ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS436/6

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

NOTIFICATION OF AN APPEAL BY INDIA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 8 August 2014, from the Delegation of India, is being circulated to Members.

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1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), India hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation in the Panel Report in *United States - Countervailing Measures On Certain Hot-Rolled Carbon Steel Flat Products From India* (WT/DS436) ("Panel Report").

2. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, India files this Notice of Appeal *together* with its Appellant's Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an *indicative* list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to India's ability to rely on other paragraphs of the Panel Report in its appeal.

4. India seeks review by the Appellate Body of the errors of law and legal interpretation by the Panel in its Report and requests findings by the Appellate Body as noted below.

I. The Panel has committed legal errors in Sections 7.2.3 – 7.2.5 of its Report and in connected findings in Section 7.3.3 of its Report

5. The Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy, in so far as the Panel found that 19 CFR § 351.511(a)(2)(i)-(iii) is not "as such" inconsistent with Article 14(d) of the SCM Agreement. In particular, the Panel erred because:

- it incorrectly interpreted Article 14(d) in finding that Article 14(d) does not require an assessment as to 'adequacy' of remuneration actually received by the 'government' provider of goods prior to determining the quantum of benefit[1];

- it incorrectly interpreted Article 14(d) in finding that government transactions can be completely ignored by investigating authorities in assessing the "prevailing market conditions" under Article 14(d) and instead, can be presumptively rejected[2];

- it incorrectly interpreted Article 14(d) in finding that investigating authorities can use out of country benchmarks without first finding that the market is distorted by governmental interference or influence[3];

- it did not make an objective assessment of the matter before it by failing to evaluate India's claim that 19 CFR § 351.511(a)(2)(ii) is inconsistent with Article 14(d) for requiring the use of out-of-country benchmarks without first exhausting all possible source of in-country benchmarks[4];

- it did not make an objective assessment of the matter before it by failing to provide a basic rationale as required under Article 12.7 of the DSU, as to the manner in which out of country benchmarks may be resorted to even in situations other than governmental influence in the market[5];

- it did not make an objective assessment of the matter before it, in finding that the method under 19 CFR § 351.511(a)(2)(ii) "must" relate to the prevailing market conditions in the country of provision merely because the parent legislation reproduces Article 14(d)[6], despite finding that the actual words used in 19 CFR § 351.511(a)(2)(ii) do not "necessarily provide[sic] the type of analysis of 'prevailing market conditions'..."[7];

- it incorrectly applied Article 14(d) in finding that 19 CFR § 351.511(a)(2)(ii) must automatically reflect the prevailing market conditions in the country of provision merely because the parent United States' legislation 19 U.S.C. 1677(5)(E)(iv) reproduces Article 14(d)[8];

- it did not make an objective assessment of the matter before it, by failing to evaluate and assess India's claim that 19 CFR § 351.511(a)(2)(i)-(iii) is inconsistent 'as such' with Article 14(d) for mandating an affirmative finding of benefit merely because the government's price in question is less than a benchmark price, without assessing whether the government price or the price difference, if any, is in accordance with 'commercial considerations'[9];

- it did not make an objective assessment of the matter before it, by failing to assess India's claim that 19 CFR § 351.511(a)(2)(i)-(iii) is inconsistent "as such" with Article 14(d) because a government price that is considered 'adequate' under a method consistent with Article 14(d), i.e. 19 CFR § 351.511(a)(2)(iii) [Tier III], would nonetheless be held inadequate under 19 CFR § 351.511(a)(2)(i)-(ii);

6. For these reasons, India requests the Appellate Body to reverse the Panel's finding that 19 CFR § 351.511(a)(2)(i)-(iii) is not "as such" inconsistent with Article 14(d) of the SCM Agreement.

[1] Panel Report, para. 7.35.
[2] Ibid. paras. 7.39, 7.42, 7.44, 7.46 and 7.189.
[3] Ibid. paras. 7.47, 7.49-7.50.
[4] Panel Report, para. 7.52.
[5] Panel Report, para. 7.50.
[6] Ibid. para. 7.51.
[7] Ibid. para. 6.5.
[8] Ibid. para. 7.51.
[9] Ibid. paras. 6.57, 6.61 and footnote 195.

7. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- 19 CFR § 351.511(a)(2)(i) to (iii) is inconsistent with the *first sentence* of Article 14(d) as it fails to assess adequacy of remuneration to the government provider prior to determining the quantum of benefit;
- 19 CFR § 351.511(a)(2)(i) is inconsistent with the *second sentence* of Article 14(d) for disregarding government prices not set in accordance with competitive bidding in assessing the "prevailing market conditions" in the country of provision;
- 19 CFR § 351.511(a)(2)(ii) is inconsistent with Article 14(d) as it mandates investigating authorities to apply out of country benchmarks to calculate benefit without first determining that the market is distorted by governmental interference or influence;
- 19 CFR § 351.511(a)(2)(ii) is inconsistent with Article 14(d) as it mandates investigating authorities to apply out of country benchmarks without first exhausting all possible sources of in-country benchmarks
- 19 CFR § 351.511(a)(2)(ii) is inconsistent with Article 14(d) as it fails to prescribe any mechanism to adjust world market prices to the prevailing market conditions in the country of provision of goods;
- 19 CFR § 351.511(a)(2)(i) to (ii) is inconsistent with the second sentence of Article 14(d) as it mandates an affirmative finding of benefit merely because the government price is less than a benchmark price, without assessing whether the government price is in accordance with 'commercial considerations' or whether the price difference, if any, is otherwise justified by 'commercial considerations';
- 19 CFR § 351.511(a)(2)(i) to (iii) is inconsistent with Article 14(d) as a government price consistent with 19 CFR § 351.511(a)(2)(iii) will be rejected if a benchmark is available under 19 CFR § 351.511(a)(2)(i) or (ii), as the case may be;

