

Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, October 14, 2016

1. INDIA – CERTAIN MEASURES RELATING TO SOLAR CELLS AND SOLAR MODULES

A. REPORT OF THE APPELLATE BODY (WT/DS456/AB/R AND WT/DS456/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS456/R AND WT/DS456/R/ADD.1)

- The United States is pleased to propose the adoption of the panel and Appellate Body reports in this dispute involving domestic content requirements for solar cells and modules under India's National Solar Mission.
- The United States would like to thank the Panel, the Appellate Body, and the Secretariat assisting them for their hard work in this dispute. The findings of inconsistency by the Panel, as upheld by the Appellate Body, and the recommendations that follow from those findings pursuant to DSU Article 19.1, are the means by which panels and the Appellate Body assist the DSB in making its recommendations and rulings.
- And it is those DSB recommendations and rulings that will assist the parties in achieving a positive solution to their dispute, through a mutually agreed solution or withdrawal of the measure, as envisioned in DSU Article 3.7.
- The United States would like to emphasize that the United States strongly supports India's effort to promote the generation and use of solar power in India. The United States looks forward to a continued partnership with India in the global fight against climate change.
- However, as noted by the United States over the course of this dispute, discriminatory policies in the clean energy sector – such as India's domestic content requirements – undermine efforts to promote the generation of clean energy by requiring the use of more expensive and less efficient equipment.
- The United States would like to draw attention to several key findings included in these reports.
- First, the Panel found – and the Appellate Body affirmed – that India's domestic content requirements are inconsistent with India's national treatment obligations under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.
- And the Panel and Appellate Body rejected India's argument that its domestic content requirements can be justified under the government procurement exemption of Article III:8(a) of the GATT 1994. This finding makes clear that Article III:8(a) *does not apply*

when a Member purchases one product, but discriminates against another, wholly different product.

- Second, the Panel found, and the Appellate Body upheld, that India had failed to establish that its domestic content requirements are justified under Article XX(j) of the GATT 1994, which permits Members to adopt WTO-inconsistent measures that are “essential to the acquisition or distribution of products in general or local short supply.”
- The Panel and Appellate Body rejected India’s argument that solar cells and modules are in “short supply” in India on account of India’s lack of domestic manufacturing capacity for solar cells and modules. Rather, a product is in “short supply” under Article XX(j) when the quantity of available supply of a product, *from all sources*, does not meet demand in a relevant geographical area or market.
- Third, the Panel found, and the Appellate Body upheld, that India had failed to demonstrate that its DCR measures are justified under Article XX(d) of the GATT 1994, which permits Members to adopt WTO-inconsistent measures that are necessary to “secure compliance” with “laws or regulations” that are not themselves WTO-inconsistent.
- The Panel and Appellate Body found that – with the exception of a single instrument – none of the domestic or international instruments identified by India constituted “laws or regulations” with which India must “secure compliance” within the meaning of Article XX(d). The Panel and Appellate Body also found that none of the domestic instruments identified by India set out a legal obligation to promote sustainable development.
- Having upheld the Panel’s findings under Article III:8(a), Article XX(j), and Article XX(d), the Appellate Body properly did “not consider it necessary” to examine India’s claims under other legal elements under those provisions as reaching those issues was not necessary to resolve the dispute.¹
- The United States also notes that the report contains a separate opinion. In general, we consider it a positive step for the members of a Division to explore and explain where they have not been able to come to one view on a particular legal issue.
- In the case of this particular opinion, however, we do not see how it relates to an issue raised in this appeal. Accordingly, it would appear to be another example of *obiter dicta*, a problem to which we have drawn the attention of the DSB in the recent past.
- As we have also expressed in the past, particularly at a time when workload issues are increasingly affecting the timetable for the resolution of disputes, including appeals, a focus on those legal issues necessary to resolve the dispute would enhance the efficient functioning of the dispute settlement system.

¹ Appellate Body Report, para. 5.155

- Mr. Chairman, in conclusion, we would like to thank both the Panel and the Appellate Body for the legal findings in these reports.