CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS558)

U.S. Responses to Questions from the Panel to the Parties
After the First Substantive Meeting

January 30, 2020

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Dominican Republic – Safeguard Measures (Panel)	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
Indonesia – Iron or Steel Products (AB)	Appellate Body Reports, *Indonesia – Safeguard on Certain Iron or Steel Product*, WT/DS490/AB/R, WT/DS496/AB/R, and Add. 1, adopted 27 August 2018
Indonesia – Iron or Steel Products (Panel)	Panel Report, *Indonesia – Safeguard on Certain Iron or Steel Product*, WT/DS490/R, WT/DS496/R, and Add. 1, adopted 27 August 2018
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

TABLE OF EXHIBITS

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USA-22	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
USA-23	Black's Law Dictionary, 10th edn, B. Garner (ed.) (Thomson Reuters, 2014)
USA-24	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)

1 PRELIMINARY RULING REQUEST

1.1 To both parties

1. In its comments on China's request for a preliminary ruling, Turkey submits that, in resolving the request, the Panel will be "require[d to] address[] also issues of applicability of the WTO safeguard disciplines to the measures at issue". Do you agree with this position? Please elaborate.

Response:

1. We do not agree, and there is no legal basis for this position.

2. The United States initiated this dispute in response to China's measure imposing additional duties on products originating only in the United States in excess of China's Schedule of Concessions. The United States' panel request alleges the inconsistency of China's measure with the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), specifically Article I:1, Article II:1(a), and Article II:1(b). The United States makes no claims under the safeguard agreement. Accordingly, there is no legal basis for asserting that the U.S. panel request was required to cite WTO safeguards provisions.

3. Of course, China has argued that its additional duties are justified under Article 8.2 of Safeguards Agreement. The evaluation of this defense, however, has nothing to do with China's request for a preliminary ruling.

1.2 To the United States

2. At paragraph 11 of its response to China's request for a preliminary ruling, the United States argues:

> **Although China relies on the Appellate Body's report in *EC – Tariff Preferences* to support this view [i.e., that the United States' panel request failed to meet the requirements of Article 6.2 of the DSU], that dispute concerned a unique circumstance particular to the Enabling Clause and is not relevant here. China fails to appreciate that India, as the complaining party in *EC – Tariff Preferences*, considered the Enabling Clause to be relevant to that dispute and requested consultations under this provision. (footnotes omitted)**

Please elaborate on whether, in your view, the approach adopted by the Appellate Body in *EC – Tariff Preferences* would ever be applicable in respect of a provision other than the Enabling Clause. In your response, please explain the basis for your position, as well as any legal reasoning.

Response:

4. Neither the United States, nor any Member, is in a position to speculate on whether a certain analytical approach could be used in any possible future and hypothetical situation. What

we can say, with certainty, is that the Appellate Body's approach in *EC – Tariff Preferences* does not support China's Preliminary Ruling Request.

5. In our view, the Appellate Body's approach in *EC – Tariff Preferences*, instead of breaking new ground or offering a unique perspective on dispute settlement proceedings, reaffirmed the basic principles under the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and the burden of proof allocation among the respective parties to a dispute.

6. First, the Appellate Body began its approach recalling the general rule that the burden of proof for a defense to a *prima facie* claim of WTO-consistency falls on the respondent as the party "assert[ing] the affirmative of a particular ... defense." Accordingly, the Appellate Body recognized that under this allocation of the burden of proof, it is normally the respondent that not only must *raise* the defense and also *prove* that the challenged measure meets the requirements of the defense being offered.

7. The reaffirmation is particular significant in light of the Appellate Body's earlier statement that it is unlikely for the general rules concerning the burden of proof allocated between the parties in a WTO dispute settlement proceeding to change or that "the usual rules on burden of proof [will] not apply, as they reflect a 'canon of evidence' accepted and applied in international proceedings."

8. Therefore, where the Appellate Body's report in *EC – Tariff Preferences* reaffirmed longstanding principles under the DSU, particularly as they relate to the burden of proof, *prima facie* cases, and related presumptions that may arise in such cases, the Appellate Body's approach applies generally to provisions within the WTO Agreement.

3. With reference to paragraph 16 of China's first written submission, please comment on China's assertion that, where a measure is purportedly taken under Article 8.2 of the Agreement on Safeguards, "a complainant cannot make a proper claim solely under Article I and II of the GATT 1994 in its panel request without also including a claim that the measures cannot be justified under Article XIX of GATT 1994 and the [Agreement on Safeguards]".

Response:

9. China has no legal basis for this position. The United States has asserted claims in this dispute under Article I and Article II of the GATT 1994 based on China's additional duties on U.S.-originating products and the discriminatory duties in excess of China's bound rates that its measure applies. These are the only breaches alleged by the United States, and the United States had no reason to cite any other legal provisions of the GATT, or in any other WTO Agreement, in the U.S. panel request.

10. China has responding by attempting to justify its action under the Safeguards Agreement, and the right of suspension found in Article 8.2. Nothing in this situation, however, in any way supports the view that the U.S. panel request was required to alleged that China did not have a defense under these arguments, or under any other provisions of the WTO Agreement.

