

***INDIA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS
FROM THE UNITED STATES***

(DS585)

**FIRST WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

February 27, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS	I
TABLE OF REPORTS	III
TABLE OF EXHIBITS.....	V
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	1
III. PROCEDURAL BACKGROUND	4
IV. RELEVANT LEGAL STANDARD.....	4
V. INDIA’S MEASURES ARE INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE I:1 OF GATT 1994	5
A. Article I:1 of GATT 1994.....	5
1. India’s Measures are Explicitly Covered by the Text of Article I:1 of GATT 1994.....	6
2. U.S. Products Subject to India’s Measures are “Like Products” with respect to Products of Other Countries	6
3. India’s Lower Duties on Like Products from Other Countries Constitutes an “Advantage” Within the Meaning of Article I:1 of GATT 1994.....	7
4. The Advantage Accorded by India to Products from Other Countries is Not Extended “Immediately” and “Unconditionally” to “Like Products” Originating in the U.S.....	8
VI. INDIA’S MEASURES ARE INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE II OF GATT 1994	8
A. Article II:1(a) and (b) of the GATT 1994.....	9
1. India’s Measures Impose Duties That Exceed its Bound Rate and Breach Article II:1(b) of the GATT 1994.....	9
2. India’s Breach of Articles II:1(b) Results in a Breach of Article II:1(a)	11
VII. IN THE EVENT INDIA ATTEMPTS TO JUSTIFY ITS ADDITIONAL DUTIES BASED ON A SAFEGUARD THEORY, SUCH JUSTIFICATION WOULD BE COMPLETELY WITHOUT MERIT BECAUSE THE UNITED STATES HAS NOT ADOPTED A SAFEGUARD.....	11

A.	Invocation is a Precondition to Applying a Safeguard Measure.....	12
B.	The United States Has Not Implemented a Safeguard.....	15
VIII.	CONCLUSION	15

TABLE OF REPORTS

Short Title	Full Citation
<i>Argentina – Textiles and Apparel (AB)</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998
<i>Canada – Autos (Panel)</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R
<i>China – Publications and Audiovisual Products (Panel)</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
<i>Dominican Republic – Safeguard Measures (Panel)</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012
<i>EC – Bananas III (Guatemala and Honduras) (Panel)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras</i> , WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R
<i>EC – Seal Products (AB)</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4

TABLE OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
USA-1	Tables Presenting Tariff Lines and Bound Rates Affected by India’s Additional Duties
USA-2	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 48/2018 – Customs, June 20, 2018</i>
USA-3	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 49/2018 – Customs, June 20, 2018</i>
USA-4	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 56/2018 – Customs, August 3, 2018</i>
USA-5	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 62/2018 – Customs, September 17, 2018</i>
USA-6	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 77/2018 – Customs, November 1, 2018</i>
USA-7	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 80/2018 – Customs, December 15, 2018</i>
USA-8	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 03/2019 – Customs, January 29, 2019</i>
USA-9	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 06/2019 – Customs, February 26, 2019</i>
USA-10	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 11/2019 – Customs, March 29, 2019</i>
USA-11	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 14/2019 – Customs, May 1, 2019</i>
USA-12	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 15/2019 – Customs, May 14, 2019</i>
USA-13	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 16/2019 – Customs, June 15, 2019</i>
USA-14	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 17/2019 – Customs, June 15, 2019</i>
USA-15	<i>Government of India, Ministry of Finance (Department of Revenue) Notification No. 50/2017 – Customs, June 30, 2017</i>
USA-16	<i>The Customs Tariff Act, 1975 (51 of 1975), as amended (August 18, 1975)</i>
USA-17	<i>The First Schedule to the Customs Tariff Act, 1975, excerpt from Chapter 5</i>
USA-18	<i>Black’s Law Dictionary, 10th edn, B. Garner (ed.) (Thomson Reuters, 2014)</i>
USA-19	<i>The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, 1993)</i>
USA-20	<i>The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, 1993)</i>
USA-21	<i>The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, 1993)</i>
USA-22	Table Presenting India’s Additional Duties As Initially Notified
USA-23	<i>The Customs Act, 1962 (No. 52 of 1962), as amended (December 13, 1962)</i>

I. INTRODUCTION

1. The United States has brought this dispute to address measures adopted by India that are 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").

2. In particular, India has imposed additional duties on U.S. products with an annual trade value of approximately \$1.4 billion.¹ The Indian measures imposing these additional duties breach India's MFN obligations under Article I of the GATT 1994, and India's commitments under Article II of the GATT 1994 to not impose duties in excess of India's tariff concessions.

