.

> Lacks legal certainty, for it would lead to different results, depending on the complexity of the process required to extract the relevant mineral, or the uncertainty regarding the amount of mineral to be extracted.[414]

357. "More fundamentally," however, the Panel found that India's approach was at odds with the meaning of the term "provides" given the GOI's direct control over the availability the relevant minerals and the fact that the GOI's grant of rights to mine those minerals essentially made them available to—and placed at the disposal of—the beneficiaries of those rights.[415] In this way, the Panel distinguished the provision of the GOI from a "mere 'general governmental act' that simply facilitates the mining operation."[416] Further, the Panel reasoned that:

> The grant of the right to mine allows the beneficiary to extract government-owned minerals from the ground, and then use those minerals for its own purposes, such as in the production of steel. In our view, this means that the GOI's grant of the right to mine is "reasonably proximate" to the use or enjoyment of the minerals by the mining entity for the grant of a mining right to be treated as the provision of a good within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[417]

358. Finally, the Panel rejected India's argument that the footnote contained in *US – Softwood Lumber IV (Panel)* affected the Panel's conclusion.[418] The Panel found that the statement was obiter, particularly in light of the fact that in India, miners pay for more than the right to explore, the location of minerals is known, and miners pay royalties under the relevant mining leases per unit of extracted mineral.[419] For these reasons, the Panel rejected India's claim that Commerce's determination that the GOI provided goods through the grant of mining rights for iron ore and coal is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.

1. The Panel Did Not Fail to Make an Objective Assessment in Accordance With Article 11 of the DSU

359. India appeals the Panel's findings under Article 11 of the DSU, on the basis that the Panel failed to evaluate India's argument that there is no proximate link between the government's grant of mining rights and the use of the minerals because of the substantial nature of the intervening acts of the leasing holders to crush, grind, separate, and classify the iron ore before its ready for use or market. In support of this argument, India asserts that the mining rights constitute only 9% of the total price of iron ore while the remaining 90% of the costs for making the minerals useable are assumed by the miner.[420] The United States submits that India's claim has no merit and should be rejected.

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[414] Panel Report, para. 7.237.
[415] Panel Report, para. 7.238.
[416] Panel Report, para. 7.238.
[417] Panel Report, para. 7.238.
[418] Panel Report, para. 7.239.
[419] Panel Report, para. 7.240.
[420] India Appellant Submission, para. 485 – 489.

First, India is incorrect to the extent that it argues that the Panel refused to evaluate its argument.[421] The Panel in fact did consider India's argument in paragraphs 7.236 – 7.237 of its report:

> India submits that, because of the uncertainties involved in mining operations, and ***because of the amount of work required by the mining entity to extract the iron ore and coal once the lease has been granted***, the grant of the mining lease by the GOI is too remote from the extracted minerals to be treated as the "provision" of a good within the meaning of Article 1.1(a)(1)(iii).
>
> We are not persuaded by India's argument. As a preliminary matter, we observe that India's approach lacks legal certainty, for it would lead to different results, depending on the complexity of the process required to extract the relevant mineral, or the uncertainty regarding the amount of mineral to be extracted.[422]

360. The Panel's description of India's argument—"because of the amount of work required by the mining entity to extract the iron ore and coal once the lease has been granted, the grant of the mining lease by GOI is too remote"—reflects not only what India argued before the Panel in its submission but also what India argues on appeal, that:

> There is no proximate linkage in this case because the link between the grant of mining rights (governmental action) and the use / enjoyment of the minerals (good in question) is intervened by other acts of extraction, crushing, grinding, separation, classification, etc. all of which are undertaken by the alleged beneficiary and not the government.[423]

361. The alleged cost-breakdown between the government and leaseholder was the evidence India supplied in support of this argument. As the Panel correctly rejected India's argument, there was no need for the Panel to specifically reference an alleged 9 or 90 percent breakdown in such costs. India's claim that the Panel did not consider India's argument regarding the breakdown of costs between the government and miner simply is incorrect. Such a breakdown was not legally relevant. As the Panel further noted in its response to India's comments on the interim report, requesting that the Panel specifically reference the 9.03 percent figure:

> Concerning the amount of royalty and GOI's lack of control over the extraction, India has not explained – and it is not evident to us – why these issues are necessary for, or relevant to, the Panel's findings.[424]

362. To the extent that India challenges the Panel's finding under Article 11 on the basis that India disagrees with the Panel's conclusion, India's Article 11 claim should be rejected because it does not stand on its own. Rather, India must challenge that legal interpretation directly (as it does below). An Article 11 claim cannot be made simply as a subsidiary claim to what is in

[421] India Appellant Submission, para. 489.
[422] Panel Report, paras. 7.235-7.236 (emphasis added).
[423] India Appellant Submission, para. 488.
[424] Panel Report, para. 6.133.

reality a disagreement on an issue of law or legal interpretation.[425] Even an erroneous legal interpretation does not amount to a failure by a Panel to make an objective assessment of the matter before it. Therefore, India's Article 11 claim is not appropriate.

2. The Panel Correctly Interpreted Article 1.1(a)(1)(iii) of the SCM Agreement, India Misunderstands The Plain Text of Article 1.1(a)(1)(iii)

363. India further appeals the Panel's legal interpretation of Article 1.1(a)(1)(iii) on the basis that the Panel "emasculat[ed]" the "reasonable proximate" test articulated by the Appellate Body in *US – Softwood Lumber IV* and instead, incorrectly applied a "but for" test.[426] India further argues, that when properly interpreted, the word "provides" in Article 1.1(a)(1)(iii) of the SCM agreement does not apply to situations in which beneficiaries of a subsidy have to engage in significant intervening acts to make a good available for use or enjoyment.[427] India's arguments are without merit as they mischaracterized the Panel's findings, evince a misunderstanding of the Appellate Body's finding in *US – Softwood Lumber IV*, and are contrary to the text of Article 1.1(a)(1)(iii). The United States submits that the Appellate Body should reject India's appeal, as the Panel did not err in finding that the GOI provides minerals in accordance with Article 1.1(a)(1)(iii) of the SCM Agreement.

364. First, India argues that the Panel improperly adopted a "but for" test instead of the Appellate Body's "reasonably proximate relationship" test in finding that mining companies would not have access to the minerals but for the government's grant of those rights in the first place.[428] Having misrepresenting the Panel's findings, India further criticizes the Panel for adopting a standard whereby an act of a government in connection with the mining industry—including domestic tax policy and property laws—would amount to the "provision" of goods.[429] India is incorrect in its description of the Panel's findings. As is clear from the Panel's report, the Panel applied a reasonable proximate relationship test and, moreover, specifically distinguished its findings from a "but for" analysis.[430]

365. The Panel began its analysis by considering the Appellate Body's findings that:

> [T]he concept of "***making available***" or "***putting at the disposal of***" . . . requires there to be a ***reasonably proximate relationship*** between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other. Indeed, a

[425] *China – Rare Earths (AB)*, para. 5.173 ("[i]n most cases … an issue will either be one of application of the law to the facts or an issue of the objective assessment of facts, and not both." Allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU. By contrast, the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision involves a legal characterization and is therefore a legal question. Importantly, a claim that a panel failed to comply with its duties under Article 11 of the DSU "must stand by itself" and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements. In our view, the opposite is also true.).
[426] India Appellant Submission, para. 497; para. 502.
[427] India Appellant Submission, para. 490.
[428] India Appellant Submission, para. 495.
[429] India Appellant Submission, para. 496.
[430] Panel Report, para. 7.235.

> government must ***have some control over the availability*** of a specific thing being "***made available***".[431]

366. In considering whether the GOI's provision of mining rights was reasonably proximate to the extracted iron ore and coal, the Panel considered both the fact that the GOI has "direct control over the availability of relevant materials" and that the "GOI's grant of the rights to mine those minerals essentially made those minerals available to, and placed them at the disposal of, the beneficiaries of those rights."[432] Moreover, the Panel also was careful to consider that this provision was more than a "but for" relationship:

> The grant of a mining lease is ***more than a mere "general governmental act" that simply facilitates the mining operation***. The grant of the right to mine allows the beneficiary to extract government-owned minerals from the ground, and then use those minerals for its own purposes, such as in the production of steel. In our view, this means that the GOI's grant of the right to mine is "reasonably proximate" to the use or enjoyment of the minerals by the mining entity for the grant of a mining right to be treated as the provision of a good within the meaning of Article 1.1(1)(a)(iii) of the SCM Agreement.[433]

367. Second, in arguing that the Panel applied the incorrect legal test, India misrepresents the "reasonable proximate relationship" approach of the Appellate Body in *US – Softwood Lumber IV*. India appears to believe that the "reasonable proximate relationship" requires that the governmental action of provision itself should directly result in the provision of goods and not the intervening acts of non-governmental bodies.[434] In India's view, the grant of mining rights does not constitute a provision of minerals by the government, because significant efforts, risks, and investment have to be undertaken by the miner to actually make the mineral available for use or enjoyment and thus the grant is insufficiently "proximate".[435] Thus, as discussed above, India believes that the GOI cannot be said to have provided iron ore or coal to miners if, in addition to royalty payments, miners must bear the costs of exploration, labor, and extraction.[436] This requirement is nowhere in the text of SCM Agreement nor in the *US – Softwood Lumber IV* Appellate Body report. Specifically, the Appellate Body found that:

> what matters, for purposes of determining whether a government "provides goods" in the sense of Article 1.1(a)(1)(iii), is the consequence of the transaction . . . Indeed, as the Panel indicated, the evidence suggests that making available timber is the *raison d'etre* of the stumpage arrangements. Accordingly, like the Panel, we believe that, by granting a right to harvest standing timber, governments provide that standing timber to timber harvesters.[437]

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[431] Panel Report, at para. 7.234 (quoting *US – Softwood Lumber IV* (AB), paras. 68-71) (emphasis added).
[432] Panel Report, para. 7.238.
[433] Panel Report, para. 7.239.
[434] India Appellant Submission, para. 495.
[435] India Appellant Submission, para. 495.
[436] India Second Written Submission, para. 216.
[437] *US – Softwood Lumber IV (AB)*, para. 75.

368. Analogously, making available iron ore and coal is the *raison d'etre* of the GOI's mining leases. India cannot distinguish this dispute from the facts of *US – Softwood Lumber IV* on the basis of additional costs that a miner must incur to make the minerals marketable. Just as in *US – Softwood Lumber IV*, here also there exists a "reasonable proximate relationship" between the grant of mining rights and the availability of the mined iron ore or coal such that the GOI provides the minerals in accordance with Article 1.1(a)(1)(iii).

369. Under Article 1.1(a)(1)(iii) of the SCM Agreement, the issue is whether the Indian government can be said to "provide" minerals through the grant of mining rights for iron and coal. The United States agrees with both the Panel and the Appellate Body in *US – Softwood Lumber IV* that the word "provides" means "to make available" or "put at the disposal of." The United States further observes the Panel's finding in footnote 429 of its report:

> We note some inconsistency in India's position during these proceedings. In the context of its claim against the USDOC's determination that the SDF Managing Committee provided direct transfers of funds, India accepts that the term "provides" means to "make available", or "put at the disposal of" (India's first written submission, para. 441). Furthermore, India contends that the term "transfer" is narrower than the term "provides", and yet accepts that the term "transfer" still covers the situation where the rights or interest in an asset are transferred (India's first written submission, paras. 441 and 443).[438]

370. In *US – Softwood Lumber IV*, the Appellate Body found that the concept of "making available" or "putting at the disposal of" requires there to be a "reasonably proximate relationship" between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other.[439] As India does not appear to dispute this finding and the Panel correctly applied the Appellate Body's test, the Appellate Body should reject India's appeal and find that the Panel did not err in its interpretation of Article 1.1(a)(1)(iii) when determining that the grant of mining rights amounted to the provision of those minerals.

371. It is for these reasons that the Commerce correctly found that evidence demonstrates that the Indian government, *i.e.,* the state governments, own all of the minerals in India, and the mining leases are approved by the central government.[440] In return for the right to mine the iron ore and coal from public land, mining and steel companies pay the GOI a per unit extraction fee.[441] From the point of view of the GOI, it can either mine and sell the iron ore and coal itself, or sell the mining rights to the iron ore and coal in the ground so that someone else may extract those minerals. In either event, the purpose of the transaction is to provide the government-owned iron ore and coal to certain enterprises for use. Similarly, from the point of view of the recipient, the object of the transaction, whether to directly purchase iron ore and coal from the

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[438] Panel Report, FN 429. Moreover, in paragraph 6.133 of its report, the Panel rejected India's request for deletion of that footnote in its comments on the Panel's interim report. In response to these comments, the Panel stated: "Regarding footnote 310 (footnote 429 of the Final Report), we consider that the inconsistency referred to therein is plain. India's assertion to the contrary is unpersuasive."

[439] *US – Softwood Lumber IV*, para. 71.

[440] *DANG Report*, at 79 (attached to *2006 New Subsidies Allegation (JSW),* Exhibit 31 (Exhibit USA-50).

[441] *Tata 2006 Verification Report,* at 8 (Exhibit USA-71); *GOI 2006 Verification Report*, at 5 (Exhibit USA-72).

GOI or to obtain the mining rights from the GOI to extract those minerals itself, is to obtain the iron ore and coal. When a government gives a company the right to take a government-owned good, such as iron ore and coal from government lands, the government is "providing" the goods within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.

372. The concept that the provision of mining rights results in the provision of the goods (in this case, iron ore and coal) for the purposes of Article 1 of the SCM Agreement is further bolstered by the fact that the miners pay a per unit extraction fee.[442] In other words, the miners only pay for the iron ore and coal that they extract from the ground, not for the products that remain in the ground. The evidence thus demonstrates that the GOI is providing mining rights for the sole purpose of providing iron ore and coal, leaving no doubt that the GOI, through mining rights, is providing "goods" – iron ore and coal.[443] Thus, the provision of rights to iron ore and coal by the GOI to steel producers is of the same nature as the provision of standing timber by the Government of Canada.[444]

373. Finally, the United States notes that the interpretation of Article 1.1(a)(1) advanced by India would weaken the disciplines of the SCM Agreement on injurious subsidization, which rather aim "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing at the same time, the right of Members to impose such measures under certain conditions."[445] Under India's interpretation of a government "providing" goods, a government could provide a broad array of *in situ* minerals to specific industries without any discipline as long as the government structured the transaction to sell the rights to the mineral as opposed to an outright sale of the mineral itself. This would allow a government to provide *in situ* mineral deposits that had not yet been mined for less than adequate remuneration (or even for free) without being subject to the disciplines of the SCM Agreement. As the Appellate Body found in *US – Softwood Lumber IV*, there is no basis for such an interpretation in Article 1.1 of the SCM Agreement.[446] On this basis the Unites States requests that the Appellate Body reject India's claims in respect of Article 1.1(a)(1)(iii) and decline India's request to complete the analysis.

a) The Appellate Body Should Reject India's Request to Complete the Analysis

374. As India has demonstrated no legal error, there is no basis to complete the analysis of this claim. Moreover, the United States notes that India's conditional appeal is predicated on a different understanding of the word "provision" in Article 1.1(a)(1)(iii) than what the Appellate Body found in *Softwood Lumber IV*.

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[442] Tata's Questionnaire Response, November 1, 2007, 12 (iron ore extraction fees) and 16 (For coal, "Tata was paying the mining royalties in terms of the MMDR Act.") (Exhibit IND-65).
[443] *US – Softwood Lumber IV (AB)*, para. 73 ("In any event, in our view, it does not make a difference, for purposes of applying the requirements of Article 1.1(a)(1)(iii) of the *SCM Agreement* to the facts of this case, if "provides" is interpreted as "supplies", "makes available" or "puts at the disposal of". What matters for determining the existence of a subsidy is whether all elements of the subsidy definition are fulfilled as a result of the transaction, irrespective of whether all elements are fulfilled *simultaneously*.").
[444] *US – Softwood Lumber IV (AB)*, para. 75.
[445] *US – Softwood Lumber IV (AB)*, para. 64.
[446] *US – Softwood Lumber IV (AB)*, para. 67.

375. For the sake of completeness, however, the United States draws the Appellate Body's attention to India's incorrect assertion that the United States does not dispute the fact that royalty for mining rights only constitute 9.03% of the final cost of the extracted mineral. India is incorrect; the United States has no basis to accept that figure as accurate. India asserted this alleged figure for the first time in its Second Written Submission before the Panel. As the United States and the Panel agreed that such information was irrelevant, there was no debate as to whether India's assertion was an accurate depiction of the cost-breakdown in Indian mining industry and there are no findings by the Panel to this effect. Such an analysis was not undertaken by the Appellate Body with regard to the market for timber in *US – Softwood Lumber IV* and the United States does not consider that such an analysis is necessary here. Moreover, because India's information was presented late in the proceeding and was not germane to the Panel's analysis, there are no Panel factual findings relating to this specific percentage of 9.03% that India considers critical to its claim. In that circumstance, the Appellate Body has previously noted it would not be appropriate for it to complete the analysis on a claim under a new approach that was not subject to relevant fact-finding and examination by the panel.[447] Similarly, it would be appropriate for the Appellate Body to decline to complete the analysis here.

376. The United States respectfully requests that the Appellate Body reject India's request that the Appellate Body reverse the Panel's findings in respect of Article 1.1(a)(1)(iii) and, on this basis, reject India's request to complete the analysis.

B. Commerce's Methodology for Calculating Benefit in Respect of Captive Mining Rights is Fully Consistent with Articles 1.1(b) and 14 of the SCM Agreement

377. This section of the U.S. Appellee Submission addresses India's challenges to Commerce's methodology for the calculation of benefit in respect of the GOI's grant of mining rights for iron ore and coal. India appeals the Panel's findings that the methodology used by Commerce to calculate the benefit of the GOI's provision of mining rights was not inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. India argues that the Panel failed to make an objective assessment under Article 11 of the DSU by determining that India's claims pertaining to "good faith" were outside the Panel's terms of reference and that the Panel incorrectly found that remuneration need not be actual remuneration under Article 14(d).[448] India further requests that the Appellate Body complete the analysis and find that under Article 14(d), Commerce erred in determining that the grant of mining rights for iron ore and coal conferred a benefit and moreover, find that remuneration cannot be notional and must be

[447] *US – Zeroing (EC) AB)*, paras. 228, 243.

[448] The United States notes that India appears to raise two claims of error under Article 14(d) in its Notice of Appeal that are nearly identical. The first claim is that the Panel "incorrectly interpreted and applied Article 14(d) of the SCM Agreement in finding that the term 'remuneration' need not be the actual recompense received by the GOI for the grant of mining rights, but can also be notional" and the second, that the Panel "incorrectly interpreted and applied Article 14(d) of the SCM Agreement in finding that Commerce was permitted to calculate quantum of benefit on the basis of a fictional constructed price of extracted iron ore (inclusive of the miner's costs and reasonable profits)". India Notice of Appeal, para. 42. The United States considers that these claims are the same because they refer to the same notion, cite to the same paragraph in the Panel Report as their basis of appeal, and no relevant distinction between the two is explained in India's Appellant Submission. On this basis, the United States further considers that India has abandoned one of these appeals.

assessed in respect of the government provider.[449] India also appeals the Panel's rejection of India's claims under "good faith." As described below, India's claims are without merit and should be rejected as they are based on India's flawed argument that remuneration should be assessed from the perspective of the government provider as well as claims that the Panel correctly found were outside the Panel's terms of reference.

1. The Panel Correctly Found That Commerce's Methodology Is Consistent with Article 14 of the SCM Agreement

378. For the sake of completeness, the United States provides a brief overview of both Commerce's benefit calculations and the Panel's findings, below:

379. Before the Panel, India argued that Commerce's benchmark determination in respect of the GOI's provision of mining rights was flawed in that Commerce should have relied on either (1) the analysis of a consultant retained by the GOI concerning GOI pricing policies compared with foreign government mining right prices, or (2) the GOI's explanations of the GOI's pricing policies.[450] Commerce did neither. Rather, consistent with the benefit calculation guidelines in Article 14(d) of the SCM Agreement, Commerce determined the benefit to the recipient based on the "prevailing market conditions" in the country of provision. As was the case in *US – Softwood Lumber IV,* there were no private or non-government prices for coal and iron ore royalties available in India that could be used as a benchmark to determine whether the GOI had conferred a benefit. Commerce constructed the cost of the iron ore and coal to Tata by adding Tata's actual royalty payments, actuals costs of extracting the iron ore and coal, actual costs of delivering ore and coal to Tata's steel factory, and profit based on data provided Tata.[451] For the iron ore benchmark in the 2006 administrative review (with respect to which Tata's costs were compared) Commerce used a 2006 world market price for iron ore from Hamersly, Australia, as found in the *Tex Report*.[452] For the coal benchmark in the 2006 administrative review, Commerce used the prices Tata actually paid for coal from Hamersly, Australia, plus actual delivery costs to Tata's factory.[453]

380. The Panel found that India's claims against Commerce's methodology were premised on two flawed arguments: First, on India's earlier argument that steel producers were only provided the right to mine minerals, rather than the extracted minerals themselves, a premise which the Panel already rejected in its findings above in respect of the meaning of "provides" under Article 1.1(a)(1)(iii). Second, on India's argument that the adequacy of remuneration should be assessed

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[449] India Appellant Submission, paras. 519-520. The United States further observes that in paragraph 44 of India's Notice of Appeal, India requests that the Appellate Body complete the analysis in four respects. On the basis of the arguments contain in India's Appellant Submission, however, the United States considers that India is requesting only that the Appellate Body reject the Panel's legal interpretation of Article 14, adopt India's interpretation own whereby remuneration cannot be notional and must be assessed from the perspective of the government provider, and to find that because Commerce's assessed remuneration from the perspective of the recipient, those finding are inconsistent with Article 14(d). The United States considers that the rest of India's claims have been abandoned.
[450] India First Written Submission, para. 393-394.
[451] *2006 Issues and Decisions Memorandum,* at Sections I.A.8 and 9 (Exhibit IND-33); *2008 Issues and Decisions Memorandum,* at Sections II.A.8 and 9 (Exhibit IND-41).
[452] *2006 Issues and Decisions Memorandum,* at Sections I.A.8 (Exhibit IND-33).
[453] *2006 Issues and Decisions Memorandum,* at Sections I.A.9 (Exhibit IND-33); *2008 Issues and Decisions Memorandum,* at Sections II.9 (Exhibit IND-41).

from the perspective of the government provider, an argument similarly rejected in the context of the Panel's consideration of Article 14(d). Having rejected the premises of India's arguments, the Panel found:

> Since the USDOC needed a government price for the provided "good" against which to compare the relevant benchmarks, we consider that it was reasonable for the USDOC to construct a notional government price for the extracted minerals.[454]

381. In respect of India's allegations that Commerce's use of a notional price was inconsistent with the principle of "good faith", the Panel found that such claims were outside of its terms of reference as India did not include such claims in its panel request.[455]

2. India Has Not Established that Commerce's Notional Government Price Methodology Is Inconsistent with Article 14(d) of the SCM Agreement.

382. India appeals the Panel's finding that Commerce's construction of a notional government price for the extracted minerals was not inconsistent with Article 14(d) on the basis that remuneration should be assessed from the perspective of the government provider. For the same reasons described, above, India's position is inconsistent with the text of Article 14(d) and should be rejected.

383. India argues that in the context of mining rights, Article 14(d) requires that an "assessment of the adequacy of remuneration" must be the amount of royalty payment received by the GOI in exchange for the mining right. India asks "can the remuneration be anything other than the actual amount received by the GOI?" and objects to the methodology employed by Commerce on this basis.[456]

384. As India has no other basis for its objection to Commerce's benchmark methodology other than to argue that Commerce should have compared the actual amount received by the government (i.e., the adequacy of remuneration should be assessed from the perspective of the government-provider), which would render the analysis of benefit completely circular, India's arguments are without merit. India has not shown that the Panel erred in its legal interpretation of Article 14(d). The United States has thoroughly addressed India's arguments regarding adequacy of remuneration, above, and will not repeat them again here. The United States refers the Appellate Body to Section III.A of the U.S. Appellee Submission.

385. The United State also takes note of India's assertion that remuneration cannot be "notional" as well as India's request for the Appellate Body to make findings in this respect.[457] India, however, does not provide any arguments in support of this assertion, whether based on the text of Article 14, prior findings by panels or the Appellate Body, or any rationale whatsoever. It is unclear on what basis India requests that the Appellate Body make findings in this regard. Indeed, the Panel found that in the context of mining rights, the construction of a

[454] Panel Report, para. 7.260.
[455] Panel Report, para. 7.261.
[456] India Appellant Submission, para. 513-514.
[457] India Notice of Appeal, paras. 42 and 44; India Appellant Submission, para. 520.

notional government price for the extracted minerals was "reasonable."[458] For these reasons the United States respectfully requests that the Appellate Body reject India's assertion and accompanying Article 14(d) claims in this regard.

386. Finally, with respect to India's requests that the Appellate Body reverse the Panel's findings and complete the analysis to find that the United States acted inconsistently with Article 14(d) in its construction of a notional government price, the United States respectfully requests that the Appellate Body reject India's claims. India has not challenged the calculations themselves but only the fact that the basic methodology does not calculated benefit from the perspective of the government provide. Even the Panel observed:

> [A]part from challenging the USDOC's basic methodology, India has not challenged the manner in which the relevant notional government prices were constructed by the USDOC. For these reasons, we reject India's claim that such methodology is inconsistent with Article 1.1(b) and 14(d) of the SCM Agreement.[459]

387. The United States further takes note of India's request in its Notice of Appeal that the Appellate Body complete the analysis and find that Commerce's determination with respect to the captive mining program for coal is inconsistent with Article 14(d) on the basis that Commerce used prices from Australia, inclusive of all charges for delivery to the steel producer in India.[460] The United States does not understand the basis for that request as India did not address it in its Appellant Submission. Accordingly, the United States considers that India has abandoned that request.

388. For the reasons described above, India's claims that Commerce's notional government price approach is inconsistent with Article 14(d) of the SCM Agreement are without merit and should be rejected.

