DRAFT REPORT

Study on Dual Pricing of Natural Resources

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CHAPTER 1: INTRODUCTION

The issue of preferential pricing of natural resources or 'dual pricing' has been raised by the US and EC in their submissions to the Rules negotiations. The US and EC have noted certain government interventions in the natural resource sector which seek to favour domestic users of the natural resource over international competitors.

These two submissions have broadly identified three practices where a country could resort to preferential pricing of natural resources. A country could control the availability of the natural resource to users outside the country, it could provide the input to domestic users at a price substantially lower than the international market price. Finally a country could price the input differently for exports and for domestic use thereby maintaining a dualistic price structure where exports of the concerned product are priced higher than its corresponding domestic sales. The term 'dual pricing' as elucidated by the US refers to the practice whereby a government maintains a two-price structure for exports and domestic use.

Countries such as the US and EC have taken exception to dual pricing practices because it limits the supply and increases the prices of the raw material to industries in importing countries, which use the raw material in manufacture of the final product. At the same time it benefits the domestic users of the raw material as their domestic production and consequently exports tend to be competitively priced.

This issue, for instance, was examined by the US International Trade Commission (ITC), in 1999 when it investigated whether the competitiveness of US manufacturers of methyl *tertiary*-butyl ether (MTBE) was being affected as a result of MTBE imports from Saudi Arabia. It was the belief of the US MTBE industry that Saudi Arabian manufacturers of MTBE were provided butane (a feedstock) at a substantial discount to world market prices, which was adversely affecting the US domestic industry for MTBE.[1] In 1998 the US was the world's largest manufacturer as well as importer of MTBE. Saudi Arabia was the world's largest exporter.[2]

At issue was Resolution No. 68, issued by the Council of Ministers of the Kingdom of Saudi Arabia on November 25, 1992, which granted national industries using liquid gases (butane, propane-natural gasoline) a 30 percent discount of the lowest international price for liquid gas obtained by the exporting party in any quarterly period from any overseas consumer. Feedstock costs represent a significant portion of MTBE production costs and, hence, it was clearly a matter of concern that Saudi Arabian MTBE producers were receiving it at a considerable discount.

[1] "MTBE: Conditions affecting the domestic industry", Investigation number 332-404, USITC, September 1999, available at www.usitc.gov

[2] See supra at pg. 6. "*The United States is the world's largest producer of MTBE, producing about 3.5 times more in 1998 than Saudi Arabia, the second largest producer. U.S. MTBE production, trade, and consumption all increased during 1994-98. After increasing during 1994, U.S. production capacity remained constant during 1995-98; U.S. capacity utilization rose steadily during 1994-97 to 86 percent before declining to 81 percent in 1998. The United States is both the world's largest importer and consumer of MTBE. Saudi Arabia, the world's largest exporter of MTBE, was the largest source of U.S. imports during 1994-98.*"

The Saudi Basic Industries Corporation (SABIC)[3] which was main producer of MTBE justified the differential pricing on the basis of transportation costs, which were incurred in exporting the product. SABIC also noted that the price was available to domestic users of butane and was made available to all consumers of liquefied gases in Saudi Arabia regardless of their geographical location or company ownership.

The USITC report suggested that this was an issue of dual pricing and would most likely be taken up by the USTR in its accession negotiations with Saudi Arabia. The discussion on Saudi Arabia's accession is included in the latter part of this paper.

I. Uruguay round negotiations

This issue was first raised in the deliberation of the Negotiating Group on Natural Resource Products (NRBP) during the Uruguay Round negotiations wherein the US[4] described dual pricing as any government program, to establish domestic prices for natural resources at some level below the value they would otherwise have if determined by market forces. It was stated that a country need not necessarily maintain two distinct price levels (one for export and one for import) and that a single domestic price kept arbitrarily low by government intervention, or a range of low price levels determined by government fiat would still constitute dual pricing. It was the US stance that by lowering costs, government intervention essentially channeled benefits to certain industries using the resource as a major input into the production of the final product. Thus by benefiting specific industries the action was akin to a traditional subsidy.[5]

It further went onto state that dual pricing would not be effective unless it was combined with some form of restrain on the export of the raw material, because without export restrictions other countries would seek to buy the resource at the lower domestic price thus leading to supply problems and an upward pressure on prices.[6] The US also identified certain non-tariff measures such as export licensing, export restrictions, taxes, prohibitions and embargos and stated that even though some measures were justifiable under GATT Article XI, they nonetheless had trade distortive effects[7]. The US further emphasized that governments used their ownership or control over industries towards furthering of dual pricing practices. In this regard it took note of the practice of countries with respect to natural gas and

[3] See pg. 16 of the USITC Report. SABIC is the main producer of MTBE in Saudi Arabia. As of 1997, it had a total MTBE production capacity of about 63,000 barrels per day through three joint-venture operations. SABIC is primarily a state-held entity, with the Government of Saudi Arabia holding 70 percent of the company's stock and the remaining shares owned by "citizens of Saudi Arabia and other Gulf Cooperation States." See p. 44(i) of the Working Part Report WT/ACC/SAU/61, 1 November 2005, where it is reported that, "In 2002, SABIC's production capacity reached over 40 million metric tons. Eight of SABIC's production companies are joint venture partnerships with international companies, including such firms as ExxonMobil, Shell Oil, Hoechst-Celanese and Duck Energy. SABIC is a partner in three joint ventures in Bahrain and has two manufacturing plants in Germany and Holland. SABIC has an ownership interest in the Saudi Arabian Fertilizer Company, which is an exporter of urea, granular fertilizer and urea fertilizer, and is 57 per cent privately owned. SABIC also fully owns Saudi Iron & Steel Company (Hadeed) which is engaged in the manufacture of a variety of steel products."

[4] MTN.GNG/NG3/W/2, 1 July 1987.

[5] MTN.GNG/NG10/W/20, 15 June 1988.

[6] MTN.GNG/NG10/W/23, 12 July 1989.

[7] *Ibid*.

crude oil pricing and distribution, which conferred an unfair advantage to domestic processing industries[8] and also highlighted petrochemicals and nitrogen fertilizers as being two areas most affected by two tier pricing.[9]

The EC also raised its concerns on dual pricing (or 'reverse dumping' as they called it) and identified it as a practice where raw materials were sold to domestic processors at prices lower than those charged to overseas processors[10]. It also identified quantitative export restrictions and export taxes as causing distortions in trade of raw materials[11].

Another aspect of dual pricing highlighted by the EC consisted of a practice whereby countries maintained higher domestic prices for refined metals compared with world prices. The consequence of such a measure was that it allowed domestic refiners to offer higher prices for imported raw materials and thus overbid their competitors and deprive them of raw materials[12]. This practice had to be necessarily coupled with an import restriction on the refined metal.[13]

In response to EC and US proposals, Australia commented that pricing schemes, which either artificially depress domestic prices for natural resource inputs or artificially raise prices of natural resource based products could be viewed as indirect production subsidies to the further processed product.

The US, supported by the EC, were of the opinion that the issue of 'dual pricing' was unique to NRPs and so characteristic of the trade in this sector that it deserved to be addressed by the Negotiating Group of Natural Resources.[14] Others doubted whether this was a sector specific problem rather than a more generic problem.[15]

As per the two countries, the existing rules did not adequately address the problem[16]. For instance, the practice of dual pricing would not give rise to a countervailable subsidy if available to all industries even though it was aimed at subsidizing domestic industry and consequently exports[17]. Similarly, GATT Article XI, which permitted export taxes, also did not address a dual pricing situation even though it

[8] MTN.GNG/NG3/5, 10 December 1987. Also see, MTN.GNG/NG3/W/8/Rev.1, 14 January 1988.
[9] MTN.GNG/NG3/W/13, 8 June 1988. Also see, MTN.GNG/NG3/W/14, 25 July 1988.
[10] MTN.GNG/NG3/W/4, 9, July 1987. The EC stated that titanium sponge produced in Japan and phosphates produced in Morocco and the US were subject to dual pricing. Also see, MTN.GNG/NG3/W/25, 13 July 1989 where the EC detailed export restrictions, prohibitions, taxes on several natural resources maintained by Members. It specifically highlighted "double pricing" on copper unwrought maintained by Japan and Republic of Korea.
[11] *Ibid*. Also see MTN.GNG/NG3/W/11, 12 February 1988.
[12] Also see, MTN.GNG/NG3/W/26, 24 November 1989 where the US pointed out that restrictive trade practices in some countries in the Aluminum sector stifled demand for semi-fabricated aluminum products and hindered the development of downstream industries. Demand was stifled because prices were maintained at levels higher than would otherwise prevail in the presence of competition from exports. The submissions however does not specifically highlight the type of measure resorted to by countries to stifle demand for imports and protect domestic production.
[13] *Ibid*. Note that while this second aspect of dual pricing was raised during the Uruguay round negotiations, it has not found mention in the submissions made by Members to the Negotiating Group on Rules.
[14] MTN.GNG/NG3/5, 10 December 1987. See also, *supra n*. 7, 13.
[15] See comment of the Nordic countries in MTN.GNG/NG3/4.
[16] MTN.GNG/NG3/W/14, 25 July 1988.
[17] MTN.GNG/NG3/W/13.

was equivalent to a prohibited non-tax export restriction.[18] Further export taxes were also not proscribed by GATT Articles I and III, which pertained to discrimination in internal taxes and charges and not export taxes, even though the effect of export taxes was to give domestic producers discriminatory access to raw materials.[19] As for situations involving government control over natural resources and production of the natural resource based product, it was felt that GATT Article XVII did not adequately address their trade distorting behaviour.

In the context of discriminatory treatment between domestic and exported products, mention must be made of a Mexican objection to language suggested by the US in the context of dealing with dual pricing under the rubric of subsidies. The language read as follows:

"*when the government is the sole provider or purchaser of the good or service in question, the provision or purchase of such good or service shall not be considered as conferring a benefit, unless the government discriminates among users or providers of the good or service. Discrimination shall not include differences in treatment between users or providers of such goods or services due to normal commercial considerations*"[20]

Mexico objected to this language on the grounds that such language prohibited price differentiation between domestic and export markets. It stated that the requirement of non-discrimination must refer only to production facilities located in the national territories of the signatory countries. The language would also suggest that national treatment is applied beyond the territory of contracting parties, which would be fundamentally inconsistent with the basic GATT concept of national treatment[21]. Mexico's suggestion was implemented and the current article 2.1 of the ASCM is a reflection of Mexico's interjection.

Coming back to the issue of export restrictions, several countries believed that recourse to export restrictions was in conformity with GATT Article XI:2 (a) and XX (g) and (j). The EC however countered that export restrictions were not always justified under these articles and Members use of these exceptions required scrutiny.[22]

The EC had instead suggested the following specific remedies to deal with dual pricing[23];

(i) First a general standstill on export measures (taxes, export restrictions)
(ii) All export prohibitions to be eliminated. Any exception would have to be justified on the basis of GATT provisions.
(iii) Existing export restrictions would be scrutinized on the basis of accepted legal exceptions and those found incompatible would be eliminated or made to conform with accepted rules

[18] *Ibid*. This was, as pointed out by the US, in divergence with NAFTA commitments wherein the parties had specifically affirmed that minimum export price restraints were inconsistent with Article XI.
[19] *Ibid*.
[20] MTN.GNG/NG3/19, 5 July 1990, para 7.
[21] Selivanova, Julia, "World trade organization rules and energy pricing: Russia's case", 38 JWT, 2004 at pg. 564.
[22] MTN.GNG/NG3/19, 5 July 1990.
[23] See, MTN.GNG/NG3/W/37, 25 June 1990 and also MTN.GNG/NG3/W/11, 12 February 1988.

(iv) Export restrictions will be "tariffied" or changed to an export duty and bound.

(v) Existing export duties would also be bound and all commitments on export taxes would be scheduled as an annex to the GATT and would be governed by GATT Articles II, XXVIII and XVIIIbis.

The Uruguay Round negotiations did not result in a code governing trade in natural resources as was proposed by the US, as several Members, including the EC felt that the issue was more generic in nature.[24] The issue has however been raised once again in the WTO Rules Negotiations as discussed below.

II. WTO submissions and identification of measures

As with the Uruguay Round negotiations, the US and the EC have been the most vocal proponents of disciplines to deal with dual pricing in the WTO Rules Negotiations.

The US raised the issue of dual pricing again in the Rules negations and describes it as a situation where the government maintains one price for exports, and another controlled price for domestic consumption, benefiting domestic producers and exporters, especially those who use the resources intensively in their own manufacturing processes. The advantage provided to domestic producers in this situation unfairly magnifies the comparative advantage that would otherwise be determined by market forces and production efficiencies. It further noted government provision of a natural resource to a domestic industry "at less than fair market value", is no different from a government provision of a cash grant allowing the purchase of a natural resource at less than fair market value.[25] The US believes that "dual pricing" cannot be adequately dealt with under the ASCM but has however provided no guidance on the manner in which these practices should be disciplined.

The EC for its part has highlighted two governmental interventions with respect to natural resource pricing. One is where a government makes available to domestic users important inputs at a price substantially lower than the international market price. Such practice benefits the domestic users when compared to their foreign competitors as the latter have to purchase their supplies at the (higher) international price. This practice as per the EC should be prohibited. The second intervention is where government actions impact on the "availability of raw materials to the disadvantage of operators outside the country taking such actions" and thereby "unfairly favour domestic operators as compared to their international counterparts." It suggests that specific remedies should be envisaged to deal with this type of situation but has not identified any specific remedial measures.

Both the above practices have the same effect, i.e. they favour domestic producers over international operators in the provision of raw materials, but they differ in the manner and *locus* of government intervention. In the first type of intervention, the government offers raw materials to the domestic industry at favourable rates. In the

[24] "*Trade Agreements, Petroleum and Energy Policies*", UNCTAD, UNCTAD/ITCD/TSB/9, 2000.
[25] TN/RL/W/78, 19 March 2003.

second, the government imposes measures, which limit the availability of the raw material to processors outside the country, thereby resulting in a border measure.

The fall-out of the second type of intervention is the making available of raw material to the domestic industry, most likely at preferential rates. Needless to mention that irrespective of the point of imposition of the measure (i.e. whether domestic or border), the effect is to favour domestic producers through the provision of raw materials at preferential rates.

III. Remedies sought

(i) Export taxes and export licensing

As mentioned above, countries identified export restrictions such as export taxes, and export licensing as being the types of measures that further dual pricing. In this regard and in continuation of the remedies suggested in the Uruguay Round negotiations, the EC has reiterated its concerns on export taxes (as NTBs), which it believes are the "flip side to tariff escalation", as they cause adverse effects on commodity producers and sought a disciplining of such measures[26]. It has proposed a draft agreement on export taxes, the salient features of which are[27]:

(i) Prohibition on the maintenance of export taxes and internal taxes on exported goods that are in excess of those imposed on like products destined for internal sale.

(ii) However, developing countries and LDCs would be permitted to maintain export taxes at "low levels" under the following conditions.

a. they are necessary, in conjunction with domestic measures, to maintain financial stability, to satisfy fiscal needs, or to facilitate economic diversification and **avoid excessive dependence on the export of primary products**;

and

b. they do not adversely affect international trade by **limiting the availability of goods to WTO Members** in general or **by raising world market prices of any goods beyond the prices that would prevail in the absence of such measures**, or otherwise **cause serious prejudice** to the interests of developing country Members.

c. Export taxes if maintained would have to comply with MFN requirements.

(iii) Members would be allowed to impose export taxes in accordance with the rules applicable under GATT Article XX (General Exceptions) and Article XXI (Security Exceptions);

(iv) Any Member, and especially developing Members and LDCs can temporarily and under specific circumstances adopt export taxes in accordance with the conditions, rules and procedures of the following Articles, where applicable:

[26] TN/MA/W/11/Add.3, 1 April 2003.
[27] *Ibid*.

- GATT Article XII on Restrictions to Safeguard the Balance of Payments;
- GATT Article XV:9 on Exchange Arrangements; and
- GATT Article XVIII on Governmental Assistance to Economic Development

(v) Members would also be obligated to notify any new export taxes or any increases in export taxes to the WTO Secretariat 60 days before their entry into force. The concerned Member would also have to provide other Members an opportunity for consultation and provide information on the reasons for the export taxes and any other matters of concern that may be raised.

In tandem with the EC, Japan too has called for transparency in the area of export restrictions. In its proposal on horizontal approaches to deal with NTBs, Japan has suggested the establishment of a new Agreement on export licensing which mirrors the existing Agreement on Import licensing.[28]

(ii) Expansion of Article 3.1 (b) of the ASCM

The EC has also suggested that Article 3.1(b) of the ASCM should be modified to so as to capture any violations of GATT Article III:4.

According to the EC, Article 3.1 (b) (prohibited export subsidy which is contingent on use of domestic over imported goods) needs to be amended because it does not adequately address import substitution programs as it requires a showing of the actual use of domestic over imported goods rather than showing that such a program exists.

According to the EC, "this very high threshold of proof makes it very difficult to counteract subsidies linked to value added conditions under the ASCM prohibited subsidy disciplines, especially where a local content requirement is only one of several alternative conditions for obtaining the subsidy[29]. Moreover, the widespread lack of transparency, in particular with respect to *de facto* local content subsidies, calls for improved rules in this area. Rules should be clarified and made operational so that any subsidy linked to the use or purchase of domestic industrial products, and thus in breach of Article III:4 of GATT 1994, is covered by the prohibition. Of course, the fact that subsidies are available only to domestic producers would not, by itself, put them in the prohibited category (Article III:8 (b) of GATT 1994)."[30]

It has therefore suggested amending ASCM Article 3.1(b) and adding another sub-clause (c) in the following manner[31]:

[28] TN/MA/W/15/Add.4, 18 April 2006.
[29] Egypt however believes that Article 3.1(b) does not raise any interpretation issues and that there is no reason to link article 3.1 (b) with Article III:4 of GATT. See, TN/RL/W/57, 10 February 2003.
[30] TN/RL./W/30, 21 November 2002.
[31] TN/RL/GEN/135, 24 April, 2006.

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods or **subsidies inconsistent with Article III of the GATT 1994**

(c) **the provision, by virtue of government action, of goods to domestic production on terms and conditions more favourable than those generally available for such goods when destined for export**

As regards the amendments proposed to Article 3(b), if hypothetically a Saudi program were to give discounts on purchase of domestically produced butane, but not on imports of butane, such a program would be a violation of GATT Article III:4 and prohibited even though the product from the domestically produced butane is not exported. If the downstream product produced from such butane is exported, it would permit an exporting country to countervail the final product on the fact that the butane was subsidized (as understood under ASCM meaning it involves a financial contribution, confers a benefit and is specific).

If a measure is violative of GATT Article III, and is successfully challenged at the WTO it would in any event have to be replaced by a GATT consistent measure. Thus the reasoning behind incorporating a specific reference to GATT Article III in Article 3(b) of the ASCM is not clear as in any event the measure would have to be replaced.

In comparison to Article 3(b) the inclusion of sub-article (c) seems to have more far reaching consequences and goes fundamentally against the concept of national treatment. The same issue was debated in the Uruguay Round discussions and there (as mentioned above) Mexico had strongly objected to similar language because it resulted in the undermining of the fundamental concept and understanding of the national treatment obligation.

On the whole reactions to the US and EC proposals on dual pricing have not been very supportive. Korea for instance has inquired of the need for specific disciplines on natural resource rather than approaching it as a generic problem[32]. Egypt has questioned the very basis of the assumption that differing prices for domestic and exports sales provide an unfair advantage to domestic users. According to Egypt such difference are a result of comparative advantages that countries possess[33]. Venezuela has specifically questioned the rationale of the US proposal is light of a situation where a government grants a subsidy without discrimination to domestic and foreign companies regardless of whether their production is directed to domestic or export markets. As per Venezuela, if the US proposal is broad enough to cover the above-mentioned situation, then it would amount to undermining the structure and concept of the ASCM, particularly with respect to prohibited subsidies.

Recently new amendments were also proposed to the ASCM which are incorporated in the Draft Rules Text presented by the Chairman of the Negotiating Group on Rules. The implications from the suggested amendments are discussed separately later in the report.

[32] TN/RL/W/96, 5 May 2003.
[33] TN/RL/W/102, 6 May 2003.

(iii) Dual pricing and accession

Dual pricing has been raised as a serious concern during the accession discussions. The prime example of this is the case of Russia and pricing of natural gas by Gazprom- Russia's gas monopoly. The exception that the EC particularly takes to this practice is on account of the fact that price of gas to Europe is significantly higher than the price of gas supplied to Russian households as well as industrial consumers.

Similarly countries had expressed concern about Saudi practice wherein it priced natural gas liquids (NGLs) (butane, propane and natural gasoline) to domestic producers at a 30% discount as compared to the export price. This differential pricing was however later repealed (probably as a result of pressure from member countries)[34]

More recently Members have raised concerns about China's policy of maintaining export restrictions in the form of export quotas on coke and fluorspar which are both exhaustible natural resources. [35] China has tried using the Article XX(g) exception on exhaustible natural resources but it has been pointed out that the said exception would not be applicable because it is not made effective in conjunction with restrictions on domestic production or consumption.[36]

IV. Conclusion and Methodology

Thus the thrust of the submissions on dual pricing have been with addressing discriminatory pricing and with various forms of export restrictions as the latter is assumed to facilitate the grant of preferential treatment to domestic consumers including making the good available at a preferential price.

The following chapters will thus examine the relevant country's legal regime to ascertain if (i) there is differential pricing in exports and domestic sales (ii) if yes, how would the pricing be dealt with under the measures suggested by the EC (iii) if there is no dual pricing, would the practice nevertheless amount to an actionable subsidy? (iv) irrespective of (iii), would the practice amount to an export restriction and if yes, would it be prohibited under Article XI; or (v) is the measure otherwise violative of other provisions such as Article III or XVII and if yes, can it nonetheless be justified under the exception sunder these Articles?

Primary reliance has been placed on the research already undertaken by ELP on the structure and legal regime governing the pricing, production and supply of the selected natural resources ("underlying research"). Independent research has been undertaken where needed. Where the underlying research suggests for example that the market is completely de-regulated and prices are free-market, no analysis has been undertaken. Similarly where no information has been provided on a particular market, independent research has not been undertaken.

[34] WT/ACC/SAU/61, 1 November 2005
[35] G/MA/W/78, 18 September 2006
[36] G/MA/W/77, 6 September 2006

However where the underlying research concludes that the market if free but the research nonetheless points to the existence of a major state role in the production or supply of the resource, an independent analysis has been attempted by securing price information to determine if there is nonetheless a case for dual pricing or subsidization. Information on prices has been secured from publicly available sources.

In light of the same analysis has been conducted for all countries in the crude oil sector, for India and Russia in the natural gas sector, for China and Russia in the Aluminium sector, for Chile in copper and for India in DAP, iron ore, coal and steel.

Finally the concluding chapter will discuss whether India should become a demander on the disciplines on dual pricing.

CHAPTER 2: NATURAL GAS PRICING IN INDIA

I. INTRODUCTION

Natural Gas has been termed as the "New-age Fuel". Since natural gas is composed of only one carbon and four hydrogen atoms per molecule, it has the lowest carbon to hydrogen ratio, hence it burns completely, making it the cleanest of fossil fuels. Apart from its environmental benefits natural gas is also emerging as a major fuel in the energy basket across countries largely due to the periodic uncertainties and volatility in both the price and supply of oil.[1]

There are three supply source of natural gas in India; (i) public sector units (ii) public private joint ventures and private ventures and (iii) import of liquefied natural gas (RLNG).

The Oil and natural gas Corporation (ONGC), Oil India Limited (OIL) and GAIL are the public sector or the National Oil Companies (NOCs) in India.

The existing joint ventures (JVs) are the Panna-Mukta & Tapti (PMT) venture and the venture for the exploitation of Ravva, Lakshmi gas.[2] Import of LNG is made by Petronet LNG.[3]

The production and distribution of natural gas is undertaken in the following manner:
Upstream: (a) exploration and production
(b) refining
Midstream: (c) transportation through pipelines and
Downstream: (d) marketing or sale of gas to end use consumers.[4]

II. EXPLORATION, PRICING AND DISTRIBUTION OF NATURAL GAS

A. Exploration

Initially, the Indian government on nominated basis awarded blocks to ONGC and OIL, through exploration and production licenses. The gas produced from these nominated blocks is being regulated by the government under the administered pricing mechanism (APM). However, with increasing demand for natural gas, the government offered exploration licenses from certain blocks to join venture companies (JVs) with production sharing contract (PSCs) being entered between the Government of India, ONGC and various other domestic and foreign partners. The price for natural gas produced by these JVs was determined according to the production sharing contract (PSC) with the government prescribing a ceiling price.

[1] "New-Age Fuel", available at http://www.gailonline.com/gailnewsite/businesses/businesses.html
[2] Tariff Commission Report. "Determination of Producer Price of Natural Gas Produced by ONGC and GAIL", 2006.
[3] "Milking the Cash Cow – ONGC", available at http://www.infraline.com/ong/default.asp?URL1=/ong/InfralinePaper/MilkingONGC.asp&idCategory=6472
[4] "Report of the Working Group on Petroleum & Natural Gas Sector for the XI Plan (2007-2012)" Ministry of Petroleum and Natural Gas, 2006, available at www.Infraline.com

This is referred to as the "Pre-NELP era" and the gas produced and sold therein is referred to as the Non-APM gas.[5]

In 1997, the government announced the New Exploration and Licensing Policy (NELP) in which licenses were granted for exploration and production of gas. The licenses were awarded by a bidding process open to all NOCs and private companies including foreign companies who then entered into a PSC with the buyer. Under NELP the price of the gas is determined according to the PSC and is market driven.[6]

B. Import

Since 2004 India is importing natural gas in the form of LNG from Ras Gas in Qatar. The imported LNG is re-gassified and is referred to as regassified LNG (R-LNG) and is imported at Petronet LNG Ltd's (PLL) Dahej LNG Terminal.[7]

C. Distribution

The gas produced by the upstream industries is transferred to the downstream companies or customers through transmission pipelines. GAIL (India) Limited is a government owned enterprise with a prime mandate of transporting gas. GAIL transports gas delivered by ONGC and other joint venture companies by its Hazira - Vijaipur - Jagadishpur (HVJ) pipeline and Dahej - Vijaipur Pipeline (DVLP) network besides having a capacity of 23.9 MMSCMD to transport R-LNG from Dahej terminal.

D. Pricing: Producer/Consumer price

However, there is no uniform pricing mechanism for the gases produced and sold by these various manufacturers and suppliers. The price at which the upstream companies such as NOCs and JVs sell to the midstream company (GAIL) for transportation and marketing of the gas is known as the producer price. Consumer price is price at which the gas is sold to the consumers at landfall from GAIL to consumers.[8]

D(i) Pricing controls: APM/Non-APM

In India, the pricing policy for natural gas differs depending upon whether it comes from PSUs or JVs or is imported LNG (RLNG). Accordingly there are two gas pricing mechanisms:

(a) Administered Pricing Mechanisms (APM) and
(b) Non – Administered Pricing Mechanisms (Non-APM)

(a) Administered Price Mechanism (APM) - refers to the gas produced from nominated fields of ONGC and OIL of around 55MMSCMD. The government determines the *consumer price* at landfall of natural gas for various categories of

[5] Tariff Commission Report, 2006 at page 48.
[6] Id. at page 48.
[7] "Gas Pricing in India", available at http://www.infraline.com/ong/default.asp?URL1=/Ong/main.asp#infra Also see "Domestic Transportation of LNG", available at http://www.thehindubusinessline.com/bline/2004/10/25/stories/2004102500450600.htm
[8] Tariff Commission Report 2006 pg 10.

consumers for gas produced from these nominated fields.[9] Thus under APM the price at which GAIL will sell to certain pre-determined customers is set.

(b) Non-administered pricing mechanism (non-APM) - Under this system the gas prices for consumers at landfall are market driven and not determined by the government. There are currently three different sources of gas production under this system:

1. The price for gas coming from JVs is determined according to the PSC entered into between JVs and GAIL. Although the parties are free to choose the method on the basis of which the gas produced from the JVs would be priced however, the government prescribes an upper ceiling limit beyond which the gas cannot be priced.[10]
2. For Imported LNG the price is determined by the Sale and Purchase Agreement (SPA) between the LNG seller and buyer and the spot cargoes are purchased on mutually agreed commercial terms.
3. In 1997 the government started the New Exploration Licensing Policy (NELP) under which blocks have been awarded for exploration and production of gas. The prices are determined according to the production sharing contracts.[11]

The final price or delivered price to end consumers is = Consumer Price at landfall price + Transmission Charges + Taxes applicable to be paid by the consumers + any applicable Royalty charges[12]. This formula is applicable for both APM and Non-APM consumers.

[9] Tariff Commission Report 2006.
[10] "Gas Pricing in India", available at http://www.infraline.com/ong/default.asp?URL1=/Ong/main.asp#infra
[11] Sixteenth Standing Committee Report on "Petroleum & Natural Gas (2007-08) on Supply, Distribution and Marketing of Natural Gas including CNG and LNG", available at www.infraline.com/ong/default.asp?URL1=/ong/StandCommRep/16SCRPNGSuuDistMktgNatGasCNGLNG-Sep07.asp&idCategory+6686
[12] See "Alternate Fuel Stock", available at http://www.gailonline.com/gailnewsite/businesses/customerinformation.html. Also see "Gas Pricing in India", available at http://www.infraline.com/ong/default.asp?URL1=/Ong/main.asp#infra

III. ADMINISTERED PRICING MECHANISM

A. Background of APM Gas pricing

1. Gas Pricing Prior to 1997

Prior to 1987, the prices of natural gas were fixed by ONGC and OIL.[13] In 1986, the government deiced to fix the price of natural gas on cost plus methodology and accordingly, the price was fixed at Rs.1400/MSCm by MoP&NG w.e.f 30-01-1987. Subsequently based on the recommendations of the Committee under the chairmanship of Dr. Kelkar, the price was revised to Rs. 1,550/MSCm, w.e.f 01-01-1992, with provisions to increase the gas price by Rs. 100/MSC p.a. up to Rs. 1850/MSCM by 1995.[14]

2. Gas pricing w.e.f. 01.10.1997

Based on the recommendations of the Shankar committee on natural gas pricing, the MoP&NG, decided to change the gas pricing methodology from cost plus basis to import parity pricing. According the ministry issued a Gas Pricing Order on September 18, 1997 which was put into effect from 01.10.1997 wherein both the consumer and the producer prices were fixed.[15]

The Gas prices were linked to the cheapest alternative liquid fuel – a Fuel Oil Basket: (Average of four fuel oils, viz. Cargoes FOB, Med basis, Italy (1% sulphur); Cargoes CIF, NEW basis ARA (1% Sulphur); Singapore, FOB, HSFO 180 cst (3.5% surplus); and Arab gulf, FOB, HSFO, 180 cst (3.5% sulphur)) with progressively increased fuel oil parity as given below.[16]

	1997-98	1998-99	1999-2000
% of Fuel Oil Parity	55%	65%	75%

As per the pricing order of 1997, the consumer price of gas at landfall points was linked to price of basket of LSHS/fuel oil with floor price of Rs.2150/MCM and ceiling of Rs.2850/MCM for consumers outside north east. For north east the consumer price was at a concession with the floor price of Rs. 800/MCM and ceiling price of Rs. 1700/MCM. However, since 1998-99 the price had stagnated at Rs.2850/MCM for consumers outside North East and Rs. 1700 for consumers from North East.

The pricing order provided for a fixed producer price of Rs.1900/MCM for OIL (with provisions for increase with increase in consumer price index) and in the case of ONGC the producer price was calculated on net back basis from sales realization and deducting the amount required to pay higher cost of gas purchased from JVs and contribution to the gas pool account[17].

[13] Available at http://petroleum.nic.in/ng.htm
[14] "Gas Pricing in India", available at http://www.infraline.com/ong/default.asp?URL1=/Ong/main.asp#infra
[15] Id
[16] Id.
[17] See, report of ELP on natural gas pricing at page 13.

3. Gas Pool Account Mechanism

Due to the existing supply linkages and operational requirements, it may well happen that the customers entitled for APM gas get physical supplies of gas produced by the joint venture or from suppliers other than ONGC/OIL at market price and vice versa. The gas pricing order of the government in 2005 states that to operationalize such a scenario, the Gas Pool Account mechanism would be utilized, with the inflow into the pool account coming from APM gas sales to consumers not entitled for APM gas at market price and outflow would be for purchase of non-APM gas to supply to the consumers entitled for gas at APM price. This arrangement was subject to the ceiling of existing available APM gas from ONGC and OIL (about 55 MMSCMD).[18]

The funds in the Gas Pool Account were used for:

- Paying additional 1% transmission charges to GAIL for every 10% increase in consumer price index (CPI) so as to account for inflation. The CPI is a statistical time-series measure of a weighted average of prices of a specified set of goods and services purchased by consumers. It is a price index that tracks the prices of a specified basket of consumer goods and services, providing a measure of inflation. CPI is a fixed quantity price index and considered by some a cost of living index. Under CPI, an index is scaled so that it is equal to 100 at a chosen point in time, so that all other values of the index are a percentage relative to this one. In India the base year is 1984-85 for 100.[19]
- In order to promote commercial and industrial activity in the North-East, the government has decided to subsidize natural gas being supplied to consumers in this region.[20] Thus the funds in the oil pool account were also be utilized for compensating Oil India Ltd. (OIL) for supplying gas to the North Eastern states at subsidized rates[21]
- Research and development purposes for exploration of new gas fields.[22]

Thus after deducting above two costs to GAIL and OIL, the resultant proceeds would be passed onto ONGC and OIL in proportion to the gas supplied by them."[23]

The formula for calculation of producer price for ONGC is given below.[24]

Gas Price or final price or delivered price to end consumer = Consumer Price at landfall price + Transmission Charges + Taxes applicable to be paid by the consumers + Royalty charges[25]

[18] Id.
[19] "How India Calculates inflation", available at www.rediff.com
[20] "Welcome to the pool party", http://www.equitymaster.com/DETAIL.ASP?story=8&date=9/9/2000
21 This is because as stated above, OIL's producer price is Rs. 1900/MCM whereas GAIL will supply gas to the North East at a floor of 800/MCM or at a ceiling of Rs. 1700/MCM thus incurring a loss for OIL.
[22] Supra n. 20.
[23] Tariff Commission Report 2006 at page 17.
[24] Supra n. 20.
[25] See "Alternate Fuel Stock", available at http://www.gailonline.com/gailnewsite/businesses/customerinformation.html.
Also see "Gas Pricing in India", available at http://www.infraline.com/ong/default.asp?URL1=/Ong/main.asp#infra

Consumer Price (based calorific value) = Basket of international fuel oil price * respective linkages rate * foreign exchange

Consumer price:

ONGC: Floor price of Rs.2150/MCM
Ceiling Price of Rs. 2850/MCM

OIL: Floor price of Rs.800/MCM
Ceiling Price of Rs. 1700/MCM

Producer Price = Gas Price – (Gas Pool Account payments) – (Compensating GAIL for gas purchases from JV's but supplied to APM customers)

The price trends during the period 1998-June'2005 for APM gas are given below:[26]

Year	Producer price Rs/MCM			Consumer price Rs/MCM	
	Basic price		Price with Royalty#	General	Special for NE region
	ONGC	OIL	ONGC		
1998-99	1834	1919	2017	2239*	958
1999-00	2255	1925	2481	2385**, 2850##	1231
2000-01	2248	1938	2472	2850	1400
2001-02	2193	1938	2412	2850	1400
2002-03	2110	1955	2321	2850	1400
2003-04	2212	1957	2433	2850	1700
2004-05	2146	1973	2360	2850	1700
2005-06 (Apr-Jun'05)	2384	1976	3247	2850	1700

Royalty is 10% over basic price

- Average of 4 quarters, ** Average of 2 quarters (Apr-Sep'99), ## Since Oct'99

4. Gas Pricing w.e.f. 01.07.2005

In June 2005 the MoP&NG came out with a new government pricing order, i.e. GPO 2005 under which the prices of APM gas were revised. The GPO states that all the APM gas which is estimated to be around 55MSCMD, will be supplied to only these categories consumers:

1. Power sector
2. Fertilizer sector
3. Consumers covered under court orders
4. Consumers having allocations of less than 0.05 MMSCMD

Producer Price: In June 2005, the determination of producer price for ONGC and OIL, was referred by MoP&NG to the Tariff commission. The MOP&NG decided that until the producer price prescribed by the tariff commission is not accepted by

[26] Tariff Commission Report, 2006.

MoP&NG, from April 2006 onwards ONGC and OIL would get a fixed producer price of Rs. 3200/MCM.[27]

Consumer Price for Non-APM consumers: Other non-APM consumers would be supplied gas at market related prices depending on price being paid by GAIL to JV's. This consumer price however had a ceiling of USD 3.86/MMBTU (ex-Dahej RLNG price). For north-eastern non APM consumers the price was fixed at Rs. 3200/MCM [28]

Consumer Price – Power & Fertilizers (Outside North East)

For power and fertilizer sectors as per MOP&NG, the consumer price at landfall would be Rs. 3200/MSCM for APM consumers. However, the GPO 2005 state that subject to the determination of producer price, based on the recommendation of the Tariff Commission, any additional gas as well as future production of gas from new fields to be developed in future by ONGC/OIL will be sold at market-related price in the context of the NELP provisions.[29]

Consumer Price – Power & Fertilizers (North East)

In order to promote commercial and industrial activity in the North-East, the government has decided to subsidize natural gas being supplied to consumers in the region.[30] Accordingly, in the GPO of 2005 it was decided that the consumer price of gas at landfall for the North Eastern Region would be pegged at 60% of the revised price for general consumers. The Commission arrived at a price of Rs. 1920/MSCM.[31]

Consumer price – transport, small consumers, etc. (outside north east)

As per MOP&NG, vide letter dated 05 June 2006, the Cabinet fixed the price for consumers at landfall other than power and fertilizer sector at Rs. 3840/MSCM.[32]

Consumer price – transport, small consumers, etc. (north east)

As per MOP&NG, vide letter dated 05 June 2006, the Cabinet fixed the price for consumers at landfall other than power and fertilizer sectors in the North East at Rs. 2340/MSCM.[33]

[27] Tariff Commission Report, 2006
[28] Id at page 20.
[29] "Gas pricing", available at taken from www.petroleum.nic.in/ng.htm
[30] "Welcome to the pool party", available at http://www.equitymaster.com/DETAIL.ASP?story=8&date=9/9/2000
[31] Supra n. 29.
[32] "Milking the Cash Cow – ONGC", available at http://www.infraline.com/ong/default.asp?URL1=/ong/InfralinePaper/MilkingONGC.asp&idCategory=6472
[33] Id.

