



C-533-821


Section 129 Proceedings
DS436-2004; DS436-2006;
DS436-2007; DS436-2008

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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Section 129 Proceeding: United States – Countervailing Duty
Measures on Certain Hot-Rolled Carbon Steel Flat Products from
India (WTO/DS436)

RE: Final Determination

I. SUMMARY

Consistent with section 129 of the Uruguay Round Agreements Act (URAA), which governs the actions of the Department of Commerce (the Department) following adverse World Trade Organization (WTO) dispute settlement reports, the Department is revising the analysis underlying certain determinations within the countervailing duty (CVD) reviews examined in *United States – Countervailing Duty Measures on Hot-Rolled Steel from India* (WT/DS436). At the request of the United States Trade Representative, we are revising the analysis underlying these four determinations in accordance with findings in the relevant reports adopted by the WTO Dispute Settlement Body (DSB).

More specifically, as part of this proceeding, as discussed in greater detail below, the Department has revised the CVD rates as well as its approach to certain analytical issues in the following proceedings below:

Case Number	Segment of Proceeding – Administrative Review	Period of Review
C-533-821	<i>Final Results of Countervailing Duty Administrative Review: Certain Hot-rolled Carbon Steel Flat Products from India</i> , 71 FR 28665 (May 17, 2006) (2004 Final Results)	January 1, 2004 through December 31, 2004



C-533-821	<i>Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India</i> , 73 FR 40295 (July 14, 2008) (2006 Final Results)	January 1, 2006 through December 31, 2006
C-533-821	<i>Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India</i> , 74 FR 20923 (May 6, 2009) (2007 Final Results)	January 1, 2007 through December 31, 2007
C-533-821	<i>Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India</i> , 75 FR 43488 (July 26, 2010) (2008 Final Results)	January 1, 2008 through December 31, 2008

On March 18 and 20, 2016, we issued the Facts Available Preliminary Determination and Other Issues Preliminary Determination which are relevant to these Section 129 proceedings.¹ Additionally, on March 21, 2016, we announced to interested parties the schedule for the submission of case briefs and rebuttal briefs, which were due to the Department on March 28, 2016 and April 4, 2016, respectively.² On March 28, 2016, the Government of India (GOI), Essar Steel India Limited (Essar), and JSW Steel Ltd. (JSW) submitted case briefs.³ On March 30, 2016, the Department sent a letter to the GOI informing them that we rejected their case brief because it contained new factual information and that the GOI may, however, remove the new factual information and any references to them from its case brief and resubmit to the Department on March 31, 2016. The GOI resubmitted its revised case brief on March 31, 2016.⁴ On April 4, 2016, Petitioner submitted its rebuttal brief.⁵

¹ See Memorandum to Paul Piquado, “Section 129(b) Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436): Preliminary Determinations of Facts Available,” (March 17, 2016) (Facts Available Preliminary Determination); and Memorandum to Paul Piquado, “Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WTO/DS436): Preliminary Determination on Other Issues,” (March 18, 2016) (Other Issues Preliminary Determination).

² See Memorandum to the File, “Section 129 Proceedings: United States – Countervailing Duty (CVD) Measures on Certain Hot-Rolled Carbon Steel Products from India (WTO/DS436): Schedule for written argument and a hearing,” (March 21, 2016).

³ See Letter from JSW, “Certain Hot Rolled Carbon Steel Flat Products from India: Comments on Preliminary 129 Determination of JSW Steel Limited,” (March 28, 2016) (JSW Case Brief); Letter from GOI, “Section 129 proceeding: United States- Countervailing duty measures on certain hot-rolled carbon steel flat products from India (WTO/DS436) – Case brief on other issues,” (March 28, 2016); and Letter from Essar, “Certain Hot-Rolled Steel Flat Products from India: Comments on Preliminary Determination,” (March 28, 2016) (Essar Case Brief).

⁴ See Letter from GOI, “Section 129 proceeding: United States- Countervailing duty measures on certain hot-rolled carbon steel flat products from India (WTO/DS436) – Case brief on other issues,” (March 31, 2016) (GOI Case Brief).

⁵ ArcelorMittal USA, LLC (AMUSA), a domestic producer engaged in the production in the United States of hot-rolled steel (HR) products, and a successor firm to interested parties Bethlehem Steel Corporation, LTV Steel Company, Inc., and Weirton Steel Corporation, that participated in the original countervailing duty investigation regarding imports of HR steel products from India. See ArcelorMittal USA LLC’s Rebuttal Brief (April 4, 2016) (Petitioner Rebuttal Brief).

As discussed below, we considered all the comments filed by the interested parties. After evaluating those comments, we have determined to make changes to the preliminary analyses with regard to the Facts Available Preliminary Determination and Other Issues Preliminary Determination. Therefore, for these four Section 129 proceedings, we are adopting the findings of the preliminary determinations for these final determinations. As explained in the preliminary analyses, there were changes made to the net subsidy rates calculated in the original administrative reviews of two of the four CVD segments as a result of these Section 129 proceedings.

II. ANALYSIS OF ISSUES PURSUANT TO WTO DS436

Comment 1: Ocean Freight

GOI's Argument

- In this preliminary determination, the Department stated, “there was evidence of only one import of iron ore from Brazil and that one import was an insufficient basis upon which to find importation of iron ore to be a prevailing market condition.”⁶ Accordingly, for JSW, the Department deducted ocean freight from the benchmark price and arrived at a significantly lower rate of 2.86 percent (as opposed to the original rate of 8.83 percent). The Department has indeed included ocean freight in terms of calculating the benefit conferred upon Essar as well. Therefore, consistent with the findings of the Appellate Body (AB) that there was insufficient basis to use delivered imported prices as benchmarks (including ocean freight), the Department has to re-assess the CVD margins as applicable to Essar for the 2006 and 2007 administrative review. Continuing the imposition of duties on Essar based on CVD margins calculated in the earlier findings for the Sale of High Grade Iron Ore for LTAR is WTO-inconsistent.
- The Department has used the very same iron ore benchmark prices for calculating the benefit conferred under both the “Sale of High-Grade Iron Ore for LTAR” and “Mining of Iron Ore” programs. The Department should revise its benchmark calculation and exclude ocean freight from the benefit calculations in both programs and for all respondents that participated in the 2006 administrative review.

Essar submitted its agreement with the GOI's argument that its subsidy rate for sale of high grade iron ore for LTAR in the 2006 administrative review should be adjusted for ocean freight.

No other parties provided rebuttal comments on this issue.

Department's Position: The AB determined that under the circumstances of this case, it was inappropriate to add ocean freight to the Hamersley, Australian benchmark because there was evidence of only one import of iron ore from Brazil and that one import was an insufficient basis

⁶ See Other Issues Preliminary Determination.

upon which to find importation of iron ore to be a prevailing market condition.⁷ In our preliminary determination, we reviewed the record evidence and could not provide an analysis of the market generally based on more than one import of iron ore. We deducted ocean freight from the Tier II benchmark for JSW's purchases of iron ore from National Minerals Development Corporation (NMDC).⁸ We have continued this approach for JSW in the final determination. Additionally, in the final determination, we have deducted ocean freight from the Hamersley, Australia benchmark for Essar and Ispat for the 2006 administrative review and Essar for the 2007 administrative review. Similarly, we have revised the Hamersley, Australia benchmark in the calculation of the provision of mining of iron ore to Tata for the 2006 administrative review.

For the benchmark, based upon the prevailing market conditions for each respondent, we will also add to the benchmark price domestic freight and charges (where available) incurred on the respondents' domestic purchases. In this manner, we derive a delivered benchmark price in accordance to 19 CFR 351.511(a)(2)(iv). For the final determination, we are adding the same domestic freight and charges to the benchmark as those included in the government price (domestic purchase price to respondent) depending on record facts for each respondent.

For the benchmark price, during the 2006 administrative review, record evidence demonstrates the prevailing market conditions for actual domestic prices paid for Ispat's domestic purchases of iron ore included delivery charges from the mine to the port. Concerning Essar, record evidence demonstrates the prevailing market conditions for actual domestic prices paid included delivery charges from the mine to the port and the port to the factory for Essar's domestic purchases of iron ore.⁹ Therefore, we have included, where applicable, these domestic delivery charges to the benchmark price. Similarly, the prevailing market conditions for Tata's mining of iron included delivery charges incurred to transport iron ore to Tata's factory, thus we adjusted the Hamersley, Australia benchmark to reflect actual domestic costs incurred.¹⁰ See Final Determination Calculation Memorandum.

As described in the Other Issues Preliminary Determination,¹¹ JSW purchased iron ore from domestic sources, *i.e.*, NMDC, however record evidence indicates that its purchase price is not on a delivered basis, therefore we included inland freight to its purchase price.¹² JSW did not report inland freight; consequently we used publically available data as a proxy.¹³

On this basis, we determine that JSW received a countervailable subsidy of 2.86 percent *ad valorem* during the 2006 administrative review for the Sale of High-Grade Iron Ore for Less Than Adequate Remunerations (LTAR).

⁷ See *United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (December 8, 2014) (*AB Report*) at para. 4.317.

⁸ See Comment 4A and 4B for our discussion of the Tier II benchmark.

⁹ See *2006 Final Results* and accompanying Issues and Decision Memorandum at 14 – 15.

¹⁰ *Id.* at 19.

¹¹ See Other Issues Preliminary Determination at 14 and 15.

¹² See JSW's supplemental questionnaire response (February 19, 2016) at Exhibit 2.

¹³ See Tata's questionnaire response (February 8, 2008) at 5.

Regarding Ispat for the 2006 administrative review, for purposes of measuring the adequacy of remuneration of the GOI's sales of lump and fine iron ore, we compared the actual domestic prices paid (including delivery charges from the mine to the port) with benchmark prices that were adjusted to include delivery charges from the mine to the port. As explained in *2006 Final Results*, we would have also adjusted the "government side" and benchmark side of the equation to include inland freight from the port to the factory, but such data are not available on the record.¹⁴ Furthermore, because there was insufficient information on the record, we did not include, for the this final determination, central sales taxes paid on Ispat domestic purchases of iron ore lumps and iron ore fines, and we did not adjust the benchmark prices to include import duties and any other taxes and fees payable on imports.

On this basis, we determine that Ispat received a countervailable subsidy of 2.88 percent *ad valorem* during the 2006 administrative review for the Sale of High-Grade Iron Ore for LTAR.

Regarding Essar for the 2006 administrative review, for purposes of measuring the adequacy of remuneration of the GOI's sales of lump and fine iron ore, we compared the actual domestic prices paid (including delivery charges from the mine to the port and the port to the factory) with benchmark prices that were adjusted to include delivery charges from mine to port, port to the factory, and the inclusion of inland freight from the port to the factory. Furthermore, because there was insufficient information on the record, we did not include, for this final determination, central sales taxes paid on Essar's domestic purchases of iron ore lumps and iron ore fines, and we did not adjust the benchmark prices to include import duties and any other taxes and fees payable on imports.

For the 2007 administrative review, with regard to Essar's purchases of fines, we compared the actual prices Essar paid to the NMDC, including central sales tax (CST), with benchmark prices for fines from Hamersley, Australia, as listed in the *Tex Report*. We adjusted the benchmark price to include all domestic charges including CST.

