INDIA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS585)

COMMENTS OF THE UNITED STATES OF AMERICA ON INDIA'S ADDITIONAL SUBMISSION ON THE U.S. REPLY TO INDIA'S REQUEST FOR A PRELIMINARY FINDING

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TABLE OF CONTENTS

TABLE OF REPORTS

SHORT FORM	FULL CITATION
Argentina – Import Measures (AB)	Appellate Body Reports, *Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Brazil – Desiccated Coconut (AB)	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
Brazil – Desiccated Coconut (Panel)	Panel Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report WT/DS22/AB/R
Canada – Wheat Exports and Grain Imports (AB)	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
EC – Tariff Preferences (AB)	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004
India – Autos (Panel)	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002
Thailand – Cigarettes (Philippines) (AB)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
US – Countervailing and Anti-Dumping Measures (China) (AB)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004

I. INTRODUCTION

1. In India's first written submission, India requested 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] On May 26, 2020, the United States submitted its response demonstrating that India's request lacked merit and should be rejected.[2]

2. India subsequently sought leave from the Panel to file an additional submission to reply to the U.S. response. The United States did not object and the Panel granted India leave to file an additional submission by June 24, 2020, and afforded the United States an opportunity to respond. As demonstrated in these comments, India's additional submission confirms that its preliminary finding request should be rejected.

3. India's additional submission merely repackages the mistaken arguments presented in its preliminary finding request, without providing any further argument to establish that the U.S. panel request is deficient.

4. In these comments, the United States first recalls, in Section II, the legal standard for evaluating a panel request under Article 6.2 of the DSU.[3] In Section III, the United States explains how India's additional submission confirms 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. LEGAL STANDARD

5. The United States briefly recalls relevant aspects of the legal standard in Article 6.2 of the DSU. Article 6.2 sets forth the requirements for a request for the establishment of a panel. 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.

6. 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) provide a brief summary of the legal basis of the complaint sufficient to clearly present the problem. Article 7.1, in turn, sets out the standard terms of reference the Dispute Settlement Body (DSB) establishes for a panel. The first element of a panel's terms of reference is "To examine, in the light of the relevant provisions in […] the covered agreement(s) cited by the parties to the dispute[], the matter referred to the DSB by [the complaining party] in [the panel request]." Thus, the "matter" to be examined by a panel

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

[2] U.S. Reply to India's Preliminary Finding Request (May 26, 2020), paras. 6-9.

[3] The United States provided background relevant to India's preliminary finding request in the U.S. reply of May 26, 2020.

consists of the "specific measure" identified and the "brief summary of the legal basis" provided by the panel request.

7. India presents no argument that the U.S. panel request does not identify the specific measure at issue. Accordingly, these comments address relevant aspects of the second requirement of Article 6.2 – a brief summary of the legal basis of the complaint sufficient to present the problem clearly. [4]

8. 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.[5]

9. In the U.S. Response to India's Preliminary Finding Request, the United States explained how the U.S. panel request meets these requirements.[6]

III. INDIA'S ADDITIONAL SUBMISSION FAILS TO ESTABLISH THAT THE U.S. PANEL REQUEST DOES NOT MEET THE REQUIREMENTS OF ARTICLE 6.2 OF THE DSU

10. India's additional submission contains several flawed responses to the U.S. Response to India's Preliminary Finding Request. A number of India's comments merely expand on flawed arguments in India's request for a preliminary finding and therefore fail for the same reasons as India's prior arguments. India's other arguments all lack a basis in the text of the DSU.

11. First, India continues to argue that the U.S. panel request must reflect what India identifies as the "main claim": Article 8.2 of the WTO *Agreement on Safeguards* (Safeguards Agreement). As the United States has already explained, however, the United States has presented no claim under Article 8.2 and was not required to do so. Next, India in its additional submission fails to demonstrate that the issue of burden of proof is tied to the sufficiency of a panel request under Article 6.2 of the DSU. Finally, with respect to India's attempts to engage on substantive issues that go beyond the scope of a preliminary request, 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,[7] the United States will respond to India's

[4] *See* India's Preliminary Finding Request, paras. 1.2-1.4, 4.1-4.40; India's Additional Submission on U.S. Response to India's Preliminary Finding Request (India's Additional Submission), paras. 3.1-3.60.

[5] *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.

[6] U.S. Reply to India's Preliminary Finding Request (May 26, 2020), paras. 6-9.

[7] *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).

arguments concerning the substance of this dispute at the meeting of the Panel with the parties and in subsequent submissions.

a. India continues to mistakenly argue that the U.S. panel request must reflect what India identifies as "*the* problem": Article 8.2 of the *Safeguards Agreement*.

12. First, India persists in the incorrect position that the United States in Section VII of the U.S. first written submission raised a claim under Article 8.2 of the Safeguards Agreement.[8] Yet, at the same time, India notes prior U.S. statements confirming that the U.S. first written submission makes no such claim.[9] For certainty, the United States repeats that it has ***not*** raised a claim under Article 8.2 in the U.S. first written submission or otherwise.