Comparison of price of APM gas with prices of alternative fuels (during 1997-98 to 2005-06)[34]

Year	Naphtha prices (Rs /MCM)	FO Price (Rs/ Price)	Producer Price of APM gas (PP_ (Rs/ MSCM)**	Consumer Price of APM gas CP (Rs/ MSCM)	%age of PP to Naphtha price	%age of PP FO price	%age of CP Naphtha price	%age of CP to FO price
1997-98	7037	3920	2092 (1902)	3824	30	53	54	98
1998-99	5870	3557	2017 (1834)	3775	34	57	64	106
1999-00	9906	6567	2481 (2255)	4170	25	38	42	63
2000-01	12286	8240	2472 (2248)	4428	20	30	36	54
2001-02	10589	7527	2412 (2193)	4422	23	32	42	59
2002-03	13265	9656	2321 (2110)	4414	17	24	33	46
2003-04	13552	9042	2433 (2212)	4424	18	27	33	49
2004-05	19001	10079	2360 (2146)	4418	12	23	23	44
2005-06	22323	13740	3247 (2952)	4726	14	23	21	34
Avg from Oct'97-Mar'06	12749	8113	2446 (2223)	4304	19	30	53	19

Note: 1- The prices of Naphtha and FO are import parity price taken from Platt's Oelogram database adjusted for thermal equivalence.
**: The producer price includes royalty: The producer price excluding royalty is indicated in brackets
Courtesy: ONGC

B. Tariff Commission recommendations on pricing 2006

Based on the decision of the government to refer the determination of producer price for ONGC and OIL to the Tariff Commission, the MoP&NG referred the issue to the Commission with the following terms of reference (TOR) for the study on August 16, 2005:[35]

1. "Tariff Commission will examine the producer price of the gas produced by ONGC and OIL from their existing nominated Blocks taking into account the investments made by these companies for development of infrastructure for production of gas including the cost incurred on exploration.
2. Tariff Commission will take into account the market conditions, including price of alternative fuels and price of natural gas from alternate sources such as gas produced by JV, LNG, etc.
3. Tariff Commission will consider that the producer should be sufficiently remunerative to provide incentive to producer to make investment in exploration and production activities.

[34] Tariff Commission Report, 2006 at pg. 23.
[35] Tariff Commission Report 2006 page 1.

4. For additional gas from existing fields or new fields, the government have decided that any additional gas as well as future production of gas from new fields to be developed in future by ONGC/OIL will be sold at market-related price in the context of NELP provisions subject to the determination of producer price, based on the recommendations of the Tariff Commission. Accordingly, on this matter also, the Tariff Commission is requested to furnish its recommendations."

Based on the TOR, the Commission initiated the study. However, as regard item (4) of TOR, since on a clarification sought by the Commission from the Ministry, the former got no response accordingly, the TOR (4) could not be covered by the Commission.[36]

However, the MoP&NG is yet to issue an order for gas prices based on the recommendations of the Tariff Commission in its 2006 Report and thus, the rates prescribed in GPO 2005 are the applicable rates as of today.

As a starting point the, the Tariff commission undertook a comparison between international prices and US gas prices with APM prices and a comparison of gas sold by JV's to APM gas prices. While stating that there cannot be a world or international price for natural gas, the Tariff Commission nonetheless undertook a comparison between APM producer and consumer prices vis-a vis US prices in determining the extent to which APM prices are priced below gas prices in a de-regulated market such as the US.[37]

[36] Id.
[37] Id at page 16 to 21.

Table 2.10

International prices of Natural Gas

In US $ /MMBTU

Year	UK Index	USA Henry Hub	Canada (Alberta)
1990	-	1.64	1.05
1991	-	1.49	0.89
1992	-	1.77	0.98
1993	-	2.12	1.69
1994	-	1.92	1.45
1995	-	1.69	0.89
1996	1.85	2.76	1.12
1997	2.03	2.53	1.36
1998	1.92	2.08	1.42
1999	1.64	2.27	2.00
2000	2.68	4.23	3.75
2001	3.22	4.07	3.61
2002	2.58	3.33	2.57
2003	3.26	5.63	4.83
2004	4.69	5.85	5.03

Source : Heren Energy Ltd. & Natural Gas Week (Courtesy : ONGC)

MMBTU = Million British Thermal Units

Table 2.11

Comprison of producer and consumer price of APM gas with US gas price

Price in US$/MMBTU

	US gas price		India's APM gas price			
Year	Well head price	Henry Hub price	Producer price	%age of producer price to US well head price	Consumer price	%age of consumer price to Henry Hub price
1997-98 (Oct.'97-March '98	2.38	2.49	1.24	52	1.49	60
1998-99	1.96	2.16	1.10	56	1.34	52
1999-00	2.49	2.54	1.31	53	1.51	59
2000-01	4.51	5.22	1.24	28	1.57	30
2001-02	3.35	2.99	1.16	35	1.51	50
2002-03	3.85	4.24	1.10	29	1.48	35
2003-04	5.04	5.27	1.21	24	1.56	30
2004-05	5.78	6.03	1.20	21	1.60	27
2005-06 (Till Dec'05)	8.36	9.67	1.65	20	1.76	18
Average(Oct'97-Dec'05)	4.17	4.48	1.23	30	1.53	34

Source : US Well head prices are taken from US Government Deptt. of Energy (EIA) website and Henry Hub prices are taken from Reuter database (Courtesy: ONGC)

Note : i) APM gas price is basic price excluding royalty

ii) US$ conversion rates are RBI reference rates

iii) Conversion from US$/MCM to US$/MMBTU at 39.68254 MMBTU/MCM as per MoPNG guidelines

Sale prices of non-APM gas by various suppliers vis-à-vis APM gas price (Apr'06)

Gas supplier	Delivered price of gas		Remarks
	$/MMBTU	Rs/MCM	
APM Gas	2.00	3520	
Non-APM Gas			
Raava	3.50	6150	
Raava satellite	3.30	5799	
Lakshmi Gas GGCL	4.46	7837	
Lakshmi Gas -GPEC	3.69	6484	
GSPC-Niko Gas to power producers	3.30	5799	
Tapti /Panna Mukta JV Gas			
Direct marketing of JV Gas of 4.8 MMSCMD	4.08	7169	
JV Gas of 5 MMSCMD of GAIL	4.75	8346	5 MMSCMD of gas being sold to GAIL for power and fertilizer plants ex-HBJ pipeline for one year period from 1st April 2006. Price is inclusive of royalty but exclusive of sales tax and other statutory levies Ex-Hazira
R-LNG Ex-Dahej	3.86	6783	

Notes : 1. The prices are inclusive of royalty but excluding sales tax and at NCV base of 10,000 Kcal/SCM
2. Exchange rate taken as Rs 44.28/$ (RBI average of 2005-06)
3. Conversion rate 39.68254 MCM per MMBTU

Source : Courtesy ONGC

Producer Price

The Tariff commission has recommended the producer price to be calculated based on the financial accounting method which is based on the Normative cost of production (cost + return) computed for natural gas. The normative cost of production takes into account estimated cost impact of projected investment required upto the period 2009-10 and also expected decline in production of gas.[38]

The Commission was of the view that since the production of nominated blocks was projected to decline in coming years to a decline of nearly 75% by 2009-10 and 26% by 2014-15 compared to production level of 2004-05, a price higher than cost plus a reasonable return basis would be unjustified[39]. Besides a higher price than cost plus a reasonable return would end up making the gas costlier in effect putting pressure on power and fertilizer sectors, which the government intends to develop.[40] However

[38] Tariff Commission Report, 2006.
[39] The additional gas from these nominated fields is to be sold at market driven price as per GPO 2005
[40] "APM and Non APM Tariff Commission's View (May 23, 2007)", available at http://www.infraline.com/ong/default.asp?URL1=/ong/naturalgas/pricing/APMtariffcommay07.asp&idCategory=6036

the Commission felt that the producer price had to be kept at a level that ensured adequate return on capital employed so as to allow for future expansion and modernization and a normative return on the net worth at the rate of 15% on post tax basis was fixed by the Commission.[41]

Initially, the Tariff Commission when it submitted its Report in 2006 recommended separate producer prices for ONGC and OIL at Rs. 3450.MSCM and Rs.4040/MSCM respectively. The low producer price for ONGC was because ONGC had not submitted details about its future investments to the Commission. Owing to the reservations of the MoP&NG, vide its letter dated 23.05.2007 the Tariff Commission revised the normative producer price to Rs. 3600/MSM for ONGC but it did not recommend any change for OIL.[42] Further, the Tariff Commission has recommended that in order to provide for escalation/de-escalation in the operating costs, for every 10 points change in the Wholesale Price Index (WPI) (base year 1993-94) over 189.40 as of March 2005, the producer price should be increased by Rs.55/MSCM. Thus the change in producer price, necessitated by change in WPI, would be issued by the MoP&NG.[43] For May 2007 the monthly WPI was 211.7 which translated into a price of Rs.110/MSCM over the normative producer price of Rs.3600 recommended by the commission.[44] Accordingly in its letter dated 23.05.207, the Commission has fixed a producer price for ONGC at Rs. 3710/MSCM and Rs. 4150/MSCM for OIL.[45]

Details of projected cost of production and producer price of Natural Gas produced by ONGC 2005-06 to 2009-10:[46]

Quantitative Information	**2005-06**	**2006-07**	**2007-08**	**2008-09**	**2009-10**
Net Produced Quantity -MM5CM	21,968	21.734	21,330	20,847	19,284
Gas qty available for sale (before recovery of higher hydrocarbons) - MMSCM	19,101	19,334	18,761	18,336	16,962
CV of Gas (Kcal)/SCM	9,269	9,269	9,269	9,269	9.269
Cost of Production Rs./MSCM					
Operating Cost	974	983	998	1,016	1,074
Recouped Cost (Depreciation, Depletion, Survey & Dry wells)	5,057	1,119	1,190	1,268	1,378
Return	1,041	1,083	1,205	1.311	1.432

[41] Tariff Commission Report at pg. 49.
[42] "APM and Non APM Tariff Commission's View (May 23, 2007)", available at http://www.infraline.com/ong/default.asp?URL1=/ong/naturalgas/pricing/APMtariffcommay07.asp&idCategory=6036
[43] "Tariff Commission Report 2006 at pg. 51. The details of the monthly WPI are available from the official website of the Economic Adviser, Ministry of Commerce and Industry (http://eaindustry.nic.in).
[44] "The new era of Administered Pricing Mechanism (APM) regime for gas pricing", available at www.infraline.com
[45] "APM and Non APM Tariff Commission's View (May 23, 2007)", available at http://www.infraline.com/ong/default.asp?URL1=/ong/naturalgas/pricing/APMtariffcommay07.asp&idCategory=6036
[46] Tariff Commission Report at pg 46.

Cost of production with return at actual CV of gas	3,071	3,185	3,393	3,594	3.883
Cost of production with return at 10000 K./cal	**3,313**	**3,43d**	**2,663**	**3,878**	**4,190**
Discounting factor (@2 1.49%)	0.8231	0.6775	0.5577	0.4590	0.3778
Discounted income (Total Rs./Lakh)	482,876	417,166	354.947	302,533	248,881
Discounted volumes (MMSCM at 10000 K./cal)	14.573	12,142	9,698	7,802	5,940
Producers Price at 10000 K./cal	**MSCM**	**3,402**			

The weighted average price for five years 2005-06 to 2009-10 for ONGC is Rs. 3602/MSCM (say Rs. 3600/MSCM) at 10,000 l. cal/MSCM.

Projected Cost of Production and Producers' Price of Natural Gas produced by OIL from 2005-06 to 2009-10[47]

Quantitative information	2005-06	2006-07	2007-08	2008-09	2009-10
Net Produced Quantity – MSCM	1,861	1,704	1,569	1,463	1,345
Gas qty available for sale-MMSCM	1,525	1,367	1,232	1,126	1,008
CV of Gas (Kcal)	8,532	8,511	8,489	8,471	8,444
Cost of Production	**Rs./MSCM**				
Operating Cost	868	934	1,001	1,062	1,140
Recouped Cost (Depreciation, Depletion, Survey & Dry wells)	628	669	729	784	847
Return	1,611	1,701	1,831	1,972	2,141
Cost of production with return at actual CV of gas	3,107	3,304	3,561	3,818	4,127
Cost of production with return at 1000 K./cal	3,642	3,882	4,195	4,507	4,888
Discounting factor (@ 21.49%)	0.8231	0.6775	0.5577	0.4591	0.3779
Discounted income (Total Rs/Lakh)	38,994	30,603	24,479	19,741	15,726
Discounted volumes (MMSCM at 10000 K.cal)	1,071	788	584	438	322
Cost of productions with return at 1000 K.cal/SCM	**Rs. 4,045/MSCM**				

The increase in producer price is due to decline in the production level of natural gas and projected investments for replacement and new compressors which amounts to nearly 10% of cost of production with return.[48]

[47] Tariff Commission Report at pg 46.
[48] Id. at pg 47. See also, Sixteenth Standing Committee Report on "Petroleum & Natural Gas (2007-08) on Supply, Distribution and Marketing of Natural Gas including CNG and LNG", taken available at

APM gases in India and the rates proposed by the Tariff Commission

S.No.	Producer	Present Price (Rs/MSCM)	Proposed Prices by Tariff Commission (Rs/MSCM)
1	ONGC	3200	3710
2	OIL	3200	4150

The producer Price for OIL is on higher side due to peculiar operating conditions of the Northeastern part of the country that is the geology of the gas fields in Assam where OIL operates and relatively lower calorific value of gas produced by OIL.[49] When the commission carried on an analysis of asset-wise production costs of ONGC, the asset cost in North Eastern region was higher.

When the Commission worked out the weighted average of prices of ONGC and OIL it came out to be Rs. 3490/MSCM. While this figure was marginally higher in case of ONGC, it was substantially lower compared to producer price worked out for OIL. The price of Rs. 3490/MSCM would not have sufficiently compensated OIL for their production cost and return on their investments. Thus the Commission recommended separate producer prices for ONGC and OIL

Consumer Price – Power & Fertilizers (Outside North East)

The issue before the Commission was that there was still a substantial difference between the producer price of APM gas and the price of alternative liquid fuels/non-APM gas, which is shown in the table below:

Producer Price	APM Gas	Non-APM Gas From JV fields	Alternate Liquid Fuels based on thermal equivalence

www.infraline.com/ong/default.asp?URL1=/ong/StandCommRep/16SCRPNGSuuDistMktgNatGasCNGLNG-Sep07.asp&idCategory+6686.

[49] Tariff Commission Report at pg 47.

	Rs. 3710/MSCM	Rs. 6854/MSCM (weighted average price) 185% above producer price under APM Gas	• Fuel Oil Basket (FO): Rs. 15262.39/MSCM This works to about 411% above producer price for APM gas • Naphtha: Rs. 24929.95/MSCM This works to about 672% above producer price for APM gas

Thus, the Tariff Commission recommended that the consumer price of natural gas for power and fertilizer sector should be fixed at 10% above the producer price which would amount to Rs. 4081/MSCM.[50]

Consumer Price – Power & Fertilizers (North East)

For the power and fertilizer sector consumers of North East the price would be 60% of the consumer price for power and fertilizer sectors outside the North East that is Rs. 2449/MSCM[51]

Consumer price – transport, small consumers, etc. (outside north east)

The Cabinet decided that the gas supplied in the transport sector, Agra Ferozadabad small industries and other small scale consumers having allocations upto 0.05 MMSCMD would be progressively increased over the next 3 to 5 years to reflect the market price. Accordingly, the Commission proposed that the price for the transport sector, Agra Ferozadabad small industries and other small scale consumers would be pegged at 20% above the APM prices for power and fertilizer sectors which comes to Rs. 4897/MSCM (Rs. 4081 + (20%) of 4081)/MSCM.

However the Commission noticed that weighted average market price of natural gas was Rs. 6854/MSCM which was more than 40% of the proposed price of Rs. 4897/MSCM for transport sector, Agra Ferozabad small industries and other small scale consumers. Thus, the Commission proposed the price for transport sector, Agra Ferozadabad small industries and other small scale consumers will be further increased over the next 1 to 3 year(s) to reflect the market prices.[52]

Consumer price – transport, small consumers, etc. (north east)

The Tariff Commission has recommended that the price would be 60% of the price for consumers other than fertilizer and power sector consumers outside North East.

[50] Report of Tariff Commission – Recommendations on Tariffs & Subsidy, "The New Era of Administered Price Mechanism (APM) regime for gas pricing", 2007.
[51] Id.
[52] "New-Age Fuel", available at http://www.gailonline.com/gailnewsite/businesses/businesses.html

Thus, the proposed consumer price would be 60% of Rs. 4897/MSCm i.e. Rs. 2938/MSCM.[53]

Isolated Consumers

In its Report in 2006 the Tariff Commission had recommended that the small isolated customers of ONGC should be supplied gas beyond their allotment at APM rates rather than at market rates. The Commission has recommended the same based on the fact that the consumer of isolated fields, lack infrastructure facilities and need to install their own scrubbers, liquid removal facilities, compression/transportation facilities which lead to lot of difficulties. However, as per the Gas Pricing Order 2005 which is applicable till date the Cabinet has taken the decision that the sale of gas beyond existing allotment, that is to power, fertilizer and small industries, should be supplied at market prices.[54] Thus the price to the isolated consumers would be the market price of the gas despite the Tariff Commission's recommendation.

Tariff Commission '06 views on Gas Pool Account Mechanism

The Tariff Commission in a clarification note of 2007 on its 2006 report for Pricing of ONCG and OIL gas has stated that since under the proposed pricing scheme the Consumer Price for outside North-East Consumers is slightly higher than the producer price thus, the gas pool mechanism should be disbanded and the difference from these prices should be used to fund new exploration ventures.[55]

However there is no further information on whether the gas pool mechanism has infact been disbanded or not.

The Table below shows the prices proposed by the Tariff Commission:

Category	Prices in Rs/MSCM
Producer Price – ONGC	3600 (Subject to change by Rs.55/MSCM fore very 10 points change in the Wholesale Price Index (WPI) (base year 1993-94) over 189.40 of March 2005)
Producer Price - OIL	4040 (subject to change by Rs.55/MSCM fore very 10 points change in the Wholesale Price Index (WPI) (base year 1993-94) over 189.40 of March 2005)
Consumer Price –	

[53] Id.
[54] Report of Tariff Commission – Recommendations on Tariffs & Subsidy, "The New Era of Administered Price Mechanism (APM) regime for gas pricing", 2007
[55] Tariff Commission Report at pg 51

(a) Outside North East	
Power and Fertilizer Sector	4081
City Gas & Small Consumers up to 0.05 MMSCMD	4897
(b) North East	
Power and Fertilizer Sector	2449
City Gas & Small Consumers up to 0.05 MMSCMD	2938

The following tables shows the consumer price at landfall for various categories of APM gases in India and the proposed rates by the Tariff Commission

S.No.	Customer Category	Present Price (Rs/MSCM)	Proposed Prices by Tariff Commission (Rs/MSCM)
1	Power & Fertilizers	3200	4081
2	City Gas & Small Consumers up to 0.05 MMSCMD	3840	4897
3	Power & Fertilizers - North East	1920	2449
4	City Gas & Small Consumers up to 0.05 MMSCMD -North East	2304	2938

Comparison of price recommended by the Tariff Commission with prices of alternative fuels (during 2005-06 to 2007-08 May' 07)[56]

Year (Average)	Naphtha prices (Rs /MCM)	FO Price (Rs/ Price)	Producer Price of APM gas (Rs/MSCM)	Consumer Price of APM gas + Royalty (Rs/MSCM)	%age of producer price of APM gas to Naphtha price	%age of producer price of APM gas to FO price
2005-06	23395.06	14896.45	3600.00	3960.00	16.93	26.58
2006-07	25926.39	15521.04	3655.00	4040.50	15.51	25.90
Apr'05 to May' 07	24929.95	15262.39	3833085	3997.23	16.03	26.19

[56] "Comparison of price of Alternate Fuels with APM Producer price of gas during 2005-06 to 2007-08 (upto May 2007), available at http://www.infraline.com/ong/default.asp?URL1=/ong/NaturalGas/Pricing/CompPriceAlternFuelAPMProdPriceGas0508-May07.asp&idCategory=6714

IV. NON - ADMINISTERED PRICING MECHANISM

Under the Non–APM mechanism parties are free to determine the price of natural gas on the basis of market prices of natural gas in the international market.[57]

There are three categories of gas pricing under this system
1. Gas sold by JVs from fields sold under the Production Sharing Contract (PSC) allocated Pre-NELP.
2. Imported LNG (RLNG)
3. Gas sold under NELP

A. Gas sold by JVs and private players under pre-NELP PSCs

With increasing demand for natural gas, the government offered exploration licenses for certain blocks to JVs with PSCs amongst the GOI, ONGC and various other domestic and foreign partners. The PSCs give details of the pricing mechanism to be used and the formulae for revision of the pricing of the gas.

The GOI entered into production sharing contracts with Panna-Mukta & Tapti (PMT) consortium on December 12, 1994 and Ravva consortium on October 28, 1994.[58]

(i) PMT – GAIL: Evolution of gas pricing

- GAIL executed a PSC with the PMT consortium on October 28, 1994. The gas supply began in June 1997 from Tapti and in February 1998 from Panna Mukta basin.
- According to the PSC a floor price of $2.11/MMBTU and ceiling price of $3.11/MMBTU was decided upon by linking the price to a basket of international average of preceding 12 months fuel oil prices from the date of first supply which comprised of (Cargoes FOB, Med Basis, Italy (1% sulphur); Cargoes CIF, NEW basis ARA (1% Sulphur); Singapore, FOB, HSFO 180 est (3.5% surplus); Arab gulf, FOB, HSFO, 180 est (3.5%sulphur).
- Under the PSC, the ceiling prices were to be revised to 150% of 90% Fuel Oil (FO) basket (average of the preceding 18 months), after 7 years from the date of first supply.[59]
- Accordingly in June 2004, the purchase price of the PMT gas came up for revision as per the provision of the PSC.
- Initially PMT gave a notice of increasing the ceiling price of Tapti gas from $3.11 to $5.57/MMBTU and for Panna-Mukta gas from $3.11 to $5.7/MMBTU. The increase was based on the Enron formula incorporated in the PSC and the increased price was also applicable for volumes of more than 5 MMSCMD to the power and fertilizers sector.[60]
- The purchase price of PMT gas was however increased from $3.11/MMBTU to $4.8/MMBTU.

[57] "Gas Pricing in India", taken from http://www.infraline.com/ong/default.asp?URL1=/Ong/main.asp#infra
[58] Id.
[59] Id.
[60] "PMT gas supplying August 2007", taken from www.infraline.com (accessed on 10/02/2008).

- However, GAIL argued that the revised purchase price of PMT i.e. $4.8/MMBTU was a lot more even if compared to the price of RLNG, which was being sold at $3.86 and was the highest priced gas in the country.
- Further, GAIL pointed out that of the available gas of 10-11 MMSCMD from PMT fields, 4.8 MMSCMD was directly marketed by PMT @ $ 4.08/MMBTU which was inclusive of the marketing margin.
- GAIL pointed out that PMT revised the price for GAIL under the PSC, to $4.8/MMBTU. However it did not revise the price of gas that it sold directly and instead kept to the earlier price of $4.08/MMBTU. If the directly marketed gas price had been increased in accordance with the price revision formula under the PSC, the price for the 4.8 MMSCMD gas should have been $4.9/MMBTU.
- GAIL asked for a market driven price for the PMT gas instead of the PSC price considering PMT was selling its directly marketed gas at $4.08/MMBTU.
- Between November, 2004 and February 2005, GAIL approached the Power and Fertilizer consumers for revision of PMT gas price atleast to the prevailing price of RLNG i.e. US$3.86/MMBTU. However, these sectors refused to accept any revision of prices without the government approval.
- In February 2005 the MoP&NG decided that with effect from April 1, 2005 about 6 MMSCMD of the PMT gas would be offered to the existing Power and Fertilizer sector consumers and the price of the gas will be market related which may be worked out in the context of RLNG. However, there was still uncertainty over the purchase price and the price adjustment mechanism.
- On March 29, 2005 by the intervention of the Ministry a purchase price for GAIL was fixed at $3.86/MMBTU for the 6 MMSCMD of the PMT gas. The balance of 5 MMSCMD of gas was to be sold directly by the PMT at a price not lower than $3.86/MMBTU. This arrangement was to continue for one year and thereafter it was to be renewed as agreed between the parties.[61]
- However, on April 8, 2005 the MoP&NG informed GAIL that existing power and fertilizer costumers would continue to be supplied the same quantity and at APM rates, irrespective of the higher price purchase price of gas from the PMT JV.
- On April 20, 2005 the MoP&NG, issued a New GPO 2005, which advocated a self financing gas pool mechanism and sale price of JV gas. The GPO stated that for non APM consumers, gas will be supplied through GAIL network at the price at which GAIL buys from the JV producers at landfall point, subject to the ceiling of ex-Dahej RLNG price of $3.86/MMBTU for the year 2005-06. While, the market price for consumers in the North East region would be Rs.3200/MCM for 2005-06.[62]
- The MoP&NG on February 28, 2006 had a meeting with GAIL and PMT in which GAIL offered to take entire gas at PSC terms. However, PMT informed that it had entered into contract with other contractors for supply of 4.8 MMSCMD gas (upto March 2008) at a price of $3.96 per MMBTU and that these commitments needed to be honoured. However on the expiry of these contracts, this 4.8 MMSCMD and additional quantity would be offered to GAIL at PSC terms.

[61] Id.
[62] "Natural Gas" http://petroleum.nig.in/ng.htm

- GAIL signed a term sheet on March 29, 2006 with the PMT for supply of 5 MMSCMD of gas, at a ceiling price of $4.75/MMBTU arrived at on the basis of the formula stated in the PSC.[63]
- In a meeting on March 13, 2007 it was decided by the MoP&NG that gas available in excess of 4.8 MMSCMD (PMT has reserves upto 16 MMSCMD) would be given to GAIL and that there would be no extension of the PMT JV direct contracts beyond March 2008. These quantities would be received and marketed by GAIL from April 2008 onwards.[64]
- Further the contracts entered into by the JV with GGCL, RIL, GSPCL, IPCL, for direct marketing for quantities beyond 4.8 MMSCMD would not be binding and GAIL would be the exclusive government nominee for receiving and marketing of the gas.[65]
- On November 16, 2007 the MoP&NG decided to fix the ceiling price. Accordingly, GAIL and PMT JVs entered into a term sheet. The term sheet states that GAIL as the nominee of GOI under PSC shall receive entire gas including the uncontracted/surplus quantities (surplus gas). Clause 2 of the

[63] "PMT gas pricing issue what is it all about", available at http://www.infraline.com/ong/default.asp?URL1=/Ong/topical/PMTpricingissue.asp&idCategory=5097 (accessed on 07/02/2008).

The Pricing formulae entered into between GAIL and PMT JV under the PSC is as follows:

The base price of PMT gas was fixed on the basis of ninety-nine percent (99%) of a Low Sulphur Fuel Oil Basket (LSFO Basket) calculated as the average of the daily mean value for low and high prices of fuel oil taking into account equal parts of:

- bulk residual fuel oil, containing one percent sulphur, quoted for barges at Northwest Europe, (Barges, FOB Rotterdam).
- bulk residual fuel oil, containing one percent sulphur, quoted for Mediterranean, basis Italy, (Cargoes, FOB Med, basis Italy)
- a theoretical blend of residual fuel oil composed of Singapore Cargoes made up of 74% of LSWR-SR 0.3%, and 26% of HSFO 180, 3.5% sulphur, viscosity 180 centistokes.

The **Base Price** is calculated on the basis of the arithmetic average of the monthly values of the prices of the listed products as published in Platt's Oilgram Price Report for the 18 months (May 1992 through October 1993). These values are derived from the mean of the daily ranges on days the postings are published to give a monthly value. For the purpose of the PMT JV contract, base price was equal to USD 2.32/MMBtu.

The price of gas for each calendar quarter thereafter was determined by the following formula:

Price = Base Price x (A/B) where 'A' is a value calculated for the HS/LSFO Basket, evaluated for the 12 months preceding the calendar quarter using the method for averaging as described for calculating the Base Price and 'B' is a value calculated for the HS/LSFO Basket, evaluated for the 12 months (April 1993 through March 1994).

The HS/LSFO basket is valued as equal parts of:

- bulk residual fuel oil, containing one percent sulphur, quoted for Mediterranean, basis Italy, (Cargoes, FOB Med, basis Italy).
- bulk residual fuel oil, containing one percent sulphur, quoted for Northwest Europe Cargoes, CIF, basis ARA, (Cargoes CIF NWE, Basis ARA).
- bulk, residual fuel oil, Singapore Cargoes, containing .3.5% sulphur, viscosity 180 centistokes, (Singapore HSFO, 180 cst), and
- bulk residual fuel oil, Cargoes, FOB Arab Gulf, viscosity 180 centistokes, (Arab Gulf, FOB HSFO 180 cst)

using the method for averaging as described for calculating the Base Price.

The **floor price** will be ninety percent (90%) of the monthly values of the prices of the LSFO Basket as published in Platt's Oilgram Price Report for the 18 months (May 1992 through October 1993). These values are derived from the mean of the daily ranges on days the postings are published to give a monthly value. For the purpose of the PMT PSC, floor Price was equal to USD 2.11/MMBtu.

Note: While the floor price is last price at which the gas will be sold. The base price is the price used in arriving at the actual price. Thus the Base price will in no circumstances be less than the floor price.

[64] "PMT gas supply & pricing November 2007", available at www.infraline.com

[65] Id..

term sheet states that the gas price would be calculated as per the formulae prescribed under PSC, which is the Enron formulae, with a ceiling price of $5.58/MMBTU (the sales price). The sales price is calculated excluding statutory taxes and levies. However, as per the PSC, the floor price remains the same, i.e., $2.11/MMBTU.[66]

There is no clarity on the price at which GAIL will supply APM customers such as power and fertilizer once it is allotted the entire PMT gas at PSC rates. If the gas is sold at APM prices to these customers (even at the prices recommended by the Tariff Commission), the purchase price from PMT would nonetheless be higher than the consumer price. Currently the gas bought from JVs is being supplied by GAIL to power and fertilizers sector consumers at APM price and adjustments are made through the *gas pool account mechanism* in terms of the pricing order of 20.6.2005. It is likely that the mechanism would have to be extended to account for the price of gas bought from PMT beyond 2008.

(ii) RAVVA JV

- GOI entered into PSCs with Ravva consortium on October 28, 1994 with GAIL as its nominee.
- According to the PSC a floor price of $1.75/MMBTU and ceiling price of $3.00/MMBTU was decided upon by linking the price to a basket price linked to average of Fuel Oil for preceding 12 months comprising of (3%/3.5% Sulphur residual fuel oil of Singapore, FOB. Rotterdam Barge and Med FOB).
- The revision of the ceiling price was due after 5 years from the date of supply and the revised ceiling price was to be negotiated between the buyer and the seller in good faith.
- The price revision for Ravva was due w.e.f. April 2002. The price revision was effected w.e.f July 1, 2005 and GAIL has been paying $3.50/MMBTU since then.
- The share of this gas going to APM consumers is being charged by GAIL at APM price, with adjustment through *gas pool account mechanism.*

Purchase price by GAIL under the PMT and Ravva JV on commencement of production of Gas

JV	Price formula	Floor Price	Ceiling Price	Commencement of gas supplies
PMT	Price linked to a basket of international average of preceding 12 months Fuel Oil prices.	2.11	3.11	June'97-Tapti Feb'98-Panna-Mukta
Ravva	Price linked to average of Fuel Oil for preceding 12 months (3%/3.5% Sulphur residual fuel oil of Singapore, FOB. Rotterdam Barge and Med FOB)	1.75	3.00	Apr'97

[66] "PMT Gas: Term Sheet for uncontracted/surplus gas", available at www.infraline.com/ong/defualt.asp?URL1=/ong/naturalgas/pricing/PMT Termsheet.asp&idCategory=6733

Gas prices under various PSCs

Name of Buyer	Approximate quantity	Price	Basis
Panna-Mukta & Tapti			
GAIL	5.7 MMSCMD from 1.4.2005	$ 3.86/MMBTU	Fixed Price
	5 MMSCMD from 1.4.2006 for 2 years	$ 4.75/MMBTU	
	16 MMSCMD from 2008	$5.58/MMBTU	As per Term Sheet
GSPC*, GGCL#, IPCL**, RIL##	4.6 MMSCMD from 1.4.2005 to March 2006	$ 4.08/MMBTU	Fixed Price
GSPC, GGCL, IPCL, RIL	1.8 MMSCMD from 1.4.2006 to March 2008	$ 5.70/MMBTU	Fixed Price
Torrent Power	0.9 MMSCMD from New revised plan of development (NRPOD) Gas scheduled from September 2007 (total expected gas production from NRPOD is 5.5 MMSCMD)	$ 4.75 MMBTU	Fixed Price
RVUNL^	1.5 MMSCMD from NRPOD Gas scheduled from September 2007	$ 4.60/MMBTU	Fixed Price
GGCL	1.65 MMSCMD from NRPOD Gas scheduled from September 2007	$ 5.70/MMBTU	Fixed Price
Ravva			
GAIL	1.10 MMSCMD from existing discoveries of Ravva 1 MMSCMD from Satellite field	$ 3.50/MMBTU effective from 1st July 2007 $ 4.30/MMBTU effective from September 2006	Fixed Price

* GSPC - Gujarat State Power Corporation Ltd.
# GGCL – Gujarat Gas Company Ltd.
** IPCL – Indian Petrochemicals Corporation Ltd.
RIL- Reliance India Ltd.
^ RVUNL – Rajasthan Rajya Vidyut Utpadan Ltd.

B. Imported LNG

A contract was signed with Rasgas, Qatar for supply of 5 MMTPA LNG (equivalent to about 18 MMSCMD) by Petronet LNG Limited and supplies commenced from April

2004. The price for LNG has been linked to JCC crude oil under an agreed formula. However, the FOB price for the period up to December 2008 was agreed at a constant price of $2.53/MMBTU. This price translates to RLNG price of $3.86/MMBTU ex-Dahej terminal. [67]

In order to make the price of R-LNG affordable, EGoM in the meeting held on 11.1.07 decided to pool prices of 5 MMTPA R-LNG presently being imported from Qatar with the price of new R-LNG being imported on term contract basis. The Ministry accordingly issued orders on 6.3.07, in consultation with Ministry of Law, in compliance with the decision of EGoM. The import (pool) price of R-LNG ex-Dahej would be about US$ 4.92/MMBTU.[68] Thus this is the price at which GAIL would purchase the gas from Petronet and transport the gas from the RLNG terminal to its customers depending on whether they are APM or otherwise.

C. NELP

The legal framework for the regulation of Exploration & Production (E&P) of oil and gas is provided by the *Oilfields (Development and Regulation) Act, 1948* and the *Petroleum and Natural Gas Rules, 1959*. These provide the powers to grant licenses for E&P, charging of royalty, etc. The above Act was amended to enable the government to introduce the New Exploration Licensing Policy.[69]

The New Exploration Licensing Policy (NELP) was proposed in 1997 and the first block for exploration to private parties were offered in 1999-2000. Under this scheme the government offers specific onshore, offshore and deepwater blocks to exploration companies (or consortia) based on a bidding process. These consortia can be awarded to public sector units, private companies and but also foreign companies. The primary incentive for the bidder is that the discovered gas would not be sold at APM prices, but at 'arms-length determined' prices, which would enable the contractor to recover the investment and make a good return on the investment.[70]

The bids are based on a 'model production-sharing contract' (MPSC), which stipulate the responsibilities of the contractor and the government respectively. The MPSC with details of the winning bid would become the PSC between the government and the contractor.[71]

It also offers a level playing field to the national oil companies and private operators as ONGC and OIL have to bid for blocks instead of being awarded blocks on nomination basis and would have to relinquish them under specified conditions applicable to all.[72] There have been six rounds of NELP and in 2008 the government came out with NELP VII.

[67] "Gas Pricing in India", available at http://www.infraline.com/ong/default.asp?URL1=/Ong/main.asp#infra
[68] Id.
[69] "Gas regulation", available at www.iclg.co.uk/index.php?area=4&country_results=1&kh_publications_id=42&chapters_id=1049 - 100k,
[70] "MPSC – Notice inviting order" http://www.indianelpvii.com/documents/Model_Production_Sharing_Contract.pdf
[71] Id.
[72] Id.

Given below are some of the important features of the PSC and bid evaluation:[73]

1. The PSC details out the methodology for determining sharing of profit between the contractor and the government.

   Article 16 of MPSC for NELP VII specifies sharing of profit petroleum under which a party's share will be calculated on the basis of the investment multiple actually achieved by the contractor at the end of the preceding year. Here the MPSC under NELP differs from the PSC under pre-NELP. While under pre-NELP the exact share percentage was specified, the MPSC under NELP gives the parties freedom to decide the distribution of profit petroleum.

   Further, Article 16.6 of MPSC specifies that the share of the contractor of the profit petroleum will be equally distributed between the parties in the proportion of their respective participating interest.

2. Under the MPSC a management committee has to be constituted which comprises of representatives from the government and the contractor, and it would be entitled to take decisions regarding exploration, development and production.

3. Certain maximum timeframes for different exploration phases are stipulated by the MPSC which also stipulates the extent of area the contractor has to relinquish after each exploration phase, in case the contractor is not able to find oil or gas while certain extenuating circumstances are also given under which the relinquishment can be deferred and procedures for doing so.

4. Under the MPSC it is stipulated that the government can take its share of profit in either cash or kind, though it does not specify how and where the profit gas would be delivered, if it were taken in kind.

Article 21.6 of the MPSC provides for the valuation of natural gas wherein it states that the contractor shall endeavor to sell natural gas produced and saved from the contract area at arms-length prices to the benefits of parties to the contract.

Under Article 1.8 "Arms Length Sales" means sales made freely in the open market, in freely convertible currencies between willing and unrelated sellers and buyers and in which such buyers and sellers have no contractual or other relationship, directly or indirectly, or any common or joint interest as is reasonably likely to influence selling prices and shall, inter alia, exclude sales (whether director or indirect, through brokers or otherwise) involving affiliates, sales between companies which are parties to this contracts, sales between governments and government-owned entities, counter trades, restricted or distress sales, sales involving barter arrangements and generally any transaction motivated in whole or in part by consideration other than normal commercial practices.

