

7.442. We recall our findings above that the United States acted inconsistently with the obligations under Articles 2.1(c), and 15.1-15.5 of the SCM Agreement. We note that the Appellate Body has treated claims under Articles 10 of the SCM Agreement as consequential claims in the sense that, when the essential elements of the subsidy within the meaning of Article 1 of the SCM Agreement are not present, or the right to impose a CVD has not been established, the CVDs imposed are inconsistent with Articles 10 of the SCM Agreement.⁹⁵⁸ We are persuaded by the Appellate Body's approach and therefore adopt it as our own. Accordingly, to the extent that we have found the USDOC's and USITC's determinations to be inconsistent with Articles 2.1(c), 15.1, and 15.5 of the SCM Agreement, and that we have found that the United States has taken no measure to comply with the DSB recommendation in the original dispute concerning the inconsistency "as such" of 19 USC § 1677(7)(G)(i)(III) with Articles 15.1-15.5 of the SCM Agreement, we also find that the United States acted inconsistently with its obligations under Article 10 of the SCM Agreement.

7.443. From the text of Article 10, it is clear that CVDs may only be imposed in accordance with Article VI of the GATT 1994 *and* the SCM Agreement.⁹⁵⁹ As a result, having determined that the United States acted inconsistently with Articles 2.1(c), and 15.1-15.5 of the SCM Agreement, we also find that the United States acted inconsistently with its obligations under Article VI of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, we conclude as follows:

- a. With respect to India's claims under Article 1.1(a)(1) of the SCM Agreement, India has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1).
- b. With respect to India's claims under Article 14(d) of the SCM Agreement:
 - i. India has not demonstrated that the USDOC applied an incorrect legal standard, and thus acted inconsistently with Article 14(d) as a matter of law, in rejecting the domestic pricing information.
 - ii. India has not demonstrated that the USDOC acted inconsistently with Article 14(d) by failing to undertake an objective examination of, and explain sufficiently, the basis for rejecting the prices in the association price chart as not representing actual transactions.
 - iii. India has not demonstrated that the USDOC acted inconsistently with Article 14(d) on the basis that its treatment of the domestic pricing information was not based on an objective examination.
 - iv. We exercise judicial economy with regard to India's claim that the USDOC acted inconsistently with Article 14(d) by failing to explain adequately the reasons for rejecting the Tata price quote on the basis of disclosing confidential data.
 - v. India has not demonstrated that the USDOC acted inconsistently with Article 14(d) by failing to make an objective assessment by failing to explain why the Tex Report is more appropriate than the domestic pricing information. We exercise judicial economy over whether India's allegation of error in this regard comprised a separate claim.
 - vi. India has not demonstrated that the USDOC acted inconsistently with Article 14(d) by rejecting the NMDC's export prices as a benchmarking source.
- c. India's claim under Article 14(b) of the SCM Agreement is not within the scope of the present compliance proceedings under Article 21.5 of the DSU, and in any case, we also conclude that India has not demonstrated that the USDOC acted inconsistently with

⁹⁵⁸ Appellate Body Reports, *US – Softwood Lumber IV*, para. 143; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

⁹⁵⁹ Appellate Body Report, *Brazil – Desiccated Coconut*, DSR 1997:I, p. 180.

Article 14(b) by failing to make adjustments to its benefit benchmark to accommodate the SDF levy as an entry cost incurred by the loan recipients.

