

***INDIA — EXPORT RELATED MEASURES***

**(DS541)**

**COMMENTS OF THE UNITED STATES ON THE RESPONSES OF INDIA ON  
QUESTIONS 91 AND 92 OF THE PANEL REGARDING THE HOLDING OF A  
SECOND SUBSTANTIVE MEETING**

**March 18, 2019**

## TABLE OF REPORTS

SHORT TITLE	FULL CITATION
<i>Thailand – Cigarettes (Philippines) (AB)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011
<i>US – Shrimp (Article 21.5 – Malaysia) (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001

## SINGLE SUBSTANTIVE MEETING

***Q.91. To both parties: The Panel recalls that, pursuant to footnote 1 to the timetable, it may schedule additional meetings if required. Do you consider that a second substantive meeting is necessary and, if so, why?***

### **U.S. COMMENTS ON INDIA'S RESPONSE TO QUESTION 91**

1. India contends holding a second substantive meeting is necessary to: (1) conform to Article 12.1 and Appendix 3 of the DSU; (2) give India an effective chance to discuss and rebut the U.S. arguments; and (3) not set a precedent contrary to the scheduling practices in prior Article 4 of the SCM Agreement export subsidy disputes. India's arguments are in error.

2. First, according to India, even though Article 12.1 of the DSU permits a panel to deviate from Appendix 3 of the DSU after consulting the parties to the dispute, any deviation from the "set procedure" in Appendix 3 somehow "results in affecting the rights of the Parties involved in the dispute."<sup>1</sup> And India argues that because Appendix 3 provides for two substantive meetings of a panel, then the Panel must provide a second substantive meeting in this proceeding.<sup>2</sup>

3. India's argument is contradictory – since India accepts that the DSU permits a panel to deviate from the procedure in Appendix 3 after consulting the parties, then it cannot be correct that any deviation from the procedure in Appendix 3 adversely affects the rights of the parties.<sup>3</sup> India's argument would render inutile the provision in Article 12.1 of the DSU granting panels the discretion to depart from the procedure in Appendix 3. Accordingly, India's argument fails even without considering Article 4 of the SCM Agreement.

4. In addition, as the United States noted in its Second Written Submission and response to Question 91, panels facing a similar 90-day deadline under Article 21.5 of the DSU have chosen to hold only one substantive meeting. These panels have not considered that a second substantive meeting was required under the DSU, and therefore these panels have refuted India's reading of Article 12.1 and Appendix 3 of the DSU.

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<sup>1</sup> India's Responses to Written Questions 91 & 92 from the Panel to the Parties ("India's Qs 91&92 Responses"), p. 3.

<sup>2</sup> India also misstates the findings in the appellate report in *Thailand – Cigarettes (Philippines)*. India states that: "The need to divide proceedings into these two stages was also noted by the Appellate Body" in that report. (India's Qs 91&92 Responses, p. 2). The appellate report does not note a "need" to divide proceedings, but simply recalls that "panel proceedings consist of two main stages" *Thailand – Cigarettes (Philippines)*, para. 149. Furthermore, this is not a reference to two substantive meetings, but rather to "each party setting out its 'case in chief, including a full presentation of the facts on the basis of submission of supporting evidence,'" and "the rebuttal by each party of the arguments and evidence submitted by the other parties." *Thailand – Cigarettes (Philippines)*, para. 149. The Panel has already provided both these stages in this proceeding. Both parties have provided their cases in chief and provided their evidence and arguments. And as described in detail below in paragraph 12, India has had ample opportunity to rebut the arguments of the United States.

<sup>3</sup> The United States presented some of this argument in its Second Written Submission, at paras. 45-51, with regard to India's alleged "due process rights" violation under Article 12.10 of the DSU. To the extent that India is also raising an Article 12.10 "rights" argument again, we refer the Panel to that portion of the U.S. Second Written Submission.

5. And consideration of Article 4 of the SCM Agreement only further demonstrates the errors in India's arguments. Article 4.6 of the SCM Agreement sets out rules for a panel proceeding where a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member. Article 4.6 is one of the special or additional rules and procedures identified in Appendix 2 of the DSU. Article 1.2 of the DSU makes clear that the rules and procedures in the DSU, such as Article 12.1 of the DSU, "apply subject to such special or additional rules and procedures."<sup>4</sup>

6. One of the requirements in Article 4.6 is that the panel's report "shall be circulated to all Members within 90 days of the date of the composition and establishment of the panel's terms of reference."<sup>5</sup> That deadline, which according to footnote 6 of the SCM Agreement can only be "extended by mutual agreement," was reached long ago and was not extended.

7. Article 12.1 and Appendix 3 of the DSU therefore need to be read in conjunction with Article 4.6 of the SCM Agreement. And just as panels under Article 21.5 of the DSU have determined that it is appropriate to accommodate the 90-day deadline in Article 21.5 by holding only one substantive meeting, a panel may also determine that it is appropriate, in light of the 90-day deadline in Article 4.6 of the SCM Agreement, to only hold one substantive meeting.

8. In this regard, it may be useful to note that in *Thailand – Cigarettes (Philippines)*, a report relied upon by India, the appellate report went on to refer to the need of "a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close." The appellate report went on to note that Article 3.3 of the DSU "calls for '[t]he prompt settlement' of WTO disputes, as this is 'essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members'." Likewise, Article 12.2 of the DSU provides that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'." And the appellate report noted that panels are best situated to determine how the balance of various interests should be struck in any given proceeding.<sup>6</sup>

9. Second, India asserts that a second substantive meeting is necessary for discussion and engagement between the parties with respect to the substantive elements of India's arguments and for the parties to rebut each other's arguments. This is incorrect.