3. India apparently has adopted these additional duties in response to certain U.S. measures that India asserts are inconsistent with WTO rules. India is challenging those U.S. measures in a separate dispute,² and those measures are **not** at issue in this proceeding. What India cannot do under the WTO system is simply retaliate against U.S. products because India is concerned with certain U.S. measures on imports of steel and aluminum products.

4. The United States understands that India may assert that Article 8.2 of the WTO *Agreement on Safeguards* ("Safeguards Agreement") justifies its additional duties.³ The United States, however, has not invoked Article XIX of the GATT 1994 as a basis for the U.S. measures, and the Safeguards Agreement is not applicable in this dispute. Accordingly, India cannot implement rebalancing measures under Article 8.2 of the Safeguards Agreement. Rather, this dispute involves a decision by India to adopt retaliatory measures, and this action cannot be justified under WTO rules.

II. FACTUAL BACKGROUND

5. India implemented its additional duties on U.S.-originating goods in several steps. First, India **increased** the rate of duty imposed on certain goods. Second, India **exempted** goods originating in all other countries – that is, except for the United States – from the duty increases. Accordingly, U.S.-originating goods – and only U.S.-originating goods – are subject to the increased duty rate. India **postponed** the implementation of its additional duties on U.S.-origin products numerous times. India also **modified** the additional duties and the products to which they were applied using a similar procedure of increasing the tariff schedule rate and then notifying corresponding exemptions for goods from all countries except the United States.

¹ India has imposed *ad valorem* duties, which range from 5 to 25 percent, and specific duties.

² *US – Steel and Aluminium Products (India)*, WT/DS547/8.

³ See Communication from the Delegation of India to Council for Trade in Goods (noting India's proposal to impose additional duties on certain products from the United States. In this same communication, India asserts that its additional duties are allegedly "in accordance with Articles 8.2 and 12.5 of the Agreement on Safeguards." In addition, the communication provides that India's proposal to impose additional duties "is made in connection with" alleged "safeguard measures imposed by the United States" on "imports of certain aluminum and steel articles".), G/L/1239 (May 18, 2018).

India’s additional duties on U.S.-originating products came into effect in June 2019. We describe this process in more detail below.

6. Before discussing the additional duties that India imposes on certain U.S.-originating products, the United States provides the Panel an overview of India’s customs framework. The Customs Act, 1962, provides for the levying of customs duties “at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)] or any other law for the time being in force, on goods imported into, or exported from, India.”⁴ The Customs Tariff Act, 1975, in turn provides that “[t]he rates at which duties of customs shall be levied under the Customs Act, 1962, are specific in the First and Second Schedules.”⁵ The First Schedule sets out import duties, while the Second Schedule sets out export duties.

7. The Customs Act, 1962, and the Customs Tariff Act, 1975, provide the authority to modify duties in the First Schedule. In particular, section 8A(1) of the Customs Tariff Act, 1975, authorizes the Indian Central Government to increase the import duty under the Customs Act, 1962, by issuing a notification amending the First Schedule, if it is “satisfied that the import duty . . . should be increased and that circumstances exist which render it necessary to take immediate action.”⁶

8. The Indian Central Government also has the authority to provide for exemptions. Section 25(1) of the Customs Act, 1962, authorizes the Indian Central Government to exempt goods from “the whole or any part of customs duty” by notification, if it “is satisfied that it is necessary in the public interest to do so,” subject to conditions specified in the notification.

9. On June 20, 2018, pursuant to section 8A of the Customs Tariff Act, 1975, India issued its *First Tariff Increase Notice*, which amended the First Schedule to raise the duty rate on 30 tariff lines at the eight-digit level.⁷ Simultaneously, on June 20, 2018, pursuant to section 25 of the Customs Tariff Act, India issued its *First Tariff Exemption Notice*, which exempts products from the duty increase.⁸

10. The *First Tariff Exemption Notice* provides that “nothing . . . [regarding these exemptions] shall apply to goods originating in the United States of America.”⁹ Thus, the *First*

⁴ The Customs Act, 1962 (No. 52 of 1962), Dec. 13, 1962, section 12(1) (Exhibit USA-23).

⁵ Customs Tariff Act, 1975 (No. 51 of 1975), Aug. 18, 1975, section 2 (Exhibit USA-16).

⁶ Customs Tariff Act, 1975, section 8A(1) (Exhibit USA-16).

⁷ See Ministry of Finance, Department of Revenue, *Notification 48/2018-Customs*, June 20, 2018 (Exhibit USA-2).

⁸ See Ministry of Finance, Department of Revenue, *Notification 49/2018-Customs*, June 20, 2018 (Exhibit USA-3). *Notification 49/2018-Customs* amended an earlier notification, *Notification 50/2017-Customs*, June 30, 2017, which provides for goods described in column (3) of the Table set forth in the notification to be exempt “from so much of the duty of customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the standard rate specified in column (4) of the said Table.” *Notification 49/2018-Customs* modified *Notification 50/2017-Customs* to add or substitute certain goods in the Table, that is, those goods subject to duty exemptions.

