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

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

July 9, 2013

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat, for your work in this dispute. As can be seen from the length of the written submissions thus far, this dispute contains numerous claims and deals with often complex issues. Ultimately, however, this dispute concerns the "delicate balance" attained in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") "between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures."[1]

2. Throughout its first written submission, India has sought to dismantle the rights of Members to address the injurious effects of unfair trading practices, particularly those caused by subsidization, one of the most significant challenges faced by Members today. India has repeatedly asked the Panel to adopt novel – sometimes even radical – and unworkable interpretations of the SCM Agreement. In taking this approach, India seeks to impose restrictions on the application of measures to countervail subsidies in a manner that goes far beyond the agreement.

3. In contrast, the United States asks the Panel, consistent with its mandate from the DSB under Articles 11 and 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), to interpret the SCM Agreement in accordance with the customary rules of interpretation reflected in the Vienna Convention on the Law of Treaties so as to protect and maintain the balance of rights and obligations it contains. The United States appreciates well the balance struck in the SCM Agreement between Members that seek to impose more disciplines on the use of subsidies versus Members that seek to impose more disciplines on the application of countervailing measures. For example, while the United States appears before this Panel as a responding party, over the past year the United States has been a complainant in three disputes involving the imposition of countervailing duties, as well as both a complaining party and a responding party in disputes involving claims of WTO-inconsistent subsidies. The United States, therefore, seeks to maintain the integrity of the SCM Agreement and the balance established by that agreement.

[1] *US – DRAMS CVD (AB)*, para. 115.

4. We will not repeat here all the points made in the U.S. First Written Submission. Rather, today, we will address five issues, beginning with India's response to the U.S. preliminary ruling request.

I. Preliminary Ruling Request

5. As the Panel is aware, the first U.S. submission included a request for a preliminary ruling, which addressed several claims in India's submission that were not contained in its panel request.

6. First, India has raised specific claims under multiple paragraphs of Article 11 of the SCM Agreement that reflect alleged "problems" not identified in India's panel request. As we discuss in our request for a preliminary ruling on this matter, in its request – under the very general heading "[i]n connection with other issues" – India stated that the United States has acted inconsistently with:

> Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.[2]

7. This very general summary – which does not even refer to a specific paragraph of Article 11, much less a specific obligation contained in one of those paragraphs – is not sufficient to present clearly the claims India went on to raise in its first written submission. Those claims state that the United States breached Articles 11.1 and 11.2, as well as 11.9, "by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies". India's claims refer to specific subsidy programs, a specific administrative review, specific paragraphs of Article 11, and specific obligations contained within those paragraphs.

8. India attempts to argue in its response to the U.S. request for a preliminary ruling that the United States confuses a complainant's obligation under Article 6.2 to clearly present its claims with an obligation for the complainant to present its arguments. But it is India that misinterprets the requirements of Article 6.2. As the Appellate Body has found, where an article of a covered agreement contains several distinct legal obligations, each capable of being breached, a cursory reference to that article in a panel request may not reveal which of those obligations is at issue.[3] Such is the case here.

9. Article 11 of the SCM Agreement deals with "Initiation and Subsequent Investigation." This is a very broad category covering many disparate obligations contained within 11

[2] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*: Request for the Establishment of a Panel by India, WT/DS436/3 (13 July 2012).
[3] *Korea – Dairy (AB)*, para. 128.

paragraphs and spread over several pages of the SCM Agreement. Given the variety of claims that may be raised under this Article, India's cursory reference to Article 11 and the brief statement included in its panel request fall far short of India's requirement to "present the problem clearly."[4]

10. India also attempts to shield itself from any failure to meet the requirements of Article 6.2 of the DSU by claiming that the United States was not prejudiced in the preparation of its defense by India's deficient panel request. However, it is not necessary for a panel to find that a party has been prejudiced in order to find that a panel request fails to satisfy Article 6.2 of the DSU. Article 6.2 does not include any qualification or exception indicating that its obligations will only apply under certain circumstances. In particular, Article 6.2 does not provide for an exception in cases where it is not demonstrated that a party or third party has suffered prejudice. Rather, Article 6.2 applies to all panel requests.

11. And while some past panel and Appellate Body reports considered prejudice to be a relevant issue in assessing whether a panel request satisfied Article 6.2, more recently the Appellate Body has been clear: "the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing," and "a party's submissions during panel proceedings cannot cure a defect in a panel request."[5]

12. Second, the U.S. preliminary ruling request addresses the claims in India's first written submission respecting a "2013 sunset review determination." India does not include in its submission any citation or more specific reference to a U.S. measure. We surmise that India may be referring to the Department of Commerce's ("Commerce") final results in the most recent sunset review for *Certain Hot-Rolled Carbon Steel Flat Products from India, Indonesia, and Thailand*. These results were issued by Commerce on March 14, 2013 – nearly a year after India requested consultations in this dispute, eight months after India submitted its request for the establishment of a panel, and one month after the composition of this Panel.