4. The United States does not dispute that China notified its additional duties measure to the Committee on Safeguards and characterised it as a rebalancing measure taken pursuant to Article 8.2 of the Agreement on Safeguards. In situations where a complaining party knows in advance what provisions of the covered agreements the responding party is relying on for the adoption of a certain measure:

a. Should the panel request include the provisions officially relied upon by the responding party?

b. What are the consequences of a panel request not referring to such provisions?

Response:

11. As noted in response to the previous question, the United States, as the complaining party in this dispute, has the right to bring claims based on the breach of another Member's obligations. The United States is not required to raise inapplicable claims because they may form the basis for the other Member's defense, such as China's safeguard theory in this dispute. If China believes the safeguard disciplines are relevant to this dispute, even though the United States has not exercised the right to apply a safeguard measure, China may do so but it also bears the burden of establish the position it is advancing to justify its action.

1.3 To China

5. In paragraphs 44 to 57 of its first written submission, China draws an analogy between the facts of the present proceedings and those in *EC – Tariff Preferences*, which concerned the Enabling Clause. In *EC – Tariff Preferences*, the Appellate Body considered that the Enabling Clause is a "defence" (Appellate Body Report, *EC – Tariff Preferences*, para. 106), whereas China maintains in its first written submission that Articles XIX of the GATT 1994 and 8.2 of the Agreement on Safeguards are not defences. Could you please comment on the legal significance, if any, of the difference between your arguments in this case and the legal characterization of the Enabling Clause in *EC – Tariff Preferences*?

Response:

12. This question is addressed to China.

6. With reference to paragraph 11 of the United States' response to China's request for a preliminary ruling, please comment on the United States' assertion that the Appellate Body Report in *EC – Tariff Preferences* "concerned a unique circumstance particular to the Enabling Clause and is not relevant here".

Response:

13. This question is addressed to China.

7. At paragraph 13 of its comments on China's request for a preliminary ruling, the United States argues that: "China is merely pointing to *additional claims* that, in its opinion, the United States *could have* presented. But that is not an issue under DSU Article 6.2 that the legal basis of the claims the United States *has* presented are not clear".

Please comment.

Response:

14. This question is addressed to China.

8. With reference to paragraphs 51-53 of its first written submission, is China of the view that a complaining party must always identify in its panel request any possible provisions of the covered agreements that may shield or otherwise exempt a challenged measure from WTO inconsistency (for example, Article III:8 of the GATT 1994)?

Please explain the legal basis for your answer.

Response:

15. This question is addressed to China.

2 THE MEASURE ARE ISSUE

2.1 To the United States

9. At paragraph 7 of its first written submission, the United States affirms that China issued the "Implementation Notice" on "the day immediately following the close of the eight-day public comment period". Footnote 4 of the United States' first written submission reads:

> **The Implementation Notice does not contain information regarding the results of the eight-day public comment process. China has not made the comments available to the public. In a statement published on April 2, 2018, a spokesperson claimed, without citing any details, that "many people expressed their support for the measure and product list," and stated that China decided to implement the additional duties "after evaluation."(…).**

What is the relevance of these statements for the Panel's evaluation of the United States' claims in the present dispute?

Response:

16. As is common in WTO submissions, we have provided a fact section in our first submission with background on the measure at issue in the dispute. Footnote 4 of the United States' first written submission is part of this factual background. Not all of the information from the background section, including in footnote 4, is necessary for proving the breach of Article I and Article II but it provides the backdrop against which the breach occurred.

10. The legal instruments listed by the United States in its panel request include "*Ministry of Commerce Notice on Publicly Soliciting Opinions on U.S. Imported Steel and Aluminium Products 232 Measures and Chinese Countermeasures* (Ministry of Commerce, published March 23, 2018)". In paragraph 6 of its first written submission, the United States observes that "[t]he *Opinions Notice* solicited public comment regarding China's proposal to impose additional duties". Subsequently, in paragraph 7 of its first written submission, the United States indicates that additional duties were imposed through the *Implementation Notice*.

a. In the United States' view, what is the legal value of the Opinion's Notice?

b. Can the United States elaborate on its identification of the Opinions Notice as a legal instrument through which China allegedly "imposes" the measure at issue?

Response:

17. The *Opinions Notice* constitutes China's first official notice of its intention to impose additional duties and provides a rationale for doing so. The *Opinions Notice* is also the first measure at issue in this dispute to identify the 128 tariff codes to which China has applied additional duties. China subsequently included those same 128 tariff codes in its March 29, 2018 notification to the Council for Trade in Goods and the *Implementation Notice*.[1]

18. The United States provides the *Opinions Notice* to provide factual background surrounding China's subsequent issuance of the *Implementation Notice*, pursuant to which China imposed additional duties on U.S.-origin goods.

11. In paragraph 8 of its first written submission, the United States argues that it noted "a number of discrepancies between the lists in the *Opinions Notice* and the *Implementation Notice*".

a. Please provide the Panel with a table identifying the specific discrepancies between the two instruments.

