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

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATED OF AMERICA

May 13, 2013

I. Introduction

1. The *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") represents a balance between disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies. Applying U.S. laws and regulations consistent with the SCM Agreement, the U.S. Department of Commerce ("Commerce") determined that the Indian government, at both the central and state levels, provided a wide range of subsidies to Indian manufacturers of hot-rolled steel products. The U.S. International Trade Commission ("Commission") further determined that those subsidies resulted in material injury to the industry of the United States.

2. India claims that these determinations, and in some cases, the laws and regulations on which they were based, are inconsistent with the SCM Agreement. The United States will demonstrate in this submission and over the course of the proceedings before the Panel that India is incorrect. The United States believes that India's claims are without merit and that the Panel should find that the U.S. laws, regulations, and determinations that are properly within its terms of reference are not inconsistent with the covered agreements.

II. Preliminary Ruling Requests

3. India raises claims in its First Written Submission that are outside the Panel's terms of reference. Specifically, India raises claims under Article 11 of the SCM Agreement that were not included in its panel request pursuant to Article 6.2 of the DSU and which failed to present the problem clearly, and which are therefore outside the Panel's terms of reference. India also raises claims regarding a Sunset Review determination issued by the Department of Commerce on March 14, 2013, which also was not included in India's panel request as required by Article 6.2. Accordingly, the United States respectfully requests that the Panel find that these claims are outside the Panel's terms of reference.

III. The U.S. Regulation for Determining the Benefit When Goods Are Provided by a Government for Less Than Adequate Remuneration Is Consistent with Article 14(d) of the SCM Agreement

4. First, India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation is inconsistent "as such" with the first sentence of Article 14(d). India argues for a methodology of calculating benefit based on "cost to government." India's interpretation contravenes the text, particularly the title and *chapeau* of Article 14. The title of Article 14 states that the provision concerns "calculation of the amount of a subsidy in terms of the benefit to the recipient." The *chapeau* of Article 14 makes clear that an investigating authority must provide for a methodology in law or regulation that allows it to calculate "the benefit to the recipient." Moreover, Article 1.1 states that "a subsidy shall be deemed to exist" where there is "a financial contribution by a government or any public body" and "a benefit is thereby conferred;" no additional analysis focused on cost to government is required. Finally, the "cost to government" standard was already considered and rejected by the Appellate Body in *Canada – Aircraft*. In contrast to India's interpretation, Section 351.511(a)(2)(i)-(ii) of the U.S. regulation calculates the benefit

from the provision of goods by a government by determining adequacy of remuneration with respect to the recipient.

5. Second, India argues that Section 351.511(a)(2)(i)-(iii) of the U.S. regulation is inconsistent "as such" with the second sentence of Article 14(d). Rather than basing its argument on the actual text of Article 14(d), India argues that the U.S. regulation is inconsistent with text taken from Article XVII:1(b) of the GATT 1994. Such an approach should be rejected.

6. Third, India argues that Article 14(d) establishes a right of Members to provide goods for adequate remuneration without facing CVD measures. India misinterprets the text. Article 14 establishes procedural guidelines for Members' investigating authorities to follow when calculating the amount of subsidy in terms of benefit; to the extent the methodology or methodologies employed by an investigating authority are consistent with Article 14, this obligation has been satisfied

7. Fourth, India argues that the U.S. regulation, by excluding government prices from the benchmark in some circumstances, is inconsistent "as such" with Article 14(d). The calculation of "benefit" requires that the financial contribution at issue must be excluded from the benchmark, and the prices of similar goods sold by private suppliers in the country of provision are to be the primary benchmark for calculating benefit.

8. Fifth, India asserts that Article 14(d) precludes out of country benchmarks. The text of Article 14(d) allows, and the Appellate Body has confirmed, where in-country private prices are not useable, an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision.

9. Finally, India argues that the U.S. regulation requires the countervailing of "comparative advantages." The United States understands India to mean that there may be factors for which a particular out-of-country benchmark needs to be adjusted before determining adequacy of remuneration in a particular market. The U.S. regulation allows for such adjustments and therefore is not inconsistent with Article 14(d).

IV. Section 351.511(a)(2)(iv) of the U.S. Regulation Provides for Adjustments When Determining The Adequacy of Remuneration Consistent with Articles 14(d), 19.3, and 19.4 of the SCM Agreement

10. India claims that, by including delivery costs in the benchmark price, the U.S. regulation is inconsistent with Article 14(d), and consequently with Article 19.3 and 19.4. Commerce makes price adjustments for delivery charges for both the benchmark price and the government price. The U.S. regulation therefore ensures that the benchmark and the government prices are compared at the same point in the distribution chain, and is consistent with the adjustments for "transportation" set out in the second sentence of Article 14(d). The U.S. regulation is therefore not inconsistent with Article 19.3 and 19.4.

