

US - Carbon Steel

Abbreviation	Description
SGAP	State Government of Andhra Pradesh
SGOC	State Government of Chhattisgarh
SGOG	State Government of Gujarat
SGOJ	State Government of Jharkhand
SGOK	State Government of Karnataka
SGOM	State Government of Maharashtra
TPS	Target Plus Scheme
United States (or US)	United States of America
USC	United States Code
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
VMPL	Vijayanagar Minerals Pvt. Ltd.
WTO	World Trade Organization

1. INTRODUCTION

1.1 Complaint by India

1.1 On 24 April 2012, India requested consultations with the United States pursuant to Articles 1 and 4 of the DSU, Article XXII:1 of the GATT 1994 and Article 30 of the SCM Agreement, with regard to the imposition of countervailing duties on certain hot-rolled carbon steel flat products from India by the United States as described in document WT/DS436/1/Rev.1.

1.2 Consultations were held on 31 May and 1 June 2012, but were unsuccessful in resolving the dispute.

1.2 Panel Establishment and Composition

1.3 On 12 July 2012, India requested, pursuant to Articles 4.7 and 6 of the DSU and Article 30 of the SCM Agreement, that the DSB establish a panel with standard terms of reference.¹ At its meeting on 31 August 2012, the DSB

¹ WT/DS436/3.

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established a panel pursuant to the request of India in document WT/DS436/3, in accordance with Article 6 of the DSU.²

1.4 The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by India in document WT/DS436/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.³

1.5 On 7 February 2013, India requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 18 February 2013, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Hugh McPhail
Members: Mr Anthony Abad
Mr Hanspeter Tschaeni

1.6 Australia, Canada, China, the European Union, the Kingdom of Saudi Arabia (Saudi Arabia) and Turkey notified their interest in participating in the Panel proceedings as third parties.

1.3 *Panel Proceedings*

1.3.1 *General*

1.7 After consultation with the parties, the Panel adopted its Working Procedures⁴ and timetable on 8 March 2013. The Panel introduced modifications to its timetable on 18 July 2013.

1.8 The Panel held a first substantive meeting with the parties on 9-10 July 2013. A session with the third parties took place on 10 July 2013. The Panel held a second substantive meeting with the parties on 8-9 October 2013. On 25 October 2013, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 31 January 2014. The Panel issued its Final Report to the parties on 11 April 2014.

1.3.2 *Working procedures on Business Confidential Information (BCI)*

1.9 After consultations with the parties, the Panel adopted, on 28 March 2013, additional procedures for the protection of BCI.⁵

² See WT/DSB/M/321.

³ WT/DS436/4.

⁴ See the Panel's Working Procedures in Annex A-1.

1.3.3 Preliminary ruling

1.10 On 3 May 2013, the United States submitted to the Panel two requests for preliminary rulings concerning the consistency of India's request for the establishment of a panel⁶ with Article 6.2 of the DSU. On 21 May 2013, in advance of the first substantive meeting of the Panel with the parties, India provided a written response to the United States' requests for preliminary rulings.

1.11 On 16 August 2013, the Panel issued the following preliminary rulings to the parties to the dispute.

1.3.3.1 Introduction

1.12 In its first written submission, the United States submitted two requests for preliminary rulings that certain claims advanced by India in its first written submission fall outside the Panel's terms of reference. The United States' requests are based on Article 6.2 of the DSU, which provides in relevant part:

The request for the establishment of a panel shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

1.13 The United States' first request concerns India's claims under Article 11 of the SCM Agreement. In its panel request, India alleged a violation of:

Article 11 of the ASCM because no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews.⁷

1.14 In its first written submission, India argued claims relating to (i) the alleged failure to initiate an investigation into new subsidies and (ii) the alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application. With respect to the former, India argued its claim under the following heading of its first written submission:

Section XII.C.4: The United States violated Article 11.1 by failing to 'Initiate' an investigation into the New Subsidies.

