

***UNITED STATES – COUNTERVAILING MEASURES
ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA***

(AB-2014-7 / DS436)

**OPENING STATEMENT OF
THE UNITED STATES OF AMERICA**

September 24, 2014

Good morning, Chair and members of the Division:

1. On behalf of the United States, I would like to thank you, as well as the Secretariat assisting you, for your work on this appeal.
2. The United States is acutely aware of the extent of that work, given the length of India's appellant submission and the U.S. appellee submission, covering some 67 claims of error and 24 additional challenges under Article 11 of the DSU by India alone. The United States also has appealed three findings. We recognize the need to move efficiently to the substantive issues on appeal, and we will not in this statement attempt to highlight or repeat the arguments presented in the U.S. submissions but will limit our presentation to certain specific issues. Before moving to those issues, however, we do wish to make one overarching comment relating to India's DSU Article 11 appeals.
3. For some time, the Appellate Body has been indicating to Members the need for a serious approach to raising claims of error under DSU Article 11. In this regard, we appreciate the articulation given by the Appellate Body in the *EC – Fasteners* dispute that “[a]n attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision.” Rather, “[i]t is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error *meets* the standard of review under that provision” and “a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the

objectivity of the panel's factual assessment.”¹ These and related articulations have been repeated by the Appellate Body in other, more recent reports.²

4. As the United States explained in its appellee submission, India has not made out a sufficient basis for its Article 11 claims. Such an approach to DSU Article 11, moreover – effectively seeking a different outcome on the same case in front of a different audience – raises concerns for the WTO dispute settlement system. Attempts at full *de novo* review on appeal strain the resources of the Appellate Body, as well as the other participants and third participants involved in a dispute. Such an approach may impede the prompt settlement of disputes. And, as recognized by the participants in this appeal, this may also make it impossible for the Appellate Body to provide its report within the period set out in DSU Article 17.5. For these reasons, Members should strive to carefully articulate a sufficient basis for the Article 11 claims that they bring and the limitation on appeals under DSU Article 17.6 to issues of law and legal interpretation should be carefully observed. In so doing, Members will assist the Appellate Body in ensuring that appeals function efficiently and effectively, as designed in the DSU.

I. Public Body

5. On appeal, the United States has requested a modification of the Panel’s interpretation of “public body” under Article 1.1(a)(1) of the SCM Agreement to clarify the role of control by the government of an entity’s financial resources in that analysis. The Panel relied on the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, the “critical

¹ *EC – Fasteners (AB)*, para. 442.

² *China – Rare Earths (AB)*, paras. 5.178-5.179.

consideration” of which it found to have been “the question of governmental authority, i.e., the authority to perform governmental functions.”³ The U.S. appeal in this dispute concerns the scope of such “governmental authority.” The Panel focused its application of Article 1.1(a)(1) on “meaningful control” of an entity, citing the Appellate Body’s finding that such control “may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.”⁴ The United States has supported the Panel’s application in this respect in its appellee submission.

6. However, the wide disparity between the parties’ understandings of the Appellate Body’s interpretation in *US – Anti-Dumping and Countervailing Duties (China)*, as applied by the Panel – as well as the divergence among the various third participants – suggests that further clarification of the Appellate Body’s articulation of what is a “public body” would be helpful.

7. For its part, India attempts to reframe the Appellate Body’s finding to mean that “‘governmental function’ is not about what a government itself may engage in; rather it involves regulating, controlling, or supervising individuals, or otherwise restraining their conduct, through the exercise of lawful authority.”⁵ “[O]ver and above the presence of a governmental framework,” India posits, “there has to be the *express delegation* of the power to regulate, control, or supervise individuals, or otherwise restrain conduct.”⁶ India attempts to make this extension by arguing that, because the Appellate Body referred to the definition of government

³ Panel Report, para. 7.80 (citing *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 310.)

⁴ Panel Report, para. 7.80 (citing *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 318.)