It provides that gas sold to the government or government nominee shall be valued on the terms and conditions actually obtained including pricing formula and delivery, mentioned in the PSC.

[73] Id.

Article 21.7 obligates the contractor to get prior approval of the Government while specifying the *arms length price* or when the arms length price is impossible to arrive at. For granting its approval the Government would take into account amongst other relevant considerations, the domestic and international prices of comparable gas and linkages with traded fields and this price would be applicable uniformly to all the consuming sectors

(i) Basis of fixing gas prices under NELP [74]

In order to have transparent and consistent guidelines for gas price discovery for the purpose of granting the Government approvals under the PSCs, the Government had constituted a committee under the chairmanship of joint secretary, Ministry of Petroleum & Natural Gas with JS(E), MOP&NG, JS(M), MOP&NG and DG, DGH as members and Director (E) as member cum-secretary. The Committee submitted its report to the Government. The Government has accepted the report, which laid down the full guidelines for pricing of natural gas from NELP.

Accordingly, while considering any proposal of the contractors under the PSCs', the following guidelines will be taken into account by the Government in granting its approval to the price formula/basis:-

1. Where, the gas supply has not commenced and the Government approval on gas formula basis has not been obtained as per the provision of the PSCs, the contracts must discover gas prices through a transparent competitive bidding process along with terms and conditions for the gas sales.
2. In cases where it is conclusively demonstrated by the contractors to the Government that the competitive bidding process was not feasible, the valuation will be based on the most recent competitively determined price in the region duly indexed to the present.
3. The indexation shall be as per the provisions of market determined contracts as each market determined price has a contract which sets out various terms and conditions of supply of natural gas.
4. Typically long term gas contracts have a clause for periodic gas price reviews. If price is reviewed as per the contract, that may become the new reference price. For interim period, it may be linked to percentage increase in price of Furnace Oil (FO). FO is not only the cheapest liquid fuel, but has also shown least price volatility in recent years.
5. Above valuation methodology may be applied in cases where actual supply has commenced but price could not be discovered through market mechanism.
6. If the actual price at which any producer supplies to any consumer happens to be higher than the one arrived at by above methodology, then the higher price shall be taken for computing entitlements of the parties including the Government take.
7. In the eventuality of applying the Committee's recommendations, Director General, Directorate General of Hydrocarbons (DGH) and Director, Petroleum Planning and Analysis Cell (PPAC), based on available authentic data, shall calculate and determine the price based on Committee's above recommended methodology

[74] "Guidelines for approving gas price formula/ basis under PSC (Applicable to NELP and CBM blocks)" available at http://www.infraline.com/ong/default.asp?URL1=/ong/Upstream/GuidelinesforApprovingGasPriceFormula.asp&idCategory=6117

(ii) RIL KG 6 basin gas pricing – NELP I

As discussed above the contractors are allowed to price gas under NELP based on competitive bidding and the final price is approved by the government. Below is an example of one such instance where the price was arrived at based on competitive bidding and highlights the extent of involvement of the government in approving such price.

The GOI, Reliance Industries Limited (RIL) and Niko Resources Limited (NRL) entered into a PSC under NELP-I with respect to contract area identified as block KG-DWN-98/3 which was signed on the 12th of April 2000. RIL would be ready to produce nearly 80 MMSCMD of gas from July 2008.[75]

In April 2007, RIL (seller) sent out an invitation to five power and five fertilizer sector consumers (buyers) for quotations based on the formula given in the box below:[76]

Sellers Price (Rs./MMBtu) = 112.5*K + ER*(CP-25)^0.15 + C

Where:
CP is the annual average Brent crude price for the previous FY with a cap of $65/barrel and a floor of $25/barrel;
ER is the average exchange rate (USD/Rs.) for the previous FY;
K is 1 for ER between 25 and 65,
ER/25 when ER is less than 25,
ER/65 when ER is more than 65;
C is the premium in Rs. /MMBtu (positive integer) quoted by bidder.

However, bidders could only bid for the integer C which could vary between 1 and 10. The total amount of biding volume of natural gas available was 34.4 MMSCMD.

The details of the bidders and the quantity that was bid for is given in the table below:[77]

Customer	Region	C	Volume (MMSCMD)			Cum. Vol	Cum Vol (%)
			2008-09	2009-10	2010-12	2009-10	2009-10
Power							
Tata Power	Maharashtra	10	3.8	3.8	3.8	3.8	12%

[75] "Pricing of Gas produced from Reliance Industries Limited's D6 Block)KG-DWN-98/3)", available at www.infraline.com/ong.default.asp?URL1=/ong/naturalgas/pricing/RILGasPricing.asp&idCategory=6120
[76] Id.
[77] Id.

Torrent	Gujarat	10	4.3	4.3	4.3	8.1	25%
MSEB	Maharashtra	8	1.0	1.0	1.0	9.1	29%
GVK Power	AP	5	4.8	4.6	4.6	13.7	43%
Konaseema Power	AP	4		4.0	4.0	17.7	55%
Total Power	.		13.7	17.7	17.7	.	.
Fertilizer							
RCF	Maharashtra	1	3.1	3.3	3.4	20.9	66%
Kribhco	Gujarat	1	1.6	20	2.0	22 9	72%
Nagarjuna	AP	1	0.8	1.4	3.1	24.3	76%
IFFCO	Gujarat/HVJ	1	5.6	s. a	6.5	30.1	95%
Chambal Fertilizers	HVJ	1	1.1	1.1	1.8	31.9	100%
Total Fertilizer	.		12.2	14.2	16.6	.	.
Total	**.**		**25.9**	**31.9**	**34.4**		**.**

According to RIL the discovered price was the price at which about 50% of the total quantity bid i.e. 17.6 MMSCMD was taken.[78]

RIL took C at which majority, that is more than 60% volume was quoted as 4. Thus RIL arrived at a seller price of $4.59.MMBtu which RIL later revised to $4.33/MMBtu. Further transportation charges and taxes needed to be added.[79]

Delivered price of D-6 gas in various states and along the HBJ pipeline [80]

	Andhra Pradesh	**Maharashtra**	**Gujarat**	**HBJ pipeline**
Basic price	$4.33/mmbtu	$4.33/mmbtu	$4.33/mmbtu	$4.33/mmbtu
Marketing margin	$0.12/mmbtu	$0.12/mmbtu	$0.12/mmbtu	$0.12/mmbtu
Sales tax rate	12%	3%	3%	3%
Sales tax	$0.52/mmbtu	$0.13/mmbtu	$0.13/mmbtu	$0.13/mmbtu
Gas price	$4.85/mmbtu	$4.46/mmbtu	$4.46/mmbtu	$4.46/mmbtu
Transportation costs				
Reliance pipeline	$0.17/mmbtu	$0.93/mmbtu	$0.93/mmbtu	$0.93/mmbtu

[78] Id.
[79] Id.
[80] Id.

GAIL pipeline	$0.14/mmbtu	$0.30/mmbtu	$0.30/mmbtu	$0.30/mmbtu
Service tax	$0.04/mmbtu	$0.15/mmbtu	$0.15/mmbtu	$0.18/mmbtu
Total transportation	$0.35/mmbtu	$1.38/mmbtu	$1.38/mmbtu	$1.72/mmtbu
Delivered price	**$5.20/mmbtu**	**$5.84/mmbtu**	**$5.84/mmbtu**	**$6.18/mmbtu**

Since Article 21.7 of the PSC stipulates that the government will review the prices set under the PSC, accordingly the government constituted an Empowered Group of Ministers (EGoM) on August 13, 2007 to decide the issue of pricing of gas for PSC under the NELP.

The EGoM came out with the following observations:[81]

1. It will not be in the interest of the nation to renege from the contractual provisions under the PSCs entered into in good faith under the NELP
2. For all NELP – I to NELP VI contracts, for natural gas price calculation, the constant will be pegged at US$2.50/MMBtu.
3. Since C was the only biddable component in the formulae given by RIL, it decided to assign the value 0 (zero) since it would address the transparency aspect of the bidding process.
4. The cap for price of crude in the variable portion of the formulae that is (CP-25) would be frozen at $60/barrel instead of $65/barrel as RIL had proposed.
5. Thus Seller Price = 2.50 + (60-25) ^0.15 = 2.50 + 1.70 = $ 4.20/MMBtu.
6. The price discovery process on arms-length basis will be adopted in the future NELP contracts only after approval of the price basis/formulae by the government.
7. The price would be applicable to all sectors uniformly

Delivered price of D-6 gas to States and along the HBJ @ basic price $4.2/mmbtu [82]

	Andhra Pradesh	**Maharashtra**	**Gujarat**	**HBJ pipeline**
Basic price	$4.20/mmbtu	$4.20/mmbtu	$4.20/mmbtu	$4.20/mmbtu
Marketing margin	$0.12/mmbtu	$0.12/mmbtu	$0.12/mmbtu	$0.12/mmbtu
Sales tax rate	12%	3%	3%	3%
Sales tax	$0.50/mmbtu	$0.13/mmbtu	$0.13/mmbtu	$0.13/mmbtu
Gas price	$4.82/mmbtu	$4.46/mmbtu	$4.46/mmbtu	$4.46/mmbtu
Transportation costs (TC)				
Reliance pipeline	$0.17/mmbtu	$0.93/mmbtu	$0.93/mmbtu	$0.93/mmbtu

[81] Id.
[82] The chart amends the basic price given in the table above from $4.33 to $4.2 assuming everything else remains same as when price was $4.33/mmbtu.

GAIL pipeline	$0.14/mmbtu	$0.30/mmbtu	$0.30/mmbtu	$0.30/mmbtu
Service tax	$0.04/mmbtu	$0.15/mmbtu	$0.15/mmbtu	$0.18/mmbtu
Total	$0.35/mmbtu	$1.38/mmbtu	$1.38/mmbtu	$1.72/mmtbu
Delivered price	**$5.17/mmbtu**	**$5.84/mmbtu**	**$5.84/mmbtu**	**$6.18/mmbtu**

Comparative chart of consumer prices @ Landfall of APM, JV, R-LNG and RIL KG-6 Basin Gas (as on September 10, 2007)

Gas Supplier	$/MMbtu	Rs/MSCM
APM Gas		
Producer price payable to ONGC & OIL		
For Supplies other than North east	1.97*	3200*
North East	1.18*	1920*
Consumer price of APM Gas		
Supply to Power and Fertilizer Consumers		
For Supplies other than North east	1.97*	3200*
North East	1.18*	1920*
Supply to APM consumers other than Power and Fertilizer like small consumers, city Gas distribution		
For Supplies other than North east	2.36*	3840*
North East	1.42*	2304*
Non APM Gas		
Ravva – Main	3.50**	5694**
Ravva Satellite	4.30**	6996 **
Lakshmi gas (CB-OS-2)	4.75**	7728**
Panna-Mukta & Tapti (PMT)		
From Existing gas - supply to GSPL[1], GGCL[2], IPCL[3] & RIL[4]	4.08**	6638**
From Existing gas - supply to GAIL & Torrent[6]	4.75**	7728**
From Existing Gas - supply to RRVUNL[6]	4.60**	7484**
Additional Gas - supply to GSPL, GGCL IPCL & RIL	5.70**	9274**
Additional gas supply to GAIL as per Term Sheet	5.58	9079+
R-LNG, Ex-Dahej		
Existing	4.02**	6540**
Spot (approx.)	9.50**	15500**
Pooling	5.47**	8900 **

RIL Gas (delivery from July 2008) to 5 power companies and 5 fertilizer companies which took part in the bid process	4.20*	6833*

* Basic Price - Excludes Royalty and other levies.
**Includes Royalty but excludes all other levies. However, there is no royalty in Case of R-LNG being imported.
+ This is an approximation based on the discussion under PMT JV above.
Notes:
1. The above prices are on NCV basis at CV of 10000 k.cal/M3.
2. FE Rate of Rs.41/US $ is assumed.
3. Conversion rate 39.68254 MCM per MMBTU
1- GSPL - Gujarat State Petronet Limited. A subsidiary of GSPC - Gujarat State Power Corporation Ltd
2- GGCL – Gujarat Gas Company Ltd.
3- IPCL – Indian Petrochemicals Corporation Ltd.
4- RIL- Reliance India Ltd.
5- Torrent - Torrent Power Ltd.
6- RVUNL – Rajasthan Rajya Vidyut Utpadan Ltd.

V. SUPPLY OF NATURAL GAS BY GAIL

GAIL's transmission system comprises of the following pipeline networks:

(a) Hazira - Vijaipur - Jagadishpur (HVJ) pipeline network to transport gas delivered by ONGC and other joint venture companies in western. Central and Northern India. D

(b) Dahej - Vijaipur Pipeline with a capacity of 23.9 MMSCMD to transport R-LNG from Dahej terminal, PLL.

2 Feeder/Spur line and dedicated pipelines: Feeder/Spur line/Dedicated pipelines are laid for those consumers who are not connected to the main trunk line.[83]

A. Gas supply agreement between GAIL and ONGC[84]

ONGC has entered into Gas Supply Agreement (GSA) with GAIL for supply of APM gas on 7.7.2006. Before this agreement, ONGC used to supply gas as per directive of Gas Linkage Committee, which was constituted in 1991. The Gas Linkage Committee was dissolved in November, 2005. The main features of the GSA include:

1. The GSA is valid for 15 years.
2. Price: As per Government orders.
3. A three stage nomination procedure through which ONGC would convey availability of APM gas for sale from its fields, based on ONGC's Long Term Gas Profile (LTGP)-2000 for sale to GAIL.
4. Take or Pay: GAIL will off-take 90% of the adjusted Annual Contract quantity or nevertheless pay for it. No mark-up is allowed.
5. Seller's Supply Obligation: ONGC would assure supply of 90% of the Annual Contract Quantity.

B. Transmission Charges

Transmission tariff is comprised of capital recovery, operating expenses and required return on investment. GAIL calculates transmission charges on Discounted Cash Flow (DCF) Method. The tariff of feeder/spur line/dedicated pipelines varies from consumer to consumer; the same is calculated separately for each consumer, considering the contractual quantity, estimated capital cost, period of contract and life of the source. After working out the estimated capital cost of the pipeline, the same along with expected operating cost and return of 12% on equity is charged over the life of asset. Tariff is fixed for the contractual period. It is being charged on fixed monthly basis upto contractual quantity and any supply of gas above contracted quantity is transported on unit rate basis.[85]

[83] "Gas Transportation Tariff in India", available at http://www.infraline.com/iplus/iplus.asp?Id=70

[84] "Gas Supply Agreements of ONGC & Major Gas Customers of ONGC (as of July 2006)" available at http://www.infraline.com/ong/default.asp?URL1=/ong/NaturalGas/gsaongcandmajorcustomer.asp&idCategory=4863

[85] Supra n. 83.

The GPO of 1997 stated GAIL is to be paid a fixed rate of Rs 1,150/tscm. The charges are linked to a calorific value of 8,500 Kcal/tscm and will be adjusted accordingly. Further, GAIL is to be paid an additional 1% of the transmission charges for every 10% increase in the consumer price index (CPI). This additional charge is borne by the gas pool account and not by the consumer.[86]

(i) MOU between MOP&NG and GAIL

Recently MoP&NG and GAIL entered into an MOU (2008-09) under which the transmission charges were fixed for supply on GAIL pipelines. The following table gives the consumer price of natural gas, R-LNG and HVJ/DVPL/DUPL transmission tariff and marketing margin as decided under the MOU.[87]

Item	Price (Rs./MSCM)_
Domestic Gas – APM	3200
Domestic Gas – APM (<50000SCMD etc.)	4608
Domestic Gas - Market Driven	7596
Domestic Gas – NE Region – APM	1920
Domestic Gas – NE Region – (Small Consumers)	2765
Domestic Gas – NE Region – Market Driven	3200
PMT JV Gas @$4.75/mmbtu	7596
Ravva JV Gas	5597
Ravva Satellite	6877
R-LNG (Pooled) – Outside Gujarat	8232
R-LNG (Pooled)- Inside Gujarat	7915
Transmission Tariff (HVJ/DVPL)	954
Transmission Tariff (DUPL)	1037
Marketing Margin – R-LNG	224

In the above table prices of market driven gas and JV gas are inclusive of royalty.

[86] "Welcome to the Pool Party", taken from www.equitymaster.com/DETAIL.ASP?story =8&date=9/9/2000
[87] "Memorandum of Understanding between Ministry of Petroleum & Natural Gas and GAIL (India) Limited 2008-09", available at www.infraline.com/ong/players/gail/MOUGAILGovt0809.pdf

VI. SUBSIDY ANALYSIS UNDER THE WTO

Natural gas is not exported out of India and therefore the issue of pricing gas differently for export as against domestic supply (dual pricing) does not arise. However since the production and supply of gas is regulated with different consumers being made available gas at different rates, it does lead to a prima facie conclusion of subsidization. Below is an analysis of whether pricing and distribution of gas leads to a countervailable subsidy.

A. Agreement on Subsidies and Countervailing Measures

A(I) Government Provision of Goods and Services

The ASCM states that a financial contribution by a government which confers a benefit constitutes a subsidy and such subsidy is actionable if it is specific to an enterprise, industry or a geographical region. Under article 1.1 (1) (a) a government is said to provide a financial contribution when:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments

In the case of natural gas supply and pricing in India, the mechanism whereby the government through ONGC/OIL and GAIL provides natural gas (at preferential rates) to certain sectors such as power and fertilizer and the north east region would quite clearly fall within the description of sub-clause (iii) above, i.e the government provides goods and services.

However can it be said that the government provides goods and services even in the case of supply of gas by PMT and Ravva JV's or in the case of supplies under NELP VII? A detailed analysis of the same is undertaken below.

A(II) Is the right to exploit natural resources a "good"?

Further apart from the provision of the good itself, i.e gas, can it be said that the fact that the government gives licenses to ONGC/OIL/JVs and private players

under NELP, is also a government provision of a good which in itself could lead to a actionable subsidy if found to confer a benefit and be specific?

The Panel in *US - Softwood Lumber III*[88] took the view that the term "goods" as used in Article 1.1(a)(1)(iii) refers to a very broad spectrum of things a government may provide. At issue in this case was whether a government that allows the exercise of harvesting rights to a company is actually providing goods within the meaning of Article 1.1(a)(1)(iii). Canada had argued that "goods" under Article 1.1(a)(1)(iii) refers to tradeable goods and not to harvesting rights or rights to exploit *in situ* natural resources, provided by the government.

According to the Panel when a government provides harvesting rights, it is in effect "providing" timber to the harvesting companies. For the Panel, "from the tenure holder's point of view, there is no difference between receiving from the government the right to harvest standing timber and the actual supply by the government of standing timber through the tenure holder's exercise of this right". According to the Panel the text of the SCM Agreement did not in any way provide an exception for the right to exploit natural resources. The only exception from the term 'goods or services' provided for in Article 1.1(a)(1)(iii) SCM Agreement was general infrastructure and not natural resources.[89]

Given the above interpretation of "goods" under article 1.1 (a) (1) (iii), it appears that the grant by a government of a license or right to exploit a natural resource would amount to a financial contribution. Thus in the case of natural gas in India, the grant or award of exploitation blocks by the government to ONGC/OIL, JVs and NELP companies would all amount to a financial contribution.

A (II)(i) Does the financial contribution confer a benefit and is it specific?

The financial contribution or the award of exploration licenses for certain blocks of gas fields would confer a benefit on the recipient if, as per Article 14 (d), the provision of goods is made for less than adequate remuneration.

The Oilfields (Regulation and Development) Act, 1948 (53 of 1948) regulates the grant of mining leases for the exploration of oil fields which includes exploration for natural gas. Section 6A fo the Act provides as follows:

6A Royalties in respect of mineral oils.

(1) The holder of a mining lease granted before the commencement of the 'oilfields (Regulation and Development) Amendment Act, 1969, shall notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral oil mined, quarried, excavated or collected by him from the leased area after such commencement, at the rate for the time being specified in the Schedule in respect of the mineral oil.

(2) The holder of a mining lease granted on or after the commencement of the oilfields (Regulation and Developent) Amendment Act, 1969 shall pay royalty in respect of any mineral oil mined, quarried, excavated or collected by him from the

[88] WT/DS236/R, September 27, 2002 at para 7.23-7.24.
[89] Id at para 7.25 and 7.26.

leased area at the rate for the time being specified in the Schedule in respect of that minerals oil.

(4) The Central Government may, by notification in Official Gazette, amend the Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral oil with effect from such date as may be specified in the notification and different rates may be notified in respect of same mineral oil mined, quarried, excavated or collected from the areas covered by different classes of mining leases;
Provided that the Central Government shall not fix the rate of royalty in respect of any mineral oil so as to exceed twenty per cent of the sale price of the mineral oil at the oilfields or the oil well-head, as the case may be.

(5) If the Central Government, with a view to encourage exploration in offshore areas, is satisfied that it is necessary in the public interest to do so, it may, by notification in the Official Gazette, exempt generally, either absolutely or subject to such conditions as may be specified in the notification, mineral oil produced from such areas from the whole or any part of the royalty leviable thereon.

The royalty on natural gas specified in the Schedule to the Act was ten per cent of the value of the natural gas obtained at well-head.

The Petroleum and Natural Gas Rules (1959) as amended by the 2003 rules in rules 5 and 6 provide for lease and license fees that are payable for an exploration license or mining lease and rule 14 details the royalties that are payable by all lease holders to the government.

However it is not clear from the Act or the Rules if the law provides or has provided for differential license/lease fees and royalties for ONGC/OIL as compared to the JV companies and the private companies under NELP. It appears that the fees or royalties that have been charged have been uniform for all players in every round. Thus if a round of NELP waived the fees, then all the participants in that round would not have to pay the fees. The exact terms would however be available in the bid documents and PSCs of each round. Similarly there is no indication that ONGC or OIL were nominated blocks in the pre-NELP era on terms more favourable than comparable terms for JV's.

If however a comparison is undertaken of license fees/royalties charged by the government for similar blocks (on-shore, off-shore) for the same round of bidding, and it appears that some companies are given favourable treatment, then the benefit granted to such preferred company/ies would be the difference in the license fees/royalties that have been forgone from the preferred player. If such preference is provided to one or certain participants as against all the awardees of the blocks, the subsidy would be specific and thus actionable.

A(III) Provision of natural gas as "government provision of goods"

(i) Provision by NOCs vs. JVs and NELP contracts

In the case of supplies by NOCs to either APM or non-APM consumers, the provision of goods (gas) by the government is evident, as these companies are

government controlled companies. Similarly could it be said that there is a provision of goods by the "government" in the case of supply of gas by JVs companies and also in the case of supply of gas by private companies under the NELP rounds?

(a) Supply from JVs

Article 1.1 (a) (1) (iv) as stated above states that a financial contribution also exists when the government entrusts or directs a private body to carry out one or more of the type of functions illustrated in Article 1.1 (a) (1) and the practice in no real sense differs from practices normally followed by the government.

This Article was interpreted by the Panel on *US - Export Restraints*[90] in which the issue was whether an export restraint constituted a financial contribution. In that case the Panel concluded that the meaning of the words "entrusts" and "directs" requires an "explicit and affirmative action of delegation or command".

In the case of JVs, PMT and Ravva have been provided with clear mandates to supply gas to GAIL (the government nominee) and while there is some freedom provided to the JVs through direct marketing and pricing of gas, most of the gas had to be sold to GAIL and the PSCs provided for floor and ceilings rates for such supplies. By virtue of the PSC the government ensured that the price of JV gas supplied to GAIL for onward supply to APM and non-APM consumers did not go beyond a certain level. Further in the case of PMT, the government has further mandated PMT to supply all gas in excess of 4.8 MMSCMD the original allotment of the government) to GAIL and the price has been fixed at USD 5.58 /MMBTU. Thus as per the term sheet, PMT would not able to supply gas independently and all gas would need to be allotted to the government.

Thus by fixing the price and volumes of gas that can be sold by the JVs to GAIL the government has mandated or directed the JVs to provide goods (gas in this case) on its behalf. The sale by the JVs of natural gas to GAIL is thus a financial contribution under the meaning of Article 1.1 (a) (1) (iv).

(b) Supply under NELP contracts

The NELP contacts were an improvement over the pre-NELP PSCs in that parties were allowed to sell gas at a price arrived at based on a formula and not at APM rates. Under NELP, while the price has to be approved by the government, the government does not fix the price as such. The prices are to be discovered through competitive bidding process and it is only where the conduct of the bidding process is not feasible, is the valuation to be based on the most recent competitively determined price (indexed to the present). As was seen with the KG6 basin example provided above, RIL came up with a price based on a pre-set formula. The EGoM while not reneging on the contractual terms indicated that some changes needed to take place in the formula and changed minor aspects such as price of the crude oil basket and the constant factor. The final price was a slight variation of the original price suggested by RIL.

[90] WT/DS194/R, June 29, 2001 at para 8.44.

While some percentage of the gas is provided to the government most of the gas is sold to all customers at the discovered price. The government does not play a part in allocating certain volumes of gas to specific customers and neither does it fix the price of gas.

Based on the above a strong case can be made that supply of gas under NELP contracts does not amount to the government entrusting a private party to provide goods and thus does not amount to a financial contribution.

A(IV) Is the provision for less than adequate remuneration?

(i) Supply to APM customers

A financial contribution which confers a benefit amounts to a subsidy. In order to determine whether a benefit has been conferred on the recipient, Article 14 lays down criteria whereby a benefit can be said to be conferred. Where the financial contribution is in the form of a government provision of goods or services, Article 14 (iv) states that such provision by the government would not confer a benefit unless the provision of goods is made for less than adequate remuneration. The adequacy of the remuneration is to be determined in relation to the prevailing market conditions for the good in question in the country of provision.

In the natural gas industry, gas is being supplied at preferential rates to certain customers in comparison to prices charged to other consumers (both as per the GPO 2005 order and the 2006 Tariff Commission recommendations). As discussed before in this chapter, gas is available from the ONGC/OIL fields to power, fertilizer, transport and small scale industries (both in the north east and otherwise) at rates which are more preferential than rates available to non-APM customers. Similarly gas made available from the JVs fields is also supplied to power and fertilizer consumers at APM rates. Only gas supplied from NELP gas fields would be supplied to all consumers without preference at the same rate.

The price chart on page 31 is restated below for easy comparison.

Gas Supplier	$/MMbtu	Rs/MSCM
APM Gas		
Producer price payable to ONGC & OIL		
For Supplies other than North east	1.97*	3200*
North East	1.18*	1920*
Consumer price of APM Gas		
Supply to Power and Fertilizer Consumers		
For Supplies other than North east	1.97*	3200*
North East	1.18*	1920*
Supply to APM consumers other than Power and Fertilizer like small consumers, city Gas distribution		
For Supplies other than North east	2.36*	3840*

North East	1.42*	2304*
Non APM Gas		
Ravva – Main	3.50**	5694**
Ravva Satellite	4.30**	6996 **
Lakshmi gas (CB-OS-2)	4.75**	7728**
Panna-Mukta & Tapti (PMT)		
From Existing gas - supply to GSPL[1], GGCL[2], IPCL[3] & RIL[4]	4.08**	6638**
From Existing gas - supply to GAIL & Torrent[6]	4.75**	7728**
From Existing Gas - supply to RRVUNL[6]	4.60**	7484**
Additional Gas - supply to GSPL, GGCL IPCL & RIL	5.70**	9274**
Additional gas supply to GAIL as per Term Sheet	5.58	9079+
R-LNG, Ex-Dahej		
Existing	4.02**	6540**
Spot (approx.)	9.50**	15500**
Pooling	5.47**	8900 **
RIL Gas (delivery from July 2008) to 5 power companies and 5 fertilizer companies which took part in the bid process	4.20*	6833*

* Basic Price - Excludes Royalty and other levies.
**Includes Royalty but excludes all other levies. However, there is no royalty in case of R-LNG being imported.
+ This is an approximation based on the discussion under PMT JV above.
Notes:
1. The above prices are on NCV basis at CV of 10000 k.cal/M3.
2. Foreign exchange rate of Rs.41/US $ is assumed.

From the above it would appear that a benefit is conferred on the power, fertilizer, transport and small consumers if compared to the "prevailing market conditions" in India, i.e. NELP priced gas. "Prevailing market conditions" would exclude JV gas because while this gas is purchased at the higher rates (stated above) it is supplied to APM consumers at APM rates. Thus the only category of gas which is not subject to any pricing restraint is the NELP gas.

Under Article 14 (d) the adequacy of the remuneration is to be determined taking into account the prevailing market conditions in the country of provision or purchase. While the Article mentions that the country of provision or purchase is relevant market for determination of the adequacy of the remuneration, the Panel and AB have determined differently on this issue. While the Panel in *US- Softwood Lumber III* held that[91] the market of provision or purchase is the relevant market in all situations, the AB in *United States - Final Countervailing Duty Determination with*

[91]WT/DS236/R. See paragraph 7.53. "In our view, the text of Article 14 SCM Agreement leaves no choice to the investigating authority but to use as a benchmark the market, for the good (or service) in question, *as it exists* in the country of provision".

respect to certain Softwood Lumber From Canada[92] seems to suggest that where the domestic market is distorted an investigating agency may use another relevant benchmark. Specifically this case stated that "an investigating authority may use a benchmark other than private prices in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods"[93]. The AB however did not state what the relevant benchmark in such a situation would be.

In the case of the Indian natural gas market, apart from the supply from NELP gas fields, all other supplies are price controlled by the government to the final consumers. It is likely that this could lead an investigating authority to reject NELP prices as an adequate benchmark on the grounds that even NELP prices are distorted on account of the predominant role of the government in supply and distribution of gas.

In such a scenario (and since the AB state what the relevant benchmark would be) the other possible benchmarks could be the price of alternative fuels, import prices or world prices. A comparative chart of natural gas prices as against alternative fuels is provided below:[94]

Statement showing price of alternative fuels / feed stocks

MT = Metric Tonne OE = Oil Equivalent TOE = Tonnes of OE

Fuel/ Feed stock	Basic Price Rs/MT	Landed price Rs/MT	Basic Price in OE terms Rs/MT	Landed price in OE terms Rs/MT
FO				
2004-05	10612	12951	11054	13491
2005-06	14185	16614	14776	17307
LSHS				
2004-05	10419	11910	10854	12406
2005-06	13487	15272	14049	15908
Coal				
2004-05	941	2206	1606	3765
2005-06	973	2321	1661	3960
R-LNG				
2004-05	9164	10423	7451	8474
2005-06 (from Jul'05)	8980	10109	7301	8219
Naphtha				
2004-05	19854	23159	18469	21543
2005-06	24087	32043	22406	29807
Natural Gas (APM)	Rs./1000SCM at 10000 Kcal			
2004-05 (from July'04)	2850	4457	3167	4952
2005-06 (from July'05)	3200	5053	3556	5614
Natural Gas (non-APM)	Rs./1000SCM at 10000 Kcal			
2004-05 (from July'04)	7271	9450	8079	10500
2005-06 (from July'05)	7473	9501	8303	10557

Note : Landed price includes transportation charges, taxes and any other levies/charges
Source : Replies to questionnaires

The above shows that basic price and landed price of APM natural gas is significantly lower than most fuels except coal. The comparison more stark if naphtha is taken as

[92] WT/DS257/AB/R.
[93] Id at para 77-122.
[94] Tariff Commission Report 2006 at pg 22.

a reference price for natural gas as it is almost 652% more than the basic price of natural gas for 2005-06.

If import prices (existing and spot) are compared to consumer price of gas to fertilizer units outside the north east, they are approximately 70% and 303% more than the price of the APM gas.

As for world prices, it is generally believed that it is not possible to talk about a world price for natural gas as the world market is fragmented and many of the gas producing markets are still highly regulated. As a result of different degrees of market liberalization, prices also differ greatly.[95] Nonetheless as per World Bank data, the indicative world prices of natural gas are as follows:

		Annual averages		
Commodity	Unit	Jan-Dec 2006	Jan-Dec 2007	Jan-Mar 2008
Natural gas, Europe	a/ $/mmbtu	8.47	8.56	10.86
Natural gas, US	a/ $/mmbtu	6.72	6.98	8.65
Natural gas LNG, Japan	a/ $/mmbtu	7.08	7.68	10.23

The APM consumer price for 2005-06 was 2.36 USD / MMBTU[96], while the lowest natural gas price for 2006 was prevalent in the US markets and this was approximately 6.72 USD/MMBTU. Even at this rate, APM gas is 184% less than the lowest priced US gas.

The above situation highlights the difficulty that an investigating agency would face in the event that it attempts to arrive at a market driven price for a natural resource, particularly in a scenario where most markets in the world are regulated. It also highlights the discretion that the interpretation of article 14. (d) as propounded by the AB in *United States - Final Countervailing Duty Determination with respect to certain Softwood Lumber From Canada* seems to place on an investigating agency. Given that there is equal justification for using prices of alternative fuels, import prices or even indicative world prices as a benchmark, it is not unlikely that depending upon the situation of the day an investigating agency could choose a benchmark for calculation of benefit that results in attributing a punitive subsidy rate in a CVD investigation.

A(V) Specificity

A subsidy is actionable only if it is specific. As stated above APM rates are provided only to certain sectors such as fertilizers, power, transport and small scale industries both in the north-east as well as elsewhere in India. The subsidy is thus specific and would be actionable.

B.(I) GAIL tariffs

As mentioned before GAIL has fixed tariffs for transmission over its pipelines. The government (through GAIL) is thus providing a service and consequently a financial contribution. However it is unclear whether there is a benefit to fertilizer and power

[95] "Benchmark and price discovery mechanism", www.unctad.org/infocomm/anglais/gas/sitemap.htm
[96] See chart pg. page 39 of this chapter.

units in the supply of gas through GAIL to them as against other non-APM consumers. There is also no data to indicate whether supply over GAIL pipeline confers a benefit on the consumer (whether APM or non-APM) as against a supply over other pipelines. The basis of pricing does not seem to indicate that there are preferential tariffs to certain customers or that tariffs over GAIL are preferential over tariffs on other networks. In light of the same it is not possible to ascertain with certainty that GAIL transmission charges confer a benefit or that such benefit is targeted to a class of consumers.

NATURAL GAS PRICING IN RUSSIA

Gazprom, which is 38% government owned is Russia's natural gas monopoly[97], and is the biggest extractor of natural gas in the world[98]. Gazprom is not only Russia's largest gas producer, it also owns the entire gas pipeline infrastructure in Russia – all 155,000 kilometers of it, along with the compressor stations.

As stated in the underlying research, natural gas supplied to the domestic market in Russia is highly discounted in comparison to the prices charged in Russia's export markets. Below is an elaboration of the manner in which domestic and export sales take place in order to ascertain if apart from dual pricing, Gazprom's pricing also leads to domestic subsidies or is violative of other provisions of GATT 1994.

I. DOMESTIC SUPPLY

Gazprom's policy on supplying gas to its domestic consumers differs considerably from its policy on determining prices for export. Gazprom's supply planning is governed by the OAO Gazprom Gas Resource Allocation Guidelines, which cover gas exports and production by independent gas producers. According to the Guidelines, OOO Mezhregiongaz annually and quarterly informs Gazprom's core departments about gas volumes physically supplied during a preceding year (quarter). Furthermore, Mezhregiongaz collects from consumers supply requests for next year. Gas is allocated based on this data. At the same time, account is taken of whether consumers have fulfilled their gas payment commitments in previous years. If necessary, Gazprom provides solvent customers with extra gas volumes with due regard of available technical capacity and existing international and domestic commitments. Gas is also supplied to new consumers and to secure gas supply, a new consumer is required to file a form, attaching detailed spreadsheets showing the consumer's heat and fuel needs, and a report from a transportation organization confirming it has the facilities and capacity to supply the gas. The permit to use gas will be issued depending on resource availability by region, optimal pipe flow requirements and economic feasibility of using gas as fuel.[99]

a. Sector wise supply of gas

Of Gazprom's supplies in 2006 approximately 37% was supplied to power, 6% to metallurgy, 6% to agriculture, 2% to cement, 10% to households, 15% to the general population and 24% to other consumers.[100]

b. Region wise allocation of gas

Gazprom's regional allocation of gas is done by assessing the needs of a region and here Gazprom looks at the following factors:

i. gasification rate of the region;

[97] Energy Tribune- February 13th, 2007- http://www.energytribune.com/style.css
[98] http://en.wikipedia.org/wiki/Gazprom
[99] http://eng.gazpromquestions.ru/index.php?id=5
[100] Id.

ii. the region's ability to undertake part of the gasification related expenses;
iii. existing gas debt;

In order to supply gas to each region Gazprom enters as a starting step into a partnership agreement between Gazprom and a regional government. Further a formal gasification contract is signed between the two parties. The local governments are also required to provide information about their prospective gas consumers for a investment bid based upon which a phased gasification plan for the region is drafted. This also includes a list of properties to be gasified as per feasibility study.[101] The state is not allowed to withdraw gas above its quota unless agreed on with Gazprom.

The whole sale price of gas to various consumers (except the population) is various zones/regions in Russia is as follows:

Price Zone	Whole sale gas price for consumers (except the population) in RR/1,000 cu m
I	779
II	937
III	1,104
IV	1,242
IVa	1,198
V	1,270
V I	1,306
V II	1,320
VIII	1,382
IX	1,427
X	1,477
Xa	1,673
XI	1,489

In November 2006, the Government of the Russian Federation decided to increase the maximum level of changes in the regulated prices for natural gas for the period up to 2010 as follows: up to 15 % in 2007, up to 25 % in 2008, up to 20 % in 2009, and up to 28 % in 2010. It is also planned to bring the sales profitability up to the European market level by 2011 (adjusted to the transportation costs and customs duties).[102]

The wholesale price of 1,000 cubic meters of gas for a Russian household (as of 2007) is around $15.90 (about $0.45 per Mscf). For industrial users, gas costs around $24.20 ($0.69 per Mscf).[103]

[101] http://eng.gazpromquestions.ru/index.php?id=5
[102] Gazprom- Annual Report- 2006- Page 45
[103] Energy Tribune- February 13th, 2007- http://www.energytribune.com/style.css

The 2008 domestic prices were set in December 2007- the average regulated wholesale gas prices were estimated at 1,690 RR/1000 cu m[104] for industrial customers and 1, 290 RR/1000 cu m for the population[105]

It is not clear and there does not seem to be any material to suggest that the prices set for each zone are further provided at more preferential rates to either one particular type of industry over another. These appear to be wholesale prices to all consumers except households which are supplied natural gas at preferential rates as compared to the industrial users. While power appears to be the predominant industrial user of natural gas, there is no material to suggest that power companies receive the gas on preferential terms or rates as compared to other industrial consumers.