On this basis, we determine that Essar received a total countervailable subsidy of 11.11 percent *ad valorem* during the 2006 administrative review and 8.03 percent *ad valorem* during the 2007 administrative review for the Sale of High-Grade Iron Ore for LTAR.

With regards to Tata's Mining Right for Iron Ore for the 2006 administrative review, in the case of iron ore fines, we converted our benchmark unit price (expressed as percentage of FE content) from U.S. dollar per dry long ton to U.S. dollar per metric ton. We then converted this unit price from U.S. dollars to rupees. Next, we multiplied the domestic percentage Fe content by the benchmark price per percentage Fe content. This resulted in the benchmark price per wet metric ton for iron ore fines to be of the same Fe content as the domestic iron ore fines purchased under the program. To this per unit benchmark price, we added delivery charges from mine to factory.

Next, we calculated a weighted average unit cost (rupees per metric ton) for the iron ore fines Tata mined under the mining rights of iron ore program as reported by Tata. This unit price includes extractions costs and the delivery charges incurred to transport the coal to Tata's

¹⁴ See *2006 Final Results* and accompanying Issues and Decision Memorandum at 14.

factory. To this unit cost, we added a profit adjustment to arrive at a total per unit iron ore fines cost.¹⁵ To calculate the benefit, we compared the per unit benchmark price to the per unit iron ore fines price. We multiplied the difference by the quantity of iron ore fines Tata mined under the mining of iron ore program.

Regarding iron ore lumps, to calculate the benchmark we followed the same methodology that we used for iron ore fines. However, we lacked record evidence concerning the FE content of iron ore lumps that Tata mined under the mining rights program. Therefore, in order to bring the benchmark price to a level of FE content that is comparable to the FE content of the domestic iron ore lumps purchased under the program, we multiplied the iron ore lumps benchmark price per percentage Fe content by the FE content of iron ore fines that Tata mined under the program. To this per unit benchmark price, we added delivery charges from mine to factory.

Next, we calculated a weighted average unit cost (rupees per metric ton) for the iron ore lumps Tata mined under the mining rights of iron ore program as reported by Tata. This unit price includes the delivery charges incurred to transport the iron ore to Tata's factory. To this unit cost, we added a profit adjustment to arrive at a total per unit iron ore fines cost.¹⁶

To calculate the benefit, we compared the per unit benchmark price to the per unit iron lumps cost. We multiplied the difference by the quantity of iron ore lumps that Tata mined under the mining rights program during the POR.

To calculate the net subsidy rate, we divided the total benefit attributable to Tata's purchases of iron ore lumps and fines under the program by Tata's total sales during the 2006 POR. On this basis, we calculated a net subsidy rate of 9.67 percent *ad valorem* for Tata.

Comment 2: Whether the CVD Rate Determined for JSW in the Department's 129 Proceeding Supersedes the Amended Final Results for JSW for the 2006 Administrative Review

JSW's Arguments

- The Department and JSW satisfactorily resolved all issues related to JSW's deposit rate in the *JSW Amended Final Results*.¹⁷ The *JSW Amended Final Results* superseded the *2006 Final Results*¹⁸ in all respects for JSW; therefore the issues raised in DS436 with regard to the AFA rate imposed on JSW in the *2006 Final Results* are moot.
- Because the *2006 Final Results* were superseded by the *JSW Amended Final Results*, no legal actions can challenge the *2006 Final Results* without also challenging the *Amended*

¹⁵ See Exhibit 70 of Tata's February 8, 2008 supplemental questionnaire response.

¹⁶ *Id.*

¹⁷ See *Certain Hot-Rolled Carbon Steel Flat Products From India: Amended Final Results of Countervailing Duty Administrative Review Pursuant to Court Decision*, 75 FR 80455 (December 22, 2010) (*JSW Amended Final Results*).

¹⁸ See *2006 Final Results*.

Final Results. Neither the Panel nor the AB, however, mentioned the *Amended Final Results* in their discussion of the arguments of the parties or in their resolution of the issues raised by the GOI. The final rate in the *JSW Amended Final Results* did not contain any element that was specifically tied to the issues subsequently raised by the GOI before the WTO, therefore it is not necessary for the Department to increase JSW's deposit rate to the level proposed in the section 129 Preliminary Determination in order to make its actions consistent with the AB's findings.

No other parties provided rebuttal comments on this issue.

Department's Position: The Department does not agree with JSW's interpretation that the *JSW Amended Final Results* renders the results of the 129(b) determination moot. JSW's interpretation does not take appropriate account of the governing provision of the statute. Section 129(b) of the Uruguay Round Agreements Act (URAA) is the applicable provision governing the nature and effect of determinations issued by the Department to implement adverse findings by WTO panels and the Appellate Body. In particular, section 129(b)(2) of the URAA states that "[n]otwithstanding any provision of the Tariff Act of 1930, . . . the administering authority shall within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action . . . not inconsistent with the findings of the panel or the Appellate Body."¹⁹ The *Statement of Administrative Action* (SAA) expressly provides that "such determinations have prospective effect only" and that such a determination is considered a "new," "second," and "different" determination.²⁰ In addition, this determination is subject to judicial review separate and apart from judicial review of the Department's original determination.²¹ Based upon the statute and the SAA, we interpret a section 129 proceeding and determination to be a separate segment of the proceeding, under 19 CFR 351.102(47) of the Department's regulations, and like an administrative review, one that is therefore "reviewable under section 516 of the Act."

Moreover, the Department has met the requirements of the *JSW Amended Final Results*. As provided in the *JSW Amended Final Results*, The Department has (1) amended the original 2006 *Final Results* with respect to JSW, setting the final countervailing duty rate for the 2006 POR to 76.88 percent, and specifying the future countervailing duty cash deposit rate for JSW to be 76.88 percent; and (2) issuing instructions to U.S. Customs and Border Protection (CBP) requiring the liquidation of the entries at issue at 76.88 percent; and (3) issuing instructions to CBP establishing the future cash deposit rate for JSW at the rate of 76.88 percent, which was to remain in place until changed by the Department in the future by an administrative review for JSW.²² The Department issued the *JSW Amended Final Results* on December 22, 2010, and issued instructions to CPB on December 22, 2010. All of JSW's entries subject to the 2006 review have been liquidated at the rate of 76.88 percent. In addition, the 76.88 percent rate cash deposit rate for JSW has remained in effect since December 22, 2010.

¹⁹ See 19 USC 3538(b)(2).

²⁰ See H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA) at 1025 and 1026.

²¹ See SAA at 1026.

²² See *JSW Amended Final Results*, 75 FR at 80455-6.

Last, by initiating WTO dispute settlement procedures to address claims regarding various segments of the *Hot-Rolled Steel from India* order, India would have understood that a section 129 determination could be the outcome from claims on which they prevailed. Indeed, one can assume that such an outcome was the Government of India's goal. Having prevailed on certain claims, India must understand that the resulting section 129 determination will supersede prior final results and accompanying cash deposit rates. Based upon the above, the Department expects to change the cash deposit rate for JSW's future entries on or after the effective date of these final results.

Comment 3: JSW's Cash Deposit Rate for Future Entries of Hot-rolled Carbon Steel Flat Products From India

JSW's Arguments

- The *Amended Final Results* satisfactorily resolved all issues with regard to JSW's cash deposit rate, therefore no further action by the Department is required in relation to JSW, and the Department may omit JSW from its recalculations under the instant section 129 proceeding.
- If the Department determines that it is required to adjust JSW's CVD rate, the Department should begin with the *Amended Final Results* and use the 76.88 percent margin as a starting point. While the 76.88 percent margin was not directly calculated from the rates set for the other respondents in the 2006 administrative review, the rates of the other respondents were the background on which negotiations regarding the CIT Order proceeded. Therefore, if the section 129 Final Determination results in a decrease to the rates of the other respondents, a proportional decrease in the 76.88 percent margin negotiated for JSW should also be made.
- The recalculated rate for JSW in the *2006 Final Results*, as proposed in the Preliminary 129 Determination, is 251.83 percent. That reduced rate is 48 percent of the 484.41 percent rate the Department originally computed for JSW in the *2006 Final Results*. Thus, if the Department recalculates JSW's deposit rate in the section 129 proceeding, it should calculate that rate as 48 percent of the 76.88 percent rate determined in *JSW Amended Final Results* – that is 36.9 percent. Accordingly, if the Department believes it must recalculate JSW's rate and apply that rate to JSW's future entries, the rate calculated by the Department should be 36.9 percent.
- In the event that, after further proceedings, the Department eventually issues a future revised implementation determination that results in a recalculated rate for JSW that is lower than the agreed rate of 76.88 percent that was reflected in the *JSW Amended Final Results*, JSW's arguments herein should not be seen as a bar to the application of such lower rate to JSW. This reflects the fact that, as noted above, the 76.99 percent negotiated rate was agreed in the context of the Department's calculations regarding the underlying NMDC program, the captive mining issues, and other determinations made in the *2006 Final Results*. That is, if a new calculated rate falls below 76.88 percent because of future WTO or Department determinations with respect to those issues, that lower rate should

be applied to JSW as its future deposit rate, as any other result would be inconsistent with a finding that JSW's CVD cash deposit rate should be reduced.

No other parties provided rebuttal comments on this issue.

Department's Position: We find JSW's argument unpersuasive. First, we note that while JSW provides no substantive argument for rejecting the Department's re-calculation of its countervailing duty rate based upon the Department's final results of the 129 proceeding for the 2006 administrative review, JSW nevertheless insists that if in this 129 proceeding its cash deposit rate were adjusted downward to a rate that is lower than the rate from the *JSW Amended Final Results*, then it would be entitled to the lower rate. JSW cannot have it both ways, obtaining whatever determination yields the lowest cash deposit rate. Rather, we find that JSW has offered no basis in law for its proposed use of the *JSW Amended Final Results* for purposes of JSW's cash deposit requirements for future entries. To the contrary, the final results of the Department's section 129(b) proceeding for the 2006 review period reflects an accurate re-calculation of JSW's countervailing duty rate that was necessary to render the Department's actions not inconsistent with the finding of a WTO panel. Accordingly, the Department expects to change JSW's cash deposit rate for the company's future entries, consistent with the Department's 129 determination for the 2006 administrative review of JSW.

Comment 4: Iron Ore Benchmarks

A. Tier I Benchmarks

GOI's Arguments

- The record contains Tier I prices from an industry association and a proprietary price quote filed by Tata Steel Limited (Tata). Concerning the data from the industry association, it contains approximately 11 transactions in the name of three companies. These 11 transactions specify the type of iron ore, the content of iron and the terms of sale and therefore, there is absolutely no reason to question these entries. Second, it is incorrect for the Department to conclude that the content of iron ore is not provided in the chart since each entry contains the type of iron ore and the iron content.
- These are the market prices prevailing at the relevant period as compiled by the association in question. The heading of the document itself states that these are "Prices of Iron Ore" and not notional prices or price estimates as the Department alleges. For the other entries in the said document where the names of the sellers are not mentioned, the GOI submits that nothing in the SCM Agreement, Article 14(d) or U.S. law mandates that only actual sale transactions with the names of the transacting parties are to be used.
- The language of 19 CFR 351.511(a)(2)(i), which is the relevant provision under which Tier I pricing is determined, does not limit the possible benchmarks to only actual transaction prices and instead refers generally to the use of a market determined price and we submit that the prices indicated in this association chart are based on actual transaction prices. In this respect, even assuming that the association chart does not reflect prices from actual transactions we also submit that to the extent the Department is applying prices as reflected

in the *Tex Reports*²³ as appropriate benchmarks, the Department cannot apply a double-standard and reject the prices shown in the association chart.

