

ANNEX 1



7.

- 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* cases¹⁴ without a qualitative assessment of the entire market comprising both imports and domestic transactions.
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- 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 NMDC²³;
- it exceeded its authority by giving a finding on the implication of 'Miniratna' or 'Navaratna' status of NMDC²⁴ 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 NMDC²⁵;
- 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 NMDC²⁶;
- 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

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 entities²⁹;
- it incorrectly interpreted and applied the te

VI. The Panel has committed legal errors in

- 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 import⁴³;
- 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 India⁴⁴, 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 advantage⁴⁵;
- 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 benchmark⁴⁶;
- 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 determination⁴⁷;
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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 coal⁴⁹, India requests the Appellate Body to

- 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 assess⁵² 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 notional⁵³;
- 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 reference⁵⁵.

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
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- 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 account⁵⁹.

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.

- 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.