II. EXPORTS

Gazprom has the sole authority to export gas out of Russia as per a Federal Law "On gas exports" which was adopted in 2006.[106]

Western Europe is the major external market for Russian gas and Gazprom supplies around 1/3 of Western Europe's aggregate gas imports. The largest importers of Russian gas are Germany, Italy, Turkey and France. In 2006 gas sales to the CIS and Baltic States grew 1/3 to 101 bcm. The key customers were Ukraine, Belarus, Kazakhstan and Azerbaijan.[107]

Volume and sales figures for supply of gas from Russia in 2006[108]:

Sales to Europe	Sales to CIS and Baltic States
161.5 bcm of gas	101.0 BCM OF GAS

EARNINGS FROM GAS SALES TO EUROPE	SALES TO THE CIS AND BALTIC STATES
RUR 845.9 BLN	RUR 209.7 BLN

a. Exports to Europe

Gazprom exports gas to Central and Western Europe mainly under long-term agreements that typically derive from intergovernmental framework treaties. Long-term agreements with key customers typically contain a "take or pay" provision, meaning that the customer agrees to pay for a certain minimum amount of gas even when a lesser amount was physically used.

[104] http://eng.gazpromquestions.ru/index.php?id=5
[105] Also see bloombery which reported an increase of 25% in Russia's domestic gas prices. http://static.seekingalpha.com/favicon.gif
[106] Annual Report 2006 at pg. 47.
[107] http://eng.gazpromquestions.ru/index.php?id=4
[108] Id.

Long-term agreements assure steady gas supply and a reliable market. As per Gazprom only long-term deals can guarantee the producer and exporter returns on its multibillion dollar investments in major gas export projects, while assuring steady and reliable gas flow for the importer in the long term.[109]

The European gas market liberalization has enabled Gazprom to take part in managing regional supply and transmission companies, and directly work with final customers, for instance in the UK and France. Starting from April 1, 2007, Gazprom has effectuated direct deliveries of Russian gas to the Italian market.[110]

Gazprom's 2006 export price figures showed the annual average export price of Russian natural gas supplied to Western and Central Europe to be approximately $260.70 per 1000 cubic metres of gas supplied[111].

b. Exports to CIS countries

In 2006, Gazprom completed a transition to the market based price setting principles for gas consumers in all of the CIS countries. As a result, gas prices for the CIS region have grown two-threefold and are gradually reaching European levels. At the same time, when building price offers for each country, consideration is given to a degree of its integration with Gazprom's gas business. Special attention is paid to developing market based cooperation with the major countries transiting Russian gas to Europe such as Ukraine and Belarus. At present, there is a clear differentiation between contracts for gas supply to Ukraine and contracts for gas transit via its territory. According to Gazprom "the market principles of relationships are fixed in a five-year gas supply and transit contract signed with Belarus."[112]

The 2006 gas sales in CIS and Baltic states increased by RR 101.3 billion (93.5 %) compared to 2005 and reached RR 209.7 billion. The increase in sales revenues was mostly due to the growth in the average sales price for natural gas by 46.7 % compared to 2005, which was RR 2,077.4 per 1,000 cubic meters (exclusive of excise tax and customs duties) in 2006. The sales volume increased by 31.9 % and reached 101 bcm.[113] As Gazprom states, its strategy in the CIS and Baltic states is to ensure that Russian gas will continue to maintain its predominant position in their energy sector while at the same time improve on the existing contractual terms so that they are on par with European levels. Gazprom however admits that this transition will be gradual and in the process Gazprom hopes to get access to consumers in these countries by participating in their privatization programs.[114]

(i) Prices for Ukraine

In early 2006, the former unified contract for gas supply to Ukraine and gas transit to Europe through its territory was split into two separate contracts: a supply and a transit one. The agreement stipulates that the initial price for natural gas supplied from Russia shall be US $ 230 per 1,000 cubic meters. Provided that Ukraine receives

[109] http://eng.gazpromquestions.ru/index.php?id=4
[110] http://eng.gazpromquestions.ru/index.php?id=4
[111] http://www.gazprom.ru/eng/articles/article24179.shtml
[112] http://eng.gazpromquestions.ru/index.php?id=4
[113] Gazprom- Annual Report- 2006- pg. 47
[114] Id at pg. 49.

Central Asian gas that is cheaper, the average price for gas supplied to it was set at US $95 per 1,000 cubic meters in 2006. In 2007 however Gazprom proposes to supply natural gas to Ukraine on the same terms. In order to optimize core asset management, Gazprom has arranged for the acquisition from its subsidiary Gazprombank of a 50% stake in ROSUKRENERGO which is the supplier of all the imported gas into Ukraine.[115]

(ii) Prices for Moldova

The price for natural gas for Moldovian consumers was increased from US $ 80 up to US $110 per 1,000 cubic meters in the first half of 2006 and up to US $ 160 per 1,000 cubic meters in the second half of 2006. In December 2006, a contract was signed that envisaged the increase in the gas price for Moldova up to US $ 170 per 1,000 cubic meters in 2007 and up to a net-back priority with average European prices in 2011.[116]

(iii) Prices for Belarus

On December 31, 2006, a five-year contract was signed with Belarus for the supply and transit of gas during the period from 2007 through 2011. The contract stipulates the price for Russian gas for 2007 (at US $100 per 1,000 cubic meters) and the price formula was to take effect on January 1, 2008. It also provided rates at which the price would move towards market price in 2008, 2009, and 2010 (67 %, 80 %, and 90 %, respectively).[117]

(iv) Prices for Armenia, Georgia, and Azerbaijan

Similarly Gazprom prices for Armenia, Georgia, and Azerbaijan, were US $ 110 per 1,000 cubic meters in 2006. As per the Gazprom Annual Report the price charged for the natural gas sold in Georgia was to increase to US $ 235 per 1,000 cubic meters in 2007 and the following years. The price for the natural gas supplied to Armenia was to remain at US $ 110 per 1,000 cubic meters till 2009. Incidentally Gazprom's shareholding in the joint venture ArmRosgazprom providing for gas transportation and transit in Armenia has increased from 45% up to 53.4% in November 2006.[118]

The table below[119] outlines Gazprom's group marketing structure in 2006:

Country	Percentage of sales
CIS	16.6%
Russia	54.6%
Europe	27.9%
Baltic States	0.9%

The difference in prices charged to Europe as against CIS countries is quite significant. September 2007 official Gazprom sales figures showed that sales of gas to far abroad countries (Europe) took place at an average price of 6,683 RR/mcm ($262.07/mcm) while sales to FSU (former soviet countries or CIS/Baltic states) countries took place at an average price of 2,842.3 RR/mcm ($111.45/mcm). In

[115] Id.
[116] Id.
[117] Gazprom- Annual Report- 2006- pg. 49
[118] Id at pg. 50.
[119] http://eng.gazpromquestions.ru/index.php?id=4

comparison the average price of natural gas sold in Russia, during the same period took place at 1,303.5 RR/mcm ($51.12/mcm)[120].

The table below[121] represents the **dynamics of average prices for natural gas sold in FSU and Europe:**

(Given in RR/1000 cubic meters)

Year	Europe	FSU
2002	2446.0 ($95.92)	1126.4 ($44.17)
2003	2938.7 ($115.24)	1056.3 ($41.41)
2004	2926.5 ($114.76)	1046.4 ($41.03)
2005	3964.8 ($155.48)	1415.7 ($55.51)
2006	5238.5 ($205.43)	2077.4 ($81.46)

III. DUAL PRICING AND REMEDIES

The preferential pricing of gas for domestic use as against exports is a classic case of dual pricing, which is facilitated not by any export restriction but by the fact that Gazprom is a monopoly (with 38% government stake) and has been granted the sole authority to conduct exports of gas out of Russia. The proponents of dual pricing, the US and EU have suggested that such practices should be addressed (the US has not provided a specific remedy) and the EC has specifically stated that dual pricing should be prohibited. Additionally the EC also suggested amendments to Article 3 of the ASCM to deal with dual pricing. The EC has suggested the following textual amendments (in italics) to Article 3 of the ASCM:[122]

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods *or subsidies inconsistent with Article III of the GATT 1994*

(c) the provision, by virtue of government action, of goods to domestic production on terms and conditions more favourable than those generally available for such goods when destined for export

The addition of sub-clause (c) to Article 3 becomes crucial in the case of Russia.

Assuming that the supply of gas domestically to all consumers is available at the same rate, Gazprom's policy would not amount to an actionable subsidy (as it would not be specific even though there would be a "financial contribution" and a benefit would be conferred in accordance with Article 14 ASCM)[123]. But whether Gazprom's pricing would be a subsidy or not is only relevant in the event that a processed product that uses natural gas as input is exported and is further the subject of a CVD proceeding such that a duty is levied. However, in the absence of exports that rely on natural gas as an input and may be subject to CVD proceedings, there would be no

[120] http://www.gazprom.ru/eng/news/2008/02/26998.shtml
[121] Gazprom 2006 Annual Report
[122] TN/RL/GEN/135
[123] A more detailed subsidy analysis is undertaken below. The stated proposition is only for purposes of the dual pricing analysis.

avenue to prohibit or sanction the grant of preferential gas pricing to domestic industry in Russia[124].

In this scenario, EC's suggested amendment through the addition of sub-clause (c) is important. EC's prime concern stems not from the fact that downstream, industries are getting natural gas at preferential rates. Their concern arises from the fact that natural as is made available to Europe at significantly higher rates than to domestic Russian households and consumers and that gas supplies to Europe are cross-subsidizing these domestic sales. Thus EC's main efforts are to limit or prohibit Russia's ability to price gas differently for exports and domestic markets.

Sub-clause (c) seems to achieve this objective of the EC. This clause states that *"the provision, by virtue of government action, of goods to domestic production on terms and conditions more favorable than those generally available for such goods when destined for export",* would amount to a prohibited subsidy.

Sub-clause (c) covers exactly the type of pricing that Gazprom is indulging in, in Russia. As discussed above, under the existing provisions of the ASCM, an importing country like EC would not be able to force (through a Panel/AB ruling) or prohibit Russia from granting gas on preferential terms to its domestic industry. The only remedy to EC would be though a CVD action wherein it would be able to countervail a product imported from Russia that uses preferentially priced natural gas as its resource, but the policy of discriminating between exports and domestic sales would remain unaffected.

However if sub-clause (C) were added, the mere fact of providing gas at differential rates would amount to a "prohibited subsidy" as it would lead to the provision of *goods to domestic production on terms and conditions more favourable than those generally available for such goods when destined for export*. Thus by classifying a policy of differential pricing between exports and domestic sales as a "prohibited subsidy" would a WTO member be able to go to the very root of the pricing policy and seek its elimination. Clearly it is only by virtue of an amendment to article 3 of the ASCM would Russia be compelled to discontinue dual pricing under the rules of the WTO. In all other scenarios, it would be permitted to maintain the dual pricing, with its downstream industries having to bear the brunt of such pricing in the event of a CVD action in an importing country.

IV. SUBSIDY ANALYSIS

The provision of natural gas by Gazprom is a financial contribution since Gazprom being directed or entrusted by the government provides goods, namely natural gas, within Russia. Accordingly there would be a benefit if the provision is made for less than adequate consideration. While Article 14(d) stipulates that the benefit is to be determined in relation to the prevailing market conditions for the good in question in the country of provision, this stipulation may be ignored when the market is distorted due to the predominant role of the government within that market[125]. In light of the same and the extensive control of Gazprom over the distribution and pricing of gas within Russia, an investigating agency is likely to ignore any prices of gas which are

[124] In Article 3, only export contingent subsidies and subsidies that are contingent on the use of domestic over imported products are prohibited outright.
[125] See discussion in natural gas subsidy analysis for India.

supplied by independent players. However neither Article 14 (d) nor the AB has recommended the appropriate benchmark to be used for arriving at the benefit if the "prevailing market conditions" are not considered due to the predominant role played by the government in that market. In light of this, an investigating agency may either use import prices, export prices or world prices. If either export prices (to Europe) or world prices are used, the quantum of benefit provided to Russian domestic industry would be significant. As stated above while sales to Europe are at an average of about $262.07/mcm, in comparison the average price of natural gas sold in Russia, are at an average $51.12/mcm. Export prices are thus almost 412% more than domestic prices thereby establishing a significantly large benefit on domestic users.

Despite the existence of a "financial contribution" and "benefit", the subsidy nonetheless would have to be specific. As stated above, Gazprom supplies gas within Russia at preferential rates to its household consumers as against industrial customers thereby conferring more of a subsidy on household consumers. Amongst industrial consumers, there is no evidence to suggest that Gazprom prices gas preferentially to one sector or industry over another.

However gas is supplied region wise and Gapzrom establishes zone wise rates for its supply. The zonal pricing chart provided above seems to indicate that the subsidy might be geographically specific in that it is available to "certain enterprises located within a designated geographical region" and thus some regions benefit more than other regions[126]. But Gazprom's regional distribution policy also indicates that such region wise distribution seems to be made taking into account an "objective criteria" which are neutral and do not favour one enterprise over another[127]. It could be argued that the criteria for setting zone wise rates are economic in nature and horizontal in application (i.e. the gasification contracts are signed after each region has given its requirement for existing and future consumers, its ability to bear some of the gasification expenses and these criteria seem to be applicable for all regions that seek supply and gasification contracts with Gazprom).

In the absence if any further evidence, the zone-wise distribution seems to be done purely taking into account the needs of the region and the same set of criteria seems applicable to all regions. If on the other hand there is evidence that the region wise pricing has infact been instituted to make gas available to certain industries which are located in certain zones (say most fertilizer units are located in Zone I and not in Zone VII), at preferential rates, there might still be a case for *de facto* specificity. But if all industries despite their location get gas at the zonal rate, it would be difficult to establish *de facto* specificity.

De facto specificity could also be argued in the case of supplies to power companies which consume nearly 37% of the gas supplies making this sector the single largest industrial gas consumer. Article 2.1 (b) states that despite the appearance of non-specificity a subsidy may in fact be specific if there is "predominant use by certain enterprises" or "the granting of disproportionately large amounts of subsidy to certain enterprises". Would the fact that the power sector consumes the largest portion of gas, amount to the predominant use by the power sector of Gazprom gas? Similarly could this fact also lead to a finding that it leads to the grant by Gazprom of

[126] Article 2.1 of the ASCM.
[127] Article 2.1 (b) of the ASCM read with footnote 2.

disproportionately large amounts of subsidy to power enterprises? While there is no clear guidance on this issue from any Panel or AB finding, it is unlikely that the mere fact that some enterprises consume more gas over others purely due to the fact that they need more gas by virtue of the nature of such enterprises, would lead to a finding of *de facto* specificity. This is particularly if Gazprom supplies to all enterprises (whether power or other industries) as much gas as these sectors need to use at the same price. Thus the mere fact that one sector uses more gas than other sectors, (in the absence of other evidence that Gazprom supplies gas to such sectors at better rates or provides less gas at the same low rate to other sectors other than the predominant user) would not by itself lead to a finding of *de facto* specificity.

V. GATT PROVISIONS

a. GATT Article XVII

It is worth examining if apart from the ASCM Gazprom's differential pricing could lead to violations of GATT provisions. In this respect GATT Article XVII on state trading enterprises may be relevant.

The relevant provisions of GATT Article XVII are provided below:

> *"(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports and exports by private traders.*
>
> *(b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.*
>
> *(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.*

Further Add article XVII paragraph I states that:

> *The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.*
>
> *Paragraph 1 (a)*

> *Governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".*

A STE is an enterprise that has either "formally or in effect", been granted "exclusive or special privileges", and such enterprise is required "in its purchases or sales involving either imports or exports to act in a manner consistent with the general principles of non-discriminatory treatment". Such non-discriminatory treatment would mean that an STE "*make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."*[128]

Under this definition Gazprom would constitute an STE as it has been given the sole authority to export gas out of Russia as per a Federal Law on gas exports which was adopted in 2006.[129] Thus Gazprom would have to follow the principles of "non-discrimination" in its purchases or sales involving either imports or exports. GATT Article XVII does not spell out clearly whether the obligation to non-discriminate applies equally to maintain non-violation of the national treatment as well as MFN obligations. GATT Panel rulings[130] have tended to indicate that Article XVII only covers the MFN obligation and not national treatment. However the issue was finally settled in the *Korea - Frozen Beef*[131] case where the Panel stated that the obligation of non-discrimination covered both MFN as well as national treatment.

(i) Article XVII and MFN obligation

A STE is required in the exercise of its privilege, not to violate the MFN principle. Thus prima facie, the policy of a STE of selling to different markets at different rates would violate the MFN obligation. However the Add article to Article XVII makes it clear that:

"*The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets*".

This same principle was also reiterated by the Panel in *Canada - Measures related to exports of wheat*[132]. In this case, the Canadian Wheat Board had been granted the exclusive right to purchase and sell western Canadian wheat for export and domestic consumption. The Canadian Wheat Board in its sales, not only sold below market rtes, it also discriminated in the prices for different markets. The US claimed that

[128] Article XVII (b)
[129] Gazprom Annual Report 2006 at pg. 47.
[130] See, *Belgian Tax Allowance*, GATT Doc. BISD1S/59, adopted on November 7, 1952 and *Canada-Administration of the FIRA*, GATT Doc. BISD 30S/140, adopted on February 7, 1984
[131] WT/DS161/R. WT/DS169/R, July 31, 2000.
[132] WT/DS276/R April 6, 2004.

such practice was inconsistent with Canada's obligations under Article XVII as Canada was violating the MFN obligation.

The Panel rejected the US argument and stated that an STE was allowed to use its privilege and discriminate so long as such discrimination was on account of commercial considerations. Thus an STE would not be acting solely in accordance with commercial considerations if it purchases or sells on the basis of "such considerations as the nationality of potential buyers or sellers, the policies pursued by their governments, or the national (economic or political) interest of the Member maintaining the STE."[133] The Panel, however, refused to accept the US argument that in relation to the term "commercial," STEs must act like commercial actors that maximize profit and that they do not enjoy government-conferred privileges and are disciplined by market forces.

Thus it is clear that an STE can discriminate between its export markets so long as such discrimination is on account of commercial considerations. In the case of Gazprom, it sells gas at significantly higher rates to Europe than it does to CIS/Baltic states. The chart above shows that in 2006 when the average price of gas to Europe was $205.43/ /1000 cubic meters, it was $81.46/1000 cubic meters for FSU (former Soviet Union) states. The Annual report of Gazprom seems to indicate that pricing to Ukraine, Belarus, Armenia etc is conditioned by the fact its strategy in the CIS and Baltic states is to ensure that Russian gas will continue to maintain its predominant position in their energy sector while at the same time improve on the existing contractual terms so that they are on par with European levels. Gazprom however admits that this transition will be gradual and in the process Gazprom hopes to get access to consumers in these countries by participating in their privatization programs.[134] It is also noteworthy that Gazprom has a 50% and 53% stake in the transportation companies of Ukraine and Armenia respectively.[135]

Based on the Panel's indicative list above of what would constitute non-commercial considerations, it can be argued that sales to the FSU are undertaken on commercial principles. The main idea behind pricing gas to FSU at a substantial discount over European prices seems to be that (i) these countries cannot afford to pay on European levels and an increase in gas prices, if any, to European levels should be gradual (ii) consistent supply of gas at discounted rates to FSU countries will secure Gazprom's market share in these countries (and act as an entry barrier for other suppliers). Providing discounts to buyers based on their paying capacity is a commercial consideration that a seller undertakes. Similarly providing discounts so as to secure a foothold in the market is also a commercial strategy that several corporations employ. This indicates that Gazprom's differential pricing between Europe and FSU countries could well be justified as being undertaken solely for commercial considerations.

(ii) Article XVII: Discrimination between export and domestic market

If STEs are allowed to discriminate between their export markets, would they also be allowed to discriminate (like Gazprom) between their domestic and export market? In the *Canada- Measures related to exports of wheat* case, the US argued that the principle of non-discrimination under Article XVII was broader than MFN and meant that not only could a STE not discriminate between its export markets but it could

133 Id at para. 6.84-88
134 Gazprom Annual Report 2006 at pg. 49.
135 See discussion above on Export Sales of Gazprom.

not discriminate between export markets, on the one hand, and its own domestic market on the other hand[136]. In support of its argument the US referred to Article XI which generally prohibits restrictions on exports. The *ad* Note, for its part, makes clear that a Member cannot circumvent its obligations under Article XVII:1(a) by acting through an STE. In the US' view, these two provisions establish that the non-discriminatory treatment prescribed in the GATT 1994 includes nondiscriminatory treatment between export markets and the domestic market

Canada disagreed, asserting that the phrase refers only to the MFN principle[137] and further noted that, in any event, Article XI could be relevant only where an export STE sells to export markets at a higher price than in the domestic market.

As for whether the phrase also covers discrimination between export markets and the STE's home market, the Panel declined to rule on this issue because it said that it would not affect its disposition of the US claim. Thus, for the sake of argument it said it would continue with its analysis on the assumption that the US view is correct.[138] It also further stated that if the US argument was upheld then the rationale of the ad Article XVII:1 would be equally valid in a situation where the comparison is between sales in an export STE's home market and its sales abroad. In other words ad Article XVII:1 would allow export STEs to discriminate between export markets and their home market for commercial reasons.[139]

If the Panel in the *Canada- Wheat* case had held that Article XVII requires of STEs to not discriminate in pricing between export and domestic markets, it would effectively have prohibited the price discrimination followed by Gazprom. The Panel however did not and the most it went on to state was that even if in the event Article XVII is given a broad meaning, a Member could nonetheless discriminate in pricing between its export and domestic market, if such discrimination was for commercial reasons. Despite this clarification, it is unlikely that Gazprom's dual pricing would meet the "commercial consideration" standard, since the sole reason for the discrimination appears to be political, i.e., to make natural gas available to domestic industry (irrespective of the industry's or any part of the industry's ability to bear the market cost of such supplies) at as lucrative a rate as possible.

VI. QUANTITATIVE RESTRICTIONS

GATT Article XI prohibits Members from maintaining any prohibitions or restrictions (duties, taxes or other charges) on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. Such prohibited restrictions could take the form of quotas, import or export licences or could be any other measure.

GATT and WTO rulings have held that a prohibition or restriction on the import or export of a product into or out of the territory of a Member may either be a *de jure* or a *de facto* QR. It is not always necessary that the Member implement a QR though a law or regulation. Even providing strong incentives or disincentives to private parties

[136] Id. at para 6.47.
[137] Supra n. 37 at para 6.44- 47.
[138] Id. at para. 6.48-50.
[139] Id at para 6.50 and footnote 146.

to act in a manner inconsistent with Article XI suffices for a measure to be attributed to a government[140]. The Panel in *Argentina - Hides and Leather*[141] further elaborated upon this standard to state that although actual trade effects of the measure did not have to be proven in order to establish a violation of Article XI:1, trade effects carried weight, as an evidentiary matter, for establishing the existence of a de facto restriction. Specifically it stated as under[142]:

"*However, it must be borne in mind that Resolution 2235 is alleged by the European Communities to make effective a de facto rather than a de jure restriction. In such circumstances, it is inevitable, as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure.*

Even if it emerges from trade statistics that the level of exports is unusually low, this does not prove, in and of itself, that that level is attributable, in whole or in part, to the measure alleged to constitute an export restriction. Particularly in the context of an alleged de facto restriction and where, as here, there are possibly multiple restrictions, it is necessary for a complaining party to establish a causal link between the contested measure and the low level of exports. In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of precisely how the measure at issue causes or contributes to the low level of exports."

Argentina – Leather, stood for the proposition that in the case of a *de facto* QR the complaining party would have to establish trade impact of such a QR in order for a successful claim under Article XI, it is not clear if the same standard applies for a *de jure* QR, or whether the mere fact of maintaining or existence of such a measure is adequate to seek its removal.

Ad Article XI clarifies that QRs made effective through State Trading Enterprises are also covered by Article XI. However the mere fact of imports of exports being carried out through STEs would not make the measure a QR. In *India - Quantitative Restrictions*[143] the Panel held that for a restriction to be found to exist, it should be shown that the operation of this state trading entity is such as to result in a restriction.

The issue is whether the dual pricing by Russia can be said to be a restriction on the exportation of natural gas out of Russia and therefore challenged as a QR. Given that Gazprom can be held to be a STE, the question is whether the operation of Gazprom and its use of dual pricing methods results in a restriction of exports. Trade data presented in this chapter above shows that despite the dual pricing, exports to both Europe as well as FSU countries have been consistently increasing. It is thus unlikely that in the absence of the showing of a restriction on the exports of natural gas, dual pricing can be challenged as a QR.

[140] *Japan – Trade in Semiconductors*, BISD 35S/116 May 4, 1988. Also see, Mavroidis, Petros, "The General Agreement of Tariffs and Trade", 2005 at pg. 33-47.
[141] WT/DS155/R December 19 2000.
[142] Id at paras 11.18 to 11.22.
143 WT/DS90/R, April 6, 1999 para 5.134-5.135.

CHAPTER 3: CRUDE OIL AND PETROLEUM PRICING IN INDIA

The regulation of the oil sector flows from the fact that India is a net importer of crude oil but it has a fairly well developed refining sector due to which its exports of petroleum products have been increasing over the years. Since crude oil is in short supply the government controls the supply and distribution of crude oil. Thus not only are ONGC and OIL required to transfer sell their crude oil output to government refineries, even JVs under the pre-NELP route are required to sell their output to the state refineries.[1]

I. PRICING OF CRUDE OIL

As stated by the underlying research the price at which crude is sold to the refineries is at the import parity price which is essentially a price linked to an international basket of crude oils. The following shows how the Indian crude oil pricing has risen over the years and its co-relation to international prices of crude oil.

Indian Basket Crude Price (From April 1997 to March 2006)[2]

Date/Month	Price ($/ BBL)	FE Rate (Rs./$)	Price (Rs./MT)
April 1997	17.61	36.01	4674.00
April 1998	12.36	39.79	3625.00
April 1999	15.16	.42.99	4765.00
April 2000	23.27	43.86	7491.00
April 2001	24.82	46.83	8492.00
September 2001	24.59	47.93	8610.00
March 2002	23.29	48.85	8322.00

[1] A pre-NELP MPSC puts a domestic sales obligation on the contractor to sell all of its entitlements of Crude oil and condensate from the contract area within the domestic market in India, till there is self-sufficiency in India. "Model Production Sharing Contract of Pre-NELP", taken from www.infarline.com

[2] http://www.infraline.com/ong/default.asp?URL1=/ong/STAT/2005-06/IndBasketCrudePriceMar06.asp&idCategory=4240

September 2002	27.63	48.50	9748.00
March 2003	28.79	47.64	10112.48
September 2003	26.27	45.85	8880.63
March 2004	32.21	45.01	10686.92
September 2004	39.15	46.10	13306.76
March 2005	49.27	43.69	15871.17
September 2005	59.74	43.92	19343.69
March 2006	60.01	44.48	19681.41

1 MT = 7.3/3 barrels of crude oil

Note: Indian Basket rate is determined based on Platt's quotes. With effect from 1st April 2005 the composition of Indian Basket of crude has been changed to ratio 58:42 for Sour and Sweet Grades respectively.

Source: PPAC

Uploaded on July 15, 2006

Indian prices as a comparison of international crude prices[3]

Fuel	Price	Date
Oman Crude ($/Bbl)	85.78	2/9/2008
Dubai Crude ($/Bbl)	84.31	2/9/2008
North Sea Brent ($/Bbl)	88.75	2/9/2008
India Crude Basket ($/Bbl)	86.53	2/9/2008
Europe - DTD Brent ($/Bbl)	89.48	2/9/2008
WTI Cushing ($/Bbl)	89.23	2/9/2008
Malaysia Tapis ($/Bbl)	94.3	2/9/2008
Wyoming Sweet ($/Bbl)	21.41	2/9/2008
Bonito Sour ($/Bbl)	90.53	2/9/2008
Arab Light ($/Bbl)	87.06	2/9/2008

[3] http://www.infraline.com/ong/default.asp?URL1=/oilprices/fuelprices.asp&idCategory=1735

Arab Heavy ($/Bbl)	80.71	2/9/2008
N. Africa Suez Blend ($/Bbl)	82.67	2/9/2008
W. Afrioca Bonny Light ($/Bbl)	91.55	2/9/2008
Indonesia Minas ($/Bbl)	86.46	2/9/2008

II. PRICING OF NON-CONTROLLED PETROLEUM PRODUCTS

Crude oil is sold to refineries on import parity basis and the resultant products are further sold by the refineries to oil marketing companies. Some of these resultant products such as kerosene and LPG are subsidized to the consumer. Even petrol and diesel are controlled to the extent that price increases in international prices of crude are not passed on to these products as such a pass-on will affect the final price of petrol or diesel. On account of these products being widely used within the economy, they are sheltered from a price increase in crude.

Thus apart from the above mentioned products, none of the other refined products are controlled. The need was felt to test this proposition given the wide spread control over crude and some petroleum products. Below are domestic prices of naphtha at inland and port refineries and international prices of naphtha in various markets.

(i) Pricing of domestic naphtha

Prices of Naphtha at Inland Refineries[4]

Location	Naphtha (per tonne)		Date
	(INR)	(USD)	
Mathura	30340	656.71	6/2/2006
Barauni	30550	661.26	6/2/2006
Koyali	29950	648.27	6/2/2006
Panipat	30460	659.31	6/2/2006

[4] Id.

Prices of Naphtha at port refineries[5]

Location	Naphtha (per tonne)		Date
	(INR)	(USD)	
Haldia	29960	648.48	6/2/2006
Bongaigaon	29960	648.48	6/2/2006
Mumbai	29630	641.34	6/2/2006
Kochi	29690	642.64	6/2/2006
Chennai	29850	646.1	6/2/2006
ONGC (Hazira & Uran)	29590	640.48	6/2/2006
Vizag	29890	646.97	6/2/2006
Narimanam	29850	646.1	6/2/2006
Kandla (imports)	N/A	N/A	6/2/2006
Mangalore	29640	641.56	6/2/2006
Jamnagar	N/A	N/A	6/2/2006

(ii) International prices of naphtha

Product	1999	2000	2001	2002	2003	2004	2005	**2006**
NW Europe								
Naphtha	18.68	28.97	23.73	24.22	29.99	41.43	52.45	**62.23**[6]
USA								
Naphtha	NA	NA	NA	NA	NA	NA	NA	NA
SINGAPORE								
Naphtha	19.39	28.28	23.78	24.89	30.03	40.73	51.12	**61.85**

Petroleum Products Spot Prices in US $/BBL[7] (Average Unit Value, FOB)

[5] Id.
[6] Approximately amounts to $ 460/ MT. 1 MT = 7.4 barrels.
[7] Energy Prices and Taxes, 3rd Quarter of 2007. International Energy agency Publication

Average Prices of Naphtha & Crude for last 5 years[8]

Month	RBI Exchange Rates	Naphtha Price		Crude Price					
		Average FOB Arab		Brent		Nymex		Bonny Light	
		$/MT	Rs/MT	$/bbl	Rs/MT	$/bbl	Rs/MT	$/bbl	Rs/MT
01-02	47.64	192	9134	24	8194	24	8373	23	8128
02-03	48.46	239	11567	28	9739	29	10256	28	9756
03-04	46.13	257	11837	29	9691	31	10501	29	9719
04-05	44.93	372	16708	42	13828	45	14790	42	13873
05-06	44.28	470	20820	58	18883	60	19444	59	19225
5 Yrs Avg	**44.29**	**306**	**14013**	**36**	**12067**	**38**	**12673**	**36**	**12140**

The prices of Naphtha as charged by BPCL[9] at various cities in March 2008 are as follows: Mumbai Rs 39380/t, Delhi Rs 40090/t, Chennai Rs 39650/t and Kolkata Rs 39790/t. Similarly international news reports place the price of CFR Japan naphtha at a record high of $920 per ton in early March, 2008.[10] This would essentially amount to Rs. 36,800/ton, which is on par with the price of BPCL's naphtha rates in the 4 major cities in India.

The Indian domestic and international prices establish that Indian prices are on par and infact higher than international prices for the relatively similar time period. The price data refutes any suggestion that apart from kerosene, LPG, petrol and diesel, other refined petroleum products are also subsidized.

[8] http://www.infraline.com/ong/default.asp?URL1=/ong/napthapolymercrudeprice5yearscorr.asp&idCategory=5271

[9] www.bharatpetroleum.com/general/gen_petroprices.asp?from=corp

[10] http://www.chemsystems.com/about/cs/news/items/QBA%20Q1%202008%20-%20Storm%20Clouds%20Gathering.cfm

CRUDE OIL PRICING IN RUSSIA

The underlying research on the regulatory environment governing the pricing of crude oil in Russia indicates that Russia may have maintained export restrictions in 2000-01 and did maintain an export tax of about 30.5 Euros a ton as of July 1, 2001.

Further research suggests that the export restriction may have been in the nature of a quantitative restriction to cut the export of crude oil by 150,000 barrels per day which was effected on account of a request made by OPEC.[11] This restriction however does not appear to be in force.

The export tax however appears to have been increased substantially to USD 200/tonne[12] in June 2007 to a historic high of USD 250.3/tonne as of November 2007[13]. Crude oil export prices have grown steadily and infact the growth of the Russian economy seems to be tied to the continually rising oil prices.

Historic Russian crude oil export prices from 1997 to March 2008 are attached below as Annexure I [14]. The prices indicate that in December 2006 the export price of crude oil from Russia was about 56.09 USD/brl. This price increased to 61.98 USD/brl in March 2007 then further increased to 68.01 USD/brl in July 2007 and 68.04 USD/Bl in August 2007 and finally to 90.55 USD/brl in December 2007. Thus there has been a significant increase of approximately 20 dollars per barrel since the export tax was raised to USD 250/tonne.

The underlying research states that the Russian government does not actively interfere or directly fix the domestic prices of crude oil, which are deregulated and determined through negotiations between buyers and sellers. However it also states that the government is a major shareholder in several vertically integrated oil companies. It has about 45% in Surgutneftegas[15] and 5% in Lukoil[16], two of the largest crude oil producing companies in Russia. The other major oil producing company in Russia is TNK-BP which is a privately owned company (one of the top 10 privately owned oil companies in the world) where British Petroleum (BP) and the Alfa, Access/Renova group (AAR) each hold 50%

[11] See, "*Russia crude oil shipments likely to surge*", Alexander's Gas and Oil Connection, volume 7, issue 13, June 27, 2002 at www.gassandoil.com/goc/news/ntr22623.htm
[12] See, "*Russian domestic June oil prices drop 9 percent trade*", Reuters, May 25, 2007 at www.uk.reuters.com/article/oilrpt/idukl2530663320070525
[13] See, "*The Russian energy outlook and its influence on East Asia*", by Motomura Masumi, Acta Slavica Iaponica, Tomus 25, pg 67, at http://src-h.slav.hokudai.ac.jp/publictn/acta/25/motomura.pdf
[14] Available at http://tonto.eia.doe.gov/dnat/pet/hist/wepcuralsw.htm
[15] http://russogasoil.blogspot.com/2006_08_01archive.html
[16] www.jamestown.org/publications_details.php?volume_id=3&issue_id=140&article_id=1662

of the equity stake[17]. It also has 37% in Eastern Oil Company, 100% in Roseneft, 75% in Slavneft and 85% in Norsi-Oil.[18]

In addition to the aforesaid, the imposition of an export tax and the consequent rise in export prices of crude oil from Russia raises the possibility of crude oil being available to domestic industries at more preferable rates than export prices.

I. DOMESTIC PRICING OF CRUDE OIL IN RUSSIA

Russia consumes half of the domestically produced crude oil. As stated before most of the oil is transferred within the vertically integrated companies at internal prices. The rest is sold through arm's length deals between producers with excess volumes and independent traders and refineries. Domestic market participants price their crude against the fixed prices offered by the large companies or through pricing formulas tied to international crude prices.[19]

Indicative domestic supply prices from various Russian oil companies are provided below:

Russian Domestic Oil Prices- May 2007[20]

Oil Producer	Roubles/tonne	Dollars[21]/tonne	Dollars/barrel[22]
Oil Producers in West Siberia	7150-7450	280.39-292.16	38.51-40.13
Surgutneftegas	7350-7400	288.23-290.20	39.59-39.86
British-Russian Firm: TNK-BP TNBPI.RTS	7200-7500	282.35-294.12	38.78-40.40

[17] www.tnk-bp.com/company/
[18] See page 4 of the Chapter on Russian oil pricing by ELP.
[19] See, Argus Russian Domestic Crude, Methodology and Specifications Guide, August 2007 at http://64.194.241.197/argusstaticcontent//meth/russoil_meth_latest.pdf
[20] Data based on "*Russian domestic June oil prices drop 9 percent trade*", Reuters, May 25, 2007 at www.uk.reuters.com/article/oilrpt/idukl2530663320070525
[21] In May 2007the exchange rate was : 1 dollar = 25.5 roubles
[22] 7.28 barrels = 1 ton

Oil Producers in Timan-Pechora (Arctic Komi Region)	6950-7150	272.55-280.39	37.44-38.52

II. RUSSIAN EXPORT PRICES

As on May 2007, export prices of Russian Ural spot prices was USD 63.17/brl (1st week of May), USD 60.58/brl (2nd week of May), USD 63.43/brl (3rd week of May), and USD 67.22/brl (4th week of May)[23].

Similarly Russian export prices as of April 30, 2007, to specific regions around the world are provided below:[24]

Russian Urals Crude Prices USD per barrel

Germany	61.84
Poland	61.84
Augusta	63.24
Czech R.	62.44
Slovakia	62.39
Fenyeslitke	62.39

The above indicates that while the Russian government may not have actively fixed the price of crude oil supplies to domestic refineries, it nonetheless has significant involvement in several oil majors in Russia and coupled with the introduction and increase in export tax the objective of making crude oil available to domestic oil companies at preferential rates may have been achieved.