⁹ See Ministry of Finance, Department of Revenue, *Notification 49/2018-Customs*, June 20, 2018, at p. 4 (Exhibit USA-3).

Tariff Exemption Notice explicitly discriminates against certain U.S. products on the basis of country of origin.

11. Taken together, the *First Tariff Increase Notice* and the *First Tariff Exemption Notice* provide for 29 products to be subject to different import duty rates depending on their country of origin: a higher rate for imports from the United States, and a lower rate for imports from all other countries. Additionally, for four products, the import duty rates on U.S.-originating goods are greater than the maximum import duty rates set out in India’s Schedule of Concessions.¹⁰ The United States provides a table showing the products subject to India’s additional duties in Exhibit USA-22.

12. As set out in the *First Tariff Exemption Notice*, India’s additional duties were to come into effect on August 4, 2018. However, on August 3, 2018, India issued *Notification 56/2018-Customs*, which was the first of nine measures postponing the implementation of the additional duties laid out by the *First Tariff Increase Notice* and the corresponding exemptions in the *First Tariff Exemption Notice*.¹¹

13. On June 15, 2019, before the *First Tariff Increase Notice* had yet taken effect, India modified the list of U.S.-originating products subject to its additional duties by issuing the *Second Tariff Increase Notice*¹² and the *Second Tariff Exemption Notice*.¹³ Like the *First Tariff Exemption Notice*, the *Second Tariff Exemption Notice* provided that India’s additional duties **only apply** to goods originating in the United States.¹⁴

14. India’s additional duties, as set forth in the *First Tariff Increase Notice* and the *Second Tariff Increase Notice*, and which apply only to the United States by virtue of the *First Tariff Exemption Notice* and *Second Tariff Exemption Notice*, took effect on June 16, 2019.¹⁵

¹⁰ See WT/Let/517

¹¹ The notifications delaying the implementation of the retaliatory duties are: Ministry of Finance, Department of Revenue Notifications 56/2018-Customs, August 3, 2018 (Exhibit USA-4); 62/2018-Customs, September 17, 2018 (Exhibit USA-5); 77-2018-Customs, September 17, 2018 (Exhibit USA-6); 80/2018-Customs, December 15, 2018 (Exhibit USA-7); 03/2019-Customs, January 29, 2019 (Exhibit USA-8); 06/2019-Customs, February 26, 2019 (Exhibit USA-9); 11/2019-Customs, March 29, 2019 (Exhibit USA-10); 14/2019-Customs, May 1, 2019 (Exhibit USA-11); and 15/2019-Customs, May 14, 2019 (Exhibit USA-12).

¹² See *Notification No. 16/2019* (Exhibit USA-13).

¹³ The *Second Tariff Increase Notice* increased the rate of duty in the First Schedule for three tariff lines beyond the rate imposed by the *First Tariff Increase Notice*, and the *Second Tariff Exemption Notice* created import duty rates applicable only to the United States for three tariff lines. The effect of these measures was to withdraw the additional duties set forth in *First Tariff Increase Notice* on two U.S.-originating products (artemia and Bengal gram), and to subject one new U.S.-originating product to additional duties (phosphoric acid), leaving 28 U.S.-originating products subject to additional duties. See *Notification No. 17/2019* (Exhibit USA-14).

¹⁴ See Ministry of Finance, Department of Revenue *Notification 17/2019-Customs*, June 15, 2019, at p. 1 (noting that “nothing... [regarding certain exemptions] shall apply to goods originating in the United States of America”) (Exhibit USA-14).

¹⁵ *Id.*, p. 2.

15. In Exhibit USA-1, the United States provides a list of the 28 products subject to the additional duties. Each of these products, when imported from the United States, is subject to a rate of duty that exceeds the rate applied to imports from other sources. In addition, four of the products are subject to duties in excess of India’s bound rates.

16. In particular, the table in Exhibit USA-1 demonstrates that India **breached** its MFN commitments for all products subject to its retaliatory duties by referencing three figures for each product: (A) India’s MFN rate, that is, the rate that India applies to imports from countries other than the United States; (B) the rate applied to imports from the United States; and (C) the difference between the rate applied to imports from the United States and the MFN rate.

17. In column (D) of Exhibit USA-1, the United States demonstrates that India **exceeded** its bound rate commitments for four products by referencing the bound rate applicable for each product, and by noting that the duty rate applicable to imports from the United States exceeds that bound rate.

III. PROCEDURAL BACKGROUND

18. On July 3, 2019, the United States requested consultations with India pursuant to Article 4 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and Article XXIII of the GATT 1994. Pursuant to this request, India and the United States held consultations in Geneva, Switzerland, on August 1, 2019. The consultations failed to settle the dispute.