3. The Panel Correctly Found that India's "Good Faith" Claim is Outside of the Panel's Terms of Reference

389. Before the Panel, India argued that the United States did not perform its obligations under Article 14(d) of the SCM Agreement "in good faith."[461] Notwithstanding such accusations in the body of India's First Written Submission, India's panel request did not contain any claims with respect to "good faith." Furthermore, India did not cite to any provision of a covered agreement as the basis for its claim, nor did India request a finding by the Panel in respect of "good faith."[462]

390. In paragraph 7.261 of its report the Panel correctly stated:

> We note that India has also alleged that the USDOC's notional government price methodology is inconsistent with the principle of good faith. We agree with the

[458] Panel Report, para. 7.260.
[459] India Appellant Submission, para. 7.260.
[460] India Notice of Appeal, para. 44.
[461] India First Written Submission, paras. 320-326.
[462] India First Written Submission, para. 641.

> United States' argument that India's good faith claim falls outside the Panel's terms of reference, since it is not provided for in India's panel request.[463]

391. Moreover, in responding to India's request for findings in respect of "good faith" in response to the interim report, the Panel made the following comment:

> We reject India's request. India has not established that the Panel should address a claim that is not within the Panel's terms of reference, as determined by India's request for establishment. Furthermore, an allegation of nullification or impairment does not amount to an allegation of violation of the principle of "good faith".[464]

392. India appeals the Panel's finding that India's claims pertaining to "good faith" are outside the Panel's terms of reference under Article 11 of the DSU. India further requests that the Appellate Body complete the analysis under Article 14(d) of the SCM Agreement and find that the United States has acted inconsistently with the principle of "good faith". As a Panel's failure to consider claims not within its terms of reference does not amount to a violation of Article 11 of the DSU, the United States considers that India's arguments are without merit and asks that the Appellate Body reject India's appeal.

393. The United States observes more generally that a claim of not acting in good faith is a very serious one that should not be made lightly or as a facile afterthought, as India has done here. Indeed, India has acted contrary to the cautions of the Appellate Body in *EC – Sardines*:

> We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention*. And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member.[465]

394. The Panel correctly rejected such claims by India—claims in which India simply re-casted its arguments under Article 14 to argue that if there is a breach of Article 14 due to interpreting it in an "unreasonable" manner, then the United States failed to act in good faith. Of course, this means no such thing. As discussed in this submission, India has advanced a number of interpretations that are unreasonable and lack any basis in the covered agreements. The United States would not contend, however, that the rejection of those interpretations would mean that India has failed to engage in these procedures in good faith, as called for by Article 3.10 of the DSU.

395. Finally, the United States notes that the WTO Agreement does not call for a finding as to whether a breach of an agreement occurs in good faith: a measure inconsistent with an agreement would be a breach of that agreement. As was explained above, however, contrary to India's arguments, all of Commerce's actions were consistent with the obligations contained in the Article 14(d) guidelines for determining the benefit for goods sold for less than adequate remuneration based on the prevailing market conditions in the country of provision, to the extent

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[463] Panel Report, para. 7.261.
[464] Panel Report, para. 6.142.
[465] *EC – Sardines (AB)*, para. 278.

such information was available. For these reasons, the United States requests the Appellate Body to reject India's claim relating to "good faith" under Article 14(d).

C. The Condition for India's Appeal in Respect of Article 2.1(c) and 2.4 of the SCM Agreement Has Not Been Met

396. India conditionally appeals of Section 7.4.2 of the Panel Report, specifically the Panel's exercise of judicial economy in respect of India's claims under Article 2.1 and 2.4 of the SCM Agreement in respect of a captive mining program for iron ore.[466] The Panel found that Commerce did not have sufficient basis to properly determine the existence of a captive mining program for iron ore as required by Article 12.5 of the SCM Agreement and, in light of this, exercised judicial economy in respect of India's Article 2.1 and 2.4 claims.[467] In its Appellant Submission, India requests, "in the event the Appellate Body finds that the United States did not violate Article 12.5 of the SCM Agreement" that the Appellate Body also: (1) find that the Panel failed to make an objective assessment in accordance with Article 11 of the DSU in exercising judicial economy in respect of India's specificity claims for that program, under Articles 2.1 and 2.4 of the SCM Agreement and (2) complete the analysis and find that the United States acted inconsistently with Articles 1.2, 2.1, and 2.4 of the SCM Agreement in finding that the grant of mining rights for iron ore was *de facto* specific.[468] Further, India asks the Appellate Body to find that the imposition of countervailing duties in respect of a captive mining program for iron ore was inconsistent with Articles 1.2, 2.1, and 2.4 of the SCM Agreement.[469]

397. The United States does not appeal the Panel's findings in respect of Article 12.5 of the SCM Agreement. Therefore, the condition for India's appeal has not been met. The United States understands that the appeal laid out in paragraphs 38 through 41 of India's Notice of Appeal and paragraphs 531 to 524 of India's Appellant submission is not before the Appellate Body. In this light, the United States will not address those arguments in this submission.

IX. THE PANEL CORRECTLY INTERPRETED AND APPLIED ARTICLE 1.1(a)(1)(i) OF THE SCM AGREEMENT TO FIND THAT THE SDF MANAGING COMMITTEE MADE A DIRECT TRANSFER OF FUNDS

398. India's appeal of the Panel's finding that Commerce's determinations with regard to the Steel Development Fund ("SDF") Program were consistent with Articles 1.1(a)(1)(i) of the SCM Agreement rests on a fundamental misunderstanding of the record in the underlying proceeding. India's legal argument is that the SDF Managing Committee could not have made a "direct transfer" of funds because the funds allegedly belonged to and were dispersed by a different entity, the JPC. But as its very name implies, and as Commerce found and the Panel observed, the SDF *Managing* Committee managed the funds by deciding on issuance, terms, and waivers of SDF loans. That is, this governmental body was responsible for every direct transfer of funds under that program and was not merely entrusting or directing another entity to transfer its funds. In this instance, the other entity was simply assigned the role of administering the loan as decided by the Managing Committee.

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[466] India Notice of Appeal, paras. 38-41; India Appellant Submission, paras. 531-524.
[467] Pane Report, para. 7.217.
[468] India Notice of Appeal, para. 40; India Appellant Submission, para. 531.
[469] India Notice of Appeal, para. 41.

399. India asserts that the Panel incorrectly concluded that the SDF loans may be considered a "direct transfer" of funds within the meaning of Article 1.1(a)(1)(i) where those funds are not owned by the government or charged to a public account, and where an intermediary entity was involved in disbursing the funds.[470] Specifically, India argues that the SDF loans may not be considered a "direct transfer" within the meaning of Article 1.1(a)(1)(i), because "Article 1.1(a)(1)(i) does not cover scenarios involving mere government decision-making".[471] In this respect, India argues that the SDF Managing Committee's role involved "only decision making on the issuance or terms of the transfer"[472], while the JPC issued and administered the loans.[473] India also argues that all direct transfers under Article 1.1(a)(1)(i) must involve government-owned funds or result in a charge on the public account.[474] According to India, contrary to the Panel's interpretation, "where a government takes the ***decision*** that an intermediate private body or agency issue a loan on certain terms or waive a loan already issues, the scenario is dealt with under Article 1.1(a)(1)(iv),"[475] not Article 1.1(a)(1)(i). India's claims are without merit.

400. The Panel correctly found that Commerce acted consistently with Article 1.1(a)(1)(i) when it found that the distribution of the SDF funds in the form of loans was a direct transfer of funds, because the decision-making regarding the issuance, terms and waivers of SDF loans was done by the SDF Managing Committee, a governmental body.[476] Contrary to India's assertions, the Panel determined that the SDF Managing Committee "was 'directly' involved in the issuance of SDF loans," because there was record evidence demonstrating that the SDF Managing Committee "made the decision whether or not loans should be issued, and on what terms."[477] Consequently, the Panel concluded that Commerce's determination that the loans provided using these funds constituted a "direct transfer" was consistent with Article 1.1(a)(1)(i) of the SCM Agreement.

A. The Panel Correctly Interpreted Article 1.1(a)(1)(i) of the SCM Agreement to Cover Government Decision-Making With Respect to Direct Transfers of Funds

401. Article 1.1(a)(1)(i) of the SCM Agreement defines a subsidy as existing if "there is a financial contribution by a government or any public body," such as where "a government practice involves *a direct transfer of funds (e.g. grants, loans*, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees). . . ."[478] The Appellate Body has interpreted this provision to mean that any government practice the effect of which is to improve the financial position of the recipient may constitute a direct transfer of funds. In *Japan – DRAMS (Korea)*, the Appellate Body observed that:

> … the words "grants, loans, and equity infusion" are preceded by the abbreviation "e.g.", which indicates that grants, loans, and equity infusion are cited examples

[470] *See* India Appellant Submission, paras. 548-577.
[471] India Appellant Submission, heading XII.B.2, p.134
[472] India Appellant Submission, para. 552.
[473] India Appellant Submission, para. 560.
[474] India Appellant Submission, paras. 563-564.
[475] India Appellant Submission, para. 555. (original emphasis)
[476] Panel Report, para. 7.295.
[477] *See* Panel Report, para. 7.293.
[478] SCM Agreement, Article 1.1(a)(1)(i) (emphasis added).

> of transactions falling within the scope of Article 1.1(a)(1)(i). This shows that transactions that are similar to those expressly listed are also covered by the provision. Debt forgiveness, which extinguishes the claims of a creditor, is a form of performance by which the borrower is taken to have repaid the loan to the lender. The extension of a loan maturity enables the borrower to enjoy the benefit of the loan for an extended period of time. An interest rate reduction lowers the debt servicing burden of the borrower. In all of these cases, *the financial position of the borrower is improved and therefore there is a direct transfer of funds within the meaning of Article 1.1(a)(1)(i)*.[479]

402. The Appellate Body reviewed this and other past findings in *US – Large Civil Aircraft (Second Complaint)* to hold that "[t]he direct transfer of funds in subparagraph (i) therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are *made available* to a recipient."[480] The Appellate Body further found that, before any determination can be made pursuant to one of the subparagraphs of Article 1.1(a)(1), a measure must be properly characterized according to its design, operation and effects.[481] As the panel in *Japan – DRAMS (Korea)* put it, "it is appropriate to look beyond the simple form of a transaction, and analyze its effects, in determining whether or not a transaction constitutes a "direct transfer of funds".[482]

403. The Panel's interpretation is consistent with the text of the SCM Agreement, and with past interpretations of Article 1.1(a)(1)(i). The Panel looked to the design, operation and effects of the SDF loan program, and found, based on the record evidence before Commerce : (1) that SDF levies are collected by the JPC; (2) that "once collected, the funds are 'remitted to the Fund,'" such that they "are no longer held by either the steel producers or the JPC; and (3) that the funds are then "held by the SDF, and disposed of pursuant to the instructions of the SDF Managing Committee."[483] Based on these facts, the Panel concluded:

> Even though the SDF Managing Committee may not have taken title over the funds, or imposed a charge on the public account when releasing those funds as loans, the SDF Managing Committee was instrumental (because of its role as decision-maker regarding the issuance, terms and waivers of SDF loans) in "transfer[ring]" those funds from the SDF to the loan beneficiaries.[484]

404. India contends that the use of the term "direct" precludes the inclusion of an intermediary entity in the government practice described in Article 1.1(a)(1)(i).[485] In India's view, therefore, "the mere decision-making of the SDF on the issuance, terms and waivers of SDF loans"[486] does not constitute a direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM

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[479] *Japan – DRAMS (Korea) (AB)*, para. 251 (emphasis added).
[480] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 614. (emphasis added)
[481] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 586 (citing *China – Auto Parts (AB)*, para. 171)
[482] *Japan – DRAMS (Korea) (Panel)*, para. 7.444, as upheld by the Appellate Body.
[483] Panel Report, para. 7.295.
[484] Panel Report, para. 7.295.
[485] India Appellant Submission, para. 550.
[486] India Appellant Submission, para. 559.

Agreement, because it was the JPC that "formally administered the disbursement and collection of funds, and the day-to-day operations of the SDF."[487]

405. India's argument that a direct transfer cannot involve an "intermediary entity" assumes a different structure for the SDF than exists in the record. It is the SDF Managing Committee that decides what happens with the levies remitted to the SDF; thus, it is not the case that the JPC is an entity with any capacity to *otherwise* decide how to dispose of SDF funds. As it did before the Panel, India presents the transfer of funds to steel companies as a discrete and isolated action performed by the JPC, wholly divorced from the decision by the SDF Managing Committee that the funds should be transferred and on what terms. India's argument draws artificial distinctions between the constituent committees of the SDF program, and would lead to a situation in which the managers of a company, for example, should be considered one entity, and the directors another. India's argument on an "intermediary entity" would also seemingly mean that, if a government were to decide to make a grant or loan using funds held in its account at a bank, such a bank would be an "intermediary entity" and there could be no "direct transfer" of funds. There is no basis in the SCM Agreement for drawing such artificial distinctions and no basis in the record evidence before Commerce for it to have made such a finding.

406. We further recall that Article 1.1(a)(1)(i) requires that "a government practice *involve[]* the direct transfer of funds." Therefore, the government practice does not need to constitute such a transfer in and of itself; it need only *involve* or *include*[488] such a transfer. Thus, even if the JPC were viewed as formally transferring the funds, the decision by the SDF Managing Committee to transfer the funds and on what terms would also be a practice involving the direct transfer of funds.

407. For these reasons, the Panel was correct in interpreting Article 1.1(a)(1)(i) to apply to the SDF Managing Committee's actions despite the involvement of the JPC in administering the distribution of the SDF loans.

B. The Panel's Interpretation Did Not Render Article 1.1(a)(1)(iv) "Inutile"

408. India is also wrong to suggest that the Panel's findings render Article 1.1(a)(1)(iv) of the SCM Agreement "inutile".[489] In this respect, India argues that "a government practice that ***mandates or enables*** the transfer of funds by an intermediator or intervening agency" is covered by Article 1.1(a)(1)(iv).[490] In India's view, this is because *indirect* transfers are covered by Article 1.1(a)(1)(iv), while 1.1(a)(1)(i) covers only *direct* transfers. As has been found by the Appellate Body previously, the scope of Article 1.1(a)(1)(iv) is the same as the scopes of Articles 1.1(a)(1)(i)-(iii).[491] Therefore, Article 1.1(a)(1)(iv) does not transform the nature of the financial contribution described in Article 1.1(a)(1)(i) from a "direct transfer" into an "indirect transfer" of funds. Rather, the difference between the two subparagraphs is whether the government is providing a financial contribution covered under Article 1.1(a)(1)(i), or a private body has been entrusted or directed to do so.

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[487] India Appellant Submission, para. 560.
[488] The New Shorter Oxford English Dictionary defines involve to mean, relevant respect, "include, contain, comprehend." *The New Shorter Oxford English Dictionary* at 1412 (1993).
[489] India Appellant Submission, heading XII.B.3, p. 135.
[490] *See* India Appellant Submission, paras. 553-557.
[491] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 112.

409. As described above, the government practice at issue *involved* the distribution of funds by the JPC; but the SDF Managing Committee did not entrust and direct the JPC to provide loans within the meaning of Article 1.1(a)(1)(iv). Based on the facts on the record, the SDF Managing Committee itself made all decisions regarding the issuance, terms and waivers of the SDF loans.[492] While the JPC administered the distribution of these funds after the SDF made its decisions, its role was ministerial; as the Panel found, "the SDF Managing Committee was instrumental (because of its role as decision-maker regarding the issuance, terms and waivers of SDF loans) in 'tranfer[ring' those funds from the SDF to the loan beneficiaries."[493] Put differently, the JPC had no authority to issue SDF loans absent a decision by the SDF Managing Committee. Thus, the JPC was not entrusted or directed to make loans using funds over which it otherwise had authority.

410. India's argument again artificially isolates the various actions taken as part of a "government practice", such that the presence of any "intermediary" would preclude the application of Article 1.1(a)(1)(i). As noted above, a bank, for example, would be involved in almost any transfer of funds and would, on India's view, be an "intermediary" that would need to be entrusted or directed. This is not the circumstance for which Article 1.1(a)(1)(iv) was intended.

411. We also note that, while the JPC is not the "public body" found by Commerce to have made the financial contribution, the United States does not agree with India that the JPC is a private body. To the contrary, the JPC is a constituent committee of the SDF Program, formed by the GOI through the issuance of an administrative order, "for the purpose of giving effect to the provisions of" the Iron and Steel (Control) Order, 1956.[494] As such, the JPC operated under the supervision of the GOI both through the supervision of the SDF Managing Committee, as well as periodic administrative orders issued by the Ministry of Steel. Information submitted to Commerce during the original investigation also indicated that the JPC was not acting in an independent capacity. Rather, GOI documents stated that the JPC "shall perform its functions relating to the Steel Development Fund in accordance with the [sic] subject to such orders or directions as may be issued by the Central Government in this behalf from time to time."[495]

C. The Panel Correctly Found that Article 1.1(a)(1)(i) Does Not Require Government Ownership Over the Funds or a Charge on the Public Account

412. India also argues that the disbursement of these funds as loans cannot constitute a direct transfer of funds because the GOI did not own the SDF funds, and because the issuance of SDF loans did not result in a "charge on the public account.[496] India contends that "subsidies have generally been linked directly to the taxation function of the government and as a general rule, monetary resources or contributions derived from this taxation function would be owned and

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[492] See Panel Report, para. 7.295; U.S. First Written Submission, para. 554; Investigation Verification Report, of GOI Responses, p.3 (Exhibit USA-74).
[493] Panel Report, para. 7.295.
[494] U.S. First Written Submission, para. 531; GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 22: "Ministry of Steel Notification of 1971" (Exhibit USA-75).
[495] U.S. First Written Submission, para. 532; GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at Exhibit 21: "Ministry of Steel Notification of 1992." (Exhibit USA-75).
[496] India Appellant Submission, paras. 562-576.

under the complete control of the government."[497] In support, India cites to preparatory work regarding Article 1.1(a)(1) of the SCM Agreement,[498] including findings by the 1960 Panel on Subsidies and Trade that "[t]he GATT does not concern itself with such action by private persons acting independently of their governments," and that "there was no obligation to notify schemes in which a group of producers voluntarily taxed themselves in order to subsidize exports of a product."[499] From this, India concludes that a direct transfer of funds "must involve financial contributions from out of [sic] public funds or involve a charge on the public account."[500]

413. Contrary to India's contention, neither the text of the SCM Agreement, nor the Appellate Body findings discussed above, support the proposition that any direct transfer of funds must be accomplished through the transfer of ownership of the relevant funds from the government to the recipient. As noted above, Article 1.1(a)(1)(i) requires that "a government practice *involve[]* the direct transfer of funds," and not that a government practice must constitute, in and of itself, such a transfer. India's interpretation narrows the scope of Article 1.1(a)(1)(i), such that significant government action could be shielded from WTO subsidy disciplines. Where, as here, a government can and does decide whether and on what terms certain funds will be made *available* to private entities, those transfers are covered by Article 1.1(a)(1)(i) of the SCM Agreement, because they constitute a government practice involving a direct transfer of funds. Accordingly, the Panel correctly found that "there is nothing in the text of Article 1.1(a)(1)(i) to suggest that the relevant government or public body must have title over the funds being transferred, or that there must be a charge on the public account, in order for a direct 'transfer' of funds to occur."[501]

414. Furthermore, as was discussed at length before the Panel, the SDF levies operated as a tax.[502] Evidence before Commerce demonstrated that, under the direction of the SDF Managing Committee, the JPC determined the amounts to be levied and sequestered the resulting funds, and the SDF Managing Committee thereafter determined the redistribution of those funds to steel producing entities and steel-related projects in accordance with the GOI's goals for the steel sector.[503] Indian steel producers did not determine the amounts to be collected from consumers and remitted to the SDF program. Further, Indian steel producers did not own or control the funds that had been collected, either individually, or through association with the JPC. To the contrary, as acknowledged by GOI officials during the investigation, the SDF Managing

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[497] India Appellant Submission, para. 571.
[498] India Appellant Submission, paras. 568-571.
[499] India Appellant Submission, para. 570, citing Panel on Subsidies and State Trading, *Report on Subsidies*, March 23, 1960, L/1160, page 3 (emphasis omitted).
[500] India Appellant Submission, para. 571.
[501] *See* Panel Report, para. 7.294.
[502] *See* U.S. First Written Submission, paras. 552-554; U.S. Responses to First Panel Questions, Question 40, para. 7; U.S. Second Written Submission, paras. 109-116; GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), p. 2 and internal Exhibits 20-22 (Exhibit USA-75). India also cites as support a decision by the Supreme Court of India, where that Court held that the SDF levy did not constitute a tax. India Appellate Submission at paras. 573-575. However, a judicial interpretation of a municipal law is not binding for purposes of WTO legal interpretation. *US – Large Civil Aircraft (2nd complaint)(AB)*, para. 586, citing to *US – Softwood Lumber IV (AB)*, para. 56. Therefore, it was appropriate for Commerce to make its determination, and for the Panel to review that determination, based on the design and operation of the program.
[503] *See* U.S. First Written Submission, paras. 552-554; U.S. Responses to First Panel Questions, Question 40, para. 7; U.S. Second Written Submission, paras. 109-116; GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), p. 2 and internal Exhibits 20-22 (Exhibit USA-75).

Committee retained complete control over the funds, and made all decisions "regarding the issuance, terms and waivers of SDF loans."[504] Thus, the SDF Managing Committee was in full control of these funds once they had been levied and sequestered, and determined their ultimate allocation and use. Consequently, as Commerce and the Panel found, the SDF loans constituted a direct transfer of funds under Article 1.1(a)(1)(i) of the SCM Agreement.

D. Conclusion

415. Based on the foregoing, the United States requests that the Appellate Body reject India's appeal of the Panel's interpretation and application of Article 1.1(a)(1)(i), and uphold the findings in section 7.5.1.2.3 of the Panel Report.

X. THE PANEL CORRECTLY FOUND THAT COMMERCE'S BENEFIT DETERMINATION IN RESPECT OF THE SDF LOAN PROGRAM WAS NOT INCONSISTENT WITH ARTICLE 14(b) OF THE SCM AGREEMENT

416. The Panel found that Commerce's loan benchmark in respect of the SDF loan program was not inconsistent consistent with Article 14(b) of the SCM Agreement.[505] India nonetheless appeals the Panel's findings on two grounds: First, India argues that the Panel disregarded the Indian Supreme Court's finding that the SDF fund was created through levies on Indian steel producers in breach of Article 11 of the DSU. Second, India argues that the Panel erred in its interpretation of Article 14(b) because, in India's view, any "comparable" loan, within the meaning of Article 14(b) would account for the both levies and any other alleged "entry fee" that Indian steel producers paid to obtain SDF loans, in the form of their own monetary contributions to the SDF Fund.[506] India's claims are without merit.

417. As discussed below, there is no basis for India's claim under Article 11 of the DSU as the Panel considered all of the record evidence and India's arguments, including the Indian Supreme Court decision. The Panel disagreed with India's arguments, finding that "we do not agree that SDF levies should have been treated as the producers' own funds."[507] A party's disagreement with the weighing of evidence is not the basis for an Article 11 violation.

418. Moreover, the United States submits that India errs in its interpretation of Article 14(b). In the 2006 administrative review Commerce properly used an average of certain Prime Lending Rates ("PLRs") as a commercial benchmark interest rate, which was compiled and published by the Reserve Bank of India for loans similar in currency, structure and maturity.[508] The Panel correctly found that Commerce acted in accordance with Article 14 in not providing a "credit" in its benefit calculations for the funds that were levied on consumers, or any administrative fees incurred by steel producers to obtain SDF loans. The Panel also correctly found that Article

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[504] U.S. First Written Submission, para. 823; Investigation Verification Report of GOI Responses at 3 (Exhibit USA-74).
[505] Panel Report, paras. 7.307-7.313.
[506] India Appellant Submission, para. 589.
[507] Panel Report, para. 7.311.
[508] *2006 Issues and Decisions Memorandum*, at section "B- Long-Term Benchmarks and Discount Rates." (Exhibit IND-33).

14(b) "does not require the USDOC to take into account the costs incurred by SDF loan recipients in obtaining SDF loans."[509]

419. The United State respectfully submits that the Panel should reject India's claims under both Article 11 of the DSU and 14(b) of the SCM Agreement. Before turning to India's appeal, the United States briefly recalls that Article 14 contains the obligations related to the calculation of a subsidy benefit. Article 14(b), specifically, concerns the calculation of a benefit when a Member provides a loan. In relevant part, Article 14 provides:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
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> * * *
>
> (b) a loan by a government shall not be considered as conferring a benefit, unless 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. In this case the benefit shall be the difference between these two amounts;

420. The Appellate Body has found that Article 14 of the SCM Agreement provides guidelines, which afford Members flexibility in the calculation of benefit. The panel in *US – AD/CVD* examined the text of Article 14(b) of the SCM Agreement and noted, at the outset, that:

> [T]he chapeau of Article 14 indicates that the provisions set forth in sub-paragraphs (a)-(d) of this provision are "guidelines", and that while investigating authorities must respect these guidelines in calculating the benefits from the particular kinds of financial contributions identified in the respective sub-paragraphs, they have flexibility as to the precise methodology that they use, so as to be able to take into account the particular facts of a given investigation.[510]

A. The Panel Did Not Fail to Make an Objective Assessment in Accordance with Article 11 of the DSU

421. On appeal, India claims that the Panel did not "fully account" for a decision by the Supreme Court of India, where that Court held that the SDF levy did not constitute a tax, but rather, consisted of steel producers' funds.[511] As support, India notes that the Panel did not cite to the decision by the Indian Supreme Court in its report.[512] On this basis, India argues that "[h]ad the Panel fully accounted for the Indian Supreme Court's ruling and considered the process that lead to the steel prices being increased . . .the Panel would have been constrained to

[509] Panel Report, para. 7.311.
[510] *US – AD/CVD (Panel)*, para. 10.107.
[511] India Appellant Submission, paras. 582-586.
[512] India Appellant Submission, para. 585.

hold that" the SDF levies were producer funds, and that Commerce should have accounted for this cost structure when finding a "comparable commercial loan" within the meaning of Article 14(b).[513] Thus, India argues that Commerce was obligated to make adjustments to account for these alleged "terms" of the SDF loans. India's claims are without merit.

