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

(DS436)

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

August 19, 2013

I. Introduction

1. As has been found by panels and the Appellate Body on numerous occasions, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") represents a "delicate balance" between disciplining the use of subsidies and countervailing measures while, at the same time, enabling Members whose domestic industries are harmed by subsidized imports to use such remedies. India's claims, and its submissions throughout this proceeding, have revealed India's intention to skew this delicate balance in its own favor, by asking the Panel to adopt novel – sometimes even radical – interpretations of the SCM Agreement. Consistent with its obligations under Articles 11 and 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), the United States asks the Panel to deny India's claims, and to protect and maintain the balance of rights and obligations attained by the negotiators of the SCM Agreement.

II. India Has No Basis For Its Claims That Section 351.511(a)(2) Of the U.S. Regulation Is Inconsistent "As Such" With Article 14(d) of the SCM Agreement

2. In this dispute, India makes several claims with respect to the consistency of Section 351.511(a)(2) – the U.S. regulation for determining the benefit when goods or services are provided by a government for less than adequate remuneration – with the guidelines contained in Article 14(d) of the SCM Agreement.

3. The text of Article 14 does not support calculating the benefit based on a cost-to-government analysis. India offers several flawed textual interpretations to advance its argument that Section 351.511(a)(2) is "as such" inconsistent with the Article 14(d) guidelines. In its responses to the Panel's first set of written questions, for example, India remains steadfast in advancing – incorrectly – a cost-to-government test in determining whether a government provides a good or service at less than adequate remuneration within the meaning of Article 14(d); an argument which is clearly incorrect based on the text of the Agreement as well as prior panel and Appellate Body reports. In response to Panel Question 4, India further provides a matrix – purporting to divide the benefit calculation for goods or services into a two-step process – in an attempt to support its argument.

4. These claims are premised on its misinterpretation of the text of Article 14(d). For example, in response to Panel Question 4 India claims that, in some instances, an investigating authority may not be entitled to find a benefit even where remuneration is determined to be inadequate. Under a proper interpretation of the Article 14(d) guidelines, however, where an investigating authority determines that a financial contribution by a government has been conferred and that the adequacy of remuneration is insufficient, an investigating authority *may* find that the amount by which the private, arm's-length benchmark price exceeds the government price is a benefit under the SCM Agreement.

5. India also attempts to support its interpretation of Article 14(d) through a flawed textual distinction between Articles 14(b)-(c) and 14(d), by erroneously arguing that the term "in relation to" contained in Article 14(d) means that the benchmark analysis under Article 14(d) is somehow fundamentally different from that under Articles 14(b) or (c). In making this

argument, India ignores the parallel structure of paragraphs 14(b), (c) and (d). India also argues that while under paragraphs 14(b) and (c) the investigating authority will find the existence of a benefit "the moment there is a difference in the amounts being compared," Article 14(d), on the other hand, employs a "much broader and more comprehensive framework." Contrary to India's assertions, in a manner equivalent to 14(b) and (c), the text of the Article 14(d) guidelines provided that where the government price is more favorable than the benchmark, a benefit has been conferred.

6. There is furthermore no support for equating the phrase "commercial considerations" in Article XVII of the GATT 1994 with "prevailing market conditions" in Article 14(d). India's position that the phrase "in relation to prevailing market conditions" – the terms actually contained in Article 14(d) – really means "in accordance with commercial considerations" reflects India's mistaken theory that the terms used in Article XVII of GATT 1994 may be substituted for those in Article 14(d) of the SCM Agreement. In particular, India again incorrectly asserts that the Panel's findings in *Canada – Wheat* support the substitution of these terms.

