UNITED STATES – COUNTERVAILING DUTY MEASURES

ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

(DS436)

EXECUTIVE SUMMARY OF THE OPENING STATEMENT

OF THE UNITED STATES OF AMERICA AT

THE SECOND SUBSTANTIVE MEETING OF THE PANEL

October 16, 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. In this statement, we will seek to clarify further some of the issues in this dispute. In particular, we will focus on India's arguments regarding the U.S. measures governing benefit both "as such" and "as applied", Commerce's specificity determinations, SDF loans as "direct transfers", cumulation of dumped and subsidized imports, and the interpretation and application of the U.S. "facts available" measures.

I. The U.S. regulation, 19 CFR 351.511(a)(2), is 'as such' consistent with Article 14(d)

2. For the reasons described extensively in the U.S. first written submission, responses to Panel's questions, and in the U.S. second written submission, India's position that Tiers-I and II of the U.S. regulation are 'as such' inconsistent with Article 14(d) of the SCM Agreement has no basis in the text of the SCM Agreement and is not supported by the findings in prior panel or Appellate Body reports. In short, India's entire mode of analysis is premised on a step that simply does not exist in the text of Article 14.

3. In its second written submission, India focuses its arguments on three textual points. First, India argues that structural differences between subparagraphs (b)-(c) and (d) of Article 14 contemplate a threshold step in Article 14(d) distinct from the "precise calculation method using an external benchmark" contained in subparagraphs (b) and (c). India has no basis for this distinction, and the United States would refer the Panel to the U.S. second written submission on this point.

4. Second, in noting that the terms "remuneration" and "benefit" are different words, India asks the Panel to accord separate "meaning to . . . the term *remuneration* and the fact that the U.S. law under challenge fails to look into the question of the *adequacy of remuneration* prior to calculating benefit." This argument has no merit. As already explained in the U.S. first written submission, while remuneration and benefit are distinct terms, they are related. The fact that the first sentence of Article 14(d) uses both terms does not mean that they are assessed from the perspective of different entities. Rather, the title to Article 14 make clear that when the financial contribution at issue is the provision of goods by a government, "benefit" is defined by the concept of "benefit to the recipient."

5. Third, in paragraph 15 of its second written submission, India notes that Article 14(d) relates to two different subsidy programs—both the purchase and provision of goods or services. India argues that the U.S. approach to assessing the adequacy of remuneration where the government is the purchaser of goods, is somehow inconsistent with the U.S. approach when the government acts as the seller. India is incorrect. With respect to government purchases of

goods, the United States does not interpret Article 14(d) to require a cost to beneficiary analysis. Rather, where the government is the purchaser of goods, the comparison would be between the price the government paid for the product, and the price for which the recipient (of the benefit) could have sold the same product to another purchaser.

6. Moreover, in its second written submission, India adopts a new argument: that an assessment of prevailing market conditions requires an assessment of whether the behavior of the provider in some undefined sense can be commercially justified. This argument has no merit and, if India's position were adopted, would amount to a radical departure from the text of the Agreement for the following reason:

7. First, India's argument assumes that for the purposes of the SCM Agreement, governments and private bodies should be treated equally. However, Members (acting through government, public bodies, funding mechanisms, or entrusted or directed private bodies) are bound by the disciplines of the SCM Agreement, and private entities are not. Moreover, Members may confer economic resources that result in negative impacts on other Members, and it is for this very reason that certain Member actions in the economic sphere are subject to the disciplines of the SCM Agreement. With respect to Article 14 specifically, the SCM Agreement ensures that the government prices are at least equivalent to market prices between private parties.

8. Second, in proposing that the price-setting behavior of governments be justified by undefined economic considerations, India seeks to carve out an unprecedented exception in the SCM Agreement. In India's view, governments have a sovereign right to set prices for goods or services as far below the market rate as they choose, provided this price-setting behavior can be justified on some sort of basis. But India's interpretation would seemingly allow a government to justify a less-than-market-price which results in driving private entities out of business on the basis that "commercial considerations" led the government to desire to expand its market share.