19. On September 20, 2019, the United States requested the establishment of a panel pursuant to Article 6 of the DSU.¹⁶ At its meeting on October 28, 2019, the Dispute Settlement Body established this Panel to consider this dispute.¹⁷

IV. RELEVANT LEGAL STANDARD

20. Pursuant to the Panel’s terms of reference, as established by Article 7.1 of the DSU, the Panel is “to examine, in the light of the relevant provisions in [the covered agreements cited by the parties to the dispute], the matter referred to the DSB” by the complaining party and then to “make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for” in the covered agreements, as required by Article 19.1 of the DSU.

21. As set out in Article 11 of the DSU, the Panel is “to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements” by “mak[ing] an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”.

22. In assessing the “applicability of and conformity with the covered agreements,” Article 3.2 of the DSU provides that the Panel is to apply the “customary rules of interpretation of public international law” to interpret the relevant provisions of the covered agreements. The United

¹⁶ See WT/DS585/2.

¹⁷ See WT/DS585/3.

States understands that Articles 31-33 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”) reflects these customary rules. Article 31(1) of the Vienna Convention sets out the general rule of interpretation that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁸

V. INDIA’S MEASURES ARE INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE I:1 OF GATT 1994

A. Article I:1 of GATT 1994

23. 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. Article I:1 states, in relevant part:

With respect to **customs duties** and charges of any kind imposed on or in connection with importation . . . **any** advantage, favour, privilege, or immunity granted by any contracting party to **any** product originating in . . . any other country shall be accorded **immediately and unconditionally** to the **like product** originating in or destined for the territories of **all other contracting parties**.¹⁹

24. As relevant here, a breach of Article I:1 may be demonstrated by establishing the following elements:

- that the challenged measure is covered by Article I:1;
- that subject imports are “like products” within the meaning of Article I:1;
- that the challenged measure confers an “advantage, favour, privilege, or immunity” to a product originating in another country; and
- that such “advantage, favour, privilege, or immunity” is not extended “immediately” and “unconditionally” to products originating in one or more WTO Member.²⁰

¹⁸ Regarding “context,” Article 31(2) of the Vienna Convention provides that:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

¹⁹ GATT 1994 Article I:1 (emphasis added).

²⁰ The Appellate Body has expressed support for this analytical approach. See *EC – Seal Products (AB)*, para. 5.86.

In the discussion that follows the United States demonstrates that India’s measures meet these four elements and are therefore inconsistent with GATT Article I:1.

1. India’s Measures are Explicitly Covered by the Text of Article I:1 of GATT 1994

25. India’s measures are explicitly covered by the text of Article I:1. The text refers to “customs duties and charges of any kind imposed on or in connection with importation”. According to its ordinary meaning, a “customs duty” is a “tax levied on imported” goods.²¹ As explained, India imposes additional duties on imports through the *First Tariff Increase Notice* and the *Second Tariff Increase Notice*, and applies these only to the United States by virtue of the *First Tariff Exemption Notice* and *Second Tariff Exemption Notice*. Therefore, India’s measures impose customs duties or charges of any kind on or in connection with importation. In particular, as shown in Exhibit USA-1, India’s measures impose additional duties on 28 products originating in the United States.

2. U.S. Products Subject to India’s Measures are “Like Products” with respect to Products of Other Countries

26. Each U.S. product subject to India’s measures is “like” a product from other countries not subject to the additional duties within the meaning of Article I:1 of GATT 1994. As explained in section II above, India’s measures discriminate against U.S products solely on the basis of origin. Thus, India’s measures differentiate among products not on the basis of physical characteristics, end-use, or consumer preferences, but rather on a distinction that is not relevant to a “like product” analysis.

27. In circumstances where the only distinction between two sets of products is the country of origin, it may be presumed that the two sets are “like products.” Numerous panel and Appellate Body reports have adopted this analysis. For instance, in *China – Publications and Audiovisual Products*, in its discussion of the like product analysis under Article III:4, the panel supported the view that:

where a difference in treatment between domestic and imported products is based **exclusively** on the products’ origin, the complaining party need not necessarily identify specific domestic and imported products and establish their likeness in terms of the traditional criteria in order to make a prima facie case of “likeness.” Instead, when origin is the sole criterion distinguishing the products, it is sufficient for purposes of satisfying the “like product” requirement for a complaining party to demonstrate that there can or will be domestic products that are “like.”²²

²¹ See Black’s Law Dictionary, ed. Bryan A. Garner, 10th edn., 2004, at. p. 617 (defining “customs duty” as a tax levied on imported goods”). (Exhibit USA-18).

²² *China – Publications and Audiovisual Products (Panel)*, para. 7.1446, citing *Indonesia – Autos (Panel)*, para. 14.113 (Emphasis added).