7. In the United States view, Section 351.511(a)(2) is consistent with Article 14's preference for using private prices for the benchmark when determining whether a good is provided at less than adequate remuneration. India has no basis for challenging the hierarchical structure of Section 351.511(a)(2). With respect to India's arguments that an import price actually paid by a producer in the Indian market is an out-of-country price, and that the inclusion of delivery charges is somehow improper, India argues that "prices emanating from countries other than the country in question represent 'out of country' prices." Prices for imported goods, which are paid by domestic purchasers, however, are in fact in-country prices; it is for this reason that under the U.S. regulation an actual import price is considered a Tier I price—a price, which emanates in the "country in question." India's contention that import prices automatically are Tier II or out-of-country prices (referring to the language in *US — Softwood Lumber IV (AB)*) is both factually incorrect and inconsistent with the realities of domestic markets.

8. Moreover, India's objection to adjustments for delivery costs is based on its flawed position that the adequacy of remuneration under Article 14(d) of the SCM Agreement should be a determination with respect to the provider of the goods, using a cost-to-government analysis. Under the SCM Agreement, the adequacy of remuneration is assessed with respect to the *recipient,* and the Article 14(d) guidelines contemplate adjustments for prevailing market conditions, conditions which explicitly include transportation. India likewise argues that if the government price is an ex-mine price, any charges associated with the delivery of goods should not be considered in the benefit calculation. However, this argument fails because an ex-works price does not include the cost incurred by the purchaser for getting a purchased input to its factory door; an ex-works price therefore is not reflective of the prevailing market conditions from the perspective of the recipient. Prevailing market conditions are such that a private purchaser (in making a purchasing decision) and a private seller (in setting a price at which to sell the good) would consider all of the costs associated with getting the good to the factory in setting the market negotiated price. India's interpretation would not be in accordance with the purpose of the Article 14(d) benchmark comparison—which is to assess whether the recipient is

better off than it would have been absent that financial contribution. Commerce's benefit regulation is consistent with the guidelines contained in Article 14(d) of the SCM Agreement.

III. India's Arguments Regarding Comparative Advantage Have No Merit

9. In its response to Panel Question 13, India continues to assert an alleged "comparative advantage" that must be accounted for in both the use of a Tier II analysis under Section 351.511(a)(2)(ii) and the use of "delivered prices" under Section 351.511(a)(2)(iv). India, however, does not provide any evidence of an alleged comparative advantage, misuses the term "comparative advantage", and inappropriately relies on the Appellate Body report in *US – Softwood Lumber IV* throughout its first written submission and in response to question 13 of the Panel's first set of written questions.

IV. Commerce Did Not Err in Finding That NMDC Provides Iron Ore For Less Than Adequate Remuneration

10. In addition to its "as such" challenges to the U.S. regulation, India has made multiple "as applied" claims, including those with respect to: Commerce's determination that NMDC's sales of high grade iron ore conferred a benefit, Commerce's determination that the provision of captive mining rights for iron ore and coal was for less than adequate remuneration, and Commerce's benefit calculations in the challenged proceedings. As discussed in the U.S. first written submission, many of these claims echo the flawed arguments put forward by India in its "as such" challenge.

11. With respect to India's claims that the NMDC's sale of high grade iron ore did not confer a benefit consistent with Article 14(d) of the SCM Agreement, India's objections lack basis. Commerce appropriately calculated the benefit for the NMDC's provision of iron ore at less than adequate remuneration in the 2004, 2006, 2007 and 2008 administrative reviews. In each of these reviews, there were no private, arm's-length prices ("Tier I" prices) for high grade iron ore and lumps in the Indian market in the record evidence submitted to Commerce. With respect to the DR-CLO ore benchmarks, on the other hand, private arm's-length prices were available and on record, which meant that Commerce was able to use such actual "Tier I" BCI prices. For all of the above, Commerce compared the respective private benchmark prices to the NMDC prices on an apples-to-apples basis in order determine whether and to what extent NMDC prices were less than adequate remuneration.