V. The Cumulation Provisions of the U.S. Statute Are Not Inconsistent, As Such, with Article 15 of the SCM Agreement

11. Despite India's claims to the contrary, the cumulation provisions of the U.S. antidumping and countervailing duty statutes are not inconsistent, as such, with Article 15 of the SCM Agreement. These provisions of the U.S. statute, which permit the Commission to cumulate subsidized and dumped imports in original investigations and sunset reviews, are fully consistent with the text, object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries being injured by unfairly traded imports from a variety of sources. Although India claims that Article 15.3 of the SCM Agreement prohibits such an approach, nothing in the text of Article 15.3 prohibits, explicitly or implicitly, the cumulation of subsidized and dumped imports. Instead, the article only addresses the conditions under which an authority may cumulate imports from multiple countries that are subject to simultaneous countervailing duty investigations.

12. Additionally, with respect to the statutory provisions governing cumulation in sunset reviews, India's claims of inconsistency with Article 15 are premised on the mistaken belief that Article 15 is applicable to an authority's likely injury determination in sunset reviews. The Appellate Body has consistently rejected the view that the injury provisions of Article 15 of the SCM Agreement and Article 3 of the AD Agreement are directly applicable to an authority's likely injury determination in sunset reviews. Furthermore, India's as such challenge to the sunset provisions of the statute necessarily fails because the U.S. statute does not mandate cumulation in sunset reviews. Instead, the statute explicitly gives the Commission discretion not to cumulate any subject imports, whether dumped or subsidized, in a sunset review, even if the statutory standards are met. As a result, India cannot establish that, in the sunset context, the U.S. statute mandates that action by the Commission that is inconsistent with the SCM Agreement.

VI. The Commission's Cumulation Determinations for Hot-Rolled Steel Imports from India Are Not Inconsistent, As Applied, with Article 15 of the SCM Agreement

13. India also has no basis for the argument that the Commission's cumulation of subsidized imports of hot-rolled steel from India with dumped hot-rolled steel imports in its injury and sunset determinations was inconsistent, as applied, with Article 15 of the SCM Agreement. The SCM Agreement does not prohibit the cumulation of subsidized and dumped imports in original investigations or sunset reviews, as India claims. Again, cumulating all unfairly traded imports, whether dumped or subsidized, is consistent with the object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries that are being injured by simultaneous unfairly traded imports from a variety of sources.

14. Furthermore, in its injury determination, the Commission did not fail to "evaluate" three factors (that is, growth, return on investment, and ability to raise capital), as contemplated by Article 15.4 of the SCM Agreement, as India claims. The Appellate Body has made clear that an authority is not required to make specific findings for each specified impact factor as part of its overall injury analysis. Instead, the Commission's report shows that it obtained and evaluated

the data pertaining to the industry's condition, including the factors of "growth," "return on investment," and "ability to raise capital," in the manner contemplated by Article 15.4.

VII. The U.S. Measures Regarding Facts Available Are Not Inconsistent As Such with Article 12.7 of the SCM Agreement

15. The United States submits that nothing in the U.S. statute or regulations regarding the use of facts available is inconsistent with the SCM Agreement. First, the U.S. statute and regulations at issue do not require the use of adverse inferences in selecting among the facts available. It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member's WTO obligations only if the legislation mandates action that is inconsistent with those obligations or precludes action that is consistent with those obligations. The text of the U.S. laws makes clear through use of the term "may" that Commerce has the discretion either to employ or not employ the use of an adverse inference in selecting from among the facts available. Because these provisions do not mandate the administering authority to take the actions challenged by India, India's "as such" claims must fail at the outset.

16. Notwithstanding the discretionary nature of the U.S. laws, the U.S. measures are consistent with Article 12.7. Article 12.7 enables investigating authorities to make determinations based on the facts otherwise available when interested parties and Members have failed to provide necessary information. India argues that Article 12.7 does not include an express provision concerning "adverse" facts available and therefore prohibits this practice. It further argues that authorities are bound to use the "best" information available, based on the context provided by Annex II to the AD Agreement. India's interpretation of Article 12.7 is wrong. Given the limited investigative powers of an investigating authority, Article 12.7 provides authorities with an essential tool for dealing with uncooperative parties, and ensures that an interested party may not evade the application of countervailing duties, or obtain a more favorable duty margin, through non-cooperation. Nothing in Article 12.7 limits the application of facts available to those facts that are most favorable to the interested party who fails to supply information, nor does the ordinary meaning of the term "facts available" speak to which facts should be selected. Annex II of the AD Agreement does provide context regarding the use of facts available, but specifically allows that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

17. The U.S. measures allow Commerce to "use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" if it determines that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information". If Commerce relies on secondary information in making its determination, that information must be corroborated to the extent practicable. Other WTO Members have similar laws. Therefore, the U.S. measures are not inconsistent with a proper interpretation of Article 12.7 of the SCM Agreement.