1.15 With respect to the claims relating to the initiation of an investigation despite the insufficiency of evidence, India argued its claims under the following headings of its first written submission:

Section XII.C.1: The United States violated Articles 11.1-11.2 by initiating investigation into NMDC and TPS programs in the 2004

⁵ Additional Working Procedures on BCI.

⁶ WT/DS436/3 (referred to hereafter as "panel request").

⁷ *Ibid.*

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AR even when the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of such subsidies.

Section XII.C.2: The United States violated Article 11.9 by initiating investigation into NMDC and TPS programs in 2004, since the written application of the domestic industry did not contain sufficient evidence as to the existence, amount and nature of said alleged subsidies.

1.16 The United States' second request concerns India's argument in its first written submission with respect to a claim that the United States' 2013 sunset review determination is inconsistent with Article 12.7 of the SCM Agreement. India did not explicitly refer to the 2013 sunset review determination in its panel request.

1.17 Pursuant to Paragraph 7 of the Panel's working procedures, the Panel invited India to respond to the United States' requests prior to the first substantive meeting of the Panel with the parties.⁸ In addition, the Panel posed certain questions relating to the requests for preliminary rulings and gave both parties the opportunity to comment on each other's answers.

1.18 The United States requested the Panel to make certain findings as a preliminary matter.⁹ In contrast, India requested the Panel to reserve its findings on the preliminary ruling requests until the final report.¹⁰ As the United States' requests concern the Panel's terms of reference, and given the clarifications provided by the parties, the Panel decided to issue its rulings prior to the second substantive meeting of the Panel with the parties in order to clarify the scope of the dispute.

1.3.3.2 Arguments of the Parties

1.3.3.2.1 United States

1.19 The United States requests the Panel to find that India's claims under (i) Article 11 of the SCM Agreement, and (ii) Article 12.7 of the SCM Agreement with respect to a 2013 sunset review determination are outside the Panel's terms of reference because India's panel request fails to comply with the requirements of Article 6.2 of the DSU.

⁸ India considered that the United States had not properly raised a request for preliminary ruling with regard to the claim in Section XII.C.4 of India's first written submission. During the first substantive meeting of the Panel with the parties, the United States clarified that its requests also covered this claim. In light of the United States' explanation, the Panel accepted that the United States' requests for preliminary rulings covered the claim in Section XII.C.4 of India's first written submission, and invited India to respond to this aspect of the United States' requests.

⁹ United States' first written submission, para. 3.

¹⁰ India's response to the United States' requests for preliminary rulings, para. 35.

1.3.3.2.1.1 Article 11 of the
SCM Agreement

1.20 The United States recalls that India's panel request only includes a general reference to Article 11 of the SCM Agreement. The United States asserts that Article 11 contains 11 subparagraphs with different obligations, and submits that India failed to identify in its panel request any specific Article 11 obligation that the United States had allegedly violated.¹¹ Thus, the United States submits that India's panel request failed to comply with the requirement of Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."¹²

1.21 Moreover, the United States notes that India's panel request suggests that the alleged violation lies in the failure to initiate or conduct an investigation at all with respect to new subsidies. However, in the United States' view, Article 11 of the SCM Agreement does not contain any obligation to initiate an investigation.¹³

1.22 With respect to the claims relating to the initiation of an investigation despite insufficient evidence in the domestic industry's written application, the United States points out that India's panel request alleges that "no investigation was initiated or conducted".¹⁴ However, the relevant arguments in India's first written submission allege that the United States erred by actually initiating an investigation into the NMDC and TPS programmes in 2004 despite an insufficient written application. The United States submits that the sufficiency of evidence in an application is a distinct issue from whether an investigation was initiated.¹⁵ Raising due process concerns, the United States contends that it could not have anticipated that India would bring these claims because they were not articulated in India's panel request.¹⁶

1.3.3.2.1.2 2013 sunset
review

1.23 Concerning India's claims under Article 12.7 of the SCM Agreement with respect to a 2013 sunset review determination, the United States understands India to refer to the final results in the most recent sunset review issued by the US Department of Commerce on 14 March 2013. The United States submits that this determination could not have been included in India's request for consultations or request for the establishment of a panel, since it was issued eight

¹¹ United States' first written submission, paras. 15, 17-19 and 22; and response to Panel question No. 38, para. 2.