422. As an initial matter, the Panel is not required to make an explicit reference to all the evidence before it.[514] And a judicial interpretation of a municipal law for purposes of characterizing it under domestic law is not the same issue as the characterization of aspects of that law (as it operates within that municipal legal system) under WTO legal principles (for example, is a domestic measure a "financial contribution" or does it confer a "benefit").[515] Nevertheless, both Commerce and the Panel considered the substance of Indian Supreme Court's holding---namely that the SDF funds consisted of "producer levies," and disagreed with this conclusion. Commerce made its determination based on an analysis of the design and operation of the program at issue, and found that, contrary to the Indian Supreme Court's findings, the funds remitted to the SDF were *not* the Indian steel producers' "own funds," but rather, they were funds collected from levies imposed on *consumers* who purchased certain steel products. As discussed in detail below, the GOI established price increases that were to be added to certain steel products, and then remitted to the SDF Program.[516] These price increases were paid by consumers purchasing these steel products. Consistent with Article 11 of the DSU, the Panel considered these facts and correctly found that Commerce properly determined that the funds remitted to the SDF were not "the producers' own funds," and instead were funds "collected from consumers and always destined for the SDF," such that steel producers would not have been able to use these funds or invest them to obtain interest.[517]

423. Moreover, India argues that had the SDF funds been considered consumer levies managed by the government, then "the program would have been open to all steel producers."[518] As they were not open to all, India argues that the SDF funds were producer funds and that "[i]t is only the participating steel producers who had any form of title or interest to the SDF funds simply because it was their decision to create and contribute to the fund."[519] India explains that ". . . it was the private entities who decided to increase prices of their products so as to direct this additional element of price to create the SDF fund."[520] India's argument is directly contrary to the record evidence. The fact that the SDF Program was limited to certain large, integrated steel producers, and not open to all steel producers in India, has no bearing on the question of whether or not the SDF levies were paid by consumers. SDF funds did not consist of voluntary contributions from participating Indian steel producers', but rather of GOI-mandated price increases that were paid by consumers purchasing steel products, and in that sense were no

[513] India Appellant Submission, para. 585.
[514] *China – Rare Earths* (AB), para. 5.178; *EC – Fasteners* (AB), paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.
[515] *US – LCA (AB)*, para. 586, citing to Appellate Body Report, *US – Softwood Lumber IV*, para. 56.
[516] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at p.2 and Exhibits 20-22 (Exhibit USA-75).
[517] *See* Panel Report, para. 7.311.
[518] India Appellant Submission at para. 584.
[519] India Appellant Submission at para. 584.
[520] India Appellant Submission at para. 584.

different from other types of involuntary taxes levied on individuals and enterprises.[521] Thus, the Panel correctly found that India's characterization of these funds as steel producer's "own funds" is incorrect.[522]

424. For these reasons, the United States requests that the Appellate Body reject India's challenge under Article 11 of the DSU.

B. The Panel Correctly Found that Article 14(b) of the SCM Agreement Does Not Require An Investigating Authority to Provide Credits

425. India appeals the Panel's findings on the basis that Commerce's benchmark for the SDF loans was not "comparable," in accordance with Article 14(b) of the SCM Agreement, because any comparable commercial loan "would have to incorporate a similar structure as well, i.e. the United States must first consider using loans that have such a similar entry fee."[523] In other words, according to India, the "deposits made by the participating steel producers to become eligible for the SDF program have to be accounted for in the benefit analysis."[524] India's assertion is incorrect.

426. As explained in detail above, the funds remitted to the SDF were not "deposits made by steel producers" or "producer levies," but rather were GOI-mandated price increases that were paid by consumers purchasing steel products.[525] Moreover, the Panel correctly found that Article 14(b) of the SCM Agreement "does not require the USDOC to take into account any alleged costs incurred by SDF loan recipients in obtaining SDF loans."[526] Article 14(b) clearly states that a benefit is conferred where there is a "difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market." No other credits or adjustments are provided for in the SCM Agreement.

427. Article 14 of the SCM Agreement provides investigating authorities flexibility in the methodology applied to calculate the benefit of a subsidy. Article 14 thus permits investigating authorities to apply methodologies that account for different factual situations and the conditions under which the subsidy was provided. Further, Article 14 contains no requirement that an investigating authority must provide a credit when calculating the benefit of a subsidy to account for alleged costs associated with obtaining the subsidy.[527] Instead, the text of Article 14 explicitly pertains to the calculation of the "benefit" to the recipient. The Appellate Body has explained that the ordinary meaning of "benefit" includes:

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[521] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at p.2 and Exhibits 20-22 (Exhibit USA-75).
[522] Panel Report, para. 7.311.
[523] India Appellant Submission, para. 589.
[524] India Appellant Submission at para. 587.
[525] GOI's March 19, 2001 Supplemental Questionnaire Response (Inv.), at p.2 and Exhibits 20-22 (Exhibit USA-75).
[526] Panel Report, para. 7.311.
[527] For example, Article 14 of the SCM Agreement is entitled "Calculation of the Amount of a Subsidy in Terms of the *Benefit* to the Recipient." (emphasis added). There is no reference in Article 14 of the SCM Agreement to instances when a government provides "no benefit" nor is there any reference to providing a credit to Members when they provide a good for adequate remuneration.

> an "advantage", "good", "gift", "profit", or, more generally, "a favourable or helpful factor or circumstance". Each of these alternative words or phrases gives flavour to the term "benefit" and helps to convey some of the essence of that term. These definitions also confirm that the Panel correctly stated that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage."[528]

428. Thus, the United States submits that Article 14 of the SCM Agreement concerns the proper calculation of benefit (*e.g.* the "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"). Article 14 does not require, or even contemplate, a "credit" in the benefit calculation when a government reduces a subsidy recipient's profits through price controls that are entirely unrelated to the subsidy at issue. The United States submits that India inappropriately relies on the word "comparable" for the purposes of advancing its flawed argument that the United States was required to provide a credit.

429. The Panel correctly found that Commerce's loan benchmark calculation did not need to include credits for any alleged costs to steel producers, and that the benchmark was consistent with Article 14(b) of the SCM Agreement.[529] For these reasons, the United States respectfully requests that the Appellate Body reject India's request to reverse the Panel's findings in respect of Article 14(b), as well as India's claims in respect of the underlying determinations.

XI. THE PANEL DID NOT ERR IN FINDING THAT THE U.S. MEASURES REGARDING FACTS AVAILABLE ARE NOT INCONSISTENT "AS SUCH" WITH ARTICLE 12.7 OF THE SCM AGREEMENT

430. On appeal, India asserts that the Panel erred in finding, in Section 7.7.5.1 of the Panel Report, that India failed to establish that section 1677e(b) of the U.S. statute and section 351.308(a), (b) and (c) of Commerce's regulation are "as such" inconsistent with Article 12.7 of the SCM Agreement.[530] India's appeal is explicitly structured in a tiered fashion, with initial allegations of error followed by conditional appeals:

> (1) India claims that the Panel failed in its interpretation of Article 12.7, because the Panel allegedly misunderstood the Appellate Body's findings in *Mexico – Rice*.
>
> (2) In the event the Appellate Body rejects India's claim under Article 12.7 of the SCM Agreement, India conditionally appeals the Panel's findings under Article 11 of the DSU.[531] In this conditional appeal, India argues that the Panel failed to conduct an objective assessment of India's claim that the provisions at issue "require the imposition of the highest possible non-*de minimis* subsidy in all cases of non-cooperation."[532]

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[528] *Canada – Aircraft (AB)*, para. 153 (citations omitted).
[529] *See* Panel Report, paras. 7.311-7.313.
[530] India Appellant Submission, para. 207.
[531] Although India's submission at para. 207 refers to the SCM Agreement, the United States understands that India intended to refer to the DSU in its reference to Article 11, consistent with section III of its Notice of Appeal.
[532] India Appellant Submission, para. 207.

> (3) In the event the Appellate Body reverses the Panel's findings under either appeal, India conditionally requests the Appellate Body to complete the legal analysis to find that the U.S. measures are inconsistent "as such" with Article 12.7 of the SCM Agreement.

431. Neither India's initial appeal (1 above), nor the two conditional appeals (2 and 3 above), have merit. With regard to (1) above, the Panel correctly interpreted Article 12.7 of the SCM Agreement, and its approach was in accordance with the findings of the Appellate Body in *Mexico – Rice*. Regarding (2) above, the Panel complied with its duties under Article 11 of the DSU when it found that the U.S. measures do not preclude Commerce from taking into account all substantiated facts on the record and do not permit Commerce to apply "facts available" that do not reasonably replace the missing information. Given that both India's primary and first conditional appeal fail, the condition set out under conditional appeal (3) is not met, and there is no basis to complete the analysis.

432. In the sections that follow, the United States will first address India's appeal regarding the Panel's interpretation of Article 12.7 of the SCM Agreement.[533] We will then address India's two conditional appeals.

A. The Panel's Interpretation of Article 12.7 Was Correct, and Consistent With the Appellate Body's Findings in *Mexico – Rice*, Contrary to India's Approach

433. In its initial (and not conditional) appeal, India contends that the Panel misinterpreted Article 12.7 of the SCM Agreement. Specifically, India argues that the Panel erred in in its discussion of the similarities and differences between the SCM Agreement and the AD Agreement related to the use of facts available. As the United States will demonstrate, however, the Panel correctly interpreted Article 12.7 of the SCM Agreement, appropriately taking into account the fact that (i) Article 12.7 of the SCM Agreement is comparable to Article 6.8 of the AD Agreement, but (ii) the AD Agreement includes an annex on the use of "facts available," while the SCM Agreement does not.

434. Article 12.7 of the SCM Agreement states:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

435. Article 12.7 enables investigating authorities to make determinations when interested parties and Members have failed to provide necessary information. That is, Article 12.7 permits "recourse to facts available when an interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation."[534] Given the circumstances in which the need to resort to facts available arises, the Appellate Body has observed that Article 12.7 is

[533] India Appellant Submission, para. 212.
[534] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 7.447.

"intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[535]

436. In *Mexico – Rice*, the Appellate Body found that Article 12.7 "permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization...and injury."[536] The Appellate Body also noted that "the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination."[537] For these reasons, "to the extent possible, an investigating authority using "facts available" in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested by the party". [538]

437. The Panel's interpretation of Article 12.7 is fully consistent with the text, and is in accord with these prior Appellate Body findings on the interpretation of the article. The Panel first found that the text of Article 12.7 "does not set out any express conditions" regarding the type of information that may be used for the application of facts available. The text does, however, refer to "*facts* available"; thus requiring, as the panel found in *China – GOES*, that "when applying facts available, an investigating authority's determination must have a *factual* foundation."[539]

438. The Panel next recalled the Appellate Body's findings in *Mexico-Rice*. In that case, the Appellate Body was requested to examine the consistency of certain Mexican legislation with both Article 12.7 of the SCM Agreement and Article 6.8 of the AD Agreement. In examining the Appellate Body's findings with respect to Article 12.7, the Panel found that:

> Although the Appellate Body endorsed the panel's findings with regard to the legal standard applicable under Article 6.8 of the AD Agreement, read in light of Annex II to that Agreement, the Appellate Body very clearly did not apply the same standard in respect of its findings pursuant to Article 12.7 of the SCM Agreement, noting expressly the lack of an equivalent to Annex II of the AD Agreement in the SCM Agreement.[540]

439. In particular, the Panel stated:

> the Appellate Body concluded that, in the absence of more detailed conditions such as those in Annex II of the AD Agreement, Article 12.7 requires that (i) an investigating authority must, to the extent possible, take into account all the substantiated facts provided by an interested party, and that (ii) the use of 'facts

[535] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296.
[536] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.
[537] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293.
[538] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 294.
[539] Panel Report, para. 7.437, quoting *China – GOES (Panel)*, para. 7.296. (emphasis added by the Panel)
[540] Panel Report, para. 7.439 (emphasis added).

> available' be generally limited to those that may reasonably replace the missing information.[541]

440. The Panel went on to explain that India's proposed interpretation of Article 12.7 was not correct, and was not consistent with the Appellate Body's finding in *Mexico – Rice*, and that India improperly sought "to import into the standard under Article 12.7 the specific requirements the Appellate Body found applicable under Article 6.8 of the AD Agreement read in light of Annex II of that Agreement."

441. Although India asserts that the Panel has misunderstood the Appellate Body's previous interpretation of Article 12.7, it is India that is mistaken and seeks to read into Article 12.7 text that is not there. India claims that the Panel applied the wrong standard based upon "an incomplete and inaccurate understanding" of that decision.[542] Quoting various statements from the Appellate Body decision, India insists that the extracts it identified "demonstrate that the Appellate Body did not prescribe different standards for Article 6.8, AD Agreement and Article 12.7 SCM Agreement."[543] India concludes that "[i]t is more than clear that the Appellate Body actually applied *the very same standard* for both Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement."[544] India is incorrect for several reasons.

442. First, and as explained by the Panel in its Report, the Appellate Body in *Mexico- Rice* separately evaluated the requirements of the two provisions under their respective agreements.[545] In doing so, it expressly declined to rely on Annex II in determining the limits under Article 12.7, noting the panel's error in having done such an analysis in its report.[546] In comparing the provisions in the respective agreements, the Appellate Body stated:

> Unlike the Anti-Dumping Agreement, the SCM Agreement does not expressly set out in an annex the conditions for determining precisely which 'facts' might be 'available' for an agency to use when a respondent fails to provide necessary information. This does not mean, however, that no such conditions exist in the SCM Agreement.[547]

The Panel's interpretation in the present dispute is consistent with this Appellate Body finding.

443. Second, in interpreting Article 12.7, the Appellate Body did not look to Annex II of the AD Agreement to identify the applicable "conditions", but instead looked to Article 12 of the

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[541] Panel Report, para. 7.439, citing *Mexico – Anti-Dumping Measures on Rice* (*AB*), para. 294 and noting "the Appellate Body considered that Annex II of the AD Agreement supported its Article 12.7 interpretation," quoting "This understanding of the limitations on an investigating authority's use of 'facts available' in countervailing duty investigations is further supported by the similar, limited recourse to 'facts available' permitted under Annex II to the Anti-Dumping Agreement. Indeed, in our view, it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations." (*Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295) cited in Panel Report, para. 7.439, at n. 732.

[542] India Appellant Submission, para. 212.

[543] India Appellant Submission, para. 216.

[544] India Appellant Submission, para. 218 (emphasis added).

[545] Compare AB report, paras. 286-289 for the AD Agreement to paras. 290-294 for the SCM Agreement.

[546] *Mexico – Anti-Dumping Measures on Rice (AB),* para. 290.

[547] *Mexico – Anti-Dumping Measures on Rice (AB),* para. 291.

SCM Agreement itself; citing, for example, the procedural fairness obligation identified in Article 12.1 that "requires the investigating authority, where appropriate, to take into account the information submitted by an interested party."[548] In keeping with this approach, rather than applying the conditions established in Annex II of the AD Agreement directly, the Appellate Body relied upon Annex II only for context in interpreting Article 12.7, noting that its "understanding of the limitations on the use of facts available in countervailing duty investigations is further supported by the limited recourse to facts available permitted under Annex II to the AD Agreement." Again, the Panel's findings were consistent with the Appellate Body's approach.

444. Third, India misreads the Appellate Body's statement that "it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[549] This statement does not support India's assertion that the "the very same standard" applies under both agreements. To the contrary, the statement notes a difference in the standards, but recognizes that in practice the use of facts available should not be "markedly different" in the two types of investigations. Thus, the Appellate Body concluded that:

> To the extent possible, an investigating authority using the "facts available" in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. Secondly, the "facts available" to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain instances, this may include information from secondary sources. [550]

445. Again, the Panel's findings in the dispute were completely in accord with this finding from *Mexico – Rice*. [551] Therefore, India is wrong to claim that the Panel's interpretation fails to comport with the Appellate Body's previous approach to Article 12.7..

446. In making its arguments regarding the relationship between facts available obligations under the SCM Agreement and the AD Agreement, India states that "only facts that are most fitting or most appropriate, determined by way of an 'evaluative, comparative assessment' can be used."[552] This position, however, at least as a general proposition, is incorrect.

447. First, and most importantly, nothing in the text of the SCM Agreement or the AD Agreement supports this interpretation. Second, although there is language along these lines in the *Mexico – Rice* panel report, the panel in that case did not explain what it meant by this language, nor can it be concluded from the lack of explanation that the panel thought the statement applied to more than the factual circumstances in that dispute. Third, although some language about comparable evaluations appears in the *Mexico – Rice* Appellate Body report, the Appellate Body was also clear that this particular language from the panel report about

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[548] *Mexico – Anti-Dumping Measures on Rice (AB),* para. 292.
[549] India Appellant Submission, para. 216, citing *Mexico – Anti-Dumping Measures on Rice*, (AB), para. 295.
[550] *Mexico – Anti-Dumping Measures on Rice (AB),* para. 294.
[551] Panel Report, para. 7.439.
[552] *See* India Appellant Submission, paras. 209 and 237.

comparable evaluations was not appealed by the other party. In any event, India fails to explain how its proposed principle of "comparative evaluation" to determine the "most fitting" information for a particular exporter could function when a respondent refuses to provide *any* information with regard to its sales in a particular period. Accordingly, given that the proposed "comparative evaluation" approach is not supported in the text of the SCM Agreement, as reflected in the lack of explanation or findings in past panel or Appellate Body reports, India presents no basis for asking the Appellate Body to find that this type of general obligation applies.

448. Nothing in Article 12.7 of the SCM Agreement prevents an authority from applying as facts available certain facts that are unfavorable to the interests of a Member or interested party who fails to supply information.[553] Nor, for that matter, does the ordinary meaning of the term "facts available" speak to which facts should be selected. Rather, the use of "the facts available" in making a determination pursuant to Article 12.7 means that an administering authority, when faced with a situation in which necessary facts have not been supplied, may apply those facts that are otherwise available. Furthermore, because the actual information has not been provided to the investigating authority, it cannot be known whether the substituted facts available will result in a finding that is *more* or *less* favorable to the responding party than the finding would have been had the party cooperated with the investigation.

449. Interestingly, India also notes that, "[f]rom a logical perspective…, the Panel's so-called proper Article 12.7 standard is no different from the standard espoused by India".[554] India "wonders", in particular, "how an investigating authority would determine what is a 'reasonable' replacement (as opposed to an 'unreasonable' one), without comparatively evaluating all the available facts."[555] The United States agrees with India's suggestion in this respect, i.e., that to the extent the SCM Agreement and AD agreement can be seen as setting forth two somewhat different "standards," the differences are not likely to lead to markedly different results. This, of course, was the Panel's and the Appellate Body's intention in so construing the obligation under Article 12.7 of the SCM Agreement. Given the similarity of the obligations, then, the United States itself wonders how India considers its appeal in this respect could lead to a reversal of the Panel's findings. Rather, consistent with India's observation, under either interpretation, the U.S. measures are consistent with Article 12.7 of the SCM Agreement. Therefore, the Appellate Body should uphold the Panel's interpretation of Article 12.7 and its finding that India failed to show that the U.S. measures are inconsistent with that provision.

[553] To the contrary, the fact that the use of facts available could result in a less favorable outcome for a non-cooperation party is expressly recognized in Annex II to the AD Agreement, paragraph 7, which provides context for an interpretation of Article 12.7.
[554] India Appellant Submission, para. 226.
[555] India Appellant Submission, para. 226.

B. The Panel Did Not Err Under Article 11 of the DSU In Finding That the U.S. Facts Available Provisions Do Not Preclude Commerce From Taking Into Account All Substantiated Facts on the Record And Do Not Permit Commerce To Apply "Facts Available" That Do Not Reasonably Replace the Missing Information

450. Conditional upon the Appellate Body's rejecting India's appeal with respect to the interpretation of Article 12.7, India appeals the Panel's assessment of the U.S. measures at issue under Article 11 of the DSU.[556] Specifically, India claims that the Panel failed to properly interpret the U.S. measures because the Panel's analysis "starts and ends with the text" of those provisions,[557] and that that the Panel failed to consider additional evidence on the application of the U.S. provisions[558] demonstrating that the U.S. provisions allow for the "punitive" application of facts available.[559]

451. As an initial matter, the United States notes that India's use of the word "punitive" is both inaccurate, and not an appropriate legal framework for analyzing issues regarding the use of facts available. The word "punitive" is not contained in the SCM Agreement. Nor does India explain precisely what it means by this inflammatory term. Certainly, as will be described below, the rates applied in the investigations at issue in this dispute are not the highest possible rates that could have been determined by an authority – rather, they generally are based on actual rates of respondents who participated in the same proceeding.[560] Further, if India intends to conflate the concept of an "adverse inference" in selecting from among the facts available for non-cooperation by an interested party with "punitive" application of facts available, India's arguments do not succeed. An adverse inference simply reflects that Commerce can take account of the fact that a respondent failed to cooperate, and this principle is explicitly recognized in Annex II of the AD Agreement.[561] In short, India's allegation of "punitive" application is without any factual or legal basis, and comes down to India's position that certain "facts available" rates are higher than India would prefer.

452. Turning from India's terminology to the legal issue presented in India's conditional appeal, the United States demonstrates below that India has failed to show that the measures governing the application of facts available require Commerce to employ an "adverse inference" while ignoring substantiated facts or using "facts available" that do not reasonably replace the missing information. As noted in its appellant submission, India does not dispute that "the text of the AFA measure is innocuous" and therefore consistent with Article 12.7 of the SCM Agreement *on its face*.[562] Nonetheless, India mistakenly argues that "'other domestic interpretive tools', including the 'legislative history', and 'relevant judicial interpretations to the extent that they form part of the effective operationalization'" of the U.S. measures, can be read

[556] India Appellant Submission, para. 228.
[557] India Appellant Submission, para. 229.
[558] India Appellant Submission, para. 230.
[559] India Appellant Submission, para. 242.
[560] See Section XII.A.
[561] Annex II of the AD Agreement, which is relevant context for interpreting Article 12,7, states: "It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."
[562] India Appellant Submission, paras. 232 and 239.

to impute a meaning on those measures that is not consistent with their text.[563] Such an interpretation itself would be inconsistent with basic tenets of statutory interpretation, and with the Panel's duty under Article 11 of the DSU. In any event, as will also be demonstrated below, India misinterprets and misrepresents the significance of this evidence.

453. Under Article 11 of the DSU, a panel is obliged to make an objective assessment of the matter before it. The Appellate Body has made clear that as "part of their duties under Article 11 of the DSU, panels have the obligation to examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before [them], including an objective assessment of the facts of the case and the applicability and conformity with the covered agreements."[564] In doing so, a panel must "conduct a detailed examination of that legislation in assessing its consistency with WTO law", keeping in mind that "it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such."[565]

454. The meaning of a challenged measure would be determined according to the domestic legal principles in the legal system of the Member maintaining that measure. That is, what a measure means or how it operates is not an issue of international law or WTO law, but an issue of the effect of that legal instrument according to that Member's municipal law. In many WTO Members, domestic legal instruments are interpreted according to the ordinary meaning of the text of that instrument. Reflecting this common fact, past reports have asserted that, when examining another party's municipal law,

> the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required.[566]

This is also the case under U.S. law, where a court's statutory interpretation must begin with the ordinary meaning of the text of a statute or regulation, taking account of a federal agency's administrative practice where the text of the statute is ambiguous.[567]

455. The Appellate Body also has emphasized that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation", and "goes to the very core of the integrity of the WTO dispute settlement process itself."[568] The burden for demonstrating such failure is accordingly high, because an allegation under Article 11 of the DSU "impl[ies] not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel."[569] India's allegation falls far short of this standard, and is belied by the Panel's report.

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[563] India Appellant Submission, para. 229.
[564] *US – Countervailing and Anti-Dumping Measures on Certain Products from China (AB)*, para. 4.98.
[565] *US – Hot-Rolled Steel (AB)*, para. 200.
[566] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 168.
[567] *US – Countervailing and Anti-Dumping Measures (Panel)*, para. 7.163.
[568] *EC – Poultry (AB)*, para. 133.
[569] *EC – Hormones (AB)*, para. 133.

456. The Panel correctly found that the U.S. facts available measures require an adverse inference to be based on a factual foundation, and do not preclude Commerce from taking into account all substantiated facts on the record or permit Commerce to apply "facts available that do not reasonably replace the missing information."[570] The United States begins by providing the text of the U.S. measures at issue in this dispute and explains that the Panel has not erred in its appreciation of the ordinary meaning of that text.

457. First, the text of the challenged provisions makes plain that Commerce has the discretion either to employ or not employ the use of an adverse inference in selecting from among the facts available. The pertinent provision of the U.S. statute states:

> Adverse Inferences.--If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this title, *may* use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available*. Such adverse inference may include reliance on information derived from-
>
> (1) the petition,
>
> (2) a final determination in the investigation under this subtitle
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
>
> (4) any other information placed on the record.[571]

458. The regulation challenged by India contains similar language. Sections 351.308(a)-(d), state, in relevant part:

> (a) Introduction. The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. If the Secretary finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Secretary *may* use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available*. This section lists some of the sources of information upon which the Secretary may base an adverse inference and explains the actions the Secretary will take with respect to corroboration of information.[572]

[570] Panel Report, para. 7.442.
[571] 19 U.S.C. § 1677(e)(b) (emphasis added). (Exhibit USA-12).
[572] 19 C.F.R. § 351.308(a) – (d) (emphasis added). (Exhibit USA-13).

> (b) *In general*. The Secretary may make a determination under the Act and this part, based on the facts otherwise available in accordance with section 776(a) of the Act.
>
> (c) *Adverse inferences*. For purposes of section 776(b) of the Act, an adverse inference may include reliance on:
>
> (1) Secondary information, such as information derived from:
>
> (i) The petition;
>
> (ii) A final determination in a countervailing duty investigation or an antidumping investigation;
>
> (iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or
>
> (2) Any other information placed on the record.

459. Consistent with the Panel's findings, based on the plain language of the text, where Commerce finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," Commerce "may use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available*."[573] Section (c) of the U.S. regulation goes on to describe what may constitute the use of an adverse inference. Specifically, the regulation provides that when a decision is made that a party has failed to cooperate to the best of its ability, use of an adverse inference "*may include reliance on* … [s]econdary information…; or [a]ny other information placed on the record." "Secondary information", according to Section (c), includes "information derived from": i) the petition; ii) a final determination in a CVD or an anti-dumping investigation; or any previous administrative or other review.

460. That is, Commerce may use an adverse inference *in selecting from among the facts otherwise available*, and in any case, must *rely on* facts in making its determinations, which can be secondary information or record information. Thus, the Panel found that under U.S. law, the authority must rely on facts in drawing adverse inferences. [574]

461. India challenged the above portions of the US statute and regulations only. However, as noted by the Panel, additional provisions excluded by India in its arguments here and before the Panel contain important restrictions relating to the use of facts available.[575] In limiting its arguments and references only to certain portions of US law, India attempted to isolate one portion of the measure, and to take it out of its proper context. These other provisions are important context, and provided further support for the Panel's findings that the challenged U.S. measures regarding determinations based on facts available comply with Article 12.7 of the SCM Agreement.

