

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

Request for the Establishment of a Panel by India

The following communication, dated 12 July 2012, from the delegation of India to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

1. On 24 April 2012 India requested consultations with the United States of America ("United States"), pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Article XXII: 1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Article 30 of the *Agreement on Subsidies and Countervailing Measures* (the "ASCM"), with regard to the imposition of countervailing duties on Certain Hot Rolled Carbon Steel Flat Products from India ("subject goods") by the United States.

2. Consultations were held on 31 May and 1 June 2012. Unfortunately, the consultations were unsuccessful in resolving the dispute. Therefore, India respectfully requests, pursuant to Articles 4.7 and 6 of the DSU and Article 30 of the ASCM, that the Dispute Settlement Body ("DSB") establish a Panel to examine this matter, with the standard terms of reference, as set forth in Article 7.1 of the DSU.

Measures at Issue:

3. The United States conducted a countervailing duty (the "CVD") investigation (No. C-533-821) and levied countervailing duties on the subject goods. The provisional measures were imposed with effect from 20 April 2001 and the final measures were imposed with effect from 3 December 2001. The United States concluded a sunset review in 2007 and continued the duties for a further period of five years. The United States also conducted several Administrative Reviews (the "AR") to determine the CVD rate/s to be applied on the imports made during the relevant AR period. The measures continue to be in force. This request covers the countervailing duties applied on the subject goods by the United States from time to time. A non-exhaustive list of determinations, orders, etc. issued by the United States in Case No. C-533-821 is enclosed as Annex 1.

4. The measures covered in this request also include the following provisions of the United States Tariff Act, 1930 as codified in the United States Code, Title 19, Chapter 4, Subtitle IV ("19 USC") and the United States Code of Federal Regulations, Title 19, Volume 3, Chapter III, Part 351 ("19 CFR 351"):

- (a) 19 CFR § 351.511(a)(2)(i) to (iii);
- (b) 19 CFR § 351.511(a)(2)(iv);

- (c) 19 USC § 1677(7)(G);
- (d) 19 USC § 1675a(a)(7);
- (e) 19 USC § 1675b(e)(2);
- (f) 19 USC § 1677e (b); and
- (g) 19 CFR § 351.308

5. The request also covers all the amendments, replacements, implementing acts or any other related measure in connection with the measures referred herein.

Legal Basis

A. "As such" claims

6. In terms of the provisions contained in 19 CFR § 351.511(a)(2)(i) to (iii), the United States follows a three-tiered benchmark approach in determining the adequacy of remuneration for the provision of goods or services by the Government. Under Tier-I, the United States considers market determined price resulting from actual transactions in the country in question referred to as 'in-country' prices. If the Tier-I price is not available, the United States considers the world market price (Tier-II), provided it is reasonable to conclude that such price would be available to purchasers in the country in question. If the Tier-II price is also not available, the United States will measure the adequacy of remuneration by assessing whether the government price is consistent with market principles. Under these provisions, the United States examines whether the Government price in question is in accordance with market principles only when no benchmark is available under either Tier I or Tier II. The above mentioned provisions of the United States law relegates the prices, which are consistent with market principles as per Tier III, below the benchmark prices determined under either Tier I or Tier II, while measuring the adequacy of remuneration.

7. Further, the benchmark prices under either Tier-I or Tier-II are mandatorily adjusted to reflect the price that a firm actually paid or would pay if it had imported the product. This adjustment will include delivery charges and import duties. The relevant provision is contained in 19 CFR § 351.511(a)(2)(iv). Even if the government price is at ex-factory level, ocean freight, delivery charges and import duties are included in the benchmark price to arrive at delivered prices. In measuring the adequacy of remuneration for the provision of goods, it is inappropriate to mandatorily include delivery charges and import duties. This practice also results in a higher subsidy margin and as a consequence, an excessive rate of countervailing duty.

