UNITED STATES – CERTAIN MEASURES RELATING TO THE RENEWABLE ENERGY SECTOR

(DS510)

COMMENTS OF THE UNITED STATES ON RESPONSES OF INDIA TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING OF THE PANEL

February 26, 2019

TABLE OF REPORTS

SHORT TITLE	FULL CITATION
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1
US – Tax Incentives (Panel)	Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R and Add. 1
US – Zeroing (EC) (Article 21.5 – EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

1. In this document, the United States comments on India's responses to the Panel's questions following the second substantive meeting of the Panel with the parties. The U.S. comments are focused on new or restated arguments presented by India, and do not repeat all of the prior U.S. responses to India's arguments in this dispute. The absence of a U.S. comment on any particular response (or aspect of a response) should not be understood as agreement with India's positions.[1]

> ***102. (India) Please specify what findings and, if applicable, recommendations India is seeking with regard to measures 1, 2, 8 and 10. In particular, please clarify whether India is seeking findings and recommendations on the original and/or amended versions of measures 1, 2 and 8, and whether India is seeking recommendations on the two expired programs under measure 10. Please also specify, in the context of each of these specific measures or programs, the legal basis for India's request that the Panel rule on measures that have been amended or repealed after panel establishment.***

U.S. COMMENT ON INDIA'S RESPONSE TO QUESTION 102

2. As the United States has explained, a panel's terms of reference are set forth in Articles 7.1 and 6.2 of the DSU.[2] Under Article 7.1 of the DSU, when the DSB establishes a panel, the panel's terms of reference (unless otherwise decided) are "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under 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 for the complaint." Consequently, the measures with a panel's terms of reference are defined by the complainant's panel request, and the relevant time for defining the measures within the panel's terms of reference is the time of the DSB's establishment of the panel.

3. 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," and thus the measures on which the panel makes findings, "must be measures that are in existence at the time of the establishment of the panel."[3] Similarly, in *EC – Selected Customs Matters*, the panel and the Appellate Body both reasoned that, under the DSU, a panel

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[1] In this regard, the United States notes that in this submission, the United States has not commented on India's responses to questions 104, 105 106, 107, 108, 109, 110, 111, 113, 115. 116, 117, 119, 117, 120, 122, 124, 125, and 128.

[2] *See, e.g.*, U.S. First Written Submission, paras. 45-47.

[3] *EC – Chicken Cuts (AB)*, para. 156.

is to determine whether the measure at issue is consistent with the relevant obligations "at the time of establishment of the Panel."[4]

4. In short, India's position is inconsistent with the text in Articles 6.2 and 7.1 of the DSU. And, India has acknowledged that the amended versions of Measure 1 and 2 were enacted after the date the panel in this dispute was established.[5] Accordingly, these measures are not in the Panel's terms of reference, and there is no basis for the Panel to issue legal findings or recommendations with respect to the amended versions of Measures 1 and 2.[6]

5. India relies on certain reports indicating that certain panels have made findings on measures adopted after the date of panel establishment. Such prior reports, however, are not persuasive. Indeed, the decisions in those reports to address measures adopted after panel establishment do not start with or even consider the relevant text of the DSU. And, as the United State has explained, nothing in the text of Articles 6.2 or 7.1 of the DSU supports the view that measures enacted after the date of panel establishment (including amendments) are within a panel's terms of reference. Nor has India identified any other text in the DSU that would otherwise support such a view.

6. Moreover, India's argument that the inclusion of the amendments in the Panel's terms of reference is necessary "to secure a positive solution to the dispute" is unsupported by the text of the DSU. As noted, Articles 6.2 and 7.1 of the DSU demarcate a panel's terms of reference. Neither provision suggests that a panel may review a measure that otherwise falls outside of its terms of reference set by Article 6.2 or 7.1 of the DSU because – in the view of the complaining Member – doing so is necessary "to secure a positive solution to the dispute." Apparently, India is trying to draw on Article 3.7 of the DSU. That provision, however, describes the aims of the dispute settlement system as a whole, and does not alter the specific provisions in the DSU governing terms of reference. Accordingly, the terms reference set out in Articles 6.2 and 7.1 are those that the drafters of the DSU understood would secure a positive resolution of the dispute.

7. For these reasons, India's view that the Panel should render findings and recommendations on amendments not in existence at the time of panel establishment is nothing more than a policy argument, unsupported by the text of the DSU. Furthermore, India's policy argument is unpersuasive. Apparently, India's argument is premised on the concern that newly-adopted amendments would somehow be exempt from DSB findings. This, however, is

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[4] *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").

[5] *See* India's First Written Submission, paras. 10 and 127.