⁵ India Appellant Submission, para. 305.

⁶ India Appellant Submission, para. 307. (Emphasis added. Original emphasis omitted.)

in *Canada – Dairy*, and because the Appellate Body likened the role of a public body to that of a government, the definition of “public body” must therefore be limited to only those entities sharing the characteristics of the milk marketing boards at issue in *Canada – Dairy*.

8. The United States disagrees that such a showing is required under the interpretation laid out in *US – Anti-Dumping and Countervailing Duties (China)*. India’s line of reasoning misrepresents the Appellate Body’s findings, and creates a much more limited definition of public body than the United States understands to have been intended. India’s interpretation would also be inconsistent with the Appellate Body’s application of Article 1.1(a)(1) to the State-Owned Commercial Banks in the same dispute, which were not found to have possessed any regulatory or supervisory powers. We recall that in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body was clear that “the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.” India’s interpretation would allow Members to potentially circumvent their obligations merely by foregoing an “express delegation” of governmental authority to an entity that would otherwise constitute a “public body.”

9. To be clear, however, the United States does not dispute that the presence of such authority would in many cases demonstrate the existence of a public body, if not a governmental entity itself. In this sense, our view of Article 1.1(a)(1) is that such characteristics in an entity may be *sufficient* to show that an entity is a public body, but are not *necessary* for such a showing to be made.

10. In our appellant submission, the United States therefore seeks a modification of the Panel’s interpretation in this dispute, to clarify that, in certain circumstances, government control over an entity also may be sufficient to establish that an entity is a “public body,” such that an additional showing of the presence of regulatory or supervisory authority is not also required. Specifically, the United States considers that governmental control over an entity, such that the government may use that entity’s resources as its own, will suffice to establish the existence of a public body.

11. Under Article 1.1(a)(1), the focus of the financial contribution analysis is whether a direct transfer or other type of financial contribution was made and can be attributable to the government or any public body of a Member. Therefore, the key governmental functions at issue are those functions described in the subparagraphs of that article – that is, making a direct transfer of funds; foregoing government revenue; providing goods or services, or purchasing goods; or making payments to a funding mechanism. Therefore, the authority required of a public body is the authority to exercise *these* functions on behalf of the government.

12. The final subparagraph of Article 1.1(a)(1) confirms this understanding that subparagraphs (i) – (iii) describe governmental functions. Subparagraph (iv) states that a financial contribution exists where a government “entrusts or directs a private body to carry out one or more *of the types 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.”⁷ That is, these subparagraphs describe governmental functions.

⁷ Emphasis added.

Where the government controls an entity, such that the government can use that entity’s resources as its own, economic transfers through “the type of functions” set out in subparagraphs (i) – (iii) made by that entity are equivalent to transfers of the government’s resources. That is, in exercising one of the functions listed in subparagraphs (i) to (iii), that entity is exercising a governmental function.

13. As can be seen from this discussion, contrary to India’s arguments, the United States does not attempt to overturn the Appellate Body’s interpretation in *US – Anti-Dumping and Countervailing Duties (China)*. The United States notes that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* observed significant overlap in the positions of China and the United States in that case. Therefore, in finding against the United States, the Appellate Body did not reject every aspect of the U.S. argument. Of particular importance to this dispute, the Appellate Body did not reject the idea that control has a role in establishing that an entity is a public body. To the contrary, the Appellate Body found that a government’s “meaningful control” over an entity, such as that exercised by the government of China over the State-owned Commercial Banks in that dispute, may suffice to satisfy the requirements of Article 1.1(a)(1).

14. One U.S. proposition affirmatively rejected by the Appellate Body in that dispute was the U.S. argument that majority ownership alone can serve to demonstrate that an entity is a public body. The panel in *US – Countervailing Measures (China)* (DS437) made the same determination, and the United States has not appealed the findings in that dispute. We similarly have not appealed the Panel’s interpretation in this dispute with respect to its finding that

ownership alone is not sufficient. Given this position, India’s argument that “cogent reasons” are required in order to support the U.S. appeal under Article 1.1(a)(1) is, even on its own terms, misplaced.

