INDIA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS585)

RESPONSE OF THE UNITED STATES OF AMERICA TO INDIA'S REQUEST FOR A PRELIMINARY FINDING

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I. INTRODUCTION

1. On April 30, 2020, India submitted to the Panel its first written submission in this dispute and a separate request for a preliminary finding. India requests that the Panel make a preliminary finding that the U.S. panel request did not meet the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).[1] As demonstrated in this response, India's request is meritless and should be denied.

2. India's request for a preliminary finding fails to establish that the U.S. panel request is deficient. Instead, India relies on irrelevant and unfounded arguments. India asserts that "the US ought to have brought a claim under Article 8.2 [of the WTO *Agreement on Safeguards* (Safeguards Agreement)] since the failure to do so does not present the problem clearly."[2] By referencing Article 8.2 of the Safeguards Agreement, India is pointing to an additional claim that, *in its view*, the United States could have presented in the U.S. panel request. Clearly, the fact that a responding Member believes that the complaining Member should have brought additional claims in no way affects whether a panel request complies with the requirements of Article 6.2 of the DSU.

3. As the United States explained in its first written submission to the Panel, this dispute is about the measure India has adopted that is plainly inconsistent with the fundamental WTO obligations to provide most-favored-nation treatment (MFN) and treatment no less favorable than that provided for in a Member's Schedule of Concessions, as set out respectively in Articles I and II of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).[3] Article 6.2 of the DSU does not require that panel requests identify justifications that the responding Member might assert during the course of this dispute.[4]

4. India also asserts that the U.S. panel request is deficient because it allegedly did not provide India with adequate notice as to what India characterizes as "the main claim" in the U.S. first written submission regarding Article 8.2 of the Safeguards Agreement.[5] This argument is completely circular and without merit – the United States has presented no claim under Article 8.2 of the Safeguards Agreement; thus, some hypothetical claim not presented by the United States is not and cannot be the "main" U.S. claim. And since it is not a U.S. claim, there was no reason for the U.S. panel request to mention Article 8.2 of the Safeguards Agreement. India compounds its errors by advancing numerous assertions that have nothing to do with Article 6.2 of the DSU, including with respect to the allocation of the burden of proof. These arguments cannot obfuscate that the U.S. panel request plainly meets the requirements of Article 6.2 of the DSU.

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[1] India's Preliminary Finding Request (April 30, 2020), paras. 1.1-1.6, 4.1-4.79.

[2] *Id*., para. 4.2.

[3] *See* First Written Submission of the United States of America ("U.S. First Written Submission") (February 27, 2020), paras. 23-51.

[4] *See* U.S. First Written Submission, paras. 52-73; *see also US – Steel and Aluminum Products (India)*, WT/DS547/8.

[5] India's Preliminary Finding Request (April 30, 2020), para. 4.2.

5. In this response, the United States will first provide, in Section II, background relevant to the preliminary ruling request with respect to the U.S. panel request and the U.S. first written submission. The United States will then establish, in Section III, that India has no basis for arguing that the U.S. panel request does not meet the requirements of Article 6.2 of the DSU. Accordingly, India's request for a preliminary finding should be rejected.

II. BACKGROUND

6. After indicating that the United States held consultations with India on August 1, 2019, the U.S. panel request[6] briefly explains that India's additional duties measure applies only to products originating in the United States. In this brief summary, the U.S. panel request notes that India's additional duties measure does not apply to like products originating in the territory of any other WTO Member and thus appears to be inconsistent with the most-favored nation obligation in Article I of the GATT 1994.[7] The U.S. panel request also notes that India's additional duties measure results in rates of duty greater than the rates of duty set out in India's Schedule of Concessions and thus appears to be inconsistent with Article II of the GATT 1994.[8]

7. The U.S. panel request then identifies the legal instruments through which India imposes its additional duties on products originating in the United States.[9] The U.S. panel request ends by explaining why India's additional duties measure is inconsistent with India's WTO obligations: (1) Article I:1 of the GATT 1994, because India fails to extend to products of the United States an advantage, favor, privilege, or immunity granted by India with respect to customs duties and charges of any kind imposed on or in connection with the importation of products originating in the territory of other Members; (2) Article II:1(a) of the GATT 1994 because India accords less favorable treatment to products originating in the United States than

[6] WT/DS585/2.

[7] *Id*.