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[573] Panel Report, para. 7.442; 19 U.S.C. §1677e (a) and 19 CFR 351.308(a) (Exhibit USA-12; Exhibit USA-13).
[574] Panel Report, para. 7.442.
[575] *See* Panel Report, footnote 736 to para. 7.442.

462. In the same section of the U.S. regulation, subpart (d) (and subpart (c) of the statute) includes the first of two important limitations on the use of facts available. Section (d) requires that, when relying on secondary information pursuant to Section (c), Commerce must, "to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal". The regulation goes on to include an illustrative list of such independent sources, and also specifies that "[c]orroborate means that [Commerce] will examine whether the secondary information to be used has probative value". Commerce may only use uncorroborated information in making its determinations where corroboration is in fact not practicable.

463. Finally, Section (e) of the regulation includes a second limitation on Commerce's ability to make a determination based on the facts available. This section makes clear that Commerce "will not decline to consider information that is submitted by an interested party and is necessary to the determination", even if it does not meet all the requirements established by Commerce, if:

> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.

464. The Panel found that the U.S. provisions, taken together, make clear that

> there is nothing in the US provisions at issue to suggest that the USDOC is not required to take into account all substantiated facts on the record [FN 736] or apply 'facts available' that do not reasonably replace the missing information.[FN 737] [576]
>
> [FN 736] We note that Section 351.308(e) of the US regulation establishes that the investigating authority "will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements" if certain conditions are met. Pursuant to Section 782(e), these conditions are: (i) the information is submitted by the deadline established for its submission, (ii) the information can be verified, (iii) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (iv) the interested party has demonstrated that it acted to the best of its ability, and (v) the information can be used without undue difficulties.
>
> [FN 737] Depending on the particular facts of the case, it may well be that an investigating authority acts inconsistently with Article 12.7 of the SCM Agreement in relying on "facts available". However, this would lead to an "as applied" inconsistency, and not an "as such" one.

[576] Panel Report, para. 7.442.

Having found that the U.S. measures do not allow for the application of facts available in a manner inconsistent with Article 12.7 of the SCM Agreement, the Panel determined that it need not determine whether the measures were mandatory in nature.[577]

465. India charges that the Panel did not objectively assess the matter before it because it ignored material evidence on the record regarding the interpretation of U.S. law. In particular, India claims the Panel's rejection of its "as such" claim was not in accord with Article 11 of the DSU because, while the Panel analyzed the text of provisions, it was also "required to consider 'other domestic interpretive tools', including the 'legislative history', and 'relevant judicial interpretations to the extent that they form part of the effective operationalization' of this [sic] 19 CFR § 351.511(a)(2)(ii)."[578] India charges that the "Panel utterly failed in complying with this legal standard."[579]

466. We note at the outset, however, that India accepts that the U.S. measures, on their face, do not breach Article 12.7. Indeed, India twice describes the text of the U.S. provisions as "innocuous"[580], in addition to acknowledging that they "appear[] to provide discretion to the USDOC to choose adverse consequences only on a case-by-case basis."[581] In India's view, the text is not a reliable basis upon which to make a determination, however, because the terms of the U.S. provisions "provide no substantive guidelines and camouflages the real understanding of the provisions".[582]

467. At this point, the United States would emphasize that India raised before the Panel an "as such" claim against the U.S. statute and regulation governing the use of facts available. Therefore, India bears the burden to show that those measures, "as such", are inconsistent with Article 12.7 of the SCM Agreement. India may not base its claims on arguments relating to a U.S. "practice"[583] or "system"[584] that is not reflected in the challenged U.S. law. Indeed, during the proceeding, India started down the road of challenging an unwritten measure, different from the U.S. statute and regulations. However, when India was questioned by the Panel about the nature of its claims, India clarified that it was challenging the U.S. laws only, and not U.S. practice.[585] In any event, India did not include any challenge to a "practice" or "system" in its panel request, and was thus proscribed from doing so in its subsequent submissions pursuant to Article 6.2 of the DSU. It is similarly proscribed from doing so on appeal. Therefore, to the extent India's arguments do not relate to the U.S. provisions themselves, any such claims were outside the Panel's terms of reference, and are outside of the scope of this appeal.

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[577] Panel Report, footnote 742 to para. 7.445.
[578] India Appellant Submission, para. 229. We note that India seems to have erroneously referred to the U.S. regulation governing benchmarks, and not that governing the use of facts available. We understand India's claims to relate instead to Sections 351.308(a)-(c) of the U.S. regulation.
[579] India Appellant Submission, para. 229.
[580] India Appellant Submission, paras. 232 and 239.
[581] India Appellant Submission, para. 239.
[582] India Appellant Submission, para. 232.
[583] India Appellant Submission, para. 230.
[584] India Appellant Submission, para. 232.
[585] See India Response to Panel Question 37 after the first panel meeting. The United States raised concerns with the nature of India's arguments in section VII.C of its First Written Submission.

468. The United States will now turn to the "other domestic interpretive tools" identified by India; as discussed below, they do not demonstrate that the Panel has failed to make an objective assessment of the meaning of the challenged U.S. provisions. In order to succeed on its claim under Article 11 of the DSU, India must show that the Panel has "exceeded the bounds of its discretion, as the trier of facts."[586] The fact that the Panel did not refer to specific evidence presented by India in its report is not sufficient to establish that the Panel failed to undertake an objective assessment of the matter before it,[587] and only shows that the Panel did not attribute to it the weight or significance that India would have liked.[588] Where evidence that a party considers to be relevant is not addressed in a panel's report, the Appellate Body has said that an appellant must explain why such evidence is so material to its case that the panel's failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment.[589] As shown below, India has failed to make such a showing. We will discuss below each piece of evidence proffered by India.

469. First, regarding the Statement of Administrative Action associated with the U.S. legislation implementing the Uruguay Round, the United States notes at the outset that the quoted section relied upon by India[590] is fully consistent with the language contained in the provisions at issue. It states that:

> Commerce and the Commission *may employ* adverse inferences about the missing information to ensure the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, *one factor to consider* is the extent to which a party may benefit from its own lack of cooperation. [591]

470. That is, according to the SAA, Commerce *may* employ an adverse inference, non-cooperation should not lead to a more favorable result than cooperation, and Commerce should consider the extent to which a party may benefit from its own lack of cooperation. This language does not state that Commerce *must* apply an adverse inference. Nor does it anywhere state, as India asserts, that Commerce must *punish* non-cooperation. Therefore, the SAA supports the Panel's conclusion and does not undermine it.

471. Additional language in the SAA also shows that India's position is without foundation. In that respect, the SAA goes on to state:

> New section 776(a) requires Commerce and the Commission to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information. Section 776(a) makes it possible for Commerce and the Commission to make

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[586] *China – Rare Earths (AB)*, para. 5.179.
[587] *China – Rare Earths* (AB), para. 5.178; *EC – Fasteners (China) (AB)*, paras. 441-442; *Brazil – Retreaded Tyres (AB)*, para. 202.
[588] *China – Rare Earths* (AB), para. 5.221.
[589] *China – Rare Earths* (AB), para. 5.178; *EC – Fasteners (China) (AB),* para. 442.
[590] India Appellant Submission, para. 230; India First Written Submission, para 173.
[591] Statement of Administrative Action (SAA), H.Rept. No. 316, Vol. 1, 103d Cong., 2d Sess. 1994 U.S.C.C.AN. 4040, (Exhibit IND-4) at internal page 4199 (emphasis added).

> their determinations within the applicable deadlines if relevant information is missing from the record. In such cases, *Commerce and the Commission must make their determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration*.[592]

472. Contrary to India's claim, nothing in the legislative history transforms a provision that is "innocuous" and "discretionary" on its face, into a so-called "punitive" and mandatory provision "as such". Rather, the plain language of the SAA states that Commerce *may* employ an adverse inference, and that non-cooperation s*hould not* lead to a more favorable result than cooperation. Moreover, the legislative history requires Commerce, when applying facts available, to base its determinations on all evidence of record and to weigh the evidence to determine which of the facts available is most probative. This is consistent with the Panel's findings.

473. As the United States noted in its submissions before the Panel, Commerce also spoke to the issue of whether the application of facts available is discretionary when it promulgated the regulation at issue.[593] During the process, commenting parties urged Commerce to adopt the position that the adverse inference must be mandatory, not discretionary, when a respondent fails to cooperate to the best of its ability.[594] These parties argued that a non-mandatory rule would undermine Commerce's ability to obtain complete, timely, and accurate information when carrying out its statutory obligations. Commerce expressly rejected the proposal and instead retained in all cases its ability to decide whether to apply an inference that is adverse to the interests of the party on a case-by-case basis.[595]

474. This was not an idle rejection. In practice, Commerce has exercised its discretion not to use an adverse inference. For example, in *Steel Plate from Indonesia*, the respondent company failed or refused to provide necessary information, as requested, and Commerce determined that the company failed to cooperate to the best of its ability. Commerce chose not to employ an adverse inference, and instead relied on information supplied by the foreign government regarding the company's non-use of the subsidy program.[596] If the provisions at issue mandated the use of an adverse inference in every case, such an outcome would not have been possible. As this evidence demonstrates, Commerce is not required to, nor does it, use an adverse inference "in all cases of non-cooperation".[597]

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[592] SAA, (Exhibit IND-4) at internal page 4198 (emphasis added).
[593] U.S. First Written Submission, para. 167.
[594] *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27340 (May 19, 1997) (Exhibit USA-14).
[595] *Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27296, 27340 (May 19, 1997) (Exhibit USA-14).*
[596] *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 Fed. Reg. 73155, 73162, Dec. 29, 1999 (Exhibit USA-15); *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163, Jan. 23, 2002, (*Issues & Decision Memorandum* at Comment 1). (Exhibit USA-16; Exhibit USA-17); s*ee also Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran*, 70 Fed. Reg. 54027, Sep. 13, 2005, at 7-8 (Comment 1). (Exhibit USA-18; Exhibit USA-19).
[597] The challenged provisions also apply to Commerce's anti-dumping duty determinations, in the context of which Commerce has also chosen to exercise its discretion not to use an adverse inference in selecting from among the facts available. *See, e.g.,* 19 C.F.R. § 351.101 on "Scope and Definitions" which provides that "This part contains

475. India has similarly misunderstood the U.S. court decisions on which it relies. In particular, India claims that the Federal Circuit decision in ***Rhone Poulenc, Inc. v. United States***[598] stands for the proposition that the best way to effectuate the purpose of the SAA is to apply the highest prior margins and that "the highest margin must be applied under the AFA."[599] However, the United States notes that this decision was issued in 1990, and therefore pre-dates the adoption of commitments contained in the Uruguay Round Agreements, and the U.S. implementing legislation and regulations that govern the application of facts available. In any event, nowhere in this decision does the Federal Circuit hold that the highest calculated rate from a prior determination must be applied as a matter of law.

476. More importantly, other Federal Circuit cases have made clear that Commerce may *not* apply facts available in a "punitive" manner, and may not disregard reliable record evidence in order to apply a higher rate of benefit, for example. In *Essar Steel Ltd v. United States*, which India cited before the Panel[600], the court stated that "[a] decision based on adverse facts is not punitive when determined in accordance with the statutory requirements." In another case cited in *Hyosung Corp v. United States*, to which India also cited before the Panel[601], the Federal Circuit found that Commerce may not disregard more reliable evidence in order to apply a higher rate of benefit. In that case, the court referenced the findings in *Gallant Ocean v. United States*, where the court held that applying a higher rate from the domestic industry's petition was unlawful where more reliable information was available to apply as facts available.[602] Contrary to India's claims, therefore, these cases demonstrate that: (1) U.S. courts have not set a binding precedent that requires Commerce to apply the highest available rate; and (2) the U.S. courts have not found that the U.S. measures themselves mandate the use of the highest available rate or the "worst possible inference". To the contrary, the court cases cited by India demonstrate that U.S. law *does not* allow the interpretation presented by India, consistent with the Panel's findings.

477. Finally, with respect to its claim of "systematic application", India provides a list of cases in which Commerce determined to apply facts available using an adverse inference. However, India fails to explain how these cases support its substantive claims, much less its claim under Article 11 of the DSU. Even if these cases were to show that the U.S. measures are mandatory,

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procedures and rules applicable to antidumping and countervailing duty proceedings under title VII of the Act (19 U.S.C. 1671 et seq.)" (Exhibit USA-99). *See also* Statement of Administrative Action, H.Rept. No. 316, Vol. 1, 103d Cong., 2d Sess. 1994 U.S.C.C.AN. 4040, at 4198 (Exhibit IND-4). Notably, in cases in which a party has failed to provide requested information, but Commerce itself failed to give the party an opportunity to remedy the deficiency as required under section 1677m(d) of the statute, Commerce has exercised its discretion not to use an adverse inference in selecting from among the facts available, notwithstanding the party's failure to cooperate with respect to the information requested. *See Static Random Access Memory From Taiwan*: Notice of Final Determination of Sales at Less Than Fair Value, 63 Fed. Reg. 8909, 8920 (Issues and Decision Memorandum, Comment 7) (Feb. 23, 1998) (Exhibit USA-100); *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission Of Administrative Reviews, Notice of Intent To Rescind Administrative Reviews, and Notice Of Intent To Revoke Order In Part, 69 Fed. Reg. 5950, 5952 (Feb. 9, 2004) (Exhibit USA-101).

[598] Exhibit IND-48.

[599] India Appellant Submission, para. 230.

[600] India's First Written Submission, n. 163 to para. 187.

[601] India's First Written Submission, n. 163 to para. 187.

[602] *Hyosing Corporation v. United States*, citing *Gallant Ocean Co., Ltd. v. United States,* 602 F. 3d 1319 (Fed. Cir. 2010), Exh. IND-47 at internal page 9.

which they do not, India has failed to explain how the facts available provisions were applied in an improper manner in any of the identified cases. Given that India is attempting to pursue an "as such" claim against the U.S. measures, a listing of instances of application of those measures, without more, cannot assist India in reaching its burden.

478. As the United States has noted, previous reports have clarified that an Article 11 claim is a very serious charge. India must do more than merely assert an error based on the Panel's failure to refer to evidence cited by India in its submission. Rather, India must explain how the alleged error was so material that examination of that evidence would have changed the outcome of the panel's assessment.[603] India has not succeeded in making such a showing. As demonstrated above, the additional information cited by India not only does not support its claim of error, the evidence in fact supports the Panel's assessment that the U.S. measures do not preclude Commerce from taking into account all substantiated facts on the record and do not permit Commerce to apply "facts available" that do not reasonably replace the missing information.[604]

479. Therefore, India has failed to demonstrate that the Panel's assessment of the U.S. measures was inconsistent with its duties under Article 11 of the DSU. Accordingly, the United States requests the Appellate Body reject India's appeal and uphold the Panel's findings in section 7.7.5.1 of the Panel Report.

C. Completion of the Analysis

480. In its final, conditional appeal, India requests the Appellate Body to complete the legal analysis in the event that either of its other appeals is successful. In making this request, India simply repeats the arguments made above and before the Panel. The United States has rebutted these arguments in the immediately preceding sections, and has shown that India has not presented any basis for a finding that the U.S. measures are inconsistent with the SCM Agreement. Therefore, India has no grounds for asking the Appellate Body to complete the analysis, and its request accordingly should be rejected.

D. Conclusion

481. Based on the foregoing, India has failed to demonstrate that the Panel erred in either its interpretation of Article 12.7 of the SCM Agreement or the U.S. facts available measures. Therefore, the Appellate Body should reject India's appeals in this respect, and uphold the Panel's findings in section 7.7.5.1 of the Panel Report.

XII. THE PANEL CORRECTLY FOUND THAT INDIA FAILED TO MAKE A *PRIMA FACIE* CASE THAT COMMERCE ACTED INCONSISTENTLY WITH ARTICLE 12.7 OF THE SCM AGREEMENT IN ITS APPLICATION OF "FACTS AVAILABLE"

482. India appeals the Panel's finding in section 7.7.5.2 of the Panel Report regarding Commerce's application of the facts available provisions in the underlying investigations.

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[603] *China – Rare Earths* (AB), para. 5.178; *EC – Fasteners (China) (AB),* para. 442.
[604] Panel Report, para. 7.442.

Specifically, India appeals (1) the Panel's findings regarding Commerce's alleged use of the highest available subsidy rate calculated for a cooperating party in 230 instances[605], and (2) the Panel's findings regarding Commerce's 2013 sunset review determination.[606] As India submitted before the Panel, and again before the Appellate Body here, these two claims challenge the *application* of the U.S. measures only. Indeed, India even takes exception to the fact that the Panel treated the first group of claims, regarding Commerce's use of the highest available subsidy rate, as if it may have been an "as such" claim in its Report.[607] The United States agrees that these claims were raised on an "as applied" basis only, and objected before the Panel to any challenge by India based on Commerce's "practice", as not within the Panel's terms of reference.[608] In short, there is no dispute as to the "as applied" nature of India's claims.

483. This being the case, India's burden before the Panel was to demonstrate that, for any instance of Commerce's application of facts available, *that instance* was inconsistent with Article 12.7 of the SCM Agreement. As the Panel stated in its Report, India could satisfy this burden by establishing a *prima facie* case of inconsistency, which would include, at a minimum, identification of the specific instance of application at issue, and an explanation of why that action was in error.[609] As the Panel found, India failed in reaching this burden with respect to either element. On appeal, India has simply reiterated the same arguments made before the Panel, without attempting to remedy its earlier failings. Therefore, the Appellate Body should reject both of India's appeals regarding section 7.7.5 of the Panel Report, and uphold the Panel's findings that Commerce did not act inconsistently with Article 12.7 in its application of facts available in the underlying proceedings.

A. The Panel Correctly Found That India Failed To Establish A *Prima Facie* Case That Commerce's Alleged "Rule" "In General or As Applied" Is Inconsistent With Article 12.7 of the SCM Agreement

484. The Panel found that India failed to establish a *prima facie* case that Commerce's determination of the amount of the benefit on the basis of "facts available" was inconsistent with Article 12.7 of the SCM Agreement. On appeal, India argues the Panel erred by applying the incorrect standard for Article 12.7, and by imposing an unnecessary burden of proof on India. In particular, India asserts that "as a fundamental rule and as a matter of conclusive non-rebuttable presumption, the USDOC only applies the highest *de minimis* rate." The Panel, however, did not find Commerce's application of facts available to be a "conclusive non-rebuttable presumption" in any instance or as a general matter. With respect to individual instances of application, the Panel found that the question of whether the highest non-*de minimis* subsidy rate reasonably replaces the missing information "can only be determined on a case-by-case basis."[610] While India referred to a large number of instances where Commerce applied the highest non-*de minimis* subsidy rate to replace missing information, the Panel correctly concluded that India failed to make a *prima facie* case, because for *no challenged instance* of application did India explain how the information used as facts available did not reasonably replace the missing

[605] India Appellant Submission, section XIV, paras. 592-607.
[606] India Appellant Submission, section XV, paras. 608-615.
[607] Panel Report, para. 207.
[608] *See* U.S. First Written Submission, section VII.C.
[609] Panel Report, para. 7.7, citing to *EC – Hormones (AB)*, para. 104.
[610] *See* Panel Report, para. 7.449

information. Thus, India failed to make out its claim that Commerce's use of facts available in any challenged instance was inconsistent with Article 12.7 of the SCM Agreement.[611]

1. India Failed To Establish a *Prima Facie* Case Because It Did not Establish for Any Application of Facts Available that the Information Selected Did not Reasonably Replace the Missing Information

485. In its first written submission before the Panel, India argued that the U.S. "rule" of applying the highest available non-*de minimis* subsidy rate calculated for a cooperating party for the same or a similar subsidy program[612] is inconsistent with Article 12.7 because it "disallows Commerce from engaging in an 'evaluative, comparative assessment' in order to decide the most fitting or most appropriate information available.'"[613] India also included a bullet point list of six groups of circumstances in which Commerce used the highest non-*de minimis* subsidy rate calculated for a cooperating party for the same or similar subsidy program. For example, the first group of challenged instances was described as follows:

> Against JSW in the 2006 AR to countervail alleged benefits granted under "Captive Mining Rights of Iron Ore", eleven sub-programs provided under "1993 KIP", the "1996 KIP", the "2001 KIP" and the "2006 KIP"*.
>
> *2006 I&DM, Exhibit IND - 33, pages 7-8, 22-25 of 98.

In this imprecise manner, India purported to challenge 230 program-specific subsidy rates that Commerce applied in the 2006, 2007, and 2008 administrative reviews.[614]

486. The Panel specifically recognized that whether the highest non-*de minimis* subsidy rate reasonably replaces the missing information or constitutes an improper use of "facts available" "can only be determined on a case-by-case basis."[615] India failed to identify any issue or develop any argument to demonstrate that these applications were inconsistent with Article 12.7. As the Panel found, "India has not explained how each specific use of that information does not, in each instance, reasonably replace the missing information, or is otherwise inconsistent with Article 12.7 of the SCM Agreement."[616] Therefore, India failed to establish, as a matter of law, that any of the instances identified by India breached U.S. obligations under Article 12.7 of the SCM Agreement. In this appeal, India presents no basis for the Appellate Body to overturn this finding.

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[611] *See* Panel Report, para. 7.449.

[612] In its submissions before the Panel, India describes the typical approach used by Commerce in a way that is generally consistent with the Panel's findings in this respect. See India's First Written Submission, para. 526, and Panel Report, para. 7.447. In describing the alleged "rule" in its appellant submission, however, India for the first time claims that "[a]lthough there appears to be three different options for applying the method of the USDOC (identical program, similar program, or any program), the USDOC only chooses the highest non-*de minimis* rate in any of the three cases." India Appellant Submission, para. 605. This is simply incorrect, and India provides no citation to support this assertion.

[613] India First Written Submission, para. 528.

[614] India First Written Submission, paras. 526-528.

[615] *See* Panel Report, para. 7.449.

[616] *See* Panel Report, para. 7.449.

2. Commerce's Use of Facts Available to Determine the Amount of Benefit Was not Inconsistent with Article 12.7

487. In the instances of use of facts available identified by India, it is undisputed that the respondents failed to provide necessary information or otherwise cooperate with the investigations, and that therefore Commerce was left with no information on the record with regard to benefit with respect to the non-cooperating companies.[617]

488. As the Panel noted, any "as applied" claim must turn on the specific facts of the specific application of "facts available." In general, the United States would note that to make a determination where a subsidy program under review was missing benefit information, Commerce used, as "facts available", other calculated subsidy rates for the identical subsidy program calculated for cooperating companies, or (in the absence of such information) for a similar or comparable subsidy program calculated for a cooperating company, or (in the absence of such information) subsidy rates calculated in another proceeding for a cooperating company for a program that companies in the hot-rolled steel industry could have used.[618]

489. Before using any facts available, Commerce examined the reliability and relevance of such rates to the extent practicable.[619] In its examination, if information on the record indicated that a particular subsidy rate to be applied as facts available was not appropriate, *i.e.*, the information showed that the rate did not have probative value and thus was not "corroborated," Commerce did not use the rate.[620] India can point to no evidence on the record that undermined the subsidy rates that were to be applied as facts available. Therefore, India has no basis for its assertion that any rate was, as India puts it, "punitive." Rather, the subsidy rates used as "facts available" were on a par with identical or similar subsidy programs used by or available to hot-rolled steel companies, and thus provided a reasonable estimate of the level of subsidization provided by the government.

490. In sum, Commerce's "facts available" benefit determinations reflected a reasoned analysis and were based upon a factual foundation. The starting point for Commerce's facts available analysis was the universe of calculated subsidy rates for cooperating companies. These rates reflected the *actual subsidy practices* of the central and state governments in India as reflected by the actual experience of companies in India. As the Panel found, in applying the facts available provisions, and as a general matter, Commerce "replace[d] unknown facts with

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[617] *See Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 5-9, and section C. State Government of Karnataka Programs (Exhibit IND-33); *See Issues & Decision Memorandum for 2007 Administrative Review*, April 29, 2009, at comments 2, 4, 5, and 6 (Exhibit IND-38); and *See Memorandum to the File "Phone Conversation with Counsel for Tata Steel Limited"* dated April 23, 2009. *See also Issues & Decision Memorandum for 2008 Administrative Review*, July 19, 2010, at 4 (Exhibit USA-25).

[618] Panel Report, para. 7.447.

[619] *See* e.g., *Issues & Decision Memorandum for 2006 Administrative Review*, July 7, 2008, at 8-9 (Exhibit IND-33). *See also*, "Results of Redetermination Pursuant to Court Remand" (Jan. 10, 2013), in *Essar Steel Limited v. United States*", pertaining to the 2007 Administrative Review (in which Commerce stated, "Consistent with the statute, the Department corroborated these rates by examining the relevance and reliability of the rates. Although the Department did not explicitly state in the Final Results that it was corroborating the subsidy rates, the net subsidy rate for each subsidy program was corroborated.") at 3 (Exhibit USA-26). The court affirmed Commerce's redetermination of Essar's subsidy rate in *Essar Steel Limited v. United States*, Slip Op. 13-48, Apr. 9, 2013, (unchanged from original determination) (Exhibit USA-27).

[620] 19 U.S.C. § 1677e (Exhibit USA-12).

the most relevant known facts, and only move[d] on to other known facts, in diminishing degrees of relevance, when more closely relevant facts [we]re not available."[621]

491. Based upon the above, it is clear that the Panel correctly concluded that India failed to establish a *prima facie* case that any instance of Commerce's use of facts available was inconsistent with Article 12.7 of the SCM Agreement."[622] Therefore, the Appellate Body should reject India's appeal, and uphold the Panel's findings in section 7.7.5.2 of the Panel Report.