In *Canada – Autos*, in its discussion of the like product analysis under Article III:4, the panel reached the same conclusion, noting:

[I]t has not been contested that the distinction made between domestic products and imported products in the definition of Canadian value is **based solely** on origin and that, consequently, there are imported products which must be considered to be like the domestic products the costs of which are included in the definition of Canadian value added.²³

28. For these reasons, the 28 products originating in the United States are like products originating in WTO Members exempt from India’s additional duties, and the like product element of Article I:1 is satisfied.

3. India’s Lower Duties on Like Products from Other Countries Constitutes an “Advantage” Within the Meaning of Article I:1 of GATT 1994

29. India’s measures confer an advantage on like products of other Members because they impose additional duties on certain U.S. products while leaving unchanged the rate of duty applicable to goods of all other countries, including all other WTO Members. Article I:1 refers to “**any** advantage” granted by a WTO Member to “**any** product originating in or destined for **any other country**”. Article I:1 requires that an advantage, such as a certain duty rate, granted by a WTO Member to a product from any country be granted to like products from all WTO Members.

30. The ordinary meaning of the term “advantage” is a “favoring circumstance” or “something which gives one a better position.”²⁴ Providing a lower duty rate constitutes a favoring circumstance or something giving someone a better position. Thus, a lower rate of duty would be an “advantage” within the meaning of Article I:1 of GATT 1994.²⁵

31. India’s measures impose additional duties on U.S. products, while not imposing such duties on like products of other countries. By providing a lower rate of duty to the like products of other countries as compared to U.S. products, India is granting these products an advantage within the meaning of Article I:1 of GATT 1994.

²³ *Canada – Autos (Panel)*, para. 10.74 (Emphasis added).

²⁴ See *The New Shorter Oxford English Dictionary*, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 31 (defining “advantage” as “1 Superior position. 1 The position, state, or circumstance of being ahead of another, or having the better of him or her; superiority, esp. in contest or debate. 2 A favouring circumstance; something which gives one a better position. 3 A vantage-ground. 4 A favourable occasion, a chance.”) (Exhibit USA-19).

²⁵ See *EC – Bananas III (Guatemala and Honduras) (Panel)*, para. 7.239 (panel determined that a measure that provides “more favorable competitive opportunities” or “affects the competitive relationship” between products of different origin confers an “advantage” in terms of Article I:1).

4. The Advantage Accorded by India to Products from Other Countries is Not Extended “Immediately” and “Unconditionally” to “Like Products” Originating in the U.S.

32. Article I:1 of GATT 1994 requires that India accord to like products from the United States, “immediately and unconditionally,” the lower duties that it is providing to products from other countries. The advantage provided by India’s measures are not “accorded immediately and unconditionally” to like products from the United States.

33. The ordinary meaning of the term “immediately” is without delay, at once, or instantly.²⁶ Accordingly, when a WTO Member grants an advantage to products from one country, it is required to extend such advantage to like products from all WTO Members at once. When a measure imposes duties on one WTO Member, and leaves duties on others unchanged, the measure does not “immediately” accord to that WTO Member an advantage that products originating in other countries enjoy.

34. Similarly, the term “unconditionally” means without being limited by or subject to conditions.²⁷ When a measure imposes duties on one WTO Member, and leaves duties on others unchanged, the measure does not “unconditionally” accord to that WTO Member an advantage that products originating in other countries enjoy.

35. India’s measures went into effect on June 16, 2019. Thus, India has failed to “immediately and unconditionally” extend to certain products from the United States the advantage that it is providing to like products from other countries.

36. As demonstrated above, India’s measures fail to extend to certain products of the United States the advantage granted to like products originating from other countries, including all other WTO Members. Thus, India’s measures breach Article I:1 of GATT 1994.

VI. INDIA’S MEASURES ARE INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE II OF GATT 1994

37. India’s measures impose duties on products originating in the United States in excess of India’s bound rate and provide less favorable treatment to such products. Accordingly, India’s measures are inconsistent with its obligations under Article II:1 of the GATT 1994. Article II:1(b) requires WTO Members to exempt products of another WTO Member from duties in excess of those set forth in their Schedule of Concessions. Article II:1(a) requires WTO Members to accord treatment no less favorable than what is provided for in that Schedule.

²⁶ See The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 1,315 (defining “immediately” as “A *adv.* 1 Without intermediary agency, in direct connection or relation; so as to affect directly. 2 With no person, thing, or distance intervening; next (before or after); closely. 3 Without delay, at once, instantly. B *conj.* At the moment that, as soon as.”) (Exhibit USA-20).

²⁷ See The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993) at 3,465 (defining “unconditional” as “Not limited by or subject to conditions; absolute, complete.”) (Exhibit USA-21).