[8] *Id*.

[9] *Id*., (noting the following Indian legal instruments: (1) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 48/2018 – Customs*, June 20, 2018; (2) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 49/2018 – Customs*, June 20, 2018; (3) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 56/2018 – Customs*, August 3, 2018; (4) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 62/2018 – Customs*, September 17, 2018; (5) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 77/2018 – Customs*, November 1, 2018; (6) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 80/2018 – Customs*, December 15, 2018; (7) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 03/2019 – Customs*, January 29, 2019; (8) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 06/2019 – Customs*, February 26, 2019; (9) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 11/2019 – Customs*, March 29, 2019; (10) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 14/2019 – Customs*, May 1, 2019; (11) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 15/2019 – Customs*, May 14, 2019; (12) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 16/2019 – Customs*, June 15, 2019; and (13) *Government of India, Ministry of Finance, Department of Revenue, Notification No. 17/2019 – Customs*, June 15, 2019).

that provided for in India's Schedule of Concessions; and (3) Article II:1(b) of the GATT 1994 because India imposes duties or charges in excess of those set forth in India's Schedule.[10]

8. In Section V of the U.S. first written submission, the United States explained that India's measure is inconsistent with its obligations under Article I:1 of GATT 1994 because it fails to extend to certain products of the United States an advantage granted by India to like products originating in other countries.[11] And in Section VI of the U.S. first written submission, the United States explained that India's measure is inconsistent with its obligations under Article II of the GATT because India's measure imposes duties on products originating in the United States in excess of India's bound rate and provides less favorable treatment to such products.[12]

9. Having presented the U.S. claims, the United States ends the U.S. first written submission with *preliminary comments* on what the United States understood might be a justification that India would present in its first written submission—namely, that in the event India attempted to justify its additional duties on a safeguard theory, such justification would be completely without merit because the United States has not adopted a safeguard.[13]

III. INDIA'S REQUEST FOR A PRELIMINARY FINDING IS MERITLESS BECAUSE THE U.S. PANEL REQUEST MEETS THE REQUIREMENTS OF ARTICLE 6.2 OF THE DSU BY PRESENTING THE PROBLEM CLEARLY

10. India makes three flawed arguments concerning the U.S. panel request. An examination of the U.S. panel request, however, makes clear that the U.S. panel request complies with the requirements of Article 6.2 of the DSU. In addition, India's request for a preliminary finding includes numerous assertions regarding the purported justification India presents in its first written submission for India's breach of Articles I and II of the GATT 1994.[14] In this response, the United States will address only India's arguments concerning Article 6.2 of the DSU. Consistent with the DSU and the Working Procedures adopted by the Panel,[15] the United States will respond to India's arguments concerning the substance of this dispute at the meeting of the Panel with the parties and in subsequent submissions. Below, the United States sets forth the

[10] *Id.*

[11] *See* U.S. First Written Submission, paras. 23-36.

[12] *Id.*, paras. 37-51.

[13] *Id.*, paras. 52-73.

[14] *See* India's Preliminary Finding Request, paras. 4.41 – 4.79 (noting that even if the Panel does not grant India's request for a preliminary finding, India argues that the Panel should dismiss the U.S. claims based on India's position that the measure at issue in this dispute were allegedly taken pursuant to Article 8.2 of the Safeguards Agreement).

[15] *See* DSU Appendix 3, paragraph 5 (noting that "[a]t its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case."); DSU Appendix 3, paragraph 7 (noting that "[f]ormal rebuttals shall be made at a second substantive meeting of the panel" and that "[t]he parties shall submit, prior to that meeting, written rebuttals to the panel."); *see also,* Working Procedures of the Panel, paragraph 15(a) (noting that "[t]he Panel shall invite the United States to make an opening statement to present its case first.") (February 7, 2020).

applicable legal standard of Article 6.2 of the DSU and then addresses India's arguments on the alleged deficiencies in the U.S. panel request.