- d. In light of our conclusions in paragraphs 8.1(b) and 8.1(c), we exercise judicial economy with regard to India's claims under the *chapeau* of Article 14 of the SCM Agreement.
- e. With respect to India's claims under Article 2.1(c) of the SCM Agreement:
 - i. India has not demonstrated that the USDOC acted inconsistently with Article 2.1(c) in its assessment of the "length of time" factor for the NMDC's sales of high-grade iron ore.
 - ii. The USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to provide a reasoned and adequate explanation for its finding that the mining leases for iron ore programme was *de facto* specific.
 - iii. In respect of the "mining leases for coal" programme, India has not demonstrated that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to consider the mandatory factors under that provision.
 - iv. In respect of the "mining leases for iron ore" programme, the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take account of the length of time during which that programme had been in operation. India has not demonstrated that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to consider the extent of diversification of the Indian economy with respect to that programme.
 - v. In light of our conclusions in paragraph 8.1(e)(ii)-(iv), we exercise judicial economy with regard to India's claim that the USDOC acted inconsistently with Articles 1.2 and 2.4 of the SCM Agreement.
- f. With respect to India's claims under Article 12.1 of the SCM Agreement:
 - i. In light of our conclusion in paragraph 8.1(b)(iv), we exercise judicial economy with regard to India's claim that the USDOC acted inconsistently with Article 12.1 regarding the Tata price quote.
 - ii. India's claim that the USDOC acted inconsistently with Article 12.1 regarding the legal implications of the NMDC's Miniratna status is not within the scope of the present compliance proceedings under Article 21.5 of the DSU.
- g. With respect to India's claims under Article 12.8 of the SCM Agreement, India has not demonstrated that the USDOC acted inconsistently with Article 12.8 by failing to disclose the two matters referred to by India.
- h. With respect to India's claims under Articles 21.1 and 21.2 of the SCM Agreement:
 - i. India's claim under Articles 21.1 and 21.2 concerning the USDOC's investigation of "new subsidies" in the 2004 to 2008 administrative reviews and the inclusion of these subsidy programmes in the Section 129 Determination is not within the scope of the present compliance proceedings under Article 21.5 of the DSU.
 - ii. India failed to establish that the USDOC investigated "new subsidies" in the Section 129 proceedings, and therefore has not demonstrated that the USDOC acted inconsistently with Articles 21.1 and 21.2 of the SCM Agreement.
- i. India's claim that the United States' failure to amend 19 USC § 1677(7)(G)(i)(III) is inconsistent with the DSB recommendation in this dispute as well as with Articles 15.1-15.5 of the SCM Agreement is within the Panel's terms of reference. India has demonstrated that the United States has taken no measure to bring 19 USC § 1677(7)(G)(i)(III) - which was found to be inconsistent "as such" with Articles 15.1-15.5

of the SCM Agreement in the original dispute - into compliance with the United States' obligations under the SCM Agreement.

- j. With respect to India's claims under Articles 15.1 and 15.2 of the SCM Agreement:
 - i. India's claims that, in the Section 129 proceedings, the USITC acted inconsistently with Articles 15.1 and 15.2 by using flawed methodology and data and ignoring data from the original determination are not within the scope of the present compliance proceedings under Article 21.5 of the DSU.
 - ii. India has not demonstrated that the USITC, in its price undercutting analysis, acted inconsistently with Articles 15.1 and 15.2.
- k. With respect to India's claims under Articles 15.1 and 15.4 of the SCM Agreement, India has not demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.4 by failing to examine and evaluate the existence of a link or relationship or explanatory force between the subsidized imports and the state of the domestic industry.
- l. With respect to India's claims under Articles 15.1 and 15.5 of the SCM Agreement:
 - i. India has not made a *prima facie* case that the USITC acted inconsistently with Articles 15.1 and 15.5 by failing to demonstrate that the subsidized imports caused injury to the domestic industry.
 - ii. India has not demonstrated that the USITC, in its non-attribution analysis, acted inconsistently with Articles 15.1 and 15.5 by failing to consider the impact of goods from Brazil, Japan, and the Russian Federation, and the contraction in demand.
 - iii. India's claim that the USITC, in its non-attribution analysis, acted inconsistently with Articles 15.1 and 15.5 by failing to examine the causes for the closure of certain plants is outside the scope of these compliance proceedings.
 - iv. India has demonstrated that the USITC acted inconsistently with Articles 15.1 and 15.5 by failing to consider the impact of dumped imports from China, Kazakhstan, Romania, Chinese Taipei, and Ukraine on the injury suffered by the domestic industry and to separate and distinguish it from the effects of subsidized imports and of other known factors.
- m. With respect to India's claims under Article 19.3 of the SCM Agreement, India has not demonstrated that the USDOC acted inconsistently with Article 19.3.
- n. As a consequence of the Panel's findings of inconsistency with respect to the Section 129 reinvestigation under Articles 2.1(c) and 15.1-15.5 of the SCM Agreement, India has demonstrated that the United States acted inconsistently with Articles 10 of the SCM Agreement and VI of the GATT 1994.

8.2. Under Article 3.8 of the DSU, when there is an infringement of the obligations assumed under a covered Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the SCM Agreement and the GATT 1994, they have nullified or impaired benefits accruing to India under these agreements.

8.3. We also conclude that the United States has failed to implement the recommendations and rulings of the DSB to bring 19 USC § 1677(7)(G)(i)(III) into conformity with its obligations under the SCM Agreement. To the extent that the United States has failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the SCM Agreement and the GATT 1994.