12. The United States did not, as India argues in its response to questions 17 and 19, artificially inflate the benchmark by adding in unnecessary delivery costs or, as India argues in response to question 20, by ignoring evidence on the record of private arm's-lengths transactions. In response to question 20, India further argues that the explanations offered by the United States in its first written submission are "ex-post facto rationalizations". But it is India and not the United States that is trying to add new arguments to the matters considered during the administrative proceeding. During the administrative proceedings at issue, none of the parties argued that the information contained in the association chart should be used in calculating the appropriate benchmarks. India raises this argument only now. With regard to the

price quote from Tata, the second piece of evidence cited by India, the United States notes that 22 of the 24 pages of the exhibit relied on by India – Exhibit IND-70 – are not, as India asserts, public documents. Rather, they are business confidential documents subject to administrative protective order (APO). Accordingly, the pricing data in the document was confidential and could not be used as a benchmark for any other party's transactions.

13. Further, not only is the data confidential but the data cannot be used as benchmarks because they do not reflect actual private, arm's-length transactions. Instead, these documents merely contain a price quote and not a completed transaction. Therefore their contents have no bearing, as India would purport, on the availability of a public in-country arm's length private price in India with respect to the challenged determinations.

14. Finally, with respect to the application of Section 351.511(2)(a)(iv), the U.S. provision which adjusts for delivered prices, the guidelines contained in Article 14(d) contemplate an apples-to-apples comparison by directing Members to account for prevailing market conditions—including transportation—in assessing the adequacy of remuneration. These charges are an integral and inseparable part of determining a benchmark price that reflects prevailing market conditions in the country of provision.

V. Commerce's Findings With Respect To Specificity Were Consistent With the SCM Agreement

15. India makes a series of challenges under Articles 2.1 and 2.4 of the SCM Agreement to Commerce's specificity determinations with respect to the GOI's sale of iron ore and captive mining programs. With respect to Commerce's finding that the NMDC iron ore program was used by a limited number of certain enterprises, the record evidence demonstrates that almost all of the iron ore consumed in India is used for the production of steel, by steel and pig and sponge iron producers. Article 2.1 provides that specificity may be found if a subsidy program is "use[d] by a limited number of certain enterprises." The question before an investigating authority is whether the enterprises or industries are "a sufficiently discrete segment" of the "economy in order to qualify as 'specific' within the meaning of Article 2 of the SCM Agreement." In the 2004, 2006, 2007, and 2008 administrative reviews, Commerce found that the GOI's provision of iron ore was *de facto* specific to the Indian steel industry because only a limited number of enterprises use iron ore. Further, the record evidence showed that 76 percent of the iron ore was used by steel producers. Therefore, positive evidence demonstrates that a limited number of certain enterprises, when compared to the diverse economy of India, use the NMDC iron ore program.

16. India also incorrectly argues that if the "inherent characteristics" of a good limit its use to a limited number of certain enterprises, the provision of that good cannot be found to be specific. Yet there simply is no basis in the text of Article 2 for prohibiting findings of specificity based on the good's "inherent characteristics." Rather, as previous panels have correctly found, when the good provided by the government is of limited utility, it is more likely that a subsidy is conferred on certain enterprises. Finally, with respect to India's arguments that the last sentence

of Article 2.1(c) required Commerce to specifically address the diversification of the Indian economy and the duration of the program, India's assertions are incorrect and contrary to the findings of previous panels with respect to this provision. Commerce in fact did take account of these factors but, in the context of a *de facto* specificity analysis, was not required to address them explicitly in its determinations.

17. India repeatedly denies the existence of a captive mining program for iron ore despite record evidence. India further argues that absent a "captive" mining program for iron ore, mining rights are generally available under India's mining lease laws and thus not specific under Article 2 of the SCM Agreement. This argument has no merit. The record is replete with evidence confirming the existence of a captive iron ore mining policy for four of India's largest steel makers; in particular, two extensive reports regarding the Indian steel industry, which were commissioned by the GOI: the *Dang Report* and the *Hoda Report*, as well as newspaper reports identifying the four steel companies who have been granted captive mining rights pursuant to India's captive mine policy. Commerce's finding that India does have a captive mining program for iron ore was based on record evidence, and Commerce thus has a sound basis for finding that the program is *de facto* limited to a few steel companies.