38. In the discussion below, the United States demonstrates that India’s measures impose duties on products of the United States in excess of its Schedule and, therefore, are inconsistent with Article II:1(a) and (b).

A. Article II:1(a) and (b) of the GATT 1994

39. As explained in greater detail below, an evaluation of a claim under Article II:1 involves an identification of (1) the treatment to be accorded under the importing Member’s Schedule for the products at issue; (2) the treatment actually accorded to those products when originating in the territory of a Member; and (3) whether the measure results in the imposition of duties on such products that are in excess of what is provided for in the importing Member’s Schedule.

40. In other words, if a measure results in the imposition of duties (x) that are in excess of the duties provided for in the Schedule (y), the measure breaches the obligations under Article II:1(a) and (b) of the GATT 1994. Simply put, in this context, where x is greater than y , there is a breach of Article II of the GATT 1994.

41. Establishing a breach of Article II:1(b) necessarily entails a breach of Article II:1(a). For this reason, the United States turns first to paragraph (b) in Article II:1 of the GATT 1994.

1. India’s Measures Impose Duties That Exceed its Bound Rate and Breach Article II:1(b) of the GATT 1994.

42. Article II:1(b) states:

The products described in Part I of the Schedule relating to any [WTO Member], which are the products of territories of other [WTO Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from *ordinary customs duties* in excess of those set forth and provided therein. Such products shall also be exempt from *all other duties or charges of any kind* imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. [emphasis added]

43. The Understanding on Interpretation of Article II:1(b) of the GATT 1994, in relevant part, provides:

In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any “other duties or charges” levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of “other duties or charges.”

The date as of which “other duties or charges” are bound, for the purposes of Article II, shall be 15 April 1994. “Other duties or charges” shall therefore be recorded in the Schedules at the levels applying on this date. At each subsequent renegotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of the incorporation of the new concession in the appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1947 or GATT 1994 shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.

“Other duties or charges” shall be recorded in respect of all tariff bindings.

44. Article II:1(b) is divided into two sentences. Under the first sentence, a WTO Member must exempt the products of another WTO Member from any “ordinary customs duties” in excess of those set forth in its Schedule when such products are imported into the territory of the former. Under the second sentence, a WTO Member must exempt those products from all “other duties or charges” of any kind that are in excess of those imposed as of certain dates.

45. The distinction between the first and second sentences concerns whether the duties in question constitute “ordinary customs duties” or “other duties or charges.” For purposes of this dispute, it is legally immaterial whether India’s additional duties constitute “ordinary customs duties” or “other duties or charges” because, under either characterization, the duties exceed India’s rates bound in its Schedule.

46. “Ordinary customs duties” typically relate to either the value of imported goods (such as *ad valorem* duties) or the volume of imported goods (such as specific duties) and are typically set out in a Member’s domestic tariff schedule whereas “all other duties and charges of any kind” form a residual category that includes any financial responsibilities resulting from the importation of goods that do not qualify as ordinary customs duties.²⁸ On their face, India’s measures impose ordinary customs duties.

47. With respect to the first sentence of Article II:1(b), Exhibit USA-1 sets out India’s bound tariff rates for ordinary customs duties in its WTO Schedule for the tariff lines at issue in this dispute. Exhibit USA-1 then compares India’s bound rate with the rate imposed on products of the United States. As established in Exhibit USA-1, since June 16, 2019, India has **exceeded** its bound rate commitments for four products at issue in this dispute.²⁹

48. To the extent that India would argue that its additional duties are not “ordinary customs duties”, but instead “other duties or charges,” the additional duties are inconsistent with India’s obligations under the second sentence of Article II:1(b). As noted above, the Understanding

²⁸ See *Dominican Republic – Safeguard Measures (Panel)*, paras. 7.79-7.85.

²⁹ The four products are: (a) almonds, in shell (HS08021100); (b) almonds, shelled (HS08021200); (c) walnuts, in shell (HS08023100); and (d) apples (HS08081000). (Exhibit USA-1).

requires that any such additional duties or charges be reflected in India’s schedule and be bound as of 1994. India’s measures, which were adopted in 2019, of course are not reflected in its Schedule.

49. On this basis, India has breached its obligation under Article II:1(b) of the GATT 1994 not to apply duties in excess of its tariff commitments.