8. Consequently, the Appellate Body must also find that all determinations by the United States in the underlying investigation are inconsistent with Article 14(d) since all the determinations apply 19 CFR § 351.511(a)(2)(i)-(iii).

II. The Panel has committed legal errors in Section 7.2.6 of its Report

9. The Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel found that 19 CFR § 351.511(a)(2)(iv) is not "as such" inconsistent with Article 14(d) of the SCM Agreement. In particular, the Panel erred because:

- it did not make an objective assessment of the matter before it by narrowing India's actual claim against 19 CFR § 351.511(a)(2)(iv)[10];
- having interpreted Article 14(d) of the SCM Agreement as mandating an assessment of the "general conditions of the relevant market, in the context of which the market operators engage in sale transactions"[11], it failed to apply its own standard to assess whether 19 CFR § 351.511(a)(2)(iv) falls short of this mandate;
- it incorrectly interpreted and applied Article 14(d) of the SCM Agreement in finding that contractual terms of government transactions can *ipso facto* be excluded in assessing the "prevailing market conditions"[12];

[10] Panel Report, paras. 6.80, 6.84 and 7.60.
[11] Ibid. para. 7.60.
[12] Ibid. para. 7.61.

- it failed to make an objective assessment of the matter before it by incorrectly assessing India's claim that 19 CFR § 351.511(a)(2)(iv) of the United States' law is "*as such*" inconsistent with Article 14(d) on the basis of existence of import transactions in a *given investigation*[13];

- it incorrectly interpreted and applied Article 14(d) of the SCM Agreement in finding that the mere presence of one or more import transactions into the country of provision justifies the calculation of benefit at delivered prices level in *all* cases[14] without a qualitative assessment of the entire market comprising both imports and domestic transactions.

- it failed to make an objective assessment of the matter before it by not providing a basic rationale as required under Article 12.7 of the DSU, to justify the rejection of India's "as such" claim against 19 CFR § 351.511(a)(2)(iv)[15];

10. For these reasons, India requests the Appellate Body to reverse the Panel's finding that 19 CFR § 351.511(a)(2)(iv) is not "as such" inconsistent with Article 14(d) of the SCM Agreement.

11. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- 19 CFR § 351.511(a)(2)(iv) is inconsistent with Article 14(d) as it mandatorily requires benefit calculation at delivered prices level in *all cases* even where the "prevailing market conditions" is not sales at delivered levels;

- 19 CFR § 351.511(a)(2)(iv) is inconsistent with Article 14(d) as it affirmatively find 'benefit' in every case where out of country benchmarks are used simply because of the difference in freight;

- 19 CFR § 351.11(a)(2)(iv) is inconsistent with Article 14(d) because it countervails comparative advantages where out of country benchmarks are used.

12. Consequently, the Appellate Body must also find that all determinations by the United States in the underlying investigation since 2004 are inconsistent with Article 14(d) as all such determinations apply 19 CFR § 351.511(a)(2)(iv).

III. The Panel has committed legal errors in Section 7.7.5.1 of its Report

13. The Panel erred in its interpretation and application of Article 12.7 of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel found that 19 USC § 1677e(b) and 19 CFR § 351.308 ("AFA provisions") are not "as such" inconsistent with Article 12.7 of the SCM Agreement. In particular, the Panel erred because:

- it incorrectly interpreted Article 12.7 of the SCM Agreement in finding that an investigating authority need not engage in a comparative evaluation of all the available evidence to select the most fitting or most appropriate information[16].

- it erred in its interpretation and application of Article 12.7 of the SCM Agreement in rejecting India's claim[17] that the AFA provisions are "as such" inconsistent with Article 12.7 of the SCM Agreement as they *require* drawing the worst possible inference (including the imposition of the highest possible duty margin) against a non-cooperating party in *all* cases of non-cooperation;

[13] Ibid. para. 7.62.
[14] Panel Report, para. 7.62.
[15] Ibid.
[16] Ibid. paras. 7.438-439, 7.440-441.
[17] Ibid. paras. 7.440-444.

- it did not make an objective assessment of the matter before it in finding that "any adverse inference drawn by the USDOC will in fact be based on the facts available" and that "nothing in the US provisions at issue suggest that the USDOC is not required to take into account all substantiated facts on record or to apply 'facts available' that do not reasonably replace the missing information"[18] because it limited itself to the text of the AFA provisions and consequently, disregarding "other domestic interpretative tools" placed on record by India;

14. For these reasons, India requests the Appellate Body to reverse the Panel's finding that the AFA provisions are not "as such" inconsistent with Article 12.7 of the SCM Agreement.

15. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- Article 12.7 of the SCM Agreement requires investigating authorities to engage in a comparative evaluation of all the available evidence to select the most fitting or most appropriate information;

- Article 12.7 does not permit investigating authorities to draw adverse inferences (including the imposition of highest possible duty margin) in *all cases* of non-cooperation;

- the AFA provisions are "as such" inconsistent with Article 12.7 of the SCM Agreement as it fails to *require* USDOC to engage in a comparative evaluation of all the available evidence to select the most fitting or most appropriate information; and

- the AFA provisions are "as such" inconsistent with Article 12.7 of the SCM Agreement as it *requires* adverse inferences (including in the form of highest possible subsidy margins), to be drawn in *all cases* of non-cooperation.

16. Consequently, the Appellate Body must also find that all determinations by the United States in the underlying investigation applying the AFA provisions are inconsistent with Article 12.7 of the SCM Agreement.

IV. The Panel has committed legal errors in Section 7.3.1 of its Report

17. The Panel erred in its interpretation and application of Article 1.1(a)(1) of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel upheld the United States' determination that NMDC is a 'public body'. In particular, the Panel erred because:

- it did not make an objective assessment of the matter before it by failing to evaluate the implications of the United States' admission before the Panel in *US – Antidumping and Countervailing Duties (China)* that in the underlying investigation in this dispute, NMDC was held to be public body merely on the basis of GOI shareholding[19];

- it did not make an objective assessment of the matter before it by failing to consider the totality of the evidence and / or did not treat all evidence in an even-handed manner in finding that the USDOC considered factors beyond GOI shareholding in NMDC while concluding NMDC to be a public body, despite the USDOC expressly stating in its determination that such consideration is not required as a matter of its domestic law[20];

- it did not make an objective assessment of the matter before it by considering the USDOC's determination in the 2007 AR to be relevant in assessing the USDOC's determination in the 2004 and 2006 AR[21];

[18] Ibid. paras. 7.440-442 & 7.444.
[19] Panel Report, para. 6.90.
[20] Ibid. paras. 6.96, 7.81 and footnote 244.
[21] Ibid. para. 7.83.

- it did not make an objective assessment of the matter before it by accepting the United States' *ex post facto* explanation that the reference to NMDC being "governed by" the GOI in the 2004 AR determination, implied that the USDOC considered factors other than GOI shareholding while determining NMDC to be a "public body"[22];

- it did not make an objective assessment of the matter before it and exceeded its authority by *suo moto* providing "additional support" to the USDOC's finding that NMDC is a 'public body' for being under the "administrative control" of the GOI, despite the express acknowledgement of the United States that the USDOC's determination did not refer to the "administrative control" of NMDC[23];

- it exceeded its authority by giving a finding on the implication of 'Miniratna' or 'Navaratna' status of NMDC[24] rather than limiting itself to an assessment as to whether the USDOC ought to have considered 'Miniratna' or 'Navaratna' status of NMDC as being relevant evidence;

- it incorrectly applied Article 1.1(a)(1) of the SCM Agreement in finding that the alleged involvement of GOI in the appointment of NMDC's directors is more 'substantive' and meaningful than GOI's shareholding in NMDC[25];

- it incorrectly applied Article 1.1(a)(1) of the SCM Agreement in finding that *nomination* of directors can be equated with *appointment* of chief executive officers and that there is no distinction between *nomination* of directors by government and *appointment* of directors by the government, in assessing whether the GOI had "meaningful control" over the NMDC[26];

- it incorrectly applied Article 1.1(a)(1) in finding that involvement in NMDC's Board of Directors along with GOI's shareholding was sufficient to fulfill the requirement of "meaningful control"[27] as was referred to by the Appellate Body in *US – Antidumping and Countervailing Duties (China)*.

- it incorrectly interpreted Article 1.1(a)(1) of the SCM Agreement in finding that "meaningful control" of NMDC by the GOI would be sufficient to determine that NMDC is a public body[28].

18. For these reasons, India requests the Appellate Body to reverse the Panel's finding in affirming USDOC's determination that NMDC is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.

19. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- "meaningful control" of an entity by a government will not be sufficient to conclude such entity as a 'public body' within the meaning of Article 1.1(a)(1) of the SCM Agreement in all cases.

- shareholding by government and appointment of directors by the government, *de hors* other factors, is not sufficient to conclude that an entity is "meaningfully controlled" by the government for the purposes of Article 1.1(a)(1) of the SCM Agreement in all cases; and

- the USDOC determination that NMDC is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement, is incorrect;

[22] Panel Report, paras. 6.93, 7.82 and footnote 245.
[23] Ibid. para. 7.82, 7.87 and 6.100.
[24] Ibid. para. 7.88.
[25] Ibid. para. 7.85.
[26] Ibid.
[27] Ibid. paras. 7.80-7.89.
[28] Ibid. paras. 7.81, 7.85-7.86 and 7.89.