B. The Panel Correctly Found that India Failed to Establish a *Prima Facie* Case With Respect to Commerce's 2013 Sunset Review Determination

492. With respect to the 2013 sunset review, the Panel concluded that "India has failed to establish a *prima facie* case that USDOC's determinations, in the 2013 sunset review, that Essar, ISPAT, SAIL and Tata benefitted from a number of subsidy programmes are inconsistent with Article 12.7 of the SCM Agreement."[623] In reaching its conclusion, the Panel found "India's presentation of its Article 12.7 claims relating to 92 instances of alleged improper application of facts available is limited to a single paragraph in its first written submission, with no further development of any substantive argument in subsequent submissions."[624] Importantly, the Panel found that "India did not adduce any evidence in support of its claims in its first written submission or subsequently" and that "India did not even specify the instances of alleged application of 'facts available' or the particular subsidy programmes at issue."[625] As a result, the Panel concluded it was "unable to evaluate India's claims, or to assess the consistency with Article 12.7 of any use of facts available by USDOC in the context of the 2013 sunset review."[626]

493. India appeals this finding, claiming the Panel did not objectively assess the matter before it and therefore failed to fulfill its obligation under Article 11 of the DSU for a number of reasons, each of which is addressed below. In particular, India claims: (1) the 2013 Sunset Review is "a published and a publicly available document", (2) "the contents of which cannot be disputed", and (3) India was challenging "every single finding in the 2013 Sunset Review and therefore the alleged non-identification of the instances is not a material defect in India's submission."[627] A closer examination reveals that even India's own arguments on appeal demonstrate that India failed to meet its burden to establish a *prima facie* case before the Panel. Accordingly, the Appellate Body should reject India's efforts to cure the fundamental defects in

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[621] Panel Report, para. 7.448.
[622] *See* Panel Report, para. 7.450. Although the Panel examined India's challenge as both an "as such" and an "as applied" claim, (Panel Report, paras. 7.448 and 7.450), India's challenge to the facts available applications to determine the amount of the benefit is limited to an "as applied" claim. In particular, India clarified that its challenge was limited to an "as applied" claim in two separate filings before the Panel. *See* India Opening Statement, July 9, 2013, para. 27; *see also* India's Answers to Panel Questions, July 25, 2013, Response to Panel Question 37, at 15. The Panel addressed India's claim in general and as applied because of the confusing way in which the issue was presented to the Panel, and not on the basis that India challenged Commerce's approach as a measure "as such".
[623] Panel Report, para. 7.480.
[624] Panel Report, para. 7.479.
[625] Panel Report, para. 7.479.
[626] Panel Report, para. 7.479.
[627] India Appellant Submission, paras. 610 and 614.

its case, and should reject India's Article 11 claim regarding the Panel's findings on the sunset determination.

494. As has been found by the Appellate Body in previous reports, "[a] *prima facie* case must be based on evidence and legal argument put forward by the complaining party in relation to each of the elements of the claim."[628] Where a party has failed to set forth arguments in its submissions before a panel sufficient to substantiate its claims, it would be an error for a panel to make the party's case for it.[629] Therefore, a party must do more than just identify a measure and identify a claim The party's burden is to explain the meaning of each and how or why the measure breaches an obligation. Here, the Panel correctly determined, on the basis of India's lack of argumentation, that India had not even attempted to make out a prima facie. Such a circumstance required the panel to find that India had failed to satisfy its burden. India's allegation that the panel failed in its duty to make an objective assessment by not making India's case for it would stand the panel's role, to make an examination and assessment, on its head. Therefore, the Appellate Body should reject India's claim under Article 11 of the DSU on this basis alone.

495. Even aside from this fatal flaw in India's appeal, each of India's arguments on appeal only serve to further demonstrate that India failed to make out its case. India's statement that the 2013 Sunset Review determination is "a published and publicly available document" points out the breadth of India's failure. India did not place the challenged 2013 Sunset Review determination on the record before the Panel. India is, nonetheless, seeking to have the Appellate Body reach a conclusion that the Panel failed to make an objective assessment by considering information in a document India failed to present to the Panel. That document and that information is not on the record of this dispute. In addition, India cited to certain alleged information contained in the 2013 Sunset Review Final Results for the first time on appeal, and would appear to cite information in a selective manner. However, neither the United States nor the Appellate Body is in a position to engage with that information in this appeal. That document, information, and citations are not on the record of this dispute, and as numerous past Appellate Body reports have found, a party cannot introduce new evidence on appeal.[630] Therefore, the Appellate Body should reject India's attempt to do so now.

496. Further, India claims that "all the instances of the 2006 AR to the 2008 AR that have been argued to be inconsistent with Article 12.7 have been repeated in the 2013 Sunset Review and India merely avoided repeating the very same arguments to avoid duplication."[631] India's challenge of the 2013 Sunset Review, however, still remains unclear. On the one hand, India claims that its challenge of the 2013 Sunset Review pertains to the same subsidy programs it challenged before the Panel for the 2006 through 2008 Administrative Reviews. This is simply incorrect. India only challenged subsidy programs for the 2006 and 2008 Administrative Reviews for JSW and Tata, respectively. Nowhere in its submissions before the Panel did India make Article 12.7 arguments pertaining to SAIL, ISPAT or Essar; nor did it challenge

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[628] *US – Gambling (AB)*, para. 140.
[629] *EC – Fasteners (China) (AB)*, para. 566; *US – Continued Zeroing (AB)*, para. 343; *Japan – Agricultural Products II (AB)*, para. 129.
[630] *See., e.g.*, *US – Countervailing and Anti-Dumping Measures (AB)*, para. 4.181; *US – Offset Act (Byrd Amendment) (AB)*, para. 222; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 171.
[631] India Appellant Submission, para. 611.

Commerce's use of facts available for the 2007 Administrative Review.[632] Therefore, India has not articulated any claims or arguments with respect to these companies. Nor, for that matter, has India articulated any claims with respect to the 2007 administrative review.

497. To the extent India is referring to an "alleged" rule concerning the use of facts available to determine the amount of the benefit for each subsidy program, the Panel did not "agree" with India, as India claims. To the contrary, the Panel found that India failed to establish a *prima facie* case for those claims because India failed to explain how each application of facts available did not reasonably replace the missing information[633], as discussed in section XII.A above. Accordingly, for the 2013 Sunset Review determination, the Panel correctly found India failed to "adduce evidence in support of its claims".[634]

498. Based upon the above, the Appellate Body should find that India has failed to show that the Panel did not make an objective examination of the facts before it under Article 11 of the DSU. The United States respectfully requests that the Appellate Body therefore uphold the Panel's finding in section 7.7.5.2.9 of the Panel Report that India failed to demonstrate that Commerce acted inconsistently with Article 12.7 of the SCM Agreement in making its 2013 sunset review determination.

XIII. THE PANEL DID NOT ERR WHEN IT CONCLUDED THAT COMMERCE DID NOT ACT INCONSISTENTLY WITH ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT IN DETERMINING THAT THE NMDC IS A "PUBLIC BODY"

499. India appeals the Panel's finding that Commerce did not act inconsistently with Article 1.1(a)(1) of the SCM Agreement when it determined that India's National Mineral Development Corporation ("NMDC") is a "public body."[635] India contends that the Panel erred in its interpretation and application of the term "public body," which appears in Article 1.1(a)(1), and that the Panel acted inconsistently with Article 11 of the DSU.[636] India's arguments are without merit.

500. As an initial matter, we recall that the United States has also appealed the Panel's interpretation of Article 1.1(a)(1) of the SCM Agreement and has requested that the Appellate Body modify the Panel's interpretation of Article 1.1(a)(1).[637] We will not repeat here the arguments made in the U.S. other appellant submission that support the U.S. request, though the arguments supporting the interpretation proposed by the United States provide an alternative basis to uphold the Panel's conclusion.[638] In this submission, we will respond to the erroneous arguments in India's appellant submission and explain how the Panel's understanding of the term "public body" is consistent with the interpretation previously set out by the Appellate Body, and why that interpretation supports the Panel's ultimate conclusion with respect to Commerce's determination that the NMDC is a "public body." The arguments set forth below are without prejudice to the U.S. other appeal.

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[632] See generally, India's FWS, paras. 522-575.
[633] Panel Report, para. 7.449.
[634] Panel Report, para. 7.479.
[635] *See* Panel Report, section 7.3.1, para. 7.89; *see also* India Notice of Appeal, paras. 17-20.
[636] India Notice of Appeal, paras. 17-20.
[637] *See* U.S. Notice of Other Appeal, para. (1).
[638] U.S. Other Appellant Submission, paras. 19-91.

501. That being said, India's arguments in its appellant submission highlight the importance of the clarification that the United States seeks. India insists, incorrectly, that the term "public body" should be limited only to entities that have the power to regulate, control, supervise, or restrain the conduct of individuals and also have the power to entrust or direct private bodies. As explained below, India's view does not follow from the Appellate Body's findings in *US – Antidumping and Countervailing Duties (China)*, and, as explained in the U.S. other appellant submission, India's proposed interpretation is not in accordance with the customary rules of interpretation.

502. In the subsections that follow, we respond to India's argument that the Panel "misunderstood" the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* and, as a consequence of its misunderstanding, incorrectly interpreted and applied Article 1.1(a)(1) of the SCM Agreement. We will show that it is India, not the Panel, that misunderstands that Appellate Body report. In fact, the Panel interpreted and applied Article 1.1(a)(1) in a manner consistent with the Appellate Body's own interpretation and application of that provision in *US – Anti-Dumping and Countervailing Duties (China)*.

503. Next, we will respond to India's claims that the Panel acted inconsistently with Article 11 of the DSU. We will demonstrate that India has failed to establish that the Panel's evaluation lacked objectivity, and that India is, in large part, simply recasting its arguments before the Panel as Article 11 claims, which the Appellate Body has explained previously is unacceptable.

504. Finally, we will respond to India's requests for the Appellate Body to complete the legal analysis. While we do not believe that it will be necessary for the Appellate Body to complete the legal analysis – because the Panel's conclusion with respect to Commerce's determination that the NMDC is a "public body" should be upheld – in the event that the Appellate Body does determine to complete the legal analysis, it should find that Commerce did not act inconsistently with Article 1.1(a)(1) of the SCM Agreement because the evidence on Commerce's administrative record supports Commerce's determination that the NMDC is a "public body," even under an interpretation of that term that requires evidence beyond "meaningful control" of the NMDC by the Government of India ("GOI").

A. The Panel Interpreted and Applied Article 1.1(a)(1) of the SCM Agreement in a Manner Consistent with the Appellate Body's Interpretation and Application of that Provision in *US – Anti-Dumping and Countervailing Duties (China)*

505. India criticizes the Panel's approach and argues that the Panel "misunderstood the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*."[639] In India's view, the existence of "meaningful control" by the GOI over the NMDC is insufficient to establish that the NMDC is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement.[640] Rather, India contends that every "public body":

> must possess governmental authority to perform governmental functions, to be called a "public body". What is implied in this context is for the body in question

[639] India Appellant Submission, para. 300.
[640] India Appellant Submission, paras. 321-326.

> to have the power to regulate, control, or supervise individuals, or otherwise restrain conduct of others, and this power must flow from the "governmental" source, as is understood in the traditional narrow sense.[641]

Additionally, India argues that every "public body":

> must also be able to entrust or direct a private body, and specifically, have the power to give "responsibility" to a private body or exercise "authority" over a private body.[642]

India asserts that its understanding is based on the interpretation of "public body" given by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. However, as explained below, India's understanding of the term "public body" is incorrect, and it is inconsistent with the Appellate Body's understanding and application of Article 1.1(a)(1) of the SCM Agreement in *US – Anti-Dumping and Countervailing Duties (China)*.

1. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body Found that an Entity Meaningfully Controlled by the Government Can Be a Public Body

506. India's arguments, which rely exclusively on its reading of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, ignore the most relevant basis in that report to understand the Appellate Body's interpretation and application of the term "public body": the Appellate Body's own "public body" findings in that dispute. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body upheld Commerce's determinations that state-owned commercial banks (SOCBs) in China were public bodies.[643] In doing so, the Appellate Body repeatedly referred to the government's "meaningful control" over an entity.[644] The Appellate Body explained that:

> [T]he USDOC, in CFS Paper, discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions. Whether or not we would have reached the same conclusion, it seems to us that in its CFS Paper determination, the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions. In the OTR investigation, this analysis was incorporated by reference. In addition, in the OTR investigation, the USDOC also referred to certain other evidence on the record of that investigation demonstrating that SOCBs are required to support China's industrial policies. In our opinion, these considerations, taken together, demonstrate that the USDOC's public body determination in respect of SOCBs

[641] India Appellant Submission, para. 308.
[642] India Appellant Submission, para. 310.
[643] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 355-356.
[644] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 318, 346, and 355.

> was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government.[645]

The Appellate Body found that there were sufficient links between the government and the SOCBs such that, when the banks "exercise[d] . . . their functions" (lending), they were "effectively exercis[ing] certain governmental functions."[646] The Appellate Body called such links "meaningful control."[647]

507. Notably, the Appellate Body did not examine or discuss any evidence that the SOCBs at issue in *US – Anti-Dumping and Countervailing Duties (China)* could or did "regulate," "control," "supervise," or "restrain" the conduct of others. This is hardly surprising, since banks typically do not possess such authority. Likewise, the Appellate Body did not examine or discuss any evidence that the SOCBs could or did entrust or direct private bodies to provide financial contributions. Again, this is not surprising, as doing so is not normally a function of banks. Despite the SOCBs not possessing these powers, however, the Appellate Body nevertheless found that the SOCBs were "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

508. This demonstrates that India's approach – wherein *every* "public body" *must* have the power to regulate, control, supervise, or restrain the conduct of individuals, and *must* have the power to entrust or direct private bodies to provide financial contributions, and the source of this power *must* be the government in the narrow sense[648] – is, in reality, a deviation from the interpretation articulated and applied by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

509. As explained at greater length in the U.S. other appellant submission, for an entity to be a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement, it is not necessary to find that the entity has "the effective power to regulate, control or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."[649] If an entity has the power to "regulate" individuals or "otherwise restrain their conduct," but not the power to provide financial contributions of government resources, the entity's regulatory powers are not relevant to the SCM Agreement. On the other hand, if an entity has no regulatory or supervisory authority, but is nonetheless controlled by the government such that the government can use the entity's resources as its own, it would be anomalous to conclude that a financial contribution by that entity is not one by a "public body" under Article 1.1(a)(1). In such a case, any transfer of

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[645] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[646] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[647] We think the clearest way to understand the links sufficient to constitute "meaningful control" is to examine the economic relationship between the government and an entity. As we have suggested in the U.S. Other Appellant Submission, there will be sufficient links when a government controls an entity such that it can use the entity's resources as its own. Using this approach, the government certainly had "meaningful control" over the SOCBs in *US – Anti-Dumping and Countervailing Duties (China)*, so that when the banks carried out their lending activities it was appropriate to consider that lending a financial contribution attributable to the Government of China.
[648] *See* India Appellant Submission, paras. 308-310.
[649] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290 (citing *Canada – Dairy (AB)*, para. 97).

economic resources by that entity is effectively a conveyance of the government's own resources.[650]

510. India is correct that, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body referenced its report in *Canada – Dairy* and reiterated that the "essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."[651] The Appellate Body went on to find that "the[] defining elements of the word 'government' inform the meaning of the term 'public body'."[652] And the Appellate Body stated that "the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body."[653] The Appellate Body did not, however, find that *every* "public body" must, like government, have the power to regulate, control, supervise, or restrain the conduct of individuals, as India asserts. To do so would collapse the terms "government" and "public body" in a way that would reduce the term "public body" to redundancy or inutility, which would be inconsistent with the customary rules of interpretation.

511. Likewise, the Appellate Body did not find that every "public body" must have the power to entrust or direct private bodies, as India argues. The Appellate Body observed that "for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command" and, "[s]imilarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility."[654] It does not necessarily follow from these observations – and the Appellate Body did not, in fact, find – that *all* public bodies must *in all cases* have such authority. Indeed, many organs of Member governments may *not* possess the legal authority to entrust or direct private bodies to carry out the functions identified in Articles 1.1(a)(1)(i)-(iii) of the SCM Agreement. The absence of authority to entrust or direct private bodies does not move these organs outside the category of "government." Similarly, the absence of authority to entrust or direct private bodies should not, as a definitional matter, move a particular entity outside the category of "public body."

512. Instead of requiring evidence that the SOCBs had the power to regulate, control, supervise, or restrain the conduct of individuals and also to entrust or direct private bodies to provide financial contributions, the Appellate Body focused its analysis in *US – Anti-Dumping and Countervailing Duties (China)* on evidence that demonstrated that the SOCBs were

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[650] We note an article in the Journal of World Trade penned by Michael Cartland, Gérard Depayre, and Jan Woznowski, each of whom participated in the Negotiating Group on subsidies and countervailing measures in the Uruguay Round. *See* Cartland, Michael, Depayre, Gérard & Woznowski, Jan. 'Is Something Going Wrong in the WTO Dispute Settlement?' Journal of World Trade 46, no. 5 (2012): 979–1016 (Exhibit USA-88). In that article, the authors explain that "Article 1 of the SCMA is not about restraining behaviour of anyone; to the contrary, in some sense it is about describing what kinds of entities might provide 'gifts' to certain other entities, with disciplines where those gifts distort trade. It is simply not necessary for a particular entity to have regulatory power (to constrain others' behaviour) for that entity to be able to provide gifts that might distort trade, that is, to channel trade distorting *government resources* to particular recipients in an economy." *Id.* at 1004-1005 (emphasis added).

[651] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290.

[652] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290.

[653] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290 (emphasis added).

[654] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 294.

"meaningfully controlled" by the government. Indeed, even when it evaluated Commerce's determinations that certain state-owned enterprises (SOEs) were "public bodies" – and ultimately found that Commerce acted inconsistently with Article 1.1(a)(1) of the SCM Agreement – the Appellate Body noted the importance of "meaningful control" to its "public body" analysis. The Appellate Body explained that:

> The USDOC relied "principally" on information about ownership. In our view, this is not sufficient because evidence of government ownership, in itself, is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function. Accordingly, such evidence, alone, cannot support a finding that an entity is a public body.[655]

513. The implication of the Appellate Body's reasoning is that evidence of government ownership plus additional evidence of government control could be sufficient to establish "meaningful control of an entity by government," which in turn is sufficient to establish that the entity is a "public body."

514. The panel in *Canada – Renewable Energy* followed the Appellate Body's reasoning when assessing whether an entity at issue there constituted a "public body." Key to that panel's finding was the observation"[t]hat the Government of Ontario has 'meaningful control' over Hydro One's activities in a way that confirms it is a 'public body' within the meaning of Article 1.1(a)(1) of the SCM Agreement . . . ."[656] Notably absent from the panel's reasoning was any finding that Hydro One had the power to regulate, control, supervise or restrain the conduct of others, or that it had the power to entrust or direct private bodies. The panel's findings in this regard were not appealed, and were adopted by the Dispute Settlement Body.

2. The Panel Understood the Appellate Body report in *US – Anti-Dumping* and *Countervailing Duties (China)* and Correctly Analyzed Whether the NMDC Is Meaningfully Controlled by the GOI

515. The Panel began its evaluation of India's claims concerning Commerce's determination that the NMDC is a "public body" by quoting relevant portions of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*.[657] After reviewing those passages of the Appellate Body report, the Panel explained that it "underst[ood] the Appellate Body to have found that the critical consideration in identifying a public body is the question of governmental authority, i.e., the authority to perform governmental functions."[658] The Panel further explained that:

> Governmental control of the entity is relevant if that control is "meaningful". Indeed, the Appellate Body explicitly stated that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental

[655] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 346 (emphasis added).
[656] *Canada – Renewable Energy (Panel)*, para. 7.235 (emphasis added); *see also id.*, para. 7.239. The *Canada – Renewable Energy* panel's findings in this regard were not appealed.
[657] Panel Report, para. 7.79.
[658] Panel Report, para. 7.80.

> authority and exercises such authority in the performance of governmental functions".[659]

The Panel also "agree[d] with the Appellate Body that 'meaningful control' may not be established on the basis of government shareholding alone, but a combination of government shareholding plus other factors indicative of control may suffice."[660]

516. After making these observations about the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, the Panel "examine[d] whether the USDOC's determination amounts to a proper finding that the NMDC is subject to 'meaningful control' by the GOI."[661] As explained above, the Panel correctly understood the Appellate Body's approach to the "public body" concept, and therefore there was no error in the Panel's decision to examine whether India exercised "meaningful control" over the NMDC.

517. We recall that "NMDC" is an acronym for India's National Mineral Development Corporation. The Panel noted that Commerce "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.'"[662] India has never disputed the fact of the GOI's near-total ownership of the NMDC. However, as the Appellate Body has explained, and as the Panel agreed, evidence of government ownership alone cannot support a finding that an entity is a "public body."[663] In the Panel's view, though, the language in Commerce's determinations "indicates that USDOC's public body determination is not based solely on the GOI's shareholding in NMDC, for it makes clear that the USDOC's determination is also based on NMDC being 'governed by' GOI."[664] The Panel explained that:

> To us, this indicates that the USDOC looked to the question of control of NMDC, and thus we consider that the USDOC's determination that the NMDC constitutes a public body was based on considerations of government control as well as government ownership.[665]

518. The Panel found that evidence on the administrative record before Commerce supported Commerce's determination that the NMDC was "governed by" the GOI. In particular, the Panel highlighted evidence that the GOI was heavily involved in the selection of the directors of the NMDC and evidence that the NMDC was under the "administrative control" of the GOI.[666]

519. With respect to GOI involvement in the selection of the NMDC's directors, the Panel noted that:

> [T]here was evidence on the USDOC's record indicating that GOI officials informed USDOC at verification for the 2004 administrative review that the NMDC's chairman, or managing director, and four functional directors are full-

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[659] Panel Report, para. 7.80 (*citing US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[660] Panel Report, para. 7.81.
[661] Panel Report, para. 7.81.
[662] Panel Report, para. 7.81 (*citing* 2004 Preliminary Results, Exhibit IND-17, p.5).
[663] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 346; *see also* Panel Report, para. 7.81.
[664] Panel Report, para. 7.81.
[665] Panel Report, para. 7.81.
[666] Panel Report, paras. 7.82-7.88.

> time directors selected by a Board that is part of the GOI. GOI officials also informed the USDOC that there are two part-time directors from, and appointed by, the Ministry of Steel.[667]

The Panel also noted that the issues and decision memorandum for the 2007 administrative review stated that:

> The information on the record of the instant review only further bolsters the Department's prior determinations that the NMDC is a GOI authority capable of providing a financial contribution within the meaning of section 771(5)(D)(iii) of the Act. For example, with regard to the NMDC's 13 board members, information from the GOI indicates that it directly appoints two members and approves the appointments of an additional seven members.[668]

520. India argued before the Panel,[669] and continues to argue now on appeal,[670] that "shareholding and appointment of directors are merely two sides of the same coin" and, accordingly, the GOI's appointment of some directors and its nomination of others "is irrelevant to the determination of whether NMDC is a public body or not."[671] As an initial observation, India does not acknowledge the contradictions in its own assertions. It argues that "the right to appoint directors inheres in shareholders," but later argues that India, which holds nearly 100 percent of the NMDC's shares, does not control the NMDC because it "only appoints 2 of the 13 directors."[672] Thus, the NMDC's own structure contradicts India's assertion that shareholding and appointment of directors are two sides of the same coin. And as explained below, India never grapples with the fact that India's influence over the naming of all 13 directors suggests a significant degree of control that extends well beyond its formal right to appoint 2 directors.

521. The Panel considered India's arguments and rejected them.[673] In the Panel's view:

> [G]overnment involvement in the appointment of an entity's directors (involving both nomination and direct appointment) is extremely relevant to the issue of whether that entity is meaningfully controlled by the government, because government involvement in the appointment of an entity's directors suggests that the relationship between the government and that entity is closer than it would be if the government simply held a shareholding in that entity. While a government shareholding indicates that there are formal links between the government and the relevant entity, government involvement in the appointment by the government of individuals – including serving government officials – to the governing board of an entity suggests that the links between the government and the entity are more substantive, or "meaningful", in nature. Indeed, we observe that in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body implicitly

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[667] Panel Report, para. 7.83 (*citing* 2004 Verification India, Exhibit USA-66, pp. 5-6) (footnotes omitted).
[668] Panel Report, para. 7.83 (*citing* 2007 Issues and Decision Memorandum, Exhibit IND-38, p. 45).
[669] *See* Panel Report, para. 7.84.
[670] *See* India Appellant Submission, paras. 290-298.
[671] Panel Report, para. 7.84.
[672] India Appellant Submission, para. 295.
[673] *See* Panel Report, para. 7.85-7.86.

> accepted that an investigating authority's determination that certain entities constitute public bodies could be based on evidence indicating that the chief executives of those entities were "government appointed", and "the party retain[ed] significant influence in their choice".[674]

522. On appeal, India urges the Appellate Body to fault the Panel for not distinguishing between "chief executives" and "directors," and between "appointment" and "nomination" of directors. But India misses the point. The more relevant distinction is between the government having the formal right to appoint board members, which may be a right of any shareholder with a significant stake in an entity, and evidence of the government actually exercising that right in a given situation. As India emphasizes in its appellant submission:

> It was India's submissions [sic] before the Panel and is India's submission before this Appellate Body that the GOI only appoints 2 of the 13 directors, nominates 7 of the 13 directors who are all "independent" and the remaining 4 directors are functional directors appointed by the Board itself, i.e. only a very small minority is appointed by the GOI.[675]

In other words, the GOI *in fact* plays a role in appointing all nine of the directors that are appointed by shareholders. The remaining four directors, including, as the Panel noted, the "NMDC's chairman, or managing director,"[676] are then appointed by those nine board members in whose appointment India plays an active role. This is, as the Panel found, *evidence* of "meaningful control" by the GOI over the NMDC.

523. The Panel found additional evidence of "meaningful control" of the NMDC by the GOI in a statement on the NMDC's own website, which was placed on the administrative record before Commerce. As the Panel explained:

> [P]etitioners submitted hard copies of material taken from the NMDC's own website stating that "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India." Although the NMDC website does not specify what precisely is meant by "administrative control", the fact that an entity is under the "administrative control" of the government suggests that the relationship between that entity and the government is very different from the relationship that would normally prevail between a private body and the government. Accordingly, in the context of government ownership and government involvement in the appointment of directors, such evidence provides additional support for a finding that an entity is under the "meaningful control" of the government.[677]

524. Finally, the Panel noted the GOI "Miniratna" and "Navratna" status documents which identified the NMDC as a "public sector" enterprise.[678] Responding to India's arguments

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[674] Panel Report, para. 7.85.
[675] India Appellant Submission, para. 295.
[676] Panel Report, para. 7.83 and footnote 248 (*citing* 2004 Verification India, Exhibit USA-66, pp. 5-6).
[677] Panel Report, para. 7.87.
[678] Panel Report, para. 7.88.

concerning those documents, the Panel reasoned that "[s]o long as public sector enterprises are involved, we are not persuaded that the grant of a greater degree of autonomy is necessarily at odds with a determination that such public sector enterprises constitute public bodies" and noted that "India has not suggested that 'Miniratna' or 'Navratna' companies are effectively private in nature."[679]

525. The Panel concluded that "the USDOC's determination, when viewed in light of the above-mentioned record evidence, effectively amounted to a determination that the NMDC was under the 'meaningful control' of GOI."[680] Accordingly, the Panel rejected India's claim that Commerce's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.[681] The Panel's conclusion in this regard is similar to and consistent with the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* and the panel report in *Canada – Renewable Energy*.