13. India claims in its response to the U.S. request for a preliminary determination that its panel request extends to this subsequent review, because it has included a reference to "amendments, implementing acts, or any other related measure" in its panel request. The inclusion of such a phrase is not sufficient to cover sunset reviews not included in the consultation or panel request. India's approach is contrary to the requirement in the DSU for requesting consultations on a measure before being able to request the establishment of a panel with respect to that measure. Furthermore, the Appellate Body has specifically found that "successive administrative, changed circumstances, and sunset review determinations… constitute separate and distinct measures, which therefore cannot be properly characterized as mere 'amendments' to those measures."[6]

[4] DSU, Art. 11.
[5] *EC – LCA (AB)*, para. 642; *citing EC – Bananas III (AB)*, para. 143; *US – Carbon Steel (AB)*, para. 127.
[6] *US – Zeroing (EC) (21.5) (AB)*, para. 192.

II. "As Such" Challenge to the U.S. Benefit Regulation

14. Next, we turn to India's "as such" claims under Article 14(d) of the SCM Agreement. In particular, we will discuss India's efforts to avoid the result of calculating the amount of the subsidy in terms of the benefit to its steel producers in favor of a cost-to-government standard tailored to exclude India's subsidies programs. As discussed in the U.S. First Written Submission, India's arguments are without basis in the text of the SCM Agreement. India's argument has also been considered by, and rejected by panels and the Appellate Body in prior disputes – and the reasoning in these reports is persuasive.[7] This alone is more than sufficient to require a finding that India's argument must be rejected. Nonetheless, at today's meeting, the United States will add the point that the implications of India's arguments would be to undermine the disciplines on subsidies as set out in the SCM Agreement. Each argument India makes seeks to turn the Panel's attention away from the production 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 the good. If accepted, India's arguments would mean that in situations where a government or public body has unique control over production inputs – in this case iron ore and coal, including mining rights – that government or public body would be able to provide those inputs to domestic producers at less than market value without a finding of "benefit" to the recipient.

15. India argues that benefit should not be determined with respect to the recipient, but rather with respect to whether the government or public body provided the good on the basis of "commercial considerations."[8] This appears to mean, in India's view, that so long as a government or public body is providing a good at cost or higher[9] – or perhaps just that the government entity or public body is profitable overall[10] – there can be no benefit to the recipient.

16. The United States recalls that 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.[11] 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."[12] 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.

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[7] *See* U.S. First Written Submission, paras. 28-72.
[8] India First Written Submissions, paras. 23-32, 58-63.
[9] India First Written Submission, paras. 59.
[10] India First Written Submission, paras. 282.
[11] *US – Softwood Lumber IV (AB)*, para. 90.
[12] *EC – LCA (AB)*, para. 981 (emphasis added).

17. In making such an argument, India implicitly acknowledges that a government or public body will not necessarily seek to maximize profit, but may be willing to provide the good in question for less than market value. In attempting to reinterpret "adequate remuneration" to constitute only a question of minimal profit, India attempts to carve out an exception from the SCM Agreement and allow its government and public bodies to provide inputs to its steel producers at less than market value.

18. Moreover, the logical conclusion of using a benchmark based on cost to or profit of the provider is that the more the government or public body makes transactions free of market discipline, the less likely a finding of benefit would be. For example, where a government or public body enjoys unique access to a good – such as control over mining rights of iron ore and coal – the result will be that the government or public body would also enjoy lower costs for acquiring those goods. A standard that simply considers whether the government or public body subsequently provides those goods to its producers at or above that artificially lowered cost will necessarily be unlikely to find that the recipient has received a benefit from that transaction, even when the recipient pays less for the goods than it would on the market.

19. 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.[13] India then seeks to expand that loophole to allow a government to place goods under government control and, by virtue of that control, pass those goods to favored producers at a lower price without that transaction being considered a subsidy. To do so, India has recycled arguments that have been considered and rejected by panels and the Appellate Body as having no basis in the text of the SCM Agreement. India has gone so far as to attempt to invent a new benefit standard based on the text of an article of the GATT 1994 (namely, Article XVII) which is directed at state trading enterprises. The fact that India must look for support not to the SCM Agreement but to a different agreement demonstrates that India is seeking to alter Members' rights and obligations under the SCM Agreement in order to allow India to subsidize its steel producers by providing goods at less than adequate remuneration. India's efforts to do so should be rejected.