20. Consequently, the Appellate Body must also find that the imposition of CVD based on the NMDC program since 2004 is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

V. The Panel has committed legal errors in Section 7.3.2 of its Report

21. The Panel erred in its interpretation and application of Articles 1.2 and 2 of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel upheld the United States' determination that sale of iron ore by NMDC was *de facto* specific. In particular, the Panel erred because:

- it incorrectly interpreted and applied Article 2.1 of the SCM Agreement in finding that a program can be held to be *de facto* specific even without establishing that the program in question 'discriminates' between the similarly-situated entities[29];
- it incorrectly interpreted and applied the term of "use of a subsidy programme by a limited number of certain enterprises as it appears in Article 2.1(c) of the SCM Agreement[30];
- it did not make an objective assessment of the matter before it by limiting the circumstances in which negotiating history can be relied upon to interpret a treaty[31];
- it did not make an objective assessment of the matter before it by specifically relying upon the findings of the Panel in *US – Softwood Lumber IV*[32], without recording and assessing the "cogent reasons" offered by India for not following said findings for subsidies covered under Article 1.1(a)(1)(iii) of the SCM Agreement;
- it incorrectly interpreted Article 2.1(c) in finding that an alleged subsidy under Article 1.1(a)(iii) can be *de facto* specific merely based on limitations inherent in the nature of the goods allegedly provided or purchased by the government[33].

22. For these reasons, India requests the Appellate Body to reverse the Panel's finding that the United States did not act inconsistently with Articles 1.2 and 2.1 in concluding that the sale of iron ore by NMDC was *de facto* specific.

23. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- a program can be *de facto* specific under Article 2.1(c) of the SCM Agreement only if there is governmental action that 'discriminates' between similarly-situated entities;
- a program can be *de facto* specific under Article 2.1(c) of the SCM Agreement on the basis that it is "use[d] by" a "limited number *of* certain enterprises", only when the subsidy in question is *used* by a smaller set within the larger set of "certain enterprises";
- A program pertaining to provision of goods, cannot be *de facto* specific under Article 2.1(c) of the SCM Agreement if the determination of *de facto* specificity is solely based on the inherent characteristics of goods in question; and
- the United States acted inconsistently with Articles 1.2, 2.1(c) and 2.4 of the SCM Agreement in finding that the sale of iron ore by NMDC is *de facto* specific.

24. Consequently, the Appellate Body must also find that the imposition of CVD based on the NMDC program since 2004 is inconsistent with Articles 1.2, 2.1 and 2.4 of the SCM Agreement.

[29] Panel Report, para. 7.121-7.124.
[30] Ibid. 7.135.
[31] Ibid. para. 7.130.
[32] Ibid. para. 7.131.
[33] Ibid. para. 7.127-7.133.

VI. The Panel has committed legal errors in Section 7.3.3 of its Report and in connected findings in Section 7.4.6.2 of its Report

25. The Panel failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU in so far as the Panel has given findings on the *ex post facto* justifications of the United States for rejecting certain domestic sales information as relevant benchmarks[34], despite expressly recognizing such justifications as *ex post facto*[35]. Accordingly, India requests the Appellate Body to reverse the Panel's finding[36] to address the *ex post facto* justifications of the United States and render moot the Panel's findings and observations[37] on the United States' *ex post facto* justifications.

26. In the alternative, conditional upon the Appellate Body rejecting the aforesaid requests of India, India submits that the Panel erred in its interpretation and application of Articles 12.1, 12.4, 12.7 and 14 of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU in so far as the Panel upheld the United States' *ex post facto* justification that the domestic sales information can be rejected as relevant benchmarks. In particular, the Panel erred because:

- it incorrectly interpreted Article 14(d) of the SCM Agreement to find that government prices can *ipso facto* be rejected without first finding that the market is distorted by governmental interference or influence[38];
- it incorrectly interpreted and applied Articles 12.1 and 14(d) of the SCM Agreement in finding that an investigating authority has sufficient discretion to disregard pricing information merely because such information does not pertain to 'actual transactions'[39];
- it incorrectly applied Articles 12.1, 12.7 and 14 of the SCM Agreement in finding that the United States can *completely* reject the price quote of a private party merely because it did not specify the exact iron ore content, even though it indicated the grade of iron ore[40];
- it incorrectly applied Articles 12.1, 12.7 and 14 of the SCM Agreement by finding that the United States could reject information relating to possible in-country benchmarks based on certain alleged defects in the price without ever highlighting and seeking clarifications on such defects during the course of the investigation[41];
- it incorrectly applied Articles 12.1, 12.4 and 14 of the SCM Agreement by finding that the United States could reject the allegedly confidential private party quote supplied by Tata as a relevant benchmark even for Tata[42].

27. The Appellate Body is requested to reverse the Panel's findings and observations on the United States' *ex post facto* justifications for rejecting certain domestic sales information as relevant benchmarks and instead, find that:

- an investigating authority cannot disregard domestic pricing information merely because such information does not pertain to 'actual transactions';
- the alleged rejection of in-country benchmarks by the United States merely because those benchmarks related to government transactions, is inconsistent with Article 14(d);

[34] Panel Report, paras. 7.159-7.165.
[35] Ibid. paras. 7.154-7.156.
[36] Ibid. para. 7.159.
[37] Ibid. paras. 7.159-165.
[38] Ibid. para. 7.160.
[39] Ibid. para. 7.162.
[40] Panel Report, para. 7.163.
[41] Ibid. para. 7.164.
[42] Ibid. para. 7.165.