526. Accordingly, the Appellate Body should reject India's argument that the Panel failed to interpret and apply Article 1.1(a)(1) of the SCM Agreement correctly, and the Panel's finding upholding Commerce's determination that the NMDC is a "public body" should be not be reversed.

B. The Panel Fulfilled Its Obligation under Article 11 of the DSU to Make an Objective Assessment of the Matter before It

527. In addition to its arguments related to the substance of the Panel's interpretation and application of Article 1.1(a)(1) of the SCM Agreement, India also claims on appeal that the Panel failed to objectively assess the matter before it, as it was required to do by Article 11 of the DSU. India advances four Article 11 claims with respect to the Panel's evaluation of Commerce's determination that the NMDC is a "public body." All of them lack merit. The United States will address each of India's Article 11 claims in turn.

1. The Panel's Treatment of a Purported "Admission" by the United States in another WTO Dispute Was Not Inconsistent with Article 11 of the DSU

528. India fails to demonstrate in its appellant submission that the Panel acted inconsistently with Article 11 of the DSU in its treatment of a purported "admission" by the United States in another dispute. India asserts that it brought to the Panel's attention what it characterizes as "the express and categorical admission by the United States before the Panel in *US – Anti-Dumping and Countervailing Duties (China)* that in the underlying investigations, the USDOC only considered shareholding of the GOI as the sole factor without reference to any more factors."[682] India further asserts that the Panel "failed to consider" this "admission," which "is in stark contrast to the submissions made by the United States before the Panel."[683] India argues that the Panel failed to meet its obligation under Article 11 of the DSU because "an objective authority

[679] Panel Report, para. 7.88.
[680] Panel Report, para. 7.89.
[681] Panel Report, para. 7.89.
[682] India Appellant Submission, para. 252 (underlining in original).
[683] India Appellant Submission, para. 253.

ought to have evaluated the relevance of this evidence instead of disregarding [it]."[684] In making these arguments, India simply wishes that the Panel had accorded more weight than it did to the irrelevant, purported "admission" identified by India.

529. As an initial matter, India is simply incorrect, as a matter of fact, when it asserts that the United States admitted in the context of the panel proceeding in *US – Anti-Dumping and Countervailing Duties (China)* that Commerce "considered shareholding of the GOI as the sole factor without reference to any more factors."[685] In its appellant submission, India supports its assertion with citations to its own submissions and statements to the Panel below.[686] In India's submissions and statements to the Panel, India cited to paragraph 7.89 of the panel report in *US – Anti-Dumping and Countervailing Duties (China)*.[687] At paragraph 7.89 of that panel report, the panel stated that "[t]he United States further notes that in a subsequent countervailing duty administrative review of *Hot-Rolled Carbon Steel Flat Products from India*, the USDOC found that a 98 per cent government-owned mining company governed by the Ministry of Steel was a public body, without reference to any more factors."[688] The panel report notes that Commerce found that the NMDC was "governed by the Ministry of Steel." Moreover, as support for its description of the U.S. statement, the panel cited to paragraph 143 of the U.S. first written submission to the panel in that dispute.[689] At paragraph 143 of the U.S. first written submission, the United States explained that, "[s]ubsequently, in a CVD administrative review of hot-rolled carbon steel flat products from India, Commerce found that a mining company in which the government owned 98 percent of the shares, and which was governed by the Ministry of Steel, was a public body, without reference to any more factors."[690] Accordingly, India's assertion that the United States even made the "admission" that India describes has no basis whatsoever in fact.

530. Furthermore, India has made no effort to actually demonstrate that the Panel acted inconsistently with the requirements of Article 11 of the DSU. In *EC – Fasteners*, the Appellate Body discussed a panel's obligation under Article 11. As the Appellate Body explained:

> [T]he duty to make an objective assessment of the facts of the case "requires a panel to consider evidence before it in its totality, which includes consideration of submitted evidence in relation to other evidence", and a panel should not disregard evidence that is relevant to the case of one of the parties. The Appellate Body has also clarified, however, that a panel is "entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements". In doing so, a panel "is not required to discuss, in its report, each and every piece of evidence." Moreover, "in view of the distinction between the respective roles of the Appellate Body and panels", the Appellate Body will not "interfere lightly" with the panel's fact-finding

[684] India Appellant Submission, para. 255.
[685] India Appellant Submission, para. 252 (underlining in original).
[686] India Appellant Submission, footnote 210.
[687] *See* India First Written Submission, para. 232; India Second Written Submission, para. 124; India's Second Opening Statement, para. 27, does not include a citation.
[688] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para 7.89 (emphasis added).
[689] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, footnote 135.
[690] U.S. First Written Submission to the panel in *US – Anti-Dumping and Countervailing Duties (China)*, para. 143 (emphasis added) (available on the USTR website at http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/definitive-anti-dump-1).

> authority, and "cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached".[691]

531. The Appellate Body further explained that:

> [W]hen alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment.[692]

532. For its part, India has made no attempt whatsoever on appeal to explain why the purported evidence is so material to its case that the Panel's alleged failure to address and rely upon it has a bearing on the objectivity of the Panel's factual assessment. India simply asserts, without explanation, that "[t]he admission from the prior dispute in this case is on the very same fact" and "would be relevant."[693] In light of the Appellate Body's elaboration of Article 11, merely asserting that the evidence would be "relevant" is, in any event, insufficient to substantiate India's Article 11 claim.

533. Moreover, it is unclear why the Panel should have considered the evidence to be relevant at all and how, if it had done so, the evidence would have been material to the Panel's evaluation of India's claims. India argued before the Panel that Commerce's determination that the NMDC constitutes a "public body" is based solely on the fact that the GOI holds more than 98 percent of the shares of the NMDC.[694] The Panel rejected India's argument. The Panel's conclusion in this regard was based on its evaluation of Commerce's determinations and other evidence on Commerce's administrative record, all of which was before the Panel. India offers no explanation for why the Panel should have accorded greater weight to India's misapprehension of a U.S. characterization of Commerce's determinations made in another WTO dispute than it accorded to the determinations themselves and the other evidence on the administrative record. It would have been illogical for the Panel to do so, since the most complete picture of what Commerce actually determined and the basis for that determination is presented by Commerce's determinations themselves and the other evidence on the administrative record.

534. Ultimately, the Panel's decision not to explicitly refer to the purported admission in its reasoning simply reflects the comparatively minor weight that the Panel accorded it. We recall the Appellate Body's statement that a panel "is not required to discuss, in its report, each and every piece of evidence."[695] India has failed to demonstrate that the Panel was obligated under Article 11 of the DSU to discuss the purported admission in its report, and India has provided the Appellate Body no basis for interfering with the Panel's fact-finding authority in this case.

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[691] *EC – Fasteners (China) (AB)*, para. 441 (emphasis added) (citations omitted).
[692] *EC – Fasteners (China) (AB)*, para. 442 (emphasis added).
[693] India Appellant Submission, para. 254.
[694] *See* Panel Report, para. 7.81.
[695] *EC – Fasteners (China) (AB)*, para. 441 (emphasis added) (citations omitted).

2. The Panel Did Not Act Inconsistently with Article 11 of the DSU by Examining Statements in Commerce's Determinations and Evidence on Commerce's Administrative Record, which thus Were Not *Ex Post Facto* Rationalizations

535. India argues that the Panel acted inconsistently with Article 11 of the DSU when it considered and based its conclusion on allegedly *ex post facto* rationalizations offered by the United States during the course of the dispute settlement proceeding.[696] India's claim is without merit.

536. As an initial matter, India simply is not correct, as a matter of fact, when it asserts that Commerce did not consider, at the time it made its determinations, the evidence of the role played by the GOI in the selection of the NMDC's directors and the statement from the NMDC's website that the NMDC is under the "administrative control" of the GOI.[697] Commerce did consider that evidence. As the Panel found, Commerce explained that it determined that the NMDC was a "public body," in part, because the NMDC was "governed by" the GOI. That was Commerce's reasoning, and it was set out in Commerce's determinations. The United States also demonstrated in its submissions to the Panel that Commerce considered various pieces of information in making its "public body" determination.[698] For the 2004 administrative review, this evidence was described in Commerce's Verification Report of Government of India Responses, which was expressly referenced in Commerce's determination that NMDC was "governed by" the GOI.[699] In later administrative reviews, Commerce considered and described additional information in its Issues and Decision Memoranda and referred to such information in its determinations.[700] Therefore, it is incorrect for India to assert that the explanations provided by the United States for Commerce's determinations were not contained in the determinations themselves, or that Commerce did not evaluate the evidence cited by the United States at the time it made its determinations.

537. Additionally, India is incorrect, as a legal matter, that the Panel was obligated to reject the arguments of the United States as *ex post facto* rationalizations. India relies for support of its Article 11 claim on the Appellate Body report in *US – Wheat Gluten* and the panel report in *Argentina – Ceramic Tiles*. India's reliance on those reports is misplaced.

538. In *US – Wheat Gluten*, the U.S. International Trade Commission ("USITC") justified a conclusion with respect to a complex issue in a safeguard investigation with a single sentence in its final report.[701] The panel in that dispute concluded that the USITC report itself "provides an adequate, reasoned and reasonable explanation" with respect to the issue. The Appellate Body faulted the panel for this conclusion because, rather than relying on the USITC report itself, the panel actually relied on "clarifications" given by the United States in response to the panel's questions. As the Appellate Body noted, those subsequent clarifications "obviously do *not* figure

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[696] India Appellant Submission, paras. 257-265.
[697] *See* India Appellant Submission, para. 264.
[698] U.S. First Written Submission, at paras. 381-383; U.S. Second Written Submission, at paras. 104-105.
[699] *See* U.S. First Written Submission, para. 382-383, *citing 2004 Preliminary Results*, 71 Fed. Reg. at 1516 (Exh. IND-17) and *2004 Verification Report of Government of India Responses*, pp. 5-6 (Exh. USA-66).
[700] *See* U.S. First Written Submission paras. 382-383, *citing, e.g.*, *2006 Preliminary Results*, 73 Fed. Reg. 1586-1587 (Exh. IND-32) and *2007 Final Issues and Decision Memorandum*, Comment 10 (Exh. IND-38).
[701] *US – Wheat Gluten (AB)*, para. 157, 159.

in the USITC Report."[702] The Appellate Body concluded that, "[b]y reaching a conclusion regarding the USITC Report, which relied so heavily on supplementary information provided by the United States during the Panel proceedings – information not contained in the USITC Report – the Panel applied a standard of review which falls short of what is required by Article 11 of the DSU."[703]

539. Here, in contrast, the Panel's analysis of Commerce's "public body" determination regarding the NMDC, and, indeed, Commerce's "public body" determination itself, is not limited to a single sentence in Commerce's final determinations. Rather, the Panel understood Commerce's determination that the NMDC is "governed by" the GOI to be Commerce's rationalization, provided in the final determinations, and that rationalization was supported by evidence discussed in other documents on Commerce's administrative record, including the 2004 preliminary results, the 2004 verification report, and the 2007 final issues and decision memorandum.[704] The Panel did not agree with India's contention that the United States was presenting new reasons for Commerce's determination and new evidence in support of that determination.[705] Rather, the United States was pointing to the statement of Commerce's reasoning in the final determination and the evidence that supported Commerce's reasoning, which was on Commerce's administrative record.[706] For these reasons, *US – Wheat Gluten* is inapposite.

540. The panel report in *Argentina – Ceramic Tiles* likewise provides no support for India's argument. On the contrary, the panel's analysis there is consistent with and supports the Panel's evaluation here. As the panel in *Argentina – Ceramic Tiles* explained:

> The question before us, however, is not whether the evaluation of the authority is provided in a public document or not, but rather whether any such reasoning has been provided in any document on the record. Under Article 17.6 of the AD Agreement we are to determine whether the [authority] established the facts properly and whether the evaluation performed by the [authority] was unbiased and objective. In other words, we are asked to review the evaluation of the [authority] made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature. We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are *ex post facto* justifications which were not provided at the time the determination was made.[707]

541. The Panel here took into consideration only the rationalization and evidence that formed part of Commerce's evaluation process at the time of its determinations. The Panel here, like the panel in *Argentina – Ceramic Tiles*, did not consider that its evaluation was limited only to a "public notice," but appropriately included "any other document of a public or confidential

[702] *US – Wheat Gluten (AB)*, para. 160.
[703] *US – Wheat Gluten (AB)*, para. 162.
[704] *See* Panel Report, footnote 245.
[705] *See* Panel Report, footnote 245.
[706] Panel Report, footnote 245.
[707] *Argentina – Ceramic Tiles (Panel)*, para. 6.27 (underlining in original).

nature" that was on Commerce's administrative record, including the 2004 preliminary results, the 2004 verification report, and the 2007 final issues and decision memorandum. The conclusion India draws – that "alleged evidence on the record before USDOC is irrelevant for the Panel's consideration unless it forms part of the evaluation or determination of the USDOC itself"[708] – simply does not follow from the analysis of the panel in *Argentina – Ceramic Tiles*. India misreads that panel report.

542. The Appellate Body report in *US – Countervailing Duty Investigation on DRAMs*, to which India does not refer in its appellant submission, is far more relevant to the question of what constitutes an *ex post facto* rationalization. In that dispute:

> In the course of making submissions before the Panel, the United States at several points attempted to rely on evidence that, although contained in the record of the CVD investigation, had not been *cited* in the USDOC's decision. The Panel refused to consider this evidence on the ground that submission of such evidence constituted "*ex post* rationalization" on the part of the United States.[709]

On appeal, the United States argued that "the Panel misunderstood the scope of this prohibition against '*ex post* rationalization'."[710] The United States further argued that the "prohibition limits only a Member's right to raise before a panel new *reasons* as the basis for its investigating authority's challenged decision, but not the right to rely during panel proceedings on *evidence* that, although contained in the record of the investigating authority, is not explicitly referred to in its decision."[711]

543. The Appellate Body agreed with the United States and found that the panel erred in declining to consider certain record evidence not cited by the USDOC in its published determination.[712] The Appellate Body explained that the SCM Agreement "does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination."[713] In that dispute, as here, the "evidence [to which the United States pointed] was on the record of the investigation and it was not put before the Panel in support of a new reasoning or rationale."[714] The Panel's decision here not to reject the arguments of the United States as *ex post* rationalizations is in accordance with the elaboration of the prohibition on *ex post* rationalizations set forth by the Appellate Body in the *US – Countervailing Duty Investigation on DRAMs*.

544. For these reasons, the Panel did not act inconsistently with Article 11 of the DSU when it declined India's request to reject U.S. arguments as *ex post facto* rationalizations.

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[708] India Appellant Submission, para. 262.
[709] *US – Countervailing Duty Investigation on DRAMs (AB)*, para. 159 (italics in original).
[710] *US – Countervailing Duty Investigation on DRAMs (AB)*, para. 159 (italics in original).
[711] *US – Countervailing Duty Investigation on DRAMs (AB)*, para. 159 (italics in original).
[712] *US – Countervailing Duty Investigation on DRAMs (AB)*, para. 165.
[713] *US – Countervailing Duty Investigation on DRAMs (AB)*, para. 164 (italics in original).
[714] *US – Countervailing Duty Investigation on DRAMs (AB)*, para. 165.

3. The Panel Did Not Act Inconsistently with Article 11 of the DSU by Disregarding Material Evidence, nor by Coming to an Inherently Contradictory Conclusion

545. India contends that "[t]he Panel has clearly drawn inferences and connections contrary to the evidence on record. The Panel has accordingly acted contrary to its mandate under Article 11, effectively disregarding all evidence that contradicted its conclusion."[715] India's contention lacks merit.

546. As noted above, in *EC – Fasteners*, the Appellate Body discussed the obligation of panels under Article 11 of the DSU, and also elaborated the responsibility of Members claiming that a panel has acted inconsistently with Article 11. As the Appellate Body explained there:

> [N]ot every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. It is incumbent on a participant raising a claim under Article 11 on appeal to explain why the alleged error meets the standard of review under that provision. An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision. In particular, when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment. It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment. Finally, a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.[716]

547. India's Article 11 claim fails to meet the standard articulated by the Appellate Body in *EC – Fasteners*. India advances two arguments in support of its Article 11 claim. First, India argues that "an objective assessment of the facts in the underlying investigation, [sic] would have led the Panel to discard 'administrative control' as a relevant factor in reaching its determination."[717] India insists that "the United States specifically admitted that 'administrative control' was not used in its determinations"[718] and, in India's view:

> It is clear from the United States' response to Panel's Questions that the United States equates "administrative control" with "governed by" which is equated with ownership and appointment of board of directors. In other words, "administrative control" is not really an independent factor as per the United States itself. The

[715] India Appellant Submission, para. 278.
[716] *EC – Fasteners (China) (AB),* para. 442.
[717] India Appellant Submission, para. 270.
[718] India Appellant Submission, para. 267.

> United States also admits that this alleged "administrative control" was never used in the USDOC's determinations itself.

548. India is simply incorrect. In question 42(b), the Panel asked the United States: "What is the basis for the USDOC's determination that NMDC is under the 'administrative control' of India's Ministry of Steel & Mines?" The United States explained in response to the Panel's question that Commerce did not determine that NMDC is under the "administrative control" of the GOI. Rather, there was evidence on Commerce's administrative record that the NMDC was under the "administrative control" of the GOI. That evidence was in the form of a description of the NMDC on its own website, and that evidence supported Commerce's conclusion that the NMDC is "governed by" the GOI and that the NMDC is a "public body." The United States did not make the "admissions" that India asserts it did.

549. Furthermore, India is merely "recast[ing] its arguments before the panel under the guise of an Article 11 claim," which the Appellate Body has said is "unacceptable."[719] As India itself notes in its appellant submission, the Panel addressed India's argument, but "[did] not consider that the United States should be understood to have admitted that USDOC did not rely on 'administrative control' in its determinations. The fact that this phrase may not have been used by the USDOC does not mean that the United States is precluded from relying on evidence – on USDOC's record – of 'administrative control' in this Panel proceeding."[720] Moreover, India has not "identif[ied] specific errors regarding the objectivity of the panel's assessment."[721] India may disagree with the conclusion the Panel drew from the evidence, but the Panel "is 'entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements'."[722]

550. India's second argument in support of its Article 11 claim is no more persuasive than the first. India attacks the Panel's conclusion that evidence of the GOI's role in the selection of the directors of the NMDC supports Commerce's determination that the NMDC is a "public body."[723] As before, though, India's argument amounts to nothing more than a disagreement with the Panel's weighing of the evidence, and India is once again simply "recast[ing] its arguments before the panel under the guise of an Article 11 claim."[724] India does not even suggest that the Panel disregarded or failed to take into account any particular piece of evidence, or that such a failure was "so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment."[725]

551. There simply is no support whatsoever for India's claim that the Panel acted inconsistently with Article 11 of the DSU.

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[719] *EC – Fasteners (China) (AB),* para. 442.
[720] Panel Report, para. 6.100; India Appellant Submission, para. 267; *see also* Panel Report, para. 6.115..
[721] *EC – Fasteners (China) (AB),* para. 442.
[722] *EC – Fasteners (China) (AB),* para. 441.
[723] *See* India Appellant Submission, paras. 271-277.
[724] *EC – Fasteners (China) (AB),* para. 442; *see also* Panel Report, para. 7.84 (describing India's contention that the GOI's role in the selection of the NMDC's directors is "irrelevant").
[725] *EC – Fasteners (China) (AB),* para. 442.

4. The Panel Did Not Act Inconsistently with Article 11 of the DSU by Ruling on a Matter not before It

552. India argues that the Panel acted inconsistently with Article 11 of the DSU because "the Panel has effectively ruled on a matter *not* before it."[726] India's Article 11 claim is without merit.

553. India describes the problem as follows:

> The Panel was only asked to assess the USDOC's *failure* to consider this evidence [of the NMDC's "Miniratna" and "Navratna" status] before concluding that NMDC was a 'public body'. Once the evidence establishes beyond doubt that the USDOC did not examine the aspect of legal status of NMDC, the Panel was only required to examine whether the United States ought to have examined this as part of Article 1.1(a)(1). Instead, the Panel exceeded its authority by giving a finding on the implication of 'Miniratna' or 'Navaratna' status of NMDC rather than limiting itself to an assessment as to whether the USDOC ought to have considered 'Miniratna' or 'Navaratna' status of NMDC as being relevant evidence. The Panel has issued a finding on a matter not before it, in direct breach of its function under Article 11 of the DSU.[727]

554. India appears to misunderstand what the panel did, what a "matter" is under the DSU, and what the proper basis is for arguing that a panel made a finding on a measure or claim outside its terms of reference. We will address each of India's misconceptions in turn.

555. First, while India has a particular view of how the Panel should have responded to its argument, the Panel appears to have taken a different view. India explains that it argued before the Panel that Commerce erred by not considering the NMDC's "Miniratna" and "Navratna" status before concluding that the NMDC is a "public body." Without opining on whether Commerce did or did not actually consider that evidence, the Panel explained that, in its view, the evidence is, in any event, not "at odds with a determination that such public sector enterprises constitute public bodies."[728] If it is India's contention that the evidence would have led Commerce to a different conclusion, then India needed to explain why. But the Panel considered India's assertions and did not consider the evidence relevant; the implication of the Panel's explanation is that it saw no reason why "USDOC ought to have considered 'Miniratna' or 'Navaratna' status of NMDC as being relevant evidence."[729] In this sense, India's argument that the Panel addressed a "matter not before it" is baseless, because the Panel's finding was directly responsive to India's contention.

556. Second, India appears to misapprehend the term "matter," as that term is used in the DSU. In *Guatemala – Cement I*, the Appellate Body had occasion to discuss the meaning of the term "matter" in Article 7.1 of the DSU. After considering the ordinary meaning of the word "matter" and the context provided by Articles 6.2 and 7 of the DSU, as well as Article 17.4 of the

[726] India Appellant Submission, para. 281 (emphasis in original).
[727] India Appellant Submission, para. 282 (emphasis in original).
[728] Panel Report, para. 7.88.
[729] India Appellant Submission, para. 282.

AD Agreement, the Appellate Body concluded that "the 'measure' and the 'claims' made concerning that measure constitute the 'matter referred to the DSB', which forms the basis for a panel's terms of reference."[730] Article 11 of the DSU requires a panel to "make an objective assessment of the matter before it." The "matter" before the panel, logically, is the same "matter" that was referred to the DSB, which is the same "matter" that forms the basis of the panel's terms of reference. That "matter," as the Appellate Body explained, consists of the "measure" and the "claims" made concerning the measure.

557. Here, the measures are, as described in India's panel request, "the countervailing duties applied on the subject goods by the United States from time to time," including "determinations, orders, etc issued by the United States in Case No. C-533-821 [as] enclosed in Annex 1."[731] The relevant claim is that Commerce acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by determining that the NMDC is a "public body." Those measures and that claim, together with the other claims raised in India's panel request, form the "matter referred to the DSB" for the purpose of Article 7.1 of the DSU and the "matter before [the Panel]" for the purpose of Article 11 of the DSU.

558. What India describes as "a matter not before" the panel is not the "matter" referred to in Article 11 of the DSU. Rather, the subject of the Panel finding that India criticizes was evidence on Commerce's administrative record and the implication of that evidence for the conclusion that Commerce reached. The Panel's finding is directly related to the "measures" and the "claim" identified in India's panel request and, as explained above, is directly responsive to the argument India made in support of its claim. In short, the Panel's finding most certainly concerns the "matter before it," as that term is used in Article 11 of the DSU.

559. Finally, India appears to claim under Article 11 of the DSU that the Panel has made a finding on a measure or claim outside the Panel's terms of reference, but there is no need to stretch Article 11 to reach such a situation. Rather, a party could ask that any legal conclusion on such a measure or claim be reversed for reaching a matter outside the panel's terms of reference under Article 7.1 of the DSU. Article 7.1 describes the panel's terms of reference in a WTO dispute:

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
>
> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

560. In this dispute, consistent with Article 7.1 of the DSU, "[t]he Panel's terms of reference are the following:"

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[730] *Guatemala – Cement I (AB)*, para. 73.
[731] India Panel Request, para. 3.

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by India in document WT/DS436/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[732]

561. As noted above, the "matter referred to the DSB" consists of the measures and claims described in the panel request.[733] If the Panel made a finding on a measure or claim not within its terms of reference, then the Panel could be said to have made a finding on something other than the "matter referred to the DSB." In that case, the Panel would have acted outside its terms of reference under Article 7.1 of the DSU.

562. On appeal here, India does not argue that the Panel's finding lacks objectivity. Rather, India complains that the Panel breached Article 11 of the DSU by making a finding on a matter not before it. While India's claim that the Panel made a finding on a matter not before it lacks merit entirely for the reasons given above, the claim also does not relate to the standard for the Panel's evaluation set out in Article 11. If the argument is that the Panel exceeded its terms of reference in making certain findings, the correct approach is to request reversal of any legal conclusion on a measure or claim outside the terms of reference, rather than inventing a new basis for an Article 11 claim.

C. Completion of the Analysis

563. For the reasons given above, the Appellate Body should reject India's appeal of the Panel's findings with respect to Commerce's determination that the NMDC is a "public body" and, accordingly, it would not be necessary for the Appellate Body to complete the legal analysis of India's claim, as India requests.[734]

564. If, however, the Appellate Body reverses or modifies the Panel's interpretation of Article 1.1(a)(1) of the SCM Agreement and/or reverses the Panel's finding that Commerce did not act inconsistently with that provision when it determined that the NMDC is a "public body," then the United States offers the following comments in response to India's requests for the Appellate Body to complete the legal analysis.