[1] *Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Article 8.2 of the Agreement on Safeguards*, G/SG/N/12/CHN/1, dated 29 March 2018.

b. What is the relevance of these alleged discrepancies for the Panel's evaluation of the United States' claims in this dispute?

Response:

19. The mention of discrepancies between similar, but not identical, product lists in the *Opinions Notice* and the *Implementation Notice* are part of the factual background that we provided in the U.S. first written submission. To be clear, China has breached GATT Articles I and II regardless of whether such discrepancies existed.

20. The United States has provided a table containing all 128 tariff codes at issue in this dispute, the Chinese-language product description for each code from the *Opinions Notice* and *Implementation Notice*, and English translations for each product description.[2] Rows are marked green, yellow, and white to indicate exact match product descriptions, nearly the same but not exact match product descriptions, and potentially substantively different product descriptions, respectively.

12. In paragraphs 155-157 of its first written submission, China requests that the Panel disregard the United States' reference to "other additional duties" in its first written submission.

a. Please comment on China's statement, in paragraph 156 of its first written submission, that "[t]he 'other additional duties' and measures underlying such duties are not included by the United States in its panel request, and are not measures at issue in this dispute".

b. At the first substantive meeting, the United States indicated that it is not seeking findings on the "other additional duties". Could the United States confirm this statement?

Response:

21. The United States is not seeking findings and recommendations in respect to the "Additional Tariffs on U.S.-Origin Products" indicated in column D of Exhibits USA-14 and USA-15. The United States included the additional tariffs in order to calculate the sum of duties, indicated in column E, actually applied to U.S.-origin goods. The United States notes that inclusion of the "Additional Tariffs on U.S.-Origin Products" in Exhibits USA-14 and USA-15 results in all 128 tariff codes at issue exceeding their respective tariff bindings.

22. Removal of the "Additional Tariffs on U.S.-Origin Products" in each exhibit results in five of the 128 tariff codes not exceeding China's tariff bindings (but has no bearing on the

[2] *See* Exhibit USA-16.

failure to extent MFN-treatment to U.S. originating products for all 128 tariff codes at issue).[3] These five tariff codes are as follows:

Number	Tariff Code	Lower of MFN / Provisional Duty	Additional Duty	Sum of Duties	Bound Rate
20	08028000	10	15	25	25
22	08029090	7	15	22	25
28	08044000	7	15	22	25
53	08104000	15	15	30	30
58	08109030	12	15	27	30

23. As stated above, the United States included the additional tariffs in order to calculate the sum of duties, indicated in column E, that is actually applied to U.S.-origin goods. The United States confirms that the "Additional Duty" indicated in column C in Exhibits USA-14 and USA-15 are the only additional duties at issue in this dispute.

13. Exhibits USA-9 through USA-12 contain pages in the Chinese language. Could the United States submit an English translation of those exhibits?

Response:

24. Exhibits USA-9 through USA-12 each contain the original Chinese and official English-language translations of the measures in question. In other words, the English text is a translation of the Chinese text that appears in the exhibits.

14. Exhibits USA-9 through USA-12 contain links to web pages. However, the links do not appear to be live. Could the United States submit further evidence concerning how it identified the products allegedly affected by the "other additional duties"?

Response:

25. As indicated above, the United States is not seeking findings and recommendations in respect to the "other additional duties" that appeared in column D of Exhibits USA-14 and USA-15.

15. At paragraph 23 of its first written submission, the United States submits that:

> **China has obtained waivers from updating its bound rate commitments to conform to HS2002, HS2007, HS2012, and HS2017, which obscures whether China has continued to meet its commitments since the harmonized system and China's domestic tariff schedule**

[3] *See* Exhibit USA-17 and USA-18.

> **have undergone substantial revisions over the past 20 years. (fn omitted)**

Please explain the relevance of this statement for its claims, and any implications it may have for the Panel's analysis in these proceedings.

Response:

26. The United States explains at paragraph 23 of its first written submission that, in order to identify the tariff binding applicable to each of the 128 HS2017 tariff codes at issue in this dispute, it converted the first 6 digits of each 8-digit tariff line from HS2017 to HS1996. The United States then identified the maximum tariff binding at the 8-digit level for each unique 6-digit code and adopted this maximum tariff binding as the bound rate for all 8-digit HTS lines falling under each subheading. This methodology is the most conservative approach possible because the bound rates that are indicated at column F in Exhibits USA-14 and USA-15 may be higher than the actual bound rates applicable to each tariff code. And even at the highest bound rate possible in column F, China's measure applies duties in excess of that level.

27. The method of identification the United States used in this dispute is necessary because China has not updated its schedule of tariff bindings following its accession. Since China's accession, both the harmonized system and China's domestic tariff schedule have undergone substantial revisions, thereby making confirmation that China has maintained its GATT Article II obligations based on its recent years' tariff schedules an opaque exercise.

2.2 To China

16. In paragraph 8 of its first written submission, the United States argues that it noted "a number of discrepancies between the lists in the Opinions Notice and the Implementation Notice". Please comment.