- The Department should use Tata's proprietary price quote, at a minimum, for the purposes of calculating applicable duty rates for Tata.

No parties provided rebuttal comments on this issue.

Department's Position: Under 19 CFR 351.511(a)(2), the Department sets forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods or services. These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation (*e.g.*, actual sales, actual imports or competitively run government auctions) (tier one); (2) world market prices that would be available to purchasers in the country under investigation (tier two); or (3) an assessment of whether the government price is consistent with market principles (tier three). As provided in our regulations, the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation.²⁴ This is because such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation.

Based on the hierarchy established above, we must first determine whether there are market prices from actual sales transactions that can be used to determine whether NMDC sold high-grade iron ore for LTAR to respondents in the 2006 administrative review. In the *2006 Final Results*,²⁵ the Department found no information on the record of actual transaction prices between private parties in India, imports, or sales from government auctions with which to measure the adequacy of remuneration under 19 CFR 351.511(a)(2)(i).

With respect to the industry association chart, the GOI argues that they are prevailing market prices at the relevant period. We acknowledge, as the GOI highlights, the association chart does contain the type of iron ore and iron content. However, upon closer examination the association chart shows that 2006 prices are provisional, *i.e.*, not final, and thus not actual transaction prices.²⁶ The GOI's argument that the remaining prices are "not notional prices or price estimates" is therefore not supported by the record, and the GOI is unable to point to any evidence to contradict the Department's determination that these provisional or estimated prices are not reliable for benchmarking purposes. Further, the GOI's assertion that the term of sale is apparent is incorrect. It is not clear the selling or the buying party and whether the destination is domestic or export. Again, the GOI's argument is not supported by the record.

We disagree with the GOI that 19 CFR 351.511(a)(2)(i) does not limit the possible benchmarks

²³ See GOI's supplemental questionnaire response (November 15, 2007) therein contains the Tex Report (*Tex Report*).

²⁴ See *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545 (April 2, 2002) (*Softwood Lumber from Canada*) and accompanying Issues and Decision Memorandum at "Market-Based Benchmark."

²⁵ See *2006 Final Results* and accompanying Issues and Decision Memorandum at 13 – 16.

²⁶ See GOI's SQR (February 12, 2008) at Exhibit 1; see also Tata's SQR (February 8, 2008) at Exhibit 67 and Memorandum to the File, "Verification of the Questionnaire Responses Submitted by Tata Steel Limited," (Tata Verification Report) (April 17, 2008) at Verification Exhibit-12.

to only actual transaction prices and instead refers generally to the use of a market determined price. On this point, the GOI quotes from the first sentence under 19 CFR 351.511(a)(2)(i) but does not mention the second sentence of the regulation, “Such a {market-determined} price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions.” Further, the *Preamble* states that with regard to 19 CFR 351.511(a)(2)(i) the Department’s “preference is to compare the government price to market-determined prices stemming from actual transactions.” The Court of International Trade upheld the Department’s determination in the 2006 administrative review, and found the Department’s use of the Hamersley, Australia prices as the benchmark for iron ore is not contrary to law.²⁷

With regards to Tata’s proprietary price quote, the GOI’s comments provide no reason for the Department to modify its analysis from the preliminary determination. As explained in the Other Issues Preliminary Determination, there is insufficient information on the record to determine what the price represents. It is unclear as to whether it is a price quote or an actual transaction price. The record also does not identify the purchaser. There is no information on the record identifying what or who the entity is.

Furthermore, the price quote provided by Tata is proprietary. The price quote provided by Tata contains data that are so limited in scope that if the Department used it as a benchmark, the proprietary numbers provided in the quote could be reverse calculated by the companies to which the Tata-based benchmark would be applied. Because the Department cannot use this proprietary price quote without making it easily susceptible to disclosure, and because the Department does not have Tata’s specific permission to disclose its prices, the Department cannot use the March 4, 2006 price quote as a benchmark.

The issue is moot with regards to the GOI’s argument that the Department should at least consider Tata’s proprietary price quote to calculate applicable duty rates for Tata. The proprietary price quote is not an actual transaction, as described above, moreover Tata did not purchase high-grade iron from NMDC during the 2006 administrative review and it was not a mandatory respondent in the 2004 or 2007 administrative reviews. Tata failed to respond as a mandatory respondent in the 2008 administrative review and we applied AFA. Thus, no changes are necessary to Tata’s rates with regards to this issue.

Notwithstanding the regulatory preference for the use of market-determined prices stemming from actual transactions in the country, where the Department finds that there is no information on the record of actual transaction prices between private parties in India, imports, or sales from government auction,²⁸ we are required under our regulations at 19 CFR 351.511 to turn next to “tier two” in our benchmarking hierarchy, *i.e.*, to derive our benchmark from available world market prices. Specifically, where we have found that market-determined prices are unavailable in the domestic market, the regulation states that we “*will seek to measure the adequacy of remuneration by comparing the government price to a world market price ...*” *See* 19 CFR

²⁷ *See United States Steel Corporation v. United States; Essar Steel Limited v. United States*, Consol. Court No. 08-00239, Slip Op. 09-152 (CIT December 30, 2009).

²⁸ *See CVD Preamble*, 63 FR at 65377.

351.511(a)(2)(ii). (Emphasis added). Thus, in the absence of suitable Tier I prices, we correctly derived a benchmark in the Other Issues Preliminary Determination using Tier II prices from Australia, as listed in the *Tex Report*.²⁹

Comment 4: Iron Ore Benchmarks

B. NMDC's export price to Japan

GOI's Arguments

- The AB while stating that NMDC's export prices should be used with caution did not allow the Department to completely exclude NMDC's export prices as a benchmark price. The AB permitted the Department to exclude the "financial contribution at issue" and not the prices of the "public body at issue." The GOI submits that there is a difference between the two inasmuch the former refers to the transaction(s) that is challenged as a subsidy and the latter refers to the entity that is allegedly responsible for that subsidy. The "financial contribution at issue" is the alleged sale of iron ore by NMDC to domestic producers in India for less than adequate remuneration (LTAR), whereas the export transactions of NMDC to Japan, while originating from the same public body, are not the "financial contribution at issue." The Department has failed to appreciate that the term "financial contribution" is used in Article 1.1(a)(1) of the SCM Agreement and the AB was using the term in that sense. Under Article 1.1(a)(1), as is relevant and applicable to this instant case, the "financial contribution" is the alleged provision of goods for LTAR.³⁰
- The AB was clear that the prices in the "financial contribution at issue" are suspect and therefore, such prices itself could not be used to assess whether they are in accordance with market conditions. At the same time, the AB observed that "[w]hile there may be reasons to exclude an export price of a government provider in determining an alternative benchmark; we are not persuaded that an investigating authority can presume that the export price set by a government provider is inherently unreliable. This must be proven on the basis of evidence that an investigating authority must examine so that it may base its determination on positive evidence on the record.
- The Panel and the AB found the Department's rejection of export prices to Japan to be WTO-inconsistent. The Department has simply failed to cure this inconsistency in its preliminary determination since no reasoned and adequate explanation as to why other world market prices are more appropriate than NMDC's export prices to Japan, especially when NMDC's export prices was previously used in the 2004 administrative review as a benchmark. This is particularly the case where the Department has been willing to use prices quoted in the *Tex Reports* as reflective of world market prices and NMDC's export prices to Japan are included within such *Tex Reports*.

²⁹ See 2004 *Final Results* and accompanying Issues and Decision Memorandum at Comment 2; 2006 *Final Results* and accompanying Issues and Decision Memorandum at Section I.A.4; 2007 *Final Results* and accompanying Issues and Decision Memorandum at Section IV.A.3.

³⁰ See *AB Report* at para. 4.287.

Essar's Arguments

- In the 2007 administrative review, Essar explained that NMDC sold iron ore on the open export market to an unaffiliated party. The Department accepted prices from a similar transaction in the 2004 administrative review, however, the Department disregarded these prices in the 2007 administrative review because it had determined that the NMDC was a public body and that it would be inappropriate to use prices from “the very public body whose iron ore for LTAR program {the Department} is evaluating.”
- The Department *per se* excluded the NMDC export price because it came from the NMDC, however, the AB concluding that such prices could not simply be presumed to be unreliable, stating “we do not consider the fact that a government provider may set its export prices in pursuit of public policy objectives, rather than market-based profit maximization, permits a *per se* conclusion that Article 14(d) does not require the consideration of any export price of government providers for purposes of determining an alternative benchmark.”³¹ The AB stated that the Department must prove that such prices are unreliable based on positive evidence on the record. The AB also noted that the Department had used the NMDC export prices in its 2004 determination but did not explain why such prices were no longer viable for use as a Tier II benchmark in the 2007 determination and has again not provided an explanation in the section 129 Preliminary Determination.

Parties did not provide rebuttal comments to this issue.

Department's Position: Citing to the *AB Report*, the GOI argues that the Department “may not presume that the export price set by a government provider is inherently unreliable” and that such a conclusion “must be proven on the basis of evidence that an investigating authority must examine so that it may base its determination on positive evidence on the records.”³² However, in making this statement, the AB also notes that “there may be reasons to exclude an export price of a government provider in determining an alternative benchmark,”³³ and elsewhere in the *AB Report*, the AB states that an investigating authority, in selecting a Tier II benchmark under Article 14(d) of the SCM Agreement, would approach export prices of the very government provider under investigation “with caution.”³⁴ Thus, the AB found that the Department must explain why its decision to exclude the NMDC's export prices were “reasoned,” “adequate,” and “based on information contained in the record.”³⁵ As in the Other Issues Preliminary Determination, we explain why it was appropriate for the Department to exclude the export prices charged by the NMDC to foreign buyers from consideration as a Tier II benchmark for NMDC domestic prices.

The *AB Report* makes clear that the prices charged by the government-related entity under examination may not serve as a viable benchmark source. The GOI argues that the AB's analysis only permits the Department to exclude the “financial contribution at issue” (which it claims in this case would be the high-grade iron prices charged by the NMDC to the respondent

³¹ See *AB Report* at para 4.287.

³² See *AB Report* at 4.287.

³³ *Id.*

³⁴ See *AB Report* at 4.290.