10. The timetable in this proceeding demonstrates that the Panel has provided India with ample time. For example, the Panel scheduled over three months between the date of India's

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<sup>4</sup> Article 1.2 of the DSU continues: "[t]o the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail."

<sup>5</sup> Article 4.6 of the SCM Agreement.

<sup>6</sup> *Thailand – Cigarettes (Philippines)*, para. 150.

second written submission and the first day of the substantive meeting to allow the parties to prepare. The Panel also granted India’s request to have over a month of time from the conclusion of the substantive meeting to submit the parties’ answers to the Panel’s questions.

11. The Panel has also given India an adequate opportunity to present its position. India has submitted hundreds of pages of written submissions, delivered lengthy opening and closing statements, actively participated in two full days of questions and answers with the Panel, and is answering or commenting on up to 92 questions from the Panel.

12. India has also had an opportunity to rebut all of the U.S. arguments at every stage of the proceeding. India submitted lengthy written submissions and gave opening and closing statements in rebuttal. India also had the opportunity to rebut all of the U.S. and third parties’ oral answers at the substantive meeting and will have the opportunity to comment on all of the U.S. responses to the Panel’s written questions. The parties have engaged in depth and an additional substantive meeting is neither necessary nor appropriate.

13. Third, India argues that previous panels that applied Article 4.12 of the SCM Agreement held two substantive meetings and not holding a second substantive meeting in this dispute would set “an incorrect precedent.”<sup>7</sup> For the reasons stated above, it is neither necessary nor appropriate to hold a second substantive meeting.

14. In none of the panel proceedings that India relies upon is there any indication that either party requested the panel to hold only one substantive meeting. Moreover, in each proceeding, the two substantive meetings were held between approximately 2 and 6 weeks apart, so that based on India’s “precedent” argument, the second substantive meeting would already have needed to have been held, and holding a second substantive meeting in the future would be contrary to the supposed “precedent” of those prior proceedings.

15. India again misstates the findings in an appellate report. Nothing in *U.S. – Shrimp 21.5 (Malaysia)* refers to past panel “practice” as creating any sort of “legitimate expectations.”<sup>8</sup> In that report, the Appellate Body was referring to the substantive findings and reasoning in panel and Appellate Body reports, not the supposed “practice” of panels in structuring their proceedings.

16. There is of course no concept of “precedent” for panel proceedings. Each panel, depending on the facts and legal issues involved, must determine what information it needs to resolve that dispute and the most appropriate manner to structure its proceedings. As the United States has demonstrated, India has presented no new issues during the substantive meeting that warrants holding a second substantive meeting. Because neither the parties nor the Panel raised any new issues, and because this is a *de jure* export subsidies dispute where the evidence of the

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<sup>7</sup> India’s Qs 91&92 Responses, p. 2.

<sup>8</sup> India’s Qs 91&92 Responses, p. 2.

subsidies are the measures themselves, the Panel has the facts and arguments it needs to make an informed decision.

***Q.92. To India: You have expressed concern that holding a single substantive meeting with the parties would affect India's due process rights.***

- a. Please indicate whether you consider that the fact of holding a single substantive meeting has concretely, so far, impaired or otherwise affected your ability to defend yourself in this case.***
- b. If you consider that your ability to defend yourself has been affected, please indicate, concretely, how you consider that this has been the case.***
- c. If you consider that your ability to defend yourself has been concretely affected, please indicate the steps that you would like the Panel to take to remedy that.***

#### **U.S. COMMENT ON INDIA'S RESPONSE TO QUESTION 92**

17. India presents only conclusory statements and speculation, rather than *concrete* examples, as to how the lack of a second substantive hearing impaired or affected its ability to make its case.

18. (a) India believes that holding one substantive meeting did not give the Panel the opportunity to explore the arguments presented by India, particularly regarding footnote 1 and the Annexes to the SCM Agreement. In addition, according to India, the proceeding has not given the parties and the Panel a chance to engage in detail about the challenged schemes.

19. However, the record contradicts this assertion. As discussed above, India has had many opportunities to present written and oral arguments about these issues to the Panel and to rebut the U.S. arguments. Tellingly, India cannot state with specificity what arguments or points with relation to footnote 1, the Annexes, or the challenged schemes it did not have the opportunity to raise and develop with the Panel.

20. For the reasons explained above, India's reliance on Appendix 3 of the DSU is misplaced, and India has not identified any specific instances of how holding one substantive meeting concretely impaired or affected its ability to defend itself in this dispute. Nor could India do so, in light of the many previous panels that have held only one substantive meeting when facing an expedited timeframe under the covered agreements.

21. (b) India asserts that the issues presented in the dispute are novel and therefore, the parties and the Panel must engage in a substantive and detailed discussion of all of the issues. India does not and cannot identify with specificity any allegedly novel or important issues that the Panel and parties have inadequately explored or ignored altogether. Instead, a detailed discussion has occurred and there are no new issues to discuss.

(c) For the reasons presented in the U.S. response to Question 91, the United States respectfully requests that the Panel not hold an unnecessary second substantive meeting that will only delay resolution of this dispute and termination of India's trade-distorting export subsidy schemes and create further conflict with the requirements of Article 4.6 of the SCM Agreement.