8. The United States laws contained in 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7), and 19 USC § 1675b(e)(2) provide that the US International Trade Commission shall cumulatively assess the volume and effect of the subject merchandise from all countries with respect to which: (a) petitions seeking imposition of either an antidumping or a countervailing duty were filed on the same day, (b) antidumping or countervailing duty investigations were initiated on the same day; or (c) when both (a) and (b) are satisfied. These provisions permit cumulation of imports from countries that are not subject to simultaneous countervailing duty investigations.

9. The United States laws contained in 19 USC § 1677e (b) and the implementing regulations contained in 19 CFR § 351.308 provide for the use of 'adverse facts available' standards in making determinations in both antidumping and countervailing duty investigations. Under the 'adverse facts available' standard, an adverse inference may be drawn by *selecting* from among the facts otherwise

available. In other words, the investigating authority need not consider *all* the facts available and it is sufficient for the authority to consider one or more facts from among all the facts available to draw an adverse inference. The ASCM does not provide for the use of 'adverse facts available' standard.

10. India considers that the aforesaid provisions of the US laws are inconsistent with the United States' obligations under the Articles 12, 14, 15, 19 and 32 of the ASCM and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization as described below:

- (a) The provisions contained in 19 CFR § 351.511(a)(2)(i) to (iii) are 'as such' inconsistent with Article 14(d) of the ASCM because they mandate a hierarchical approach in which an evaluation of whether the government price in question is in accordance with market principles is not made in every case but only in a case where both Tier I and Tier II benchmarks are not available.
- (b) The provision contained in 19 CFR § 351.511(a)(2)(iv) is inconsistent 'as such' with Article 14(d) of the ASCM because it mandates the use of 'delivered prices' in every case, disregarding the prevailing market conditions for the goods in question in the country of provision.
- (c) The provision contained in 19 CFR § 351.511(a)(2)(iv) is inconsistent 'as such' with Articles 19.3 and 19.4 of the ASCM because the use of 'delivered prices' in every case leads to an excessive subsidy margin and consequently, an inappropriate amount of duty, in excess of the amount of actual subsidy, if any.
- (d) The provisions contained in 19 USC § 1677(7)(G), 19 USC § 1675a(a)(7), and 19 USC § 1675b(e)(2) are "as such" inconsistent with Article 15.3 of the ASCM because they mandate cumulation of imports from countries not subject to simultaneous countervailing duty investigations and consequently, are also "as such" inconsistent with Articles 15.1, 15.2, 15.4 and 15.5 of the ASCM.
- (e) The provisions contained in 19 USC § 1677e (b) and the implementing regulations contained in 19 CFR § 351.308 are "as such" inconsistent with Article 12.7 of the ASCM because they provide for the use of "adverse facts available" in countervailing duty investigations.

11. To the extent the United States Code and the Code of Federal Regulations mentioned above are inconsistent with the provisions of the ASCM, the United States is violating Article 32.5 of the ASCM as well as Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.

B. "As applied" claims

12. India considers that the determinations made, and the countervailing measures imposed, by the United States are inconsistent with Articles 1, 2, 10, 11, 12, 13, 14, 15, 19, 21 and 22 of the ASCM and, at a minimum, with the following obligations under the covered agreements:

- (a) *In connection with the alleged provision of High Grade Iron Ore for Less Than Adequate Remuneration –*
 - (i) Articles 1.1(a)(1) of the ASCM –
 - 1. Because the National Mineral Development Corporation Limited (NMDC) is not "government" or a "public body".