11. Article 6.2 of the DSU sets forth the requirements for a request for the establishment of a panel in order to bring a "matter" (in the terms of Article 7.1 of the DSU) within a panel's terms of reference. In relevant part, Article 6.2 of the DSU provides that a request to establish a panel:

> shall indicate whether consultations were held, identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

12. According to the text, two basic requirements in Article 6.2 are that the panel request (1) identify the specific measure at issue and (2) include a brief summary of the legal basis of the complaint in a sufficient manner to clearly present the problem. These requirements serve the twin purposes of establishing and defining the panel's jurisdiction and providing notice to the responding party and potential third parties as to the nature of the dispute.[16] The United States will address the second requirement of Article 6.2 – a brief summary of the legal basis of the complaint sufficient to present the problem clearly – as that appears to be the focus of India's preliminary ruling request. [17]

13. To provide the brief summary of the legal basis of the complaint required by Article 6.2 of the DSU, it is sufficient for a complaining Member in its panel request to specify the legal claims under the WTO provisions that it considers are breached by the identified measure.[18]

14. In this dispute, the U.S. panel request identifies the legal instruments through which India imposes the additional duties measure.[19] The U.S. panel request then explains which WTO obligations form the legal basis of the U.S. complaint. Furthermore, although not required by Article 6.2, the panel request explains why India's additional duties are inconsistent with the specified WTO obligations:

- Article I:1 of the GATT 1994, because India fails to extend to products of the United States an advantage, favor, privilege, or immunity granted by India with respect to customs duties and charges of any kind imposed on or in connection with the importation of products originating in the territory of other Members;

[16] *See Argentina – Import Measures (AB)*, para. 5.39.

[17] *See* India's Preliminary Finding Request, paras. 1.2-1.4, 4.1-4.40.

[18] *See Argentina – Import Measures (AB)* (noting that a panel request meets the element of DSU 6.2 to "present the problem clearly" by connecting the challenged measure with the provisions claimed to have been infringed.), para. 5.39.

[19] In paragraph 2.4 of its Preliminary Finding Request, India indicates that it "considers the factual description relating to the measures at issue set out in the US FWS to be broadly accurate for the purposes of this Request."

- Article II:1 (a) of the GATT 1994, because India accords less favorable treatment to products originating in the United States than that provided for in India's Schedule of Concessions; and

- Article II:1(b) of the GATT 1994 because India imposes duties or charges in excess of those set forth in India's Schedule.[20]

Thus, the U.S. panel request sets out that the United States considers that India's additional duties measure is inconsistent with India's WTO obligations under Articles I and II of the GATT 1994. Accordingly, the U.S. panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

15. India, therefore, is incorrect in arguing that the U.S panel request does not meet the requirements of Article 6.2 of the DSU.

16. Despite the straightforward application of Article 6.2 to the U.S. panel request, India puts forth three flawed arguments. India's first argument – that the United States "ought to have brought a claim under Article 8.2"[21] of the Safeguards Agreement – fails because India is merely pointing to an additional claim that, *in its view*, the United States could have presented. India attempts to connect its flawed argument to Article 6.2 of the DSU in arguing that "although the US may have identified a legal basis in its [p]anel [r]equest, it is not the proper legal basis, and is insufficient to dispose of the dispute between the parties",[22] which, according to India, is about "whether India has properly invoked Article 8.2"[23] of the Safeguards Agreement. But that is not the legal standard under Article 6.2 of the DSU. The fact that the United States did not bring a claim under a provision that India deems relevant – or under any other WTO provision not specified in the Panel request – simply means that the United States is not seeking findings on those provisions.

17. Furthermore, the provisions identified in the U.S. panel request as the basis of its claims do not limit which provisions India may choose to cite to attempt to establish a justification for its measure. And Article 6.2 of the DSU does not require that a panel request anticipate legal arguments raised by the responding party. Rather, in Appendix 3, paragraph 4, the DSU reflects that "[b]efore the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments." Thus, it is for India in its first written submission to present its arguments, which are not limited by the claims as set out in the U.S. panel request.

18. India's second argument – that Section VII of the U.S. first written submission includes *claims* under Article 8.2 of the Safeguards Agreement that were not included in the U.S. panel

[20] *See* WT/DS566/2.

[21] India's Preliminary Finding Request, para. 4.2.

[22] *Id*., para. 4.19. (emphasis added).

[23] *Id*., para. 4.19.

request – is simply baseless.[24] Section VII of the U.S. first written submission plainly did **not** purport to raise any claims under Article 8.2 of the Safeguards Agreement, or under any other WTO provision. Rather, this section of the U.S. first written submission simply anticipated a line of argument that India might present in an attempt to justify its additional duties.