II. Cross-Cumulation

15. The United States also appeals the Panel’s finding that the U.S. statute governing cumulation is “as such” inconsistent with Article 15 of the SCM Agreement. The Panel committed legal errors in both its interpretation of the U.S. statute and the relevant provisions of the SCM Agreement.

16. With respect to the statute, the United States emphasizes that, where a statute is challenged “as such,” the complainant bears the burden of demonstrating its interpretation of the measure. Second, a panel has a duty under Article 11 “to examine the meaning and scope of the municipal law at issue.”⁸ As the Appellate Body has emphasized, “as such” claims about another Member’s laws are “serious challenges” that “seek to prevent Members ex ante from engaging in certain conduct,” the implications of which “are obviously more far-reaching than ‘as applied’ claims.”⁹ Thus, it is essential that the panel “conduct a detailed examination of that legislation in assessing its consistency with WTO law.”¹⁰

17. The meaning of a challenged measure would be determined according to the domestic legal principles in the legal system of the Member maintaining that measure. That is, what a

⁸ *US – Countervailing and Anti-Dumping Measures on Certain Products from China* (AB), para. 4.98.

⁹ *US – Oil Country Tubular Goods Sunset Reviews* (AB), para. 172.

¹⁰ *US – Hot-Rolled Steel* (AB), para. 200.

measure means or how it operates is not an issue of international law or WTO law, but an issue of the effect of that legal instrument according to that Member’s municipal law. In the United States, domestic legal instruments are interpreted according to the ordinary meaning of the text of the instrument, taking account of legislative history; judicial decisions; and application by an administering agency, which “governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of the language that is ambiguous.”¹¹ Thus, where the terms of a U.S. legal instrument are not clear on their face, the panel must examine additional evidence.

18. As stated in the U.S. first written submission to the Panel in this dispute, the text of the U.S. statute governing cumulation *permits* cross-cumulation, *i.e.*, the cumulation of subsidized and non-subsidized dumped imports;¹² but the statute, on its face, does not require that such cumulation be performed in every injury analysis. The measure at issue falls within the “Definitions; [and] special rules” section of the Tariff Act of 1930, which applies to both anti-dumping and countervailing duty investigations. Under Section 1677(7)(G), the statute uses the term “or” when it states that the Commission shall cumulate imports with respect to which petitions were filed or investigations initiated under section 1671a [for countervailing duty investigations] *or* 1673a [for anti-dumping investigations] on the same day.

19. The statute does not state that the Commission shall cumulate imports for both countervailing duty *and* anti-dumping investigations. Interestingly, in examining the terms “dumping or subsidization” of the SCM and AD Agreements pursuant to Article VI of the GATT

¹¹ See *US – Countervailing and Anti-Dumping Measures on Certain Products from China (Panel)*, para. 7.163 (quoting U.S. Supreme Court decision in *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) at 316).

¹² U.S. First Written Submission, para. 86.

1994, the Panel declined to read “or” as meaning “and.” Similarly here, the Panel was required to look beyond the text of the statute to explain how the “or” should be read as an “and” in determining that the measure, “as such,” is inconsistent with Article 15 of the SCM Agreement.

20. Far from undertaking such an analysis, the Panel failed even to examine the text of the U.S. measure. In lieu of an analysis, the Panel simply asserted that “[i]n [its] view, Section 1677(7)(G) requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports.”¹³ Given the standard under Article 11, and the far-reaching impact on a WTO Member of an “as such” finding of inconsistency, the Panel’s failure to perform even a cursory analysis of the text of the measure cannot satisfy its duties under Article 11 of the DSU.