2. Because the sale of iron ore by the NMDC did not amount to financial contribution by the Government of India.
 - (ii) Articles 1.1(a)(1) of the ASCM, in view of the absence of a valid determination that the NMDC is "government" or a "public body" and the failure to make a determination that the Government "entrusts or directs" NMDC to provide high grade iron ore to producers of the subject goods.
 - (iii) Article 1.1(b) of the ASCM, in view of the failure to establish that the sale of iron ore by the NMDC to producers of subject goods conferred a benefit.
 - (iv) Article 2.1(c) of the ASCM, because the sale of iron ore by the NMDC is not *de facto* specific and the determination has been made without considering all the mandatory factors listed therein, in particular, the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy program has been in operation.
 - (v) Article 2.4 of the ASCM, in view of the failure to substantiate the determination of specificity on the basis of positive evidence.
 - (vi) Article 14(d) of the ASCM –
 1. Because the adequacy of remuneration for the provision of iron ore was determined by reference to a benchmark price, without first examining whether the NMDC price itself was adequate.
 2. Because the adoption of the delivered price as benchmark disregarded the prevailing market conditions for sale of iron ore in India.
 3. Because the adequacy of remuneration was not determined in relation to the prevailing market conditions for sale of iron ore in India.
 4. Because the export prices of the NMDC were rejected in determining the adequacy of remuneration.
 5. Because of the use of an 'out of country' benchmark even when an 'in country' benchmark was available, while determining the adequacy of remuneration.
 - (vii) Articles 19.3 and 19.4 of the ASCM, because the determination leads to an excess amount of subsidy, if any, and an inappropriate amount of duty.
- (b) *In connection with the Captive Mining of Iron Ore*
- (i) Article 12.5 of the ASCM, because the United States, based on the evidence on record, could not have satisfied itself as to the existence of a "captive" mining rights program and a separate set of regulations therefor.
 - (ii) Article 1.1(a)(1)(iii) of the ASCM, because the grant of 'mining rights' does not amount to financial contribution by way of provision of goods.
 - (iii) Article 1.1(b) of the ASCM, in view of the failure to establish that grant of mining rights conferred a 'benefit'.

- (iv) Article 2.1(c) of the ASCM, because the grant of mining rights of iron ore is not *de facto* specific to just steel producers and the determination has been made without considering all the mandatory factors listed therein, in particular, the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy program has been in operation.
 - (v) Article 2.4 of the ASCM, in view of the failure to substantiate the determination of specificity on the basis of positive evidence.
 - (vi) Article 14(d) of the ASCM –
 - 1. In view of the failure to determine whether the remuneration for the grant of mining rights was adequate.
 - 2. Because the adequacy of remuneration was not determined in relation to prevailing market conditions for the iron ore in question, in India.
 - 3. Because the prices of the NMDC were rejected in determining the adequacy of remuneration.
 - 4. Because of the use of an 'out of country' benchmark even when an 'in country' benchmark was available while determining the adequacy of remuneration.
 - (vii) Articles 19.3 and 19.4 of the ASCM, because the determination leads to an excess amount of subsidy, if any, and an inappropriate amount of duty.
- (c) *In connection with the Captive Mining of Coal*
- (i) Article 1.1(a)(1)(iii) of the ASCM, because the grant of 'mining rights' does not amount to financial contribution by way of provision of goods.
 - (ii) Article 1.1 (b) of the ASCM, because of the failure to establish that grant of mining rights conferred a benefit.
 - (iii) Articles 2.1(a) and (b) of the ASCM, because the grant of captive mining rights for coal was based on objective criteria and conditions.
 - (iv) Article 14(d) of the ASCM –
 - 1. In view of the failure to determine whether the remuneration for the grant of mining rights was adequate.
 - 2. Because the adequacy of remuneration was not determined in relation to prevailing market conditions for the coal in question, in India.
 - (v) Articles 19.3 and 19.4 of the ASCM, because the determination leads to an excess amount of subsidy, if any, and an inappropriate amount of duty.