³⁵ *Id.*

firms) and not any other prices charged by the public body at issue (e.g., other prices charged by the NMDC to firms other than those under examination in the CVD proceedings at issue). However, in making this argument the GOI does not acknowledge the *AB Report's* clarification of its use of the phrase “government-related prices other than the financial contribution at issue,” which the AB states:

. . . is intended to capture prices other than the financial contribution at issue which are provided by other government-related entities. . . we use the term “government-related entities” to refer to all government bodies (whether national or regional), public bodies, and any other government-owned entities for which there has not been a “public body” determination.³⁶

In other words, the AB found that only government prices charged by “government-related entities” other than those charged by the public body providing the financial contribution at issue potentially may serve as a viable benchmark source. In particular, the AB states, “[I]t is inherently circular to require that the very government price that investigating authorities are seeking to test against the market be used as the market benchmark for the purposes of Article 14(d).”³⁷ As noted in the Other Issues Preliminary Determination, the only “government prices” charged by a “government-related entity” on the record of the proceedings at issue are those charged by the NMDC.³⁸ Thus, by the AB’s own reasoning, we find that the NMDC’s export prices do not constitute a viable benchmark price. The AB makes its findings regarding the use of “government-related prices” other than the financial contribution at issue” in the context of section 4.4.1.3.4 of the *AB Report*, which addressed “Government-Related Prices Under Tier I of the U.S. Benchmarking Mechanism.”

The manner in which the NMDC is owned and controlled further supports the Department’s decision not use its export prices as the basis for the Tier II benchmark. In the 2004 administrative review, the GOI divulged at verification that the iron ore extracted from the NMDC’s Bailadila mines are very rich in iron content and, for this reason, “the government does not want all of it to be exported.”³⁹ Thus, while low grade iron-ore may be “freely exported,” the GOI, per an export bulletin, imposed a “canalization restriction” on the exportation of high-grade iron-ore.⁴⁰ GOI officials indicated that “canalization restrictions” were export restrictions in which the GOI capped the volume of the NMDC’s high grade iron that could leave the country and designated the MMTC, a trading company, as the sole firm eligible to export the NMDC’s high grade iron.⁴¹ Additionally, during the verification conducted as part of the 2004 administrative review, the GOI divulged that “The Ministry of Commerce monitors the export of

³⁶ See *AB Report* para 4.1665 at footnote 770.

³⁷ *Id.*

³⁸ See Other Issues Preliminary Determination at 13.

³⁹ See Memorandum to Eric B. Greynolds, Program Manager, Office 3, Operations, “Verification of the Questionnaire Responses Submitted by the Government of India,” January 3, 2006 (2004 Review GOI Verification Report) at 8.

⁴⁰ *Id.*

⁴¹ *Id.*

high grade through the MMTC and the MMTC keeps records of all high grade iron ore that is exported to make sure that Bailadila {mine} does not exceed its caps.”⁴²

The GOI was able to ensure that its “canalization” efforts were followed by means of its pervasive control over the NMDC and the MMTC. As discussed above, the record demonstrates that as of 2004 the NMDC was 98 percent owned by the GOI and “governed” by the Ministry of Steel.⁴³ Further, as of 2004, the NMDC’s Board of Directors consisted of 12 directors. Of these directors, there was a Board Chairman (or managing director) and four functional directors. These five directors served full-time and were selected by the Public Enterprises Selection Board (PESB), which is part of the GOI’s Department of Public Enterprises (DPE).⁴⁴ Additionally, NMDC’s board consisted of two part-time directors from the Ministry of Steel who were appointed by the Ministry, four outside part-time directors, and a part-time director from the Minerals & Metals Trading Corporation (MMTC).⁴⁵ Thus, the record indicates that as of 2004, eight of the NMDC’s 12 directors were appointed by GOI authorities and that of these eight directors, three directors were employed by a GOI Ministry or GOI-owned and controlled firm.

Concerning the MMTC, the record demonstrates similar control by the GOI. As of 2004, the GOI held 99.4 percent of the company.⁴⁶ Further, as of 2004, MMTC’s board consisted of nine directors comprised of four functional directors (who were appointed by the GOI’s DPE and PESB), two part-time directors from the Ministry of Commerce, a managing director, a finance director, and a director from the NMDC.⁴⁷ Thus, as of 2004, seven of the MMTC’s nine directors were appointed by GOI entities and that of these seven directors three were employed by a GOI Ministry or GOI-owned and controlled firm.⁴⁸

Furthermore, the record indicates that the directors at the NMDC and MMTC were not mere figure heads but rather played key roles at the company. Of particular importance to the instant proceedings is the fact that NMDC directors were directly involved in the price negotiations with potential foreign buyers.⁴⁹ The GOI’s influence over the NMDC and MMTC is further revealed by MMTC’s officials’ description of the relationship the NMDC and MMTC have with the GOI. At the verification conducted as part of the 2004 review, MMTC officials stated that with regard to the firms’ relationship with the GOI “there is a give and take policy, whereby the directors from the Ministry give input on National Policy during board meetings, and the MMTC informs the GOI of issues or concerns that the company holds.”⁵⁰ Additionally, at the verification, an official from the Ministry of Steel stated that “because the MMTC and NMDC provide a specific service to the people, they are monitored and reviewed by the government, as they are viewed as strategic companies.”⁵¹

⁴² See 2004 Review GOI Verification Report at 8.

⁴³ See *Id.* at 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *Id.* at 8.

⁴⁷ *Id.* at 9.

⁴⁸ *Id.*

⁴⁹ See *Id.* at 6.

⁵⁰ *Id.* at 9.

⁵¹ *Id.*

As discussed above and in Comment 5, the record demonstrates that the GOI not only owns but also has operational control over the NMDC. The record further demonstrates that the GOI appointed directors at the NMDC not only set export prices but that the GOI, through its “canalization” policy, exercises its control of the supply and demand of high grade iron ore that the NMDC sells in the Indian and global market. Such actions are not mere presumptions of control, but constitute an actual means by which the GOI shapes the market for high grade iron ore.

In sum, due to (1) the extensive government ownership of the NMDC and MMTC, (2) the fact that the corporate leadership of these two firms were dominated by GOI-appointed officials (many of whom were themselves GOI employees), (3) these corporate directors played a key role in setting the export prices charged by the NMDC and the MMTC, (4) the information discovered at verification indicates that the GOI imposed direct control over the volume of high-grade iron that the NMDC/MMTC could export abroad, and (5) the statements at verification made by Ministry of Steel officials that the NMDC and MMTC are “strategic companies” whose operations are “closely monitored” by the GOI, the Department finds that the NMDC’s export prices are set with GOI policy considerations⁵² in mind and, therefore, record evidence establishes that they are unreliable as a viable Tier II benchmark. As a result, based on the facts of the record (and not on mere presumption of unreliability) we continue to find that the world market prices for high-grade iron ore from Australia and Brazil are the most appropriate benchmark available on the record and better reflect prevailing market conditions. As noted here, the GOI is intervening with regard to the supply and demand of iron ore sold by NMDC. Thus, we find that the prices from the NMDC do not represent prevailing market conditions in India because the conditions of the market are being influenced by the GOI’s policy considerations and actions, as describe above, rather than by the activity of unfettered participants in a private market.

Lastly, in regard to Essar’s arguments, the AB Report found that the Department failed to “adequately explain” its inconsistent treatment of the NMDC’s export prices in the 2004 administrative review, on the one hand, and in the 2006, 2007, and 2008 administrative reviews, on the other hand.⁵³ On this point, the Department’s decision to strip out the NMDC prices from the *Tex Report* prices used to derive a Tier II iron ore benchmark is simply a matter of the Department refining its approach from one review to another. In this case of 2004 and 2006 reviews, no party had squarely addressed the issue of whether it was appropriate for the Department to include export prices charged by the NMDC in the calculation of the Tier II benchmark. Nevertheless, the Department, upon further consideration of the issue, indicated in the *2006 Final Results of HRS from India* that because the NMDC export prices contained in the *Tex Report* constituted prices from the very provider of the financial contribution at issue, we would limit the Tier II benchmark price to iron ore prices from non-NMDC sources (*e.g.*, the prices from Hamersley, Australia). Moreover, rather than constitute a change in its practice, the Department’s decision in the 2006 review to remove the NMDC’s export prices from the Tier II

⁵² See Comment 5: NMDC as a Public Body and Comment 6: Mining of Iron Ore for additional discussion on iron ore.

⁵³ See *AB Report* at para.4.291.

benchmark price moved its benchmark calculation into line with its standard benchmark methodology.

Comment 5: NMDC as a Public Body

GOI's Arguments

- The Department is required to establish whether and how the NMDC “possesses, exercises or is vested with governmental authority.”⁵⁴ The Department, on the contrary, has simply asserted and assumed that the NMDC is “vested with government authority,” with no explanation of what is meant by “governmental authority” or on what basis the Department determined NMDC to be allegedly “vested with governmental authority.”⁵⁵
- The *AB Report* reiterated the legal standards arising from the AB’s earlier ruling in DS379.⁵⁶ The Department issued a “Public Bodies Memorandum” dated May 18, 2012, to comply with its section 129 proceeding for DS379. The Department cannot apply two different legal frameworks in the analysis of a “public body.” The Department is inconsistent with its own prior practice on the applicable law governing “public body” as arising from WTO jurisprudence.
- The Department has not provided positive evidence that the NMDC is performing a “governmental function,” but has come to the conclusion that the GOI is involved in the day-to-day operations of NMDC based on the GOI’s shareholding, the power to appoint and nominate the board of directors, and the reference on the NMDC’s website indicating that the NMDC is under “administrative control” of the GOI. The AB has found these three factors insufficient for NMDC to be considered as a body possessing, exercising, or being vested with governmental authority.
- The Department’s 2004 Review GOI Verification Report supports the conclusion that 8 of the 12 directors on NMDC’s board, *i.e.*, a majority, are not government appointees and have no allegiance to the GOI inasmuch as their salaries are from the profits of the NMDC and not the GOI. Further, in the 2007 administrative review, Essar submitted on the record that 7 of the 13 members of the NMDC’s board were independent directors.⁵⁷ In its questionnaire response for the 2004 administrative review the GOI indicated that the 8 independent directors are required to comply with the corporate governance norms of the national stock markets regulator, *i.e.*, Securities and Exchange Board of India.⁵⁸ Therefore, the board of the NMDC was and continues not to be majority controlled by the GOI.
- The GOI is not involved in the day-to-day operations of the NMDC. In its 2004 SQR, the GOI indicated that the chairman and managing director of the NMDC constitute a committee of directors to carry out negotiations with various domestic customers on price.⁵⁹ The Department’s 2004 Review GOI Verification Report observed that GOI

⁵⁴ See *AB Report* at para 4.9

⁵⁵ See Other Issues Preliminary Determination at 7.

⁵⁶ See *AB Report* at para. 4.37.

⁵⁷ See *2007 Final Results* and accompanying Issues and Decision Memorandum (IDM) at Comment I 0.

⁵⁸ See GOI’s 2004 administrative review (AR) supplemental questionnaire response (SQR) (September 2, 2005) at 4.