13. In addition, according to India's distorted reading, Section VII of the U.S. first written submission suggests that India's additional duties measure violates Articles I and II of the GATT 1994 because India cannot claim recourse to Article 8.2 of the Safeguards Agreement in the absence of a safeguard measure.[10] However, as plainly presented in the U.S. first written submission, the United States made no such argument. To the contrary, the U.S. panel request, as well as the U.S. first written submission, provides the legal basis of the complaint on India's measure as GATT 1994 Articles I and II – as required by DSU Article 6.2. The United States establishes a *prima facie* case regarding these claims – based solely on the obligations contained in those provisions – in the U.S. first written submission.[11] Therefore, India has no basis for asserting that it lacked adequate notice with respect to the U.S. claims under Articles I and II of the GATT 1994.[12]

14. India next argues that, even accepting that the United States did not raise a claim under Article 8.2 of the Safeguards Agreement, such an omission would mean that the United States failed to provide a legal basis sufficient to present the problem clearly. As the United States has explained, to provide a brief summary of the legal basis of the complaint as required by Article 6.2 of the DSU, it is sufficient for the complaining Member in its panel request to specify the legal claims under the WTO provisions that it considers are breached by the identified measure.[13] In its additional submission, India argues that there is some further onus on a

[8] India's Additional Submission, para. 3.3.

[9] India's Additional Submission, paras. 3.5, 3.6.

[10] India's Additional Submission, para. 3.4 (emphasis in original).

[11] U.S. First Written Submission, Section V (demonstrating that India's measures are inconsistent with Article I:1 of GATT 1994 because they fail to extend to certain products of the United States an advantage granted by India to like products originating in other countries) and Section VI (demonstrating that India's measures are inconsistent with Article II:1 by imposing duties on products originating in the United States in excess of India's bound rate and provide less favorable treatment to such products).

[12] India's Additional Submission, para. 3.6.

[13] *See* U.S. Response to India's Preliminary Finding Request, para. 13 (citing *Argentina – Import Measures (AB)*, para. 5.39). India takes issue with the U.S. citation to *Argentina – Import Measures* (AB). The United States cites this dispute for the general proposition that it is sufficient for the complainant to make a plain connection between

complaining Member in specifying legal claims, at least in cases under the GATT 1994 where, according to India, "other provisions are involved".[14] India goes beyond the text of the DSU – Article 6.2 does not impose any additional obligation on a complaining Member making a claim under the GATT 1994. Rather, the DSU envisions that *the complaining party* will identify the measures at issue and the legal provisions in the panel request.[15]

15. Contrary to India's argument, the Appellate Body report in *Brazil – Desiccated Coconut* does not support India's position that the United States was required to identify Article 8.2 of the Safeguards Agreement in the U.S. panel request to comply with Article 6.2 of the DSU. In that dispute, the sufficiency of the panel request under Article 6.2 was not an issue on appeal. The question on appeal was whether Article VI of the GATT 1994 and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) are an inseparable package of rights and obligations that must be interpreted in conjunction.[16] The Appellate Body found that the SCM Agreement explicitly provides that the imposition of countervailing duties must be in accordance with the provisions of both Article VI and the SCM Agreement.[17] Here, GATT Articles I and II can be interpreted independently of other provisions.

16. Further, India's argument that non-inclusion of Article 8.2 of the Safeguards Agreement in the U.S. panel request would "render this provision inutile" lacks merit.[18] Article 6.2 of the DSU does not impose any obligation on the United States as the complaining Member to raise Article 8.2 in order to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. As the United States has previously stated, it is incumbent on a respondent to identify other WTO provisions where it considers that such other provisions are applicable. Indeed, India has done so by raising Article 8.2 in this dispute,[19] confirming that India's argument is unfounded.

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the measure identified and the legal basis to present the problem clearly in a panel request. *See also Argentina – Import Measures (AB)*, para. 5.82 (citing *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 162; *US – Gambling (AB)*, para. 141; *China – Raw Materials (AB)*, para. 220; *US – Countervailing and Anti-Dumping Measures (China) (AB)*, para. 4.8).

[14] India's Additional Submission, para. 3.9.

[15] *See* DSU Article 6.1 ("If *the complaining party* so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel"), and DSU Article 3.3 ("The prompt settlement of situations *in which a Member considers* that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO...").

[16] *Brazil – Desiccated Coconut (AB)*, page 13.

[17] *Brazil – Desiccated Coconut (AB)*, page 14 (citing *SCM Agreement*, Articles 10 and 32.1). The United States also notes that the panel's finding on the terms of reference in *Brazil – Desiccated Coconut* related to unique temporal circumstances where the challenged countervailing measures were imposed *after* entry into force of the WTO Agreement on January 1, 1995, but initiated *before* entry into force. *Brazil – Desiccated Coconut (AB)*, page 10 (with the implication that the *SCM Agreement* – and therefore the GATT 1994 – were found inapplicable).

[18] India's Additional Submission, para. 3.18.

[19] India's First Written Submission, para. 39.

