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

EXECUTIVE SUMMARY

September 1, 2014

SERVICE LIST

Participant

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Third Parties

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I. INTRODUCTION

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, and is 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 over 20 additional challenges under Article 11 of the DSU. Indiscriminate use of the appellate process strains the resources of the Secretariat and the Appellate Body Members, as well as the other participants and third participants involved in a dispute. Therefore, requesting the Appellate Body to review every finding made by a panel is not in keeping with the objective of the prompt settlement of disputes, and the requirement in Article 3.7 of the DSU that Members exercise judgment in deciding whether action under the WTO dispute settlement procedures would be fruitful. Therefore, the Appellate Body should deal with India's many claims fairly, but judiciously. Where India has failed to articulate an appropriate claim under Article 11 of the DSU, India's claims should be rejected outright.

II. COMMERCE'S BENCHMARK REGULATION IS "AS SUCH" CONSISTENT WITH ARTICLE 14(d) OF THE SCM AGREEMENT

2. 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. 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 before considering whether a benefit has been conferred (from the perspective of the recipient). 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-to-government analysis already considered and rejected by the Appellate Body in Canada – Aircraft and numerous other reports. The United States requests that the Appellate Body reject India's claim.

3. 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." The United States submits, that 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 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." 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. Because 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", 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. The Appellate Body should reject India's claim on this basis.

4. Moreover, India appeals the Panel's rejection of each of India's arguments. The Panel 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. India appeals these findings on three grounds but 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). The United States respectfully requests that the Appellate Body reject those claims.

5. India further requests that the Appellate Body reverse the Panel's findings in respect of Tier II of the U.S. regulation and find it "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." India's arguments are based on an incorrect understanding of the use of out-of-country benchmarks under Article 14(d) and the Appellate Body's findings in US – Softwood Lumber IV. 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

6. 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. 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.

7. Finally, India argues that the Panel both failed to evaluate its second and third grounds of argument: (1) 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 (2) that 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. India requests that the Appellate Body find that Commerce's benchmark regulations are "as such" inconsistent with Article 14(d) for these reasons. The United States submits that India's claims are misplaced as the Panel did consider India's claims and, in any case, they are improperly premised on India's cost-to-government argument. 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. In that light, there was no further need to consider what additional assessments may be required. The Appellate Body similarly should reject India's claims.

III. 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

8. 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. India's Article 11 challenge is a thinly veiled attempt to amend its argument on appeal, and should be rejected. 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). India's claim under Article 11 of the DSU therefore has no merit, because the Panel properly considered and rejected India's arguments. An appeal premised primarily on a party's disagreement with a panel's reasoning and weighing of evidence – as India's is here – in any event, does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU.

9. Second, 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.'" This argument was never before the Panel, however, and is raised by India for the first time on appeal. India cannot fault the Panel under Article 11 of the DSU for failing to make an objective assessment of an argument that it never heard. Based on the foregoing, 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. Therefore, India's Article 11 challenges must fail.

10. India also 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. 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, and asks the Appellate Body to reverse the Panel's findings here for the same reasons that it argued in Part III.C of its Appellant Submission. The United States responded to India's arguments in full in the previous section of its appellee submission regarding that U.S. measure, and refers the Appellate Body to those arguments.

11. 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.'" Contrary to India's assertion, however, the Panel provided more than one rationale

for rejecting India's "as such" claims in respect of comparative advantage. Specifically, the 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." 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. The Panel further observed that this reasoning was consistent with the Appellate Body's approach in *US – Softwood Lumber IV*. The Panel also 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, and concluded 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 therefore 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.

12. In its second challenge in respect of the Panel's interpretation of Article 14(d), India argues that the Panel's finding 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) and inappropriately conflates the term "prevailing market conditions" with "import transactions". 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. Also as discussed above, 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.

13. Based on its foregoing appeals, India requests the Appellate Body to complete the analysis based on the India's "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." 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. 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. Whatever the reason for this late change of perspective, the result is that there are no panel interpretive findings on this precise issue, and the Appellate Body should decline to make findings in this respect accordingly. Even if it were to review India's claim, the Appellate Body should in any event reject India's argument on substantive grounds as well, because it is premised on India's misplaced view of Article 14(d), requiring that the adequacy of remuneration be assessed from the perspective of the government provider, and that an investigating authority 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 requirements.