Response:

28. This question is addressed to China.

17. In paragraph 156 of its first written submission, China states that:

> **[I]t is not appropriate for the United States to include the "other additional duties" in column "Sum of Duties (E)", and compare it with "Bound Rate (F)" to reach a calculation for "Exceeds MFN/Bound Rate" on China's measures at issue in Exhibit USA-14 and USA-15.**
>
> **Please expand on this argument, and explain why China considers this to be "inappropriate".**

Response:

29. This question is addressed to China.

3 ORDER OF ANALYSIS

3.1 To both parties

18. Concerning the order of analysis to be followed by the Panel in these proceedings:

a. Should the Panel begin its analysis by assessing the United States' claims under Articles I and II of the GATT 1994, or by assessing China's argument concerning the applicability of Article 8.2 of the Agreement on Safeguards to the measure at issue?

b. If you consider that the Panel should first examine the United States' claims under Articles I and II of the GATT 1994, should the Panel examine China's arguments under Article 8.2 of the Agreement on Safeguards only if it were to make findings that the measure at issue is inconsistent with Articles I or II of the GATT 1994?

c. If you consider that the Panel should begin its analysis by assessing China's arguments concerning Article 8.2 of the Agreement on Safeguards, should the Panel examine the United States' claims under Articles I and II only if it were to find that that provision does not apply to the measure at issue?

Response:

30. In WTO dispute settlement a panel generally begins its assessment by examining the claims of the complainant before assessing the respondent's defense. We do not see this dispute presenting a situation that would merit the Panel beginning its analysis by assessing China's defense first.

3.2 To China

19. When arguing its claims under Article II:1(a) and II:1(b) of the GATT 1994, the United States commences its analysis by Article II:1(b). In paragraph 65 of its first written submission, the United States argues that "[s]ince Article II:1(b) proscribes the type of measures that are equally inconsistent with Article II:1(a), in demonstrating a breach of the former, the United States has also established a breach of the latter".

Please comment in the light of the order of analysis chosen by the United States.

Response:

31. This question is addressed to China.

4 CLAIM UNDER ARTICLE I OF THE GATT 1994

4.1 To China

20. At paragraph 21 of its first written submission, the United States, referring to Exhibits USA-14 and USA-15, argues:

> **Read together, the three numbers the United States referenced for each tariff line – (1) China's applied MFN rate; (2) China's applied tariff rate on U.S.-originating products before the additional duties took effect on April 2, 2018; and (3) China's additional duty rate on U.S.-originating products effective as of April 2, 2018 – demonstrate that for all 128 tariff lines at issue in this dispute, China is applying duties higher than its MFN commitments. This is the case for the 16 tariff lines subject to provisional duty applied MFN rates, as well as for the 112 tariff lines subject to permanent duty applied MFN rates.**

Please comment. To the extent that you disagree with the United States' allegation in the above-mentioned paragraph, please identify the tariff lines for which the combination of China's applied MFN rate and China's additional duty would not exceed China's MFN commitments.

Response:

32. This question is addressed to China.

21. At paragraph 41 of its first written submission, the United States argues:

> **China's measure imposes additional duties only on products originating in the United States, and leaves unchanged the rate [of] duty applicable to other countries, including all other WTO Members. Specifically, China's measure applies an additional 15 percent or 25 percent duty to certain products originating in the United States. The measure, however, does not apply these additional duties on "like products" from other countries. In other words, U.S[.] origin is the only criterion used by the measure for imposing additional duties on U.S. products covered by the 128 tariff lines, but not products from other countries entered under the same tariff lines. Thus, the like product element of Article I:1 is satisfied.**

Please comment.

Response:

33. This question is addressed to China.

5 CLAIM UNDER ARTICLE II OF THE GATT 1994

5.1 To China

22. At paragraph 66 of its first written submission, the United States argues:

> **Given China's breach of Article II:1(b) through the imposition of the duties in excess of its bound rate on products originating in the United States, China has correspondingly accorded less favourable [treatment] to these products and breached Article II:1(a) as well.**

Please comment.

Response:

34. This question is addressed to China.

23. At paragraph 26 of its first written submission, the United States argues:

> **Read together, the three figures the United States referenced for each tariff lines [in Exhibits USA-14 and USA-15] – (1) China's bound rate; (2) China's applied tariff rate on U.S.-originating products before the additional duties took effect on April 2, 2018; and (3) China's additional duty rate on the U.S.-originating products effective as of April 2, 2018 – demonstrate that for all 128 tariff lines at issue in this dispute, China exceeded its bound rate commitments.**

Please comment.

To the extent that you disagree with the United States' allegation in the above-mentioned paragraph, please identify the tariff lines for which the combination of China's MFN rate with the additional duty does not exceed China's bound rate commitments.