- the alleged rejection of in-country benchmarks by the United States merely because it did not specify the exact iron content, even though it did indicate "low grade" and "high grade" is inconsistent with Articles 12.1, 12.7 and 14 of the SCM Agreement;

- the alleged rejection of in-country benchmarks by the United States, based on certain alleged defects in the price without ever highlighting and seeking clarifications on such defects during the course of the investigation, is inconsistent with Articles 12.1, 12.7 and 14 of the SCM Agreement; and

- the failure by the United States to apply the allegedly confidential private party quote supplied by Tata as a relevant benchmark even for Tata is inconsistent with Articles 12.1, 12.4 and 14 of the SCM Agreement.

28. Further, the Panel erred in its interpretation and application of Articles 14 of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel upheld the United States' determination that sale of iron ore by NMDC conferred a benefit. In particular, the Panel erred because:

- it failed to consider the totality of the evidence and / or did not treat all evidence in an even-handed manner in finding the Brazilian and Australian prices of iron ore, inclusive all charges for delivery to steel producers in India, as relevant benchmarks on the basis that NMDC allegedly sets its domestic prices in light of what iron purchasers are willing to pay to import[43];

- it incorrectly interpreted and applied Article 14(d) of the SCM Agreement incorrectly in finding that the existence of an import transaction of iron ore from Brazil into India must necessarily mean that the price of iron ore from Brazil, inclusive of all charges for delivery to steel producers in India, will reflect 'prevailing market conditions' for iron ore in India[44], without a qualitative assessment of the entire market comprising both import and domestic transactions for iron ore;

- it incorrectly interpreted and applied Article 14(d) of the SCM Agreement in finding that inclusion of charges associated with international transit in the benchmark price does not nullify and countervail India's comparative advantage[45];

- it incorrectly applied Article 14(d) of the SCM Agreement in finding that export prices of the government provider in question can *ipso facto* be rejected as a relevant benchmark[46];

- it did not make an objective assessment of the matter before it in upholding the USDOC determinations under challenge by referring to record evidence which was never relied upon by the USDOC itself in its determination[47];

- it did not make an objective assessment of the matter before it, by failing to assess whether the USDOC 'adequate[ly]' explained its inconsistent treatment of NMDC's export prices as a relevant benchmark, as required under the chapeau to Article 14 of the SCM Agreement;

- it did not make an objective assessment of the matter before it, by failing to assess whether the USDOC has transparently and adequately explained why NMDC export prices are not 'world market prices' within the meaning of United States' national implementing regulations, viz. 19 CFR § 351.511(a)(2)(ii)[48].

[43] Ibid. para. 7.182.
[44] Panel Report, para. 7.181-7.183.
[45] Ibid. para. 7.185.
[46] Ibid. para. 7.189.
[47] Ibid. para. 7.182.
[48] Ibid. para. 7.189-192.

29. For these reasons, India requests the Appellate Body to reverse the Panel's finding that the United States did not act inconsistently with Article 14 of the SCM Agreement in concluding that the sale of iron ore by NMDC conferred a benefit.

30. To the extent the Panel's findings in relation to the NMDC program are reiterated in the context of grant of mining rights for iron ore and coal[49], India requests the Appellate Body to reverse the same as well.

31. Further, the Appellate Body must, where necessary, complete the legal analysis and find that, in relation to the sale of iron ore by NMDC and the grant of mining rights for iron ore by the GOI:

- the United States acted inconsistently with Article 14(d) of the SCM Agreement by presumptively rejecting NMDC export prices as a relevant benchmark to determine the existence and quantity of 'benefit';
- the United States acted inconsistently with Article 14(d) of the SCM Agreement by using prices of iron ore from Brazil, inclusive of all charges for delivery to steel producers in India, as the benchmark price to determine the existence and quantity of 'benefit';
- the United States acted inconsistently with Article 14(d) of the SCM Agreement by using prices of iron ore from Australia, artificially adjusted to include all charges for delivery to steel producers in India, as the benchmark price to determine the existence and quantity of 'benefit'; and
- the United States acted inconsistently with the chapeau to Article 14 of the SCM Agreement by failing to transparently and adequately explain why NMDC export prices are not 'world market prices' within the meaning of United States' national implementing regulations, viz. 19 CFR § 351.511(a)(2)(ii).

32. Consequently, the Appellate Body must also find that:

- the United States acted inconsistently with Article 14(d) of the SCM Agreement by using a benchmark price inclusive of all charges for delivery to steel producers in India, as the benchmark price to determine the existence and quantity of 'benefit' in respect of the Captive Mining of Iron Ore program;
- the United States acted inconsistently with Article 14(d) of the SCM Agreement by using a benchmark price inclusive of all charges for delivery to a steel producer in India, as the benchmark price to determine the existence and quantity of 'benefit' in respect of the Captive Mining of Coal program.

33. Consequently, the Appellate Body must also find that the imposition of CVD for the NMDC program since 2004, and the imposition of CVD for the Captive Mining of Iron Ore and Coal programs, is inconsistent with Article 14(d) and the chapeau to Article 14 of the SCM Agreement.