9. Third, India refers to this carve out from the disciplines of the SCM Agreement as an "inherent right" of governments to subsidize in any manner that they choose. The simple answer to India's argument is that this dispute is not about what types of subsidies governments may or may not, under whatever authority, determine to provide. India exercised its inherent sovereign right in agreeing to the disciplines of the SCM Agreement, and thus has agreed that other WTO Members may countervail subsidies it provides that cause injury to another Member's industry.

10. The United States offers the following additional comments on the structure of its regulation: Both the United States and India agree that the benefit calculations performed under Tier-III of the U.S. regulation are consistent with Article 14(d) of the SCM Agreement. India, however, argues that the regulation's preference for the application of a Tier-I or Tier-II analysis for the calculation of benefit is inconsistent with Article 14(d) insofar as it precludes the application of a Tier-III analysis. India's objections are without merit; they are based on India's

flawed interpretation of the first sentence of Article 14(d), and India's oft-repeated, and unsupportable, insistence that the adequacy of remuneration must be assessed from the perspective of the provider of the benefit. Under the Article 14(d) guidelines, the adequacy of remuneration is assessed from the perspective of the recipient of the financial contribution and the hierarchical structure of the U.S. regulation is fully-consistent with this principle. The U.S. regulation appropriately begins with Tier-I, a preference for actual arm's length prices between private parties in the market of the economy of provision.

11. The crux of India's concern with the hierarchical structure of the U.S. regulation is its view that a government price that may be adequate under Tier-III should not be countervailed under another method, such as Tier-I or Tier II. However, if remuneration is less than adequate based on a comparison with actual arm's length prices between private parties, then a benefit has been conferred and, in such instances, the government price cannot be consistent with market principles. Application of the U.S. regulation will never lead to a result where remuneration which has been found to be inadequate under Tier-I or Tier-II will somehow be found to be adequate under Tier-III.

II. The mandatory inclusion of delivered prices under 19 CFR 351.511(a)(2)(iv) is "as such" consistent with Article 14(d)

12. In paragraphs 36 through 45 of its second written submission, India continues to argue that the mandatory inclusion of delivery charges under subsection (iv) of the U.S. regulation is "as such" inconsistent with Article 14(d) of the SCM Agreement. The United States has addressed India's "as such" challenges to the regulation extensively in its previous submissions. We have the following additional comments:

13. First, in paragraph 38 India states that, "for reasons unknown and unsubstantiated, the United States assumes that the term 'delivery charges' covers only import duties." This statement is factually incorrect. As explained in detail in response to the Panel's questions 44 and 47, the term 'delivery charges' includes not only import duties (where appropriate) but, more specifically, all of the delivery charges incurred by the producer to physically get the input to the producer's facility for use, which could include freight, import duties, or taxes. Second, India continues to argue in paragraph 39 of its second written submission that an apples-to-apples comparison could be completed at the ex-works level. An ex-works price does not include the costs incurred by the purchaser for getting a purchased input to its factory door and, therefore, is not reflective of the prevailing market conditions for that input from the perspective of the recipient.

14. Third, India states in paragraph 40 that "the 'delivered prices' of a domestic government provider can never be equal to or higher than such a benchmark price that includes international freight and import duties." This simply is not true. Indeed, India provides no evidence to

support such a categorical statement. Fourth, India appears to be confused about what the factors listed in Article 14(d) mean. The non-exhaustive list of "prevailing market conditions for the good or service in question in the country of provision" in Article 14(d) includes price, quality, availability, marketability, transportation and, as India correctly points out, other conditions of purchase or sale. Thus, contrary to India's line of argument, the terms "availability" and "marketability", for instance, are not terms typically found in negotiated contracts.

15. Fifth, in both paragraphs 42 and 43 (in addition to others) India mischaracterizes the United States as making a "cost to exporter" (or "cost to producer") analysis. This is incorrect. The United States, consistent with Article 14 of the SCM Agreement, is making a benefit to the recipient analysis by comparing the prices that the recipient actually would pay for the benchmark product and the government product. Sixth, the United States would observe that the term "availability" is specifically included in the non-exhaustive list of prevailing market conditions identified in the second sentence of Article 14(d). For India to argue that adjustments to the benchmark with respect to "availability" are not contemplated in the text of the SCM Agreement is incorrect.

