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DISPUTE SETTLEMENT: DISPUTE DS436

United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India

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Appellate Body report circulated on 8 December 2014 [i](#)

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Short title:	US – Carbon Steel (India)
Complainant:	India
Respondent:	United States
Third Parties:	Australia; Canada; China; European Union; Saudi Arabia, Kingdom of; Turkey
Agreements cited: (as cited in request for consultations)	GATT 1994: Art. I, VI Subsidies and Countervailing Measures: Art. 1, 2, 10, 11, 12, 13, 14, 15, 19, 21, 22, 32 Agreement Establishing the World Trade Organization: Art. XVI:4
Request for Consultations received:	12 April 2012
Panel Report circulated:	14 July 2014
Appellate Body Report circulated:	8 December 2014

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The summary below was up-to-date at 8 December 2014 [i](#)

Consultations

Complaint by India.

On 12 April 2012, India requested consultations with the United States with regard to the imposition of countervailing duties by the United States on certain hot rolled carbon steel flat products from India (“subject goods”).

India challenges countervailing duties levied on those products through various instruments, as well as provisions of the US Tariff Act and Code of Federal Regulations on customs duties. India claims that the countervailing duty investigation and related measures are inconsistent with Articles I and VI of the GATT 1994 and with Articles 1, 2, 10, 11, 12, 13, 14, 15, 19, 21 and 22 of the SCM Agreement. India also claims that the challenged provisions of US Law are inconsistent “as such” with Articles 12, 14, 15, 19 and 32 of the SCM Agreement.

On 7 May 2012, Canada requested to join the consultations.

On 12 July 2012, India requested the establishment of a panel. At its meeting on 23 July 2012, the DSB deferred the establishment of a panel.

Panel and Appellate Body proceedings

At its meeting on 31 August 2012, the DSB established a panel. Australia, Canada, China, the European Union, Saudi Arabia and Turkey reserved their third-party rights. On 7 February 2013, India requested the Director-General to determine the composition of the panel. On 18 February 2013, the Director-General composed the panel. On 8 July 2013, the Chair of the panel informed the DSB that the panel expected to issue its final report to the parties by April 2014, in accordance with the timetable adopted after consultation with the parties.

On 14 July 2014, the panel report was circulated to Members.

Summary of key findings

This dispute concerned the imposition by the United States of countervailing duties on imports of certain hot-rolled carbon steel flat products from India. India challenged certain provisions of the United States Tariff Act, 1930, as codified in the United States Code (USC), and the United States Code of Federal Regulations (CFR). In addition, India challenged a number of measures relating to the application of the USC and CFR in the context of the countervailing original investigation and subsequent reviews at issue. India's claims pertained to various procedural and substantive provisions of the SCM Agreement and, consequently, to Article VI of the GATT 1994 and Article XVI:4 of the WTO Agreement.

With regard to the United States' request for preliminary ruling relating to the scope of these proceedings, the Panel concluded that India's claims that the United States acted inconsistently with Articles 11.1, 11.2 and 11.9 of the SCM Agreement in connection with the alleged initiation of an investigation, despite the insufficiency of evidence in the domestic industry's written application, fell outside the Panel's terms of reference. The Panel dismissed the United States' remaining preliminary objections to India's claims.

With regard to India's claims that were within the scope of these proceedings, the Panel concluded that the United States acted inconsistently with:

- a. in connection with the provision of high grade iron ore by the NMDC:
 - i. Article 2.1(c) of the SCM Agreement by failing to take account of all the mandatory factors in its determination of *de facto* specificity regarding NMDC; and
 - ii. Article 14(d) of the SCM Agreement by failing to consider the relevant domestic price information for use as Tier I benchmarks, in respect of which the United States sought to rely on *ex post* rationalization;
- b. in connection with the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme:
 - i. Article 12.5 of the SCM Agreement by failing to determine the existence of the Captive Mining of Iron Ore Programme on the basis of accurate information;
 - ii. Article 1.1(a)(1)(iii) of the SCM Agreement by determining without sufficient evidentiary basis that GOI granted Tata a financial contribution in the form of a captive coal mining lease under the Captive Mining of Coal Programme/Coal Mining Nationalization Act; and
 - iii. Article 14(d) of the SCM Agreement in connection with the USDOC's rejection of certain domestic price information when assessing benefit in respect of mining rights for iron ore;
- c. Article 15.3 of the SCM Agreement, with respect to Section 1677(7)(G) "as such" and "as applied" in the original investigation at issue, in connection with the "cross-cumulation" of the effects of imports that are subject to a CVD investigation with the effects of imports that are not subject to simultaneous CVD investigations;
- d. Articles 15.1, 15.2, 15.4 and 15.5 of the SCM Agreement, with respect to Section 1677(7)(G) "as such" and "as applied" in the original investigation at issue, in connection with injury assessments based on *inter alia* the volume, effects and impact of non-subsidized, dumped imports;
- e. Article 12.7 of the SCM Agreement by applying "facts available" devoid of any factual foundation in connection with the following determinations:
 - i. JSW received iron ore from NMDC at no charge during the period covered by the 2006 administrative review;
 - ii. VMPL used and benefited from the 1993 KIP, 1996 KIP, 2001 KIP and 2006 KIP subsidy programmes;
 - iii. Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy

- programmes under the 2001 JSIP: (1) capital investment incentive; (2) feasibility study and project report cost reimbursement; (3) incentive for quality certification; and (4) employment incentives;
- iv. Tata used and benefited, during the period covered by the 2008 administrative review, from the following subsidy programmes: (1) 6 programmes at issue administered by the SGOG; (2) 8 programmes at issue administered by the SGOM; (3) 10 programmes at issue administered by the SGAP; (4) 9 programmes at issue administered by the SGOC; and (5) 22 programmes at issue administered by the SGOK;
 - v. Tata used and benefited from the subsidy provided through the purchase of high-grade iron ore from NMDC during the period covered by the 2008 administrative review;
 - vi. Tata used and benefited from the MDA and MAI subsidy programmes during the period covered by the 2008 administrative review; and
 - vii. Tata used and benefited from the six sub-programmes of the SEZ Act at issue during the period covered by the 2008 administrative review;
- f. Article 22.5 of the SCM Agreement by failing to provide adequate notice of the USDOC's consideration of certain in-country benchmarks when assessing benefit conferred by NMDC's sales of iron ore.

The Panel exercised judicial economy in connection with a small number of India's claims, and rejected India's remaining claims.

On 8 August 2014, India notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report. On 13 August 2014, the United States filed an other appeal in the same dispute. On 6 October 2014, the Chair of the Appellate Body informed the DSB that it estimated that the Appellate Body report would be circulated no later than 8 December 2014.

On 8 December 2014, the Appellate Body report was circulated to Members.

Summary of key findings

Public Body

India appealed the Panel's findings regarding the USDOC's determination that the National Mineral Development Corporation (NMDC) is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. For its part, the United States argued that the Panel interpreted and applied Article 1.1(a)(1) in a manner consistent with the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*. Further, the United States requested, in its other appeal, that the Appellate Body clarify that "an entity that is controlled by the government, such that the government may use the entity's resources as its own" is also a public body. The Appellate Body recalled that a public body is "an entity that possesses, exercises or is vested with governmental authority", and explained that whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. The Appellate Body found that the Panel erred in its application of Article 1.1(a)(1) to the USDOC's public body determination in the underlying investigation, in effect treating the GOI's ability to control the NMDC as determinative for purposes of establishing whether the NMDC constitutes a public body. The Appellate Body consequently reversed the Panel's findings, and completed the legal analysis and found that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1).

Financial Contribution

India appealed the Panel's findings regarding whether India's captive mining rights and Steel Development Fund (SDF) loans constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement. Finding that the Panel correctly determined that there was a reasonably proximate relationship between India's grant of mining rights for iron ore and coal and the beneficiary's use or enjoyment of the final extracted goods, the Appellate Body upheld the Panel's finding in respect of Article 1.1(a)(1)(iii). With respect to SDF loans, the Appellate Body found that the Panel correctly found that the role of the SDF Managing Committee in making critical decisions regarding the issuance and terms of the SDF loans supported a conclusion that the SDF loans constitute direct transfers of funds, and

upheld the Panel's finding in respect of Article 1.1(a)(1)(i).

Benefit

India appealed multiple findings of the Panel concerning Section 351.511(a)(2)(i)-(iv) of the United States Code of Federal Regulations, setting forth the US benchmarking mechanism for calculating benefit. The Appellate Body rejected India's "as such" claims regarding benefit benchmark selection. Although the Appellate Body disagreed with the Panel to the extent it suggested that investigating authorities could, at the outset, discard all prices of government-related entities in a benchmark analysis, the Appellate Body considered that, under Section 351.511(a)(2)(i), the USDOC is required to consider in its benchmark analysis all market-determined prices in the country of provision for the good in question, including such prices of government-related entities other than the entity providing the financial contribution. The Appellate Body also rejected India's "as such" claims that the Panel erred in finding that Article 14(d) permits the use of out-of-country benchmarks in situations in which the government is not the predominant provider of the good in question, and that Section 351.511(a)(2)(ii) requires the USDOC to make adjustments to out-of-country benchmarks to ensure that such benchmarks reflect prevailing market conditions in the country of provision. The Appellate Body also rejected India's claims that the Panel erred in finding that the use of "as delivered" benchmarks under Section 351.511(a)(2)(iv) is not "as such" inconsistent with Article 14(d). Contrary to India's suggestion, the Appellate Body did not consider that the US benchmarking mechanism precludes adjustments to benchmarks to reflect delivery charges that approximate the generally applicable delivery charges for the good in question in the country of provision.