III. SUBSIDY ANALYSIS

Given Russia's imposition of the export tax and the involvement of the Russian government in several oil producing companies, it is worth exploring if the provision of oil to domestic consumers would amount to an actionable subsidy under the ASCM. The finding of an actionable subsidy requires that (i) there is a financial contribution by the government (ii) that such financial contribution confers a benefit and (iii) the subsidy is specific

a. Financial contribution

[23] http://tonto.eia.doe.gov/dnat/pet/hist/wepcuralsw.htm

[24] Petroleum Argus Weekly, Global Markets, Oil price reporting, derivatives and analysis, volume XXXVII, 30 April 2007, available at www.argusmediagroup.com

Under article 1.1 (1) (a) a government is said to provide a financial contribution when:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments

There are two issues here; (i) if the supply of crude oil by various Russian companies to downstream consumers without any clear evidence of volume allocations to such downstream companies, would amount to a government "providing a good" and (ii) if private or minority owned Russian companies can be said to be entrusted by the Russian government to supply goods to downstream companies.

(i) Government provision of goods

The data and information on the structure of the Russian crude oil industry does not indicate that in the supply of crude oil domestically, the Russian oil companies allot specific quantities of oil among various consumers. However the wording of Article 1.1 (a) (1) (iii) does not require the government to allocate and a mere provision of goods and services would suffice to constitute "financial contribution".

(ii) Entrustment to private companies

As stated above, apart from some Russian companies that are majority owned and controlled by the Russian government, others are either JVs or are companies in which the government does not have a majority stake (51%). Thus they would not fall under the definition of "government", unless they are said to be entrusted or directed by the government as required by article 1.1 (a) (1) (iv) to provide a good or service and thus a financial contribution.

This Article was interpreted by the Panel on *US - Export Restraints*[25] in which the issue was whether an export restraint constituted a financial contribution. In

[25] WT/DS194/R, June 29, 2001 at para 8.44.

that case the Panel concluded that the meaning of the words "entrusts" and "directs" requires an "explicit and affirmative action of delegation or command".

The Panel in *EC- DRAMS Countervailing measures*[26] stated that the investigating authority will need to ensure that the evidence of entrustment or direction is probative and compelling and this will obviously differ from case to case and further stated that the extent to which the interested parties cooperated with the authority is, would be a relevant element to be taken into account.

The Panel in *Korea - Measures affecting trade in commercial vessels*[27] stated that the entrustment or direction need not be "explicit", however the direction must be compelling.

From the above it appears that to find a financial contribution as being provided by private parties under direction by the government, there need not be explicit direction to act in a certain manner. Nonetheless despite the implicit nature of the direction, the evidence must be compelling enough to establish that the private parties acted under government direction.

In the case of Russian oil companies, the vertically integrate companies transfer the crude oil to their integrated refining companies at internal rates. The private suppliers seem to price the crude either at the price set by the large companies or based on international prices. Thus there does not appear to be an explicit direction to price crude below international prices. But given the fact that the government is shareholder (albeit not majority) in most oil companies and could have the ability to control the board and policies of these companies and further that the domestic prices of all oil companies seem to be in the same range, a case could be made that even private oil companies are being directed by the government to price domestic crude oil at rates significantly below international rates. Further evidence on the functioning of these companies, could reveal that their pricing policies are tied to the prices set by the bigger Russian government controlled companies and such evidence could go to establish the provision of goods by private companies under the direction of the Russian government.

b. Benefit

Under Article 14 (iv) a government provision of goods or services confers a benefit if such provision is made for less than adequate remuneration. The adequacy of the remuneration is to be determined in relation to the prevailing market conditions for the good in question in the country of provision.

As stated before it has been held by the AB in *United States - Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*[28] that where the domestic market is distorted due to the

26 WT/DS299/R), August 3, 2005.
27 WT/DS273/R, 7 March 2005
28 WT/DS257/AB/R.

predominant role of the government, an investigating agency may use another relevant benchmark.

In Russian crude oil scenario an agency an investigating agency would well be justified in rejecting crude oil price data of private oil companies given that there are few such entities and further because even these private companies tend to benchmark their prices to those of the larger government controlled companies.

The AB has not laid down guidelines for selecting an alternative relevant benchmark. Export prices or international prices could be pertinent and if taken would establish that domestic companies receive crude oil at a significant benefit since average export prices (for 2007) were in the range of USD 60/barrel in comparison to 38 or 40 USD/barrel for Russian prices. Similarly the crude oil prices for the various benchmarks ranged from USD 68/ barrel to USD 72/ barrel.

Crude oil, avg. spot	$/bbl	64.29	71.12	95.31	57.23	66.13	73.50	87.61	95.31	90.69	93.39	101.84

		Annual averages			Quarterly averages					Monthly averages		
Commodity	Unit	Jan-Dec 2006	Jan-Dec 2007	Jan-Mar 2008	Jan-Mar 2007	Apr-Jun 2007	Jul-Sep 2007	Oct-Dec 2007	Jan-Mar 2008	Jan 2008	Feb 2008	Mar 2008
Crude oil, Brent	$/bbl	65.39	72.70	96.67	58.07	68.73	75.04	88.95	96.67	91.92	94.82	103.28
Crude oil, Dubai	$/bbl	61.43	68.37	91.30	55.58	64.71	69.97	83.21	91.30	87.17	89.96	96.78
Crude oil, West Texas Int.	$/bbl	66.04	72.28	97.94	58.03	64.96	75.48	90.67	97.94	92.98	95.38	105.47

c. Specificity

Despite the presence of a financial contribution and a benefit, the subsidy may not meet the requirements of specificity as the regulatory framework for the sector does not indicate that crude oil is supplied to certain refineries or customers on preferential terms.

Thus the domestic pricing of crude oil may not amount to a countervailable subsidy.

IV. DUAL PRICING ANALYSIS

As stated in the chapter on Russian natural gas pricing, the amendments proposed by the EC seek to address a situation of dual pricing where exports of a

natural resource product are priced higher than the domestic sales. To this effect the EC has proposed the following amendments to Article 3 of the ASCM:

"the provision, by virtue of government action, of goods to domestic production on terms and conditions more favorable than those generally available for such goods when destined for export"

Unlike the Gazprom situation where Gazprom is a government controlled company, proving provision of goods by the government in the crude oil sector may not be that easily possible. It is likely that the same standards as are used in determining whether a private party has been entrusted or directed by a government to provide goods as under Article 1 will be used to determine "the provision, by virtue of government action, of goods to domestic production" under the new sub-clause (c). However it all depends on the compelling nature of the evidence. If it is determined that private crude oil companies supply crude oil at differential rates to domestic as against export markets and such provision is directed by the government, the mere provision would amount to a prohibited subsidy and would be liable to be dismantled.

The advantage of this insertion to Article 3 is that by classifying the dual pricing as a prohibited subsidy, a country would be able to seek its withdrawal altogether, unlike a subsidy situation wherein the export of the a downstream product (one that relies on crude oil as an input) would be countervailed but it would not prevent Russia from maintaining the a policy.

V. GATT ANALYSIS

Referring to the discussion under the pricing of natural gas in Russia, pricing of crude oil prima facie presents the same issues with respect to Article XI (QR) and XVII (STE).

In crude oil it would not be possible to prove the functioning of an STE as several Russian companies export crude oil out of Russia and there is no one company that has been conferred with the privilege of conducting exports.

In the case of QR's, like for natural gas exports, exports of crude oil out of Russia have been increasing and constitute 70% of the production and thus a complaining party will not be able to establish that dual pricing amounts to a "restriction" on the exportation of crude oil.

OIL PRICING IN SAUDI ARABIA

The Saudi Arabian oil sector is extensively controlled and regulated by the government. The underlying research indicates that there are two state owned oil companies in Saudi Arabia that are in control of the petroleum sector- Saudi Aramaco and Petromin. Saudi Aramacois described as the sole concessionaire producing crude oil in Saudi Arabia. Saudi Aramco produced over 95 per cent, by both value and volume, of the crude oil exported from Saudi Arabia and is the only supplier of crude oil for domestic refineries[29]. It is the claim of the Saudi government that while Saudi Aramco is wholly-owned by the government, the government does not play any role in setting company policy or in making operational decisions. The Chairman of the Board of Directors (the Minister of Petroleum and Mineral Resources) and three of the remaining eleven Directors are Government officials, four are members of the company's management and four are from the private sector, including three non-Saudi nationals.[30]

During its accession Saudi Arabia reserved the right to maintain price controls on certain products such as crude oil, diesel, kerosene, gasoline and fuel oil. According to the Ministry of Foreign Affairs, the said prices are applicable to all "usage quantities" and the Ministry states that outlined prices are fixed and offered to local and foreign investors alike[31].

The price controls are as stated below:

Type of Service	Rate	Category
Refined Oil for Industries	12.5 halalas/liter ($. 3.33)	For all usage quantities
Petrol***	90 halalas/liter ($. 0.24)	For all usage quantities
Kerosene	43.5 halalas/liter ($. 0.17)	For all usage quantities
Natural Gas (Methane & Ethane)	SR.2.81 /million BTU ($ 0.75)	For all usage quantities
Liquid Petroleum Gas (LPG)	Japan FOB in a given quarter minus 30% discount.	For all usage quantities
Diesel	36 halalas/liter ($. 0.10)	For all usage quantities
Crude Oil	35 halalas/liter ($. 0.10)	For all usage quantities
(**): According to the Council of Ministers Approval No.169 dated 11/8/1419H. (***): According to Saudi-ARAMCO announcement dated 20/1/1420H.		

The reservation as to price controls does not appear to be a reservation to maintain the price control at a certain level for, in 2006 the above prices were

[29] See, Report of the Working Party on the accession of the Kingdom of Saudi Arabia, WT/ACC/SAU/61, November 1, 2005 at pg. 26.
[30] Id.
[31] www.mofa.gov.sa/Detail.asp?InSectionID=1719&InNewsItemID=34509

further revised downwards. In December 2006, Premium gasoline was slated to be sold within Saudi Arabia between 45 and 60 halalas per liter, instead of the previously announced prices of 75 and 60 halalas.[32] Similarly diesel prices were also cut from 37 to 25 halalas per litre[33].

In comparison the Saudi export prices are comparable to world prices. In December 2006, Saudi heavy spot crude oil prices were USD 52.79/ barrel. In 2007 they ranged from 57 to 86 USD/brl and in 2008 they are about 90 USD/brl.

Similarly, light spot prices are provided as Annexure II and Medium spot prices are provided as Annexure III.

The world crude oil prices are as follows:

		Annual averages			Quarterly averages					Monthly averages		
Commodity	Unit	Jan-Dec 2006	Jan-Dec 2007	Jan-Mar 2008	Jan-Mar 2007	Apr-Jun 2007	Jul-Sep 2007	Oct-Dec 2007	Jan-Mar 2008	Jan 2008	Feb 2008	Mar 2008
Energy												
Crude oil, avg. spot	$/bbl	64.29	71.12	95.31	57.23	66.13	73.50	87.61	95.31	90.69	93.39	101.84
Crude oil, Brent	$/bbl	65.39	72.70	96.67	58.07	68.73	75.04	88.95	96.67	91.92	94.82	103.28
Crude oil, Dubai	$/bbl	61.43	68.37	91.30	55.58	64.71	69.97	83.21	91.30	87.17	89.96	96.78
Crude oil, West Texas Int.	$/bbl	66.04	72.28	97.94	58.03	64.96	75.48	90.67	97.94	92.98	95.38	105.47

Thus Saudi prices have been in line with world crude prices.

While the Saudi practice amounts to dual pricing, it is unlikely whether the remedies proposed by the EC, in terms of inserting a new sub-clause (c) to article 3 on "prohibited subsidies", in the ASCM would be applicable to countries such as Saudi Arabia that have negotiated the right to maintain controls in their accession dialogues. It is also pertinent that Saudi Arabia is a member of OPEC and part of its arrangement with the organization includes its right to limit the supply and peg prices of exports at a certain level as agreed between all the member countries of OPEC. Thus in the case of Saudi Arabia, arriving at a solution for the dual pricing essentially means addressing the OPEC issue and dismantling the price controls that Saudi has negotiated for itself.

[32] www.arabnews.com/?page=1&section=0&article=90356&d=24&m=12&y=2006
[33] www.thehindubusinessline.com/blnus/10011221.htm

Assuming that the price controls are not part of its accession protocol, it is still unlikely whether the lowered domestic cost would amount to an actionable subsidy. The Saudi price controls would meet the thresholds of financial contribution and benefit, but are unlikely to be held to be specific. It appears that the depressed prices are charged across the Saudi economy to all enterprises to the extent of their need. Thus there does not appear to be any preferential allocation to some sectors over others or preferential pricing of the same fuel to certain customers and not others.

CHAPTER 4: PRICING OF ALUMINIUM IN CHINA

The country research for China indicates that in 2006 the Chinese government imposed a 5% export tax on aluminium and canceled a 15% export tax refund available to Chinese exporters. It also appears to have imposed an export ban on aluminium.

The underlying research indicates that the Chinese government does not directly fix the prices of bauxite or aluminium. However the industry is dominated by CHALCO (a state controlled aluminium corporation). The underlying research further states that there are 3 other significant producers of aluminium in China. The conclusion of the said research states that notwithstanding the imposition of the export tax and the reduction in export tax refund, there is no evidence of direct price control of aluminium in the Chinese market and no conclusive evidence of dual pricing.

However an export tax can have the effect of a formal price fixing scheme as it is believed that restricting exports of the good makes the good available to domestic producers at a comparative price advantage. Given the presence of CHALCO and the imposition of the export tax and the cancellation of the 15% refund, it was felt that price data should nevertheless be analysed to ascertain whether the imposition of the tax or reduction in duty rebate has had the effect of depressing prices domestically or limiting exports from China. To this effect a comparison of Chinese domestic as well as international aluminium prices was undertaken. The data was gathered from publicly available sources.

I. International prices of Aluminium

International aluminium prices have been on the rise since July 2007. In that period the international price of aluminium were $2,675.80/ metric ton[1]. The current international price of aluminium is around $2,850 a ton[2]. Below are the London Metal Exchange prices as of 3rd April 2008 figures[3]:

	ALUMINIUM
Cash-buyer	2,835
Cash-seller and settlement	2,837
3-months buyer	2,886
3-months seller	2,887
15-months buyer	2,963
15-months seller	2,968
27-months buyer	2,975
27-months seller	2,980

II. Domestic prices in China

[1] International Herald Tribune- July 2007: http://www.iht.com/articles/2007/07/02/business/bxinvest.php
[2] BuyJunction- Market News- February 21st, 2008: http://buyjunction.in/market_news/aluminium_price_rally_to_continue.php
[3] London Metal Exchange- http://www.lme.co.uk/aluminium.asp

As of Feb 28, 2008, Chinese domestic spot aluminium price stayed around RMB 19,360 ($2,709.2) per tonne on the Shanghai market[4]. On the same day at the Shanghai Futures Exchange the prices ranged from a high of RMB 20,000 ($2,798.8) a tonne to RMB 19,915 ($2,786.9).[5]

In February the three-month aluminium price at the LME was $2,920. At the same period on the Shanghai Futures Exchange the aluminium prices had touched a peak of RMB 20,150 ($2,819.76) in February 2008[6].

The above therefore indicates that Chinese domestic aluminium prices are in consonance with world prices and the export tax and reduction in tax refund do not seem to have made aluminium available to local Chinese downstream companies at more favourable rates.

III. Export data for aluminium

Measures such as the imposition of the export tax and the reduction in the export rebate appear to have adversely affected the aluminium exporters and exports have tended to decrease in the last few years. In 2004, the total volume of primary aluminium exported from China was 16,80,000 tonnes.[7] However, in 2005, it sharply reduced to 7,00,000 tonnes. Again the increase in taxes in the later half of 2006 reduced the volume of exports in 2007 to just 20% of the total volume of aluminium exported in 2006.[8] In 2006, China had exported 7,19,030 tonnes of primary aluminium, whereas, in 2007 it exported just 1,43,806 tonnes.

In spite of such unfavourable policies, the aluminum industry of China has been doing well. The export restrictions on primary aluminum has led to the industry switching focus to processed aluminium in order to generate higher profits and therefore exports of processed aluminium products have increased.

The table below compares the volume of aluminum exported in October and the first 10 months of 2007.

Product	Country	Vol. in Oct. 2007 (t)	Y-ot Change (%)	Vol. in Jan-Oct 2007(t)	Y-Y Change (%)
Primary Al.	Japan	347	-96.6	41,128	-64.3
	Netherlands	325	-	914	104.1
	South Korea	298	-99.1	76,452	-82.5
	Total	1043	-97.8	143,806	-80
Al. Alloy	Japan	13,973	5.9	116,219	-31.7
	Hong Kong	7,200	39.7	67,423	64.7
	South	3,119	44.5	46,186	28.7

[4] Resource Investor- http://www.resourceinvestor.com/pebble.asp?relid=40762
[5] Resource Investor- http://www.resourceinvestor.com/pebble.asp?relid=40762
[6] China's Aluminium Price Likely to Soar Above $3,000 in Q2", Interfax-China 26 Feb 2008
[7] Supra 2
[8] http://www.chinamining.org/News/2007-11-26/1196050606d7900.html

	Korea				
	Indonesia	1,473	-6.2	11,164	58.8
	Netherlands	1,213	235.7	11,748	403.4
	Total	30,776	25.5	300,941	-3.9
Al. Products	Total	109,090	-	1,548,080	58.7
Scrap Al	Hong Kong	6	-6	112	399.1
	Japan	1	-13.6	173	-36.5
	Total	7	-94.1	2,644	203.6
Aluminum	DPRK	4,350	-	25,586	86.2
	Japan	246	181.8	1,650	194.9
	Netherlands	70	-	133	-
	Magolia	60	-	180	-
	Total	4,984	1,678.60	30,685	81.8

Source: General Administration of Customs, China[9]

IV. Dual pricing analysis

Imposing export taxes or reducing export rebates are the kinds of measures that the EC and US have contended as leading to dual pricing. However as pricing data above indicates, despite the export tax and the reduction in rebate, domestic prices of aluminium have nonetheless been rising in tandem with LME prices. This may also be on account of the winter storms that China experienced that led to a fall in aluminium production and thus a consequent rise in price. Further as is seen above, the imposition of the tax and the reduction in rebates have led to fall in the exports of primary aluminium.

Thus the measure may have reduced the availability of the natural resource, but it has not necessarily made the product available at more preferential rates to domestic producers. The data seems to indicate that even when a country imposes a restriction or measure that limits the availability of the resource outside the country of production, that fact alone may not necessarily lead to the resource being available to the country's downstream industry at preferential rates. Thus a mere export restriction or a disincentive to export may not always lead to the dual pricing though it could limit the availability of the resource out of the country of imposition.

V. GATT Article XI

As discussed before in the chapter on natural gas pricing for Russia, no WTO member is allowed to maintain a prohibition or restriction, except for duties, taxes or other charges, on the importation or exportation of a good from the country in question,

[9] http://www.chinamining.org/News/2007-11-26/1196050606d7900.html

irrespective of whether such restrictions is made effective though quotas, import/export licenses or other measures.

The imposition of the export tax thus seems valid under this stipulation. The question that follows is whether a reduction or cancellation of an export tax refund also amounts to a measure in the nature of a "duty, tax or other charge" or is it in the nature of "other measures" which are prohibited. There is no Panel or AB ruling that throws more light on this issue and one must necessarily go by the rationale for granting export rebates in order to assess whether the elimination of an export rebate is in the nature of a tax (which is allowed) or in the nature of "other measures" (which are not allowed to be maintained).

Export rebates are given by countries based on the principle that on the export of a product, the import duties or indirect taxes levied on such product are refunded. This derives from the principle that countries should export goods and not the taxes thereon. Such rebates of import duties or indirect taxes as the case may be are also permitted under the ASCM provided they meet the strict verification guidelines provided in Annex II of the ASCM. Thus the refund of import duty or refund of indirect taxes essentially represents such percentage of the import duty or indirect tax suffered by the inputs that went into the making of the final product which is then exported.

In accordance with the principles of the ASCM, these import duties are then refunded on the export of the final product. Thus an export tax rebate may increase or decrease in relation to the increase or decrease in the rate of import duties or indirect charges that were levied on the inputs, thus affecting the final rebate rate. The export rebate may also change if a government decides as in the case of China, to reduce the extent of export rebate on Aluminium due to which aluminium is made to suffer some incidence of the import duty or the indirect tax which was levied on the input, thereby reducing the incentive to export.

The grant of an export rebate is not an obligation of a WTO Member but all Members provide for such rebates because they ensure the competitiveness of their exports. In light of the same, a reduction in the export rebate does in a sense amount to the final product suffering an incidence of tax which it would not normally have, if the export rebate was provided to the full extent. Thus the reduction in an export rebate in effect amounts to imposing a duty or charge on the exported product. For this reason a reduction in export rebate rates are more likely to be seen as duties or charges rather than as "other measures" and would be permissible as a valid restriction under Article XI.

The export ban on the other hand would not be maintainable as it would amount to the type of "prohibition" which is violative of Article XI of the GATT[10].

[10] *Canada –Periodicals*, WT/DS31/R, June 30, 1997

CHAPTER 5: PRICING OF COPPER IN CHILE

The underlying research states that while the state is the owner of the mines, while mining concession are given to several private mining companies. CODELCO (Chile's state owned company) which is dedicated to extracting and selling copper is the world's largest producer of copper products. The research further states that all copper mining companies with an output of more than 75,000 tonnes are obliged to supply to the national manufacturing industry. This supply however takes place at the prevailing international fob prices.

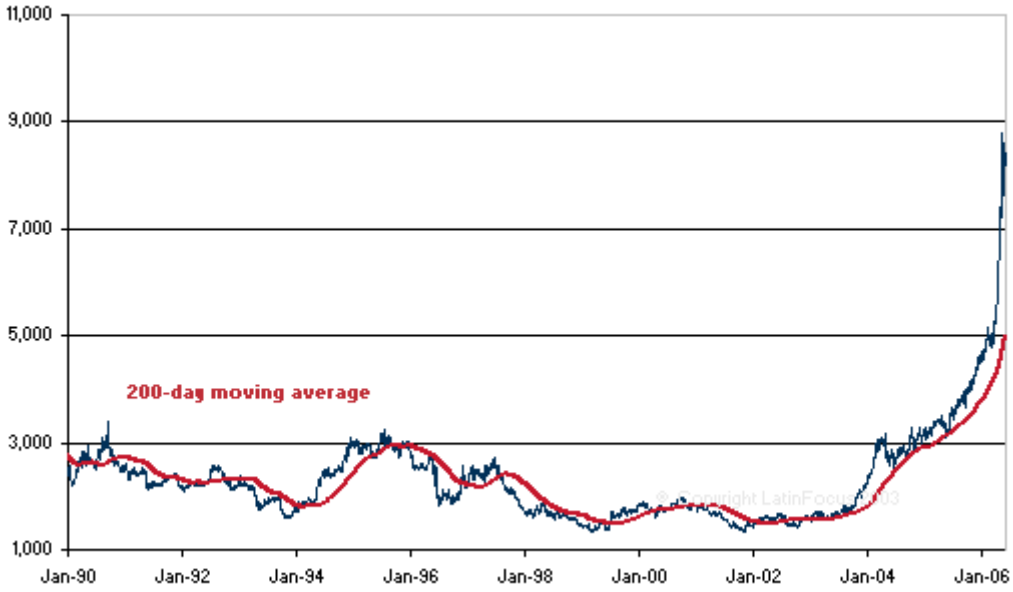
This fact indicates that while there may be a financial contribution (by the fact that CODELCO and private companies are acting on the express entrustment or direction of the government), the allocation may nonetheless not amount to an actionable subsidy. In the absence of data on domestic prices, it is not possible to ascertain whether any downstream industry that uses copper is provided preferential terms with respect to such supplies of copper. There is also no material to suggest that some sectors that use copper or units within those sectors have been provided more copper than others despite the same requirement. Or that either CODELCO or any of the copper mining firms have been instructed to supply copper to certain industries in preference over others. The underlying research instead indicates that atleast in terms of pricing policy; all supplies to the domestic manufacturing industry take place at international fob prices. In light of the same, it appears that while there might be a financial contribution, it may not lead to a benefit and in any event such allocation may not be specific, unless evidence to the contrary is presented.

The **LME** prices for April 2008 prices (US$/tonne)[1] for the international price of copper are given below:

	Copper
Cash-buyer	8590.00
Cash-seller and settlement	8591.00
3-months buyer	8440.00
3-months seller	8441.00
15-months buyer	7995.00
15-months seller	8005.00
27-months buyer	7585.00
27-months seller	7595.00

[1] http://www.lme.co.uk/copper.asp

Copper Prices, 1995 – 2007[2]



Note: Copper Grade A, daily cash seller and settlement prices in US$ per metric tonne and 200-day moving average.
Source: London Metal Exchange and LatinFocus calculations.

As on March 06, 2008, copper, Chile's leading export surged 5.5% to an equivalent record of $8880.12 per ton, the highest nominal value it has ever attained.[3] Thus export prices and LME price seem to be at par.

The report on the structure of the copper industry thus concludes that despite the domestic allocation, there is no dual pricing of copper and that copper pricing within Chile or domestic copper prices are in line with LME prices. It has not been possible to verify whether Chilean domestic prices are in line with fob prices as data on domestic prices is limited and not available through publicly sources. Thus in the absence of information which suggests that Chile exports copper at LME rates but makes it available to downstream industry at discounted rates or preferential rates, it is not possible to come to the conclusion that Chile indulges in dual pricing.

[2] http://www.latin-focus.com/latinfocus/countries/chile/chlcopper.htm
[3]London Metals Exchange-
$4.028 a lb- 1 ton = 2204.6lb
$4.028 a lb = $8880.12 per ton
http://today.reuters.com/news/articleinvesting.aspx?type=comktNews&rpc=33&storyid=2008-03-06T182529Z_01_N06231317_RTRIDST_0_CHILE-COPPER.XML

CHAPTER 6: FERTILIZER PRICING IN INDIA

I. Pricing of DAP

The underlying research states that DAP is a de-controlled fertilizer, meaning that it is not subject to the orders under the Essential Commodities Act and a producer of DAP (whether government company or private) is only subject to the scheme of concession if such producer or importer sells at the Maximum Retail Price (MRP) as indicated by the government.

There are three elements in the pricing of DAP; (i) Cost of Sales, (ii) MRP and (iii) Concession. The Cost of Sales is in effect the cost of production plus return. For indigenous DAP it is the sum of the normative industry price (including the cost of raw materials, conversion cost and return) and the selling and distribution cost. The essential raw materials for producing DAP are rock phosphate, sulphur, ammonia and phosphoric acid. Producers mostly import the rock phosphate, sulphur for conversion to phosphoric acid or import the phosphoric acid directly. Since India is heavily dependent on the import of these essential raw materials, it is also subject to international price increases of these products.

Just as in the case of indigenous DAP, the industry wide cost of sales for imported DAP includes average C&F cost of imported material, customs duties, selling and distribution costs and reasonable return.

The MRP is one single price and fixed for the whole country in order to ensure uniformity in prices across the country and is the price at which DAP is sold to farmers.

The Concession is thus the difference between the Cost of Sales and the MRP, which is given to the producers/importers. As the underlying paper states, it had been the policy of the government to maintain a reasonable differential in the rates of concession in favour of indigenous DAP vis-à-vis imported DAP. For instance, as the data in the paper shows, MRP for both indigenous and imported DAP was fixed at Rs. 9350/MT since February 28, 2002. The concession rates in April 2006 were fixed at Rs. 6173/MT for indigenous DAP and at Rs. 5206/MT for imported DAP. Thus imported fertilizer received a lower amount of concession. This was however justified by stating that the domestic industry faced disadvantages in the procurement of raw materials used in the manufacture of DAP due to which cost of production was higher (unlike international producers of DAP) and thus indigenous deserved a higher amount of concession. Even within indigenous DAP, the government fixed a different concession rate for DAP produced by importing rock phosphate and sulphur and DAP produced from imported phosphoric acid.

The Cabinet Committee on Economic Affairs though has directed the Department of Fertilizers in 2004-05 to evolve a methodology for working out concession rates for DAP using international prices of DAP as a benchmark. The Expert Group, constituted by the Department of Fertilizers accordingly suggested a methodology for arriving at concession rates of indigenous DAP based on the prices of imported DAP.[1]

In line with the recommendations, the 2007-2008 MRP and Base Concession figures of DAP show a single rate of concession for both domestic as well as imported DAP and are as follows[2]:

Product	MRP as on date (Rs./MT)	Base Concession Rates for 2007-2008 (Rs./MT)
DAP	9350	Indigenous DAP Group I – 9398 Indigenous DAP Group II – 9398 Imported DAP – 9398

Thus providing the same amount of concession rate to both indigenous and imported DAP and fixing a uniform MRP across the country essentially amounts to assuming that both indigenous and imported DAP incur the same level of cost of sales.

Presently the Government announces the indicative MRP for DAP and the normative delivered price, which is calculated by the Department based on the recommendations of the Tariff Commission (the MRP announced by the Government is lower than the normative delivered price of DAP). The normative delivered price is updated quarterly based on the escalation/de-escalation formulae given by the Tariff Commission. The difference between the quarterly updated normative delivered price and the indicative MRP is paid to the manufacturers/importers, as concession on these fertilizers.[3]

The other main recommendations of the Expert Group are as follows:[4]

(a) In fixing the cost of sales, representative prices in the international market of DAP would be taken into account so that they are not prone to manipulation.

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[1] Fourteenth Lok Sabha Report of the Standing Committee on Chemicals and Fertilizers

[2] No. 22011/5/2007-1781, Ministry of Chemicals and Fertilizers, Department of Fertilizers, July 10, 2007. Also see, http://pib.nic.in/archieve/others/2007/nov07/r2007111403.pdf

[3] 12th Standing committee on Chemicals and Fertilizers (2205-06) 14th Lok Sabha, Ministry of Chemicals and Fertilizers, (Department of Fertilizers), Demand for Grants (2006-07), April 2006, of pg 23. The recommendation of the Tariff Commission are not publicly available.

[4] The report of the Expert Group is not publicly available. Excerpts from the Group's recommendations are provided in the 12th Standing committee on Chemicals and Fertilizers (2205-06) 14th Lok Sabha, Ministry of Chemicals and Fertilizers, (Department of Fertilizers), Demand for Grants (2006-07), April 2006, of at pg 24.

(b) The cost of domestic production would be arrived at by taking into account the normated cost of phosphoric acid, international ammonia prices[5], cost of conversion and the capital cost based on the norms given by the Tariff Commission. It is also believed that pegging phosphoric acid prices to international prices will help the industry to enter into long term contracts for supplies of phosphoric acid and consequently increase indigenous production of DAP[6].

(c) One of the components of the concession would be the cost of marketing including all the selling and distribution expenses as well as the dealers' margin. The marketing cost is recommended at Rs. 1350/MT, which would be escalated on an annual basis linked to WPI (General) index.

(d) While the base concession would be payable to both to domestic manufacturers as well as to importers without any discrimination, marketing costs would only be paid to those importers that have infrastructure and extension network for providing various services to the farmer in a comprehensive manner and are not exclusively in the business of sale of DAP. Indigenous manufacturers are not subject to the condition requiring them to have in place a network so as to make the DAP available to farmers.

(e) The Expert Group has also recommended another component of the concession which would only be payable to domestic manufacturers. There is not much detail on how this component would be calculated and paid but it essentially seeks to offset the disadvantage faced by domestic manufactures of DAP vis-à-vis manufacturers abroad. This recommendation has been adopted from the Gokak Committee Report wherein it had been stated that in the event of ammonia prices rising to very high levels or the DAP prices falling substantially in the international market, the domestic manufacturer would suffer a disadvantage to the extent of 26-30%. Floor and ceiling for the disadvantage have been recommended as 5% and 20%. Thus it appears that in these two scenarios, the domestic manufacturer would be provided a higher rate of concession than the importer. These rates could revised downwards depending on the competitiveness of the industry. The extent of disadvantage would be estimated on the normated cost of phosphoric acid (this is based on the methodology suggested by the Expert Group in its interim recommendations) and would also take into account the cost of holding inventory by the domestic industry.

(f) The adjustment in subsidy on the base concession and marketing cost would be made quarterly after taking into account the prevalent international prices and foreign exchange rates.

Apart from the concession, freight support for transportation of indigenous and imported DAP for remote/difficult areas was also introduced in 1997. This scheme

[5] This was confirmed by Mr. Abbas, Deputy Director, Department of Fertilizer, who stated that in computing the cost of phosphoric acid or the other imported ingredients, the landed cost r the international price, whichever is lower is considered.

[6] 12th Standing Committee Report at pg. 18.

was implemented to ensure availability of fertilizers in all parts of the country. The increase in freight given by the Government with effect from 1st April 2007 is given in the table below:

PRODUCT	FREIGHT INCREASE (Rs./MT)
Ind. DAP (Group I)	252
Ind. DAP (Group II)	171
Imp DAP/ MAP	165

II. Monitoring of Fertilizer sales

The Department of Fertilizers, in recognizing the problems inherent in the system of payment of concession under the Concession Scheme, devised an alternative mechanism for the release of payment. In 2006, the Department launched a web-based online 'Fertilizer Monitoring System' for monitoring production, distribution and sales of decontrolled phosphatic and potassic fertilizers in the country.

The system was introduced with an aim to introduce a more transparent and upto-date system of disseminating information to the public on the dispatches and receipts of phosphatic and potassic fertilizers to different destinations in the country on a day-to-day basis. As per this system, State Governments exempt manufacturers/importers from sales certification. State Governments have to however monitor receipts of decontrolled fertilizers in their respective states and ensure the supply of quality fertilizers to farmers. The 'Fertilizer Monitoring System' is applicable to DAP, MOP and NPK with effect from January 2006.

III. DAP- Import Pricing

A March 2008 figure sets the international price of DAP at $1000/tonne, which represents a three-fold increase in price in the span of a year. The international price of DAP in January 2007 was a mere $300/tonne in comparison to the current four-figure price.[7] The high prices are also attributed to Cargill's monopoly situation in the global market where it has approximately 80% market share.[8]

The requirement and indigenous production of DAP during 2004-05 and 2005-06 was as under :-

(Qty. in Lakh MTs)

Period	Requirement	Production

[7] http://economictimes.indiatimes.com/News/News_By_Industry/Indl_Goods__Svs/Chem__Fertilisers/Tripling_of_Di-ammonium_phosphate_price_to_send_subsidy_bill_soaring/articleshow/2856616.cms

[8] Id.

2004-05	70.59	51.84
2005-06	78.02 (Estimate)	45.41 (Estimate)

In order to tide over the shortage, imports of DAP have been increasing:[9]-

(Quantity in lakh tonnes)

Year	Urea	DAP	MOP
2003-04	0.00	7.34	25.80
2004-05	6.41	6.44	34.09
2005-06 (Upto Dec.2005)	14.75	22.42	36.73

The table[10] below shows the average international price patterns for DAP until September 2007:

YEARS	AVERAGE INTERNATIONAL PRICE (in USD)
2002-03	183
2003-04	203
2004-05	260
2005-06	290
2006-07- 1st Quarter	303
2006-07- 4th Quarter	392
2007-08- 1st Quarter	506
September '07	534

DAP - Demand, Production & Imports[11]

			DAP			
	DEMAND		INDIGENEOUS PRODUCTION		IMPORT	
	Quantity ('000MT)	MRP Rs/MT	Quantity ('000MT)	Average Product Cost Rs/MT	Quantity ('000MT)	Price Rs/MT
2000- 2001	5900	8900	4889	13050	861	11950

[9] 12th standing Committee Report at pg 28.
[10] http://pib.nic.in/archieve/others/2007/nov07/r2007111403.pdf
[11] Fertilizer Sector and Natural Gas Scenario from www.infraline.com

2001- 2002	6200	9350	5094	12950	933	11050
2002-2003	7180	9350	5241	11941	383	11050
2003-2004	7705	9350	4732	12584	734	11350
2004-2005	8187	9350	5184	14770	644	14530
2005-2006	8669	**9350**	4520	**15396**	2438	14844
Future Projections						
2006-2007	6802		5718		1084	
2007-2008	7069		6004		1065	
2008- 2009	7625		7864		239	
2009- 2010	7917		8257		340	

Thus while India imports DAP at a price of approximately Rs. 40/kg, the same is sold in the domestic market to farmers at just Rs. 9/kg, thus indicating that the Government pays a concession of approximately Rs.31/kg.[12]

India is dependent on Morocco for a large percentage of its Rock Phosphate and Phosphoric Acid requirements, both of which are required for DAP production. India imports nearly 1.1 Million Tonnes (MT) of rock phosphate from Morocco, which is about 22% of total import of rock phosphate. About 1.2 MT of phosphoric acid is imported to India from Morocco, which is about 50% of the country's import.[13] Data is not available on the domestic prices of rock phosphate and phosphoric acid in Morocco or Jordan so that the same can be compared with the international prices

IV. Subsidy expenditure

Allocations for the concession scheme are made under the Union Budget. The budgetary allocations are used to pay the concession as incurred on both domestic as well as imported DAP. For instance, the budgetary provision of the Department of Fertilizers for the year 2006-07 were Rs. 18154.06 crore, out of which the Plan component was Rs. 98.81 crore and the Non-Plan component was Rs. 18055.25 crore. In the revised estimates for 2005-06, the Plan expenditure was pegged at Rs. 105.00 crore and Non-Plan at Rs. 18055.25 crore. This showed a reduction of Rs. 6.19 crore for 2006-07 in the Plan Budget and no change in the Non-Plan Budget.[14]

[12] op cit note 3
[13] http://news.webindia123.com/news/Articles/India /20080327/918783.html
[14] 12th Standing committee on Chemicals and Fertilizers (2205-06) 14th Lok Sabha, Ministry fo Chemicals and Fertilizers, (Department of Fertilizers), Demand for Grants (2006-07), April 2006, of at pg 21 and 64.

The total budget allocation for the financial year 2005-06 under the Concession Scheme was Rs.5200 crore. Additional funds for an amount of Rs.550 crore were further allocated in the 2nd batch of supplementary demands.

V. Subsidy Analysis

The issue of dual pricing does not arise in the case of DAP as India does not have significant exports of DAP. Infact the domestic production is unable to meet the domestic demand due to which India resorts to imports and quantities imported over the years have been increasing.

The pricing of DAP however raises questions under the ASCM and the issue is whether the pricing of DAP would lead to an actionable subsidy. The text below discusses whether fixing MRP and granting concessions amounts to a financial contribution and if so, does it confer a benefit and could it be held to be specific.