565. "In previous disputes, the Appellate Body has emphasized that it can complete the analysis 'only if the factual findings of the panel, or the undisputed facts in the panel record' provide a sufficient basis for the Appellate Body to do so."[735] Here, Commerce's determinations and the evidence that support those determinations are all part of Commerce's administrative record and the evidentiary record provided to the Panel. There would not appear to be any dispute about the facts in the Panel record, only the Panel's weighing of those facts. In that case, it would be possible for the Appellate Body to complete the legal analysis.

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[732] WT/DS436/4.
[733] *Guatemala – Cement I (AB)*, para. 73.
[734] *See* India Appellant Submission, paras. 284-289 and 328-338.
[735] *See, e.g., US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 1250 (*citing* numerous Appellate Body reports in prior disputes).

566. If the Appellate Body agrees to India's requests to complete the legal analysis, the United States respectfully requests that the Appellate Body find that the evidence on Commerce's administrative record would support a finding that the NMDC is a "public body."

567. India argues that Commerce's determination that the NMDC is a "public body" is inconsistent with Article 1.1(a)(1) of the SCM Agreement because it was based solely on a determination that India owned over 98 percent of the NMDC.[736] However, this argument does not accurately reflect the full extent of Commerce's analysis and does not account for the evidence that the NMDC performs what is in India a government function. As demonstrated below, the record evidence indicates that the NMDC is a "public body" within the meaning of Article 1.1(a)(1) because it is owned and controlled by India and has the authority to perform Indian government functions.

568. As an initial matter, and as noted above, there is no dispute that the GOI owns over 98 percent of the NMDC. The GOI, in response to Commerce questionnaires, reported that 98.38 percent of the NMDC is owned by the government and that the remaining shares are owned by financial institutions, private shareholders, and employees of the company.[737] Throughout the proceeding, the GOI never indicated that any of these facts had changed.

569. Commerce, as part of its final results in the 2004, 2006, 2007, and 2008 administrative reviews, found that the NMDC was part of the GOI, *i.e.,* was a "public body," and pointed to the GOI's 98 percent ownership of the NMDC.[738] However, Commerce's analysis did not stop with just an analysis of ownership. Commerce also found that the NMDC, as a state-owned mining company, was "governed by" the GOI's Ministry of Steel.[739] Indeed, record evidence showed that the NMDC's own website declared that the "NMDC was established as a fully owned Government of India Corporation in 1958 with the objective of developing all minerals other than coal, petroleum oil and atomic minerals. NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel, Government of India."[740]

570. During the 2004 administrative review verification, Indian and NMDC officials explained that the GOI was heavily involved in the selection of the directors of the NMDC, a few of which were directly appointed by the Ministry of Steel.[741] During the 2007 review, India further explained that it appoints two directors and had approval power over an additional seven directors out of a total of 13 directors. Commerce explicitly found that this evidence supported its determinations that the NMDC was "part of the GOI."[742] Therefore, contrary to India's

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[736] *See, e.g.*, India Appellant Submission, paras. 285 and 334-335.
[737] *India's September 2, 2005, Supplemental Questionnaire Response (2004 AR)* (Exhibit USA-68).
[738] *2004 Preliminary Results*, 71 Fed. Reg. at 1516 (Exhibit IND-17); *2006 Preliminary Results,* 73 Fed. Reg. 1586-1587 (Exhibit IND-32); *2007 Final Issues and Decision Memorandum*, Comment 10 (Exhibit IND-38); *2008 Preliminary Results*, 75 Fed Reg. at 1503 (Exhibit IND-40).
[739] *2004 Preliminary Results,* 71 Fed. Reg. at 1516 (Exhibit IND-17); *2006 Preliminary Results,* 73 Fed. Reg. 1586-1587 (Exhibit IND-32); *2007 Final Issues and Decision Memorandum*, Comment 10 (Exhibit IND-38); *2008 Preliminary Results*, 75 Fed Reg. at 1503 (Exhibit IND-40).
[740] *2004 New Subsidies Allegation,* Exhibit 6, p.2 (May 2, 2005) (Exhibit USA-69).
[741] *2004 Verification Report of Government of India Responses,* at 5-6 (January 3, 2006) ("*2004 Verification India*") (Exhibit USA-66).
[742] *2007 Final Issues and Decision Memorandum,* Comment 10 (Exhibit IND-38).

arguments, Commerce's determinations that the NMDC is a "public body" are not based solely on ownership but also an analysis of the control that India has over the NMDC.

571. India argues that in *US – Antidumping and Countervailing Duties (China)*, the Appellate Body reasoned that a public body must have the authority to perform government functions.[743] The Appellate Body further considered that "the legal order of the relevant Member may be a relevant consideration whether or not a specific entity is a public body."[744] But India fails to acknowledge that, in the legal order of India, the NMDC performs a government function.

572. In India, as set out in evidence on the record of the relevant reviews, the Indian government, *i.e.,* the state and federal governments, owns all the mineral resources on behalf of the Indian public.[745] The Indian federal government has the final approval of the granting of mining leases for iron ore.[746] Therefore, as the government is the owner of all of the mineral resources in India, it is a function of the government of India to arrange for the exploitation of public assets, in this case iron ore. The GOI specifically established the NMDC to perform part of this function, *i.e.,* "developing all minerals other than coal, petroleum oil and atomic minerals."[747] During Commerce's on-site verification in the 2004 administrative review, an official from the Indian Ministry of Steel identified the NMDC as a strategic company which was monitored and reviewed by the government because it provided a specific service to the Indian public.[748] While the NMDC mines other minerals, the NMDC operates several iron ore mines and sells the iron ore it obtains from those mines.[749] Because the NMDC is exploiting public resources on behalf of the Indian government, the owner of the resources, the NMDC is performing a government function in India.

573. India argues that Commerce ignored evidence that most of the day-to-day operations are not dictated directly by the Indian government. However, Commerce did not ignore that evidence. Even though some of the day-to-day operations may not be directly managed by the GOI, it has a decisive say in the appointment of the board of directors, who act on the GOI's behalf in the day-to-day operations of the NMDC.

574. In sum, the Appellate Body should conclude that Commerce did not err in determining that the NMDC is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the GOI owns over 98 percent of the NMDC, the GOI controls the NMDC through the selection of its directors, and the NMDC performs a government function, by directing the exploitation of government-owned resources.

575. Finally, we would note that the Appellate Body is not precluded from finding that record evidence supports a determination that the NMDC is a "public body" based on a legal standard

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[743] *US – Antidumping and Countervailing Duties (China) (AB)*, at para. 290.
[744] *US – Antidumping and Countervailing Duties (China) (AB)*, at para. 297.
[745] *The Report of the "Expert Group" on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore,* p. 79, ("*DANG Report*") (attached to *2006 New Subsidies Allegation (JSW),* (Exhibit USA-50) (Under Indian law, the state governments owns the minerals in the land, however, for iron ore, which is listed as a Schedule 1 mineral, the federal Indian government must approve all mining leases.).
[746] *DANG Report*, at 79 (attached to *2006 New Subsidies Allegation (JSW)* (Exhibit USA-50).
[747] *2004 New Subsidies Allegation,* Exhibit 6, p.2 (May 2, 2005) (Exhibit USA-69).
[748] *2004 Verification Report,* at 9 (Exhibit USA-67).
[749] *India's September 2, 2005, Supplemental Questionnaire Response (2004 AR), New Subsidy Allegations* A.2.(b) and (c) (Exhibit USA-68).

different from that which Commerce applied in reviews at issue. As the Appellate Body found in *US – Anti-Dumping and Countervailing Duties (China)*, while Commerce (and the panel in that dispute) had applied an interpretation of Article 1.1(a)(1) that the Appellate Body rejected, the evidence on the administrative record of the underlying proceeding nevertheless supported a finding that the SOCBs in China were public bodies.[750] The same is true in this dispute, and, if it completes the legal analysis, the Appellate Body should find that Commerce's determination that the NMDC is a "public body" is not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

XIV. THE PANEL CORRECTLY FOUND THAT THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH ARTICLES 11, 13, 21 AND 22 OF THE SCM AGREEMENT WITH REGARD TO NEW SUBSIDY ALLEGATIONS EXAMINED IN ADMINSTRATIVE REVIEWS

576. In assessing India's claims regarding new subsidy allegations examined in the context of administrative review proceedings, the Panel correctly found that the United States did not act inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement.[751] Addressing the question of whether Commerce could examine new subsidy programs during annual administrative reviews conducted in accordance with Article 21 of the SCM Agreement, the Panel found that "[t]here is nothing in the text of Article 21.1 or 21.2 that would limit an investigating authority to considering only" the specific subsidy programs in place at the time of the original investigation.[752] The Panel then found that "new subsidy allegations are clearly relevant to the investigating authority's consideration of the need for continued imposition of the duty," in accordance with Article 21.2 of the SCM Agreement.[753] Having found that Commerce was entitled to examine new subsidy programs in administrative reviews conducted consistently with Article 21, the Panel found that it need not address India's claims under Articles 11.1, 13.1, and 22.1 and 22.2 of the SCM Agreement.[754]

577. On appeal, India challenges the Panel's findings, based on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. First, India argues that the Panel failed to objectively assess this claim by India, in violation of its obligations under Article 11 and 12.7 of the DSU.[755] Second, India asserts that the Panel failed to interpret Article 11 of the SCM Agreement when it interpreted Article 21 of that same agreement.[756] In the event that the Appellate Body agrees with its first two claims, India requests that the Appellate Body complete the legal analysis to find that the United States breached Articles 11.1, 13.1, 22.1, and 22.2 of the SCM Agreement.

578. In the view of the United States, the Panel did not err in its interpretation of Articles 11 and 22 of the SCM Agreement. Further, the Panel objectively assessed the matter before it,

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[750] *US – Anti-Dumping and Countervailing Duties (China) (AB),* para. 355 (emphasis added).
[751] Panel Report, paras. 7.503-7.508.
[752] Panel Report, para. 7.505.
[753] Panel Report, paras. 7.503, 7.505.
[754] Panel Report, para. 7.507.
[755] India Appellant Submission, paras. 622-628.
[756] India Appellant Submission, paras. 629-644.

reasonably considered India's various claims, and provided a basic rationale for its findings, consistent with Article 11 and 12.7 of the DSU. The United States notes a fundamental incongruity in India's position. On the one hand, were a subsidy recipient to allege that a subsidy program from which it had benefitted previously has ended, India would have no problem with an investigating authority examining that allegation as part of a review proceeding, and presumably would say that this is required to ensure the countervailing duty is not in excess of the subsidy determined to exist. On the other hand, if there is an allegation or information that a subsidy recipient is receiving a new subsidy, India claims that the investigating authority is precluded from investigating that allegation to determine the precise amount of subsidy unless the investigating authority initiates an entirely new investigation. Such differential treatment of allegations relating to the existence of a subsidy would make little sense; it should come as no surprise, then, that such a result does not follow from a correct interpretation of the text of the SCM Agreement.

579. We will first address India's claims with respect to the interpretation of the SCM Agreement, and then address its claims that the Panel acted inconsistently with its duties under Articles 11 and 12.7 of the DSU.

A. The Panel Correctly Interpreted Article 21 and 11 of the SCM Agreement

580. On appeal, India asserts that the Panel erred in its interpretation of the SCM Agreement with respect to new subsidies examined during review proceedings. Specifically, India argues that "[t]he question posed to the Panel involved the interplay of both Article 21 and 11," and that the Panel should have examined "how the two provisions are to be read together."[757] India goes on to contend that if an investigating authority examines new subsidy allegations in an administrative review, the obligations set forth in Articles 11.1, 13.1, and 22.1 and 22.2 should be imported into the proceeding conducted pursuant to Article 21.[758] In doing so, India ignores the distinctions between investigations and reviews, disregarding both the text of the SCM Agreement and findings by panels and the Appellate Body. [759]

581. The Panel rejected India's attempt to import and apply the obligations contained in Article 11, 13, or 22 to administrative review proceedings. The Panel also found that "nothing in the text of Article 21.1 suggests that the term 'subsidization' may not cover newly alleged subsidy programs as well."[760] Further, the Panel found that "nothing in the text of Article 21.2 limits the review of the need for continued imposition of the duty to consideration of *already examined* subsidization."[761] The Panel explained:

> Article 21.2 clearly establishes what is to be reviewed – not the original determination, but 'the need for the continued imposition of the duty.' The investigating authority's review under Article 21.2 concerns the continued imposition of a countervailing duty, which is a measure clearly "in existence" at the time of the review. The question to be answered in the review is whether the

[757] India Appellant Submission, para. 630.
[758] India Appellant Submission, paras. 635, 643.
[759] *See US – Carbon Steel (AB)*, para. 72; *US – OCTG from Argentina (AB)*, para. 294; *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 152; and *US – Zeroing (EC) (Panel)*, para. 7.181.
[760] Panel Report, para. 7.503.
[761] Panel Report, para. 7.503.

> continued existence of that measure is justified. There is nothing in the text of Articles 21.1 or 21.2 that would limit an investigating authority to considering only whether the original basis for the measure is sufficient to justify its continued existence.[762]

582. The Panel's reasoning is consistent with the text of the SCM Agreement, which sets out a process by which a Member may investigate instances of subsidization affecting its domestic producers, and, where appropriate, impose duties to countervail those subsidies. Once a duty has been imposed, the SCM Agreement separately allows interested parties to request a "review" of that duty to determine whether it is still necessary to counteract subsidization. The text of each relevant provision, and the structure of the overall SCM Agreement, suggests that an "investigation" and a subsequent "review" of a duty imposed pursuant to an investigation are two separate and distinct processes, governed by separate provisions of the SCM Agreement. Indeed, panels and the Appellate Body have found this to be the case.[763]

583. In addition to the structure of the SCM Agreement, the text of Articles 11.1, 13.1 and 22.1 and 22.2 expressly limits the application of these provisions to the original investigation, just as Articles 21.1 and 21.2 apply only in the context of review proceedings. We will discuss each of these provisions in turn.

584. Article 11 of the SCM Agreement is entitled "Initiation and Subsequent Investigation". While the term "investigation" is not defined, the structure of the SCM Agreement – the inclusion of one set of provisions covering "an investigation" and another set covering the "review" of countervailing duties – as well as the use of the singular term "investigation" – reveal the negotiators' intent to identify obligations that are specific to the investigation rather than reviews.

585. The various subparagraphs of Article 11, including Article 11.1, reinforce this interpretation. Article 11.1 provides:

> Except as provided in paragraph 6, *an investigation* to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.[764]

Thus, by its very terms, the requirement that a written application be submitted by or on behalf of the domestic industry applies to the initiation of one, singular, "investigation".

586. Article 13.1 requires an investigating authority to invite Members involved in a potential investigation for consultations aimed at "clarifying the situation" alleged in written applications submitted pursuant to Article 11. This requirement, however, is expressly limited in its application to a particular point in the overall proceedings. That is, the obligation to invite a Member for consultations comes into effect "[a]s soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation". An invitation to consult need not, therefore, be made with respect to every event or proceeding involving a

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[762] Panel Report, para. 7.505.
[763] *See US – Carbon Steel (AB)*, para. 72; *US – OCTG from Argentina (AB)*, para. 294; *US – Corrosion Resistant Steel Sunset Review*, para. 152; and *US – Zeroing (EC) (Panel)*, para. 7.181.
[764] Emphasis added.

countervailing duty order. Rather, and as the temporal language of the provision indicates, it is a requirement triggered when an application is accepted for the investigation into the subsidization of a product, but before the investigating authority initiates the investigation.

587. Articles 22.1 and 22.2 are similarly limited in their application, and take as their triggering event "the initiation of an investigation". Article 22.1 requires that a public notice be made to Members and other interested parties, and specifies that this requirement is triggered "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11". Thus, like Article 13.1, the public notice requirement of Article 22.1 arises during a particular phase of the investigation, at the outset of the proceeding. Article 22.2, for its part, sets out the content requirements for the public notice referred to in Article 22.1, restricting its scope to "[a] public notice of the initiation of an investigation".

588. Article 21, by contrast, provides for the review of a countervailing duty already in force pursuant to a final determination in an investigation. Article 21.1 provides that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." Article 21.2 of the SCM Agreement, for its part, provides for the review of "the need for the continued imposition of the duty, upon request by any interested party which submits positive information substantiating the need for a review." Reviewing "the need for the continued imposition of the duty, where warranted," necessarily requires the investigating authority to consider any and all programs that benefit the subject product, including new subsidies brought to the attention of the investigating authority. Therefore, the structure and content of Article 21 reveal that a review performed under that Article is different in nature and form from the original investigation, and that it should be carried out "expeditiously".

589. Article 21.2 does not refer to or otherwise include the requirements of Article 11 of the SCM Agreement. Nor does Article 21.2 suggest that the request for a review proceeding is equivalent to a petition for initiation of an investigation. Were this the intention, the drafters could have included the requirements of Article 11 by reference. By contrast, Article 21.4 contains an express cross-reference to the evidentiary rules and due process protections contained in Article 12, thereby incorporating those rules into Article 21 such that they apply to "review" proceedings as well as "investigations". Given this cross-reference, an interpreter would expect that, were the rules of any other provision to be similarly incorporated into Article 21, those rules would also be incorporated by cross-reference. The Appellate Body has frequently relied on the presence of cross-references to determine that the requirements of one WTO provision apply also under another provision, and has also found that their absence may indicate an intention on the part of the negotiators *not* to import into a particular provision the requirements of any other provision.[765]

590. The text of Article 21 focuses on the need for the continued imposition of the duty. Reviewing "the need for the continued imposition of the duty, where warranted," necessarily requires the investigating authority to consider any and all programs that benefit the product, including new subsidies brought to the attention of the investigation authority. Therefore, the structure and content of Article 21 reveal that a review performed under that Article is different in nature and form than the original investigation.

[765] *See, e.g.*, *US – Carbon Steel (AB)*, para. 69.

591. Given the language and structure of the SCM Agreement, and the similar language and structure of the AD Agreement, findings of panels and the Appellate Body have confirmed that requirements found in provisions applicable to a countervailing duty or anti-dumping *investigation* will not automatically be read into those provisions expressly applying to proceedings that take place after the conclusion of an original investigation, such as administrative or sunset *reviews*.[766]

592. In its arguments before the Panel, India recognized the distinction between "investigations" and "reviews" under the SCM Agreement, and conceded that there are "categorical distinctions between an original investigation and a review proceeding under Article 21" and that "obligations applicable to original investigations will not necessarily apply to review proceedings."[767] However, on appeal India ignores any such distinction and suggests that it is possible to conflate the two different types of proceeding, arguing that "Articles 11, 13, and 22 provide the manner in which new subsidies can be considered in a review under Article 21."[768] That is, without any textual basis, India argues that a new investigation is required *vis-a-vis* any new subsidy allegation examined in an administrative review.[769] The lack of any textual basis, particularly in light of the incorporation into Article 21 of requirements under Article 12, is reason to reject India's claim.

593. In light of its lack of any text to support its argument, India attempts to support its view by suggesting that Articles 11, 13, and 22 "create multiple thresholds to ensure due process," and that the Panel's finding "allows the United States to circumvent the procedural and substantive due process contained in Articles 11, 13, and 22."[770] However, India ignores the extensive procedural and evidentiary safeguards that the SCM Agreement provides for review proceedings. Article 21, by incorporating the rules of Article 12, provides for specific rules to ensure procedural fairness in any review proceeding, including one in which new subsidies are alleged. India's argument would therefore "create multiple thresholds" for reviews under Article 21 without any basis in that article for grounding those additional "thresholds".

594. In practice, India's argument would require an investigating authority to conduct multiple investigations and administrative reviews simultaneously, even where the same Member, interested parties, and product are at issue. The SCM Agreement provides no indication that a formal change in a Member's subsidization of an industry should result in an entirely new investigation concurrent with a review proceeding – where the original investigation has already resulted in a determination to apply a countervailing duty, and the review has uncovered ongoing subsidization providing a benefit to those imports. If such a process were necessary simply because the subsidies identified in the review were not identical to those identified in the original investigation, it would create an absurd result, whereby multiple investigations, reviews, and duty determinations would exist simultaneously with respect to a single product.

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[766] *US – Zeroing (EC) (Panel)*, paras. 7.181-7.186; *US – Carbon Steel (AB)*, paras. 69-72; *US – Corrosion Resistant Steel Sunset Review*, para. 152; *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 294-300.
[767] India First Written Submission, para. 622, citing *US - Carbon Steel*, para. 87; *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 119; *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107.
[768] India Appellant Submission, para. 636.
[769] India Appellant Submission, paras. 635-636, 643.
[770] India Appellant Submission, paras. 640 and 642.

595. The Panel's findings are consistent with the text and structure of the SCM Agreement, and India's appeal to conflate the requirements of investigations and review proceedings lacks any legal basis. Therefore, the United States respectfully requests that the Appellate Body reject India's appeal, and uphold the Panel's interpretation of the SCM Agreement.

B. The Panel Acted Consistently with Articles 11 and 12.7 of the DSU

596. On appeal, India argues that the Panel failed to objectively assess this claim by India, contrary to Articles 11 and 12.7 of the DSU.[771] India contends that the Panel "simply *assumed* that Articles 21 and 11 are merely two contrasting provisions conferring jurisdiction on an investigating authority, which are mutually exclusive of each other."[772] However, India errs. The Panel objectively assessed the matter before it, as called for by Article 11, and provided a "basic rationale" for its findings, consistent with Article 12.7 of the DSU.

597. Article 11 of the DSU provides that "a panel should make an objective assessment of the matter before it." As has been stated above, an allegation that a panel has failed to conduct an 'objective assessment of the matter before it is a "very serious allegation"[773] that "impl[ies] not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel."[774] Therefore, a DSU Article 11 claim "must stand by itself" and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.[775] But this is precisely what India has done; the crux of its complaint is that the Panel has misinterpreted Article 21 of the SCM Agreement as exclusive of Article 11. Because that is a claim of legal error, and not a challenge to the Panel's objectivity, India's claim under Article 11 of the DSU may be rejected on that basis.

598. India argues that the Panel erred under Article 11 of the DSU because India's claims were not made dependent on one another, and that the Panel "assum[ed] an artificial dependency" that "alter[ed] the substance of India's claim".[776] India cannot impose on the Panel a particular legal analysis or order to its analysis. The Panel found that where new subsidies could be examined within the context of review proceedings, the obligations of Articles 11, 13 and 22 regarding the initiation of investigations did not apply as a matter of law.

599. Again, it may well be the case that India does not agree with the legal conclusion reached by the Panel. But that claim is not a claim of error pursuant to Article 11 of the DSU. Therefore, India's appeal under Article 11 of the DSU should be rejected.

600. Article 12.7 provides that "a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." Article 12.7 "establishes a *minimum* standard for the reasoning that panels must provide in support of their findings and recommendations," and that "[p]anels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings

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[771] India Appellant Submission, paras. 622-628.
[772] India Appellant Submission, para. 626.
[773] *EC – Poultry (AB)*, para. 133.
[774] *EC – Hormones (AB)*, para. 133.
[775] *China – Rare Earths (AB)*, para. 5.173; *EC – Fasteners (China) (AB)*, para. 442.
[776] India Appellant Submission, para. 624.

and recommendations."[777] Moreover, the Appellate Body has found that Article 12.7 does not require "panels to expound at length on the reasons for their findings and recommendations."[778] Therefore, India must show that the Panel's reasoning failed to comply with even the minimum standard provided under Article 12.7, neglecting to disclose the fundamental justification behind its findings. Contrary to India's assertions, the Panel's report complied with Article12.7 of the DSU.

601. With respect to Article 12.7, the Panel first noted that the measures at issue were administrative reviews "conducted under Article 21 of the SCM Agreement."[779] Next, the Panel explained that India "points to no obligation in the text of Article 21 that was breached by the USDOC in its examination of the new subsidy allegations in administrative reviews," and that instead, India had argued that these allegations should have been examined pursuant to Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement.[780] Accordingly, the Panel reasoned that if Commerce was entitled to review new subsidy allegations in administrative reviews conducted pursuant to Article 21.1 and 21.2 of the SCM Agreement, it did not need to separately analyze India's claims relating to Articles 11.1, 13.1, 22.1 and 22.2, because these provision do not apply in the context of a review proceeding. After reviewing Article 21 and finding that new subsidies may be included in the scope of review proceedings, the Panel determined that it need not further consider India's claims under Articles 11, 13 and 22, in keeping with its prior rationale.

602. India may not agree with the Panel's basic rationale underpinning its findings under Article 11, 13 and 22, but the Panel's report reveals that this rationale was nonetheless provided. And while India may have preferred that the Panel provide a more detailed explanation for its findings, the Appellate Body has rejected that such an explanation is required under Article 12.7 of the DSU. Therefore, India's appeal under Article 12.7 also should be rejected.

C. The Appellate Body Should Decline to Complete the Analysis Because India Has Failed to Make Its Case and Because There Are Not Sufficient Panel Findings or Uncontested Record Facts

603. Accordingly, the Panel correctly found that the United States did not act inconsistently with Articles 11, 13, 21 and 22 of the SCM Agreement when it examined new subsidy allegations in the challenged administrative reviews. Further, the Panel objectively assessed the matter before it, reasonably considered India's various claims, and provided a basic rationale for its findings, consistent with Article 11 and 12.7 of the DSU. Given that India's claims on appeal are without merit, there is no basis for the Appellate Body to complete the legal analysis of India's claims under Articles 11.1, 13.1, 22.1, and 22.2 of the SCM Agreement.

604. Even if the Appellate Body were to reverse the Panel's findings in section 7.8.4 of the Panel Report, it should decline India's request for completion of the analysis, because India did not make a *prima facie* case of inconsistency and because, in any event, there are not sufficient uncontested facts or panel findings on which the Appellate Body could base an analysis.

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[777] *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 106.
[778] *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 109.
[779] Panel Report, para. 7.500.
[780] Panel Report, para. 7.500.

605. India asserts that it is "clear" that Articles 11.1, 13.1 and 22.1 and 22.2 "would continue to apply to a proceeding under Article 21, if it involves an examination of the existence, degree or effect of a subsidy for the first time."[781] However, India never explains precisely *how* these provisions, which on their face apply only in the context of original investigations, should apply in the context of review proceedings. Further, India does not point to any record evidence demonstrating that Commerce did not comply with these obligations – save the fact, admittedly undisputed, that Commerce did not initiate a *new* investigation into each of the new subsidy allegations at issue.