21. Neither could the Panel have considered India to have presented a *prima facie* case in this regard, given the ambiguity found on the face of the measure. In addition to the text, however, India did nothing more than refer to the single instance of application at issue in the same dispute. Without any factual findings having been made by the Panel, and given the lack of additional evidence on the record as to the interpretation of the U.S. statute under U.S. law, no undisputed facts exist upon which the Appellate Body could base its own interpretation. Therefore, the Appellate Body should also refrain from completing the analysis. Without a finding that the U.S. statute necessarily leads to a breach of Article 15 of the SCM Agreement,

¹³ Panel Report, para. 7.340.

the Panel’s findings as to the consistency of the U.S. measure with Article 15 of the SCM

Agreement cannot be sustained.

22. With respect to the relevant provisions of the SCM Agreement, as discussed in more detail in the U.S. submissions, Article 15.3 does not address the circumstances in which simultaneous countervailing duty investigations *and* antidumping investigations may be taking place. Cross-cumulation is not inconsistent with the SCM Agreement when appropriately read in context and in light of the object and purpose of the Agreement and Article VI of the GATT 1994.

23. As the Appellate Body has acknowledged previously, the ability to cumulate the injurious effects of dumped imports is a “useful tool” for an investigating authority “to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority’s determination.”¹⁴ An analysis that focuses solely on the injurious effects of either dumped or subsidized imports alone when both types of unfairly traded imports are injuring the domestic industry at the same time would necessarily prevent the investigating authority from “adequately taking into account” the injurious effects of all unfairly traded imports, and would render the authority’s injury analysis less than complete.

24. As the Appellate Body has recognized, “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.”¹⁵ The

¹⁴ *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 297.

¹⁵ *US – Upland Cotton (AB)*, para. 549 (quoting *Argentina – Footwear (EC) (AB)*, para. 81 (original emphasis)); *see also Korea – Dairy (AB)*, para. 81; *US – Gasoline (AB)*, p. 23, para. 21; *Japan – Alcoholic Beverages II (AB)*, p. 12, para. 106; and *India – Patents (US) (AB)*, para. 45).

cumulation of dumped and subsidized imports is fully 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 unfairly traded imports from a variety of sources.¹⁶

III. Facts Available

25. With respect to facts available, we note that throughout this dispute, India has changed course a number of times with respect to its “as such” argument and the relevance of Annex II for purposes of interpreting Article 12.7 of the SCM Agreement. In its first written submission to the Panel, India relied heavily on Annex II of the AD Agreement to support its argument that the challenged U.S. provisions violate Article 12.7 of the SCM Agreement.¹⁷ In its second submission, India reversed its position, claiming that the exclusion of a similar annex in the SCM Agreement should be “given significant weightage” because it shows “definitive intent to ensure that the detailed stipulations in Annex II from the AD Agreement are not directly *or indirectly* brought into the SCM Agreement.”

26. India took that position after the United States and several third parties in the dispute supported the use of Annex II as relevant context for interpreting Article 12.7 of the SCM Agreement.¹⁸ The United States and third parties found Paragraph 7 of Annex II to have particular relevance in this case, which states that a party’s failure to cooperate “could lead to a

¹⁶ *EC - Tube or Pipe Fittings (AB)*, para. 116.

¹⁷ India First Written Submission, paras 162-172.

¹⁸ See U.S. First Written Submission, paras. 183-186; U.S. Oral Statement at the First Panel Meeting, paras. 32-36; U.S. Oral Statement at the Second Panel Meeting, paras. 71-73; Canada 3rd Party Submission, paras. 29-31; China 3rd Party Submission, paras. 67-70; Turkey Oral Statement, paras. 12-17; Australia Response to Panel Question No. 1; Canada Response to Panel Question No. 1, paras. 1-5; China Response to Panel Question No. 1, paras. 1-6; EU Response to Question No. 1, paras 1-2; Turkey Response to Panel Question No. 1, paras. 1.1-1.8.

result which is less favourable.”¹⁹ Despite the protections contained in Annex II, however, India was unwilling to accept any notion that non-cooperation by the Government of India or India companies could ever lead to an adverse result. It therefore preferred to read Article 12.7 in isolation than to read it as allowing for the possibility of an adverse outcome.