India also advanced several "as applied" claims under Article 14 of the SCM Agreement. Regarding iron ore provided by the NMDC, the Appellate Body found that the Panel erred by suggesting that government prices are not an indicator of prevailing market conditions, and reversed the Panel's finding rejecting India's claim that the USDOC's exclusion of the NMDC's export prices from its benchmark is inconsistent with Article 14(d). The Appellate Body completed the legal analysis and found that the USDOC's exclusion of such export prices is inconsistent with Article 14(d). The Appellate Body also reversed the Panel's finding rejecting India's claim that the use of benchmarks from Australia and Brazil is inconsistent with Article 14(d), finding that the Panel had not properly concluded that the "as delivered" prices at issue reflect prevailing market conditions in India. The Appellate Body also found that the USDOC had not provided a reasoned and adequate explanation of the basis for its use of these "as delivered" prices. The Appellate Body completed the legal analysis and found that the USDOC's use of these prices as benchmarks is inconsistent with Article 14(d) of the SCM Agreement. Regarding India's claim in respect of captive mining rights, the Appellate Body found it permissible for an investigating authority to construct a government price in a benefit calculation, and upheld the Panel's finding rejecting India's claim that the USDOC's construction of government prices for iron ore and coal is inconsistent with Articles 1.1(b) and 14(d). Regarding India's claim in respect of SDF loans, the Appellate Body found that the Panel improperly excluded consideration of a borrower's costs in assessing the cost of a loan programme to the recipient. The Appellate Body reversed the Panel's finding rejecting India's claim as it relates to the USDOC's determination that loans provided under the SDF conferred a benefit under Articles 1.1(b) and 14(b), but found that it was unable to complete the legal analysis.

Specificity

India appealed aspects of the Panel's analysis concerning the USDOC's determination that the sale of iron ore by the NMDC is specific within the meaning of Article 2.1(c) of the SCM Agreement because it concerns the "use of a subsidy programme by a limited number of certain enterprises". The Appellate Body upheld each of the Panel's findings challenged by India in respect of Article 2.1(c), namely: that there was no obligation on the USDOC to establish that only a "limited number" within the set of "certain enterprises" actually used the subsidy programme; that specificity need not be established on the basis of discrimination in favour of "certain enterprises" against a broader category of other, similarly situated entities; and that, if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, it is not necessary, in establishing specificity, that the subsidy be limited to a subset of this industry.

Facts Available

India appealed aspects of the Panel's interpretation and application of Article 12.7 of the SCM Agreement. India's appeal concerned the "as such" and certain "as applied" findings of the Panel regarding Section

1677e(b) of the United States Code and Section 351.308(a)-(c) of the United States Code of Federal Regulations. The Appellate Body reaffirmed that an investigating authority must use those "facts available" that reasonably replace the missing information with a view to arriving at an accurate determination, and it modified the Panel's interpretation of Article 12.7 to the extent that the Panel's interpretation excluded, in all instances, a comparative evaluation of all available evidence. The Appellate Body found, in this regard, that Article 12.7 calls for a process of evaluation of available evidence to be reflected in the determination, the extent and nature of which depends on the particular circumstances of a given case. The Appellate Body found further that the Panel failed, under Article 11 of the DSU, to make an objective assessment of India's "as such" claim, because the Panel disregarded certain evidence submitted by the parties regarding the meaning of the challenged US measures. The Appellate Body thus reversed the Panel's rejection of India's "as such" claim under Article 12.7 and sought to complete the legal analysis, finding that India had not established that Section 1677e(b) of the United States Code and Section 351.308(a)-(c) of the United States Code of Federal Regulations are inconsistent "as such" with Article 12.7 of the SCM Agreement. Regarding India's "as applied" claims under Article 12.7 of the SCM Agreement, the Appellate Body found that the Panel did not apply an "unnecessary burden of proof" regarding the application of an alleged "rule" on selecting the highest non-*de minimis* subsidy rates in the instances identified by India. It thus upheld the Panel's finding that India failed to establish a *prima facie* case of inconsistency with Article 12.7 in that regard.

New Subsidy Allegations

India appealed the Panel's finding rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement. The Appellate Body held that, in principle, Articles 21.1 and 21.2 permit investigating authorities to examine new subsidy allegations in the conduct of an administrative review. Such examination, while subject, *mutatis mutandis*, to the public notice requirements set out in Article 22, are not subject to the obligations set out in Articles 11 and 13. Accordingly, while the Appellate Body upheld the Panel's finding rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, and 21.2 of the SCM Agreement, the Appellate Body reversed the Panel's finding rejecting India's claims as they relate to inconsistency under Articles 22.1 and 22.2. However, the Appellate Body was unable to complete the legal analysis in respect of India's claims under Articles 22.1 and 22.2.

Cross-Cumulation

Finally, the United States appealed the Panel's finding that Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement do not authorize investigating authorities to assess cumulatively the effects of subsidized imports with the effects of non-subsidized, but dumped imports. Although the Appellate Body found that the Panel did not err in this regard, it found that the Panel failed to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter in finding that Section 1677(7)(G) of the United States Code is inconsistent "as such" with Article 15. Completing the legal analysis with respect to one part of Section 1677(7)(G), the Appellate Body found that Section 1677(7)(G)(iii) of the United States Code is inconsistent "as such" with Article 15 of the SCM Agreement.

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