¹² United States' first written submission, paras. 18 and 22.

¹³ *Ibid.*, paras. 17 and 22.

¹⁴ *Ibid.*, paras. 17 and 20.

¹⁵ *Ibid.*, para. 20.

¹⁶ United States' first written submission, para. 21.

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months after the latter.¹⁷ Furthermore, although this sunset review was initiated on 1 November 2010, India does not refer to the initiation in its consultations or panel requests. Thus, the United States submits that the final results of the 2013 sunset review fall outside the Panel's terms of reference.¹⁸

1.3.3.2.2 India

1.3.3.2.2.1 Article 11 of the SCM Agreement

1.24 India contends that its panel request need not be identically worded as the claims pursued in its first written submission, and argues that the Panel should examine the panel request as a whole and in light of "attendant circumstances".¹⁹ India contends that the United States attributed an "extremely narrow and acontextual meaning" to India's panel request. India argues that the term "initiated" in its request is to be construed in light of footnote 37 of the SCM Agreement. This would necessarily imply that "India's panel request is directed to the manner in which investigations into new subsidy programs were initiated and conducted", i.e. the fact that they were "not [] initiated, commenced and performed in the manner '*provided [for] in Article 11*' of the SCM Agreement."²⁰

1.25 Moreover, India contends that its panel request clearly connects the challenged measures with the relevant obligations under Article 11 of the SCM Agreement.²¹ According to India, the United States fails to appreciate that "India's panel request covers violations of all obligations in Article 11, barring those that are obviously and logically inapplicable to the case at hand".²² India contends that its panel request delineates that violations are limited to (i) Article 11, (ii) the initiation and conduct of investigations, and (iii) new subsidy programmes. Thus, according to India, Articles 11.6, 11.8, 11.10 and 11.11 of the SCM Agreement are logically excluded due to the words used in the panel request. India also argues it has the discretion in its first written submission to only elaborate on a sub-set of the remaining provisions in Article 11 covered by India's panel request, namely Articles 11.1, 11.2 and 11.9. However, India contends that Articles 11.3, 11.4, 11.5 and 11.7 of the SCM Agreement have also been breached, but India chose not to press these violations in its first written submission.²³ Moreover, India submits that all subparagraphs of Article 11 are closely related and interlinked, and the reference to a common obligation, i.e. the manner in which investigations are to be

¹⁷ *Ibid.*, para. 24.

¹⁸ *Ibid.*, para. 27.

¹⁹ India's response to the United States' requests for preliminary rulings, paras. 7-8 and 14-15.

²⁰ *Ibid.*, paras. 10-11. (emphasis original)

²¹ *Ibid.*, para. 13.

²² *Ibid.*, para. 16.

²³ *Ibid.*, paras. 17-19.

initiated and conducted, is sufficient to meet the standard of Article 6.2 of the DSU.²⁴

1.26 Finally, India contends that the due process rights of the United States have not been prejudiced, and the United States' first written submission shows that it was in a position to file detailed responses to India's claims. India also notes that the claims at issue here only refer to determinations made by the United States and documents made publicly available by the United States. Moreover, the consultations between the United States and India prior to the establishment of this panel revealed India's point of concern with respect to these claims. Therefore, according to India, it cannot be said that "the United States was completely unaware that India would raise claims in relation to sufficiency of evidence for commencing investigations into new subsidies."²⁵

1.3.3.2.2 2013 sunset review

1.27 Regarding the 2013 sunset review, India notes that paragraph 5 of its panel request "covers all amendments, replacements, implementing acts or any other related measure in connection with the measures referred herein." India submits that all determinations and orders issued by the United States are measures covered in the panel request, and the 2013 sunset review determination amends the determinations included in the panel request. Referring to the understanding of past panels and the Appellate Body, India notes that the 2013 sunset review determination does not change the nature of the measures challenged, and India has not raised different claims in relation to this determination. India submits that agreeing with the United States' preliminary objection would allow the United States to evade adjudicatory review and prevent a positive resolution of the dispute on a purely technical point.²⁶

1.3.3.3 Evaluation

1.28 The United States' requests for preliminary rulings concern India's claims under (i) Article 11 of the SCM Agreement, and (ii) Article 12.7 of the SCM Agreement with respect to a 2013 sunset review. We examine each request in turn.