27. Now, on appeal, India reverses course again and challenges the U.S. provisions based on the panel report in *Mexico – Anti-Dumping Measures on Rice*, and in particular, the finding that an investigating authority must make “an evaluative, comparative assessment” to determine the “best information available.”

28. Even if India were correct that the Appellate Body applied the very same standard under Articles 6.8 and 12.7 in *Mexico – Anti-Dumping Measures on Rice*, this would not mean that the panel’s statement could be applied in future cases without reference to the text of the SCM Agreement, or Annex II to the AD Agreement, the text of which gave rise to the panel’s statement. That is not how WTO law operates. The panel in *Mexico – Anti-Dumping Measures on Rice*, as well as the Appellate Body in that dispute and the Panel and Appellate Body in this dispute, was charged with interpreting and applying the provisions of the WTO Agreements; in this case, that provision is Article 12.7 of the SCM Agreement.

29. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body interpreted this provision, based on its terms and read in light of its context. It found noteworthy the absence of

¹⁹ See U.S. First Written Submission, paras. 183-186; U.S. Oral Statement at the First Panel Meeting, paras. 32-36; U.S. Oral Statement at the Second Panel Meeting, paras. 71-73; Canada 3rd Party Submission, paras. 29-31; Canada Response to Panel Question No. 1, para. 3.

an Annex similar to Annex II to the AD Agreement,²⁰ but also noted that “it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of facts available in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.”²¹ Having just interpreted Article 6.8 of the AD Agreement, the Appellate Body did not find that the very same standard applies under Article 12.7. Rather, the Appellate Body found that Article 12.7 of the SCM Agreement requires, first, “that an investigating authority take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party;” and second, that “the ‘facts available’ to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide.”²²

30. The Panel in this dispute agreed with the Appellate Body’s interpretation in *Mexico – Anti-Dumping Measures on Rice*, and found that the U.S. measures comport with this standard. The United States respectfully requests the Appellate Body to do the same on appeal.

IV. The Panel Correctly Rejected India’s “As Such” Challenges to the U.S. Benchmark Regulation on the Basis that The Adequacy of Remuneration Under Article 14(d) is Assessed From the Perspective of the Recipient and Not the Government Provider

31. Next, we turn to India’s appeal to the Panel’s “as such” findings under Article 14(d) of the SCM Agreement, the fundamental thrust of which is India’s argument that the adequacy of remuneration is to be assessed separately from the calculation of benefit and that this assessment

²⁰ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 290.

²¹ *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295.

²² *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 294.

takes place from the perspective of the government provider. This two-step approach forms the basis of nearly all of India’s “as such” and “as applied” challenges to the U.S. benchmark regulations. India advances this argument in a number of ways, all of which would create an additional step in the benchmark assessment as well as prevent an investigating authority from making a meaningful comparison at all.

32. For example, India argues that the first step in calculating benefit under Article 14(d) is to assess whether remuneration is adequate from the perspective of the government provider before inquiring whether a benefit has been conferred from the perspective of the recipient.

33. India then goes on to argue, in the alternative, that under Article 14(d), once an investigating authority calculates benefit to the recipient using a benchmark comparison, an investigating authority must subsequently go back and assess whether the government price was set in accordance with “commercial considerations.” Commercial considerations appear to mean, in India’s view, that so long as a government or public body is providing a good at cost or higher²³ – or perhaps just that the government entity or public body is profitable overall²⁴ – there can be no benefit to the recipient.

34. India also makes this same argument in terms of “market principles,” a term it takes from Tier III of the U.S. regulation in arguing that the hierarchy of the U.S. regulation is “as such”

²³ India First Written Submission, para. 59.