VIII. Commerce's Application of Facts Available was Consistent with Article 12.7 of the SCM Agreement

18. India also challenges the program-specific subsidy rates that Commerce applied in the 2006, 2007, and 2008 administrative reviews, and claims that Commerce applied the U.S. measures in a punitive manner and made determinations without a factual foundation. In each of the challenged administrative reviews, it is undisputed that necessary information was not provided, as requested, and therefore Commerce properly resorted to the application of facts available under Article 12.7. In each case, Commerce examined the available evidence and, where there was no information to the contrary, Commerce reasonably inferred that the refusing party benefitted from the subsidy program in question, and benefitted at the same rate as a cooperating party was found to benefit in this proceeding, or, if necessary, another proceeding pertaining to India. These determinations were thus based on facts available on the record in the proceeding, and the refusal of these companies to provide *any* necessary information with respect to the benefits they received was properly taken into account in selecting from among the facts available. Therefore, India has failed to demonstrate the Commerce acted inconsistently with Article 12.7 of the SCM Agreement in making its determinations based on facts available.

IX. Commerce Acted Consistently with Articles 1.1, 1.2, and 14 with Respect to the Provision of High Grade Iron Ore by NMDC

19. First, India claims that Commerce's public body determinations in the challenged investigation are inconsistent with Article 1.1(a)(1) of the SCM Agreement because Commerce based its determinations on "[m]ere majority shareholding by government" or "solely" on "alleged control by a government." India fails to provide the Panel with arguments necessary to support its claims, because India relies on an erroneous interpretation of Article 1.1(a)(1). When interpreted according to the customary rules of treaty interpretation of public international law pursuant to Article 3.2 of the DSU, the term "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own. India has not presented any legal argument demonstrating that Commerce's determinations are based on an understanding of the term "public body" contrary to Article 1.1(a)(1) of the SCM Agreement, when properly interpreted.

20. Even if the Panel finds that India's interpretation of Article 1.1(a)(1)(iv) is appropriate, and that Commerce should have applied the test set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, the United States respectfully requests the Panel to further find that the record evidence available during the investigation would support a finding that NMDC is a "public body." Specifically, the record evidence indicates that the NMDC is a public body because it is over 98% owned by India and has the authority to perform Indian governmental functions.

21. Second, India claims that Commerce's determination that India's provision of iron ore for less than adequate remuneration was specific to certain enterprises was inconsistent with Article 2. India argues that Commerce failed to establish that the provision of iron ore for less than adequate remuneration was used by a "limited number of certain enterprises." Article 2.1(c)

specifically provides that *de facto* specificity may be found in light of the use of a subsidy program by a limited number of certain enterprises, and the *chapeau* of Article 2.1 clarifies that "certain enterprises" includes an "industry" or "group of industries." Therefore, where the recipients of a subsidy constitute an industry, only comparing producers of a similar product would be circular. Rather, under Article 2.1(c), a panel or investigating authority is to decide whether the recipients of the subsidy constitute a discrete segment of the economy and are therefore "certain enterprises." Commerce's determinations demonstrate that Indian users of iron ore constitute a discrete segment of the Indian economy.

22. India also argues that Article 2.1(c) of the SCM Agreement does not permit a *de facto* specificity finding where the inherent characteristics of the product, rather than the program itself, make the product useful only to certain enterprises. There is no basis in the text of Article 2.1(c) for such an assertion, and a WTO panel has already considered and rejected it.

23. India claims that Commerce failed to consider the extent of economic diversification in India, as well as the length of time high-grade iron ore has been sold in India, as required by the third sentence of Article 2.1(c). Commerce did account for the fact that India's economy is highly diverse and that only a limited number of enterprises use iron ore. Commerce also stated that the only industries that could receive the subsidy over time would be defined as part of the original, limited group of beneficiaries – those that use iron ore – and therefore further consideration of the duration of the subsidy was not necessary.

24. Additionally, contrary to India's assertions, Commerce's specificity determination concerning the GOI's provision of iron ore at less than adequate remuneration is substantiated by positive evidence and is consistent with Article 2.4 of the SCM Agreement.