18. Moreover, contrary to India's assertions, record evidence demonstrates that Tata Steel's captive mining rights for coal are subject to India's law on captive mining of coal. In its response to question 25 of the Panel's first set of written questions, for example, India avoids answering the Panel's yes or no question regarding whether record evidence demonstrates the existence of a captive mining program for coal. As explained in the U.S. first written submission, the GOI's provision of a captive mining lease to Tata was specific, as defined by Article 2.1(a) of the SCM Agreement.

VI. U.S. Cumulation Measures Are Not Inconsistent As Such, or As Applied in the Underlying Hot-Rolled Steel Proceedings, with Article 15 of the SCM Agreement

19. In its submissions to the Panel, India has presented "as such" and "as applied" claims under Article 15 of the SCM Agreement with respect to cumulation in original investigations and sunset reviews. As demonstrated in the U.S. first written submission and in the U.S. answers to the Panel's questions, India's claims are unfounded.

20. India's as such and as applied claims under Article 15 of the SCM agreement with respect to the cumulation of subsidized and dumped imports in sunset reviews must fail because Article 15 does not apply to sunset reviews. India included in its Panel Request a challenge to the U.S. statute and the Commission's sunset determination under Articles 15.1, 15.2, 15.3, 15.4 and 15.5 of the SCM Agreement to the U.S. statute and the Commission's sunset determination. These provisions, however, only govern injury determinations in original investigations, and do not apply in the context of sunset reviews. The SCM Agreement does contain obligations with respect to sunset reviews; those obligations, however, are set out in Article 21 of the SCM Agreement. India's panel request does not raise any Article 21 claims with respect to sunset determinations, and therefore any such issues are not within the Panel's terms of reference.

21. In addition to the key difference between the SCM Agreement articles applicable to investigations and those applicable to sunset reviews, the United States notes that India misunderstands important factual differences between investigations and sunset reviews. Relying on *EU – Footwear from China*, India asserts that the determination in the sunset review relied on the determination in the original injury investigation, and therefore is "tainted" by the allegedly WTO-inconsistent original injury investigation. India's argument is illogical for two reasons. First, the sunset determinations for hot-rolled steel examined a different legal issue than that considered in the original investigation. The original investigation entailed an examination of whether subject imports during the original period of investigation materially injured the domestic industry or threatened it with material injury, while the sunset review involved an assessment of data during the period of the sunset review to determine whether the likely volume, price and impact of subject imports were likely to lead to continuation or recurrence of material injury to the domestic industry if the orders were revoked. Second, the Commission's determination in the sunset reviews was based on a very different set of imports than was its original injury determination. In short, the original investigation and sunset review were distinct processes with different purposes.

22. With respect to the consistency of the U.S. cumulation measures in the context of original investigations, the United States submits that the text of Article 15.3 does not prohibit cumulation of dumped and subsidized imports in original investigations. Moreover, it is not possible, as a practical matter, for an authority to disentangle the effects of dumped imports from those of subsidized imports. The difficulty presented by India's interpretation of Article 15 can be seen from the fact that in many investigations, significant volumes of subject imports are both dumped and subsidized, as was the case in the hot-rolled steel investigations and reviews. In this situation, other investigating authorities, such as the Canadian International Trade Tribunal and the Australian Customs and Border Protection Service, have expressed the view that it is not possible to "disentangle" the injurious effects of the dumped and subsidized imports. Indeed, India acknowledges that it is not arguing that an authority must disentangle the effects of imports that are both dumped and subsidized. By taking such a position, India implicitly acknowledges the validity of the positions expressed by the United States in this dispute.