[6] The United States does not dispute that to the Panel should make findings on the amended version of Measure 8, because that measure was amended prior to panel establishment.

incorrect. When a Member successfully establishes that a measure is inconsistent with a WTO obligation, the DSB will recommend that the measure be brought into conformity with WTO rules. The Member subject to the recommendation is not somehow exempt from the compliance provisions of the DSU simply because that Member amends the measure subject to DSB recommendations. To the contrary, the DSU established a procedure under Article 21.5 in which questions of compliance may be addressed.[7]

8. In sum, the amended versions of Measures 1 or 2 are not in the Panel's terms of reference because neither measure existed at the time of panel establishment. On the other hand, the United States does not dispute that the amended version of Measure 8 is properly within the Panel's terms of reference as it was enacted before the panel was established (though its effective date was after the panel was established[8]). With respect to the two expired programs under Measure 10, the United States does not dispute that those measures were in existence on the date of panel establishment.[9]

103. (India and the United States) If the Panel were to find that the amended versions of Measures 1, 2, and 8 fall outside its terms of reference, should the Panel nevertheless make findings (and/or recommendations) concerning the versions of those measures that were in force at the time the Panel was established? Please explain the legal basis for your answer.

U.S. COMMENT ON INDIA'S RESPONSE TO QUESTION 103

9. As explained, the United States agrees that India is entitled to legal findings and recommendations on the pre-amended versions of Measures 1, 2, and 8 because each of those measures were in existence on the date of panel establishment.[10]

[7] *See US — Zeroing (EC)* (Article 21.5 — EC) (*AB*), paras. 301–302 ("The task of a panel under Article 21.5 of the DSU is to examine the questions of the existence or consistency with the covered agreements of measures taken to comply with the recommendations and rulings of the DSB. This examination will cover the instruments or actions that the responding Member has identified as measures "taken to comply". However, other closely connected measures *or omissions* in compliance by the responding Member fall within the scope of compliance proceedings and will be examined by the compliance panel in order to determine whether such actions or omissions undermine or negate the compliance achieved by the declared measures "taken to comply", or establish inexistent or insufficient compliance.")

[8] The amended version of Measure 8 was enacted on December 21, 2016, with an "effective date" of April 20, 2017). *See* PA 342 of 2016 (Exhibit IND – 45).

[9] However, the United States continues to maintain that the Rebate for Solar Thermal Systems is *not* within the Panel's terms of reference because it was not identified in India's request for consultations. *See* U.S. First Written Submission, paras. 66-74.

[10] *See* U.S. Response to Panel Question 103.

118. (India) Please respond to the United States' argument, at paragraphs 6-13 of the United States' second written submission, that India has failed to demonstrate that the challenged measure, and particularly Measures 1, 2, and 7-10, "are bound or likely to have … [an] incentivizing effect".

U.S. COMMENT ON INDIA'S RESPONSE TO QUESTION 118

10. In its response to Panel question 118, India complains that the United States "has framed it arguments solely on the use of the term incentivization."[11] The United States, however, can only respond to India's arguments in the way that India has framed them in its various submissions. Because India has argued that the measures at issue accord "less favourable" treatment to imported products *by* incentivizing the purchase or use of domestic products, the United States, as the party complained against, has responded with explanations of why India has not established that the measures were likely to have the incentivizing effects claimed by India.

11. Moreover, in its first written submission, India referenced various data points for the ostensible purpose of demonstrating that the measures at issue have incentivized the purchase or use of domestic products *in fact*.[12] Accordingly, it was India – *not* the United States – that introduced the question of "actual [trade] effects"[13] into this dispute by attempting to show that the measures at issue have produced such effects as an empirical matter. Surely, it would have not gone unremarked upon by India had the United States failed to refute the relevance of the trade data that India entered into the record.[14]

12. Once again, contrary to India's suggestion,[15] the United States does not argue that a demonstration of "actual trade effects" or "incentivization" are required elements of a claim under Article III:4 of the GATT 1994. But because India based its *prima facie* case on the assertion that the measures at issue *incentivize* the purchase or use of domestic products – and attempted to support that argument by showing supposed trade effects – India assumed the burden of demonstrating that the measures are likely to have such an incentivizing effect.[16] Oddly, India contends that it "has [not] proposed to assume such [a] burden." Of course, the

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[11] *See* India's Response to Panel Question 188, para. 39.

[12] *See* U.S. Opening Statement at the First Substantive Meeting of the Panel with the Parties ("U.S. Opening Statement at the First Meeting"), para. 11.

[13] *See* India's Response to Panel Question 118, para. 40.

[14] U.S. Opening Statement at the First Meeting, paras. 7-11.

[15] *See* India's Response to Panel Question 118, para. 40.

[16] *See* U.S. Opening Statement at the First Meeting, para. 3, referencing *Japan – Measures Affecting Agricultural Products (AB)*, para. 121, citing *United States – Shirts and Blouses (AB)*, note 18 ("Various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.").

burden assumed by a complaining party is not a matter of its discretion, but determined by the legal and factual arguments it has advanced to support its claims.