(i) Financial contribution

That the concession scheme makes fertilizers available to farmers at a price which is less than the cost of production plus return of manufacturing units, or less than the price that a farmer would have to pay if market forces were at play, clearly establishes that the Indian farmer is being provided DAP at subsidized rates.

However the issue is whether the concession scheme amounts to the government purchasing goods from DAP manufacturers/importers, and if so, is this being done for more than adequate remuneration[15].

DAP as mentioned above is a de-controlled fertilizer meaning that only units that price the DAP at the specific MRP are eligible for concession. Units are also thus free to price the DAP in divergence with the governments indicative price. However there is no likelihood of that happening as a DAP manufacturer not taking benefit of the scheme would have to also price the DAP at the MRP set by the government or risk losing market share. Besides there is no indication that there are any manufacturers supplying DAP outside the scheme. Further while manufacturers/ importers are allowed to sell DAP through their own network, there appears to be a clear monitoring system in place for verifying the claims of the manufacturers/importers. Only valid claims secure the benefit of the concession scheme, which then is a cost to the government and is paid out of the Budget. Thus while the government may not be "physically" buying stocks of DAP, the manner in which the scheme functions, i.e. setting the MRP and monitoring of sales at the state level, effectively amounts to the government purchasing DAP from manufacturers and importers and supplying it to the farmers at the indicated MRP. The concession scheme amounts to purchasing DAP and the government is thus providing a financial contribution as under Article 1.1 (a) (1) of the ASCM.

(ii) Benefit

[15] See the subsidy analysis in the natural gas chapter which establishes that fertilizer units are being provided with natural gas at less than adequate remuneration which amounts to an actionable subsidy. In the case of DAP, the government does not procure or direct another agency to supply rock phosphate, ammonia or phosphoric acid and make it available to fertilizer units. Thus there is no provision of these specific goods by the government to DAP manufacturers at less than adequate remuneration.

In the case of DAP, when the government gives the concession it is in effect reimbursing the manufacturer for the 'cost of sales'. The cost of sales essentially amounts to the selling price of fertilizer as it includes, cost of production, distribution and marketing costs as well as a reasonable return. Thus the concession is a reimbursement of hypothetical[16] costs and selling price, which it is believed, would have been charged by the manufacturers had the units not been under the scheme.

Thus the governments reimbursement of the cost of sales through the payment of the 'on account' and 'balance' concession payments, would amount to a benefit if the actual selling price charged by manufacturers not under the scheme, is less than the stated 'cost of sales' under the scheme.

However in the absence of any private manufacturers of DAP outside of the scheme and the extensive involvement of the government, any investigating authority would be justified in rejecting the Indian market under the standard laid down by the AB in the *Lumber III* case.

For the same reason, comparison with imports would also be rejected as imports of DAP are also the beneficiaries of the concession scheme. In light of the same, an investigating authority may resort to international prices of DAP.

As shown in the chart above, the international prices of DAP as of 2007-08 (1st quarter) are at about USD 506/MT and in 2005-2006 were at about $290/MT. In comparison to the same, the average product cost of Indian DAP (see chart above on DAP- demand, production and imports) was about $385 for 2005-06[17]. It should also be noted that a report has stated that the international price of DAP is about $1000/tonne. It is not clear if and the extent to which the concession rate for domestic and imported DAP will be revised in light of the latest international price increase.

However if it is assumed that that the domestic and international prices since 2005-2006 have moved in tandem in the same ratio until 2008, it may likely result in a finding that the government has purchased DAP from indigenous producers at more than adequate remuneration. Ironically, it would similarly imply that for the years 2005-06, the government may have purchased DAP for more than adequate remuneration from importers as well. This will result from the fact that the concession scheme as amended in 2005 provided the same level of concession for imported DAP (which would be priced at international rates), as it did with domestic DAP. It also fixed one uniform MRP for both types of DAP. Thus by providing the same concession per tonne for both domestic as well as imported DAP and setting the same MRP, the scheme treats imports on the same level as domestic produce. In other words, it assumes that the cost of sales/tonne is the same for both domestic and as well as imported DAP. But DAP imports would presumably be priced at international levels, which as per the 2005-06 data are lower than the average product cost of domestic DAP. The result is that under the concession scheme

[16] It is hypothetical to the extent that an industry average is taken.

[17] Data on the cost of sales is not publicly available and the above data is taken with the assumption that it would be in close comparison to the cost of sales.

importers may end up being compensated at the level of cost of sales, which is higher than the international price of DAP.

As pointed out earlier, in light of the latest price increase, it is not clear if the government will revise concession rates. If rates are revised, and it is found that the cost of sales for domestic DAP is higher than the average international price, that fact could likely result in a finding of benefit, or the purchase of DAP for more than adequate remuneration.

(iii) Specificity

The concession scheme will be found to be specific on two counts. Firstly it is specific to the fertilizer industry, and secondly, being a de-controlled scheme, it is also specific to those units that avail of the concession. It would thus amount to an actionable subsidy[18].

VI. GATT Analysis

(i) National treatment: Article III:4

Article III:4 of GATT 1994 states as follows:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product".

Under Article III:4, all WTO members are required to ensure that all laws, regulations or requirements which affect the internal sale, offering for sale, purchase, transportation, distribution or use of a product are not applied to imported products in a manner that leads to such imported products being accorded less favourable treatment than a like domestic product.

WTO jurisprudence has held that according "treatment no less favourable" amounts to mirroring the principle in Article III:1 wherein it has been stated that members should not use domestic measures to afford protection to domestic production.[19] Further the AB has also held that a member in order to prove that it has been accorded treatment less favourable than accorded to a like domestic product, need not

[18] Being an actionable subsidy, an export of DAP may be subject to a CVD investigation in an importing member. However it would be interesting to see how a claim for injury is substantiated. How would Indian DAP which costs more than international DAP, injure the market of an importing member? This may resukt if a manufacturer in India, whose cost of production is actually lower than the industry average cost but who receives the industry wide concession, then uses this advantage to under price exported DAP in comparison to the selling price in the importing country.

[19] *EC-Asbestos*, WT/DS135/AB/R March 12, 2001.

prove that it has suffered in terms of trade (trade effects) or that its imports have reduced as a result of the measure. This is because Article III:4 seeks to protect legitimate expectation of a particular behaviour rather than the trade outcomes itself.[20]

The concession scheme would amount to a law or regulation which affects the internal sale of DAP within India. Since 2004-05 the concession provided to domestic as well as imported DAP is the same and so is the MRP. This would amount to treating both types of products on the same level. However, if as mentioned above, the Expert Committee's recommendations on the marketing component and the disadvantage offset are carried out, this would provide an exporting country with justification to challenge the scheme on grounds of national treatment violation. The recommendation states that marketing costs would only be paid to those importers that have sufficient infrastructure network for providing various services to the farmer in a comprehensive manner and are not exclusively in the business of sale of DAP. Indigenous manufacturers are not subject to the condition requiring them to have in place a network so as to make the DAP available to farmers. Similarly indigenous DAP would be provided an offset (possibly a increase in the concession by a certain rate) if ammonia prices rise to very high levels. This again is not provide to importers. In the first instance, favourable treatment is afforded to domestic DAP producers who need not establish the sufficiency of their distribution networks unlike importers. And if an importer does not meet this burden, he is denied the marketing component of the scheme thus putting him at a financially disadvantageous position. Similarly in the second instance, account of the rise in ammonia prices is only taken into account for domestic producers as against importers who may also have been subject to the price rise. Again by not making this component available to all producers including importers, they are disadvantaged.

The fact that imports of DAP have been increasing would not be a justification to maintain this discriminatory treatment as Article III:4 does not delve into the trade effects of a measure.

Further it has also been held in *Indonesia –Autos*[21] that, in respect of subsidies, violations of Article III:4 occur where discrimination between domestic and imported products results from the conditions attached to the granting of subsidies. As stated above the concession scheme fulfills the description of an actionable subsidy. Moreover since the grant of the concession to DAP importers could vary/lessen on account of the marketing cost and the adjustment offset, it amounts to discriminating between domestic and imported DAP and on this count is also violative of Article III:4.

(ii) Quantitative restrictions

A reading of Article XI and the Panel's interpretation of the said article in *Argentina Hides*[22], it is clear that any measure that acts as a restriction on the import of a

[20] *US-FSC*, WT/DS108/AB/R February 24, 2000, at para 215.
[21] WT/DS54/R, July 23, 1998 at para 14.29 –14.46.
[22] WT/DS155/R, December 19, 2000 at paras 11.20 – 11.21.

product may amount to a QR, albeit a *de facto* QR. In that case the Panel had to determine, whether the presence of representatives of the domestic hide tanning industry in the Argentine customs inspection procedures for hides destined for export was an export restriction. The Panel discussed the relevance of the actual trade effect of the measure and found that although actual trade effects did not have to be proven in order to establish a violation of Article XI:1, trade effects carried weight, as an evidentiary matter, for establishing the existence of a *de facto* restriction. The Panel reiterated that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows. In order to establish that the Argentine measure infringes Article XI:1, the EC was not required to prove actual trade effects. However, because the allegation was with respect to a *de facto* rather than a *de jure* restriction, it wold be necessary as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure. The Panel further stated that even if trade statistics showed that the level of exports were unusually low, this would not prove, in and of itself, that that level is attributable, in whole or in part, to the measure alleged to constitute an export restriction. Particularly in the context of an alleged *de facto* restriction it would be necessary for a complaining party to establish a causal link between the contested measure and the low level of exports.

Thus any measure may be alleged to be a QR. In the case of DAP pricing, the differential concession rate (not relevant presently), the discriminatory marketing costs and disadvantage offset made available only to domestic producers, could be challenged as *de facto* QRs. However as is stated in the *Argentine-Hides*, a country challenging the measure would have to prove trade effects and further show that the lowered imports are as a result of the *de facto* measure. On this count a challenge may not be tenable under Article XI as imports of DAP have been increasing considerable over the years and the discriminatory aspects of the concession cannot be held to be have an effect on the trade flows of DAP into India.

(iii) Subsidy under Article III:8

As is mentioned above, the Union Budget funds the subsidy provided by the government under the DAP concession scheme. It is worth considering whether by virtue of Article III:8, the concession scheme could be immune from an allegation of national treatment violation.

Article III:8 (b) states as under:

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

A Panel[23] and AB[24] have clarified that the subsidy envisaged under Article III:8 involves the expenditure of revenue by a government. It would not for instance involve tax exemptions or rebates.

[23]Supra *Indonesia –Autos* at para 14.118 –14.122
[24] *Canada- Periodicals*, WT/DS31/AB/R, July 30, 1997.

A Panel considered the relationship between Article III:8(b) and other provisions on Article III in *EC- Trade in Commercial Vessels*[25] and held that the fact that Article III "shall not prevent" the payment of subsidies that meet the conditions of Article III:8(b) means that if a measure is covered by Article III:8(b), it cannot be inconsistent with any provision in Article III, including Article III:4.[26] It further stated that the "payment of subsidies" "not prevented" by Article III:8(b) only covers subsidies "exclusively to domestic producers" of a given product. It understood this to mean that a subsidy is not inconsistent with Article III:4 merely because it is granted only to domestic producers of a product and not to foreign producers of that product.

While the concession scheme provided by the government would amount to the type of subsidy envisaged under Article III:8 (b) as it involves disbursements from the Union Budget, it would nonetheless not be saved by this article on account of the fact that it is provided to both domestic as well as imported DAP.

Thus a claim stating that the concession scheme cannot be held to be violative of Article III:4 as a result of the exemption provided under Article III:8 would not be tenable.

[25] WT/DS301/R, April 22, 2005
[26] Id at para 7.68.

CHAPTER 7: IRON ORE PRICING INDIA

I. ROLE OF THE MMTC AND EXPORT RESTRICTIONS

The MMTC had been entrusted with the primary responsibility for canalising import/export of metals and minerals in the country. Essentially a trading company, the MMTC's role is to ascertain the needs of prospective buyers, to identify the goods and services they require, to find suppliers for these products, and to ensure prompt delivery of these goods and services in order to hedge against the risks associated with uncertainties in supply, and fluctuating markets.[1] Apart from MMTC, other government companies such as NMDC, KIOCL and private miners of Goa, Hospet, and Nalda also account for export of iron ore. As the underlying research indicates, the Department of Commerce also grants export licenses to private miners to export ore of Fe content above 64%. In conducting the exports, the purchase division of MMTV, prepares an annual procurement plan of iron ore keeping in view the export targets and the previous years closing stocks and procures accordingly. Previously MMTC and NMDC had a long-standing supply arrangement to supply iron ore from NMDC's mines in Bailadila. The two PSUs would hold meetings and record various decisions as to supply of ore and these were then implemented to regulate the supply. The modalities however were revised in 2001 wherein the entire award and risk of a contract were to be borne by NMDC and MMTC would aid NMDC in obtaining contracts and to carry out co-ordination activities. For this service MMTC charges a fee of 3% of the sales proceeds.[2]

A. Canalization

Iron ore exports have increased over the years and the share of MMTC in exports has decreased.[3] Nonetheless the MMTC is India's largest supplier of iron-ore, (handling approximately 15% of India's total exports)[4]. The export of all iron ore with over 64% Fe content is canalized through the MMTC. Export of Iron of Goan origin to China, Europe, Japan, South Korea and Taiwan (irrespective of Fe content), and export of ore from the Redi region to all markets (irrespective of Fe content), is not canalized. Certain types of high-grade iron ore (with Fe content above 64%) from specific areas such as Bailadila in Chattisgarh, are allowed to be exported with restrictions on quantity, which are imposed primarily with a view to meet domestic demand on priority.[5]

B. Quantitative Restrictions

[1] Disinvestment Commission Report X, June 2009- http://www.divest.nic.in/comm-reports/dcreport10.pdf
[2] http://cag.nic.in
[3] http://cag.nic.in
[4] MMTC Website- http://www.mmtclimited.com/generic/show_generic.php?id=1
[5] Ministry of Steel-Policy Framework- http://steel.nic.in/policy.htm

According to the underlying research the present quantitative ceiling of iron ore fixed by the Govt. are:

AREA	ANNUAL QUANTITY (in Million Tonnes)
a) Bailadila Lumps	Not Exceeding 3.00 MT Further reduced to 2.7 million tonnes[6]
b) Bailadila Fines	Not Exceeding 3.80 MT Further reduced to 1.81 million tonnes. Both done in deference in demand to steel industry
c) High Grade Lumps (Bellary-Hospet Sector)	No limit
d) High Grade Fines (Bellary-Hospet Sector)	No limit

C. Export Tax

In 2006-07 Finance Ministry imposed a export tax of Rs. 300/tonne. Given the then prevailing export spot fob price of $62 fpr iron ore exports of 63.5% Fe content, this amounted to about 11% of the fob price. But after lobbying from the mining industry, the export duty on iron ore fines of Fe content of 62% and below was reduced to Rs. 50/tonne and the 300 Rs./tonne price was maintained for iron ore of Fe content of above 62%. In light of the fob price of about USD 135/tonne in January to February 2008, this works out to about 5% of the fob price. The export tax of Rs. 50/tonne works to about 1% of fob price.[7] The new budget has served to maintain the status quo on the export tax of iron ore in India in spite of lobbying by the steel industry to increase export duty (to about 10-15%) and discourage export of high-quality iron ore.[8]

(i) Arrangements with countries

The MMTC mainly exports iron ore to manufacturers in Japan, Korea, China and Pakistan. In terms of the contractual arrangements for the supply of iron ore to these countries, in the case of Korea and Japan, the MMTC has held long-term contractual agreements with Pohang Iron and Steel Company (POSCO) and

[6] "MMTC to ink fresh iron ore export deals", http://164.100.24.208/lsq14/quest.asp?qref=31061, Friday, March 31, 2006

[7] "Indian government maintains status quo on iron ore export tax", March 29, 2008 available at, www.steelguru.com

[8] Steel Guru News, March 29th, 2008 http://www.steelguru.com/news/index/2008/03/01/MzgxMDI%3D/Indian_government_maintains_status_quo_on_iron_ore_export_tax.html. Also see, "India's possible iron ore export tax could negatively impact Chinese steel mills", www.resourceinvetsor.com/pebble.asp?relid=39189

Japanese Steel Mills (JSMs) Association.[9] The contracts for the export of iron ore to South Korea and Japan were renewed in 2006, and provided that iron ore exports to these countries would take place through the NMDC. These contracts were extended until 2011, and assess the quantity to be exported to fall in the range of 2.7 mt to 6.8 mt.[10]. MMTC source indicates that JSMs would buy between 3.47 to 6.75 million tonnes and POSCO would buy between 4.27 and 8.35 million tonnes as part of these contracts.[11]

Around 60% of the iron ore export takes place through long-term contracts. The sales to China and Pakistan have, in the past, taken place on a spot-basis.[12] Recently, however, the Government decided to enter into a long-term ore export contact with China, which has been India's largest importer of iron ore (with imports of 59 million tonne in 2004-2005 and about 68 mt in 2005-2006). Most deals with China, in the past, have taken place on a spot basis. A long-term deal with China would mean that a large portion of the iron ore produced in India would be locked for exports, thereby preventing the Government from further cutting down on iron ore exports.[13]

II. PRICES OF IRON ORE

A. Domestic Prices

Iron ore prices in India have been on a continuous hike which has consequently led to an increase in steel prices. In order to curb inflation and the high prices of steel, the government has been in talks with steel companies to voluntarily cut back exports and has cut DEPB rates and reduced excise duties[14] Steel companies however claim that they would have no option to raise steel prices in light of escalating input prices particularly iron ore. Infact steel companies have been seeking an increase in the export tax on exports of iron ore to 10-15% and a reduction in the prices of iron ore supplied by local companies. They claim that they face a serious disadvantage as against steel companies that have captive mines as the latter incur only about Rs. 300/ton in extracting iron ore.

However despite the requests and in line with its earlier statements that it would increase prices by almost 50% in April so as to be aligned with the international markets[15], NMDC sent letters to steel companies at the end of March stating that there would be a further price hike and the price would be linked to export prices

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[9] Disinvestment Commission Report X, June 1999, http://www.divest.nic.in/comm-reports/dcreport10.pdf

[10] Ministry of External Affairs, Weekly Economic Bulletin, June 27th to July 3rd, 2006, http://indianembassy.ru/docs-htm/en/en_05_03_t2706_2006.htm

[11] See, Lok Sabha unstarred questions answered on July 31, 2006 on export of iron ore, available at http://164.100.24.208/lsq14/quest.asp?qref=31061

[12] Disinvestment Commission Report X, June 2009- http://www.divest.nic.in/comm-reports/dcreport10.pdf

[13] http://www.indiainbusiness.nic.in/business-news/news-bulletin/May_15th_May_21st.pdf

[14] See detailed discussion in the steel chapter.

[15] "NMDC says iron ore prices could rise by 50pc by April", February 12, 2008 at http://economictimes.indiatimes.com/News/News_By_Industry/Indl_Goods_Svs/Met

to JSM[16]. NMDC benchmarks its prices to those charged by global iron ore majors such as BHP Billiton and Rio Tinto.
Reports at the end of March indicate that the domestic prices have risen to Rs. 4000 (about $125/tonne)[17].

On about January 2008, NMDC had raised prices across all grades of iron ore by 47.5 per cent to **Rs 1,783 per** tonne. Before the price hike, effective retrospectively from October 1, 2007, NMDC used to sell the ore with 64 per cent iron content at around Rs 1,209 per tonne[18].

The domestic **spot prices** in March 2008 were around $63 a tonne (approximately 2520 Rs /tonne). At the same time Chinese spot prices are about $90 a tonne. Thus NMDC claims that its domestic prices are still much lower.

Some commentators suggest that the export tax has been nullified due to an almost 100% increase in the export spot prices.

Currently, domestic ore prices are fixed on par with those on long-term export contracts NMDC signs with Japanese steel mills and South Korea's Pohang Iron & Steel Company (Posco). The corporation exports about 3.5 million tonnes (mt) out of its total production of 27 mt; the rest is sold to domestic players that have tied up for supply of ore. Steel makers such as Ispat Industries Ltd and Essar Steel Ltd, which do not have mines of their own, claim that the export price is inflated by the additional 3% service commission that NMDC pays to MMTC for finalizing export contracts and organising vessels. They wanted this to be deducted while calculating the price of the ore for sale in the domestic market. The companies also want the export tax on ore to be deducted while calculating this price[19].

Steel companies have been seeking long term contracts with iron ore mines, with the price linked to a cost of mining plus a reasonable rate of return and with an in built annual escalation clause. NDMC has been entering into short term contract of 3 months so that iron ore prices can be revised based on the tender prices quoted by merchant exports of iron ore[20].

B. Iron ore export prices[21]

In March 2007, the export price ranged from $30-50/tonne.[22] A year later in March 2008, Chinese spot prices are ruling over $90 a tonne.

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[16] "NMDC starts price hike drill", April 2, 2008, available at http://www.telegraphindia.com/1080402/jsp/business/story_9085526.jsp
[17] India wants domestic miners to cut iron ore prices, www.reuters.com/article/rbssIndustryMaterialsUtilitiesNews/idUSDEL1890472. Also see, "Steel manufacturers to meet Paswan", March 3, 2008, http://www.thehindubusinessline.com/2008/03/03/stories/2008030351460200.htm.
[18] www.thehindubuisinessline.com/2008/01/01/stories/2008010250920300.htm
[19] http://www.livemint.com/2007/08/28013439/Govt-panelfinds-no-merit-in-d.html, March 31, 2008
[20] "Steel firms threaten massive hike in prices, March 4, 2008, DNA, available at http://finance.indiainfo.com/2008/03/04/0803041118_steel_firms_threaten_massive_hike_in_prices.html . Also see, "Iron ore politics hits steel venture", Central Chronicle, Marc 20, 2008
[21] FIMI Bulletin, No.1, Volume XXXXI, January 1, 2008.
[22] http://www.financialexpress.com/news/Duty-on-iron-ore-may-hit-mining-industry/193447/, March 7, 2007

- Spot export prices even touched $200/tonne (CFR) in early December 2007[23].

- In December 2007, the export prices of iron ore were in the range of **$180-185** /tonne (approximately **Rs.7,200/tonne**).

- KIOCL received bids as high as **$180.30/tonne** fob and **$185/tonne** fob in December 2007[24].

- In December 2007, Chinese import prices were:
  FOB Indian port $135 to $140
  CIF Chinese port $185 to $192

C. World iron ore prices

As per World Bank data the international prices of iron ore are as follows:

		Annual averages			Quarterly averages					Monthly averages		
Commodity	**Unit**	Jan-Dec 2006	Jan-Dec 2007	Jan-Mar 2008	Jan-Mar 2007	Apr-Jun 2007	Jul-Sep 2007	Oct-Dec 2007	Jan-Mar 2008	Jan 2008	Feb 2008	Mar 2008
Iron ore	c/dmtu	77.4	84.7	140.6	84.7	84.7	84.7	84.7	140.6	140.6	140.6	140.6

(Brazilian), Companhia Vale do Rio Doce (CVRD) Carajas prices for years 2005-08, with 67.50% Fe content and a contract price to Europe, f.o.b. Ponta da Madeira.

D. Volume of exports

Year	Volume of Exports (in tones)	Export Prices (Rupees/t)	Import Prices (Rupees)	Domestic Prices (Rupees)
2005-06	84,046,000[25]	2002 approx.[26] (about USD46/ton)	4484 approx.[27] (about USD103/ton)	1450[28] (about USD 33.3/ton)
2006-07	91,425,000[29]	1931 approx.[30] (about 41.5 USD/ton)	5072 approx.[31] (about 109 USD/ton)	1,517[32] (about USD32.6/ton)
2007-08	100,000,000[33]	Ranged from 2000 –3600-to 7400 (contract price)	----------	Rs. 4000 (about $100)

[23] http://economictimes.indiatimes.com/articleshow/msid-2666523,prtpage-1.cms
[24] FIMI Bulletin at supra n. 21 at pg. 13.

		(spot price approx$50 to $90 and contract price at $140 (fob)-$185 (cif))		

Exports, Imports & Domestic Prices of Iron Ore, 2005-06 to 2007-08

III. DUAL PRICING

The data on iron ore prices and export volumes suggests that despite the tax, exports have increased to 100 million tonnes and export prices have surged to $185/tonne. Domestic steel companies' infact appear to be of the opinion that the export tax has done nothing to reign in the exports of iron ore. Export prices also appear to be in line with international iron ore prices as reflected in the World Bank data. Domestic prices have been lower than fob prices to China but are quite close to the spot prices. Further the present price increase of Rs. 4000/tonne, has been effected in order to raise domestic prices in line with export prices. It is also pertinent to note that the price element in the domestic contracts includes the export tax along with the service charges charged by MMTC, thus implying that NMDC has been trying to benchmark domestic prices to export prices which, includes the element of tax.

The policy of imposing an export tax so as to deter exports of a commodity and make it available for the domestic industry or restrict its availability in the international market is the type of situation that the EC and US have envisaged as amounting to dual pricing. However the iron ore scenario in India appears to suggest that despite an export tax, quantitative restrictions and canalization, a resource may nonetheless be made available in the international markets at international rates and a tax or restrictions need not necessarily curtail the level of exports or make the resource available at significantly lower rates to the domestic industry. This scenario also suggests that if there is international demand for a product (in this case, the growing demand of China that has pushed prices up), the upward rise in export prices may nullify the effect of a tax on exports. Thus the imposition of a tax need not necessarily result in the type of consequence envisaged by the US and EC.

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[25] http://mines.nic.in/ Annual Report , 2007-08, Hindi, Annexure
[26] Supra 25, Total export volume = 84,046,000 tonnes, Total value = Rs 16, 829 crores
[27] Supra 25, Total import volume = 611, 000 tonnes, Total value = Rs 274 crores
[28] http://209.85.175.104/search?q=cache:pWLsmJJuwEwJ:www.assocham.org/events/recent/event_72/Global_and_Indian_trends_in_Metal_industry_Ashutosh_Satsangi.ppt+2005+%2B+NMDC+%2B+iron+ore+domestic+prices&hl=en&ct=clnk&cd=8
[29] Supra 25 Total export volume = 91,425,000 tonnes, Total value = Rs 17, 656 crores
[30] Supra 25 Total import volume = 483,000 tonnes, Total value = Rs 245 crores
[31] http://www.steelguru.com/selectednews/index/2008/003/01/archives.html#38157
[32] http://www.thehindubusinessonline.com/2006/11/15/stories/2006111501161100.htm
[33] http://www.steelguru.com/selectednews/index/2008/003/01/archives.html#38157

IV. SUBSIDY ANALYSIS

The provision by NMDC or other private miners of iron ore to the domestic steel industry will not amount to an actionable subsidy. At the outset while NMDC as a government body does "provide goods", there does not appear to be a direction from the government compelling the other private miners to provide iron ore to domestic companies. Apart from the export tax that may act as a disincentive to export, the tax itself is not in the form of a "direction" to supply ore to steel companies with consequences for non-supply. Further only Iron ore of Fe content of above 64% is canalized through MMTC. Even here, ore from Goa and Redi region irrespective of its iron content is freely allowed to be exported and private miners can under a license also export iron ore of any Fe content. Private miners thus have enough flexibility to either carry out exports or supply the domestic market. Further in light of the fact that exports have increased and that the percentage of exports from MMTC has decreased implies that non-government entities are increasing their share of exports, which would not have been possible if they were under a direction from the government to supply the domestic market. Thus only NMDC can be said to provide goods as understood under Article 1.1 (a)(1) (iv).

To determine if the provision is for adequate remuneration, one would have to compare the prices that NMDC charges to steel companies as against the prices charged by private miners. Though one could argue that the Indian market should be rejected in light of the "predominant role of the government", that argument may not be tenable given that there are several large and small miners who produce almost 57.7 million tonnes of the total 142.71 million tonnes produced in India (almost 40% of total production).[34] And these miners are either free to export or sell in the domes tic market. Thus an investigating agency may not be able to reject the Indian market solely on the ground of the presence of NMDC or the existence of export restrictions.

The adequacy of the remuneration will have to be judged in comparison to the prices charged by other private miners in India. Information is not available on supplier specific domestic prices charged to steel companies and therefore reliance will have to be placed on general price data, which suggests that almost all suppliers of iron ore increased the domestic price to Rs. 4000/ton in March 2008. If this data was rejected a comparison could be made with export prices. Here one may find a "benefit" to the extent that domestic prices are not totally on par with export prices, but the difference is unlikely to be significant especially if NMDC continues to increase domestic prices to bring them in line with export prices.

Most importantly, an investigating authority may not find the supply of NMDC to be specific to any one steel company or group of them. NMDC appears to supply on commercial considerations without a mandate to give preference to any particular steel company/ies. Thus even if the NMDC supply is held to be subsidy, such subsidy will not amount to being specific.

V. GATT ANALYSIS

[34] See ELP chapter on iron ore pricing at pg. 144.

(i) State Trading Enterprises

The relevant provisions pertaining to STEs need to be evaluated for MMTC. For an enterprise to be considered a an STE, it must be granted either formally or in effect, an exclusive or special privilege. MMTC is not the exclusive authority exporting iron ore, but it is the only authority that is allowed to export iron ore of above Fe 64% along with private miners that have been given licenses to export similar grade of ore. To that extent it has been conferred with a privilege. But as stated above, since 2001, NMDC has been negotiating and finalizing contracts (bearing the risks and awards) for export sales and MMTC only charges a fee for co-ordination activities. Most importantly, there is no evidence to suggest that MMTC or NMDC acting through MMTC violates the MFN obligation in its export sales. MMTC has long term export sales contracts with JSM, POSCO, Chinese importers and with Pakistan and these reflect commercial terms. There is also nothing to suggest that MMTC has not supplied or refused to supply to other importers from other countries (for reasons that are not commercial) thereby leading to a possible MFN violation.

Thus even assuming that MMTC acts as an STE, there does not appear to be a violation of Article XVII of the GATT in its manner or nature of functioning.

(ii) Quantitative Restrictions

The quantitative limitations on the export of iron ore from the Bailadila mines will amount to a prohibited restrictive measure under Article XI as it limits the exportation of ores out of India and the measure is not a tax , duty or charge.

Similarly the grant of export licenses to certain mine owners which permit them to export iron ore of above Fe 64% along with MMTC, would also qualify as a QR as the issuance of the export license does not appear to be automatic.[35]

[35] *India- Quantitative Restrictions*, WT/DS90/R, April 6, 1999, para 5.129-5.130

CHAPTER 8: PRICING OF STEEL IN INDIA

India, the 7th largest producer of crude steel in the world, recorded 12.088 million tones in production of Finished (Carbon) Steel in 2007-2008.

I. DISTRIBUTION CONTROLS

A. Allocations of Steel

The Steel Industry in India was delicensed and decontrolled in 1991 and 1992 respectively. As a result of this, producers are free to determine and announce their prices which are governed solely by market forces of demand and supply. Following deregulation, however, it was ensured that priority continued to be accorded to meet the requirements of:

1. Small scale industries
2. Exporters of engineering goods
3. North Eastern Region of the country
4. Defence
5. Railways

The quantity allocation to priority sectors is made by Ministry of Steel. However, the Indian government does not retain any control over prices of iron & steel.[1]

To meet the requirements of steel of Small Scale Industries, allocations are made by the Development Commissioner for Iron and Steel- this is in addition to purchases made by Small Scale Units, which source their material directly from the main producers[2]. Research compiled from the Ministry of Steel suggests that while no caps or regulations exist on the sale of steel to consumers, it is dependant on the contract terms between the two parties. Public Sector Undertakings (PSUs) in the steel sector are under an obligation to allocate a certain specified percent of the steel produced to Small Scale Industries (SSI).[3]

(i) Allocation to small scale industries

Under the Distribution of Iron and Steel Items to SSI sector for the year 2007-08 scheme allocation of Iron & Steel materials from main producers such as SAIL, RINL and TATA Steel is made to SSI units, and other government departments (upto 30% of the steel produced is so allocated), through the Small Scale Industries Corporations (SSICs) as well as through National Small Scale Industries Corporations (NSICs) (jointly referred to as "corporations").

In order to ensure that SSIs obtain these raw materials at reasonable prices, the Government provides nominal handling charges of approximately Rs.500/- per tonne

[1] http://www.steel.nic.in/over.htm
[2] http://www.steel.nic.in/distribution.htm.
[3] Telephonic conversation with Mr. N.R.Das, Ministry of Steel.

to the corporations so as to enable supply of steel to SSI units. These appear to be in the nature of fees to the SSIC and NSIC for enabling the supply of steel to SSI units.

Instructions for allotment

The instructions for the allotment of steel material as listed in the Distribution Policy for 2007-2008 state that:

- SSI units, irrespective of their size, may procure iron and steel items from any source of their choice i.e. either through corporations or direct from the producers.
- In such case, corporations/producers should ensure that the materials are being supplied to actual users only.
- In case, corporations exhaust their quarterly allocation they can utilize allocation of the next quarter.
- Request for additional allocation will be considered provided the corporations exhaust 75% of their annual allocation.

Policy Guidelines for Allocation

The Distribution Policy also provides guidelines for the allocation and lifting of iron and steel material by SSICs and NCIS.

- To enable the producers to take up proper planning and supply, 25% of the individual annual allocation is treated as quarterly allocation. Each corporation must register its specific requirement for each category size/grade-wise steel at least 15 days in advance of the quarter.
- In case a corporation exhausts its quarterly allocation it can register and utilize allocation of the next quarter.
- Based on the registration, the producers are required to indicate the offered quantity to the individual SSICs/NSIC. While the producers are under no obligation to compulsorily supply the registered quantity they are required to endeavour to honour the entire registered quantity. In case the offer is less than the registered quantity, the balance may be carried forward to the next quarter. If the SSICs/NSIC fails to lift any part of the quantity offered by the producers, the same can be adjusted in the next quarter.
- The review of supply against the allocation shall be based on the quantity registered, the quantity offered and the quantity lifted against the offer.
- Adjustment of material from one category to another category may be permissible subject to availability with the producer.
- Inter-category adjustment has been allowed for the iron and steel items not allocated for the year.
- Permissible limit for supply of allocated materials to Government departments by the SSICs/NSIC is 30%.
- SSICs/NSICs are paid handling charges by the main producers on the materials lifted by them at the time of delivery/invoice stage.
- For the purpose of examination of handling charges claims, a joint monthly statement signed by the SSICs/NSIC and the main producers indicating the supply made by the main producers during the previous month is submitted to the Ministry of Steel and the JPC by the 10th of the following month. In case of failure to ensure timely submission of the joint statement, the handling charges could be discontinued at the invoice stage.

- JPC is required within seven days to scrutinize the claims and after proper and due verification of such claims may make payment of handling charges to main producers.
- Handling charges on inter-category adjustment within the overall allocation limits may be permissible based on the joint statement signed by the main producer and SSICs/NSIC.
- Under no circumstances can SSICs/NSIC attempt to sell the material to non-eligible categories viz. traders. If deviation from this procedure is detected, Ministry of Steel may direct JPC to discontinue the payment of handling charges to the SSICs/NSIC and supplies shall also be stopped.
- SSICs/NSIC must submit the Utilization Certificate (UC) to the Ministry of Steel and JPC by 20th of every month after expiry of the quarter. Non-submission of UC in time may disqualify the SSICs/NSIC from availing the handling charges. The UC should be signed by the Managing Director of the Corporations or by a person who has been duly authorized in writing by the Managing Director.
- Validity of offer of the producers for collection of the materials by the Corporations shall be 7 working days excluding holidays that fall in between.
- Producers are required to share their rolling schedule with the corporations for ensuring better planning at their end. The rolling schedule is to be placed on the producer's website and SSICs/NSIC are intimated of the same.
- The producers is also required to display the stock position of stock and selling price of each steel item on the Notice Board of every Branch of Sales Office.
- Producers are required to accept cheques from the SSICs/NSIC. However, producers may fix the individual limits for the cheques through mutual discussions.

(ii) Allocations to other Priority Sectors

Unlike the detailed distribution policy for SSI sector, the government has not issued any notifications regarding the distribution procedures for the other priority sectors.

The requirements of Defence and Railways are met by the main producers directly on priority in accordance with the same procedures that were being followed in the past.

The Development Commissioner also continues to issue Release Orders for supplies to exporters of engineering goods and make annual supply plans for North Eastern Region. Considering the special problems in meeting the requirements of consumers in the North Eastern Regions, the Indian government states that special efforts are made to ensure adequate and timely supplies of that region.[4]

Allocation of Iron & Steel items made during the last three years is as follows:

(Quantity in '000 MTs)

[4] http://www.jpcindiansteel.nic.in/profile.asp

Corporations	2004-2005	2005-2006	2006-07
SSICs	861 (59.4%)	619 (-28.1%)	432 (-30.2%)
NSIC	428	212 (-50.4)	62 (-70.75%)
Total	1289 (139.7%)	831 (-35.5%)	492 (-40.55%)

Note
Figures in brackets indicate % change over the previous year. In the year 2006-2007, allocations were made based on actual lifting plus 10% done in the year 2005-2006.

(iii) Steel Price Monitoring Committee- SPMC

The SPMC or the Steel Price Monitoring Committee, was formed by the Steel Ministry to monitor steel prices on a continuous basis and to check artificial hike in prices. The committee comprised members of both public and private sector steel producers, and is headed by joint secretary in the Steel Ministry. Its essential role is to formulate a pricing strategy for the future and recommend plans with regard to steel production, consumption and trading.[5] The committee serves primarily as a forum for government-industry interaction, and essentially serves a regulatory function in situations where for example, companies justify price hikes or demand concessions, which do not fall within their purview. Its recommendations are however not binding on the steel companies.