14. In its request that the Appellate Body complete the analysis to find that the U.S. measure is inconsistent with Article 14(d), India first 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." 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. However, as the Panel found, 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.

15. 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. Therefore, 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.

16. Next, 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*. 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).

17. We first note that India's assertion 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" 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 "country in question." 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.

18. A prime example of the problems with India's argument, 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. This record evidence demonstrates that market conditions in 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. 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. This same logic applies for the Tier II world market prices where Tier I prices are unavailable.

19. 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. 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). 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". The United States notes that India reiterates the same arguments on appeal that it did in its submissions before the Panel. Therefore, India's arguments fail for the same reasons they did before the Panel.

IV. 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

20. 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 those determinations, in particular Commerce's determination of benefit in accordance with Articles 1.1 and 14 of the SCM Agreement.

21. 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. 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. 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, which do not include the passages to which India refers. 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.

22. 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. India's claims therefore are without merit. First, 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. Second, India raises new claims on appeal; on this basis the United States submits that the Appellate Body should reject India's appeal. Third, the Panel's interpretation of Article 14 is not unfair to Indian companies as many of those companies had access to price quotes from actual transactions; Indian exporters are not at the "mercy of the administering authority. Fourth, the Panel correctly considered that the Tata price quote could not be considered for a benchmark as it does not specify an iron ore content. For all these reasons, the United States further 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. 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 and that the Appellate Body should not rules on those claims.

23. The Panel correctly found 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. India's claims are without merit as the Panel correctly observed that that Commerce's explanation "was clear and intelligible, and is easily understood and discerned" and therefore, not contrary to the *Chapeau* of Article 14.[1] The United States urges the Appellate Body to reject India's appeal under Article 11, which has no basis. The United States further requests that the Appellate Body reject India's request for completion of the analysis, as the Panel objectively considered the matter before it.

[1] Panel Report, para. 7.192.

V. 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

24. India challenges Commerce's determinations in respect of the GOI's provision of captive mining rights for iron ore and coal. 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) under both Articles 11 of the DSU and 1.1(a)(1)(iii) of the SCM Agreement. With respect to India's claim under Article 11 of the DSU, this claim has no merit as the Panel in its report noted India's argument that "***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)."

25. 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. 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). 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. 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.

26. Second, India alleges that Commerce's benefit determinations in respect of the captive mining rights programs are inconsistent with Articles 14(d) of the SCM Agreement and Article 11 of the DSU. 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). 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.

27. 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 assessed in respect of the government provider.

28. 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. 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.

29. 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.

VI. 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

30. The Panel correctly 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. India's Article 11 appeal is without merit as the Panel properly considered all record evidence, including the Supreme Court of India decision. The Appellate Body also should reject India's claim under Article 14(b) as 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. 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.

VII. 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

31. India appeals 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 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 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.

32. 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. 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. 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.

33. Similarly, 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 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. Yet, India cannot point to a single piece of evidence that would demonstrate that the Panel erred.

34. 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." 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.

35. 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." 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. The United States has already addressed these arguments extensively in response to India's "as such" claims, above. For the same reasons, the United States respectfully requests that the Appellate Body reject India's claim.

36. 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. This claim as well is discussed in response to India's "as such" challenge above.

37. Finally, with respect to India's claim regarding the use of delivered prices for benchmark calculations in respect of captive mining and iron ore, 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 in that section above.

VIII. 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

38. 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 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. However, 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, such 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." The Panel correctly concluded that Commerce complied with Article 1.1(a)(1)(i) in making its determination.