⁵⁹ *Id.* at 4.

officials describe how prices are set by the NMDC. The NMDC reviews the market situation, such as supply and demand of the market. The NMDC indicated that the Ministry of Steel does not play a role in setting the prices of iron ore.⁶⁰

- The Department has not engaged in any meaningful investigation on the “Miniratna” status of the NMDC. The Department was under an obligation to have sought out the required clarification or information to properly investigate this aspect in a reasonable and objective manner. The GOI asserts during the original proceedings in the 2004, 2006 and 2007 administrative reviews, the Department followed the erstwhile WTO-inconsistent test relying only on the alleged majority control of NMDC’s shareholding, and therefore, the Department ignored every other evidence. The Department cannot now seek to overcome this inconsistency by simply dismissing the relevance of ‘ratna’ status by stating that evidence on record did not clarify the meaning and implication of this.

Essar’s Arguments

- The AB found that the Department only examined evidence that “would be seen more appropriately as evidence of ‘formal indicia of control’ such as the GOI’s ownership interest in the NMDC and the GOI’s power to appoint or nominate directors.”
- The Department found that because the GOI treated the NMDC as a public body and because NMDC is exploiting public resources on behalf of the Indian government, therefore, the GOI exercises meaningful control over the NMDC. However, the AB found that the Department must determine the extent to which the GOI exercised meaningful control over the NMDC.
- In the Other Issues Preliminary Determination, the Department provided a revised argument for NMDC’s status as a public body, citing the fact that 98 percent of NMDC’s shares are owned by the GOI, the NMDC is governed by the GOI’s Ministry of Steel, the NMDC is under the administrative control of the Department of Steel under the Ministry of Steel & Mines, the NMDC was accorded the status of a “Public Sector Company by the GOI’s ‘Mini Ratna,’” and the GOI treated the NMDC as a public sector company and was sufficiently involved in its day-to-day operations. These are merely the indicia of the functional control that the AB determined was not sufficient to confer public body status as required by Article 1.1(a)(1).

Petitioner’s Rebuttal Arguments

- In the Other Issues Preliminary Determination, the Department evaluated the relationship between the GOI and the NMDC and confirmed that NMDC is a public body by sufficiently addressing “the extent to which the GOI in fact ‘exercised’ meaningful control over the NMDC and over its conduct.”
- The Department applied the framework described in the AB report for determining a “public body” and demonstrated that the NMDC possesses, exercises or is vested with government authority by specifically explaining that “as 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

⁶⁰ See Memorandum to Eric Greynolds, “Countervailing Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India: Verification of the Questionnaire Responses Submitted by the Government of India,” (January 3, 2006) (2004 Review GOI Verification Report) at 6.

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 materials.’”⁶¹ Together with government ownership and appointment of a majority of the members of the NMDC’s Board of Directors, the Department fully addressed the AB’s concern that the Department had not originally satisfied the evidentiary standard that a government must exercise meaningful control over an entity and its conduct to be considered a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.

Department’s Position: We disagree with the GOI and Essar’s assertion that the Department has failed to demonstrate the NMDC is a government authority within the meaning of section 771(5)(B) of the Act, and, thus, a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. We also disagree with the GOI’s argument that the Department’s reasoning here is inconsistent with the AB’s findings and with the Department’s prior practice on the applicable law governing a “public body” determination.

In the *AB Report*, the AB stated that “the Panel reviewed some indicia of control by the GOI (such as shareholding and the GOI’s involvement in the selection of directors), but did not address the question of whether there was evidence that the NMDC was performing governmental functions on behalf of the GOI.”⁶² However, the Department’s analysis in *Other Issues Preliminary Determination* shows that the NMDC is vested with governmental authority and providing a governmental function in India. The GOI owns 98.38% of the NMDC and that the remaining shares are owned by financial institutions, private shareholders, and employees of the company.⁶³ Beyond the GOI’s majority ownership, the record shows that the government is exercising meaningful control over the NMDC, wherein the NMDC possesses, exercises, or is vested with governmental authority. In particular, NMDC, a state-owned mining company, was governed by the GOI’s India’s Ministry of Steel⁶⁴ -- the NMDC’s 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; and NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel, {and} Government of India.”⁶⁵ As described in the *Other Issues Preliminary Determination*, the Indian government (*i.e.*, the state and federal governments), owns all the

⁶¹ See Letter to Secretary Gutierrez, “Third Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India,” (May 2, 2005) (2004 New Subsidies Allegation) at Exhibit 6 page 2.

⁶² See *AB Report* at para. 4.42.

⁶³ See GOI’s supplemental questionnaire response (SQR) (September 2, 2005); see also *Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 FR 1512 (January 10, 2006) (2004 Preliminary Results); *Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Preliminary Results of Countervailing Duty Administrative Review*, 73 FR 1578 (January 9, 2008) (2006 Preliminary Results); *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review*, 73 FR 79791 (December 30, 2008)(2007 Review Preliminary Results); *Certain Hot-Rolled Carbon Steel Flat Products from India: Preliminary Results of Countervailing Duty Administrative Review*, 75 FR 1495 (January 11, 2010) (2008 Preliminary Results).

⁶⁴ See 2004 Preliminary Results 71 FR at 1516; 2006 Preliminary Results, 71 FR 1586-1587; See also 2007 Final Results and accompanying Issues and Decision Memorandum at Comment 10; 2008 Preliminary Results, 75 FR at 1503.

⁶⁵ See Letter to Secretary Gutierrez, “Third Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India,” (May 2, 2005) (2004 New Subsidies Allegation) at Exhibit 6 page 2.

mineral resources on behalf of the Indian public, and for iron ore, which is listed as Schedule 1 mineral, the federal Indian government must approve all mining leases.⁶⁶ As explained in the Other Issues Preliminary Determination, 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.⁶⁷ Moreover, as explained further below, the GOI exercises meaningful control of the NMDC through the appointment of the board of directors. In particular, the directors act on the behalf of the GOI in the day-to-day operations of the NMDC.

The record evidence does not support the GOI's assertion that the GOI does not have majority control of NMDC's board of directors, or that the directors are independent. At the 2004 verification, GOI officials explained that a board, Public Enterprise Selection Board (PESB), within the Department of Public Enterprises (DPE), which is a part of the GOI, selects the chairman or managing director and four functional directors who are full time directors.⁶⁸ The GOI further explained at verification, that two part-time directors on NMDC's board are officials from the Ministry of Steel; a part-time director from the MMTC, India's largest trading company; and four outside part-time directors for a total of 12 directors.⁶⁹ The GOI appoints eight of the twelve directors, of which two are Ministry of Steel officials. As noted above, one part-time director is from the MMTC. The MMTC is 99.4 percent owned by the GOI; with four functional directors all appointed by the same GOI bodies, the DPE and PESB, as NMDC; two part-time directors are officials from the Ministry of Commerce; a chairman, a director of finance, and the chairman of the NMDC also sits on the board of MMTC.⁷⁰ The GOI's argument that certain directors on NMDC's board are independent is not fully supported by the record, and the GOI is unable to point to any evidence contradicting the 2004 verification findings regarding the appointment of board members by the GOI.⁷¹ The GOI's argument that the NMDC is not meaningfully controlled by the GOI remains unpersuasive.

Furthermore, at the verification, NMDC officials explained the administrative duties of the directors. The directors, not NMDC staff members, hold negotiations with customers to discuss price and quantity. The chairman approves negotiation and then contracts are submitted to the Board for ratification.⁷² This demonstrates that the board members, particularly the chairman, which is appointed by the GOI, are not mere observers but active and involved in the day-to-day operations of the NMDC on the GOI's behalf. Further, the record shows that the chairman of NMDC, in line with governmental policies and as part of the Expert Group on Preferential Grants of Mining Leases, recommended that except for long term contracts, the export of iron ore not be allowed.⁷³ Contrary to the GOI's assertion that prices are determined by the supply and demand of the market, NMDC described at verification that there are export restrictions in

⁶⁶ See Letter to Secretary Gutierrez, "Fifth Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India," (May 23, 2007) (JSW 2006 New Subsidy Allegation) at Exhibit 31: *The Report of the "Expert Group" on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore* at page 79 (*Dang Report*)

⁶⁷ See 2004 New Subsidies Allegation at Exhibit 6 page 2.

⁶⁸ See 2004 Review GOI Verification Report at 5.

⁶⁹ *Id.* at 5 - 6.

⁷⁰ *Id.* at 9.

⁷¹ GOI Case Brief at 18.

⁷² See 2004 Review Verification Report at 6.

⁷³ See *Dang Report* at 185.

place for high-grade iron ore with a high Fe content.⁷⁴ Furthermore as described in Comment 4B, NMDC is a “strategic compan{y}” whose GOI appointed directors not only negotiate contracts with customers, but also closely monitor the supply and demand of iron ore which constitutes the GOI’s involvement in NMDC’s day-to-day operations. We find that the prices from the NMDC do not represent prevailing market conditions in India because the conditions of the market are being influenced by the GOI’s policy considerations and actions, as described above, rather than by the activity of unfettered participants in a private market.

With respect to the NMDC’s “Mini Ratna” categorization, the GOI does not point to supporting record evidence that shows that this categorization reflects “enhanced autonomy” on the part of the NMDC. The Department disagrees that the record was deficient regarding NMDC’s “Mini Ratna” status as it related to NMDC’s autonomy. Indeed, the record shows that NMDC’s management and day-to-day operations remained under the control of the GOI, and that NMDC provided a governmental function in the legal order of India. The Department’s analysis in the Other Issues Preliminary Determination and above goes beyond the “mere formal indicia of control” such as majority ownership, and establishes that the government is exercising meaningful control over the NMDC, wherein the NMDC possesses, exercises, or is vested with governmental authority.

Accordingly, we disagree with the GOI’s argument that we have reiterated our previous findings on the public body status of NMDC without further analysis. Rather, our determination in this proceeding cites ample record evidence to demonstrate the NMDC’s public body status. In conclusion, we do not agree with arguments presented in the GOI and Essar’s case brief and hereby adopt the preliminary determination with respect to public bodies in Other Issues Preliminary Determination for this final determination. We have determined that a change to the Department’s original findings is not warranted and we continue to find the NMDC is a governmental authority within the meaning of section 771(5)(B) of the Act, and thus a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.

Comment 6: Mining Rights of Iron Ore

GOI’s Arguments

- The Department initiated a new subsidy allegation during the 2006 administrative review on captive mining rights and found the program *de facto* specific in the preliminary determination of this section 129 proceeding. The Department’s attempt to change the program on which it initiated the investigation in the present proceedings is against the statutory mandate of section 702 of the Act and against the Federal Circuit’s mandate on the scope of the section 129 proceedings. The record does not indicate that the Department has initiated an investigation for “mining of iron ore” under section 702(a) of the Act nor does the record indicate that a petition was filed under section 702(b) of the Act regarding “mining of iron ore.” The belated attempt by the Department to change the nomenclature of the program is a deliberate attempt to circumvent the recommendations of the DSB in DS436.
- The Federal Circuit concluded that a section 129’s limited reference to making the action not

⁷⁴ See 2004 Review GOI Verification Report at 8.

inconsistent with the findings of the AB leans toward precluding the Department from revisiting issues not raised before the WTO.⁷⁵ Any attempt to change the program, on which the Department conducted its investigation and which was a subject matter of dispute at the WTO, in section 129 proceedings is contrary to Department's own position and the mandate of the Federal Circuit.