²⁴ India First Written Submission, para. 282.

inconsistent with Article 14(d) because it does not require that remuneration be assessed from the perspective of the government provider in every case.

35. In the context of delivered prices, India further argues that because the government is not remunerated by the costs of transportation, the use of delivered prices is not reflective of prevailing market conditions.

36. Further, India raises this same argument in respect of Tier II of the U.S. regulation, alleging that Tier II fails to make adjustments for the terms of sale of the government provider, thereby ignoring prevailing market conditions. In other words, prevailing market conditions, in India's view, can only be assessed from the perspective of the government provider.

37. All of these arguments are variants of the same misguided approach that benefit is to be assessed from the perspective of the government provider.

38. The Panel, of course, rejected the fundamental premise underlying India's arguments as inconsistent with both the text of Article 14 and previous panel and Appellate Body reports. Once finding that the adequacy of remuneration and calculation of benefit form a single assessment from the perspective of the recipient, the Panel went on to reject all of India's claims.

39. India appeals all of the Panel's findings in respect of the U.S. benchmark regulation and advances, once again, a cost-to-government assessment under Article 14(d). Not only does India challenge the Panel's finding that the adequacy of remuneration is assessed from the perspective of the recipient under Article 14(d) directly, but India faults the Panel under Article 11 of the DSU for not properly addressing two variations of India's flawed argument, another

inappropriate recasting of a substantive claim of error as an alleged failure to make an objective assessment. As all these claims simply repeat what the Panel had already considered and properly rejected, India’s claims, which do nothing more than repeat the same premise, are without merit and should be rejected.

40. The United States recalls that the purpose of Article 14(d) is to calculate whether there is a benefit to the recipient such that the recipient has received a good or service on terms more favorable than what it otherwise would have received on the market.²⁵ The price-setting motivations of the government provider are not relevant. Indeed, as the Appellate Body has found, the preferred benchmark for a benefit analysis is one based on the price for which a good is sold by private suppliers in an arm’s-length transaction.²⁶ The reason for that preference is that a private, profit-maximizing seller will sell its good at the market-clearing price. As the Appellate Body has noted, “the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of *both* buyers and sellers in that market.”²⁷ In contrast, India seeks a standard that ignores the preferred benchmark of a private price in favor of a standard based simply on some minimal level of profit.

41. India’s arguments seek to turn the Appellate Body’s attention away from the mineral inputs Indian steel producers have actually received and the remuneration they have provided for those inputs, in favor of a series of inquiries directed at the provider of goods. If accepted, India’s arguments would mean that in situations where a government or public body has unique

²⁵ *Canada – Aircraft (AB)*, para. 157.

²⁶ *US – Softwood Lumber IV (AB)*, para. 90.

²⁷ *EC and certain member States – Large Civil Aircraft (AB)*, para. 981 (emphasis added).

control over production inputs – in this case iron ore and coal, including mining rights – the government or public body would be able to provide those inputs to domestic producers at less than market value while avoiding a finding of “benefit” to the recipient.

42. In addition, India’s interpretation of Article 14(d) would significantly handicap the ability of a WTO panel or any investigating authority to conduct a meaningful benchmark assessment. First, India argues that the phrase “prevailing market conditions” in Article 14(d) requires that the benchmark include the government prices so that a government price is compared to itself. Second, India seeks to artificially limit the circumstances in which an investigating authority can use out-of-country benchmarks to establish benefit. In both instances India’s approach would tie the hands of the panel or investigating authority. Comparing the government’s price to itself, prevents any meaningful comparison. Limiting the use of out-of-country benchmarks would prevent any comparison at all where no useable private market prices are available. Under India’s approach to Article 14(d), the more pervasive the government intervention in the market, the less likely a panel or an investigating authority would be able to find benefit. Such an interpretation cannot be correct.