25. Third, India claims that Commerce's benchmarks for determining whether the NMDC's sales of high grade iron ore were for less than adequate remuneration are inconsistent with Article 14. First, India argues that Commerce should have determined whether a benefit was conferred by using a "cost to government" standard. For the same reasons as discussed with respect to India's "as such" claim made on that basis, the argument should be rejected.

26. India also argues that Commerce improperly relied on out-of-country benchmarks because in-country price information was available. Commerce could not rely on this information because it was incomplete and would reveal proprietary data of an Indian respondent.

27. Finally, India argues that the world market prices used by Commerce were improper because they were not identical to the market conditions in the country of provision, that Commerce improperly countervailed India's "comparative advantage, and that including ocean freight and import duties is inconsistent with prevailing market conditions in India. Article 14 requires that world market prices relate or refer to, or is connected with, prevailing market conditions in the country of provision, not that the prices be identical. Second, for the reasons explained above, Commerce can and does make adjustments appropriate for factors India

describes as "comparative advantage." Third, India's position that prices must be compared on an ex-mine basis would mean the price comparison would not reflect prevailing market conditions.

X. Commerce's Determinations That the Provision of Captive Mining Rights for Iron Ore and Coal Constitutes a Financial Contributions, are Specific to Certain Enterprises, and Provide Benefits To The Recipients Are Not Inconsistent with Articles 12.5, 1.1, 1.2, 2, and 14 of the SCM Agreement

28. India claims there is no "captive" mining rights program for iron ore in India and that Commerce's findings of such a program are contrary to Article 12.5 of the SCM Agreement. The record evidence demonstrates that India has a captive mining programs for iron ore and coal, and by relying on that evidence, Commerce met its obligations under Article 12.5.

29. India also argues that the GOI's granting of mineral rights does not constitute the provision of goods within the meaning of Article 1.1(a)(1)(iii). As the Appellate Body has found, when a government provides a right to a good, the government "makes available" the good itself. As determined by Commerce, India provided the rights to iron ore and coal to steel producers, and therefore made a financial contribution within the meaning of Article 1.1(a)(1)(iii).

30. India claims that Commerce's specificity determination with regard to the provision of mining rights for iron ore and coal are inconsistent with Article 2 of the SCM Agreement. Record evidence demonstrates that India maintains captive iron ore mining programs that are *de facto* specific to the steel industry, and captive coal mining programs that are *de jure* specific to certain enterprises. As such, Commerce's determination of specificity was consistent with Article 2.

31. Finally, India argues that Commerce's calculation of the benefit for India's leasing of captive mining rights for iron ore and coal are inconsistent with Article 14(d) of the SCM Agreement. For the same reasons as above, India's argument that the calculation of benefit should be determined by reference to the cost to the government of the financial contribution should be rejected. India's argument that Commerce was required to compare the mining rights at issue to a benchmark based on mining rights values sourced in other countries is also incorrect. Commerce properly relied on the cost of mining rights in the country of provision, comparing recipients' actual mining and delivery costs and profit, and comparing that result to a market benchmark.

XI. The United States Complied with Articles 1, 14, and 22 of the SCM Agreement with Regard to its Findings Relating to the SDF Program in the Challenged Determinations

32. First, India claims that Commerce's finding with respect to the SDF Managing Committee was inconsistent with Article 1.1(a)(1) of the SCM Agreement because neither the

SDF Managing Committee nor the JPC was properly determined to be a public body in accordance with Article 1.1(a)(1). However, based on the record evidence, Commerce found that the SDF Managing Committee made all final decisions on loans, including setting the terms and approving waivers of SDF loans. Because this committee decided whether or not to provide loans to Indian steel companies at advantageous rates, and because this committee was comprised exclusively of GOI senior officials, it is clear that, at a minimum, the GOI controlled the SDF Managing Committee for purposes of Article 1.1(a)(1), such that it could, and did, use its resources as its own. In the alternative, even under the interpretation of "public body" set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, Commerce's determination is consistent with Article 1.1(a)(1), because the SDF Managing Committee performed governmental functions, and because the GOI exercised meaningful control over the SDF Managing Committee. Having made this determination, Commerce did not need to make an additional determination regarding entrustment or direction pursuant to Article 1.1(a)(1)(iv).