- The Department's specificity preliminary determination is contrary to the evidence on the record. Exhibit 12 of the verification report of Tata from the 2006 administrative review contains the total concession for iron ore granted by the GOI during the POR to various parties. The evidence establishes that the grant of mining rights for iron ore was not restricted to just steel producers and that a large number of leases for iron ore mining were granted during the POR to various entities, including steelmakers and stand-alone miners.
- The *Dang Report* and the *Hoda Report* indicate that a majority of mining rights were granted to companies that are not "captively" consuming iron ore.⁷⁶
- Contrary to the Department's preliminary determination, "mining leases for iron" rights are not predominantly granted to steel producers and the predominant users of such concessions are independent miners. Therefore, the requirements of section 771(5A)(D)(iii)(I) of the Act have not been met in the present case and the Department's finding of *de facto* specificity is inconsistent with the U.S.'s WTO obligations.
- The Department relies on selective quotes from the *Hoda Report* and the *Dang Report* to support the existence of captive mining, however, the Panel, after extensive appraisal of the contents of the *Hoda Report*, observed that the existence of captive mining did not demonstrate the existence of a Captive Mining of Iron Ore Program, or any policy in favor of captive mining. The granting of mining leases for iron ore is not limited to steel producers and therefore is not specific and the Department's preliminary determination continues to be inconsistent with the DSB's recommendations in DS436.

No parties provided rebuttal comments with regards to this issue.

Department's Position: We disagree with the GOI's assertion that the Department's preliminary determination continues to be inconsistent with the DSB's recommendation.

We disagree with the GOI's argument that the Department is unable to revise a program that it initiated upon in the 2006 administrative review. The GOI argues that the Department incorrectly applied its authority under section 702(b) of the Act because the Department did not initiate on the new subsidy with respect to "mining of iron ore" but rather was based on a subsidy program labeled "Captive Mining of Iron Ore".

⁷⁵ See 603 F.3d 928, 934 (Fed. Cir. 2010).

⁷⁶ See Letter to Secretary Gutierrez, "Fifth Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India," dated May 23, 2007 (Tata 2006 New Subsidy Allegation) at Exhibit 10: *National Mineral Policy, Report of the High Level Committee (Hoda Report)* at 149. See also Letter to Secretary Gutierrez, "Fifth Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India," (May 23, 2007) (JSW 2006 New Subsidy Allegation) at Exhibit 31: *The Report of the "Expert Group" on Preferential Grant of Mining Leases for Iron Ore, Manganese Ore and Chrome Ore, (Dang Report)* at 50.

The GOI's claim that any attempt to change the program, on which the Department conducted its investigation, and which was the subject matter of the dispute at the WTO, in these section 129 proceedings would be contrary to Department's own position and the mandate of the Federal Circuit fundamentally misconstrues the role and function of a section 129 proceeding. In this proceeding the Department is reevaluating the evidence on record and examining the GOI's provision of all iron ore mining rights, including captive and non-captive iron ore mines, and presenting arguments regarding the specificity of mining rights of iron ore. Nothing in U.S. law, or based upon any Federal Circuit decision, prohibits the Department from re-examining the subsidy program in a section 129 proceeding that was at issue in a WTO dispute, as we have done here. The GOI also misconstrues the role of an investigation when it argues that a subsidy program alleged and initiated upon cannot be revised based upon the information gathered and obtained in the course of an investigation. According to India, a change in the nomenclature of the program should mean the Department is legally barred from examining the program further, and prohibited from providing the domestic industry with the statutory relief it is otherwise entitled. This position appears to be based on the belief that a panel finding of inconsistency with the SCM Agreement entitles the GOI to removal of the subsidy program from the administrative review, rather than affording the Member the opportunity to bring the measure into conformity with its obligations, which is the function of a 129 proceeding.

With respect to a CVD proceeding, petitioners may submit subsidy allegations based on reasonably publicly available information, and the Department may amend and adjust its analysis of an alleged program based on information gathered and obtained during the course of the proceeding, including proprietary information provided by the examined respondents and the government of the exporting country.⁷⁷ For example, in *LWR Pipe and Tube from China*, we initially investigated a program of land for less than adequate remuneration and then upon examination discovered that the program was in fact a grant.⁷⁸

Moreover, the Department's 129 determination here is distinguished from the Federal Circuit court decision that the GOI cites, *ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States*.⁷⁹ In that case, the question of whether a ministerial error in the original investigation that a respondent raised for the first time in a section 129 proceeding section falls within the scope of a section 129 determination. The court deferred to the Department's interpretation of the statute in finding that the consideration of such an error was outside the scope of a section 129 proceeding. The Department disagrees with the GOI's argument that the holding in *ThyssenKrupp* can be analogized to the Department's analysis of the iron ore program in this proceeding.⁸⁰ The issue

⁷⁷ See *Non-Oriented Electrical Steel From the People's Republic of China, the Republic of Korea, and Taiwan: Initiation of Countervailing Duty Investigations*, 78 FR 68412 (November 14, 2013) and accompanying Countervailing Duty Investigation Initiation Checklist: Non-Oriented Electrical Steel from Taiwan at 8; also *Non-Oriented Electrical Steel From Taiwan: Final Affirmative Countervailing Duty Determination*, 79 FR 61602 (October 14, 2014) and accompanying Issues and Decision Memorandum at 15 (During the initiation, we found the program *de facto* specific under section 771(5A)(D)(iii)(I) of the Act, but through our investigation found the program *de facto* specific under section 771(5A)(D)(iii)(III) of the Act.)

⁷⁸ See *Light-Walled Rectangular Pipe and Tube From the People's Republic of China*, 73 FR 35642 (June 24, 2008) (*LWR Pipe and Tube from China*) and accompanying Issues and Decision Memorandum at 9-10.

⁷⁹ See 603 F.3d 928, 934 (Fed. Cir. 2010).

⁸⁰ *Id.*

of the specificity of iron ore mining rights is not a similarly novel issue to the ministerial error in *ThyssenKrupp* because it was the subject of India's dispute before the WTO.⁸¹ Furthermore, in the Panel's analysis of the Department's determination regarding the GOI's provision of coal for LTAR, the Panel concluded that the Department lacked sufficient evidence to countervail the program as originally characterized, but consistent with the principles in such disputes, the Panel left open the option for the Department to adjust its analysis of the program and determine it to be countervailable.⁸²

Accordingly, in this proceeding the Department evaluated information on the record regarding the specificity of the granting of mining rights of iron ore, and finds that the Department's determination on specificity for mining of iron ore is not inconsistent with the findings of the Panel. Specifically, the Department re-examined the record and concludes that the GOI's provision of mining rights was specific in accordance with section 771(5A)(D)(iii)(I) of the Act because the provision of the rights was limited to two industries, specifically steel producers and mining companies.

The GOI argues that mining leases for iron ore are not predominately granted to steel producers. The GOI correctly asserts that the number of iron ore mine leases that are held by vertically integrated steel companies, and are therefore labeled as "captive iron ore mines," generated about 25 percent of the total iron ore production in India in 2004-05, with the remaining production coming from standalone mining companies.⁸³ Based on the smaller share of iron ore production attributed to steel companies, the GOI argues that mining leases for iron ore are not predominately granted to steel producers.

As an initial matter, the Department notes that the information that the GOI refers to is iron ore production by weight, and not the total number of mining leases granted by the GOI.⁸⁴ Therefore, the production numbers only demonstrate the relative level of production of iron ore by steel companies versus the production of iron ore by standalone mining companies, which is based on both the efficiency of iron ore production and the total number of iron ore mining leases held by steel companies and mining companies. The numbers do not indicate the proportion of leases held by steel and mining companies.

Regardless of the iron ore production amounts by steel companies and by standalone mining companies, the Department is not finding specificity of the mining rights of iron ore program on the basis of predominant use. The Department is finding specificity of the mining rights of iron ore program based on the limited number of users. The relevant facts are the GOI provided iron ore mine leases to certain steel and mining entities and the inherent use of iron ore which support the specificity determination of this program. The evidence on record indicates that the leases for iron ore mines granted by the GOI are limited in number and that the GOI grants those leases

⁸¹ See *United States – Countervailing Duty Measures on Certain Hot-Rolled Steel Flat Products from India*, WT/DS436/R (July 14, 2014) (*Panel Report*) at 8.2.b.i and at para. 7.217 and 2.265. See also *AB Report* at 1.7.a.

⁸² See *Panel Report* at footnote 458.

⁸³ See GOI's case brief at 26. See also *Hoda Report* at 149.

⁸⁴ See *Hoda Report* at 149.

to only two industries, *i.e.*, steel makers and mining companies, and thus the GOI's provision of mining rights for iron ore is *de facto* specific under Section 771(5A)(D)(iii)(I) of the Act.

Furthermore, as discussed in the Other Issues Preliminary Determination, evidence on record shows that iron ore's inherent characteristics makes the use of iron ore limited to steel companies as an input for producing steel. The *Hoda Report* states that "iron ore cannot be used for any purpose other than steel making and its intermediates like pig iron and sponge iron."⁸⁵ It requires approximately 1.6 tons of iron ore to produce one ton of steel⁸⁶ and in 2003 and 2004, for example, India produced 122.84 million tons of iron ore, of which 44.97 million tons was used by domestic steel companies to produce 34.25 million tons of crude steel, while the remaining 77.87 million tons was exported or stored as surplus iron ore.⁸⁷ The *Dang Report* estimates that India will need about 600-700 million tons of iron ore to produce 500 million tons of steel, assuming that around 30% of steel is made using scrap.⁸⁸ The report cites other forecasts for the Indian steel industry's demand for iron ore, including a forecast by the GOI which estimates that domestic steel demand will reach 110 million tons by 2020, which will require 200 million tons of iron ore.⁸⁹ Given that the steel industry is the predominant user of iron ore, the GOI's provision of mining rights for iron ore is *de facto* specific under Section 771(5A)(D)(iii)(II) of the Act. The Department relied on considerable evidence found in the *Hoda Report* and the *Dang Report* to support our determination that the GOI's provision of iron ore mining rights is *de facto* specific and we disagree with the GOI's argument that we engaged in "quote min{ing}" by selecting only evidence that supported our determination.

In conclusion, we do not agree with the arguments presented in the GOI's case brief and instead we find that the mining rights of iron ore program is *de facto* specific in each of the four administrative reviews to which this memorandum applies.

Comment 7: Mining of Coal

GOI's Arguments

- The Department is attempting to change the program on which it initiated the investigation in the present proceedings, which is against the statutory mandate of section 702 of the Tariff Act, against the requirements of section 129 of the URAA, and not in compliance with the DSB's recommendations and rulings.
- The record does not indicate that the Department initiated an investigation under section 702(a) of the Act regarding the GOI assuming Tata Steel's coal mine lease under the MMDR Act. The record also does not indicate that a petition was filed under section 702(b) of the Act regarding the GOI assuming the lease under the MMDR Act. The record is clear that the program for which a petition was filed and the program investigated by the Department was "captive mining of coal" pursuant to the Nationalization Act 1973. In this preliminary

⁸⁵ See *Id.* at 159.

⁸⁶ *Id.* at 153.

⁸⁷ See *Id.* at 164.