43. In short, India first seeks to carve out a “cost-to-government” loophole in the SCM Agreement, a theory already rejected by the Appellate Body and, second, to strip a panel or an investigating authority’s ability to use private market benchmarks, which the Appellate Body has already stated is the primary benchmark.²⁸ Ultimately, India’s approach would allow a government to pass goods under government control to favored producers at a lower price than is

²⁸ *Canada – Aircraft (AB)*, paras. 154-156.

or would be available on the market without that transaction being considered a subsidy. Such an approach has effectively already been considered and rejected by panels and the Appellate Body as having no basis in the text of the SCM Agreement.

V. India’s Approach to Specificity Would Carve Out a Loophole for All Goods From Article 2 of the SCM Agreement

44. Similarly, the interpretation of Article 2 advanced by India would undermine the disciplines of the SCM Agreement by carving out an exception for the provision of all goods, particularly those provided by governments and public bodies on an industry-wide basis. India argues that for a finding of *de facto* specificity under Article 2.1(c), an investigating authority must identify a limited number of entities in receipt of a subsidy and *further* show that this limited number is a subset of the universe of similarly situated (or “like”) entities eligible for the subsidy. In other words, contrary to long-established findings by previous panels and the Appellate Body whereby a financial contribution is specific if the recipients are a sufficiently discrete segment of the economy, India argues that Article 2.1(c) requires the investigating authorities to perform a *double* specificity determination in order to find that a government’s financial contribution is *de facto* specific. Such a requirement of course does not exist under Article 2.1(c) of the SCM Agreement and the Panel was correct to find that India’s “comparative subset” argument “would make little, if any sense”²⁹.

45. Assuming the industry is defined by the products it produces, there will generally be no “similarly-situated” entities that the relevant industry could be part of. In such cases, the

²⁹ Panel Report, para. 7.125.

“similarly-situated” entities and the “certain enterprises” would be the same, such that it would not be possible to establish that similarly situated entities were excluded from the subsidy.

While India’s approach to specificity would suggest that specificity could not be established in such circumstances, such an approach is clearly at odds with the plain language of Article 2.1.³⁰

46. India further seeks to weaken the disciplines of the SCM Agreement by arguing that the provision of goods which are inherently limited in use is exempt from the subsidies disciplines. India bases this argument on negotiating history, which does not support India’s interpretation but rather, as the Panel correctly found, demonstrates that “the SCM Agreement, as agreed by Members, does not provide for any special regime in cases where access to a subsidy is limited by the inherent characteristics of goods.”³¹ India goes on to argue, however, that the Panel must be wrong because all goods are inherently limited in use, except for general infrastructure. In India’s view, because all goods are inherently limited in their use, an investigating authority will always make a positive determination of specificity on this basis alone.

47. Yet it is India’s argument that leads to an absurd result and not the Panel’s findings. If, as India argues, all goods are naturally inherently limited in their use, under India’s interpretation the provision of all goods would be exempt from the subsidies discipline unless an investigating authority could determine that the provision was *de jure* specific. There simply is no basis in the text of Article 2 for such an interpretation. Rather, the United States agrees with India that Article 2.1(c) “cannot be interpreted in a manner that would indirectly incorporate into the treaty

³⁰ Panel Report, para. 7.125.

³¹ Panel Report, para. 7.130.

what negotiators could not originally agree on.”³² As negotiators did not agree to carve out an exception for the provision of goods other than general infrastructure in the SCM Agreement, India’s attempts to carve out an exception for NMDC’s provision of iron ore to its steel industry on the basis that entities that use iron ore are inherently limited in number should be rejected. Rather, the United States agrees with the Panel that when a government provides something of limited utility (like a good), it is all the more likely that a subsidy is conferred on certain enterprises.³³

VI. Conclusion

48. Chair, members of the Division, this concludes our opening statement. We thank you for your attention and would be pleased to respond to any questions that you may have.

³² India Appellant Submission, para. 397.

³³ *US – Softwood Lumber IV (Panel)*, para. 7.116.