Response:

35. This question is addressed to China.

6 ARGUMENTS CONCERNING THE SAFEGUARDS REGIME

6.1 To both parties

24. In paragraph 2 of its first written submission, China submits:

> **China has explicitly notified WTO its measures at issue in this dispute are proposed suspension of substantially equivalent concessions and other obligations under Article XIX:3 of the GATT 1994 and Article 8.2 of the Agreement on Safeguard"1, and therefore the United States has been on notice and well aware of the legal basis of China's measure under the WTO rules.**

a. What is the applicable legal standard under Article 8.2 of the Agreement on Safeguards? In particular, what are the analytical steps that a panel must take in assessing whether a measure falls within Article 8.2?

b. Can a panel determine whether a measure falls under Article 8.2 of the Agreement on Safeguards without determining whether an underlying safeguard measure exists? Or is the existence of an underlying safeguard measure a threshold question?

c. If you consider that the existence of an underlying safeguard measure is a threshold question, can a panel examine whether the underlying measure is a safeguard measure even if it was not identified in the panel request and/or the Agreement on Safeguards was not identified in the panel request?

36. As an initial matter, the United States observes that whether China's characterizes its additional duties as rebalancing measures is legally irrelevant. As the United States explained during the first substantive meeting of the parties, the classification of a measure under municipal law is not determinative of the applicable WTO obligation.

37. Regarding the analytical steps to assess whether a measure falls within Article 8.2 of the Safeguards Agreement, this provision sets out a right arising for an affected exporting Member if a safeguard measure is applied and no agreement has been reached by the Members concerned. The other "Member concerned" is that identified in Article 8.1 – that is, a "Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure". Thus, the first step in assessing whether a measure "falls within Article 8.2" (in the words of the question) is to examine whether a Member is "proposing to apply" or is "seeking an extension of a safeguard measure" under Article 8.1, and then subsequently "the measure is applied".[4]

38. Articles 8.1 and 8.2 contain cross-references to "the provisions of" and "consultations under" Article 12.3. Article 12.3 describes consultations being offered by a "Member *proposing* to apply or extend a safeguard measure", and Article 12.2 also refers to certain "notifications" by a "Member *proposing* to apply or extend a safeguard measure".[5] This language parallels GATT 1994 Article XIX:2, which establishes that "[b]efore … tak[ing] action", a Member "shall" give notice in writing and afford an opportunity to consult "in respect of the *proposed* action".[6]

[4] Safeguards Agreement, Art. 8.2 (right to suspend concessions arises if no agreement is reached and must be exercised "not later than 90 days after the measure is applied"; right to suspend concession is "to the trade of the Member applying the safeguard measure").

[5] Safeguards Agreement, Art. 12.3 ("Member proposing to apply or extend a safeguard measure shall provide…"), Art. 12.2 (first sentence: "Member proposing to apply or extend a safeguard measure shall provide…"; third sentence: "the Member proposing to apply or extend the measure").

[6] GATT 1994 Article XIX:2 ("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.").

These provisions all describe the same sequence of a Member proposing to take action, affording the opportunity to consult, and then taking action to apply a safeguard measure.

39. Accordingly, a WTO Member cannot implement rebalancing measures under Article 8.2 of the Safeguards Agreement **unless** another Member has proposed to apply or extend a safeguard measure and then has applied that measure.

40. Regarding question 15(b), a panel cannot determine whether a retaliatory measure falls under Article 8.2 of the Safeguards Agreement without first determining whether a safeguard measure exists. The exercise of the right – through invocation – to apply a safeguard measure is a **precondition** not only for a measure to constitute a safeguard but for another Member to implement a retaliatory measure under Article 8.2 of the Safeguards Agreement. Thus, the existence of a safeguard measure would be a threshold question in a dispute in which a complaining party, having exercised its right under GATT 1994 Article XIX and the Safeguards Agreement to take safeguard action, subsequently seeks to challenge the conformity of a rebalancing measure with Article 8.2.

41. Finally, regarding question 15(c), a panel cannot assess whether a measure is a safeguard measure when a responding party seeks to invoke the "right" to "rebalancing" under the Safeguards Agreement as a defense. Article 7.2 of the DSU provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Here, the Safeguards Agreement and Article 8.2 is not a "relevant provision[] of a[] covered agreement". Because the United States has not sought to exercise a right to exceed its tariff bindings through GATT 1994 Article XIX (a fact China does not contest), no "right" to "rebalancing" can arise for another Member. Instead, to the extent such a Member considers that the United States has no legal basis to exceed its tariff bindings, it may pursue a claim of breach or non-violation nullification or impairment.

25. In paragraph 10 of its third-party submission, Japan states that:

> **[T]he Appellate Body [in Indonesia – Iron or Steel Products] categorized the action and purpose factors as necessary – but not sufficient – to find a given measure to constitute a safeguard measure. The Appellate Body did not attempt to propose a comprehensive definition of a safeguard measure or ultimately to decide the scope of the Agreement on Safeguards. It would be, therefore, incorrect to treat the Appellate Body's statement as a "definition" or "case law" on the scope of the Agreement on Safeguards.**

Additionally, in paragraph 11, Japan submits that "significant evidentiary value must also be ascribed to some important factors, such as the status of fulfilment of the notification requirements under Article 12 of the Agreement on Safeguards".

Please comment on these statements.

Response:

42. Before addressing Japan's comments on *Indonesia – Iron or Steel Products*, the United States would like to provide some background on that dispute.