606. Regarding Article 11.1, India attempts to argue that use of the term "investigation", when read together with the definition of "investigation" in footnote 37 to Article 10, means that "Article 11.1 thus provides a general rule that the authority shall begin the investigation in the prescribed or customary form with all the formalities required."[782] India then proceeds to describe the steps taken by Commerce when beginning an investigation in order to demonstrate what is required under Article 11.1 alone. According to India, Article 11.1 requires Commerce to follow U.S. law with respect to initiation by petition, notification of governments, and public notice of initiation.[783]

607. India claims that Commerce failed to comply with this expansive reading of Article 11.1 because:

> when the United States initiated investigations into the new subsidies, it did not comply with the said prescribed or customary procedure. The preliminary determination in every AR merely informs about such initiation of the investigation in a single sentence and refers back to the "New Subsidies Allegation Memorandum" made available in the Central Records Unit of the United States. Thus the United States did not 'initiate' an investigation into the New Subsidies as required under Article 11.1 of the SCM Agreement.

608. India's interpretation has no basis in the text of Article 11.1, and is contradicted by the fact that other provisions of the SCM Agreement expressly govern the content of a petition (Article 11.2), consultation with the foreign government (Article 13.1), and public notification of initiation (Article 22.1). Contrary to India's claims, the requirement of Article 11.1 is limited to that which is covered by the text of that provision, namely, that an investigation shall not be initiated unless there has been a written application by or on behalf of the domestic industry.

609. In this case, Commerce's initiation of an examination into new subsidies was based on written requests submitted by the domestic industry in the relevant administrative reviews, which were placed on the record in the panel proceeding by India.[784] India does not explain why these

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[781] India Appellant Submission, para. 645.
[782] India Appellant Submission, para. 646.
[783] India Appellant Submission, paras. 647-650.
[784] See *New Subsidy Allegations Against Essar*, 2004 AR, May 2, 2005 (Exhibit IND – 15A); *Clarification Regarding One of the New Subsidies Alleged Against Essar*, 2004 AR (Exhibit IND – 15B); *New Subsidy Allegations Against Ispat*, 2006 AR, May 23, 2007 (Exhibit IND – 24); *New Subsidy Allegations Against JSW*, 2006 AR, May 23, 2007 (Exhibit IND – 25); *New Subsidy Allegations Against Tata*, 2006 AR, May 23, 2007 (Exhibit IND – 26); *New Subsidy Allegations Against Essar*, 2006 AR, May 23, 2007 (Exhibit IND – 27); *New Subsidy Allegations Against Essar*, 2007 AR, May 29, 2008 (Exhibit IND – 35).

requests would not satisfy the requirements of Article 11.1 of the SCM Agreement, when interpreted based on the text of that provision, if applied in the context of an administrative review proceeding.

610. We note that several new subsidies were examined by Commerce without a written request, as noted by India in paragraph 651 of its Appellant Submission. If the Appellate Body determines that Article 11 of the SCM Agreement applies in the context of review proceedings, the self-initiation by Commerce of these additional subsidies would be covered by Article 11.6, which is not at issue in this appeal. Therefore, India's claims in this respect are also without merit.

611. With respect to Article 13.1, India's claim consists of a single paragraph alleging Commerce's failure to invite India for consultations, followed by a second paragraph describing the importance of consultations and mutually agreed solutions under the WTO Agreements.[785] Again, India does not explain how Article 13.1 would apply in the context of a review proceeding when the provision on its face applies only to investigations. Additionally, India does not cite to any record evidence, or explain why the evidence on record does not satisfy the requirements of Article 13.1.

612. For each of the administrative reviews, Commerce published a notice of initiation in the Federal Register.[786] Where the domestic industry had alleged new subsidies, domestic parties served copies of the new subsidy allegations on both the GOI and the respondents being reviewed.[787] For all potential new subsidies identified – whether alleged by domestic parties or discovered by Commerce – Commerce issued questionnaires seeking information regarding the alleged subsidies from the GOI and the appropriate respondent firm.[788] Therefore, based on the record evidence, the GOI was notified of new subsidy allegations at the earliest possible point in the proceedings – at the same time Commerce itself was notified – and was afforded the opportunity to provide Commerce with any information it deemed necessary or relevant to Commerce's examination of each newly identified subsidy.

613. India's claims under Articles 22.1 and 22.2 are similarly flawed. India argues, under Article 22.1, that because Commerce did not actually publish its New Subsidy memoranda in the *Federal Register*, Commerce failed to provide public notice of the initiation of the administrative

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[785] India Appellant Submission, paras. 657-658. India made the identical arguments in paragraphs 605-606 of its First Written Submission before the Panel.

[786] *See* First Review Initiation (Exhibit USA-80); 2004 Initiation (Exhibit USA-81); 2006 Initiation (Exhibit USA-47); 2007 Initiation (Exhibit USA-82).

[787] First Review New Subsidies Allegation, (May 19, 2003) (Exhibit USA-78); 2004 New Subsidies Allegation, (May 2, 2005) (Exhibit USA-69); Clarification of 2004 New Subsidies Allegation, (June 29, 2005) (Exhibit IND-15B); 2006 New Subsidies Allegation (Essar), Certificate of Service, (May 23, 2007) (Exhibit IND-27); 2006 New Subsidies Allegation (Ispat), Certificate of Service, (May 23, 2007) (Exhibit IND-24); 2006 New Subsidies Allegation (JSW), Certificate of Service, (May 23, 2007) (Exhibit IND-25); and 2006 New Subsidies Allegation (Tata), Certificate of Service, (May 23, 2007) (Exhibit IND-26).

[788] *See Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 69 FR 907-01, January 7, 2004 (2002 AR) (Exhibit IND – 12); *Notice of Preliminary Results of Countervailing Duty Administrative Review*, January 10, 2006, 71 FR 1512 (2004 AR), (Exhibit IND – 17); *Notice of Preliminary Results of Countervailing Duty Administrative Review*, January 9, 2008, 73 FR 1578 (2006 AR) (Exhibit IND – 32); *Notice of Preliminary Results and Partial Recession of Countervailing Duty Administrative Review*, December 20, 2008, 73 FR 79791 (2007 AR) (Exhibit IND – 37).

reviews in which new subsidies were being examined. This is simply incorrect. As stated above, initiation was publicized in the federal register, consistent with Article 22.1.[789] Furthermore, as also stated above, the GOI and interested parties were "notified" of newly alleged subsidies, because they received those allegations directly.[790]

614. Regarding the content of the review proceeding being initiated, Article 22.2 expressly allows that the listed information be made available "through a separate report" that is "readily available to the public". Therefore, the SCM Agreement does not require that all information be "published". Commerce made available to the public its New Subsidy memoranda. Where new subsidies were not alleged and therefore Commerce did not issue a new subsidy memorandum, to which India refers in paragraph 618 of its Appellant Submission, any new subsidy programs were notified to the GOI and interested parties through questionnaires issued by Commerce, and were publicized in the preliminary and final review determinations.[791] Again, India has not explained how the obligations set out under Articles 22.1 and 22.2 would not be met in the proceedings at issue.

D. Conclusion

615. Based on the foregoing, the Appellate Body therefore should reject India's appeals regarding Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement, and uphold the Panel's findings in section 7.8.4 of the Panel Report. There would then be no basis for the Appellate Body to consider India's request to complete the analysis. But even if the Appellate Body were to reverse these findings, the Appellate Body should decline India's request for completion of the legal analysis for the reasons stated above.

XV. THE PANEL'S ASSESSMENT OF INDIA'S PANEL REQUEST IN ITS PRELIMINARY RULING WAS CONSISTENT WITH ARTICLES 6.2 AND 11 OF THE DSU

616. India's conditional appeal[792] of the Panel's preliminary ruling in section 1.3.3 of the Panel Report reflects a continued misunderstanding of the standard under Article 6.2 of the DSU and should be rejected. Under Article 11 of the DSU, India argues that the Panel was obliged to require a showing of prejudice in order to find a claim to be outside the terms of reference. India also argues, under Article 11 of the DSU, that the Panel failed to examine the legal basis of India's claim. According to its submission, India makes the same argument regarding the

[789] *See* First Review Initiation (Exhibit USA-80); 2004 Initiation (Exhibit USA-81); 2006 Initiation (Exhibit USA-47); 2007 Initiation (Exhibit USA-82).
[790] First Review New Subsidies Allegation, (May 19, 2003) (Exhibit USA-78); 2004 New Subsidies Allegation, (May 2, 2005) (Exhibit USA-69); Clarification of 2004 New Subsidies Allegation, (June 29, 2005) (Exhibit IND-15B); 2006 New Subsidies Allegation (Essar), Certificate of Service, (May 23, 2007) (Exhibit IND-27); 2006 New Subsidies Allegation (Ispat), Certificate of Service, (May 23, 2007) (Exhibit IND-24); 2006 New Subsidies Allegation (JSW), Certificate of Service, (May 23, 2007) (Exhibit IND-25); and 2006 New Subsidies Allegation (Tata), Certificate of Service, (May 23, 2007) (Exhibit IND-26).
[791] *See Notice of Preliminary Results of Countervailing Duty Administrative Review*, January 10, 2006, 71 FR 1512 (2004 AR), (Exhibit IND – 17); *Notice of Preliminary Results of Countervailing Duty Administrative Review*, January 9, 2008, 73 FR 1578 (2006 AR) (Exhibit IND – 32); *Notice of Preliminary Results and Partial Recession of Countervailing Duty Administrative Review*, December 20, 2008, 73 FR 79791 (2007 AR) (Exhibit IND – 37).
[792] India raises this appeal only in the event the Appellate Body finds in India's favor regarding the appeals raised in sections VI and VII of India's appellant submission.

Panels' failure to examine the legal basis of India's claim with respect to the Panel's application of Article 6.2 of the DSU.[793]

A. Article 11 of the DSU

617. As has been pointed out many times already, an Article 11 claim is a serious allegation that must rest on independent grounds that address "specific errors regarding the objectivity of the panel's assessment."[794] It is "unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim."[795] It is also unacceptable for an Article 11 claim to be made "merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."[796]

618. India's submissions are unique, in that India raises its Article 11 claim as its primary argument, and then raises its claims regarding the Panel's application of the WTO provision as a subsidiary claim based on the same reasoning as its Article 11 claim. Nonetheless, in substance, India effectively raises its Article 11 appeal in precisely the manner the Appellate Body has described as "unacceptable". That is, India's claims – that a showing of prejudice is required under Article 6.2, and that the Panel incorrectly interpreted India's panel request – relate to the Panel's interpretation and application of Article 6.2 of the DSU. India raised the same arguments before the Panel,[797] and has not articulated on appeal "specific errors regarding the objectivity of the panel's assessment" of these claims.[798] Therefore, India's appeal under Article 11 of the DSU fails.

619. Even aside from the fact that India's appeal was not properly raised, India's appeal fails because, as a matter of law, Article 6.2 of the DSU requires an evaluation of the panel request *on its face*, and does *not* require a showing of prejudice. Therefore, whether addressed as a matter of objective assessment under Article 11 of the DSU, or in reviewing the Panel's application of Article 6.2 of the DSU, India's claims should be rejected.

B. Interpretation of Article 6.2 of the DSU

620. Article 6.2 of the DSU serves a pivotal due process function for the responding party and Members in choosing whether to participate as third parties,[799] and in the words of the Appellate Body, "is not a mere formality."[800] Without the safeguards of Article 6.2, the responding party may not be "made aware of the claims presented by the complaining party, sufficient to allow it to defend itself."[801] Similarly, other Members may not be able to make an informed decision as

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[793] India Appellant Submission, para. 682.
[794] *China – Rare Earths (AB)*, para. 5.178; *EC – Fasteners (China) (AB),*, para. 442.
[795] *EC – Fasteners (China) (AB),*, para. 442.
[796] *China – Rare Earths (AB)*, para. 5.173; *EC – Fasteners (China) (AB),* para. 442; *US – Steel Safeguards (AB)*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 238.
[797] India Response to the U.S. Preliminary Ruling Request, sections II.A.2 and II.A.5.
[798] *EC – Fasteners (China) (AB),* para. 442.
[799] The Appellate Body has repeatedly found that the requirements of Article 6.2 "ensure due process by informing the respondent and third participants of the matter brought before a panel." *See*, *e.g.*, *US – Zeroing (Japan) (Article 21.5) (AB)*, para. 108; *US – Zeroing II (AB)*, para. 161; *US – Carbon Steel (AB)*, para. 126; *EC – Bananas III (AB)*, para. 142; *China – Raw Materials (AB)*, para. 219.
[800] *Australia – Apples (AB)*, para. 416.
[801] *Thailand – H-Beams (AB)*, para. 95.

to whether to become a third party. Moreover, those Members who are third parties may not be made aware of the claims presented sufficiently for them to prepare their positions.

621. Article 6.2 of the DSU provides, in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly....

622. The Appellate Body has found that Article 6.2 has "two distinct requirements,"[802] namely: (1) identification of the specific measures at issue; and (2) the provision of a brief summary of the legal basis of the complaint.[803] "[I]f either of them is not properly identified, the matter would not be within the panel's terms of reference."[804]

623. Regarding the second requirement, at issue in this dispute, the brief summary of the legal basis "must be sufficient to present the problem clearly."[805] Such a summary must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed."[806] Compliance with Article 6.2 requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances."[807]

624. The Appellate Body has stressed that "it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."[808] Such an examination "must be objectively determined on the basis of the panel request as it existed at the time of filing" and be "demonstrated on the face" of the panel request.[809] The question of whether a claim falls within a panel's terms of reference therefore is a threshold issue, distinct from the merits of the claim. The Appellate Body has clarified that "questions pertaining to the identification of the 'measures at issue' and the 'claims' relating to alleged violation of WTO obligations, set out in a panel request, should be analyzed separately."[810] Accordingly, a complainant's later submissions made during the panel proceedings cannot cure a defect in a panel request.[811]

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[802] *Australia – Apples (AB)*, para. 416. *See also China – Raw Materials (AB)*, para. 219; *EC – Large Civil Aircraft (AB)*, para 786; *US – Carbon Steel (AB)*, para. 125.
[803] *Australia – Apples (AB)*, para. 416.
[804] *Australia – Apples (AB)*, para. 416.
[805] *EC – Customs Matters (AB),* para. 131.
[806] *US – OCTG from Argentina (AB)*, para. 162. *See also China – Raw Materials (AB)*, para. 220.
[807] *US – Carbon Steel (AB)*, para. 127.
[808] *EC – Bananas III (AB)*, para. 142.
[809] *US – Carbon Steel (AB)*, para. 127; *EC – Large Civil Aircraft (AB),* para. 640; *China – Raw Materials (AB)*, para. 230.
[810] *EC – Customs Matters (AB)*, para. 131.
[811] *EC – Large Civil Aircraft (AB),* para. 790; citing *Australia – Apples (AB)*, para. 416; *EC – Bananas III (AB)*, para. 143; and *US – Carbon Steel (AB)*, para. 127.

C. The Panel Did Not Err in Finding that Prejudice Is Not Required to Find a Panel Request Fails to Meet the Requirements of DSU Article 6.2 and in Declining to Rely on Questions Allegedly Raised During Consultations

625. India's claims that the Panel erred in failing "to follow previously adopted Reports without offering cogent reasons"[812] rest on a mistaken view of both the interpretation of Article 6.2 and of the Panel's duty under Article 11 of the DSU.

626. India is simply wrong that Article 6.2 requires a showing of prejudice in order for a claim to be found outside a panel's terms of reference. Nothing in the text of Article 6.2 suggests such a requirement, and in no recent case has the Appellate Body interpreted Article 6.2 as containing such a condition. To the contrary, the Appellate Body has declined to apply this interpretation of Article 6.2 in recent Appellate Body Reports, including in *China – Raw Materials*, in which the Appellate Body expressly found that "the fact that China may have been able to defend itself does not mean that … the complainants' panel requests in this dispute complied with Article 6.2 of the DSU".[813] Thus, the Panel did not err in finding that a showing by a responding party of prejudice is not necessary to conclude that a panel request does not meet the requirements under DSU Article 6.2. For that reason, India's reliance on language in *Korea – Dairy* is misplaced.

627. India's claim with respect to the panel report in *US – Lamb* is equally unpersuasive. The text of Article 6.2, and the Appellate Body's interpretation of Article 6.2, makes clear that a panel request must be examined *on its face*.[814] Contrary to India's appeal, therefore, the Panel was not required, or even permitted, to look to the consultations held between the parties in order to determine whether these "attendant circumstances"[815] could cure an otherwise deficient panel request.

628. Furthermore, India appears to fundamentally misunderstand the nature of WTO dispute settlement. Past panel reports are not binding on a panel in a dispute. The Panel addressed India's arguments with respect to "attendant circumstances."[816] There was no obligation for the Panel to refer separately to *US – Lamb* or to explain how its findings related to *US – Lamb*.

629. In addition, notwithstanding the interpretive errors on which India's claim is based, the consultations questions to which India referred[817] were not presented to the Panel, and therefore could not have been evaluated by the Panel. In any event, these questions do not support India's claim that the United States had notice that "India was concerned with whether the written application by the domestic industry contained sufficient evidence for the United States to have initiated and commenced investigation into such new subsidies". And the fundamental question is what claims did India include in its panel request, since it is India's choice as to which claims to pursue in the end. The universe of claims from which India might have selected in

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[812] India Appellant Submission, para. 667 and heading XVII.B.1.
[813] *China – Raw Materials (AB)*, para. 233. *See also EC – Fasteners (China) (AB)*, paras. 132, 139, 562-564 and 595-598 (in which China argued that the European Union was not prejudiced in its ability to defend itself, but the Appellate Body did not discuss prejudice in its interpretation or application of Article 6.2 of the DSU).
[814] *US – Carbon Steel (AB)*, para. 127; *EC – Large Civil Aircraft (AB)*, para. 640; *China – Raw Materials (AB)*, para. 230.
[815] India Appellant Submission, para. 669.
[816] Panel Report, paras. 1.35 and 1.37.
[817] India Response to the U.S. Preliminary Ruling Request, para. 25.

formulating its panel request in not relevant. Here, as the Panel found, India did not present a claim with respect to initiating an investigation based on insufficient evidence, but only with respect to not initiating an investigation at all.[818]

630. As has been emphasized by the Appellate Body, the fact that a panel does not address an argument presented by a party does not rise to the level of a violation of Article 11 of the DSU.[819] Nor can an appellant succeed in an Article 11 claim by simply recasting its factual arguments before the panel in the guise of an Article 11 claim before the Appellate Body. Instead, an appellant must identify specific errors regarding the objectivity of the panel's assessment,[820] explaining *why* the alleged error *meets* the standard of review under that provision.[821] Here, India has simply re-aired the same arguments made before the Panel regarding the interpretation of Article 6.2 of the DSU, and has not made a showing that the Panel's rejection of these arguments calls into question the Panel's objectivity or undermines the Panel's findings. Therefore, the Appellate Body should reject India's appeal under Article 11 of the DSU.

D. The Panel Properly Rejected India's Claim That the Definition of "Initiation" in the SCM Agreement Did Not Cure Its Defective Panel Request

631. India's appeal in section XVII.B.2 repeats its argument before the Panel, namely that, based on the definition in footnote 37 to Article 10 of the SCM Agreement, "the term 'initiated' means procedural action by which a Member formally commences an investigation *as provided in Article 11*", such that the claim in India's panel request "related to such investigations not being commenced and performed in a manner 'provided in Article 11' of the SCM Agreement within the meaning of footnote 37.'"[822] India further argues that this claim encompasses all the various sub-paragraphs of Article 11 of the SCM Agreement, because they are "closely inter-linked".[823] India's appeal fails for the same reasons its arguments before the Panel failed.

632. India's panel request stated, under the heading "In connection with other issues", that the United States acted inconsistently with:

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

633. India's first written submission contained claims that the United States breached:

> "Articles 11.1-11.2 by initiating investigation into NMDC and TPS programs in the 2004 AR even when the written application of the domestic industry did not

[818] Panel Report, para. 1.34.
[819] *China – Rare Earths* (AB), para. 5.224.
[820] *EC – Fasteners (China)* (AB), para. 442; *China – Rare Earths* (AB), para. 5.178.
[821] *China – Rare Earths* (AB), para. 5.178 (quoting *EC – Fasteners (China*) (AB), para. 442 (emphasis original)).
[822] India Appellant Submission, para. 674.
[823] India Appellant Submission, para. 677.

> contain sufficient evidence as to the existence, amount and nature of such subsidies"[824]; and
>
> "Article 11.9 by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies"[825]

634. The Panel found that "whether an investigation was initiated despite insufficiency of evidence is an issue entirely distinct from whether an investigation to determine the effects of new subsidies was initiated and conducted at all."[826] Accordingly, the Panel found that "by clearly and only stating that an investigation was *not* initiated or conducted, India's panel request precludes claims relating to the alleged initiation of an investigation, or the manner in which an investigation was conducted, being included in the scope of the dispute."[827] Based on the text of the panel request, therefore, the Panel concluded that "India's panel request is not reasonably open to the reading advanced by India."[828]

635. As the Panel found, India's arguments regarding the definition of "initiation" do not explain how India's panel request can be read as encompassing, on its face, issues concerning whether sufficient evidence existed to initiate investigations into specific subsidy programs. While India is correct that footnote 37 to Article 10 of the SCM Agreement defines the term initiation, India failed to convince the Panel that the assistance of this definition "permits a sufficiently clear identification of which particular obligations in Article 11 of the SCM Agreement form the legal basis of India's complaints."[829]

636. India's claim that the various sub-paragraphs of Article 11 of the SCM Agreement are "closely interlinked" is unconvincing. We note that India claims on appeal that the United States does not dispute that the sub-paragraphs of Article 11 are interlinked; however, the U.S. submissions before the Panel reveal the opposite. To the contrary, the United States emphasized before the Panel that Article 11 contains 11 subparagraphs, and numerous disparate obligations relating to everything from initiation to sufficiency of the evidence to customs clearance to duration of the investigation.[830] The United States also emphasized that, as the Appellate Body has found, where an article of a covered agreement contains several distinct legal obligations, each capable of being breached, a cursory reference to that article in a panel request may not reveal which of those obligations is at issue.[831] The Panel found that to be the case with respect to Article 11 of the SCM Agreement, and India's suggestion otherwise is not supported by the text of those provisions.

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[824] India First Written Submission, heading XII.C.1.
[825] India First Written Submission, heading XII.C.2.
[826] Panel Report, para. 1.34.
[827] Panel Report, para. 1.34.
[828] Panel Report, para. 1.35.
[829] Panel Report, footnote 39 to paragraph 1.34.
[830] U.S. First Written Submission, para. 17.
[831] *Korea – Dairy (AB)*, para. 128.

637. Based on the foregoing, the Panel correctly applied Article 6.2 of the DSU, as previously interpreted by the Appellate Body.[832] The Panel also did not err under Article 11 of the DSU, because India identifies nothing in the Panel Report to suggest that the Panel's assessment and rejection of India's argument lacked objectivity. Therefore, India's appeals under Articles 6.2 and 11 of the DSU should be rejected.

E. India's Request for Completion of the Analysis

638. India makes a conditional request in the event the Appellate Body were to overturn the Panel's preliminary ruling. India requests the Appellate Body to complete the legal analysis to find that Commerce acted inconsistently with Articles 11.1, 11.2 and 11.9 of the SCM Agreement in relation to the NMDC and TPS programs. The United States respectfully requests the Appellate Body to decline India's request for completion of the analysis.

639. At the outset, we note that India's claims in section XII.C.1 and XII.C.2 of its first written submission would fail for the same reason India's other claims under Article 11.1 of the SCM Agreement failed. The Panel found that Commerce did not err when it examined new subsidy programs in the context of review proceedings under Article 21 of the SCM Agreement, and that therefore, India's claims under Article 11.1 of the SCM Agreement must fail, because this provision does not apply in the context of review proceedings.

640. For the claims at issue in India's request for completion of the analysis, the same reasoning applies. India's claims relate to the examination of the TPS program in the context of the 2004 administrative review proceeding. As the Panel found, Commerce was permitted to examine new subsidies in the context of an administrative review under Article 21 of the SCM Agreement. Therefore, claims under Articles 11.1, 11.2 and 11.9 of the SCM Agreement must fail, as India's claims under Article 11.1 failed, because these provisions apply only in the context of original investigations and do not apply to administrative review proceedings. India has appealed the Panel's findings under Article 11.1 of the SCM Agreement, and the United States has responded to this appeal in the immediately preceding section of its submission.

641. Furthermore, even aside from the lack of a legal basis upon which to review India's claims, the Appellate Body would lack the factual basis upon which to complete the legal analysis, because the Panel made no factual findings on these claims, and the facts on the record are not undisputed. Commerce's preliminary determination in the 2004 AR, for example, directly contradicts India's claim that no allegation was made regarding the sale of high-grade iron ore by NMDC.[833] That determination states: "On May 2 and June 29, 2005, petitioner submitted new subsidy allegations, alleging that the GOI, through the government–owned National Mineral Development Corporation (NMDC), provided high–grade iron ore to Essar for

[832] India states that "[t]he Panel, while correctly identifying the legal standard for Article 6.2 of the DSU, incorrectly applied the same to the facts of the instant dispute." India Appellant Submission, para. 681. Therefore, India does not dispute that the Panel "must objectively determine [its] terms of reference on the basis of the panel request as it existed at the time of filing." Panel Report, para. 1.34.

[833] India Appellant Submission, para. 685.

less than adequate remuneration."[834] Therefore, the record facts do not support India's claim, and are in any event, disputed.

642. Regarding the TPS program, which was not initiated based on a written request, Article 11.6 of the SCM Agreement relating to self-initiation by an investigating authority would apply, and India has not raised an 11.6 claim in this dispute. Therefore, India's claims with respect to the TPS program must fail.

643. Therefore, because India's appeals under Articles 11 and 6.2 of the DSU must fail, and because no legal or factual basis exists upon which to complete the analysis, the Appellate Body should reject India's request for completion of the analysis.

F. Conclusion

644. Based on the foregoing, the United States respectfully requests the Appellate Body to reject India's conditional appeal of the Panel's preliminary ruling under Articles 11 and 6.2 of the DSU, and uphold the Panel's finding that India's claims in sections XII.C.1 and XII.C.2 of its first written submission were outside the Panel's terms of reference.

XVI. CONCLUSION

645. Based on the foregoing, the United States respectfully requests the Appellate Body to reject India's claims on appeal, and uphold the Panel's findings.

[834] *Notice of Preliminary Results of Countervailing Duty Administrative Review*, January 10, 2006, 71 FR 1512 (2004 AR) (Exhibit IND – 17), at p. 5 of the exhibit.