19. India's third and final argument – that the United States "attempts to unduly shift the burden of proof onto India"[25] – confuses matters related to the sufficiency of a panel request and the concept of burden of proof in dispute settlement proceedings. The U.S. panel request does not assert a breach of Article 8.2 or any WTO provision involving safeguard disciplines because no safeguard is involved, and the United States understandably is not seeking any findings under the Safeguard Agreement. This fact completely rebuts India's argument under Article 6.2 of the DSU.

20. The question of which party bears the burden with regard to India's asserted justification is a completely distinct issue. And on this issue, the United States understands that India has the initial burden of showing that the Safeguard Agreement applies. This arises from the basic principle that the United States is not responsible for establishing such a breach and, India, as the party asserting that proposition, carries the burden to establish it. In this regard, the Appellate Body's observation in *US – Wool Shirts and Blouses* concerning the proper allocation of the burden of proof is relevant here. In that dispute, the Appellate Body noted that "it is a generally accepted cannon of evidence in civil law, common law, and, in fact, most jurisdictions that the burden of proof rests upon the party, whether complaining or responding, who asserts the affirmative of a particular claim or defence."[26] As explained by the panel in *India – Export Related Measures*, "it makes little sense to require complainants to anticipate all possible excluding provisions that might apply and then explain why, in fact, they do not apply. A responding Member is best placed to know whether its measures fall under a particular excluding provision."[27] Perhaps India disagrees with this. But the issue of the allocation of burden of proof has nothing to do with the issue in the preliminary ruling request – namely, whether the U.S. panel request met the requirements of Article 6.2.

21. The United States also notes that India's burden of proof argument mistakenly relies on the reasoning of the Appellate Body's report in *EC – Tariffs*. The findings in that dispute, however, are not relevant to the Panel's assessment of whether the U.S. panel request meets the requirements of Article 6.2. First, in *EC – Tariffs,* Article 6.2 of the DSU was not an issue of law raised in the appeal before the Appellate Body.[28] Nor did the Appellate Body address a legal interpretation developed by the panel concerning Article 6.2. Accordingly, the Appellate Body's

[24] *Id.*, paras. 4.22-4.26.

[25] *Id*., heading 4.3.

[26] *US – Wool Shirts and Blouses (India) (AB)*, page 14.

[27] *India – Export Related Measures (Panel)*, para. 7.11.

[28] *See EC – Tariffs (AB*) (the section of the report noting the issues raised in the appeal does not include the panel's interpretation of Article 6.2 of the DSU), para.78.

observation[29] regarding the application of Article 6.2 of the DSU to panel requests concerning measures authorized by the *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of the Developing Countries* ("Enabling Clause")[30] is mere *dicta*. Second, that dispute concerned the Enabling Clause and addressed a fundamentally different facts. In *EC–Tariffs*, the complaining party considered the Enabling Clause **to be relevant** to that dispute and requested consultations under this provision.[31] Here, the United States as the complainant does not consider any safeguard provisions to be relevant.

22. Furthermore, India's suggestion that the Appellate Body report in *EC – Tariffs* imposes an obligation that goes beyond the text of Article 6.2 of the DSU is necessarily incorrect. As the DSU states explicitly, the "Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."[32]

23. In essence, India puts forth a number of flawed arguments concerning the U.S. panel request and Article 6.2 of the DSU. As the United States explained in the U.S. first written submission, this dispute is about India's WTO commitments under Articles I and II of the GATT 1994. That is the legal basis for the U.S. claims, and that basis was presented clearly in the U.S. panel request. Accordingly, the arguments presented by India regarding Article 6.2 of the DSU are baseless.

IV. CONCLUSION

24. For the foregoing reasons, the United States respectfully requests that the Panel reject India's request for a preliminary finding. Consistent with the Panel's working procedures, the Panel should defer a finding on the issues raised by India's request until the Panel issues its Report to the parties.

[29] *Id*., (noting that "we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the 'legal basis of the complaint sufficient to present the problem clearly.'"), para. 110 (internal citations omitted).

[30] BISD 26S/203.

[31] *See EC – Tariff Preferences (AB)* (noting that "In its request for the establishment of a panel, India asked that a panel examine whether the aforementioned arrangements of the European Communties' GSP scheme 'are consistent with . . . the requirements set out in paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause.'"), para. 119.

[32] DSU Article 19.2; *see also* DSU Article 3.2 (noting that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").