2. India’s Breach of Article II:1(b) Results in a Breach of Article II:1(a)

50. Article II:1(a) of the GATT 1994 provides:

Each [Member] shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

51. Article II:1(b) specifically describes the types of measures that are inconsistent with Article II:1(a). Accordingly, by demonstrating a breach of Article II:1(b), the United States has also established that India’s additional duties breach Article II:1(a).³⁰

VII. IN THE EVENT INDIA ATTEMPTS TO JUSTIFY ITS ADDITIONAL DUTIES BASED ON A SAFEGUARD THEORY, SUCH JUSTIFICATION WOULD BE COMPLETELY WITHOUT MERIT BECAUSE THE UNITED STATES HAS NOT ADOPTED A SAFEGUARD

52. In this first submission, the United States has made out its case that India’s measures breach its WTO obligations. As explained above, India’s additional duties are plainly inconsistent with its obligations under Articles I and II of the GATT 1994. Having established the U.S. case, this first U.S. written submission could well end here.³¹

53. Nonetheless, to assist the Panel, the United States will make some preliminary comments on what it understands may be a justification that India may present in its first submission. In particular, the United States understands that India may assert that its additional duties are authorized by Article 8.2 of the Safeguards Agreement.³² If India makes such an assertion in this

³⁰ See *Argentina – Textiles and Apparel (AB)*, para. 45 (noting that “Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member’s Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is the application of ordinary customs duties in excess of those provided for in the Schedule.”).

³¹ See DSU Appendix 3, paragraph 4 (“Before 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.**”) (Emphasis added); see also Working Procedures of the Panel, paragraph 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.”).

³² See Communication from the Delegation of India to Council for Trade in Goods (noting India’s proposal to impose additional duties on certain products from the United States. In this same communication, India asserts that its additional duties are allegedly “in accordance with Articles 8.2 and 12.5 of the Agreement on Safeguards.” In addition, the communication provides that India’s proposal to impose additional duties “is made in connection with”

dispute, the United States will respond in full in subsequent submissions to any specific arguments of India regarding the relevance of the Safeguards Agreement.

54. In this first submission, the United States emphasizes a fatal flaw in any justification based on the Safeguards Agreement: namely, no U.S. safeguard is related to the matters in this dispute.

55. For a measure to be a safeguard, the importing Member must invoke Article XIX of the GATT 1994 to exercise its right to suspend obligations or withdraw or modify tariff concessions. Accordingly, India would have no basis for asserting that its additional duties are authorized by Article 8.2 of the Safeguards Agreement.

56. As shown below, a measure cannot constitute a safeguard under the WTO Agreement unless a Member that departs from its GATT 1994 obligations invokes the right to implement a safeguard measure and provides the required notice to other exporting Members of such action. If the Member departing from its GATT 1994 obligations does not invoke Article XIX, then it is not entitled to claim the Safeguards Agreement provides a legal basis for its measure, and that measure is not a safeguard. In these circumstances, another WTO Member affected by the breach could raise the matter bilaterally or in WTO dispute settlement. What the affected Member may **not** do is to reach a unilateral determination to the effect that a WTO violation has occurred and, on that basis, decide to adopt retaliatory measures on the theory that they are “rebalancing measures.”

57. The United States has not invoked the Safeguard Agreement with respect to any measure of relevance to this dispute. Furthermore, the Safeguards Agreement only applies to measures taken pursuant to Article XIX of the GATT. The U.S. measures cited by India in its communication to the Council for Trade in Goods were taken pursuant to Article XXI of the GATT 1994. Accordingly, the U.S. measures cited by India do not fall within the scope of the Safeguards Agreement.

A. Invocation is a Precondition to Applying a Safeguard Measure

58. The invocation requirement in Article XIX of the GATT 1994 stems from the provisions on providing notice of a proposed action. Absent this invocation, a measure cannot fall under the WTO’s safeguards disciplines. This proposition is clear from the text of Article XIX.

59. Before discussing the relevant text, the United States observes that Article XIX establishes a process that authorizes Members to suspend obligations or withdraw concessions in certain circumstances. The first mandatory step in the process is that the Member that wishes to depart from its GATT 1994 obligations must invoke Article XIX by notifying all other WTO Members. The requirement for invocation before any other steps in the process are applicable is reflected in every paragraph of Article XIX, as well as in the Safeguards Agreement.

alleged “safeguard measures imposed by the United States” on “imports of certain aluminum and steel articles”), G/L/1239 (May 18, 2018).

60. The title of Article XIX, “Emergency Action on Imports of Particular Products”, does not focus on any particular type of measure, nor does it reference any type of obligation. Instead, the article sets out procedural and substantive rules for how a Member may choose to take action that would otherwise be inconsistent with obligations under the GATT 1994 affecting imports of particular products.