III. The imposition of countervailing duties in respect of the sale of high grade iron ore by NMDC is fully consistent with Articles 1.1, 2.1(c) and 2.4 of the SCM Agreement

16. Turning now to India's claims related to specificity, to recall, India argues that *de facto* specificity may only be determined under Article 2.1(c) where a subsidy is granted or enjoyed by a few enterprises as compared to a larger universe of similarly-situated entities otherwise capable of using that subsidy. This "comparative subset" argument simply is incorrect and India's previous arguments on this point have been adequately addressed in our previous submissions. We offer the following observations:

17. First, as clearly presented in our previous submissions, the United States disagrees with India's interpretation of Article 2.1 of the SCM Agreement. The passages of Appellate Body reports and selected negotiating documents of the SCM Agreement relied on by India to support its positions do not clarify the meaning of Article 2.1(c) do not address *de facto* specificity nor do they address specificity in the context of a financial contribution in the form of a provision of goods or services. Second, India is also incorrect in arguing that the text of Article 2.1(c) somehow mandates an order of analysis whereby an investigating authority is required to first apply the principles under Articles 2.1(a)-(b) before Article 2.1(c).

18. Third, there is no basis in Article 2.1(c) to support India's contention that the inherent characteristics of a good cannot limit its utility. There is no exception in the SCM Agreement allowing governments to provide goods, which, by their nature are of limited use, for less than market value. Fourth, India argues that in a *de facto* specificity analysis under Article 2.1(c), failure to require that a comparative subset of eligible entities be identified would result in

"every form of supply of goods to be specific in all cases." Contrary to India's categorical assertions, specificity is assessed on a case-by-case basis and, under Article 2.1(c), will only be found where certain enterprises constitute a discrete segment of the economy of the Member granting the subsidy.[1]

19. India's two specificity arguments, including the one contained in section VII.C.2 of its first written submission effectively are the same: for both, India argues that the text of Article 2.1(c) requires that an investigating authority not only identify certain enterprises which are receiving the subsidy but also those eligible enterprises that are not.

20. In its second written submission, India continues to confuse the obligation of an investigating authority to take account of the factors identified in the second sentence of Article 2.1(c) with some sort of requirement that the authority's determinations must include a separate discussion of each factor. The United States met its obligation under Article 2.1 to take "account" of both the economic diversification of the Indian economy and the duration of the program in determining that the GOI provision of iron ore for less than adequate remuneration was *de facto* specific to a limited number of certain enterprises that used iron ore. Moreover, contrary to India's assertions, a Member does not and cannot "shirk" obligations by, as here, pointing out relevant facts on the record in a dispute.

IV. The sale of iron ore by NMDC conferred a benefit within the meaning Article 14(d) of the SCM Agreement

21. Turning now to India's 'as applied' claims against the U.S. imposition of countervailing duties in respect of the sale of high grade iron ore by NMDC, in its second written submission the United States wishes to highlight the following positions: First, India is incorrect that the explanations of the United States are *ex-post facto* rationalizations of the determination. The determinations on the record in this dispute contain complete and persuasive explanations for why Commerce determined that Indian steel companies received countervailable subsidies. The alleged pricing, party identification, and iron content information contained in these documents was incomplete; this data was therefore insufficient to be used in a Tier-I analysis which, contrary to India's assertions in paragraph 193, very clearly requires that a benchmark price be based on data from actual imports or actual sales. Second, India incorrectly states that the United States starts with the presumption that all government prices (even prices not under challenge) are suspect and ought to be rejected without any examination. India has ignored paragraph 66 of

[1] *US – Upland Cotton (Panel)*, para. 7.1151.

the U.S. first written submission, in which the United States explains that the United States does not always reject the use of government prices as benchmarks if the government prices are determined to be set by the market. For example, a government price set by a competitively run government auction is explicitly included as a possible benchmark under Tier I of the U.S. regulation.

22. Third, the United States takes issue with India's apparent new argument that Article 12.1 of the SCM Agreement requires an investigating authority to affirmatively use all information submitted by interested parties in calculating a benchmark, regardless of that information's veracity or usability. That claim is therefore outside the Panel's terms of reference, even aside from the fact that it would be untimely to raise arguments for the first time in its second written submission.