43. As a third-party participant in *Indonesia – Iron or Steel Products*, the United States agreed with the disputing parties that the Indonesian measure at issue met what, in most circumstances, is the fundamental criterion for establishing the existence of a safeguard measure: namely, that the Member adopting a measure invokes Article XIX of the GATT 1994 as the basis for suspending an obligation or withdrawing or modifying a concession. Article XIX:2 of the GATT 1994 and Article 12 of the Safeguards Agreement make clear that advance notice by a Member intending to suspend an obligation or withdraw a concession is a precondition to applying a safeguard measure. In *Indonesia – Iron or Steel Products*, Indonesia did notify other Members that it intended to adopt a safeguard measure, and thus did invoke Article XIX of the GATT 1994. In most situations, the question of whether the WTO's safeguards disciplines applied would have been resolved by this fact.

44. *Indonesia – Iron or Steel Products*, however, presented unusual circumstances, stemming from the fact that Indonesia did not have tariff bindings with respect to the products covered by the Indonesian measure. Despite this, Indonesia conducted an investigation with a view to complying with its obligations under the Safeguards Agreement and imposed a duty in light of the outcome of that investigation.[7] Furthermore, the parties in that dispute consistently argued that the duty at issue was a safeguard measure.[8] Accordingly, the panel was placed in the position of assessing whether the Indonesian measure at issue involved suspension of an obligation or modification of a concession, and thus whether Article XIX or the Safeguards Agreement applied to the measure at issue.

45. The *Indonesia – Iron or Steel Products* panel proceeded to find that Indonesia had no binding tariff obligation with respect to the good at issue.[9] The panel reasoned that Indonesia's obligations under Article II of the GATT 1994 did not preclude the application of the specific duty on imports of the good at issue; thus, to apply the measure at issue, Indonesia did not suspend, withdraw, or modify its obligations under Article II of the GATT 1994.[10] For these reasons, the panel found that Indonesia's specific duty on the good at issue was not a measure within the scope of Article XIX of the GATT 1994, or the Safeguards Agreement. The Appellate Body affirmed the panel's conclusion.

46. This dispute presents a fundamentally different scenario from *Indonesia – Iron or Steel Products*. The central question in this dispute is whether China has any justification for its apparent breach of Articles I and II of the GATT 1994. As the United States explained in the U.S. opening statement, China's legal theory has no basis on the text of the WTO Agreement. Instead, China asserts that the governing standard for determining whether a measure is a safeguard measure is the standard developed by the Appellate Body in *Indonesia – Iron or Steel*

[7] *Indonesia – Iron or Steel Products (Panel)*, fn. 84 and para. 7.47.

[8] *Id*.

[9] *Id*., para. 7.18

[10] *Id*.

Products. As discussed in more detail, the reasoning from the Appellate Body's report in that dispute is simply not applicable here.

47. Moreover, as Japan correctly asserts in paragraph 10 of its third-party submission, the Appellate Body "did not attempt to propose a comprehensive definition of a safeguard measure or ultimately to decide the scope of the Agreement on Safeguards."[11] Rather, as the Appellate Body reasoned in *Indonesia – Iron or Steel Products*, "whether a particular measure constitutes a safeguard measure for purposes of WTO law can be determined only on a case-by-case basis."[12] Accordingly, given the unusual circumstances presented in *Indonesia – Iron or Steel Products*, the Appellate Body determined whether the WTO's safeguards disciplines applied to the measure at issue in that dispute. As Japan mentioned in paragraph 10 of its third-party written submission, the **action** (*i.e.*, suspension, withdrawal, or modification of a GATT concession) and **purpose** (*i.e.*, suspension, withdrawal, or modification must be designed to prevent or remedy serious injury) factors used by the Appellate Body in its test are "*necessary* – but not *sufficient* – to find a given measure to constitute a safeguard measure."[13]

48. Japan's assertions in paragraph 11 of its third-party written submission further support the U.S. position. According to Japan,

> treating the action and purpose features raised by the Appellate Body as a comprehensive definition of the applicability of the Agreement on Safeguards could lead to **unreasonable outcomes**. Indeed, to apply only the "two key features test" could **confuse** an assessment of whether the WTO's safeguard disciplines apply to a measure.[14]

49. Thus, Japan argues that the Panel should ascribe "significant evidentiary value" to "some important factors," such as notification to the WTO Committee on Safeguards. In this dispute, the U.S. has not notified the WTO Committee on Safeguards of any proposed action or safeguard measure taken because the United States did not invoke Article XIX of the GATT 1994 as the basis for action on imports.

26. In *Indonesia – Iron or Steel Products*, the Appellate Body referred to two constituent features of safeguard measures. Are there any other characteristics that a measure must have in order to be a safeguard falling within Article XIX:1 of the GATT 1994 and the Agreement on Safeguards, or absent which a measure cannot be characterized as a safeguard?

[11] Third-Party Submission of Japan (June 20, 2019), para.10.

[12] *Indonesia – Iron or Steel Products* (AB), para. 5.57.