23. Therefore, India is incorrect in asserting that the United States in this dispute has stated or implied that disentanglement is possible. India's assertion is based on a misunderstanding of a discussion in the U.S. first written submission of volume trends and underselling levels of the subject imports in the steel investigations at issue in this dispute. In this portion of the U.S. submission, the United States was responding to India's partial portrayal of the record. In particular, the United States pointed out that the record of its original investigations showed the volume of subject imports found to be both dumped and subsidized represented 40% of all cumulated subject imports; that they represented nearly half of import growth during the period; and that they undersold the domestic like product in the same percentage of comparisons as the subject imports that were only found to be dumped. The United States further explained that the record data showed that the volumes of imports that were both dumped and subsidized, such as those from India, exacerbated the adverse effect on the domestic industry during the period of investigation. Nothing in this explanation, however, suggests that it was possible to disentangle the effects of these imports.

24. Based on the foregoing, the United States requests that the Panel find that the U.S. measures "as such", and "as applied" in the underlying countervailing duty proceedings, are not inconsistent with Article 15 of the SCM Agreement.

VII. The United States Complied With Article 1 of the SCM Agreement in Finding that the SDF Managing Committee and NMDC Were Public Bodies

25. We have set out in the U.S. first written submission an interpretation of the term "public body" in Article 1.1(a)(1), based on a proper interpretation of that provision given its text, and in light of its context and the object and purpose of the SCM Agreement. Specifically, we have explained that the term public body refers to any entity controlled by the government such that the government can use the entity's resources as its own. The evidence on record in this dispute with respect to the NMDC and the SDF Managing Committee satisfies not only this interpretation of the term public body, but would satisfy any interpretation of that term, given the GOI's extensive involvement in and control over each entity, as well as the nature of the functions that each entity performs in India.

26. With respect to the SDF Managing Committee, the relevant facts with regard to the SDF Program are clear. The GOI established the SDF Program and its constituent committees to modernize the steel sector, and to ensure that there was a steady supply of certain types of iron and steel in line with government goals. Under the program, steel producers could only sell at the prices set by the JPC, and the JPC increased the prices for certain steel products and mandated that the additional funds "be remitted to the SDF." Companies that contributed to the fund were eligible to take out long-term loans at advantageous rates, and the terms and availability of these loans were approved by the SDF Managing Committee. In its final determination, Commerce found that the SDF Managing Committee was composed entirely of senior GOI officials, including the Secretary of the Ministry of Steel, the Secretary of Expenditure, the Secretary of the Planning Commission, and the Development Commissioner for Iron and Steel. Because the SDF Managing Committee made all financial decisions with respect to SDF loans, and because this committee was composed exclusively of GOI senior officials, it is clear that, at a minimum, the GOI controlled the SDF Managing Committee for purposes of Article 1.1(a)(1), such that it could, and did, use its resources as its own. In the alternative, Commerce's determination is consistent with a finding that the SDF Managing Committee is a public body even under the standard set out by the Appellate Body in *US – Anti-Dumping and Countervailing Duties* because the SDF Managing Committee took actions that constituted governmental functions, and because the GOI exerted meaningful control over the SDF.

27. With respect to NMDC, India continues to misrepresent Commerce's determination that the NMDC is a public body by erroneously claiming that the determination is solely based on the fact that the GOI owns the NMDC. As was demonstrated in the U.S. first written submission, Commerce analyzed evidence regarding both ownership and control in making its finding that the NMDC was a public body, including evidence that the GOI was heavily involved in the selection of directors of the NMDC, and NMDC's own statement that the "NMDC is under the administrative control of the Ministry of Steel & Mines, Department of Steel Government of India." Therefore, India cannot deny that Commerce made its "public body" determination

based on a finding of government control as well as government ownership. Moreover, even in the event that this Panel relies on the "government function" test enunciated by the Appellate Body in *US – Antidumping and Countervailing Duties*, the evidence clearly demonstrates that the NMDC performs a government function in India. In addition to the evidence of ownership and control discussed above, record evidence indicated that the Indian government, *i.e.,* the state and federal governments, owns all the mineral resources on behalf of the Indian public, and that the federal government has the final approval of the granting of mining leases for iron ore. Therefore, it is a government function in India to arrange for the exploitation of public assets, in this case iron ore, and the GOI specifically established the NMDC to perform part of this function.