²⁴ *Ibid.*, paras. 20-22.

²⁵ India's response to the United States' requests for preliminary rulings, paras. 24-26.

²⁶ *Ibid.*, paras. 27-33.

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1.3.3.3.1 Whether India's panel request relating to Article 11 of the SCM Agreement satisfies the requirements of Article 6.2 of the DSU

1.29 The main issue before the Panel is whether the general reference to Article 11 of the SCM Agreement in India's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly."²⁷ India contends that its panel request refers to two different inconsistencies with Article 11, namely: (i) the alleged failure to initiate an investigation into new subsidies and (ii) the alleged initiation of an investigation despite the insufficiency of evidence in the domestic industry's written application.²⁸ We consider each alleged inconsistency separately.

1.3.3.3.1.1 Alleged failure to initiate an investigation into new subsidies

1.30 It is undisputed that India's panel request refers generally to Article 11 of the SCM Agreement, without explicitly identifying any specific paragraphs of that provision as the legal basis of its complaint. We note that Article 11 contains several paragraphs that set out multiple distinct obligations.

1.31 While the Appellate Body has explained that when "a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged"²⁹, the Appellate Body has also indicated that "compliance with the requirements of Article 6.2 [of the DSU] must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".³⁰ Thus, the mere fact that India failed to explicitly specify in its panel request the particular paragraphs of Article 11 at issue does not necessarily mean that India's panel request fails to meet the requirements of Article 6.2 of the DSU. This is because the relevant WTO obligations may nevertheless be identifiable from a careful reading of the panel request as a whole.³¹ Accordingly, we shall examine whether a careful reading of India's panel request, including any narrative explanation contained therein³²,

²⁷ Article 6.2 of the DSU.

²⁸ See paragraphs 1.14 and 1.15 above.

²⁹ Appellate Body Report, *China – Raw Materials*, para. 220. See also Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598.

³⁰ Appellate Body Report, *US – Carbon Steel*, para. 127.

³¹ With similar understanding, see the preliminary ruling of the panel in *US – Countervailing and Anti-Dumping Measures (China)*, para. 3.35, document WT/DS449/4 dated 7 June 2013.

³² We note in this regard that, in applying Article 6.2 of the DSU, the panel in *Mexico – Anti-Dumping Measures on Rice* considered the listing of the relevant provisions of the WTO Agreement

permits a sufficiently clear identification of which particular obligation(s) in Article 11 of the SCM Agreement form(s) the legal basis of India's complaint regarding Article 11, to enable us to conclude that it is consistent with Article 6.2 of the DSU.

1.32 In addition to the general reference to Article 11 of the SCM Agreement, India's panel request explains India's concern that "no investigation was initiated or conducted to determine the effects of new subsidies included in the administrative reviews". This text indicates that the issue raised by India concerns the United States' alleged failure to initiate or conduct an investigation into the effects of new subsidy allegations. We note that similar language in Article 11.1 of the SCM Agreement may contain a "potentially relevant obligation"³³ relating to the initiation of "an investigation to determine the existence, degree and effect of any alleged subsidy".³⁴ In our view, therefore, the general reference to Article 11 and the above-mentioned narrative explanation together are sufficient to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", consistent with Article 6.2 of the DSU. Consequently, the claim in Section XII.C.4 of India's first written submission³⁵ falls within the Panel's terms of reference.³⁶

1.3.3.3.1.2 Alleged
initiation of an investigation
despite the insufficiency of
evidence in the domestic
industry's written application

1.33 However, we are not persuaded that the general reference to Article 11 of the SCM Agreement and the above-mentioned narrative explanation in India's panel request are sufficient to bring India's remaining Article 11 claims within the Panel's terms of reference.