II. STEEL PRICING

Steel pricing has been following huge upswings and fluctuations according to surges in demand abroad. In 2004 there were 12 price hikes the largest of them being by almost 17% in one month bringing hot rolled steel prices to a high of almost $ 600/ ton. [6]

A February 2008 article states that major domestic steel producers have increased prices by up to Rs 2,500/tonne across various products. In January 2008, public sector companies increased prices by Rs 500 to Rs 1,500 per tonne while private companies hiked prices by Rs 500 to Rs 1,000 per tonne. The largest domestic steel manufacturer, Steel Authority of India Ltd, increased prices by Rs 1,500 to Rs 2,500 per tonne across product categories, while Rashtriya Ispat Nigam Ltd (RINL), the holding company of Vizag Steel Plant, hiked prices by Rs 1,000 to Rs 1,500.[7]

In the second price increase in 2008, following global hikes in prices of freight and raw materials by almost 50%, Indian steel makers across the board raised hot rolled coil prices by Rs. 2000-2500 on the current average rate of Rs 30,000/ ton. Following a meeting with the steel minister who was concerned with the negative impact on parallel industries, the hike was partially scaled back between Rs 200-500 by some of

[5] http://www.domain-b.com/industry/steel/20070112_monitoring.html
[6] Indrajit Basu, "The Olympic effect on Indian steel", March 3, 2004, Asia *Times Online*.
[7] http://www.thehindubusinessline.com/2008/02/02/stories/2008020252690100.htm

the steel makers. This roll back however went contrary to the pledge by 7 of the major steel companies to roll back prices by Rs. 500- Rs. 1000.[8]

In the last decade, because of combined vagaries of energy prices and diminishing raw materials world over there has been almost a 180% increase in prices of steel and other related finished products.[9]

Rising demand and spiraling costs in the Indian steel industry have seen steel majors increase prices significantly since January 2008. Recent data seems to suggest that steel prices may decline to Rs 38,000 per tonne from the present Rs 40,000 per tonne.[10]

The Ministry of Steel is considering increasing the powers of the SPM committee to enable it to check steel prices more effectively. In March 2008 Union Steel Minister Ramvilas Paswan had cautioned steel companies to refrain from increasing steel prices arbitrarily and pass on the benefits of the 2 per cent CENVAT duty cut in the union budget. The industry, however, defied the minister raising prices of flat products and hot rolled coils by Rs 2,000-3,000 per tonne[11] In order to curb the rise of inflation, and make steel available to domestic users, DEPB rates on exports of steel have been reduced and steel companies have been asked to reduce their exports. Steel companies in turn have been seeking an export ban on iron ore so that it is made available to steel manufacturers.

The tables detailed below offer a comparative view of Domestic and International Prices for various products:

(i) Steel Prices of Domestic and International Flat Products:

Steel Prices - Domestic Flat Products (Rs./ton)

Date	GP sheets	GC sheets	HR sheets	CR sheets
27-Nov-07	38000	40000	34000	35000
27-Oct-07	38000	40000	34000	35000
11-Sep-07	38000	40000	34000	35000
10-Jul-07	38000	40000	34000	35000
9-Jun-07	38000	40000	34000	35000
15-May-07	38000	40000	34000	35000
1-May-07	38000	40000	34000	35000
9-Apr-07	38000	40000	34000	35000
25-Mar-07	38000	40000	34000	35000
9-Mar-07	38000	40000	34000	35000
23-Feb-07	38000	40000	32500	34500
2-Feb-07	38000	40000	32500	34500
26-Jan-07	38000	40000	32500	34500

[8] Maitreyee Handique, "Strong demand takes steel prices to new highs", *Mint (The Wall Street Journal*), Wednesday, February 20 2008.

[9] "Steel Yourself", *Money Today*, Friday, March 07, 2008

[10] "Steel Makers Shine"- Capital Market, Friday, March 28th, 2008- http://www.ndtvprofit.com/2008/03/28153306/Steel-makers-shine.html

[11] http://www.indianexpress.com/story/282742.html Steel price Committee may get more teeth, Sumant Banerji, March 11 2008, Indian express.

19-Jan-07	38000	40000	32500	34500
12-Jan-07	38000	40000	32500	34500
5-Jan-07	38000	40000	32500	34500

Steel Prices - International Flat Products ($/tonne) fob Antwerp

Date	Hot Coil	CR Coils	Galvanized Sheet	Heavy Plates
31-Jan-08	590	675	780	820
24-Jan-08	590	675	780	820
17-Jan-08	590	675	780	820
10-Jan-08	590	675	780	820
3-Jan-08	590	675	780	820
27-Dec-07	590	675	780	820
20-Dec-07	590	675	780	820
13-Dec-07	590	660	780	790
6-Dec-07	590	660	780	790
29-Nov-07	590[12]	660[13]	780	790[14]
14-Nov-07	590	660	780	790
1-Nov-07	590	660	780	790
25-Oct-07	590	660	780	790
18-Oct-07	590	660	780	790
11-Oct-07	590	660	780	790
4-Oct-07	590	660	780	790
27-Sep-07	555	660	750	773
20-Sep-07	555	660	750	773
13-Sep-07	555	660	750	773
6-Sep-07	555	660	750	773
30-Aug-07	555	660	750	773
23-Aug-07	555	660	750	773
16-Aug-07	555	660	745	745
9-Aug-07	555	660	745	745
2-Aug-07	555	660	745	745
26-Jul-07	555	660	745	745
19-Jul-07	555	660	745	745
5-Jul-07	555	660	745	745
21-Jun-07	555	660	745	745
7-Jun-07	555	660	745	745
31-May-07	555	660	745	745
24-May-07	555	660	745	745
10-May-07	555	650	745	745
26-Apr-07	555	650	745	745
19-Apr-07	531	638	713	733
12-Apr-07	531	638	713	733
5-Apr-07	531	638	713	733
29-Mar-07	522	628	685	723

[12] Amounts to approximately Rs. 24780/Ton at an exchange rate of Rs. 42.
[13] Amounts to approximately Rs. 27720/Ton at an exchange rate of Rs. 42.
[14] Amounts to approximately Rs. 33180/Ton at an exchange rate of Rs. 42.

22-Mar-07	522	628	685	723
15-Mar-07	522	628	685	723
8-Mar-07	522	628	685	723
1-Mar-07	522	628	685	723
22-Feb-07	522	628	685	723
13-Feb-07	522	628	685	723
6-Feb-07	522	628	685	723
24-Jan-07	520	625	683	720
19-Jan-07	520	625	683	720
12-Jan-07	520	625	683	720
5-Jan-07	520	625	683	720

(ii) Prices of International and Domestic Pig Iron:

Steel Prices - International Pig Iron ($/ton) Fob stowed

Date	Pig Iron
22-Jan-07	318
19-Jan-07	318
12-Jan-07	303
5-Jan-07	303[15]

Steel Prices - Domestic Pig Iron & Sponge Iron

Date	Pig Iron (Rs/ton)	Sponge Iron (Rs/ton)
7-Dec-07	25000	18200
30-Nov-07	25500	18300
23-Nov-07	25500	18300
16-Nov-07	26200	18300
9-Nov-07	26000	18300
2-Nov-07	25300	18400
26-Oct-07	24500	18400
19-Oct-07	23500	18300
12-Oct-07	23500	18100
5-Oct-07	22700	18400
28-Sep-07	22600	18000
21-Sep-07	22400	17600
14-Sep-07	22400	17500
7-Sep-07	22400	17600
31-Aug-07	21900	16900
24-Aug-07	21700	16300
17-Aug-07	21700	16300
10-Aug-07	21800	16400
3-Aug-07	21800	15900
27-Jul-07	21800	15900
20-Jul-07	21800	15900

[15] Amounts to approximately Rs. 13635/Ton at an exchange rate of Rs. 45.

13-Jul-07	21800	16200
6-Jul-07	21700	16000
29-Jun-07	21800	16000
22-Jun-07	21800	16300
15-Jun-07	21800	16500
8-Jun-07	21800	16800
1-Jun-07	21800	16800
25-May-07	22000	16400
18-May-07	22000	16300
11-May-07	22300	16500
4-May-07	22000	18000
27-Apr-07	21900	17300
20-Apr-07	21900	17800
13-Apr-07	21300	17500
6-Apr-07	21000	16600
30-Mar-07	21000	16600
23-Mar-07	21300	16500
16-Mar-07	21300	16500
9-Mar-07	21300	16500
2-Mar-07	21300	16300
23-Feb-07	20800	16000
16-Feb-07	20800	15800
9-Feb-07	20700	15800
2-Feb-07	20700	15800
26-Jan-07	20300	14500
19-Jan-07	20000	14900
12-Jan-07	20000	14700
5-Jan-07	19800	14700

The table[16] detailed below is representative of the latest World Carbon Steel Transaction Prices (as of April 2008):

WorldCarbon Steel Transaction Prices (US$/tonne)

Month	Hot Rolled Coil	Hot Rolled Plate	Cold Rolled Coil	HD Galv. Coil	Electro Zinc Coil	Wire Rod (mesh)	Structural Sections & Beams	Rebar	Merchant Bar
Nov-06	560	743	658	839	803	501	718	521	592
Dec	558	757	665	863	817	499	734	517	593
Jan-07	549	747	647	866	804	495	735	512	590
Feb	562	748	654	873	806	507	751	535	609
Mar	577	758	670	890	802	533	768	589	618
Apr	617	788	698	893	821	577	798	615	646

[16] http://www.meps.co.uk/World%20Carbon%20Price.htm

May	623	800	696	890	827	606	815	622	659
Jun	611	800	686	876	821	602	812	617	653
Jul	599	808	681	856	817	590	819	591	646
Aug	603	814	686	863	823	594	825	596	650
Sep	602	810	673	851	817	580	821	589	655
Oct	611	826	680	850	811	584	844	595	670
Nov	615	833	688	862	819	584	853	591	678
Dec	630	837	705	870	833	598	859	599	681
Jan-08	639[17]	847[18]	716[19]	880[20]	826	621	871	631	695

From the data it is evident that domestic prices of steel are on par or even higher than comparable international prices and that even with the presence of the steel price monitoring committee, the threatened sanctions of the steel ministry, prices have not reined in.

III. SUBSIDY ANALYSIS

The steel PSUs are required to allot a portion of their production to, small scale industries, exporters of engineering goods, north eastern region of the country, defence and railways. It has been clarified that these allocations are not also price monitored. While the allocations to the small scale industries are guided by policy guidelines for allocation, similar guidelines are not available for the other sectors.

Nonetheless to the extent that steel PSUs are required to allot a portion of their production to these sectors, the allocation would amount to a "provision of goods" and thus a financial contribution. However it is unlikely that a mere allocation without any price control on the allocation would lead to a "benefit" being conferred on the stated sectors. Given that these sectors have to pay market prices for the product allotted to them, the provision would not amount to a benefit as the provision is being provided at the same level of remuneration as prevalent in the market and not at les than adequate remuneration. The financial contribution would be specific, but since it does not lead to the conferring of a benefit, it would not amount to an actionable subsidy.

IV. QUANTITATIVE RESTRICTIONS

As discussed in the chapter on Aluminium pricing in China, the issue of whether a reduction in export tax rebate amounts to the type of QR prohibited in Article XI is also an enquiry that is equally applicable to steel pricing. It has been mentioned

[17] Amounts to approximately Rs. 25560/Ton at an exchange rate of Rs. 40.
[18] Amounts to approximately Rs. 33880/Ton at an exchange rate of Rs. 40.
[19] Amounts to approximately Rs. 28640/Ton at an exchange rate of Rs. 40
[20] Amounts to approximately Rs. 35200/Ton at an exchange rate of Rs. 40

above that the government has reduced DEPB rates in order to discourage exports of steel and make it available to downstream users of steel. The question is whether such reduction in DEPB rates is a type of "duty, tax or other charge" which has been levied on steel and is therefore justified or whether it amounts to "other measure" which is not justifiable under Article XI.

Article XI states that no WTO member is allowed to maintain a prohibition or restriction, except for duties, taxes or other charges, on the importation or exportation of a good from the country in question, irrespective of whether such restrictions is made effective though quotas, import/export licenses or other measures.

There is no Panel or AB ruling that sheds more light on this issue and one must necessarily go by the rationale for granting duty drawbacks in order to assess whether the reduction in a duty drawback is in the nature of a tax (which is allowed) or in the nature of "other measures" (which are not allowed to be maintained).

Duty drawbacks are given by countries based on the principle that on the export of a product, the import duties or indirect taxes levied on such product are refunded. This derives from the principle that countries should export goods and not the taxes thereon. Such rebates of import duties or indirect taxes as the case may be are also permitted under the ASCM provided they meet the strict verification guidelines provided in Annex II of the ASCM. Thus the refund of import duty as in the case of the DEPB, essentially represents such percentage of the import duty suffered by the inputs that go into making the final product. In accordance with the principles of the ASCM, these import duties are then refunded on the export of the final product.

Thus a duty drawback rate may increase or decrease in relation to the increase or decrease in the rate of import duties that were levied on the inputs, thus affecting the final drawback rate. The export rebate may also change if a government decides as in the case of India, to reduce the extent of the drawback due to which steel exports are made to suffer some incidence of the import duty which was levied on the input, thereby reducing the incentive to export steel.

The grant of a duty drawback is not an obligation of a WTO Member but all Members provide for such rebates because they ensure the competitiveness of their exports. In light of the same, a reduction in the drawback rate does in a sense amount to the final product suffering an incidence of tax which it would not normally have, if the drawback was provided to the full extent. Thus the reduction in a duty drawback rate in effect amounts to imposing a duty or charge on the exported product. For this reason a reduction in duty drawback rates are more likely to be seen as duties or charges rather than as "other measures" and would be permissible as a valid restriction under Article XI.

CHAPTER 9: COAL PRICING IN INDIA

I. NEW COAL DISTRIBUTION POLICY

At the outset it must be mentioned that the system of linkages through the standing linkage committee has been disbanded and a new Coal Distribution Policy has been formulated in 2007[1]. Under this policy the distinction between core[2] and non-core sectors has been done away with.

(i) Erstwhile core consumers

Coal is now sought to be supplied under Fuel Supply Agreements (FSA). Thus linkage holders in the core and non-core sectors under the former policy are required to enter into FSAs with CIL/SCCL. The Policy mandates CIL/SCCL to meet 100% of the normative requirement of Independent Power Producers (IPP), Captive power plants and fertilizer companies in light of the fact that these sectors are governed by price regimes. CIL/ SCCL is also required to meet 100% of the requirement of new units in these sectors, that are yet to be commissioned but whose coal requirements has been assessed by the Ministry of Coal and have been provided with a letter of assurance (LOA)[3]. Thus the new Policy envisages the continuation of the Standing Linkage Committee to the extent that this committee would continue to issue LOA's to consumers in the power, cement, sponge iron and steel sectors.

It is not clear from the wording of the Policy if CIL/SCCL is also required to meet 100% of the requirement of steel companies, given that they also constituted the erstwhile core sector. In any event the LOA replaces the old system of coal linkages and the LOAs are provided by CIL/SCCL to all consumers apart from power, cement, sponge iron and steel. The LOA are sought to be converted into FSAs upon the units achieving their milestones. Consumers granted the LOA have to furnish a bank guarantee equivalent to five percent of their annual requirement of coal which will be forfeited if the suggested milestones are not achieved within the stipulated period. Bank guarantees have been introduced to encourage only genuine consumers and to prevent pre-emption of coal linkages without developing the end-use projects in time as had been happening under the old policy. The supplies take place at prices that are fixed/notified by CIL. The latest prices were notified in December 2007 and are provided below in this chapter.

[1] 23011/4/2007- CPD, Ministry of Coal 18, October, 2007.

[2] The core consumers used to be power (independent power purchases and captive plants), defense, railways, fertilizer, steel (including sponge iron and pig iron units), cement, aluminum industries, paper industry, central PSU's for consumption and use (as against trading) and export to neighboring countries under bilateral agreements. See, www.coalindia.nic.in/customer4.htm

[3] As mentioned below LOA for power (including power utilities, IPPs and captive power plants), steel (including sponge and pig iron) and cement sectors will be granted by the Standing Linkage Committee (Long Term) functioning in the Ministry of Coal. For all other consumers the LOA would be given by CIL/SCCL.

The Policy specifically provides that supplies to steel plants would be made on the basis of the FSA and the price would be based on import parity with adjustments for quality. Steel requires very high quality of coal which India is deficient in and therefore has to import. The coal used by steel is of grades (A to D) and constitutes about 9% of domestic production. On the other hand the power sector uses the poorest quality coal, which is the coal of grades E to G of the CIL basis of classification and it constitutes 80% of domestic production. Cement uses about 5% of domestic coal.

(ii) Other consumers

For other consumers the Policy mandates CIL/SCCL to supply 75% of their requirement through FSAs at notified prices. Similarly for units for these other consumers that are yet to be commissioned but whose coal requirements has been assessed by the Ministry of Coal through the provision of a letter of assurance (LOA), CIL/SCCL is required to supply 75% of the requirement at fixed prices[4]. For the remaining 25% of their requirement, these consumers are required to either import their coal or procure it through the e-auction system.[5] Under the new e-auction system, e-auction would be conducted for the supply of coal for longer periods of one year or more and the other for supply of coal for shorter periods as per the frequency of offer of e-auction. Further all the coal PSUs will be required to announce a schedule of offer of coal for sale under the e-auction system at the start of the year so as to enable proper planning both by the coal supplies and consumers.

(iii) Small consumers

Under the old policy, small consumers whose requirement was less than 500 tons were supplied coal through nominated state agencies/National Co-operative Consumer Federation (NCCF) and National Small Industries Corporation (NSIC). Under the new policy the nominated state agency/NCCF/NSIC would enter into a FSA with CIL/SCCL or any of its subsidiaries and the FSA would be based on firm commitment with compensation for default in performance of either party. The 500 tons limit has now been raised to 4200 tons and if a unit's requirement is less than 4200 tons, the unit would continue to procure from the state agency/ NCCF/NSIC. Units with requirements above 4200 tons would need to enter into a FSA and procure coal directly from CIL/SCCL. For consumers in the erstwhile non-core sector that were linked with the Ministry of Coal and whose requirement is less than 4200 tons now have the option of either entering into a FSA or procuring coal from the state agency/NCCF/NSIC. The price to these state agencies would be the same price as is to be charged to other FSA contract parties. CIL/SCCL would however also be entitled to recover actual freight and charge for its services at 5% of the basic price from such state agency/NCCF/NSIC.[6]

The advantage of signing a FSA seems to be the ability to procure coal at fixed prices from CIL/SCCL. The Policy further stipulates that CIL/SCCL are under an obligation

[4] The LOA to the new consumers would be issued based on the linkage already granted to similar consumers and would take into account prevailing norms and factors such as existing capacity.

[5] The e-auction would not maintain a floor price but coal companies would be entitled to fix an undisclosed reserve price which would not be below the price notified by CIL in its FSAs. Under the previous regime consumers could bid for coal at a fixed price which was 130% of the notified price and the coal would be supplied on a first come first serve basis.

[6] Under the old policy coal was released to nominated state agencies at a floor price which was 20% above the notified price.

to supply coal to contracting parties under the FSA and in the event of a shortfall can import the coal.

II. COAL PRICING

Coal prices can be categorized as pit-head prices of coal and the prices of coal at the end of the consumers. Pithead prices are based on the cost of production of the coal, and comprise the following elements[7]:

i. salaries and wages
ii. stores
iii. depreciation
iv. interest
v. power
vi. administrative expenses
vii. others

The prices of coal at the consumers' end include statutory levies such as royalty, cess (in case of coal produced in West Bengal), stowing excise duty, sales tax/VAT etc. These levies are add-ons to the pithead prices and these together constitute the price of coal at the end of the consumers. The cost of transportation (railway freight) is also added to the pithead price of coal. At the consumers' end, cost of production constitutes about 40% of the price, while 60% of the price comprises the statutory levies and the railway freight etc. The details of overhead charges which are add-ons to pit-head prices of coal are as under:

i. Royalty
ii. Cess (only in respect of West Bengal)
iii. Stowing excise duty
iv. Sales Tax
v. Freight & handling charges
vi. Local levies

The Colliery Control Order, 2000 introduced a new policy, setting out the deregulation of the pricing and distribution system for all grades of coal. Under the order, the Central Government no longer had the powers to regulate the prices of coal. The prices of coal are now fixed by coal companies with the approval of their Board of Directors. CIL fixes the price of its products from time to time taking several factors into account. These include assessing market forces such as the demand for coal, evaluating the increase in input costs for coal production, taking into account the change in landed prices of imported coal, and ascertaining the acceptability of the market prices of coal.

(i) Domestic Prices

The last revision to prices was made by CIL in December 2007 and the following are the prices of coal for CIL and its various subsidiaries[8]:

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[7] Detailed Write-up on Coal Pricing in India as in March, 2007, www.infraline.com

[8] See, www.coalindia.nic.in. Also the prices above are pit head costs meaning there by they are exclusive of any cesses or taxes. According to the notification the following charges would be extra:

- Additional Rs.15 shall be charged on pithead price of Run of Mine coal for the supply of Slack Coal.

TABLE-I

Basic Price of Run of Mine Non-Long-Flame Non-Coking Coal (In Rupees/ Tonne)

Field/ Co.	A	B	C	D	E	F	G
ECL/ Ranigunj (for 104 units vide Annex I)	1910	1800	1580	1360	850	630	420
ECL (for 8 units vide Annex II)	1490	1340	1120	900	680	530	370
ECL/ Mugma (for 16 units vide Annex IV)	1710	1520	1300	1080	860	640	420
ECL/ SP Mines (for 2 units vide Annex III)	**2060**[9]	1840	1620	1400	940[10]	720	500
ECL/ Rajmahal	-	-	-	-	890	760	610
BCCL	1440	1310	1090	900	720	570	410
CCL	1470	1330	1110	910	720	570	410
CCL (for 7 units vide Annex VI)	1760	1580	1360	1140	900	680	460
CCL(for 16 units vide Annex VII)	1650	1500	1280	1070	-	-	-
NCL	1350	1220	1000	840	670	530	390
WCL	1450	1380	1280	1210	990	780	590
SECL	1190	1110	950	800	660	520	390

- Additional Rs.165 shall be charged on pithead price of Run of Mine Coal for the supply of Steam Coal.
- Where the top size is being limited to any maximum limit within the range of 200 mm - 250 mm through manual facilities or mechanical means, a charge at the rate of Rs.35.00 per tonne will be levied, in addition to the price applicable for Run of Mine coal.
- Where the top size is being limited to 100 mm through manual facilities or mechanical means, a charge at the rate of Rs.55.00 per tonne will be levied, in addition to the price applicable for Run of Mine coal.
- Where the top size is being limited to 50 mm through manual facilities or mechanical means, a charge at the rate of Rs.70.00 per tonne will be levied, in addition to the price applicable for Run of Mine coal.
- Where coal is loaded, either into Indian Railways system or into the purchasers' own system of transport, through high capacity loading system with a nominal capacity of 3500 tonnes per hour or more, additional charge of Rs.18.00 per tonne shall be levied for such loading.

When the coal is transported beyond a distance of 3 kms to the loading point, the coal companies shall be entitled to charge additional transport costs from the purchasers at the following rates, namely:

1. For a distance of more than 3 kms but not more than 10 kms Rs.40.00 per tonne.
2. For a distance of more than 10 kms but not more than 20 kms Rs.70.00 per tonne.

- In cases, where coal is transported for more than 20 kms to the loading points, transport charges will be payable on actual basis, to be borne by the purchaser.
- The pit head prices fixed are exclusive of Royalty, Cess, Taxes and Levies, if any, levied by the Govt., Local Authorities or any other bodies of Excise and Sales Tax from time to time.
- Grading/ classification of coal and the definitions relating to the same have been given in Annexure -X.
- The prices given in this notification are either FOR or FOB, as the case may be . Surface transportation charges, where applicable, would be levied extra .
- The prices do not apply to coal sold for export .For undertaking special sizing or beneficiation of coal, additional charges as
- may be negotiated between the purchaser and the producer may be realised over and above the pithead prices .
- A rebate of 5% for supply of washery grade coking coal will be given to power houses other than captive ones

[9] This would amount to 51.5 USD/MT at an exchange rate of Rs 40 to a US dollar

[10] This would amount to 23.5 USD/MT at an exchange rate of Rs 40 to a US dollar

MCL	1160	1030	860	720	560	440	**320**[11]

TABLE-II

Coking Coal (Run of Mine) (Rs. /Tonne)

SUBSIDIARY	Steel Grd I	Steel Grd II	Washary Grd I	Washary GrdII	Washary GrdIII	Washary Grd IV
BCCL (for 53 units vide Annex VII)	**3260**[12]	**2730**[13]	2380	1720	1290	1190
BCCL	-	-	1760	1460	1080	1000
ECL	-	-	2080	1730	1280	1190
CCL	-	-	1780	1470	1090	1020
WCL	-	-	1550	1280	1170	-

TABLE-III

Semi Coking & Weakly Coking Coal (Run Of Mine) Rs./Tonne

SUBSIDIARY	Semi Coking Grd I	Semi Coking Grd II
Eastern Coalfields Limited(Ranigunj)	**1870**[14]	1560
South Eastern Coalfields Limited	1580	1320

[11] This amounts to about 8 USD /MT at exchange rate of 40 Rs. to a US dollar.
[12] This amounts to about 81.5 USD /MT at exchange rate of 40 Rs. to a US dollar.
[13] This amounts to about 68.25 USD /MT at exchange rate of 40 Rs. to a US dollar.
[14] This amounts to about 40 USD /MT at exchange rate of 40 Rs. to a US dollar.

TABLE IV

Direct feed Coking Coal (Run of Mine) (Rs./Tonne.)

Grade of Coal	
Direct feed Coking Coal of Collieries Listed in Annexure IX (14 Units)(Ash exceeding 20% but not exceeding 21%)	
(Note: Bonus/penalty @Rs.110/te. per percent decrease/increase in Ash)	**3230.00**[15]

(ii) Import prices[16]

(a) Import data for imported coal at the different ports of the country (November-December 2006)[17].

This data includes prices of thermal as well as coking coal from various locations. It shows the following price trends:

1. Coking coal

- The highest priced coke was Glassmakers Met coke from USA at $444/MT.
- Coking coal of ash content of less than 12% ranged from $100.84/MT to $144.25/MT (both Australia). But soft coking coal of ash content of less than 8.2% was at $ 98.16/MT
- Low ash met coke ranged from $169.57.84/MT to $259.72.25/MT (both China). It was $207.99/MT for Japan and $ 190.88/MT for Hongkong.

Non-Coking coal

- It ranged from $ 45.76-48.33/MT for Indonesia.
- For Australia it was about $ 79.25/MT
- China's ranged from $ 66.57 to 74.07/MT
- South Africa's ranged from $ 69.39 to 70.78/MT

TABLE V

[15] This amounts to about 80.75 USD /MT at exchange rate of 40 Rs. to a US dollar.
[16] All import data is from www.infraline.com
[17] The table is only indicative of the some of the export transactions that took place and actual exports were at higher levels.

Products	Port	Source	Quantity (MT)	Avg. Price in USD per MT	Value in Rupees Crore
Brown Coking Coal	Vis	Australia	7336.00	131.33	4.3886004
Coking Coal (of ASH Content Below 12%)	Cal	Australia	25000.00	100.84	0.0052727
Coking Coal (of ASH Content Below 12%)	Cal	New Zealand	20935.00	114.05	10.8756091
German Creel Coking Coal ASH Content 8.8%	Vis	Australia	904.00	144.25	0.5939732
Goonyella B Coking Coal ASH Content 8.7%	Vis	Australia	1607.00	137.86	1.0091247
L & K Mid Volatile Hard Coking Coal Prime Quality	Vis	U.S.A	36000.00	130.63	21.4209767
Low ASH Bottle Tree Hard Coking Coal	Vis	Australia	52703.00	123.91	29.7458613
Low Ash Metallurgical Coke	Vis	China	3647.24	169.57	2.8170461
Low Ash Metallurgical Coke	Bom	China	7783.60	218.49	7.7462435
Low Ash Metallurgical Coke	Bom	China	9980.00	218.49	9.932097
Low Ash Metallurgical Coke	Bom	China	4990.00	218.49	4.9660485
Low Ash Metallurgical Coke	Cal	China	3988.40	182.81	3.3211371
Low Ash Metallurgical Coke	Cal	China	3988.40	182.81	3.3211371
Low Ash Metallurgical Coke	Cal	China	5608.48	127.14	3.2481072
Low Ash Metallurgical Coke	Vis	China	10627.56	168.15-170.29	8.2013932
Low Ash Metallurgical Coke (in Bulk)	Cal	Japan	2994.00	207.99	2.8365612
Low Ash Metallurgical Coke (in Bulk)	Cal	Japan	1309.10	172.56	1.0289436
Moura Soft Coking Coal ASH Content 8.2%	Vis	Australia	20000.00	98.16	8.9421857
Non Coking Coal (Other Coke)	Cal	Australia	6553.00	79.25	2.3656668
Non Coking Coal in	Vis	Indonesia	39453.00	52.90	9,507258

Bulk

Steaming (Non Coking) Coal	Bom	Indonesia	68711.00	45.76	14.3208186
Steaming (Non Coking) Coal in Bulk	Vis	Indonesia	51694.00	48.33	11.3797268
Steaming (Non Coking) Coal in Bulk	Kan	South Africa	14000.00	70.78-73.03	4.5784315
Washed/Unwashed Werris Creek Low ASH Coal	Vis	U.S.A	36000.00	77.56	12.7175612
Torrington Coking Coal	Vis	Australia	51979.00	131.40	31.5206783
Electly Calcined anthracite Coal (ECA Coal)	Cal	China	205.00	259.72	0.239329
Freshily Mined & Prime Quatily Washed Cambria creek Medium	Vis	Australia	40000.00	150.66	27.0880872
Glassmakers Carbon (Metallurgical Coke)	Jnp	U.S.A	18.18	444.14	0.0362944
Low ASH Metallurgical Coke	Cal	China	3988.40	188.77	3.3841626
Low ASH Metallurgical Coke	Mad	Taiwan	53.83	214.14	0.0518136
Low ASH Metallurgical Coke (in Bulk Size 20MM 50MM)	Cal	Japan	6000.00	198.88-200.46	5.3779726
Low ASH Metallurgical Coke (Machinery Coke)	Cal	China	5871.90	189.12-191.09	5.0174149
Low ASH Metallurgical Coke (Other Coke)	Cal	China	14955.00	196.26	13.1931394
Low Ash Metallurgical Coke in Bulk	Mad	China	4990.50	203.01	4.5539808
Low Ash Metallurgical Coke in Bulk	Mad	Hongkong	30787.71	190.88	26.415992
Low Ash Metallurgical Coke in Bulk	Mad	Switzerland	30768.00	207.09	28.6414545
Low ASH Metallurgical Coke (Other Coke)	Cal	China	12462.00	196.26	10.9938418
Metallurgical Coke (in Bulk Size 20 50MM)	Cal	Japan	4000.00	198.29	3.5653
Shenhua Steaming Coking (non Coking) Coal	Mad	China	18000.00	66.52-74.07	5.9254059

Shenhua Steaming Coking (non Coking) Coal in Bulk	Mad	China	5250.00	66.52	1.5698861
Steam Non Coking Coal in Bulk	Mad	Indonesia	50400.00	59.11	13.3922951
Steam Non Coking Coal in Bulk	Kan	South Africa	18000.00	69.39-70.78	5.6269606
Steam Non Coking Coal in Bulk	Mad	South Africa	7500,00	75.95-77.52	2.5957
Steaming (Non Coking) Coal in Bulk	Mad	Indonesia	128003.70	47.47-66.28	31.902789
Steaming (Non Coking) Coal in	Bom	Indonesia	31000.00	48.25	6.7228849
Steaming (Non Coking) Coal in Bulk	Vis	Indonesia	31837.00	48.33	6.9161619
Thermal Coal	Vis	Indonesia	5000.00	41.36	0.9294792
Thermal Coal	Vis	Indonesia	11500.00	41.36	2.1378025
Torrington Coking Coal	Vis	Australia	51001.00	142.50	32.6676273

(b) Import data of steam coal imports by India (March-April 2007)[18]

TABLE VI

Country of Origin	**Entry Date (mm/dd/yyyy)**	**Rs/Tonne**	**Total**
China	3/12/2007	2771.88[19]	12219
		2816.23	63524
	4/17/2007	3379.92[20]	5080
	4/23/2007	3280.51	3926
China Total			**84749**
Indonesia	3/2/2007	1810.00	7717
		2010.00	15000
		2016.91	74199
		2030.00	5000
		2574.70	2032
	3/3/2007	3073.23[21]	31999
	3/6/2007	2485.81	42846

[18] The actual data contains more entries, however only an indicative list is stated herein.
[19] This amounts to about 69.3 USD /MT at exchange rate of 40 Rs. to a US dollar.
[20] This amounts to about USD 84.5/MT at exchange rate of 40 Rs. to a US dollar.
[21] This amounts to about 76.83 USD /MT at exchange rate of 40 Rs. to a US dollar.

	3/7/2007	2356.00	1231
	3/8/2007	2473.13	1000
		3073.23	10160
	3/9/2007	1662.91[22]	6615
		1717.00	29000
	4/9/2007	1727.77	7000
		1753.69	2906
		1767.50	23000
		2000.00	20000
		2010.00	11000
		2030.00	3000
		2228.03	49040
		2385.27	2016
	4/21/2007	2323.00	2000
	4/23/2007	2322.48	26483
	4/25/2007	2251.62	1016
		2365.94	**5080**
Indonesia Total			**2061320**
South Africa	3/2/2007	3610.75	4400
	3/5/2007	3055.56[23]	16984
	3/6/2007	3300.00	10000
		3350.00	4000
		3370.00	8000
		3399.33	6465
		3409.74	39803
		3450.00	19000
		3470.00	26259
		3476.61	15000
		3495.81	11000
		3546.14	4000
	3/7/2007	3486.28	7000
		3495.81	2000
	3/8/2007	3333.00	13054
	3/10/2007	3138.07	676
		3232.00	6000
		3297.65	15000
	3/17/2007	3537.15	14820
	3/19/2007	3280.51	3658
		3333.00	3500

[22] This amounts to about 41.5 USD /MT at exchange rate of 40 Rs. to a US dollar.
[23] This amounts to about 76.35 USD /MT at exchange rate of 40 Rs. to a US dollar.

		3535.00	6000
		3545.10	10000
		3555.20	4901
		3535.00	13000
		3592.25	2000
		3555.20	24223
		3590.00	12000
		3610.75	25000
	4/11/2007	3126.81	8130
	4/12/2007	3252.96	1524
		3333.00	10000
		3430.00	10000
	4/13/2007	3468.40	7648
		3535.00	45000
	4/27/2007	3893.55 [24]	10000
South Africa Total			**3961264**
Steam Coal Customs Code 27011920 Grand Total			**6107333**

Thus the prices for steam coal imports range from **$ 69.3/MT to $ 84.5/MT for China,** from **$ 41.5 to 76.83 for Indonesia** and from $ **76.35 to $ 97.33 for South Africa.**

(iii) Indicative Global Prices

(a) Steam coal prices for the industry[25]
(U.S. Dollars per Metric Ton)

Country	1998	1999	2000	2001	2002	2003	2004	2005	2006
Argentina	NA	NA	NA	NA	NA	NA	29.95	NA	NA
Austria	63.7	56.0	53.9	55.5	74.1	86.3	168.6	175.9	173.6
Belgium	NA	NA	NA	NA	NA	NA	NA	NA	NA
Brazil	NA	NA	NA	NA	NA	NA	33.20	NA	NA
Canada	NA	NA	NA	NA	NA	NA	NA	NA	NA
Chile	NA	NA	NA	NA	NA	NA	49.69	NA	NA
China	29.69	28.69	27.28	27.15	30.40	32.14	43.16	NA	NA
Chinese Taipei (Taiwan)	68.81	71.45	74.16	NA	NA	NA	NA	NA	NA
Colombia	NA	NA	NA	NA	NA	NA	28.32	NA	NA
Costa Rica	NA	NA	NA	NA	NA	NA	62.96	NA	NA
Cuba	NA	NA	NA	NA	NA	NA	80.45	NA	NA
Czech Republic [3]	15.8	15.2	14.4	15.2	18.1	C	C	C	C
Denmark	NA	NA	NA	NA	NA	NA	NA	NA	NA
Finland	84.4	84.7	77.9	84.8	84.1	98.8	122.5	127.6	130.4
France	112.3	108.0	93.6	95.4	97.0	115.8	NA	NA	NA
Germany	NA	NA	NA	NA	NA	NA	NA	NA	NA

[24] This amounts to about 97.33 USD /MT at exchange rate of 40 Rs. to a US dollar.
[25] *Energy Prices & Taxes - Quarterly Statistics, First Quarter 2007*, Part II, Section D, Table 18, and Part III, Section B, Table 15, Paris: International Energy Agency, 2007

Hungary	44.5	NA	NA	NA	NA	NA	NA	NA	NA
India	24.03	24.02	24.38	25.25	28.57	30.49	35.53	36.87	NA
Indonesia	12.16	16.39	NA	NA	NA	NA	NA	NA	NA
Ireland	NA	NA	NA	NA	NA	NA	NA	NA	NA
Italy	40.7	33.4	38.3	44.8	41.4	42.3	63.5	73.2	NA
Jamaica	NA	NA	NA	NA	NA	NA	53.68	NA	NA
Japan	42.8	37.8	36.4	39.5	38.4	36.1	53.5	64.7	65.1
Kazakhstan	13.33	9.01	7.72	8.83	7.97	6.80	8.45	8.95	10.65
Korea, South	31.5	46.7	55.0	48.2	49.9	55.1	60.3	74.4	NA
Luxembourg	NA	NA	NA	NA	NA	NA	NA	NA	NA
Mexico	- -	- -	- -	- -	- -	- -	- -	- -	- -
New Zealand	C	C	C	C	C	C	C	C	C
Norway	NA	NA	NA	NA	NA	NA	NA	NA	NA
Panama	NA	NA	NA	NA	NA	NA	NA	NA	NA
Peru	NA	NA	NA	NA	NA	NA	27.59	NA	NA
Poland	43.8	37.2	38.5	43.1	39.9	45.1	52.0	61.3	NA
Portugal	31.1	28.0	33.1	40.5	34.7	41.0	NA	NA	NA
Romania	23.34	NA	NA	NA	NA	NA	NA	NA	NA
Russia	NA	NA	NA	12.06	11.75	12.03	NA	NA	NA
Slovak Republic (Slovakia)	30.9	27.8	NA	NA	NA	NA	NA	NA	NA
South Africa	16.43	15.81	14.21	13.39	NA	NA	NA	NA	NA
Spain	NA	NA	NA	NA	NA	NA	NA	NA	NA
Switzerland	50.3	47.2	51.5	58.9	52.8	64.5	94.3	94.2	95.4
Thailand	30.31	32.16	30.16	34.03	31.38	31.44	40.26	NA	NA
Turkey [3]	37.5	35.2	32.3	31.8	42.2	44.5	40.8	47.8	48.6
United Kingdom	58.2	56.4	53.1	57.1	58.3	63.0	77.7	89.3	NA
United States	35.6	34.8	35.0	36.1	37.0	37.7	43.3	52.1	57.0
Venezuela	NA	NA	NA	NA	NA	NA	NA	NA	NA

As of 2005, average steam coal price in India was 36.87 USD/MT as compared to 175.9 USD/MT for Austria, 73.2 USD/MT for Italy, 64.7 for Japan, 8.95 for Kazakhstan, 94.2 for Switzerland, 47.8 for Turkey, 89.3 for UK and 52.1 for the US.