33. India also contends that the SDF loans cannot be considered "a direct transfer of funds" within the meaning of Article 1.1(a)(1)(i), because "the SDF levy was not [the GOI's] own fund and is not tax revenue." To the contrary, however, the facts demonstrate that Commerce reasonably concluded that the SDF levy operated as a tax imposed on consumers, over which the GOI, through the SDF Managing Committee, had complete control. Consequently, the loans provided using these funds were "made available" to steel producers by the GOI, and therefore constituted a "direct transfer" within the meaning of Article 1.1(a)(1)(i).

34. India also claims that Commerce's benefit calculation in the challenged determinations were inconsistent with Article 14(b). India first challenges Commerce's benchmark calculation as comparing the amount paid for the SDF loans with the amount that Tata would have paid on a "comparable commercial loan" in accordance with Article 14(b) of the SCM Agreement. India's claim is without merit. Commerce properly used as a commercial benchmark interest rate an average of certain Prime Lending Rates, compiled and published by the Reserve Bank of India, for loans similar to the SDF loans in currency, structure and maturity, and this rate was comparable within the meaning of Article 14(b) of the SCM Agreement.

35. India also challenges Commerce's benefit calculation overall, in the challenged proceedings, as not accounting for Indian steel producers allegedly contributing their own funds and incurring certain costs to participate in the SDF program. Commerce acted consistently with Article 14 in not providing a "credit" in its benefit calculations for the funds that were levied on consumers and remitted by steel producers to the SDF fund, or any administrative fees incurred to obtain the SDF loans.

XII. The United States Did Not Act Inconsistently with Articles 11, 13, 21 and 22 of the SCM Agreement with Regard to New Subsidy Allegations Examined in Administrative Reviews

36. India claims that the United States acted inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement with respect to its review of new

subsidies programs within the context of administrative reviews. India premises these claims on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. In India's view, then, the United States was required to examine new subsidies programs only upon receipt of a complete written application complying with Articles 11.1, 11.2 and 11.9; that it was required to initiate a new investigation into these programs pursuant to Article 11.1; that it was required to invite India for consultations regarding its examination of these new programs pursuant to Article 13.1 as a result of its initiation of a new investigation; and that it was similarly required to issue a public notice upon "initiation" of a new investigation in compliance with Articles 22.1 and 22.2. As a result of its having examined these subsidies programs instead in the context of administrative reviews, under Article 21, India claims that the United States has additionally violated Articles 21.1 and 21.2 of the SCM Agreement.

37. Because they are all premised on the same erroneous interpretation, each of India's claims under Articles 11, 13, 21 and 22 of the SCM Agreement must fail. Given the language and structure of the SCM Agreement, and the similar language and structure of the AD Agreement, findings of panels and the Appellate Body have confirmed that requirements found in provisions applicable to a countervailing duty or anti-dumping *investigation* will not automatically be read into those provisions expressly applying to proceedings that take place after the conclusion of an original investigation, such as administrative or sunset *reviews*. The terms of Articles 11.1, 11.2, 11.9, 13.1, 22.1 and 22.2 indicate that their requirements apply to events occurring early on in an "investigation", and the provisions do not contain any reference that would broaden their scope to events or proceedings occurring after the completion of such an investigation. Furthermore, Article 21, which does apply to subsequent "review" proceedings, does not contain a reference incorporating these provisions of Article 11, 13 and 22. Therefore, India's claims regarding to Articles 11, 13 and 22 cannot succeed with respect to actions taken by Commerce in the context of administrative review proceedings. On the other hand, the purpose of subsequent reviews under Article 21 is to "examine whether the continued imposition of a duty is necessary to offset subsidization." By including in its reviews of this countervailing duty order allegations of additional subsidization programs with respect to the same product and the same companies at issue in the original investigation, Commerce acted consistently with that provision. For these reasons, the Panel should reject India's claims under Articles 21.1 and 21.2 of the SCM Agreement.

XIII. Commerce's Determinations Were Not Inconsistent with Article 22.5 of the SCM Agreement

38. India argues that Commerce did not adequately explain its rejection of a few specific arguments put forth by the respondents with respect to the SDF program, captive mining rights for iron ore and coal, and the sale of high grade iron ore by the NMDC. Article 22.5 requires that an investigating authority must provide public notice of its determinations, including explanations of the legal and factual bases of the determination, and reasons for the acceptance and rejection of parties' relevant arguments. For each of the parties' arguments cited by India in its submission, Commerce explained the reasons for rejection, as explained in the portions of the U.S. submission corresponding to each of these subsidy programs. Thus, while India may

disagree with the reasons provided in Commerce's determinations, the fact remains that Commerce did provide the information required under Article 22.5, and therefore did not act inconsistently with its obligations under that provision.

XIV. Conclusion

39. For the foregoing reasons, the United States respectfully requests that the Panel reject India's claims.