III. Cumulation

20. India has also challenged U.S. measures permitting the International Trade Commission ("ITC") to cumulate the effects of dumping and subsidization for imports subject to simultaneous trade remedies investigations. As the United States explained in its first submission, however, the provisions of the U.S. statute governing cumulation in injury and sunset proceedings are fully consistent with the text of the SCM Agreement, when read in context and in light of the object and purpose of the Agreement. The text of Article 15.3 of the SCM Agreement does not discuss, let alone prohibit, the cumulation of dumped and subsidized imports, as India asserts. Rather, a full interpretive exercise that considers the context of Article 15.3, including Article 3.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), as well as the object and purpose of the SCM Agreement, demonstrates that the agreement permits the cumulation of dumped and subsidized imports.

[13] *Canada – Aircraft (AB)*, paras. 154-156.

21. Both the SCM and the AD Agreement permit investigating authorities to cumulate imports for the purpose of assessing injury. And the Appellate Body has been clear that the availability of cumulation is meant "to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account."[14] Given the aims of the cumulation provisions in both the SCM and AD Agreements, India's claim that Article 15.3 of the SCM Agreement prohibits the cumulation of both dumped and subsidized imports leads to an anomalous result whereby the same injury may be countervailed in some circumstances but not in others.

22. A simple example using some of the facts of these investigations will help to demonstrate this point. Assume that an injury investigation involves imports from five countries that are found to be subsidized. In this investigation, assume one Member, Country A, has a small volume of subsidized imports. Due to the small volume of imports, imports from this country might not themselves be causing material injury to the industry in a manner that would warrant the imposition of countervailing duties under the SCM Agreement. Under Article 15.3, however, an authority may cumulate imports from this country with the subsidized imports from the other four countries. In this circumstance, if the subsidized imports from all five countries are found to be materially injuring the industry, countervailing duties may be applied to each country, including those from Country A.

23. Now let's change the scenario slightly. Assume that the injury investigation involves imports from five countries that are each *dumping* their exports of the product, but only one of which (again, Country A) is found to be *subsidizing* its imports. In this scenario, assume the domestic industry is competing with the exact same volume of unfairly traded imports, and the imports are having the same volume and price effects on the domestic industry. Under this scenario, according to India's interpretation, the imports from Country A may be cumulated with the other dumped imports and made subject to antidumping duties but may not be cumulated with them and subjected to countervailing duties, even though imports from all five countries are unfairly traded and injuring the industry in exactly the same manner outlined in our first scenario.

24. The United States submits that there is no reasonable or logical rationale that can account for the difference in this outcome. A harmonious reading of Article 15.3 must lead the Panel to find against India on its claims with respect to cumulation.

IV. Public Body

25. India also claims that Commerce erred in applying Article 1.1(a)(1) of the SCM Agreement when it found subsidies to exist based on the activities of the National Mineral Development Company ("NMDC") and the Steel Development Fund ("SDF") Managing Committee. We have responded to India's arguments fully in our first written submission. In particular, we have explained that the proper interpretation of Article 1.1(a)(1) requires that a public body be an entity controlled by the government such that the government can use that entity's resources as its own. Despite our disagreement with the Appellate Body's interpretation

[14] *US – OCTG from Argentina (AB)*, para. 297.

of public body in *US – AD/CVD*, however, we think it bears repeating that India has not presented the findings in that case accurately.

26. India attempts to reframe the Appellate Body's findings in *US – AD/CVD* to mean that public bodies must not only exist within a "government framework," but that "there has to be the *express delegation* of the power to regulate, control, or supervise individuals, or otherwise restrain conduct."[15] The basis for India's position appears to be that, because the Appellate Body relied on the definition of government 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 Dairy Boards at issue in *Canada – Dairy*.

27. India has misinterpreted the findings of the Appellate Body in *US – AD/CVD* in a way that results in a far more limited definition of public body. We recall that in *US – AD/CVD*, 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."[16] Therefore, the Appellate Body itself did not intend to create an all-purpose, bright-line test. India's interpretation on the other hand would lead to a highly formulaic application of the SCM Agreement, and would allow Members to circumvent their obligations merely by foregoing an "express delegation" of governmental authority to an entity that would otherwise constitute a "public body."