1.34 We note that the arguments in Sections XII.C.1 and XII.C.2 of India's first written submission relate to the fact that an investigation was allegedly initiated despite the fact that the written application of the domestic industry did

together with the narrative which accompanied that listing. (Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.30)

³³ We note that the panel in *EC – Approval and Marketing of Biotech Products* referred to the concept of "potentially relevant obligations". See Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 77 of the preliminary ruling reproduced at para. 7.47 of the reports.

³⁴ Article 11.1 of the SCM Agreement.

³⁵ For a brief summary of this claim, see paragraph 1.14 above.

³⁶ We emphasize, however, that in considering whether this aspect of India's panel request complies with the requirements of Article 6.2 of the DSU we express no opinion on the merits of India's complaint. As clarified by the Appellate Body in *EC – Selected Customs Matters*, the "question of whether a measure falls within a panel's terms of reference is a threshold issue, distinct from the question of whether the measure is consistent or not with the legal provision(s) of the covered agreement(s) to which the panel request refers." (Appellate Body Report, *EC – Selected Customs Matters*, para. 131)

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not contain sufficient evidence as to the existence, amount and nature of certain subsidies.³⁷ We agree with the United States that whether an investigation was initiated despite insufficiency of evidence is an issue entirely distinct from whether an investigation to determine the effects of new subsidies was initiated or conducted at all.³⁸ Indeed, the narrative in India's panel request states that "no investigation was initiated or conducted". India contends that its panel request should be read as relating to "investigations not being initiated, commenced and performed in a manner 'provided in Article 11' of the SCM Agreement."³⁹ We must objectively determine our terms of reference on the basis of the panel request as it existed at the time of filing.⁴⁰ In our view, by clearly and only stating that an investigation was *not* initiated or conducted, India's panel request precludes claims relating to the alleged initiation of an investigation, or the manner in which an investigation was conducted, being included in the scope of the dispute.

1.35 India submits that the Panel should examine India's panel request in light of "attendant circumstances". India argues that its panel request "covers violations of all obligations in Article 11, barring those that are obviously and logically inapplicable to the case at hand".⁴¹ However, we are unable to reconcile India's view with the general reference to Article 11 read together with the narrative in India's panel request. Had India intended to raise claims under Articles 11.1, 11.2 and 11.9 of the SCM Agreement relating to the initiation of an investigation despite insufficient evidence, India should have provided some summary of the relevant legal basis sufficient to present this particular problem clearly, which in our view it did not. As it is, India's panel request is not reasonably open to the reading advanced by India.⁴²

³⁷ For a brief summary of these claims, see paragraph 1.15 above.

³⁸ See United States' first written submission, para. 20.

³⁹ India's response to the United States' requests for preliminary rulings, para. 11. (emphasis original) India refers to footnote 37 of the SCM Agreement to argue that it "clearly suggests that an investigation should commence in a manner provided in Article 11." See India's response to the United States' requests for preliminary rulings, paras. 9-11. However, it remains unclear to us, and India has not sufficiently explained, how the meaning in footnote 37, including the reference to a *procedural action to formally commence* an investigation as provided in Article 11, permits a sufficiently clear identification of which particular obligations in Article 11 of the SCM Agreement form the legal basis of India's complaints at issue regarding Article 11.

⁴⁰ The Appellate Body has stated that "[a]lthough subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642)

⁴¹ India's response to the United States' requests for preliminary rulings, para. 16.

⁴² We find support in the Appellate Body Report in *EC – Fasteners (China)*, where it was found that the mere reference to a general provision would not allow a complaining party to introduce an issue that does not fall within the scope of the narrative explanation or description included in the panel request. See Appellate Body Report, *EC – Fasteners (China)*, paras. 595-599.