(d) *In connection with the operations of the Steel Development Fund (SDF)*

- (i) Article 1.1(a)(1) of the ASCM –
 - 1. Because the Joint Plant Committee (JPC) is not 'government' or a 'public body'.
 - 2. Because the grant of loans from the SDF is not a government practice that involves the direct transfer of funds, or potential direct transfer of funds, to steel producers.
- (ii) Articles 1.1(a)(1) of the ASCM, in view of the absence of a valid determination that JPC is "government" or a "public body" and the failure to make a determination that –
 - 1. The SDF involves the Government making payments to a funding mechanism.
 - 2. The Government "entrusts or directs" the JPC to establish and operate the SDF.
- (iii) Article 1.1(b) of the ASCM, because the SDF program did not confer a benefit on the participating steel producers.
- (iv) Article 14 of the ASCM –
 - 1. In view of the failure to determine the net benefit, if any, i.e., after adjusting the costs incurred by the exporters in order to participate in the SDF program.
 - 2. Because the benchmark adopted did not represent the rate applicable for comparable commercial loans.
 - 3. Because the application of the relevant United States' laws and regulations is not transparent and adequately explained.
- (v) Articles 19.3 and 19.4 of the ASCM, because the determination leads to an excess amount of subsidy, if any, and an inappropriate amount of duty.
- (vi) Article I of the GATT, in view of the inconsistent and discriminatory determinations in respect of similar programs, i.e., funds from producer levies.

(e) *In connection with the injury determination –*

- (i) Article 15.3 of the ASCM, because imports from 11 countries have been cumulated, of which six countries are not subject to simultaneous CVD investigation.
- (ii) Articles 15.1 and 15.2 of the ASCM, because both subsidized imports and non-subsidized imports have been considered together in determining injury.
- (iii) Articles 15.1 and 15.4 of the ASCM –
 - 1. Because both subsidized imports and non-subsidized imports have been considered together while examining the impact of subsidized imports on the domestic industry.

2. In view of the failure to consider all the mandatory economic factors, in particular, growth, return on investment and ability to raise capital or investment.

- (iv) Article 15.5 of the ASCM, because both subsidized imports and non-subsidized imports have been considered together while demonstrating the causal relationship between subsidized imports and injury to the domestic industry.

(f) *In connection with other issues*

- (i) Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.
- (ii) Articles 13.1 and 13.2 of the ASCM, in view of the failure to invite India for consultations before including New Subsidy Allegations within the scope of Administrative Reviews.
- (iii) Article 21 of the ASCM, because levying countervailing duties in respect of new subsidies does not amount to reviewing the need for continuation of the existing countervailing duties.
- (iv) Article 22.1 and 22.2 of the ASCM, in view of the failure to issue a public notice regarding initiation of investigation into the alleged new subsidy programs.
- (v) Article 12.7 of the ASCM, in view of the punitive application of the 'adverse facts available' standard while determining the subsidy margins.

13. India considers that the measures, 'as applied', are inconsistent with Articles 22.3 and 22.5 of the ASCM because the determinations of the United States do not set forth, in sufficient detail, the findings and conclusions on the material issues of facts and law, all relevant information on the matters of fact and law, reasons for the various findings, as well as reasons for acceptance or rejection of relevant arguments or claims raised by the interested parties.

14. As a consequence of the inconsistencies mentioned above, the countervailing duties applied in this case are inconsistent with Articles 10 and 32.1 of the ASCM and Article VI of the GATT 1994.

15. India further considers that the measures at issue have a serious adverse impact on the export of subject goods from India to the United States. Further, India considers that the measures at issue cause nullification or impairment of benefits accruing to India under all the aforesaid cited agreements.

16. India hereby requests that this request for the establishment of a Panel be placed on the agenda of the DSB meeting to be held on 23 July 2012.