28. In fact, the Appellate Body's findings in *US – AD/CVD*, with respect to state-owned commercial banks, directly refute India's proposed interpretation. With respect to China's state-owned banks, the Appellate Body found neither an "express delegation" of governmental authority, nor any evidence demonstrating that the banks had "the power to regulate, control, or supervise individuals, or otherwise restrain conduct." Rather, the Appellate Body upheld Commerce's finding that the state-owned banks were public bodies based on evidence demonstrating the government's *meaningful control* over them. The Appellate Body's interpretation was applied in a similar way in *Canada – Renewable Energy*, where the panel found that "the Government of Ontario has 'meaningful control' over Hydro One's activities in a way that confirms it is a 'public body.'"[17]

29. Therefore, while the Appellate Body did discuss "governmental authority" and the ways in which this authority may manifest itself, it did not, as India has argued, find that "there has to be the *express delegation* of the power to regulate, control, or supervise individuals, or otherwise restrain conduct."[18] Rather, the Appellate Body focused on the meaningful control exercised by the government over state-owned banks. The United States urges this Panel also to focus its review in this case on the issue of control, and to find that an entity can be considered a public body where the government's control over the entity is such that it can use the entity's resources as its own.

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[15] India First Written Submission, para. 225.
[16] *US – AD/CVD (AB)*, para. 317.
[17] *Canada – Renewable Energy (Panel)*, para. 7.235.
[18] India First Written Submission, para. 225.

V. Use of Facts Available

30. India also challenges U.S. measures governing the use of facts available in countervailing duties investigations. In doing so, however, India not only misinterprets and misrepresents U.S. law, but wholly misunderstands the obligations of the SCM Agreement with respect to the application of facts available.

31. India argues that the U.S. measures "authorize using certain information simply because it may be adverse to the allegedly non-cooperating party."[19] This contention, however, is not supported by the text of the U.S. measures. To the contrary, as discussed in the U.S. First Written Submission, the U.S. measures set out specific requirements for and limitations on the use of facts available.[20] It is not the case that Commerce may use information "simply because it may be adverse"[21] to the interests of a responding party.

32. India also ignores other provisions, specifically within Annex II of the AD Agreement, that provide relevant context for understanding the meaning of the term "facts available." Most notably, Paragraph 7 of Annex II states, in relevant part, that "[i]t is clear … 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." Given that the respondent's non-cooperation has made *un*available the precise facts sought by the authority, inferences are a necessary and unavoidable element in selecting from, and applying, the *available* facts. In such a situation, Annex II confirms that the inferences drawn in such cases can lead to results less favorable to a party than if the party did cooperate. Such inferences are no different in the context of the SCM Agreement than they are in the context of the AD Agreement as confirmed by Annex II.

33. India also seems to understand Article 12.7 of the SCM Agreement, as well as Annex II to the AD Agreement, to require that when a responding party refuses to cooperate in a countervailing duty investigation, the responding party must in fact *benefit* from the *best* information available – from the responding party's perspective.

34. However, India takes the term "best information available" out of context. In doing so, India seeks to turn the right given to an investigating authority to rely on facts available into an obligation to put a responding party into a better position than they might have been in had they cooperated fully with the investigation.

35. In context, the term "best" facts available in Annex II refers to the most probative, relevant and verifiable facts which are timely submitted in the proceedings, and not to those facts

[19] India First Written Submission, para. 178.
[20] U.S. First Written Submission, paras. 171-175.
[21] India First Written Submission, para. 178.

which are most favorable to the respondent. This interpretation is supported by the substantive provisions of the Annex. Those provisions require an authority to take into account all information submitted that is verifiable and timely, and that can be used in the investigation without undue difficulty. It also prevents an authority from disregarding information that "may not be ideal in all respects", "provided the interested party has acted to the best of its ability".[22]

36. Therefore, the title of Annex II of the AD Agreement must be interpreted in light of all the safeguards contained in the Annex itself. In other words, the best information available is obtained through the application of the provisions of Annex II. India would turn these provisions on their head, and require an investigating authority to use certain information even if it cannot be verified, and even if has not been submitted at all. For example, as can be seen from India's "as applied" claims, India believes that the SCM Agreement would allow a responding party to submit responses to questionnaires during an initial proceeding, and then require the same information serve as the basis for all subsequent reviews. Commerce would therefore be required to *assume* that a party's circumstances have not and will not change, rather than to verify that such is the case.

37. Such an interpretation is clearly unworkable and would tie the hands of investigating authorities to the point of undermining countervailing duty investigations altogether. India's interpretation would further provide an incentive to producers and exporters to withhold unfavorable information to achieve more favorable countervailing duty rates, and simultaneously frustrate the efforts of the investigating authority to calculate the amount of subsidy accurately. We therefore urge the Panel to examine the U.S. measures *on their face*, and to apply to them a proper interpretation of the SCM Agreement, based on its text, in context, and in light of the object and purpose of the SCM Agreement.

VI. Conclusion

38. Mr. Chairman and members of the Panel, this concludes the opening statement of the United States. We thank you for your attention and would be pleased to respond to any questions you may have.

[22] AD Agreement, Annex II, para. 5.