28. Therefore, the Panel should reject India's claim that Commerce acted inconsistently with Article 1.1(a)(1) in finding that the SDF Managing Committee and the NMDC were public bodies.

VIII. The SDF Loans Constituted "A Direct Transfer of Funds" Within the Meaning of Article 1.1(a)(1)(i)

29. The facts demonstrate that Commerce reasonably concluded that the SDF levy operated as a tax imposed on consumers over which the GOI, through the SDF Managing Committee, had complete control. India has attempted to call this finding into question by presenting the transfer of funds to steel companies as a discrete and isolated action performed by the JPC, wholly divorced from the decision by the SDF Managing Committee that the funds should be transferred. India's argument draws artificial distinctions between the constituent committees of the SDF program, and would lead to a situation in which the managers of a company, for example, should be considered one entity, and the directors another. There is no basis in the SCM Agreement for drawing such artificial distinctions and no basis in the record evidence before Commerce for it to have made such a finding.

30. India attempts to obscure the straightforward facts, and has presented inconsistent arguments regarding whether the funds collected from steel consumers were "consumer funds" or "producer funds." Most recently, in its response to the Panel's questions, India has argued that the extra SDF price element collected from steel consumers constituted steel producers' "profits," and became part of the Indian steel producers' own funds when the purchase price was paid by consumers – and therefore was not analogous to a tax, as Commerce determined. However, this *GOI-mandated* levy can no more constitute a profit for steel producers than a government-determined sales tax collected on the sale of those goods could constitute profit. As explained above, the GOI required a levy to be added to the price of certain steel products, and also mandated that this levy be deposited in the SDF Fund after it had been collected by the producers. Thus, this levy, although it was collected as an extra price element, was never an extra *profit* amount determined by steel producers and intended for their use as they deemed necessary. Rather, it was a tax-like element mandated by the GOI and earmarked for the government-controlled SDF Fund. Based on the foregoing, India has not shown that Commerce acted inconsistently with Article 1.1(a)(1)(i) of the SCM Agreement in making its determination.

IX. The U.S. Measures Regarding Facts Available Are Not Inconsistent "As Such" with Article 12.7 of the SCM Agreement

31. India's claim that the U.S. measures governing facts available are inconsistent "as such" with Article 12.7 of the SCM Agreement is in error. India has cited several of Commerce's determinations in an effort to show the United States takes the approach of "systematically drawing adverse inferences in all cases of non-cooperation". Despite these arguments, however, India has clarified that "it is not challenging the 'systematic application' as a measure", but rather is challenging the statutory and regulatory provisions themselves. Indeed, India cannot argue otherwise, given that its panel request does not include a challenge to Commerce's "practice", but to the U.S. statute and regulation. Therefore, India bears the burden to demonstrate that section 1677e(b) of the U.S. statute, and section 351.308(c) of Commerce's regulations, on their face, are inconsistent with Article 12.7 of the SCM Agreement. India has not done so, and its claims therefore must fail.

32. As an initial matter, the United States has demonstrated that Commerce holds discretionary authority with respect to the use of adverse inferences in selecting from among the facts available. India ignores the statements made by Commerce in promulgating the regulation at issue, dismisses the cited cases out of hand without explanation, and continues to insist that Commerce has drawn adverse inferences "in all cases of non-cooperation." Contrary to India's assertions, however, the cases cited by the United States document Commerce's exercise of discretion, and thereby demonstrate that Commerce holds discretionary authority under U.S. law. Indeed, India acknowledges that the language of these provisions is "discretionary". Therefore, India's cannot sustain its "as such" claims against these measures.

