INDIA – CERTAIN MEASURES ON IMPORTS OF IRON AND STEEL PRODUCTS

(AB-2018-12 / DS518)

THIRD PARTICIPANT SUBMISSION
OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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Dominican Republic – Import and Sale of Cigarettes (Panel)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
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I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by India and Japan in *India – Certain Measures on Imports of Iron and Steel Products* (DS518). In this submission, the United States will address certain issues of legal interpretation concerning various provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. As set forth below, the United States considers the Panel did not err by making findings on the safeguard measure identified in Japan's panel request and within the Panel's terms of reference. Rather, as the Dispute Settlement Body ("DSB") established the Panel and set its terms of reference to examine "the matter" set out in Japan's panel request, the Panel's findings on the measure as it existed when the Panel was established is required by the DSU. Further, under DSU Article 19.1, if a panel or the Appellate Body finds a measure is WTO-inconsistent, it "shall recommend" that the Member bring the measure into conformity with the relevant covered agreement. Therefore, unless the Appellate Body reverses all of the Panel's substantive findings that India's measure is inconsistent with the GATT 1994 or the Safeguards Agreement, the Panel's recommendation to India to bring its measure into conformity with those agreements must stand, as required under DSU Article 19.1.

3. The United States also considers that Japan's Other Appeal of the Panel's "conditional" recommendation should be upheld. The Panel's "conditional" recommendation has no basis in the DSU, and the limitation in the Panel's recommendation should be reversed.

II. THE PANEL CORRECTLY MADE FINDINGS AND A RECOMMENDATION AS THE SAFEGUARD MEASURE APPARENTLY EXPIRED AFTER THE DSB ESTABLISHED THE PANEL AND SET ITS TERMS OF REFERENCE

4. India argues that the Panel erred in finding that the contested measure, which apparently expired almost one year after the DSB established the panel, continues to have "lingering effects" despite its expiry.[2] India also claims on appeal that, because of the measure's expiry, the Panel should not have made any recommendation, even if the measure continues to have any effects.[3] The United States disagrees with India, irrespective of whether the measure has lingering effects or not. The DSB established the panel with standard terms of reference under DSU Article 7.1. Accordingly, the DSB charged the panel with examining the matter set out in Japan's panel request – that is, the specific measure at issue and the claims of WTO-inconsistency – not *another* matter as might arise through *subsequent changes* to the measure at issue or through *different* claims. The expiration of a measure after panel establishment is not relevant to the Panel's analysis of the matter referred to it by the DSB, nor to the Panel's

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[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 263 words, and this U.S. third participant submission (not including the text of the executive summary) contains 3649 words (including footnotes).

[2] *See* India Appellant Submission, para. 21 and 52.

[3] *Id.*

responsibility under the DSU Article 19.1 to make a recommendation with respect to any measure found to be inconsistent with a Member's obligations.

A. Panel Findings Regarding the Expiration of India's Measure

5. The DSB established the panel on April 3, 2017.[4] The DSB set standard terms of reference for the panel pursuant to DSU Article 7.1. Accordingly, the terms of reference were:

> 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 Japan in document WT/DS518/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

6. In its report, the Panel took note of the expiry of the challenged measure on March 13 2018, almost one year after the DSB established the panel and set its terms of reference. The Panel then considered whether to proceed with making findings as to the safeguard measure as it existed when the Panel was established.[6] The Panel determined to proceed.[7]

7. As the Panel report states at paragraph 7.25:

> 7.25 . . . . [I]n the circumstances of the present case, the expiry of the measure at issue after the Panel was established does not excuse us from exercising our function under Article 11 of the DSU to make findings with respect to the matter raised by Japan.

8. The Panel found the Indian measure inconsistent with India's obligations under the covered agreements.[8] Pursuant to Article 19.1 of the DSU, and having found that India acted inconsistently with certain provisions of the GATT 1994 and the Safeguards Agreement, the Panel then recommended "that, to the extent that the measure continues to have any effects, India bring it into conformity with its obligations under those agreements."[9]

B. Through the Terms of Reference, the DSB Charged the Panel With Making Findings on the Safeguard Measure Identified in Japan's Panel Request As It Existed When the Panel Was Established

9. Contrary to what India claims in its appeal, the expiration of the measure was not relevant to the matter being examined by the Panel pursuant to its terms of reference as set by the DSB.

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[4] *See* Panel Report, para. 7.11.

[5] *See* Note by the Secretariat, *Constitution of the Panel Established at the Request of Japan*, WT/DS518/6.

[6] *See* Panel Report, para. 7.11-28.

[7] *See* Panel Report, para. 7.25.

[8] *See* Panel Report, para. 7.429.

[9] Panel Report, para. 8.6.

10. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Specifically, when the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request.[10] Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[11] As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[12]

11. India's claim that the Panel should have examined the situation as of March 13, 2018, when the safeguard measure appears to have expired, would contradict the DSU and the Panel's terms of reference. The expiry of the safeguard measure would have occurred almost one year after the DSB established the Panel and set its terms of reference. India's assertion to the Panel that it should examine the safeguard measure as of March 13 was thus a request to examine *not* the matter in Japan's panel request, but a *different* matter.

12. That is, India would have had the Panel examine not the "specific measure at issue" in the panel request (Article 6.2) but a different measure and situation (whether a safeguard measure existed following the original measure's expiry). But changing the specific measure to be examined would also change the matter being examined, contrary to the terms of reference. Similarly, Japan could not have requested the Panel to examine *claims* additional to those set out in its panel request, as such additional claims would fall outside "the matter" referred to the panel by the DSB. Thus, there is no basis in DSU Article 7.1 or in the terms of reference set by the DSB for the Panel to have examined a different matter than that set out in Japan's panel request.

13. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations "*at the time of establishment of the Panel.*"[13] The United States agrees with this panel and Appellate Body understanding of the DSU. It is thus the challenged measures, as they existed at

[10] DSU, Art. 7.1.

[11] DSU, Art. 6.2; *see US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

[12] *EC – Chicken Cuts (AB)*, para. 156; *see also China – Raw Materials (AB)*, para. 260 ("a finding by a panel concerns a measure as it existed at the time the panel was established").

[13] *See, e.g.*, *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id*., para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also EC – Approval and Marketing of Biotech Products*, para. 7.456.

the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel should make findings.

14. Consistent with this understanding, the DSU addresses the function of a panel with respect to the matter referred to it by the DSB. Specifically, Article 11 requires that the panel should make an objective assessment of the "matter", including an objective examination of the facts and the applicability of and conformity with the covered agreements.[14] The panel also must issue a report under Article 12.7 setting out its "findings of fact, the applicability of relevant provisions and the basic rationale" for those findings.[15] There is nothing in these provisions that supports an understanding that a panel could make an assessment of a matter other than that the DSB has referred to it.

15. Therefore, the panel in this dispute was authorized and charged by the DSU to make a finding with respect to the measures within its terms of reference, i.e., the challenged measures, as they existed at the time of the Panel's establishment. The expiration of a measure identified in Japan's panel request does not alter the scope of the Panel's terms of reference, nor the Panel's mandate under the DSU. The United States thus agrees with Japan that the Panel acted in accordance with its obligations under the DSU by making findings with respect to India's measure, notwithstanding the apparent expiry of that measure before the Panel issued its report.[16]

16. Other panels and the Appellate Body have reached similar conclusions.[17] For example, in *China – Raw Materials*, the complainants challenged "export duties" and "export quotas" "comprised of basic framework legislation and implementing regulations . . . and specific measures . . . [issued] on an annual or time-bound basis."[18] As the three co-complainants requested, the panel made findings on the measures as they existed at the time of the panel's establishment and, with respect to measures found to be WTO-inconsistent, made a

[14] DSU, Art. 11.

[15] DSU, Art. 12.7.

[16] *See, e.g.*, Japan Appellee Submission, para. 67; *see, EC – Selected Customs Matters (AB)*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, *we fail to see how [they] showed uniform administration at the time of the establishment of the Panel*") (italics added).

[17] *See, e.g., EC – IT Products*, para. 7.167 ("[W]e note that any repeal would have taken place after the panel was established and its terms of reference were set. Therefore, the Panel considers that it may make recommendations with respect to these measures."); *US – Wool Shirts and Blouses (Panel)*, para. 6.2 ("In the absence of an agreement between the parties to terminate the proceedings, we think that it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate . . . notwithstanding the withdrawal of the US restraint."); *see also Indonesia – Autos*, para. 14.9; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *China – Raw Materials (AB)*, para. 260.

[18] *China – Raw Materials (AB)*, para. 264.

recommendation under Article 19.1 of the DSU. The Appellate Body found that the panel had acted correctly.[19]

17. Therefore, the United States considers the Panel did not err by making findings on the safeguard measure identified in Japan's panel request and within the Panel's terms of reference. Rather, as the DSB established the Panel and set its terms of reference to examine "the matter" set out in Japan's panel request, the DSU required the Panel to make findings on the measure as it existed when the Panel was established.

C. Where a Measure is Found to Be Inconsistent with a WTO Agreement, DSU Article 19.1 Requires a Panel or the Appellate Body to Make a Recommendation to Bring the WTO-Inconsistent Measure into Conformity with the Relevant Covered Agreements

18. Article 19.1 of the DSU requires panels and the Appellate Body to make a recommendation to a Member to bring the measure found to be inconsistent with the WTO Agreement into conformity with the relevant covered agreement.