13. In this regard, it appears that India seeks to jettison its assumed burden by deemphasizing the incentivization theory set forth its first written submission.[17] In particular, India now argues that is does not "bear[] the burden of demonstrating that the challenged measures are 'bound or likely to have [an] incentivizing effect'" because the measures are "facially discriminatory"[18] – an argument that India did not make in its first written submission. But as the United States has explained, India was required to present its *prima facie* case in its first written submission.[19] Therefore, to the extent India considers that the measures *on their face* breach Article III:4, – India was required to make out this argument in its first written submission, consistent with paragraph 3 of the Panel's Working Procedures.[20] It would therefore be completely inconsistent with the Working Procedures, as well as procedural fairness, to allow India to reframe is *prima facie* case at this late stage.

14. At any rate, in none of its submissions has India met the legal burden necessary to establish that the measures at issue are inconsistent with Article III:4 of the GATT 1994. As noted, the arguments in India's first written submission are comprised primarily of conclusory statements that are unsupported by the required analysis of the challenged measures or the markets in which the measures operate.[21] In its second written submission, India simply argues that the United States "has not disputed India's claims under Article III:4 of the GATT 1994," notwithstanding the fact that the United States did just that for each measure at issue in its first written submission.[22] Finally, in its response to Panel question 118, India resorts to paraphrasing the arguments of its first written submission, without making any attempt to address the "conclusory" nature of those arguments. India does engage in some new discussion in which it characterizes the measures at issue as "facially discriminatory" or as having "discriminatory element[s]."[23] But the term "discriminatory" (or variations thereof) is not a relevant legal term; it does not appear in the text of Article III:4 of the GATT 1994 or any other paragraph of Article III. Rather, to establish claims under Article III:4 with respect to a group of measures, a Member must establish each and every element of Article III:4 with respect to each measure at issue. For

[17] *See, e.g.*, India's Response to Panel Question 118, para. 37.

[18] *See* India's Response to Panel Question 118, para. 42.

[19] *See* U.S. Reponses to the Panel's Questions Following the First Substantive Meeting, para. 3.

[20] Working Procedures of the Panel, para. 3.1 ("Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.")

[21] *See* U.S. Second Written Submission, paras. 4-13.

[22] *See*, India's Second Written Submission, paras. 12-16.

[23] *See, e.g.*, India's Response to Panel Question, para. 42.

these reasons, India's new assertion that the measures are "discriminatory" does nothing to buttress India's claims under Article III:4 of the GATT 1994.

123. (India) Please respond to the argument at paragraph 40 of the United States' second written submission that the use of the term "maintain" in Article 3.2 of the SCM Agreement "does not support" India's position because it "simply means that Members may not maintain prohibited subsidies beyond the initial grant of the subsidy".

U.S. COMMENT ON INDIA'S RESPONSE TO QUESTION 123

15. The United States understands India to be referencing paragraph 7.154 of the panel report in *US – Tax Incentives* when it makes following statement in its response to Panel Question 118:

> The panel in *US – Tax Incentives* has clarified that even a promise or commitment by a government to make a financial contribution satisfies the existence of financial contribution. It is on this basis that the panel found existence of a subsidy with respect to the challenged measures in that dispute. Therefore, the import of the term "maintain" under Article 3.1(b) is that a Member may not "cause or enable to continue" a subsidy (i.e. even subsidies that result from a commitment or promise to make a financial contribution).[24]

16. India's reliance on the findings in *US – Tax Incentives* is clearly misplaced: the panel was *not* interpreting the term "maintain" as used in Article 3.2. Instead, the panel's discussion at paragraph 7.154 is focused on the phrase "government revenue is forgone" within the meaning of Article 1.1(a)(1)(ii). Therefore, India's reference to *US – Tax Incentives* is not relevant to the question what it means to "maintain" a prohibited subsidy within the meaning of Article 3.2 of the SCM Agreement.

17. India has emphasized the disjunctive phrasing of Article 3.2 ("grant *or* maintain" prohibited subsidies),[25] but India has not explained, nor can it explain, how the phrasing of Article 3.2 has any relevance as to whether or not a contribution exists under the terms set out in Article 1. Further, the United States disagrees that such phraseology is inconsistent with the view that the language of Article 3.2 conveys that Members may not maintain prohibited subsidies beyond the initial grant of the subsidy. In this respect, the use of the term "maintain" reflects the reality that certain subsidies can continue to confer benefits beyond the initial grant and confirms that Article 3 imposes an obligation to affirmatively withdraw such subsidies (as opposed to the more modest obligation to refrain from granting such subsidies in the future).

[24] India's Response to Panel Question 118, para. 52.

[25] *See* India's Response to Panel Question 123, para. 53.