23. India's 'as applied' challenges to the use of delivered prices in the calculation of benefit for the sale of iron ore by NMDC are identical to the arguments presented in its 'as such' challenges to the U.S. regulation, subsection (iv), the paragraph that mandates adjustments for fully delivered prices. As India's arguments are the same, for the same reasons as explained above, these arguments are without merit and are not based on the text of the SCM Agreement. Therefore, India's 'as applied' claims on the use of delivered prices must also fail.

V. The imposition of countervailing duties on the grant of captive mining rights for iron ore and coal is consistent with Articles 12.5, 1.1, 1.2, 2 and 14 of the SCM Agreement

24. Article 12.5 of the SCM Agreement requires that "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based." While India has every incentive to deny the existence of a captive mining rights program for iron ore, Commerce satisfied itself as to the accuracy of information contained in the *Hoda* and *Dang* reports and therefore the U.S. actions fully complied with Article 12.5 of the SCM Agreement.

25. Further, India incorrectly argued that the Government of India did not provide iron ore or coal within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because there is no "reasonable proximate relationship" (as articulated by the Appellate Body in *Softwood Lumber IV*) between the grant of mining rights on the one hand and the availability of the mined iron ore or coal on the other. India now argues that there is no reasonable proximate relationship because the royalty paid for the grant of mining rights is 9.03% of the total costs borne by the miner to enjoy the final minerals. Under Article 1.1(a)(1)(iii), the question regarding financial contribution is whether there was a provision of goods or services by a government or public body. The percentage of total cost represented by the financial contribution is not pertinent to

this question. The price that the government charges in providing that exclusive right is not relevant.

26. India also argues that the GOI cannot be said to have provide iron ore or coal to miners if, in addition to royalty payments, miners must bear the costs of exploration, labor, and extraction. This requirement is nowhere in the text of SCM Agreement nor in the *US – Softwood Lumber IV* Appellate Body report. Analogously, making available iron ore and coal is the *raison d'etre* of the GOI's mining leases. India cannot distinguish this dispute on the basis of additional costs that a miner must incur to make the minerals marketable.

27. In paragraphs 218-219 of its second written submission India continues to argue that the GOI has not provided captive mining rights for coal to Tata Steel within the meaning of Article 1.1(a)(1) because the United States has not proven the non-existence of an alleged exemption to the Coal Mines Nationalization Act and the Ministry of Coal's guidelines for the allocation of captive coal blocks. As explained in the U.S. first written submission, Commerce properly determined that the law, as amended, clearly applies to *all coal mining leases*, without exception. It is India that has argued for the existence of an exemption for Tata, but yet has pointed to no evidence on the record of such an exemption.

28. India asks the Panel to apply a novel three-step analysis in examining whether the investigating authority properly determined specificity. India's proposed three-step standard of review is inconsistent with, and unsupported by, the text of the SCM Agreement. It also departs from prior Appellate Body findings. For example, India's third step appears to be taken from a misreading of the Appellate Body report in *US – Large Civil Aircraft*, wherein the Appellate Body's reference to the "broader legal framework" applied to determinations of *de jure* specificity in which there exist a legal framework to evaluate in the first place. Moreover, India's proposed methodology would amount to a *de novo* review of the facts on the record, requiring the Panel to substitute its judgment for that of the regulator.

29. In paragraph 225 of its second written submission, India continues to dispute Commerce's *de facto* specificity determination with respect to a captive mining rights program for iron ore on the basis that "the United States has not identified any separate regulation or guidelines governing mining rights of iron ore as distinguished from other minerals." Here too India confuses the difference between *de jure* and *de facto* specificity under Article 2.1(a)-(b) and 2.1(c). Specificity determinations under Article 2.1(c) do not require that an investigating authority identify a specific piece of legislation, regulations, or guidelines pertaining to eligibility or amount of subsidy.