(b) Steam Coal Prices for Electricity Generation[26]
U.S. Dollars per Metric Ton)

Country	1998	1999	2000	2001	2002	2003	2004	2005	2006
Argentina	NA	NA	NA	NA	NA	NA	NA	NA	NA
Austria	C	C	53.8	45.7	52.7	64.5	143.4	149.6	148.0
Belgium	34.2	30.2	32.8	37.7	34.5	35.9	72.5	80.3	63.2
Brazil	NA	NA	NA	NA	NA	NA	NA	NA	NA
Canada	NA	NA	17.9	18.5	19.2	21.0	NA	NA	NA
Chile	NA	NA	NA	NA	NA	NA	NA	NA	NA
China	NA	NA	NA	NA	NA	NA	NA	NA	NA
Chinese Taipei (Taiwan)	93.04	96.37	100.03	NA	NA	NA	NA	NA	NA

[26] *Energy Prices & Taxes - Quarterly Statistics, First Quarter 2007*, Part II, Section D, Table 19, and Part III, Section B, Table 16, Paris: International Energy Agency, 2007

Colombia	NA	NA	NA	NA	NA	NA	NA	NA	NA
Costa Rica	NA	NA	NA	NA	NA	NA	NA	NA	NA
Cuba	NA	NA	NA	NA	NA	NA	NA	NA	NA
Czech Republic [3]	9.5	9.6	8.0	8.0	8.5	C	C	C	C
Denmark	NA	NA	NA	NA	NA	NA	NA	NA	NA
Finland	43.0	39.4	38.6	46.7	44.0	48.3	67.0	72.1	74.3
France	41.4	38.2	37.2	45.3	42.9	42.4	63.6	75.0	NA
Germany	46.6	41.9	42.4	51.9	45.7	50.0	70.0	79.7	NA
Hungary	C	C	C	C	C	C	C	C	C
India	15.94	16.22	16.49	17.11	16.61	17.67	20.62	21.40	NA
Indonesia	10.87	17.91	18.26	NA	23.60	26.91	NA	NA	NA
Ireland	36.3	30.9	30.3	35.4	37.5	35.5	67.2	70.1	61.3
Italy	50.4	C	C	C	C	C	C	C	C
Jamaica	NA	NA	NA	NA	NA	NA	NA	NA	NA
Japan	50.5	44.4	40.9	42.7	39.6	NA	NA	NA	NA
Kazakhstan	NA	NA	NA	NA	NA	NA	NA	NA	NA
Korea, South	NA	NA	NA	NA	NA	NA	47.6	55.1	51.5
Luxembourg	NA	NA	NA	NA	NA	NA	NA	NA	NA
Mexico [3]	25.9	28.8	31.8	33.9	33.7	32.1	37.1	41.0	42.3
New Zealand	C	C	C	C	C	C	C	C	C
Norway	NA	NA	NA	NA	NA	NA	NA	NA	NA
Panama	NA	NA	NA	NA	NA	NA	NA	NA	NA
Peru	NA	NA	NA	NA	NA	NA	NA	NA	NA
Poland	32.6	29.1	28.2	31.4	32.2	36.2	40.0	47.5	NA
Portugal	36.0	31.5	30.2	38.6	32.3	38.4	57.5	67.6	58.3
Romania	NA	NA	NA	NA	NA	NA	NA	NA	NA
Russia	NA	NA	NA	12.06	11.75	12.03	NA	NA	NA
Slovak Republic (Slovakia)	20.7	17.9	NA	NA	NA	NA	NA	NA	NA
South Africa	7.48	7.02	6.51	5.81	4.97	NA	NA	NA	NA
Spain	NA	NA	NA	NA	NA	NA	NA	NA	NA
Switzerland	- -	- -	- -	- -	- -	- -	- -	- -	- -
Thailand	NA	NA	NA	NA	NA	NA	NA	NA	NA
Turkey [3]	15.9	15.4	14.4	10.3	15.2	19.0	25.9	25.2	24.8
United Kingdom	50.0	47.0	44.4	46.5	44.5	45.9	59.7	65.6	NA
United States	28.6	27.8	27.5	28.2	28.7	29.1	30.9	35.3	38.6
Venezuela	NA	NA	NA	NA	NA	NA	NA	NA	NA

As of 2005, the price in India for steam coal used for electricity generation was 21.40 USD/MT as compared to 175.9 USD/MT for Austria, 70.1 USD/MT for Ireland, 55.1 for South Korea, 41.0 for Mexico, Belgium was 80.3, 67.6 for Portugal, 25.2 for Turkey, 65.6 for UK and 35.3 for the US.

(c) Coking Coal Prices for Industry[27]:
(U.S. Dollars per Metric Ton)

Country	1998	1999	2000	2001	2002	2003	2004	2005	2006

[27] *Energy Prices & Taxes - Quarterly Statistics, Fourth Quarter 2006*, Part II, Section D, Table 20, and Part III, Section B, Table 17, Paris: International Energy Agency, 2007

Argentina	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	29.95	n.a.	n.a.
Austria	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Belgium	55.5	49.3	47.2	54.0	n.a.	n.a.	n.a.	n.a.	n.a.
Brazil	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	18.54	n.a.	n.a.
Canada	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Chile	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	44.01	n.a.	n.a.
China	40.45	38.06	37.24	n.a.	38.38	41.28	52.18	n.a.	n.a.
Chinese Taipei (Taiwan)	x	x	x	x	x	x	x	x	x
Colombia	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	33.43	n.a.	n.a.
Costa Rica	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Cuba	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Czech Republic	53.9	52.7	47.1	51.4	61.0	c	c	c	c
Denmark	x	x	x	x	x	x	x	x	x
Finland	107.0	105.9	99.8	105.1	109.8	126.0	158.6	196.6	n.a.
France	55.6	49.4	47.3	52.5	60.4	62.1	74.9	110.6	n.a.
Germany	55.7	c	c	c	c	c	c	c	c
Hungary	c	c	c	c	c	c	c	c	c
India	37.46	38.24	38.24	39.61	38.45	42.52	62.75	n.a.	n.a.
Indonesia	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Ireland	x	x	x	x	x	x	x	x	x
Italy	56.3	50.1	50.6	55.3	57.8	60.3	75.6	103.5	n.a.
Jamaica	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Japan	54.9	46.5	42.4	44.0	45.8	45.8	65.0	97.5	n.a.
Kazakhstan	46.64	17.19	14.19	14.07	7.84	10.10	13.78	17.87	n.a.
Korea, South	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	68.5	109.9	n.a.
Luxembourg	x	x	x	x	x	x	x	x	x
Mexico	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
New Zealand	c	c	c	c	c	c	c	c	c
Norway	x	x	x	x	x	x	x	x	x
Panama	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	52.58	n.a.	n.a.
Peru	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Poland	47.5	38.6	39.0	46.8	47.8	52.4	96.1	115.4	n.a.
Portugal	37.8	31.7	31.7	38.8	32.6	38.7	n.a.	n.a.	n.a.
Romania	57.29	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Russia	n.a.	n.a.	n.a.	14.38	12.90	14.59	n.a.	n.a.	n.a.
Slovak Republic (Slovakia)	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
South Africa	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Spain	c	c	c	c	c	c	c	c	c
Switzerland	x	x	x	x	x	x	x	x	X
Thailand	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Turkey	82.0	61.8	69.9	62.5	75.2	80.5	103.5	129.2	n.a.
United Kingdom	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
United States	50.8	50.6	49.0	51.3	56.5	55.9	67.8	92.4	n.a.
Venezuela	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	0.69	n.a.	n.a.

The prices for coking coal across the world as of 2004 and 2005 ranged from $196.6 /MT for Finland, $110.6/MT for France, $103.5/mt for Italy, $97.5/mt for Japan, 17.87 for Kazakhstan, 109.9 for South Korea, 62.75 India (2004), 115.4 for Poland, 129.2 for Turkey, 92.4 for the US and 67.8 for the US in 2004.

(iv) Indicative difference between Indian and imported coal as of March 2007[28]

Indicative Landed Cost of Coal at various distance from pithead/unload port

(Figs. in Rs./Tonne)

Particulars	**Indian Coal**	**Imported Coal**
Coal Grade	MCL/F ROM	Indonesia/Thermal
GCV (KCal/Kg)	3865	6500
Basic Price / CIF Price	**400.00**	**2386.80**
Sizing/Transportation Charges	50.00	
Port Charges		135.00
Import Duty		120.53
Royalty	65.00	
Cess		10.00
SED	10.00	
Central Sales Tax	21.00	
Edu. Cess	0.42	2.41
"FOR" Price at Pithead/Unload Port	**546.42**	**2654.74**

Freight (Rs./Te)	**Distance (Kms)**	**Landed Price (Rs./Te)**	
0.00	Pithead/Unload Port	546.42	2654.74
116.80	100	663.22	2771.54
424.80	500	971.22	3079.54
617.30	750	1163.72	3272.04
809.80	1000	1356.22	3464.54
1194.80	1500	**1741.22**	**3849.54**
Distance (Kms)		**Landed Energy Price (Rs./MKCal)**	
	Pithead/Unload Port	141.38	408.42
	100	171.60	426.39
	500	251.29	473.78

[28] Detailed Write-up on Coal Pricing in India as in March, 2007, www.infraline.com

	750	301.09	503.39
	1000	350.90	533.01
	1500	450.51	592.24
Notes: CIF Price of Imported Coal considered at 51 US $/Te Exchange Value considered @ 1 US $ = Rs. 46.80.			

III. SUBSIDY ANALYSIS

India does not restrict the export of coal and thus there is no issue of dual pricing. However coal production and distribution is nationalized and CIL and its subsidiaries and SCCL essentially supply all of the coal produced to the domestic industry. The largest users are power, steel and cement sectors. Below is an analysis of whether the supply of coal by CIL/SCCL would amount to an actionable subsidy.

Since the sector is nationalized and thereby under complete control of the government companies, the supply of coal by these companies would amount to government provision of goods to the domestic industry. The next step then is to ascertain whether such provision is for less than adequate remuneration. As stated in Article 14(d), the adequacy of the remuneration is determined in relation to the prevailing market conditions. However as the AB clarified in *Lumber III*, the adequacy of the remuneration may not be compared to the prevailing market conditions, if such market is distorted by virtue of the predominant role of the government in the provision of the goods. In the case of coal, one benchmark for ascertaining the extent of benefit would be to compare the prices of CIL/SCCL to those of the prices discovered at the E-Auction system. Under the e-auction scheme of 2007, coal companies cannot maintain a floor price would be entitled to fix an undisclosed reserve price which would not be below the price notified by CIL in its FSAs. Under the previous regime consumers could bid for coal at a fixed price which was 130% of the notified price and the coal would be supplied on a first come first serve basis. Thus compared to the former system, the new system does not maintain a cap on the price that can be charged. Despite this change it is unlikely that the prices in an e-auction would be market driven as bidders would always bid keeping the prices charged by the coal companies to the various sectors under FSAs as a benchmark. Thus it is quite likely that prices of coal discovered in an e-auction would not be considered to be an appropriate benchmark for ascertaining the adequacy of remuneration. In light of this, an authority would be free to use any other appropriate price as a benchmark, including import or world prices.

As the data above establishes, coal prices charged by CIL/SCCL is significantly lower than imported coal even if taxes, levies and transportation costs are considered. As per the chart above the landed cost ot the customer of Indian coal would only be Rs. 1741.22/tonne as against a price of Rs. 3849.54/tonne for coal imported from Indonesia. Further a comparison between the prices charged by CIL and its subsidiaries and import data for prices of coal from Indonesia show that the import prices are about 121% more than domestic prices.

Similarly global data shows that India's steam and coking coal prices are one of the lowest in the world save for Kazakhstan in a few cases. Thus clearly the government provides coal to Indian industries at less than adequate remuneration.

However in order to be actionable the subsidy would have to be specific. Considering that coal is available to all consumers at subsidized rate can it be held that the coal subsidy is specific? It should be noted that even though coal is available to all sectors that need it, CIL does prioritize the allocation to some sectors over others. Under the new coal distribution policy, CIL is mandated to meet 100% of the requirement of power and fertilizer companies. This prioritized allocation is also applicable to new units. For other consumers, CIL/SCCL are required to supply 75% of the coal requirement of these companies. In the case of power, cement, sponge iron and steel sectors, the LOA would be provided by the Standing Committee. The Standing Committee considers the long term requirement of coal to these consumers and links the consumer to one of the nationalized companies and its coal mines. Thus these consumers benefit in that they are assured of a supply source for their long term plans. This would also mean that once the LOAs are granted to the linked consumers, the capacity of the coal mines would be blocked to the extent of such assured supply. This essentially ensures that the erstwhile core sector is supplied first before coal is allotted to other companies/industries. This in effect amounts to limiting "access" to the subsidized coal the core sectors, as their requirement would be met after which the coal would be allotted to the other consumers. Thus while subsidized coal may be available to all consumers within the Indian economy at the CIL/SCCL notified rates, (depending on the grade required) coal is available to some sectors on more preferential terms than to other sectors, thereby making it specific to these sectors.

COMMENTARY ON THE DRAFT RULES TEXT

The Chairman of the Negotiating Group on Rules came out with a Draft Rules Text in November 30, 2007 reflecting the positions taken by members during these negotiations on the antidumping agreement as well as ASCM. Before a discussion is undertaken on the possible implications of these amendments it may be worthwhile to point out the limitations of the current ASCM and GATT disciplines in dealing with dual pricing.

An aggrieved WTO member may resort to the following disciplines to discipline dual pricing; (1) challenge the practice as a subsidy (ii) challenge the role of the state under GATT Article XVII on STEs and (iii) challenge it as a violation of GATT Article XI on QRs.

As mentioned previously in this report, dual pricing could be achieved through measures such as export taxes, conscious pricing of the input differently for domestic industries or through state intervention. The pricing of natural gas by Gazprom is an example of state intervention, wherein the state (through Gazprom) has a monopoly on export of natural gas and sets a differential rate for exports as compared to domestic sales. While Gazprom is a largest manufacturer and distributor of natural gas within Russia, there are a few independent oil companies vying for space in the Russian market (independent oil companies cannot export natural gas outside Russia) but have been unable to secure a foothold in the Russian domestic market due to the presence of Gazprom. As has been elaborated in the Chapter 2 (on 'Natural gas pricing'), domestic supplies in Russia are region wise and while there are differential rates for the regions, there is no indication that particular industries are supplied gas at preferential rates. On the export front, Gazprom maintains differential rates for Europe and CIS countries.

As previously discussed in Chapter 2 an aggrieved country may be successful in targeting Russian dual pricing as a subsidy if it can prove that the grant is specific. However this is debatable as the gas is supplied region wise and there does not appear to be indication of de facto specificity either. Assuming a country is successful in this respect the challenge would affect the domestic subsidization but would not affect Russia's ability to price gas differentially for export and domestic sales.

As discussed in Chapter 2, Russia's export pricing may also be challenged under GATT Article XVII on STEs and GATT Article XI on QRs. However as the discussion therein stated WTO case law may permit differential gas pricing for different export markets and even between export markets and the domestic market, provided the differentiation is for commercial considerations.

Similarly any challenge to high priced export sales of Russian natural gas may not be successful under GATT Article XI since despite the high price, exports of natural gas to EC have been increasing and the situation would not provide the necessary trade effects to successfully challenge a de facto QR.

Given the limitations of the existing disciplines, several attempts have been made to target dual pricing. The proposal made by the EC in this regard in 2006[1] may have provided the much

[1] TN/RL/GEN/135

needed remedy as the proposal consisted in including the "*provision by virtue of government action of goods to domestic production on terms and conditions more favourable than those generally available for such goods when destined for export*" as a prohibited subsidy under Article 3 of the ASCM.

However the proposal was not received favourably by the WTO Membership. The latest attempt to address dual pricing is evidenced in the Draft Rules text presented by the Chairman of the Negotiating Group on Rules on November 30, 2007.

The implications of the amendments on dual pricing are discussed below.

(i) Amendment to Article 14 title and sub clause 14 (d) with additional footnotes

"*Article 14*

Subsidy Calculation ~~of the Amount of a Subsidy in Terms of the Benefit to the Recipient~~

(d) the **provision of goods or services** or **purchase of goods by a government** shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale). Where the price level of goods or services provided by a government is regulated, the adequacy of remuneration shall be determined in relation to prevailing market conditions for the goods or services in the country of provision when sold at unregulated prices, adjusting for quality, availability, marketability, transportation and other conditions of sale; provided that, when there is no unregulated price, or such unregulated price is distorted because of the predominant role of the government in the market as a provider of the same or similar goods or services, the adequacy of remuneration may be determined by reference to the export price for these goods or services, or to a market-determined price outside the country of provision, adjusting for quality, availability, marketability, transportation, and other conditions of sale.

14.2 For the purpose of Part V, where a subsidy is granted in respect of an input used to produce the product under consideration, and the producer of the product under consideration is unrelated to the producer of the input, no benefit from the subsidy in respect of the input shall be attributed to the product under consideration unless a determination has been made that the producer of the product under consideration obtained the input on terms more favourable than otherwise would have been commercially available to that producer in the market.[2]"

[2] Where, however, it has been established that the effect of the subsidy is so substantial that other relevant prices available to the producer of the product under consideration are distorted and do not reasonably reflect commercial prices that would prevail in the absence of the subsidization, other sources, such as world market prices, can be used as the basis for the determination in question.

As is evident, original Article 14 (d) addresses two situations:

1. provision of goods for less than adequate remuneration
2. purchase of goods and services for more then adequate remuneration

Gazprom, when it supplies natural gas within Russia on a region wise basis to households and industries at subsidized rates, may be said to provide goods at less than adequate remuneration. As stated in Chapter 2, the original language of Article 14 (d) and the AB's observations in the *Lumber III*[3] decision could lead to a finding of "benefit" under Article 14 (d). And if adequate evidence exists that the benefit is targeted, the provision of natural gas to downstream industries would amount to an actionable subsidy. Thus in the event that steel or cement (products which use natural gas in the production process) face CVD action in jurisdictions abroad, such jurisdiction could quantify the level of benefit from provision of subsidized natural gas and impose a corresponding CVD on the product. An aggrieved member could also challenge the subsidy as causing serious prejudice on account of "*significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market.…"* [4]

While the above remedies would target the downstream provision of subsidized natural gas to Russian industry it would not compel Russia to put an end to its practice of pricing export sales prohibitively or higher than its domestic sale prices.

In light of the same it is interesting to note that the amended text of Article 14 (d) makes reference to a situation where the "*price level of goods or services provided by a government is regulated*". The question that arises is whether the government regulation of prices is a distinct situation apart from the two situations originally envisaged in Article 14 (d), i.e. provision of goods at less than adequate remuneration and government purchase at more than adequate remuneration.

One possible interpretation could be that the added text seeks to clarify a situation wherein a determination whether the provision of goods or services is for adequate remuneration cannot be made because domestic prices are also affected by government intervention. Thus the new text only codifies what the AB had observed in its *Lumber III* decision in that a comparison in such situations may be made with the *export price for these goods or services, or to a market-determined price outside the country of provision, adjusting for quality, availability, marketability, transportation, and other conditions of sale*.

It should be noted however that had it been the intention of the amended text to provide such clarification, the above portion on possible parameters for comparison would have been inserted at the end of the second sentence of Article 14 (d).

The fact that a situation contemplating 'government regulated prices' has been inserted as the third sentence in Article 14 (d) and the clarification as provided by the *Lumber III* decision follows this sentence is of some significance. It tends to indicate that possibly the amended Article 14 (d) now envisages 3 situations wherein a benefit may be said to be conferred (i) government provision of goods for less than adequate remuneration (ii) government purchase of goods and services for more than adequate remuneration and (iii) government provision of goods and services at regulated prices.

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[3] WT/DS257/AB/R

[4] See Article 6.3 (c) of the ASCM.

The third clause will also cover a situation where the government provides a good at a regulated price and there is no unregulated price in the market of the country of provision thus mandating a comparison of the adequacy of remuneration to another benchmark such as export prices or market determined prices in a third country. The pricing of natural gas in Russia is one example where export and domestic prices are regulated. In this case Gazprom provides natural gas to downstream customers at regulated prices and exports natural gas to third country markets at regulated prices.

It should be noted that the amended text does not mandate that the regulated price at which goods are being provided should always be for "less than adequate remuneration" when compared to unregulated prices in the country of provision. The language of the amended text is broad enough to suggest that government regulated prices can be more than adequate remuneration and thus a benefit can be conferred.

In cases where governments regulate export prices such that export prices are higher than domestic prices for certain commodities, such government regulation would now fall under the amended text of Article 14 (d). In the absence of the amendment, it would be difficult to capture a Gazprom like scenario under the original Article 14 (d), since in the case of Gazprom the export of the good would be for "more than" rather than "less than adequate remuneration".

Thus under the above interpretation, it appears Gazprom's export of natural gas at (high) regulated prices would be captured under the amended text. In order to determine the adequacy of remuneration a possible benchmark for comparison could be domestic Russian prices. However given that the prices are regulated, this benchmark would be rejected and another benchmark, namely prices in a third country market would be taken. While it is generally believed that there is no world market for natural gas, it may nonetheless be possible to compare Gazprom's prices with those of other countries that supply to Europe or prices within such gas producing countries itself. It is likely that a comparison such as this may show that Russian gas prices to Europe are significantly higher than gas prices in other gas producing nations or from such nations to other countries.

Provision of goods

Another question which arises is whether export of commodities can be said to constitute "provision" of goods by a government. The WTO Panel in *Lumber III*[5], (in examining the scope of a similar phrase under Article 1.1 (a) (1) (iii)) addressed the issue of whether a government that allows the exercise of harvesting rights to a company is actually providing goods. The Panel in that case considered that when a government does allow harvesting, it is "providing" timber to the harvesting companies. Canada had contended that "to provide" means something more than "to make available" or "to put at the disposal of", and that the phrase infact implies "giving". The Panel rejected this line of reasoning. As per the Panel, "from the tenure holder's point of view, there is no difference between receiving from the government the right to harvest standing timber and the actual supply by the government of standing timber through the tenure holder's exercise of this right". From the *Lumber III* decision it appears that a government could be said to "provide" even if it made available a good generally.

Going by Canada's understanding of "to provide" as reflected in the *Lumber III* case, even domestically, Gazprom does not "give" natural gas specifically to industries. It only fixes the price and transports the gas through its pipelines to various regions depending on the gasification

[5] WT/DS236/R

requirement and if an industry happens to be situated in that region, it secures gas at the regional price. Gazprom thus makes the gas available and fixes the price at which it is made available.

But the act of making available in effect results in providing gas to industries at certain rates. Similarly Gazprom is the sole exporter of natural gas out of Russia. It supplies gas as per the contractual terms with various CIS and European countries. But governmental control over Gazprom means that export gas is made available only at a certain rate and in effect results in Gazprom "providing" natural gas to certain countries.

Moreover when a government or government controlled company is exclusively engaged in export of a good, it is likely that under the parameters of the *Lumber III* decision such export could be considered as government provision both for the purposes of Article 1.1 (a) (1) (iii) and for Article 14 (d).

The above discussion suggests that export prices of goods when regulated by the government may well come under the amended text of Article 14 (d). But Article 1.1 (b) still requires that a "benefit is thereby conferred".

Benefit

In the original Article 14 (d), the manner of provision or purchase is tied to the determination of benefit. Meaning, if the government provision is not for less than adequate remuneration, a benefit cannot be said to be conferred. Similarly if government purchase is not for more than adequate remuneration a benefit would not result. The point above is illustrated through two examples in the context of Gazprom.

Scenario I:
Gazprom fixes both domestic as well as export price and export price is higher

- In this case, Gazprom could be said to provide natural gas both to the domestic as well as export market.
- Based on Article 14 (d) parameters, provision of domestic gas could be said to be for "less than adequate remuneration"
- Thus it could be held that benefit is conferred on domestic buyers.
  - A follow on enquiry that the provision of gas at less than adequate remuneration to domestic buyers is specific under Article 2 would result in actionable subsidy

- Under the original text of Article 14 (d) the provision of export gas could be said to be for "more than adequate remuneration"
- However under original text of Article 14 (d) a benefit is conferred only if provision is for less than adequate remuneration.
- Export sales would in effect be out of the purview of Article 14 (d)

Scenario II:
Gazprom fixes only export price of gas which is higher than unregulated domestic price

- In this case, Gazprom could be said to provide natural gas to the export market.
- Based on Article 14 (d) parameters, provision of export gas could be said to be for "more than adequate remuneration"
- But unable to determine if a benefit is conferred as Article 14 (d) only recognizes benefit if ***provision*** is for less than adequate remuneration.
- Export sales would in effect be out of the purview of Article 14 (d)

The amended text to Article 14 (d) overcomes this limitation by simply requiring that government regulate prices and the adequacy of the remuneration be determined as per certain benchmarks. The conferral of benefit is not tied either to the nature of provision (whether less or more) or purchase (whether less or more).

The effect of the amended text is illustrated through two examples in the context of Gazprom.

Scenario III under amended text
Gazprom *regulates* both domestic as well as export prices

- As above Gazprom could be said to *provide* natural gas both to the domestic as well as export market.
- If adequacy of remuneration to Gazprom from domestic sales is sought to be determined then:
  - Choose external benchmark as export prices are also distorted
  - On comparison may find that the remuneration Gazprom is getting on domestic sales is less than adequate
  - Domestic buyers benefit as less than world prices
  - If specific under Article 2 then actionable
- If on the other hand adequacy of remuneration to Gazprom from export sales is sought to be determined then:
  - Compare export prices to domestic prices. But domestic prices will disregarded as they are regulated
  - Valid comparison will be external prices which might reveal that Gazprom's export prices are significantly higher than third country prices
  - Therefore remuneration that Gazprom gets for provision of gas on the export market is more than adequate (i.e. when compared to third country prices)
  - Domestic buyers, i.e. industries that use natural gas in Russia benefit as they are getting gas at a much lower rate than even third country markets
  - Benefit will be the difference between export price and domestic price

Scenario IV under amended text
Gazprom regulates only prices of exports

- Assume Gazprom does not regulate the domestic market
- There are other independent domestic gas explorers and distributors
- Gazprom's export price is pegged at say 45% of the highest unregulated domestic gas price for a quarter
- As above, Gazprom could be said to *provide* natural gas to the export market.
- If adequacy of remuneration to Gazprom from export sales is sought to be determined then:
  - Compare export prices to unregulated domestic prices.
  - Comparison will reveal that export price is significantly higher
  - Therefore remuneration that Gazprom gets for provision of gas on the export market is more than adequate (i.e. when compared to domestic prices)
  - Domestic buyers, i.e. industries that need gas however benefit as they are getting critical input at a much lower rate than in third country markets to whom Gazprom exports
  - Benefit will be the difference between the Gazprom's export price and domestic price

The above examples reveal that under the amended text it would be possible to determine a benefit when government regulates export sales which are for "more than adequate remuneration".

However in order to be actionable the subsidy would have to fulfill the requirements of Article 2. In this context the proposed amendments to Article 2 are discussed below.

(ii) Amendment to Article 2 (c) on specificity:

Article 2

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[6] In the case of subsidies conferred through the provision of goods or services at regulated prices, factors that may be considered include the exclusion of firms within the country in question from access to the goods or services at the regulated prices. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

The effect of the amended text becomes clear when one considers the implications for specificity under Scenarios III and IV above in light of the original language of Article 2.

Under Scenarios III and IV by virtue of the amendments in Article 14 (d), it will be possible to establish that government regulation of export prices (such that they are for more than adequate remuneration) is a financial contribution which confers a benefit on the domestic users of natural gas. Thus as per Article 1.1, the elements of a subsidy are satisfied.

However under the original Article 2, one would then need to ascertain whether the subsidy is specific to an enterprise or industry within the granting authority. Under sub clause (a), one would need to show that granting authority or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises. Since in scenarios III and IV, the benefit is conferred on the domestic users, an investigating authority will determine if the benefit is limited to certain enterprises within Russia. As stated before, facts suggest that the subsidy is not limited to certain industries or enterprises within Russia. Even if it is argued that clause (a) is met, Russia could likely put up a successful defense under (b), in that Gazprom has objective criteria by which the natural gas and pricing is structured. An investigating authority would then need to establish de facto specificity but again facts do not suggest that certain industries receive proportionately larger amounts of subsidized gas than others.

[6] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

It appears that even if Article 14 (d) were amended on the lines suggested, a complainant may nonetheless not be able to prove specificity within the language of original Article 2. The proposed amendment to Article 2 on the other hand dispenses with the need to determine specificity by examining if the benefit is targeted either *de jure* or *de facto* to certain enterprises. The operative part of the amended Article 2 is below:

"In the case of subsidies conferred through the provision of goods or services at regulated prices, factors that may be considered include the exclusion of firms within the country in question from access to the goods or services at the regulated prices."

As mentioned, claims of specificity may not be very successful under sub clause (a) and (b) and Russia could defend its natural gas pricing structure under sub clause (c). Note that the amended text comes in clause (c) on de facto specificity and states that if the good whose price is regulated is not accessible to firms within the country at the regulated price then the subsidy will be held to be specific.

Examining scenarios III and IV, a financial contribution exists because Gazprom (controlled by the Russian government) provides goods, i.e. export of natural gas at regulated prices. Under Article 14 (d), the export price will be held to be regulated and the remuneration held to be more than adequate if compared to either unregulated domestic prices or to third country prices. Correspondingly domestic users can be said to benefit from supply of natural gas which is cheaper when compared to export prices.

In determining specificity, an investigating agency will find that Gazprom does not sell natural gas domestically at the regulated price at which it exports natural gas. It will also find that export of natural gas is undertaken only by Gazprom and no other entity is permitted to export natural gas, which could lead one to conclude that firms within the country are excluded from access to the goods at the regulated prices. An investigating agency will thus find specificity under the amended Article 2 language even when within Russia one would be hard pressed to find either de facto or de jure specificity between consumers of natural gas.

CONCLUSION

The crux of the debate on dual pricing is on account of the fact that dual pricing (i) limits the supply and (ii) increases the prices of the raw material to industries in importing countries, which use the raw material in manufacture of the final product. At the same time (iii) it benefits the domestic users of the raw material (by providing the resource at preferential rates) and their domestic production and consequently exports tend to be competitively priced.

The US and EC have through their submissions contended that the effect discussed above can result either from maintaining two prices or by imposing export restrictions. However while the EC is more concerned with the availability of the natural resource itself, the US has pointed out the comparative advantage that is provided to downstream products that use the resource, which on export then tend to displace the market of the importing country. This in effect is like the provision of a subsidy because it channels the resource at lowered costs to domestic industries using the resource as a major input.

Thus the discussion has covered practices such as differential pricing of gas by Gazprom, which is achieved without the imposition of any export restriction, the discounted pricing by Saudi Arabia on NGLs which was alleged to provide an advantage to MBTE producers and export restrictions maintained by China on coke and fluorspar that limit the availability of these products to downstream industries in other countries.

An important point made in these discussions, was the one made by Mexico when it stated that if differential pricing in the domestic as against the export market was considered to be a benefit under the ASCM, it would essentially nullify the very purpose of Article III and the GATT, which only prohibits discrimination between an imported product and the domestic product and not between a domestic product and an exported product. Mexico's interjection resulted in the present language of Article 2.1 of the ASCM which makes it very clear that the grant and effect of a subsidy will only be considered on the enterprises present within the territory of a member state and not those that are beyond such territory.

This suggestion which resulted in the present language of Article 2.1 is again sought to be undermined in the EC proposal where it states that the provision of goods to domestic industry on terms more favourable than those made to exported goods would amount to a prohibited subsidy. As explained in the natural gas chapter, incorporating the concept of dual pricing in Article 3 has its significant advantages because the practice would be prohibited without having to show that the preferential pricing was made specifically applicable to certain enterprises or industry.

Coming back to the measures that lead to dual pricing;- the US and EC have identified differential pricing and export restraints as the types of practices that make the resource available to downstream domestic industry at preferential terms and limit the accessibility of the same resource (whether by volume or by virtue of an exorbitant price) to users outside the country.

The discussion that follows, examines each of the sectors studied in this report to identify if any of the country practices leads to the effect attributable to dual pricing detailed above. And if it does lead to this effect, would the measure nonetheless be sanctioned by other provisions of the GATT or ASCM.

1. Natural gas pricing
    a. India: it has no exports of natural gas thus dual pricing does not arise. But the provision of APM gas is an actionable subsidy and if a product is manufactured using APM gas, it could be countervailed in an export market
    b. Russia: this is a classic case of dual pricing which can be maintained because National Treatment does not apply to exported products. The practice also has the effect of substantially increasing the prices of gas to Europe. In the given facts the pricing is not an actionable subsidy because there is not enough evidence of specificity but in light of more data, the pricing could well be held to be an actionable subsidy. Gazprom would also be in violation of Article XVII if it is determined that the derogation from MFN is not supported by commercial considerations.

2. Crude oil pricing
    a. Russia: it maintains an export tax, but the tax is valid under Article XI. The pricing of crude oil domestically also appears to be at preferential rates. However sufficient information does not exist to suggest that the subsidy is specific. But if the EC's suggested insertion to Article 3 ASCM is accepted, the Russian crude oil pricing may be prohibited. It should be mentioned here that the EC suggested amendment does not carve out an exception for higher prices as a result of export taxes which are valid under Article XI. In the absence of this language it is debatable how this provision could be interpreted by a Panel.
    b. Saudi Arabia: Saudi does not maintain an export tax but it maintains an internal price control on some of its petroleum products. The practice is however one that is permitted under Saudi Arabia's accession schedule. Further it is a member of OPEC thus any reduction in volume of crude oil available or rise in prices is a direct fall out of its OPEC membership.
    c. India: Does not restrict exports of petroleum products and apart from some controlled products, other products appear to be sold at international prices

3. Aluminium
    a. China: It has maintained an export tax and cut export rebates (both valid measures under Article XI), and exports of primary aluminium have reduced. But domestic prices of aluminium have increased and are on LME levels. Can this nonetheless be the type of dual pricing that is proposed to be sanctioned? If Chinese industry is not benefiting in any way from the export tax, is there justification in prohibiting it?

4. Copper
    a. Chile: It does not restrict the exports of copper in any way and copper is one of its largest foreign exchange earners. There is significant government control as all the mines are owned by the government and allocations also appear to be made domestically. But there is no evidence to suggest that this is specific to any one or more industries.

5. DAP pricing
    a. India: Presents no issues of dual pricing.

6. Iron ore
    a. India: Imposes an export tax (valid under Article XI) and quantitative restrictions (not valid under Article XI) and is thus a classic dual pricing scenario. But ironically none of the effects of dual pricing are seen in this case. Exports have increased and domestic prices are also on par with international prices and in line with export prices. Thus none of the assumed effects of dual pricing play out in this sector for India.

7. Steel
    a. India: India appears to be contemplating imposing export taxes and has reduced DEPB rates. Both export taxes and reduction in DEPB rates are valid measures under Article XI. Nonethelss, it has not stopped steel exports or reduced steel domestic prices, which are on par and even higher than world prices. Thus again despite the measures to curb exports, the effects of dual pricing are not playing out.

8. Coal
    a. India: India does not export significant quantities of coal because most of it is supplied domestically. It is a typical example of a government providing goods for less than adequate remuneration to its domestic industry.

The hypothesis of this study has been that instituting measures that aim to restrict exports (such as export taxes) or make a resource available to downstream industry, do actually have that effect. That is, if an export tax is

imposed it would necessarily reduce the volume of the product exported and it would necessarily make the product available to downstream industry at preferential rates. But as is seen above, this hypothesis is proven wrong especially in the case of aluminium and iron ore, where the countries in question have imposed export taxes and cut export rebates but that has not deterred exports or reduced the price of the product domestically.

It must also be remembered that both the measures employed above are valid under Article XI. It is only if EC's suggestion to phase out exports and prohibit the use of export taxes is carried through, would these measures per se be violative of the GATT. Otherwise they are legitimate.

The only scenarios that exhibit the effects of dual pricing are Gazprom's natural gas pricing, Russia's crude oil pricing and Saudi Arabia's price regulation on petroleum products. Out of these three, dealing with the Saudi situation essentially also means undoing its scheduled commitments and further also addressing the effect of OPEC on oil exports and prices. Both the options are untenable.

In the case of Gazprom, the pricing itself is valid as it is not sanctioned by Article III, but the manner in which Gazprom makes the gas available to industries could still make a case for a an actionable subsidy. It is true though that, the effect of a CVD would be on the downstream product leaving Gazprom free to continue its pricing. Again, Gazprom's differential export prices to Baltic vis a vis Europe might make for a Article XVII violation but more evidence is needed on that front. This however shows that the existing provisions of the GATT and the ASCM can be used to tame the effect of dual pricing.

Similarly in the case of oil from Russia, export taxes on crude are valid under Article XI, but the manner in which the Russian oil companies (mostly government companies) supply this oil to downstream refining companies may amount to a subsidy in light of adequate evidence. Also it should be mentioned that exports of crude constitute 70% of the total production thereby implying that exports are a major source of revenue for Russia. This does not explain why the export tax was imposed (possibly for fiscal reasons) but it does also indicate that given the emphasis on exports, oil companies may not be deterred from exporting on account of the tax.

In light of the same it should be noted that while dual pricing may be a problem, it does not exhibit the same effects in all cases. Despite the classical measures used to employ dual pricing, the export volume and domestic price data might reveal that the measures have had no effect in actually implementing dual pricing. But even in cases such as Gazprom's, the ASCM and GATT provide several tools whereby a member's policies might be disciplined.

The only way in which the specific problem of dual pricing can be dealt with is, as the EC suggests, by making it a prohibited subsidy. This suggestion however

would have enormous implications for the GATT and would go against the grain of Article III. It would amount to re-negotiating what the founding fathers had envisaged as the balance between fair trade and the ability of a member to nonetheless nurture its domestic industry (within the pillars of GATT)

Given that most measures complained of are (i) legitimate and valid under the GATT, (ii) can further be dealt with or disciplined through other provisions of the GATT or ASCM and, most importantly (iii) do not always have the effect of restricting exports or reducing domestic prices, it is suggested that India not subscribe to or support the positions propagated by the EC or the US on dual pricing.