

4.626. Accordingly, if the word "or" is read in its exclusive sense throughout the provision of Section 1677(7)(G), cumulation of the volume and effects of dumped and subsidized imports would be required only under Section 1677(7)(G)(iii). However, if the word "or" is read in its inclusive sense – i.e. as meaning *either one or the other, or both in combination* – then the word "or" in Section 1677(7)(G) would indicate that the authority shall cumulate the volume and effects of dumped and subsidized imports under Section 1677(7)(G)(i), (ii), and (iii).

4.627. It follows from this analysis that, regardless of whether the word "or" is interpreted in the "inclusive" sense or in the "exclusive" sense, Section 1677(7)(G) requires, to some extent, cumulation of the volume and effects of dumped and subsidized imports. If the word "or" is interpreted in the "exclusive" sense, such cumulation would be required only in the third scenario. In contrast, if the word "or" is read in the "inclusive sense", it would generally be required under all three scenarios. Even if the word "or" is read in the "exclusive" sense, the use of the word "and" in Section 1677(7)(G)(iii) requires cumulation of the volume and effects of dumped and subsidized imports when the conditions of that clause are met.

4.628. In the light of the above analysis, we consider that it is unclear whether Section 1677(7)(G)(i) and (ii) requires the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports. In the absence of an analysis by the Panel to this effect, and given the paucity of evidence regarding the application of the measure at issue on the Panel record, we are unable to complete the legal analysis with regard to the measure in these respects.

4.629. However, due to the use of the word "and" in Section 1677(7)(G)(iii), it is clear under either reading of the word "or" in this clause that, on its face, this Section requires the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports when petitions to initiate countervailing duty investigations *or* anti-dumping duty investigations are filed on the same day *and* countervailing duty investigations *or* anti-dumping duty investigations are initiated by the investigating authority. Consequently, we find that Section 1677(7)(G)(iii) of the US Statute to be inconsistent "as such" with Article 15.3 and with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

## 5 FINDINGS AND CONCLUSIONS

5.1. For the reasons set out in this Report, the Appellate Body:

- a. with respect to the Panel's findings regarding the term "public body" under Article 1.1(a)(1) of the SCM Agreement:
  - i. reverses the Panel's finding, in paragraphs 7.89 and 8.3.c.i of the Panel Report, rejecting India's claim that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement; and
  - ii. completes the legal analysis and finds that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement;
- b. with respect to the Panel's findings regarding financial contribution under Article 1.1(a)(1)(i) and (iii) of the SCM Agreement:
  - i. upholds the Panel's finding, in paragraphs 7.241 and 8.3.d.i of the Panel Report, rejecting India's claim that the USDOC's determination that the GOI provided goods through the grant of mining rights for iron ore and coal is inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement; and
  - ii. upholds the Panel's finding, in paragraphs 7.297 and 8.3.e.ii(1) of the Panel Report, rejecting India's claim that the USDOC's determination that the SDF Managing Committee provided direct transfers of funds is inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement;

- c. with respect to the Panel's "as such" findings regarding benefit under Article 14(d) of the SCM Agreement:
- i. upholds the Panel's finding, in paragraph 7.35 of the Panel Report, rejecting India's claim that the US benchmarking mechanism is inconsistent with Article 14(d) of the SCM Agreement because it fails to require investigating authorities to assess the adequacy of remuneration from the perspective of the government provider before assessing whether a benefit has been conferred on the recipient;
  - ii. upholds, albeit for different reasons, the Panel's finding, in paragraph 7.46 of the Panel Report, rejecting India's claim that the US benchmarking mechanism is inconsistent "as such" with Article 14(d) of the SCM Agreement because it excludes the use of government prices as benchmarks;
  - iii. upholds the Panel's finding, in paragraph 7.52 of the Panel Report, rejecting India's claim that the use of "world market prices" as Tier II benchmarks provided for in Section 351.511(a)(2)(ii) of the US Regulations is inconsistent "as such" with Article 14(d) of the SCM Agreement; and
  - iv. upholds, albeit for different reasons, the Panel's finding, in paragraph 7.63 of the Panel Report, rejecting India's claim that the mandatory use of "as delivered" benchmarks provided for in Section 351.511(a)(2)(iv) of the US Regulations is inconsistent "as such" with Article 14(d) of the SCM Agreement;
- d. with respect to the Panel's "as applied" findings regarding benefit under Article 14 of the SCM Agreement:
- i. declares moot and of no legal effect the Panel's alternative findings, in paragraphs 7.160-7.165 of the Panel Report, on the *ex post* rationales put forward by the United States to justify the USDOC's failure to consider certain domestic pricing information in assessing whether the NMDC provided iron ore for less than adequate remuneration;
  - ii. reverses the Panel's findings, in paragraphs 7.189 and 7.192 of the Panel Report, rejecting India's claims that the USDOC's exclusion of the NMDC's export prices in determining a Tier II benchmark is inconsistent with Article 14(d) and the chapeau of Article 14 of the SCM Agreement; and completes the legal analysis and finds that the USDOC's exclusion of such prices is inconsistent with Article 14(d) and the chapeau of Article 14 of the SCM Agreement;
  - iii. reverses the Panel's findings, in paragraphs 7.183 and 7.185 of the Panel Report, rejecting India's claim that the USDOC's use of "as delivered" prices from Australia and Brazil in assessing whether the NMDC provided iron ore for less than adequate remuneration is inconsistent with Article 14(d) of the SCM Agreement; and completes the legal analysis and finds that the USDOC's use of such prices is inconsistent with Article 14(d) of the SCM Agreement;
  - iv. upholds the Panel's finding, in paragraph 7.260 of the Panel Report, rejecting India's claim that the USDOC's construction of government prices for iron ore and coal is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement; and
  - v. reverses the Panel's finding, in paragraph 7.313 of the Panel Report, rejecting India's claim as it relates to the USDOC's determination that loans provided under the SDF conferred a benefit within the meaning of Articles 1.1(b) and 14(b) of the SCM Agreement, and finds that it is unable to complete the legal analysis;