VI. The United States correctly calculated the benefit for a price of extracted iron ore and coal, consistent with Articles 1.1(b) and 14 of the SCM Agreement

30. In paragraph 231 of its second written submission, India argues that the GOI did not "provide" extracted iron ore or coal in accordance with Article 1.1(a)(1)(iii) but rather granted mining rights and that, consequently, the costs incurred by the miner in extracting iron ore and coal cannot form part of the benchmark calculation under Article 14(d). For the reasons explained above and consistent with the Appellate Body's findings in *US – Softwood Lumber IV*, by providing the right to extract iron ore and coal, the GOI provided recipients with iron ore and coal consistent with Article 1.1(a)(1)(iii). Commerce properly constructed the cost of the iron ore and coal to Tata and compared this constructed price to a world market price for iron ore and an actual import price for coal in order to determine whether the recipients of the mining rights received something "on terms more favorable than those available in the market." These calculations are fully explained in paragraph 515 of the U.S. first written submission. India's objections to the benefit calculations for mining rights are premised on incorrect interpretations of both Articles 1 and 14 of the SCM Agreement and therefore are without merit.

VII. The U.S. Cumulation Provisions are Consistent with the SCM Agreement

31. India's arguments regarding cumulation fail because the cumulation of subsidized and dumped imports that are subject to simultaneous injury investigations is consistent with the text and context of Article 15 of the SCM Agreement, read in light of the object and purpose of the SCM Agreement. India argues that the text of Article 15.3 does not permit cumulation of subsidized imports with dumped imports. However, the text of Article 15.3 does not address this type of cumulation at all, much less prohibit it. Both the SCM and AD Agreement permit investigating authorities to cumulate imports for the purpose of assessing injury, and the Appellate Body has found cumulation to be "a useful tool for investigating authorities to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination…" By identifying this policy as a critical rationale underlying the cumulation provisions of these Agreements, the Appellate Body has acknowledged that injury to the domestic industry might come from several sources simultaneously, and has recognized that "it may well be the case that the injury the [antidumping and countervailing] duties seek to counteract is the same injury to the same industry."

32. It is telling that India has not challenged the cumulation of imports that are simultaneously subsidized and dumped, even though this circumstance was presented by the underlying determination. If Article 15.3 permits a cumulated analysis of the effects of imports that are both dumped and subsidized in injury investigations, then Article 15.3 must also permit a cumulated analysis of all unfairly traded imports, whether subsidized or dumped. For, as the United States has explained, it is simply not possible, as a practical matter, for an authority to

disentangle or unravel the dumping-related effects of dumped and subsidized imports from their subsidies-related effects, because the effects are precisely the same.

33. Finally, India mistakenly claims that the U.S. aggregated "negligibility" analysis is inconsistent with Article 15.3 because it requires the Commission to perform this analysis on an individual country basis. Neither Article 15.3 nor Article 11.9 of the SCM Agreement specifically defines the term "negligibility". Moreover, the parallel provision in the AD Agreement includes the same allegedly country-specific language, but goes on to set parameters for "negligibility" findings that explicitly contemplate an aggregated analysis. Given that there is no level of negligibility specified in the SCM Agreement, the U.S. statute's negligibility test is not inconsistent, as such, with the provisions of Article 15.3.

34. With respect to the U.S. sunset provisions and the Commission's sunset analysis, India's challenges have a simple and fatal problem: they were raised under Article 15 of the SCM Agreement, which does not apply to sunset reviews. As the Appellate Body has consistently found, for example in *US – Carbon Steel* and *US – Corrosion-Resistant Steel Sunset Reviews*, the provisions of the Agreements governing dumping, subsidies, and injury findings in original investigations do <u>not</u> apply to an authority's likely injury analysis in sunset reviews. Therefore, India has no basis for either an "as such" or "as applied" challenge to these measures.

VIII. Financial Contribution

66. India argues that the SDF loans are neither "direct," nor even a "transfer" of funds under the SCM Agreement, because the funds do not move "directly" from the SDF Managing Committee and because the SDF Managing Committee does not hold title to the funds such that it can "transfer" that title. However, there is no question that a loan made to an entity by a public body is a "direct transfer". Article 1.1(a)(1) includes "loans" in its illustrative list of direct transfers. Rather, India's arguments relate to which entity *made* the loan, and whether or not that entity was a public body. And as the United States has repeatedly pointed out, the record shows that the SDF Managing Committee, which is comprised exclusively of four government officials, made all the decisions regarding the issuance, terms and waivers of all SDF loans. Thus, while the JPC handled many of the day-to-day operations of the SDF program, the facts demonstrate, and Commerce found, that the SDF Managing Committee controlled the distribution of loans, and was therefore responsible for making the loans available to recipient companies.