39. India's argument that a direct transfer cannot involve an "intermediary entity" assumes a different structure for the SDF than exists in the record. Record evidence demonstrated that it was the SDF Managing Committee that handled all decision-making regarding the issuance, terms and waivers of SDF loans; thus, it was not the case that the Joint Plant Committee ("JPC") was an entity with any capacity to *otherwise* decide how to dispose of SDF funds. The JPC simply administered the loan. India's argument would mean that, if a government were to decide to make a grant or loan using funds held in its account at a bank, the 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. 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, such that Article 1.1(a)(1)(iv) would apply. To the contrary, the JPC is a constituent committee of the SDF Program, which operated under the supervision of the GOI both through the supervision of the SDF Managing Committee.

40. India is also mistaken 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. 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. 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.

IX. 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

41. 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 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. 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. 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. The Appellate Body should reject all of India's appeals.

42. 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. Second, India argues that the Panel ignored the Appellate Body's report in *US – Large Civil Aircraft (2nd Complaint)*. 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.

43. 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. 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." Furthermore, India's approach would read out the plain text of the *chapeau* of Article 2.1, which collectively refers to "an enterprise or industry or group of enterprises or industries" as "certain enterprises," such that 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. With respect to India's reliance on the *US – Large Civil Aircraft (2nd Complaint)*, the question before the Appellate Body in that dispute was whether the grant of Industry Revenue Bonds (IRBs) were *de facto* specific due to the "granting of disproportionately large amounts of subsidy to certain enterprises" under Article 2.1(c). 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. 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 Appellate Body therefore should reject India's appeal of the Panel's findings, as well as its request for completion of the analysis.

44. India also 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 a strained reading of the text of Article 2.1(c). India's arguments in this respect should be rejected. Not only does India's reading have no basis in the text of Article 2.1(c), but India has failed to explain how its reading supports the view that an investigating authority must examine a "comparative subset" of actual to potential recipients.

45. India also 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*. Contrary to India's claim, however, a panel has no obligation under Article 11 to address every argument raised by a party. In order to make out a claim under Article 11 in relation to a panel's decision not to address a particular argument, therefore, 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. India has not given that explanation, and its Article 11 claim fails on that basis. India is in any event wrong that the Panel relied on *US – Softwood Lumber IV* "and nothing more" in reaching its conclusions. Rather, the Panel relied on its *earlier finding*s in respect of Article 2.1(c) to reject India's claim, noting that the panel in *US – Softwood Lumber IV* reached "essentially the same conclusion." The Appellate Body should therefore 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. India's second claim under Article 11 was included in India's Notice of Appeal, but not its appellant submission. Therefore, the United States understands India to have abandoned this claim.

46. Regarding India's next appeal of the Panel's legal interpretation of Article 2.1(c) of the SCM Agreement, 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. Even where India is correct in arguing that all goods are inherently limited in use, however, the interpretation advanced by India cannot be upheld because it which would create a loophole in the subsidies disciplines, because *all* goods could be said to be inherently limited. There simply is no basis in the text of Article 2 for such an interpretation.

47. Finally, India also appeals the Panel's findings that Commerce had relied on positive evidence, within the meaning of Article 2.4 of the SCM Agreement, 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." India argues 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). As the Appellate Body has found, however, 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). Further, 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". 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.

X. 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"

48. India criticizes the Panel's approach to Article 1.1(a)(1) and argues that the Panel "misunderstood the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*." 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. India's arguments ignore the fact that, in that dispute, repeatedly referred to the government's "meaningful control" over an entity, and 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." The Appellate Body called such links "meaningful control."

49. 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 – is, in reality, a deviation from the interpretation articulated and applied by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

50. 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." 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 economic resources by that entity is effectively a conveyance of the government's own resources.

51. The Panel "understood 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." The Panel further explained that "[g]overnmental control of the entity is relevant if that control is 'meaningful.'" 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." After making these observations, 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." 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. This is consistent with the Appellate Body's application of Article 1.1(a)(1) in *US – Anti-Dumping and Countervailing Duties (China).*

52. India also 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 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." In fact, that 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." Furthermore, 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.

53. India's claim 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 is also without merit. India is wrong 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. India also is incorrect, as a legal matter, that the Panel was obligated to reject the arguments of the United States as *ex post facto* rationalizations. Contrary to its submissions, the Appellate Body report in *US – Wheat Gluten* and the panel report in *Argentina – Ceramic Tiles* do not support India's claim. 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, 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*," and therefore did not constitute *ex post facto* argumentation.