⁸⁸ See *Dang Report* at 168.

⁸⁹ *Id.* at 175.

determination, the Department has simply omitted all references to the Nationalization Act of 1973, which has no bearing on the lease held by Tata Steel. Therefore, the only logical conclusion is to terminate the investigation in this regard. The belated attempt by the Department to change the program is a deliberate attempt to circumvent the recommendations of the DSB in DS436.

- The Department has not identified any action on the part of the GOI which qualifies as “providing” the coal mine lease to Tata Steel. The GOI notes that in *US – Softwood Lumber IV* the United States defined the term “provides” as meaning, *inter alia*, to “supply or furnish for use; make available,” while the Appellate Body added another definition of “provides” as “to put at the disposal of.” The United States has not identified any action on the part of the GOI that qualifies as “providing” the coal mine lease to Tata Steel. The GOI did not provide coal to Tata Steel through granting a coal mine lease as the lease predates the existence of the GOI, therefore there cannot be a financial contribution under Article 1.1(a)(1)(iii) of the SCM Agreement or Section 777(D)(iii) of the Act.

No other parties provided rebuttal comments on this issue.

Department’s Position: We disagree with the GOI’s assertion that the Department’s preliminary determination is not in accordance with the DSB’s recommendations and rulings.

First, the Department is not legally barred from investigating and making a determination or redetermination on the ground that a subsidy program ruled upon by the Department in its final determination varies from the original subsidy program that was initiated by the Department, pursuant to facts and information obtained by the Department in the course of its investigation. To argue otherwise, as the GOI does here, misconstrues the purpose and function of countervailing duty investigations. The aim of a countervailing duty investigation is not merely to rule upon the countervailability of the particular subsidy program alleged and initiated upon, but rather to gather information to understand the nature of the program and to examine the factual information that pertains to each component that goes into a countervailing duty determination.

In the 2006 administrative review, in response to a new subsidy allegation submitted by Petitioners, the Department investigated the GOI’s provision of coal to Tata Steel for LTAR through the “Captive Mining of Coal” under the Nationalization Act of 1973.⁹⁰ The Panel concluded that the Department lacked a sufficient evidentiary basis to claim that Tata Steel had been granted a coal mining lease under the Nationalization Act of 1973,⁹¹ however, the Panel observed in a footnote, “there would appear to be sufficient evidence on the USDOC’s record for a determination that Tata is presently mining coal under a lease that has validity in Indian law, and could therefore be attributed to the GOI. Provided the relevant requirements of the SCM

⁹⁰ See Memorandum to Melissa G. Skinner, “Countervailing Duty Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India: New Subsidy Allegations for Tata Steel Limited,” (September 27, 2007) at 3-4.

⁹¹ See Panel Report at para. 7.252.

Agreement are complied with, we see no reason why the provision of coal under that lease could not be countervailed.”⁹²

In the instant section 129 proceeding the GOI argues that the Department is attempting to “circumvent the recommendations of the DSB” by changing the program on which it originally initiated an investigation, which is against the statutory mandate of section 702(b) of the Tariff Act and against the Federal Circuit’s interpretation of the scope of section 129 proceedings.⁹³ The Department disagrees. Nothing in U.S. law, or based upon any Federal Circuit decision, prohibits the Department from re-examining the subsidy program in a section 129 proceeding that was at issue in a WTO dispute, as we have done here. The GOI also misconstrues the role of an investigation when it argues that a subsidy program alleged and initiated upon cannot be revised based upon the information gathered and obtained in the course of an investigation. According to India, a change in the nomenclature of the program should mean the Department is legally barred from examining the program further, and prohibited from providing the domestic industry with the statutory relief it is otherwise entitled. This position appears to be based on the belief that a panel finding of inconsistency with the SCM Agreement entitles the GOI to removal of the subsidy program from the administrative review, rather than affording the Member the opportunity to bring the measure into conformity with its obligations, which is the function of a 129 proceeding.

In the instant section 129 proceeding, the Department is reevaluating evidence already on the record, requesting clarification from the GOI and respondents through supplemental questionnaires, and presenting the Department’s arguments regarding financial contribution and *de facto* specificity with respect to the GOI’s provision of a coal mining lease to Tata Steel. As part of this section 129 proceeding, the Department issued supplemental questionnaires to the GOI⁹⁴ and Tata Steel⁹⁵ requesting clarification of evidence on the record regarding the transfer of Tata Steel’s original coal mining lease from the Raja to the GOI and to state governments, and how the lease fits into the GOI’s legal scheme, in order to show that Tata Steel’s coal mine lease has validity in Indian law under the MMDR Act of 1957 and the Bihar Land Reform Act of 1950. Such actions fall within the scope of a section 129 proceeding.

Second, we disagree with the GOI’s argument that it did not “provide” a financial contribution to Tata Steel because the GOI did not grant the coal mining lease to Tata Steel as the lease predates the existence of the GOI itself. The GOI argues that under the ordinary meaning of the term “provides” the Department did not identify any action on the part of the GOI which qualifies as a provision of the financial contribution to Tata Steel.⁹⁶ The record shows that the Raja of Ramgarh, as the original government authority, granted Tata Steel the coal mining lease in 1907. After India’s independence in 1947, the record shows that the GOI replaced the Raja of Ramgarh

⁹² See *Id.* at footnote 458.

⁹³ See GOI’s case brief at 40-41.

⁹⁴ See Department’s Supplemental Questionnaire to GOI (October 27, 2015). See also Department’s Supplemental Questionnaire to GOI (January 12, 2016).

⁹⁵ See Department’s Supplemental Questionnaire to Tata Steel (January 12, 2016).

⁹⁶ The GOI cited a discussion of the term “provides” in the AB Report for *US – Softwood Lumber IV* to support its argument. See GOI’s case brief at 41-42.

as the government authority.⁹⁷ Under Section 10 and Section 10A of the Bihar Land Reform Act of 1950, all existing leases and subleases of mines and minerals, which included the coal mining lease to Bakaro & Ramgur and the sublease to West Bokaro Ltd., the predecessor to Tata Steel, were deemed to have been leased by the State Government of Bihar to the leaseholder.⁹⁸ Accordingly, the GOI recognized the validity of all leases issued by the Raja of Ramgarh.⁹⁹ Under the MMDR Act of 1957, the GOI became the only entity with the ability to provide leases by requiring that all new mining licenses be obtained from the GOI. In addition, the GOI wrote a provision under section 4 of the MMDR Act of 1957 allowing preexisting mining lease holders to continue to hold their leases, effectively exempting them from renegotiated leases with the GOI.¹⁰⁰ The MMDR Act of 1957 and the Bihar Land Reform Act of 1950 defined the status of the coal mine leases in the Indian legal scheme, with Tata Steel as the leaseholder and the state government of Bihar, in place of the former Raja of Ramgarh, as the government authority providing the lease. The effect of the above legislation was that the GOI did not terminate the coal mine lease held by Tata Steel nor did it require Tata Steel to renegotiate the terms of the lease; rather, the GOI legislated an exemption for pre-existing leaseholders, allowing Tata Steel to continue to hold the original coal mine lease and replacing the Raja of Ramgarh with the state government of Bihar as the provider of Tata Steel's coal mine lease. Therefore the Department continues to find that the GOI, in allowing Tata Steel to retain its original coal mine lease, provided a financial contribution within the meaning of Section 771(5) of the Act.

In conclusion, we do not agree with the arguments presented in the GOI's case brief and find the program to be *de facto* specific in the 2006 administrative review to which this memorandum applies.

Comment 8: Administration of Section 129 Proceeding

GOI's Arguments

- The Department has conducted this proceeding in a manner that prejudices the interest of the GOI and other interested parties. In December 2014, the parties agreed to implement the DSB's recommendations but a substantial period of time had passed before the Department appeared to take any action. In a final rush to complete the proceeding, and after seeking an extension of time, the circumstances indicate that the Department prejudged its conclusion on several issues, in particular the public body and benchmark issues, rather than meaningfully comply with the DSB's recommendations.

No other parties provided rebuttal comments on this issue.

⁹⁷ See GOI's SQR (November 10, 2015) at 5-7. See also Panel Report at para. 7.247.

⁹⁸ See GOI's SQR (November 10, 2015) at 5. Section 10A of the Bihar Land Reform Act of 1950 also resulted in West Bokaro Ltd. making the per-unit royalty payments for the coal it mined directly to the State Government of Bihar. See, e.g., GOI's SQR (November 10, 2015) at Exhibit 2 and GOI's SQR (November 20, 2015) at Annexure 2.

⁹⁹ See Tata Steel's SQR (February 8, 2008) at 1.

¹⁰⁰ See GOI's SQR (November 10, 2015) at 7. See also GOI's NSAQR (November 8, 2007) at 71.

Department's Position: The Department provided the GOI with sufficient time to respond to its supplemental questionnaires. The Department gave the GOI 10 days to respond to the October 27, 2015, supplemental questionnaire, and the Department granted an extension of 10 days to respond to question 5 of the questionnaire in order to accommodate an Indian holiday and the demands of gathering old documents.¹⁰¹ Additionally, the Department provided the GOI 10 days to respond to the January 12, 2016, supplemental questionnaire, which it later extended an additional 28 days, after the Department learned that the GOI's counsel had not utilized the correct email address to access the questionnaire via the Department's electronic filing system.¹⁰² In fact, it was this delay that required the Department to extend the reasonable period of time by an additional 30 days.

We disagree that the Department has rushed its decision and prejudiced the interest of the GOI. The Department has carefully weighed all of the record evidence in reaching its conclusions. Furthermore, the Department afforded interested parties an opportunity to submit case and rebuttal briefs and to request a hearing. Concerning the briefing schedule, we provided interested parties the same amount of time to submit briefs as we do in a typical investigation.¹⁰³ Additionally, at the request of the GOI, we conducted a hearing in which the GOI and Essar reiterated the arguments in their briefs.¹⁰⁴

Comment 9: Specificity of Sale of High Grade Iron Ore by NMDC

GOI's Argument

- The Panel found the Department acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take account of all the mandatory factors in its determination of the *de facto* specificity regarding NMDC. In its preliminary determination of this section 129 proceeding, the Department failed to address this issue.

No parties provided rebuttal comments with regards to this issue.

Department's Position: The Department inadvertently did not address this issue in its preliminary determinations but provides its analysis here. Under Article 2.1 (c) of the SCM Agreement, when analyzing whether a domestic subsidy is *de facto* specific, "account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as length of time during which the subsidy programme has been in operation." This language is reflected in section 771(5A)(D)(iii) of the Tariff Act of 1930 (the Act).¹⁰⁵

¹⁰¹ See Department's Supplemental Questionnaire to GOI (October 27, 2015). See also Department's letter to GOI (November 10, 2015).

¹⁰² See Department's Supplemental Questionnaire to GOI (January 12, 2016). See also Department's letter to GOI (February 8, 2016).

¹⁰³ See 19 CFR 351.309(c)(iii) and 19 CFR 351.309(d).

¹⁰⁴ See Memorandum to the File, "Notice of Hearing – Hot-Rolled Carbon Steel Flat Products from India, Section 129 Determination (DS436)," (April 5, 2016).