17. Finally, to support its assertion that omission of Article 8.2 from the U.S. panel request would result in an "error of law," India cites panel and Appellate Body reports related to the proper order of analysis *of claims that had been raised*.[20] Those reports do not suggest that certain claims must be included by a complaining Member in a panel request. For instance, India cites panel reasoning in *India – Autos* concerning the proper order of analysis where the complainants made claims under both the GATT 1994 and the *Agreement on Trade-Related Investment Measures*.[21] This reasoning does *not* speak to whether identification of claims in a panel request is sufficient under Article 6.2 of the DSU. The same is true of *Canada – Wheat*, where the Appellate Body addressed the proper order of analysis in considering the GATT 1994 Article XVII subparagraphs that the complaining Member claimed had been violated.[22]

18. Accordingly, India has again failed to demonstrate that the U.S. panel request was required to include a claim under Article 8.2 of the Safeguards Agreement to comply with DSU Article 6.2.

b. India fails to demonstrate that the issue of burden of proof is tied to the sufficiency of a panel request under Article 6.2 of the DSU.

19. India in its additional submission also persists in confusing the sufficiency of a panel request with the concept of burden of proof.[23] In attempting to connect two distinct concepts, and without any basis in the text of the DSU, India argues that "the issue of burden of proof is tied to sufficiency of a panel request in certain cases."[24] India is incorrect; DSU Article 6.2 simply does not address the burden of proof applicable with respect to specific contentions that may arise in a dispute. Rather, it requires the complaining Member to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. As the United States has explained, the U.S. panel request meets this requirement.[25]

20. Furthermore, India continues to mischaracterize the Appellate Body report in *EC – Tariff Preferences* as finding that the Enabling Clause needed to be mentioned *in the panel request* to meet the requirements of DSU Article 6.2. In fact, the complaining Member in that dispute included GATT Article I *and provisions of the Enabling Clause* in its panel request.[26] Therefore, India is incorrect that the Appellate Body made any "holding" as to the required inclusion of connected provisions in a panel request. In any event, the DSU makes clear that WTO adjudicators cannot add to or diminish rights and obligations contained in the covered

[20] India's Additional Submission, paras. 3.19-3.21.

[21] *See India – Autos (Panel)*, paras. 7.151-7.163.

[22] *See Canada – Wheat Exports and Grain Imports (AB)*, paras. 77-134.

[23] India's Additional Submission, section 3.2

[24] India's Additional Submission, para. 3.51.

[25] *See* U.S. Response to India's Preliminary Finding Request, paras. 13-15.

[26] WT/DS246/4 (December 9, 2002).

agreements.[27] Further, India is mistaken in suggesting that citations in subsequent reports to prior findings somehow establishes the legal validity of such prior findings.[28]

21. Finally, with respect to India's suggestion that evaluation of the U.S. panel request should involve a "test of reasonableness" and the complaining Member's "awareness of a proposed recourse to a provision,"[29] no such standard is set out in the DSU. India appears to derive these alleged requirements from the general notion of "due process." But India misunderstands the role of "due process" in WTO dispute settlement. One might characterize "due process" as being *reflected by* the provisions of the DSU[30] – that is, the process that is "due" is that explicitly set out in the DSU. On the other hand, the general notion of "due process" cannot serve as an invitation to add rights and obligations beyond the text of the DSU.[31]

c. India persists in attempting to raise substantive issues that go beyond the scope of a preliminary request.

22. Finally, India's additional submission expands on numerous assertions in its preliminary finding request regarding the purported justification India presents in its first written submission for India's breach of Articles I and II of the GATT 1994.[32] For example, in Section 4.4, India makes arguments concerning the legal characterization of the U.S. security measures under Section 232, the criteria for existence of a safeguard measure, the legal standard for a measure taken pursuant to Article 8.2, and an analysis as to whether India's measure meets the standard it espouses. In Section 4.5, India comments on hypothetical compliance scenarios and asserts that a finding in this dispute would not secure a positive solution. These arguments, however, clearly go to the merits of the dispute between the parties, not to the sufficiency of the U.S. panel request.

23. Consistent with the DSU and the Working Procedures adopted by the Panel,[33] 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.

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[27] DSU Articles 3.2 and 19.2.

[28] India's Additional Submission, para. 3.53. *See* U.S. DSB Statement, Item 4, December 18, 2018, WT/DSB/M/423, paras. 4.2-4.25 (explaining that the DSU does not assign precedential value to panel or Appellate Body reports).

[29] India's Additional Submission, para. 3.56.

[30] *See Thailand – Cigarettes (Philippines) (AB)*, para. 147. The United States notes that India incorrectly cites this same paragraph to impose obligations beyond the text of Article 6.2 of the DSU.

[31] DSU Articles 3.2 and 19.2.

[32] *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 measures at issue in this dispute were allegedly taken pursuant to Article 8.2 of the Safeguards Agreement).

[33] *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

IV. CONCLUSION

24. In summary, India in its additional submission has repeated and built upon flawed arguments concerning the U.S. panel request and DSU Article 6.2. As the United States explained in the U.S. first written submission, this dispute is about India's WTO commitments under GATT 1994 Articles I and II. That is the legal basis for the U.S. claims, and that basis was presented clearly in the U.S. panel request. Accordingly, the United States again respectfully requests that the Panel reject India's request for a preliminary finding.

"[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).