54. India also fails to demonstrate 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." India is incorrect that "the United States specifically admitted that 'administrative control' was not used in its determinations", as its response to Panel question 42(b) demonstrates. Furthermore, 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." India's attack on the Panel's reference to evidence in the 2007 AR is equally unpersuasive. As before, 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." While India may disagree with the conclusions the Panel drew from the evidence, 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'."

55. India also erroneously argues that the Panel acted inconsistently with Article 11 of the DSU because "the Panel has effectively ruled on a matter *not* before it" when it stated that NMDC's status as a Miniratna/Navratna company did not preclude a finding that NMDC was a "public body". What India describes as "a matter not before" the panel, however, 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.

56. 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. If the Appellate Body agrees to India's requests to complete the legal analysis, the United States 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."

57. Commerce 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. Commerce also found that the NMDC, as a state-owned mining company, was "governed by" the GOI's Ministry of Steel, and 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." Further, Indian and NMDC officials explained to Commerce that the GOI was heavily involved in the selection of the directors of the NMDC, and that it appointed two directors and had approval power over an additional seven directors out of a total of 13 directors.

58. Regarding governmental authority, 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 and has final approval of the granting of mining leases for iron ore. Therefore, 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." Therefore, 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.

59. 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.

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

60. 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, and misunderstood the findings of the Appellate Body in *Mexico – Rice*. 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.

61. Article 12.7 enables investigating authorities to make determinations when interested parties and Members have failed to provide necessary information. In *Mexico – Rice*, the Appellate Body found that Article 12.7 "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." 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".

62. 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, but does require that "an investigating authority's determination must have a *factual* foundation." The Panel next recalled the Appellate Body's findings in *Mexico-Rice*, and found that "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 [and 6.8 of the AD Agreement], noting expressly the lack of an equivalent to Annex II of the AD Agreement in the SCM Agreement." Rather, "Article 12.7 requires that (i) an investigating authority must, to the extent possible, take into account all the substantiated facts provided by an interested party, and that (ii) the use of 'facts available' be generally limited to those that may reasonably replace the missing information." The Panel therefore disagreed with

India's proposed interpretation of Article 12.7 was not correct, which it found was not consistent with the Appellate Body's finding in *Mexico – Rice*.

63. 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. 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. 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 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." 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." This 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.

64. India is also incorrect that, under the SCM Agreement and the AD Agreement, "only facts that are most fitting or most appropriate, determined by way of an 'evaluative, comparative assessment' can be used." 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 comparable evaluations was not appealed by the other party.

65. India acknowledges 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". Therefore, it is not clear 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.

66. 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. However, based on the text of the U.S. measures, 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 allow Commerce to apply "facts available that do not reasonably replace the missing information. 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.

67. India accepts that the U.S. measures, on their face, are "innocuous", and that they "appear[] to provide discretion to the USDOC to choose adverse consequences only on a case-by-case basis." However, despite its challenge having been raised based on the U.S. measures "as such", India charges that the Panel did not objectively assess the matter before it because it ignored "other domestic interpretive tools" on the record regarding the interpretation of U.S. law, including legislative history and judicial decisions. However, the legislative history India cites 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; consistent with the Panel's findings. Similarly, contrary to India's contentions, the judicial cases cited by India demonstrate that U.S. courts have *not* found that the U.S. measures require Commerce to apply the highest available rate, and have in fact found the opposite: that U.S. law *does not* allow the interpretation presented by India, consistent with the Panel's findings. India's mere listing of cases to establish its claim of mandatory "systematic application" is similarly unconvincing, because India has failed even to explain how the facts available provisions were applied in an improper manner in any of the identified cases. 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.

XII. THE PANEL DID NOT ERR IN ITS FINDINGS RELATED TO COMMERCE'S APPLICATION OF "FACTS AVAILABLE"

68. India also appeals two of the Panel's findings regarding the application of the facts available provisions, including Commerce's alleged use of the highest available subsidy rate calculated for a cooperating party in 230 instances, as well as its findings regarding Commerce's 2013 sunset review determination. India appeals the former finding under Article 12.7 of the SCM Agreement, and the latter under Article 11 of the DSU.