Annex 1

Original Investigation

1. Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Determination With Final Antidumping Duty Determinations: *Certain Hot-Rolled Carbon Steel Flat Products From India*., 66 FR 20240-01, April 20, 2001.
2. Issues and Decision Memorandum – Final Results of the Countervailing Duty Investigations: *Certain Hot-Rolled Carbon Steel Flat Products From India*, 66 ITADOC 49635, September 21, 2001.
3. Final Affirmative Countervailing Duty Determination: *Certain Hot-Rolled Carbon Steel Flat Products From India*, 66 FR 49635-01, September 28, 2001.
4. Injury Determination: *Hot Rolled Steel Products from China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 701-TA-405-408 and 731-TA-899-904 and 906-908, Pub. 3468, United States International Trade Commission, November 2001.
5. Amended Final Results of Countervailing Duty Orders: *Certain Hot-Rolled Carbon Steel Flat Products From India and Indonesia*, 66 FR 60198-01, December 3, 2001.
6. Countervailing Duty Order in the Investigation: *Certain Hot Rolled Carbon Steel Flat Products from India*, January 8, 2002.

Administrative Review: POR April 20, 2001 through December 31, 2002

7. Preliminary Results of Countervailing Duty Administrative Review: *Certain Hot-Rolled Carbon Steel Flat Products from India*, 69 FR 907-01, January 7, 2004.
8. Issues and Decision Memorandum – Final Results of the Countervailing Duty Investigation: *Certain Hot-Rolled Carbon Steel Flat Products From India*, 69 ITADOC 26549, May 6, 2004.
9. Final Results of Countervailing Duty Administrative Review: *Certain Hot-Rolled Carbon Steel Flat Products from India*, 69 FR 26549-01, May 13, 2004.

Administrative Review: POR January 1, 2004 through December 31, 2004

10. Preliminary Results of Countervailing Duty Administrative Review: *Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 FR 1512-01, January 10, 2006.
11. Issues and Decision Memorandum – Final Results of Administrative Review of the Countervailing Duty Order : *Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 ITADOC 28665, May 10, 2006.
12. Final Results of Countervailing Duty Administrative Review: *Certain Hot-rolled Carbon Steel Flat Products from India*, 71 FR 28665-01, May 17, 2006.

Sunset Review

13. Issues and Decision Memorandum – Final Results of Expedited Sunset Reviews of the Countervailing Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand, 71 ITADOC 70960, December 7, 2006.
14. Final Results of the Expedited Five-Year (Sunset) Reviews of the Countervailing Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand, 71 FR 70960-03, December 7, 2006.
15. Injury Determination – Hot Rolled Steel Products from China, India, Indonesia, Kazakhstan, Argentina, Romania, South Africa, Taiwan, Thailand, and Ukraine, 701-TA-404-408 and 731-TA-898-902 and 904-908(Review), Pub. 3956, United States International Trade Commission, October 2007.
16. Continuation of Antidumping Duty and Countervailing Duty Orders – Certain Hot-Rolled Carbon Steel Flat Products from India, Indonesia, the People's Republic of China, Taiwan, Thailand, and Ukraine, 72 FR 73316-03, December 27, 2007.

Administrative Review: POR January 1, 2006 through December 31, 2006

17. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 73 FR 1578-02, January 9, 2008.
18. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India, 73 ITADOC 40295, July 7, 2008.
19. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products From India, 73 FR 40295-02, July 14, 2008.

Administrative Review: POR January 1, 2007 through December 31, 2007

20. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 73 FR 79791-01, December 30, 2008.
21. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 74 ITADOC 20923, April 29, 2009.
22. Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 74 FR 20923-01 May 6, 2009.

Administrative Review: POR January 1, 2008 through December 31, 2008

23. Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 75 FR 1496-01, January 11, 2010.
24. Issues and Decision Memorandum – Final Results of Countervailing Duty Administrative Review: Certain Hot Rolled Carbon Steel Flat Products from India, 75 ITADOC 43488, July 19, 2010.

25. Final Results of Countervailing Duty Administrative Review – Certain Hot Rolled Carbon Steel Flat Products from India, 75 FR 43488-01, July 26, 2010.

The request also covers all the amendments, replacements, implementing acts or any other related measure in connection with the measures referred above.