19. Pursuant to DSU Article 11, a panel's "function" is to assist the DSB by "mak[ing] an objective assessment of the matter before it, including . . . the applicability of and conformity with the relevant covered agreements." With respect to the panel's recommendation, Article 19.1 sets out in mandatory terms that, where a panel "concludes that a measure is inconsistent with a covered agreement, it *shall recommend* that the Member concerned bring *the measure* into conformity with that agreement."[20] Thus, pursuant to Article 19.1, a panel is *required* to make a recommendation where it has found a measure within its terms of reference to be inconsistent with the relevant Member's obligations.

20. If a panel or the Appellate Body, contrary to DSU Article 19.1, fail to make a recommendation on a WTO-inconsistent measure because the measure has expired or changed during the course of panel or appellate proceedings, a responding party could theoretically avoid compliance with its WTO obligations by withdrawing a contested measure during the proceedings, and then later re-imposing it. Without a recommendation under Article 19.1, the responding Member would have no prospective implementation obligation with respect to that WTO-inconsistent measure,[21] and the complaining Member would have no right to request

[19] *See China – Raw Materials (AB)*, para. 260 ("While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations.").

[20] DSU, Art. 19.1 (emphasis added).

[21] *See, e.g.*, *China – Raw Materials (AB)*, para. 260 ("While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations.").

review of the responding Member's action under Article 21.5 of the DSU.[22] Such an outcome would necessarily diminish the rights of affected parties under the covered agreements.[23]

21. If the parties cannot arrive at a mutually satisfactory solution, then this dispute must preserve the rights and obligations of both parties under the DSU.[24] The United States considers that denying Japan a recommendation with respect to the measure at issue would prejudice its rights under the DSU.

22. As explained in the previous section, the United States disagrees with India that the Panel erred in making findings on the safeguard measure since the measure was in force at the time of the establishment of the Panel and within the Panel's terms of reference. Having found an inconsistency, the Panel was obligated under Article 19.1 of the DSU to issue a recommendation, as it did, with respect to the WTO-inconsistent measure.

23. For the foregoing reasons, therefore, the United States agrees with Japan that India's claim of error relating to DSU Article 19.1 must be rejected.[25] Unless the Appellate Body reverses all of the Panel's substantive findings that India's measure is inconsistent with the GATT 1994 or the Safeguards Agreement, the Panel's recommendation to India to bring its measure into conformity with those agreements must stand, as required under DSU Article 19.1.

III. JAPAN'S OTHER APPEAL OF THE PANEL'S "CONDITIONAL" RECOMMENDATION SHOULD BE UPHELD

24. In Japan's Other Appeal, Japan requests reversal of the panel's "conditional" recommendation.[26] Japan argues that "the Panel erred in recommending that India bring the measure into conformity with its WTO obligations only 'to the extent that the measure continues to have any effects'." The United States agrees.

25. As Japan explains, the Panel appears to have considered that a "conditional" recommendation would be appropriate where a measure has expired but continues to have "lingering effects". However, as the United States has explained in the previous Section, under DSU Article 7.1, a panel is to make findings on the specific measure at issue as it existed on the date the DSB referred the matter to the panel for examination. Under DSU Article 19.1, if a

[22] *See* DSU, Art. 21.5 ("Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures.").

[23] DSU, Art. 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

[24] *See* DSU, Art. 3.2 ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements . . . .").

[25] *See, e.g.*, Japan Appellee Submission, para. 76.

[26] *See, e.g.*, Japan Other Appellant Submission, para. 137.

panel or the Appellate Body finds a measure is WTO-inconsistent, it "shall recommend" that the Member bring the measure into conformity with the relevant covered agreement.

26. Nothing in Article 7.1 contemplates or authorizes a panel to examine a different, subsequent matter, including whether a measure has "lingering effects" at some point after panel establishment. Similarly, nothing in Article 19.1 contemplates or authorizes a panel to make a recommendation "to the extent" a measure has effects at some point after panel establishment.[27] The Panel's "conditional" recommendation therefore has no basis in the DSU.

27. In conclusion, the United States agrees that Japan's claim of error should be upheld, and the limitation in the Panel's recommendation should be reversed. In any event, the limitation the Panel sought to introduce in its recommendation can be viewed as moot and without legal effect as it has no basis in and contradicts the plain terms of DSU Article 19.1.

[27] *See* Japan Other Appellant Submission, para. 139 ("It thus follows from Article 19.1 of the DSU that, if a panel makes findings that a challenged measure is inconsistent with a covered agreement, it *is required to* ("shall") make recommendations with regard to that measure. There is no qualification in Article 19.1 of the DSU that such recommendations shall or should be "conditional" upon the measure having effects. In other words, there is no textual basis in Article 19.1 of the DSU that recommendations shall be made with regard to an expired measure only if that measure continues to have effects.").