[13] Third-Party Submission of Japan, para. 10. (Emphasis in the original); *see also Indonesia – Iron or Steel Products* (AB) (noting that "in order to constitute one of the 'measures provided for in Article XIX," a measure must present certain constituent features, **absent** which it could **not** be considered a safeguard measure." China, however, fails to address this aspect of the Appellate Body's reasoning.) (emphasis added), para. 5.60.]

[14] Third-Party Submission of Japan, para. 11. (emphasis added).

Response:

50. The first step to determine whether a measure falls under Article XIX of the GATT 1994 and the Safeguards Agreement is to identify whether the importing Member has invoked the right to take action pursuant to these provisions. Absent this invocation (in the terms of Article XIX:2, providing notice and an opportunity to consult; in the terms of the Safeguards Agreement, providing notification and an opportunity to consult), a measure cannot be characterized as a safeguard measure, nor would it fall under the WTO's safeguards disciplines. In addition to this first condition, the two conditions in Article XIX:1 would also need to be present for a measure to be characterized as a safeguard.

27. Could any measure that raises duties above a bound rate be considered a "suspension of concessions"?

Response:

51. No; it is not the case that any measure that raises duties above a bound rate can be considered a suspension of concessions under Article XIX of the GATT 1994. The term "suspension of concessions" applies to situations where the Member adopting the measure understands that it is departing from WTO obligations, and invokes a provision of the WTO Agreement that specifically allows for a suspension of concessions. As the United States explained in the U.S. first written submission,[15] for a measure to fall under the WTO's safeguards disciplines the importing Member must invoke Article XIX of the GATT 1994 to exercise a right to suspend obligations or withdraw or modify tariff concessions. Similarly, when a Member invokes DSU Article 22.7 upon adopting a measure inconsistent with its tariff bindings, it is "suspending concessions." Absent this type of invocation, a Member is not "suspending concessions"; rather, the Member is simply adopting a measure that it is inconsistent with Article II of the GATT 1994.

52. The United States would highlight that over the course of the WTO, and before that the GATT 1947, numerous disputes have involved alleged breaches of a tariff commitment. The well-established and proper terminology is that such disputes involve an inconsistency with Article II; the terminology **is not** that the Member has "suspended a concession." It is only China and its supporters in this particular dispute that apparently advocate for the view that any measure that departs from an Article II commitment can be termed a "suspension of concessions." For all the reasons the United States has presented, the Panel must reject this novel position.

28. Is any and every measure that (a) suspends an obligation or modifies or withdraws a concession (b) for the purpose of protecting a domestic industry against serious injury or the threat thereof from an increase in imports *always and necessarily* a safeguard?

[15] *See* U.S. First Written Submission, paras. 69.

Response:

53. No. As the United States has argued throughout this dispute, and as indicated in the U.S. response to question 27, for a measure to be a safeguard, the importing Member must invoke Article XIX of the GATT 1994 to exercise a right to suspend obligations or withdraw or modify tariff concession. Absent such invocation, a Member will not have a basis for that measure under Article XIX or the Safeguards Agreement.

29. Article 2.2 of the Agreement on Safeguards states that "[s]afeguard measures shall be applied to a product being imported irrespective of its source". In the view of the parties, is non-discriminatory application a "constituent element" of a safeguard measure?

Response:

54. Article 2.2 of the Safeguards Agreement provides that safeguard measures "shall be applied to a product being imported irrespective of its source." Non-discriminatory application of a safeguard measure, then, is a requirement that safeguard measures have to meet in order to comply with the obligations of the Safeguards Agreement. In fact, Article 2 is titled "Conditions", and Article 2.1 reiterates one of the conditions (or "constituent elements" in AB terms) set out in GATT 1994 Article XIX:1 (increased imports and injury).

30. With reference to paragraph 5.60 of the Appellate Body's report in *Indonesia – Iron or Steel Products*, please comment on how, in your view, a panel should "evaluate and give due consideration to" the factors mentioned in that paragraph, including the manner in which a measure was adopted and its characterization in a Member's municipal law.

Response:

55. How a panel "evaluates and gives consideration" to the factors (domestic law, domestic procedures, and notifications) listed in paragraph 5.60 of the Appellate Body's report in *Indonesia – Iron or Steel Products* depends on the circumstances of a particular dispute. For instance, if a panel were to confront a factual scenario similar to *Indonesia – Iron or Steel Products*, it could make sense for such panel to use the factors in its assessment of the measure at issue.

56. Here, the factors listed in paragraph 5.60 would not be helpful in the Panel's assessment of whether China's additional duties are consistent with its obligations under Articles I and II of the GATT. In addition, in its assessment of China's justification for its measures, the first step the Panel should take is to determine whether the United States invoked Article XIX of the GATT 1994 in connection with this dispute. The United States has not, and this fact is not contested by China. Thus, the Panel's inquiry can end there.