VII. The Panel has committed legal errors in Section 7.4.3 of its Report

34. The Panel erred in its interpretation and application of Article 1.1(a)(1)(iii) of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel upheld the United States' determination that the grant of mining rights amounts to the 'provision' of the mined minerals. In particular, the Panel erred because:

- it disregarded material evidence necessary to make an objective assessment of the matter before it, by finding as irrelevant, the fact that the royalty paid to the GOI by miners contributes an insignificant 9.03 % of the final cost of the mined mineral[50];

[49] Ibid. para. 7.263-265.
[50] Panel Report, para. 6.133.

- it incorrectly applied Article 1.1(a)(iii) of the SCM Agreement in finding that "allow[ing] the beneficiary to extract government-owned minerals from the ground, and then us[ing] those minerals for [the beneficiary's] own purpose" means that the "GOI's grant of the right to mine is reasonably proximate to the use or enjoyment of the minerals by the mining entity"[51].

35. For these reasons, India requests the Appellate Body to reverse the Panel's finding that the United States did not act inconsistent with Article 1.1(a)(iii) of the SCM Agreement in concluding that the grant of mining rights amounts to 'provision' of the mined mineral.

36. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- the United States acted inconsistently with Article 1.1(a)(iii) of the SCM Agreement in finding that grant of mining rights to iron ore and coal, amounts to 'provision' of iron ore and coal.

37. Consequently, the Appellate Body must also find that the imposition of CVD based on the Captive Mining of Iron ore programme and the Captive Mining of coal program is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.

VIII. The Panel has committed legal errors in Section 7.4.2 of its Report

38. The requests contained in this part are made conditional upon the United States filing an appeal against the Panel decision in Section 7.4.1 of the Panel Report and the Appellate Body reversing the Panel's finding in Section 7.4.1.3 of the Panel Report.

39. The Panel failed to fulfill its duty under Article 11 of the DSU and/or falsely exercised judicial economy in so far as the Panel did not assess[52] India's claim under Article 2.1 of the SCM Agreement against the USDOC's determination that the grant of mining rights for iron ore is *de facto* specific. India requests the Appellate Body to find that the Panel erred in exercising judicial economy in this case.

40. Further, the Appellate Body must complete the legal analysis and find that:

- the United States acted inconsistently with Articles 1.2, 2.1 and 2.4 of the SCM Agreement in finding that grant of mining rights to iron ore was *de facto* specific.

41. Consequently, the Appellate Body must also find that the imposition of CVD based on the Captive Mining of Iron ore programme is inconsistent with Articles 1.2, 2.1 and 2.4 of the SCM Agreement.

IX. The Panel has committed legal errors in Section 7.4.6 of its Report

42. Further, the Panel erred in its interpretation and application of Articles 14 of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel upheld the United States' determination the GOI conferred a benefit in granting mining rights for iron ore and coal. In particular, the Panel erred because:

- it incorrectly interpreted and applied Article 14(d) of the SCM Agreement in finding that a term 'remuneration' need not be the actual recompense received by the GOI for the grant of mining rights, but can also be notional[53];

- it incorrectly interpreted and applied Article 14(d) of the SCM Agreement in finding that the USDOC was permitted to calculate quantum of benefit on the basis of a fictional constructed price of extracted iron ore (inclusive of the miner's costs and reasonable profits)[54];

[51] Ibid. paras. 7.237-7.238.
[52] Panel Report, para. 8.4.a.
[53] Panel Report, para. 7.260.
[54] Ibid.

- it did not make an objective assessment of the matter before it by determining that India's claim pertaining to "good faith" interpretation is outside the Panel's terms of reference[55].

43. For these reasons, India requests the Appellate Body to reverse the Panel's finding that the United States did not act inconsistently with Article 14 of the SCM Agreement in concluding that the GOI conferred a benefit in granting mining rights for iron ore and coal.

44. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- the 'remuneration', the adequacy of which is to be assessed under Article 14(d) of the SCM Agreement, can only be the actual recompense received by the GOI and cannot be fictional / notional;

- the costs incurred and profits earned by a miner cannot be considered as part of 'remuneration', the adequacy of which is to be assessed under Article 14(d) of the SCM Agreement;

- the United States acted inconsistently with Article 14(d) of the SCM Agreement in finding that the GOI conferred a benefit in granting mining rights for iron ore and coal; and

- the United States acted inconsistently with Article 14(d) of the SCM Agreement by using prices of coal from Australia, inclusive all charges for delivery to the steel producer in India, as the benchmark price to determine the existence and quantity of 'benefit'.

45. Consequently, the Appellate Body must also find that the imposition of CVD based on the Captive Mining of Iron ore programme and the Captive Mining of coal program is inconsistent with Article 14(d) of the SCM Agreement.