61. Article XIX:1(a) of the GATT 1994 provides that:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, **the contracting party shall be free**, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, **to suspend the obligation in whole or in part or to withdraw or modify the concession.** (emphasis added)

62. Under Article XIX:2, a Member’s ability to take action pursuant to Article XIX:1 is conditioned on invocation with notice to other Members before that Member can take action. In relevant part, Article XIX:2 provides:

Before any contracting party shall take action **pursuant** to the provisions of paragraph 1 of this Article, it **shall give notice** in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the **proposed** action.³³

63. Thus, without invocation and notice from the WTO Member proposing to take action, a Member is not seeking legal authority **pursuant** to Article XIX to suspend an obligation or to withdraw or modify a concession. Of note, the third sentence of Article XIX:2 provides a limited exception to *consulting* in cases of “critical circumstances”; this exception, however, does not apply to the requirement to give notice in writing.³⁴ Thus, the requirement for notice is unconditional.

64. The text of Article XIX:3(a) of the GATT 1994 shows that invocation is a **precondition** to applying a safeguard measure. Under that provision, if the consultations envisioned by Article XIX:2 fail to address the concerns of affected Members, affected Members can suspend substantially equivalent concessions or other obligations. Invocation and notice, however,

³³ Emphasis added.

³⁴ See third sentence of Article XIX:2 (“In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.”).

trigger the consultations envisioned by Article XIX:2. Thus, in terms of Article XIX:3(a), without notice of a proposed action, a Member “which proposes to take or continue the action shall [**not**] be free to do so.” That is, without invocation, a Member cannot take (and has not taken) action **pursuant** to Article XIX.

65. Accordingly, absent invocation of the right to take action pursuant to Article XIX of the GATT, a measure cannot be characterized as a safeguard measure. This is reinforced by the text of the Safeguards Agreement. The Safeguards Agreement elaborates on the rights and obligations in Article XIX of the GATT.

66. Article 1 of the Safeguards Agreement states “[t]his Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures **provided for** in Article XIX of the GATT 1994.”³⁵

67. Article XIX authorizes Members facing an injurious increase in imports subject to an obligation or concession “to suspend the obligation in whole or in part or to withdraw or modify the concession.” The measure can only be “**provided for**” under Article XIX if the Member taking emergency action invokes the provision. Where a Member has not asserted this right, then the WTO safeguards disciplines are not relevant to the particular matter.

68. One of the requirements from Article XIX that the Safeguards Agreement elaborates upon is that the right to apply a safeguard measure requires invocation of Article XIX through written notice of that invocation to other WTO Members and, as recited in Article 12 of the Safeguards Agreement, to the Council for Trade in Goods (CTG) and the Committee on Safeguards. Specifically, Article 12.1 provides that:

A Member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

This requirement, as the procedural mechanism to invoke Article XIX, constitutes an essential step that must occur for a measure to be a safeguard.

69. Accordingly, notification under Article XIX is a prerequisite for taking a safeguard measure. If a Member does not provide the required notification invoking this authority, a measure cannot be considered a safeguard under Article XIX and the Safeguards Agreement. Moreover, India cannot exercise the rights of the United States under Article XIX. If the United

³⁵ Emphasis added.

States did not invoke Article XIX with the required notification, that is simply the end of the matter.

B. The United States Has Not Implemented a Safeguard

70. The United States has not invoked Article XIX of the GATT 1994 with respect to the U.S. security measures that India may cite to justify its additional duties.³⁶ Rather, as the United States has informed the CTG, the U.S. security measures were taken pursuant to Article XXI of the GATT 1994.³⁷

71. According to Article 11.1(c) of the Safeguards Agreement, the Safeguards Agreement only applies to measures taken **pursuant** to Article XIX of the GATT 1994. In relevant part, Article 11.1(c) provides:

This Agreement **does not apply** to measures sought, taken or maintained by a Member **pursuant** to provisions of GATT 1994 **other than Article XIX**, and Multilateral Trade Agreements in Annex 1A other than this Agreement, pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994. (emphasis added)

72. Thus, only measures sought, taken, or maintained “pursuant” to Article XIX fall within the scope of the Safeguards Agreement. To justify its additional duties, India may attempt citing U.S. measures that were “sought, taken or maintained” under Article XXI of the GATT 1994 – which is a provision “other than” Article XIX. Accordingly, by the plain text of the Safeguards Agreement, the U.S. measures that India may cite do **not** fall within the scope of the Safeguards Agreement.

73. In short, because the WTO’s safeguards provisions are not applicable in this dispute, India cannot assert that Article 8.2 of the Safeguards Agreement authorizes its additional duties.

VIII. CONCLUSION

74. For the foregoing reasons, the United States respectfully requests that the Panel find that India’s measures that impose additional duties on products originating in the United States are inconsistent with Articles I and II of the GATT 1994.

³⁶ G/L/1239 (May 18, 2018).

³⁷ See Minutes of the Meeting of the Council for Trade in Goods, March 23 and 26, 2018, at 26 (noting that in response to comments from other Members, the United States provided information relating to the Steel and Aluminum Proclamations issued by the President of the United States, consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on November 30, 1982.), G/C/M/131.