69. 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." 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 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, and the Appellate Body should reject India's appeal of the Panel's finding in this regard.

70. With respect to the 2013 sunset review, the Panel also concluded that India failed to establish a *prima facie* case of inconsistency, because "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." 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," and may not rely on the panel to make its case for it. India not only failed to articulate sufficient arguments, but failed even to

place the challenged 2013 Sunset Review determination on the record before the Panel. India attempts to remedy this error by including additional information in its appellant submission, but as numerous past Appellate Body reports have found, a party cannot introduce new evidence on appeal. Therefore, the Appellate Body should also reject India's appeal under Article 11 of the DSU regarding the Panel's assessment of the 2013 sunset review.

XIII. 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

71. 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. India argues on appeal that the Panel erred in interpreting Articles 11 and 21 of the SCM Agreement, because it focused only on the text of Article 21 in its evaluation. India also argues that the Panel failed to make an objective assessment of the matter in violation of Article 11 of the DSU when it rejected India's claims under Articles 11, 13 and 22 of the SCM Agreement after finding that Commerce had acted consistently with Article 21 of the SCM Agreement in reviewing new subsidy allegations in the context of an administrative review proceeding.

72. Regarding the Panel's interpretation of Articles 11 and 21 of the SCM Agreement, 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. India goes on to contend that if an investigating authority examines the "existence, degree and effect" of a new subsidy in a review proceeding, the obligations set forth in Articles 11.1, 13.1, 22.1 and 22.2 should be imported into that proceeding. 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.

73. As the Panel found, "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." Moreover, the Panel 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. 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. In addition, 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.

74. 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. 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. The SCM Agreement envisions no such process.

75. India is also mistaken in its claim that the Panel breached its obligations under Articles 11 and 12.7 of the DSU when it focused its interpretation on the text of Article 21 of the SCM Agreement without appreciating how Articles 11 and 21 of the SCM Agreement "are to be read together." An allegation that a panel has failed to conduct an 'objective assessment of the matter before it is a "very serious allegation," 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. 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.

76. India also claims that the Panel violated Article 12.7 of the DSU by failing to set out in its Report the basic rationale for its findings. Article 12.7 of the DSU, however, "establishes a *minimum* standard for the reasoning that panels must provide in support of their findings and recommendations," and requires only that "[p]anels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations." 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." The Panel satisfied this burden when it interpreted Article 21 of the SCM Agreement, determined that Commerce acted consistently with that obligation in examining new subsidies in a review proceeding, and further determined that, therefore, as a legal matter, 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. India may not agree with the Panel's basic rationale, but the Panel's report nonetheless reveals that this rationale was provided. Therefore, India's appeal under Article 12.7 also should be rejected.

77. 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. Even if the Appellate Body were to reverse the Panel's findings, 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.

XIV. THE PANEL'S ASSESSMENT OF INDIA'S PANEL REQUEST IN ITS PRELIMINARY RULING WAS CONSISTENT WITH ARTICLES 6.2 AND 11 OF THE DSU

78. India's conditional appeal 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 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.

79. 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, and has not articulated on appeal "specific errors regarding the objectivity of the panel's assessment" of these claims. Therefore, India's appeal under Article 11 of the DSU fails.

80. 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. India's claims that the Panel erred in failing "to follow previously adopted Reports without offering cogent reasons" rest on a mistaken view of the interpretation of Article 6.2. 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. 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*. 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" could cure an otherwise deficient panel request.

81. 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.'" India's appeal fails for the same reasons its arguments before the Panel failed. As the Panel found, the issue of "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." 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.

82. Therefore, the Panel correctly applied Article 6.2 of the DSU, as previously interpreted by the Appellate Body. 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. Because India's appeals under Articles 11 and 6.2 of the DSU must fail, the Appellate Body need not complete the legal analysis as requested by India. Even aside from the failure of India's appeals, however, no legal or factual basis exists upon which the Appellate Body could complete the analysis, and India's request should therefore in any event be rejected.