X. The Panel has committed legal errors in Section 7.5.1 of its Report

46. Further, the Panel erred in its interpretation and application of Articles 1.1(a)(1) of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel upheld the United States' determination that the SDF program was a subsidy within the meaning of Article 1.1(a)(1) of the SCM Agreement. In particular, the Panel erred because:

- it did not make an objective assessment of the matter before it, by assuming a meaning for the phrase '*direct*' '*transfer*' of funds as it appears in Article 1.1(a)(1)(i) of the SCM Agreement, without ever interpreting it in accordance with customary rules of interpretation[56];

- it did not make an objective assessment of the matter before it, by assuming a meaning for the term '*transfer* of funds' as it appears in Article 1.1(a)(1)(i) of the SCM Agreement, without ever interpreting the term in accordance with customary rules of interpretation[57];

- it incorrectly interpreted and applied Article 1.1(a)(1)(i) of the SCM Agreement in finding that the USDOC could have reasonably determined the SDF Managing Committee to have '*direct[ly]*' transferred SDF loans merely on the basis that the SDF Managing Committee decides on the issuance, terms and waivers of the SDF loans[58] after finding that the actual transfer is done by an intermediary or intervening private party, i.e. the JPC;

[55] Ibid. para. 7.261.
[56] Panel Report, paras. 7.292-293.
[57] Ibid. paras. 7.295-296.
[58] Ibid. paras. 7.292-293.

- it incorrectly interpreted and applied Article 1.1(a)(1)(i) of the SCM Agreement in finding that the 'transfer' of funds need not involve the government having title to the funds in question and / or resulting in a charge on the public account[59].

47. For these reasons, India requests the Appellate Body to reverse the Panel's finding that the United States did not act inconsistently with Article 1.1(a)(1) of the SCM Agreement in concluding that the SDF loans constituted a subsidy.

48. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- '*direct* transfer of funds' under Article 1.1(a)(1)(i) of the SCM Agreement excludes *government* transferring funds to the beneficiary through an intermediate private body;

- 'direct *transfer* of funds' under Article 1.1(a)(1)(i) of the SCM Agreement only covers situations where the funds so transferred are owned by the government and / or results in a charge on the public account;

- the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in determining that the SDF program is a "direct transfer of funds" by the SDF Managing Committee.

49. Consequently, the Appellate Body must also find that the imposition of CVD based on the SDF program is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

XI. The Panel has committed legal errors in Section 7.5.2 of its Report

50. Further, the Panel erred in its interpretation and application of Article 14 of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel failed to appreciate that the benchmark used under Article 14(d) must be 'comparable' to the terms of the loan program itself. In particular, the Panel erred because:

- it did not objectively assess the matter before it in finding that the SDF funds are not producer funds as the funds were sourced from a levy on the consumers and the levy was always destined only towards the SDF funds[60];

- it incorrectly interpreted Article 14(b) and 1.1(b) in finding that the USDOC did not have to account for the entry deposits made to the SDF program by the beneficiaries, while determining that the SDF program conferred a 'benefit'[61].

51. For these reasons, India requests the Appellate Body to reverse the Panel's finding that the United States did not act inconsistently with Article 14 of the SCM Agreement in concluding that the SDF loans conferred a benefit.

52. Further, the Appellate Body must, where necessary, complete the legal analysis and find that the USDOC violated Articles 14(b) and 1.1(b) in determining that the SDF program conferred a benefit without accounting for the entry deposits made to the SDF program by the beneficiaries.

XII. The Panel has committed legal errors in Section 7.7.5.2.1 of its Report

53. Further, the Panel erred in its interpretation and application of Article 12.7 of the SCM Agreement and/or failed to make an objective assessment pursuant to Article 11 of the DSU, and/or falsely exercised judicial economy in so far as the Panel found that the United States did not act inconsistently with Article 12.7 of the SCM Agreement when applying the highest non-*de minimis* subsidy margin in 230 instances in the underlying investigation[62]. In particular, the Panel erred in its interpretation of Article 12.7 of the SCM Agreement and applied the incorrect standard

[59] Ibid. paras. 7.294-296.
[60] Panel Report, para. 7.311 and footnote 526.
[61] Ibid. paras. 311-312.
[62] Ibid. paras. 7.448-7.449.

to assess the claim[63]. Further, even when applying its erroneous interpretation of Article 12.7, the Panel incorrectly applied its own standard in rejecting India's claim and imposed an unnecessary burden on India[64].

54. Therefore, India requests the Appellate Body to reverse the Panel's finding that the 230 instances in the underlying investigation of applying the *highest* non-*de minimis* subsidy margin pursuant to the AFA provisions is inconsistent with Article 12.7 of the SCM Agreement. Further, the Appellate Body must, where necessary, complete the legal analysis and find that the United States acted inconsistently with Article 12.7 of the SCM Agreement by applying the *highest* non-*de minimis* subsidy margin in the 230 instances highlighted by India.

55. Further, India would like to reiterate its earlier request that the Appellate Body also find that the AFA provisions are "as such" inconsistent with Article 12.7 of the SCM Agreement as it requires adverse inferences (including the imposition of highest possible subsidy margins) to be drawn in *all cases* of non-cooperation.

XIII. The Panel has committed legal errors in Section 7.7.5.2.9 of its Report

56. The Panel failed to make an objective assessment pursuant to Article 11 of the DSU by failing to consider India's submissions in totality, when concluding that India had not made out a *prima facie* case in respect of the 2013 Sunset Review of the USDOC against Essar, ISPAT, SAIL and Tata[65]. Therefore, India requests the Appellate Body to reverse the Panel's finding.