IX. U.S. Measures Regarding the Use of Facts Available

67. India claims in its second written submission that the United States "provides almost no substantive defense to India' (sic) claims" against the U.S. facts available provisions set out in paragraph 172 of its first written submission, and that we instead use the discretionary nature of

the provisions as a "safe harbor". India's claims are patently wrong, as the United States has demonstrated repeatedly throughout its submissions.

68. First, we find it interesting that India refers back to these specific arguments, because two of the three arguments listed there reflect the panel's interpretation of Annex II to the AD Agreement in *Mexico – Rice*. India argues in its most recent submission, however, that the protections included in Annex II should not even apply in the context of the SCM Agreement. In addition to being incorrect, India's argument – if accepted – would mean that the entire legal premise of India's own facts available argument would disappear. This is because Article 12.7 of the SCM Agreement – standing alone and without context – provides no basis for India's facts available claim. It is the context of Annex II which provides the basis for a breach. But India cannot rely on certain elements of Annex II for context, while saying at the same time that paragraph 7 of Annex II – which explicitly notes consequences for non-cooperation – should be ignored. Rather, the United States agrees with other Members and the Appellate Body that Annex II of the AD Agreement is important context for interpreting Article 12.7. As we explained in our opening statement at the first panel meeting, the term "best" facts available – as used in the title of Annex II – refers to the facts that would be derived by an authority in its application of the protections contained in Annex II to the AD Agreement. In the U.S. view, these facts are those most probative, relevant and verifiable. The U.S. measures fully reflect these provisions.

69. Second, with respect to the third of the three bullet points in paragraph 172 of India's first written submission, the United States has consistently disputed India's assertion that the U.S. measures allow the punitive application of facts available, or apply the "worst possible inference". For example, India often refers to examples of application in which Commerce chose the highest subsidy rate found for another cooperating company from the same country, using the same program. The highest rate for a *cooperating* company is far from "the worst possible inference," and far from "punitive." Rather, in those instances, Commerce used a verifiable fact otherwise available – an actual subsidy rate – that reflected circumstances as similar as possible to those of the non-cooperating company. In reality, however, the non-cooperating party might have benefitted from the subsidy program to a *greater* extent than the parties that chose to cooperate and provide the requested information. By basing its determination upon verifiable facts, Commerce limits the extent of the inference it draws in making determinations based on facts available. Therefore, far from drawing the "worst possible inference", Commerce often may put the non-cooperating party in a *better* position than it would have been in had the party cooperated.

X. 2013 Sunset Review

70. India complains in its second written submission that the United States "offers no substantive response to the findings under challenge from the 2013 sunset review determination".

However, in its own submission, India has not raised a single argument as to which findings the Panel should make, has not explained what evidence should be examined, nor described how the WTO Agreement applies. Rather, India simply states: "for substantially the same reasons as enunciated above, the entire set of findings in the 2013 sunset review determination is inconsistent with Article 12.7 of the SCM Agreement". India's claims with respect to the 2013 sunset review are "as applied" claims, which must be demonstrated on the facts. India has raised no arguments, much less informed the Panel and the United States of the findings it wishes to challenge. India has failed to even submit the measure to which it refers to the Panel as an exhibit. As the Appellate Body in *EC – Fasteners (China)* stated: "the burden rests on the complainant to substantiate its claims with legal arguments and evidence in its written and oral submissions to the panel. While the DSU, and Article 11 in particular, require a panel to make an objective assessment of the matters that are before it, the panel must turn its attention to and direct its questions at claims and arguments that the parties have articulated." That is, the party itself must articulate its claims and arguments and cannot simply raise claims for the Panel to substantiate on its own initiative. In these circumstances, India has provided no *prima facie* case for the United States to rebut, and India's claims in this respect therefore must fail.