¹⁰⁵ In order to collect information on the extent of diversification of economic activities, the Department's standard questionnaire for the GOI at I.D. solicits "any bulletins of economic and/or financial statistics published during or since the POR." (The Department also solicits the relevant information regarding length of time. See Section II

The SAA¹⁰⁶ sets forth the standard of analysis for specificity contained in the language of the specificity test: “The Administration intends to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which are truly broadly available and widely used throughout an economy.”

Section 771(5A)(D)(iii) of the Act and Article 2.1(c) of the SCM Agreement states that in analyzing whether a domestic subsidy is *de facto* specific, “account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority.”¹⁰⁷

Whether a subsidy is broadly available and widely used throughout an economy, the extent of economic diversification is an inherent part of the analysis of *de facto* specificity. When the Department finds that a subsidy program is *de facto* specific because there are a limited number of enterprises or industries, that determination is based upon whether the subsidy is broadly available and widely used throughout the economy of the investigated country. In the 2004 administrative review, the Department found the Sale of High-Grade Iron Ore for Less than Adequate Remuneration (LTAR) specific under Section 771(5A)(D)(iii)(I) because the GOI limits actual recipients of the subsidy to industries that use iron, including the steel industry.¹⁰⁸

Accordingly, even if the Department did not explicitly determine in the administrative reviews that the Indian economy is diverse, its *de facto* specificity determinations that the users of high-grade iron ore were limited in number implicitly acknowledged the diversity of the Indian economy. However, because the Panel concluded that it saw “nothing” that the Department had taken account of “the extent of diversification of economic activities within the jurisdiction of the granting authority,”¹⁰⁹ we have explicitly conducted such an analysis in this memorandum.

Diversification of Economic Activities

As noted above, “account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority.” The SCM Agreement does not define “economic activities.” The periods of investigation (POR) for the four cases at issue in the Panel decision are 2004, 2006, 2007, and 2008. Based upon a review of record evidence, the extent of diversification of economic activities does not change the Department’s final determinations of *de facto* specificity in the administrative reviews at issue in the Panel decision.

Standard Questions Appendix, “[d]escribe the nature of the program, when it was established, and the government’s policy behind the program. How is the program administered and how does it operate?” In addition, with respect to *de facto* specificity, the *Standard Questions Appendix*, requests that the GOI “provide a list by industry and by region of the companies which have received benefits under this program in the year the provision of benefits was approved and each of the preceding three years. Provide the total amounts of benefits received by each type of industry in each region in the year the provision of benefits was approved and each of the preceding three years. How many companies have applied for benefits under this program in the year the financial assistance or benefit was approved and each of the preceding three years? How many applicants have received financial assistance/benefit and how many applicants have been rejected in the year the financial assistance/benefit was approved and each of the preceding three years? Please explain why applicants have been rejected.”

¹⁰⁶ See SAA at 929.

¹⁰⁷ Articles 22.3, 22.4, and 22.5 of the SCM Agreement set forth the extent to which this issue is required to be addressed in a preliminary or final determination.

¹⁰⁸ See 2004 Final Results and accompanying Issues and Decision Memorandum at 13.

¹⁰⁹ See Panel Report at para. 7.136.

Based upon the concept and application of specificity, a subsidy program would be found to be *de facto* specific when the subsidy is not broadly available and widely used throughout an economy. Therefore, as in the cases at issue where the Department found the inputs to be specific to a limited number of enterprises or industries, the extent of diversification of economic activities would only be material or relevant when diversification of economic activities does not exist. While a subsidy program that is used by only seven industries may on its face appear to be limited, within a jurisdiction lacking diversification of economic activities, these seven industries may represent the extent of economic activities within that country. As such, subsidies disbursed under the program to these seven industries would be broadly available and widely used throughout an economy, and therefore, would not be *de facto* specific under Article 2.1(c) of the SCM Agreement and section 771(5a)(D)(iii) of the Act. However, within an economically diverse jurisdiction, this subsidy program would be *de facto* specific.

While neither the Act, nor the SCM Agreement, define the term “diversification of economic activities,” diversity within the industrial sector would demonstrate the diversification of economic activities within a country.¹¹⁰ The Reserve Bank of India publishes its annual report, which provides a wealth of information demonstrating the diversification of economic activities within India, including the economic statistics on India’s industrial sector. As noted above the POR for the four cases at issue in the Panel decision range from 2004 through 2008. Therefore we derived information from the Reserve Bank of India’s annual reports for 2005 through 2008, which would have statistical information that covers the 2004 through 2008 administrative reviews, to demonstrate the diversification of economic activities within India.¹¹¹

According to the Reserve Bank of India’s annual reports, there is diversification of the industrial sector in India as this sector is comprised of the following industries and economic activities:¹¹²

- Food Products
- Beverages, tobacco and products
- Cotton textiles

¹¹⁰ We recognize that other factors could be used to show the diversity of economic activities within a country, but the industrial sector is a good source for purposes of these proceedings. For example, the evidence excerpted above demonstrates that India’s economy produces diverse products, such as agriculture and allied activities, industry (of which contains manufacturing; mining and quarrying; and electricity, gas, and water supply), and services (of which contains construction; trade, hotels, transport, storage and communication; finance, insurance, real estate; and community, social and personal services) and this, in turn, demonstrates that there is a broad diversity of economic activities within the Indian economy.

¹¹¹ See Letter from Embassy of India, “Re: Countervailing Duty Administration Review Carbon Hot Rolled Carbon Steel Flat products from India; Subject: Submission of Exhibits,” (July 24, 2007) (GOI SQR) at Exhibit 2: Reserve Bank of India Annual Report 2005-2006 (BOI Annual Report 2005-2006); Letter from Embassy of India, “Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India,” (May 9, 2008) at Exhibit 4: Reserve Bank of India Annual Report 2006-2007 (BOI Annual Report 2006-2007); and Letter from Embassy of India, “Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India,” (April 23, 2009) at Exhibit 4: Reserve Bank of India Annual Report 2007-2008 (BOI Annual Report 2007-2008).

¹¹² See Table 1.5 of the BOI Annual Report 2005-2006, Table 1.8 of the BOI Annual Report 2006-2007, and Table 1.8 of the BOI Annual Report 2007-2008.

- Wool, silk and man-made fibre textiles
- Jute and other vegetable fibre textiles
- Textile products
- Wood and wood products, furniture
- Paper and products and printing
- Leather and leather and fur products
- Chemical and chemical products
- Rubber, plastic, petroleum and coal
- Non-metallic mineral products
- Basic metal and alloy industries
- Metal products and parts
- Machinery and equipment
- Transport equipment and parts
- Other manufacturing industries
- Mining and Quarrying
- Electricity

We have determined that this information reflects diverse economic activities in India, in accordance with the text of Article 2.1(c).¹¹³ An economy which derives income from, for example, an agricultural sector, industries that produces metals, and the production of machinery and equipment is an economy that is diverse. This would be in contrast to an economy, for example, which had only one industrial source of income. Thus, for the provision of goods by NMDC, we have determined in the four administrative reviews at issue, that there does not exist a lack of diversification within the Indian economy that changes the Department's determination that the sale of high-grade iron ore for LTAR program in each of those cases were *de facto* specific.

Length of Time

In addition to considering "the extent of diversification of economic activities," Article 2.1(c) of the SCM Agreement also states that an investigating authority consider "length of time during which the subsidy programme has been in operation." This language mirrors the language in section 771(5A)(D)(iii) of the Act. In order to give consideration to length of time in the Department's analysis of *de facto* specificity, the first question of the *Standard Questions Appendix* of the Countervailing Duty (CVD) Questionnaire requires the government to provide the date the subsidy was established.¹¹⁴ In addition, the *Standard Questions Appendix* requests

¹¹³ See *Panel Report* at 7.136.

¹¹⁴ See Letter to Embassy of India, "Re: Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India; Subject: New Subsidy Allegation Questionnaire," (July 19, 2005) (2004 GOI NSA Questionnaire); Letter to Embassy of India, "Re: Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India; Subject: Issuance of Initial Questionnaire to the Government of India and Indian Firms Subject to Review," (February 2, 2007) (2006 GOI Initial Questionnaire); Letter to Embassy of India, "RE: Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India; Subject: Issuance of Initial Questionnaire to the Government of India and Indian Companies Subject to Review," (February 28, 2008) (2007 GOI Initial Questionnaire); and Letter to Embassy of India, "RE: Countervailing Duty

that the government provide the number of program recipients for a four-year period (the year in which the respondent company was approved for assistance under the program as well as each of the preceding three years).¹¹⁵

The “length of time” language instructs the investigating authority to account for the fact that there may be only a limited number of users because the subsidy program has only been in operation for a limited period of time. A program with a limited number of recipients may not necessarily be *de facto* specific if the subsidy program has only been in effect for a limited period of time. For example, a program may only have 50 users because the program has only been in operation for a few months.¹¹⁶ In the SAA, the issue of new subsidies was also identified: “{t}he Administration interprets the criterion concerning the duration of a subsidy program to mean that where a new subsidy program is recently introduced, it is unreasonable to expect that use of the subsidy will spread throughout the economy in question instantaneously.”¹¹⁷

As noted above, the Department requested information for the three-year period the NMDC provided high-grade iron ore to respondents demonstrating that the subsidy had not been in operation “for a limited period of time only.” The NMDC’s 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, {and} Government of India.”¹¹⁸ The NMDC sold high-grade iron ore in the 2004 administrative review to Essar;¹¹⁹ in the 2006 administrative review to Essar, Ispat, and JSW;¹²⁰ and in the 2007 administrative review to Essar.¹²¹

Thus, for sale of high-grade iron ore for LTAR by NMDC, we have determined that the subsidy program has not been in operation “for a limited period of time only” and, therefore, the length of time in which the subsidy program has been in operation does not change the Department’s determination that the input LTAR program in each of the four relevant cases were *de facto* specific.

Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India; Subject: Issuance of Initial Questionnaire to the Government of India and Indian Companies Subject to Review,” (February 6, 2009) (2008 GOI Initial Questionnaire).

¹¹⁵ *Id.*

¹¹⁶ The discretion factor set forth in subsection 771(5A)(D)(iii)(IV) of the *de facto* provision in the Act “plays a particularly important role in situations involving new subsidies. Where the users of a new subsidy appear to be small in number due to the recent introduction of the program, but an analysis of the discretion factor indicates that the authority administering the program may be favoring certain enterprises or industries over others, a finding of *de facto* specificity would be appropriate.” See SAA at 932.

¹¹⁷ See SAA at 931-932.

¹¹⁸ See Letter to Secretary Gutierrez, “Third Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India,” (May 2, 2005) (2004 New Subsidies Allegation) at Exhibit 6 page 2.

¹¹⁹ See 2004 Final Results and accompanying Issues and Decision Memorandum at 4.

¹²⁰ See 2006 Final Results and accompanying Issues and Decision Memorandum at 16.

¹²¹ See also 2007 Final Results and accompanying Issues and Decision Memorandum at 16.


III. Conclusion

We recommend that you accept the recommendations made above.



Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

14 APRIL 2016
(Date)