57. Further, the Appellate Body must, if necessary, complete the legal analysis and find that *all of* the US DOC's determinations in the 2013 Sunset Review against Essar, ISPAT, SAIL and Tata, are inconsistent with Article 12.7 of the SCM Agreement.

58. In the alternative, the Appellate Body must find that, at a minimum, the USDOC's determinations in the 2013 sunset review are inconsistent with Article 12.7 of the SCM Agreement to the extent they repeat those instances from the previous ARs that have already been found to be inconsistent with Article 12.7 of the SCM Agreement.

XIV. The Panel has committed legal errors in Section 7.8.4 of its Report

59. The Panel failed to make an objective assessment pursuant to Article 11 and/or falsely exercised judicial economy, in so far as the Panel failed to assess India's claims that the investigation into new subsidies in the course of administrative reviews by the United States in the underlying investigation is inconsistent with Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement[66]. In particular, the Panel erred because:

- it did not objectively assess the matter before it by failing to asses India's claims under Articles 11.1, 13.1, 22.1-22.2 of the SCM Agreement merely because new subsidies were examined under Article 21[67] and by failing to provide a "basic rationale" as required under Article 12.7 of the DSU in this respect;

- it incorrectly interpreted Articles 11 that Article 11 is inapplicable to Article 21 proceedings ignoring the textual meaning that Article 11 would apply anytime where a Member studies the existence, degree or effect of a subsidy, irrespective of how the proceeding is designated under the domestic law;

- it incorrectly interpreted Articles 11 and 21 in assuming that the applicability of Article 21 *ipso facto* excludes applicability of Articles 11, 13.1, 22.1-22.2[68].

60. Therefore, India requests the Appellate Body to reverse the aforesaid findings of the Panel.

[63] Ibid.
[64] Ibid. Para. 449.
[65] Panel Report, paras. 7.479-7.481.
[66] Ibid. para. 7.501.
[67] Ibid. paras. 7.501, 7.507, 7.508, 7.168.
[68] Ibid.

61. Further, the Appellate Body must, if necessary, complete the legal analysis and find that the United States acted inconsistently with Articles 11.1, 13.1, 22.1 and 22.2 of the SCM Agreement by investigating new subsidies in the course of administrative reviews in the underlying investigation.

XV. The Panel has committed legal errors in its preliminary ruling

62. Conditional upon the Appellate Body rejecting all the requests made by India in sections IV and V above, the Appellate Body is requested to assess India's appeal in this part. In other words, in the event the Appellate Body finds that the United States did not violate Article 1.1(a)(1) ***or*** Articles 2 and 1.4 of the SCM Agreement, the Appellate Body is requested to assess India's appeal in this part, relating to the Panel's ruling on the United States' preliminary request contained in section 1.3.3 of the Panel Report.

63. The Panel erred in its application of Articles 4.6 and 6.2 of the DSU and/or failed to make an objective assessment pursuant to Article 11 of the DSU, in so far as the Panel found that India's claim under Section XII.C.1 and Section XII.C.2 of India's First Written Submissions are outside the Panel's terms of reference. In particular, the Panel erred because:

- it did not make an objective assessment of the matter before it in accordance with Article 11 and 3.2 of the DSU by failing to record and follow, without offering cogent reasons, the previously adopted findings in *Korea - Dairy* that the respondent bears the initial burden to prove it was actually prejudiced by the allegedly incomplete Panel Request of the complainant;

- it did not make an objective assessment of the matter before it in accordance with Article 11 and 3.2 of the DSU by failing to record and follow, without offering cogent reasons, the previously adopted finding of the Panel in *US – Lamb*, that the questions circulated by India during consultations is one of the relevant "attendant circumstances" in assessing India's Panel Request[69].

- it did not make an objective assessment of the matter before it in accordance with Article 11 and 3.2 of the DSU by failing to examine the legal basis of India's submission that a reference to the term 'initiated' in India's Panel Request must be understood in the light of footnote 37 to the SCM Agreement[70].

- it incorrectly applied Article 6.2 of the DSU in finding that India's Panel Request excludes claims under Article 11 relating to the "alleged initiation of an investigation or the manner in which an investigation was conducted"[71];

64. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's claims under Section XII.C.1 and Section XII.C.2 of India's First Written Submissions are not within the Panel's terms of reference.

65. Further, the Appellate Body must, where necessary, complete the legal analysis to find that:

- in assessing a Member's Panel Request under Article 6.2 of the DSU, questions circulated by the Parties during the course of consultations held under Article 4 of the DSU, is one of the relevant "attendant circumstances" to be considered.

- with respect to an objection raised under Article 6.2 of the DSU, the respondent bears the initial burden to prove it was actually prejudiced by the allegedly incomplete Panel Request of the complainant.

- India's claims in Section XII.C.1 and Section XII.C.2 of India's First Written Submissions are within the Panel's terms of reference; and

[69] Panel Report, para. 1.37.
[70] Ibid. footnote 39.
[71] Ibid. paras. 1.34 and 1.38.

- the United States violated Articles 11.1-11.2, 11.9 of the SCM Agreement by initiating investigations into NMDC and TPS programs in the 2004 AR without sufficient evidence as to the existence, amount and nature of said subsidies.

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