33. In any event, India has not demonstrated that the discretionary authority provided by the U.S. measures violates Article 12.7 of the SCM Agreement, as interpreted in its context, including Article 6.8 and Annex II of the AD Agreement. In this respect, we draw the Panel's attention to India's response to Panel Question 75, where India expressly recognizes that Article 12.7 permits authorities to apply what it terms "adverse facts," provided it is "demonstrated that those 'adverse facts' are the 'most fitting and appropriate' ones." India fails to explain, however, why the discretion to apply so-called "adverse facts" provided for in the U.S. measures breaches Article 12.7. The application of facts available occurs where certain necessary facts are *not available*. Other facts, therefore, as well as certain inferences, must be used in filling in the gap in the record before the investigating authority. Without the discretion to use an adverse inference, it is unclear how an authority would otherwise reach a determination in which "the most fitting and appropriate" "adverse facts" are applied.

34. Lastly, the United States reiterates its submission that Article 6.8 and Annex II of the AD Agreement provide relevant context to interpret Article 12.7 of the SCM Agreement, as recognized by the Appellate Body in *Mexico – Rice*. India agrees with this interpretation, but argues that "use of the word 'could' [in paragraph 7 of Annex II] only acknowledges that in cases of non-cooperation, the inferences / conclusions *may* result in findings that are less favourable to the party concerned." India fails, however, to recognize the logical extension of this statement: that inferences or conclusions that *may* result in such findings therefore can

properly be reflected in an authority's legislation, as is the case here. For the foregoing reasons, India has no valid basis for its claims under Article 12.7 of the SCM Agreement.

X. The United States Did Not Act Inconsistently with Articles 11, 13, 21 or 22 of the SCM Agreement with Regard to New Subsidies Examined in Administrative Reviews

35. India claims that the United States acted inconsistently with Articles 11.1, 11.2, 11.9, 13.1, 21.1, 21.2, 22.1, and 22.2 of the SCM Agreement with respect to Commerce's review of new subsidies programs within the context of administrative reviews. India premises these claims on the erroneous proposition that an investigating authority may not levy countervailing duties pursuant to administrative reviews on subsidy programs that were not examined in the original investigation. India's claims have no merit.

36. As explained in the U.S. first written submission, the SCM Agreement sets out a process by which Members may investigate instances of subsidization affecting its domestic producers and, where appropriate, impose duties to countervail those effects. Once duties have been imposed, the SCM Agreement separately allows interested parties to request a "review" of those duties to determine whether they are still necessary to counteract subsidization. The text of each relevant provision, and the structure of the overall SCM Agreement, establishes that an "investigation" and a subsequent "review" of duties imposed pursuant to an investigation are two separate and distinct processes governed by separate provisions of the SCM Agreement. Indeed, panels and the Appellate Body have found this to be the case.

37. India has recognized the distinction between "investigations" and "reviews" under the SCM Agreement, and acknowledged that there are "categorical distinctions between an original investigation and a review proceeding under Article 21" and that "obligations applicable to original investigations will not necessarily apply to review proceedings." Nonetheless, India glosses over these distinctions – and ignores the text of the SCM Agreement – when it suggests, in response to Panel questions, that "[t]he United States may initiate and conduct the investigation against new subsidies alongside or part of review proceedings covering the old subsidies, while ensuring that the obligations under Articles 11 and 13 are complied with *qua* the new subsidies." While India states that it "is not concerned as to whether a separate docket is created for such new subsidy allegations," that is the practical result of India's claims. Even in its response to a direct question from the Panel, however, India has not explained how its novel interpretation of the SCM Agreement can be supported by the text, much less how it could work in practice.

XI. Conclusion

38. For the foregoing reasons, the United States respectfully requests that the Panel reject India's claims.