- e. with respect to the Panel's findings regarding specificity under Article 2.1(c) of the SCM Agreement:
- i. upholds the Panel's finding, in paragraph 7.135 of the Panel Report, that there was no obligation on the USDOC to establish that only a "limited number" within the set of "certain enterprises" actually used the subsidy programme;
  - ii. upholds the Panel's finding, in paragraph 7.126 of the Panel Report, rejecting India's argument that specificity must be established on the basis of discrimination in favour of "certain enterprises" against a broader category of other, similarly situated entities; and
  - iii. upholds the Panel's finding, in paragraph 7.133 of the Panel Report, rejecting India's argument that, if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is further limited to a subset of this industry;
- f. with respect to the Panel's findings regarding the use of "facts available" under Article 12.7 of the SCM Agreement:
- i. modifies the Panel's interpretation of Article 12.7 of the SCM Agreement, in Section 7.7.5.1 of the Panel Report, and finds that Article 12.7 requires an investigating authority to use facts available that reasonably replace the missing necessary information with a view to arriving at an accurate determination, and that this also includes an evaluation of available evidence;
  - ii. finds that the Panel failed to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter before it, and therefore reverses the Panel's finding, in paragraphs 7.445 and 8.3.h of the Panel Report, that India failed to establish a *prima facie* case that Section 1677e(b) of the US Statute and Section 351.308(a)-(c) of the US Regulations are inconsistent "as such" with Article 12.7 of the SCM Agreement; and completes the legal analysis and finds that India has not established that Section 1677e(b) of the US Statute and Section 351.308(a)-(c) of the US Regulations are inconsistent "as such" with Article 12.7 of the SCM Agreement; and
  - iii. upholds the Panel's finding, in paragraph 7.450 of the Panel Report, that India failed to establish a *prima facie* case of inconsistency with Article 12.7 of the SCM Agreement;
- g. with respect to the Panel's findings regarding the USDOC's examination of new subsidy allegations in administrative reviews:
- i. upholds the Panel's finding, in paragraphs 7.508 and 8.3.j of the Panel Report, rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews related to the imports at issue is inconsistent with Articles 11.1, 13.1, 21.1, and 21.2 of the SCM Agreement; and
  - ii. reverses the Panel's finding, in paragraphs 7.508 and 8.3.j of the Panel Report, rejecting India's claims that the USDOC's examination of new subsidy allegations in administrative reviews related to the imports at issue is inconsistent with Articles 22.1 and 22.2 of the SCM Agreement, and finds that it is unable to complete the legal analysis in this regard;

- h. with respect to the Panel's findings regarding "cross-cumulation" under Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement:
- i. finds that the Panel did not err in finding that Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement do not authorize investigating authorities to assess cumulatively the effects of imports that are not subject to simultaneous countervailing duty investigations with the effects of imports that are subject to countervailing duty investigations; and
  - ii. finds that the Panel failed to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter before it, and therefore reverses the Panel's findings, in paragraphs 7.356, 7.369, 8.2.c, and 8.2.d of the Panel Report, that Section 1677(7)(G) of the US Statute is inconsistent "as such" with Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement; and completes the legal analysis and finds that Section 1677(7)(G)(iii) is inconsistent "as such" with Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement;
  - i. except for the findings in paragraphs 5.1.f.ii and 5.1.h.ii above, otherwise rejects all of India's claims that the Panel failed to make an objective assessment of the matter before it, and therefore acted inconsistently with Article 11 of the DSU; and
  - j. with respect to the Panel's findings identified in paragraphs 5.1.c and 5.1.g above, rejects India's claims that the Panel failed to provide a basic rationale for its findings, and therefore acted inconsistently with Article 12.7 of the DSU.

5.2. The Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under the SCM Agreement into conformity with that Agreement.

Signed in the original in Geneva this 19th day of November 2014 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Ujal Singh Bhatia  
Member

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Thomas Graham  
Member