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Page: 1/3

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INDIA – CERTAIN MEASURES ON IMPORTS OF IRON AND STEEL PRODUCTS

NOTIFICATION OF AN OTHER APPEAL BY JAPAN UNDER ARTICLES 16.4 AND 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES AND UNDER RULE 23 OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 21 December 2018, from the delegation of Japan, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 23(1) of the Working Procedures for Appellate Review, Japan hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report entitled *India – Certain Measures on Imports of Iron and Steel Products* (WT/DS518/R), which was circulated on 6 November 2018 ("the Panel Report").

Pursuant to Rules 23(1) and 23(3) of the Working Procedures for Appellate Review, Japan simultaneously files this Notice of Other Appeal and its Other Appellant's Submission with the Appellate Body Secretariat. Japan is also providing an executive summary of the Other Appellant's Submission, in accordance with the Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).

For the reasons further elaborated in its Other Appellant Submission, Japan appeals and requests the Appellate Body to reverse the findings and conclusions of the Panel with respect to the errors of law and legal interpretations contained in the Panel Report described below:¹

1. The Panel erred in its interpretation of Article XIX:1(a) of the GATT 1994 when finding that Article XIX:1(a) does not provide any guidance on how the relationship between unforeseen developments and the increase in imports shall be examined.² The Panel erred by failing to recognize that the reasoned and adequate explanation of a logical connection between the unforeseen developments and the increase in imports may require a demonstration of how the unforeseen developments modified the conditions of competition between the domestic and imported products. Consequently, the Panel also erred in its application of Article XIX:1(a) of the GATT 1994 by failing to conclude that, in the circumstances of this case, the Indian authority, in the absence of an explanation on how the alleged unforeseen developments have modified the conditions of competition between the imported and domestic products to the detriment of the latter, failed to demonstrate that the increase in imports of the products concerned into India occurred as a result of unforeseen developments. As a result, Japan requests the Appellate Body to reverse the Panel's findings in paragraph 7.105 of the Panel Report and to find that an analysis of how the unforeseen developments modify the conditions of competition between the imported and domestic products to the detriment of the latter may be required under Article XIX:1(a) of the GATT 1994. Japan further requests the Appellate Body to find that India acted inconsistently with Article XIX:1(a) of the GATT 1994 as it failed

¹ Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures for Appellate Review, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Japan to refer to other paragraphs of the Panel Report in the context of its other appeal.

² Panel Report, para. 7.105.

to examine how the alleged unforeseen developments modified the conditions of competition between the imported and domestic products to the detriment of the latter.

2. The Panel erred in its application of Article 4.1(c) of the Agreement on Safeguards when finding that Japan has not demonstrated that India failed to meet the requirement of "a major proportion" under Article 4.1(c).³ More specifically, the Panel erred in rejecting Japan's argument that the domestic industry's definition involved a "self-selection" process that introduced a material risk of distortion and in carrying out a purely quantitative analysis rejecting Japan's argument that data concerning the sales, market share and production were relevant to determine that the domestic industry did not substantially reflect the total domestic production. As a result, Japan requests the Appellate Body to reverse the Panel's findings and conclusions in paragraphs 7.158-7.168 and 8.3(a) of the Panel Report and to find that India acted inconsistently with Article 4.1(c) of the Agreement on Safeguards in its determination of the domestic industry, and consequently also with Articles 2.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
3. The Panel erred in its application of the standard of review pursuant to Article 11 of the DSU when assessing Japan's claim that India failed to determine serious injury as required by Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards because it failed to provide a reasoned and adequate explanation concerning the effect of the decline in the domestic industry's market share on the situation of the domestic industry and a reasoned and adequate explanation of the finding of serious injury given the positive trends in certain injury factors.⁴ Japan submits that the Panel erroneously made the analysis for the Indian authority. Japan submits that the Panel also erred in its application of Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards when it found that the Indian authority's explanation with regard to the market share and to the overall situation of the domestic industry was reasoned and adequate. As a result, Japan requests the Appellate Body to reverse the Panel's findings and conclusions in paragraphs 7.179-7.193 and 7.207-7.215 of the Panel Report and to find that India acted inconsistently with Articles 4.1(a) and 4.2(a) of the Agreement on Safeguards because it failed to provide a reasoned and adequate explanation concerning the effect of the domestic industry's market share on the situation of the domestic industry and of the finding of serious injury given the positive trends in certain injury factors.
4. The Panel erred in its application of Articles 12.1(a), (b) and (c) of the Agreement on Safeguards when finding that Japan has failed to demonstrate that India acted inconsistently with those provisions by failing to notify the Committee on Safeguards "immediately" of the initiation of a safeguard investigation relating to serious injury or threat thereof, the findings of serious injury in the investigation and the decision to apply a definitive safeguard measure.⁵ In particular, the Panel erred when applying the requirement that the notifications take place "immediately" to the facts of the case. As a result, Japan requests the Appellate Body to reverse the Panel's findings and conclusions in paragraphs 7.318-7.340 and 8.3(b) of the Panel Report and to find that India acted inconsistently with Articles 12.1(a), (b) and (c) of the Agreement on Safeguards by failing to immediately notify the Committee on Safeguards of the initiation of the safeguard investigation, the findings of serious injury in the investigation and the decision to apply a definitive safeguard measure.
5. The Panel erred in its interpretation and application of Article 12.2 of the Agreement on Safeguards when finding that Japan has failed to demonstrate that India acted inconsistently with that provision by failing to identify the proposed date of introduction of the proposed measure.⁶ The Panel erroneously interpreted the words "proposed date of introduction" in Article 12.2 and, in particular, erred when finding that the "proposed date of introduction" to which Article 12.1 refers "may be expressed with reference to the act or event that must occur for the measure to enter into effect".⁷ Consequently, the Panel also erred in finding that, by referring in its notification to the date of issuance of the notification by the Department of Revenue of India's Ministry of Finance, India did not fail to provide the Committee on Safeguards with a proposed date of introduction of the proposed measure. As a result,

³ Panel Report, paras. 7.158-7.168 and 8.3(a).

⁴ Panel Report, paras. 7.179-7.193 and 7.207-7.215.

⁵ Panel Report, paras. 7.318-7.340 and 8.3(b).

⁶ Panel Report, paras. 7.376-7.381 and 8.3(b).

⁷ Panel Report, para. 7.379.

Japan requests the Appellate Body to reverse the Panel's findings and conclusions in paragraphs 7.376-7.381 and 8.3(b) of the Panel Report and to find that India acted inconsistently with Article 12.2 of the Agreement on Safeguards by failing to provide the Committee on Safeguards with the proposed date of introduction of the proposed measure.

6. The Panel erred in its interpretation and application of Article 19.1 of the DSU in making conditional recommendations.⁸ More specifically, the Panel erred in recommending that India brings its measure into conformity with obligations under the GATT 1994 and the Agreement on Safeguards "to the extent that the measure continues to have any effects." Article 19.1 of the DSU, when interpreted on the basis of its ordinary meaning and in light of its context, requires the Panel to make unconditional recommendations. As a result, Japan requests the Appellate Body to reverse the Panel's findings and conclusions in paragraphs 7.26-7.26 and 8.6 of the Panel Report and to make unconditional recommendations, namely that to recommend that India brings its measure into conformity with the covered agreements without any condition.

⁸ Panel Report, paras. 7.26-7.28 and 8.6.