57. Even if the Panel were to further assess China's justification by applying the factors to the U.S. 232 measures, the Panel would find that the application of the factors supports the U.S. position. Regarding the first factor (domestic law), safeguard measures in the United States are

authorized by Section 201 of the Trade Act of 1974.[16] In relevant part, Section 201 allows the President of the United States to take action if "the United States International Trade Commission" determines that

> an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.[17]

58. In contrast, under U.S. domestic law, the U.S. national security measures are authorized by Section 232 of the Trade Expansion Act of 1962.[18] Section 232 authorizes the President of the United States, upon receiving a report from the U.S. Secretary of Commerce finding that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the **national security**," to take action that "in the judgment of the President" will "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the **national security**."[19]

59. Regarding the second factor (domestic procedures), the U.S. International Trade Commission is the only competent authority in the United States authorized to conduct safeguards investigations.[20] In contrast, the Bureau of Industry and Security of the U.S. Department of Commerce conducted the investigation regarding the U.S. national security measures.

60. Finally, the application of the third factor (notification to the WTO Committee on Safeguards), further supports the U.S. position. The United States has not notified the WTO Committee on Safeguards of any proposed action or any safeguard measure taken because the United States did not invoke Article XIX of the GATT 1994.

31. The Appellate Body in *Indonesia – Iron or Steel Products* held that for a measure to be a safeguard, it must be designed to remedy (or prevent) serious injury. Is the purpose of a measure an objective element or a subjective characteristic, entirely within the power of the regulating Member to decide? If so, is the existence of a safeguard measure really an "objective" question?

Response:

[16] 19 U.S.C. §§ 2251, *et seq*

[17] 19 U.S.C. § 2251(a) (Exhibit USA-19)

[18] 19 U.S.C. §§ 1862, *et seq*

[19] 19 U.S.C. § 1862(c)(1)(A) (emphasis added) (Exhibit USA-20)

[20] *See* 19 U.S.C. § 2251(a)

61. In the United States, the purpose of a safeguard measure is an objective element that can be deduced from the text of the measure. For instance, the text of the U.S. statute that authorizes the imposition of safeguard measures explicitly states the purpose of the statute. In relevant part, the U.S. statute that authorizes a safeguard measure provides that, if certain conditions are met, the President of the United States shall take action to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[21] In addition, a Presidential Proclamation that implements a U.S. safeguard measure also states the purpose of the measure.[22]

32. At paragraph 3 of its oral statement at the third-party session, New Zealand argued that:

> **A failure to notify a safeguard measure will be inconsistent with the obligations set down in Article XIX GATT and Article 12 of the Safeguards Agreement. It is not, however, determinative of the legal characterisation of the measure, or the applicability of the safeguards regime.**

In your view, does the fulfilment of the notification requirements laid down in Article 12 of the Agreement on Safeguards relate to the applicability of the safeguards regime to a specific measure, or to the consistency of a safeguard measure with the relevant provisions of the Agreement on Safeguards?

Response:

62. The requirement to invoke GATT 1994 Article XIX flows from its provisions on providing notice of a proposed action, which is then repeated and elaborated in the notice requirement of Article 12 of the Safeguards Agreement. These elaborated notification requirements may relate to both applicability of the WTO's safeguards disciplines and consistency of a measure with the Safeguards Agreement.

63. Regarding application, Article XIX:2 of the GATT 1994 provides that invocation by a Member proposing to suspend an obligation or to modify or withdraw a concession is a precondition to applying a safeguard measure. 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**.[23]

[21] 19 U.S.C. §2251(a) (Exhibit USA-19)

[22] *See* Proclamation 9694 of January 23, 2018 (noting that the proclamation aims to "facilitate positive adjustment to competition from imports of large residential washers".) (Exhibit USA-21)

[23] Emphasis added.

Thus, before a Member may take a proposed action, it "shall" give notice and afford an opportunity to consult. The third sentence of Article XIX:2 provides a limited exception to consulting in cases of "critical circumstances", but critically, this exception *does not apply* to the requirement to give notice in writing. Thus, in terms of Article XIX:3, 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.

64. Regarding consistency, any measure for which the coverage of Article XIX and the Safeguards Agreement is invoked must meet the obligations set out in the Agreement on Safeguards, including the obligations in Article 12. Thus, a claim may be brought asserting that the importing Member's notification does not meet the requirements set out in Articles 12.2 or 12.3 of the Safeguards Agreement.

33. Is a measure already a safeguard before it is notified to the Committee on Safeguards? Or does a measure become a safeguard only the moment in which it is notified to the Committee on Safeguards?

Response:

65. As an initial matter, the United States would note that the phrase "is a measure already a safeguard" perhaps reflects an incorrect legal viewpoint – one advocated by China and its supporters in this dispute. Specifically, for the phrasing to be correct within the GATT 1994 framework, it must be shorthand for the question of "whether the disciplines of Article XIX apply to the measure." What is not correct is to view a "safeguard" as any measure that is inconsistent with a WTO obligation, and which is arguably taken to protect domestic producers. Indeed, the term safeguard measure simply means a measure subject to Article XIX. This is plain from the text of Article XIX, and is specifically stated in Article 1 of the Safeguards Agreement.

66. And, without invocation, Article XIX does not apply to a measure. Once the importing Member invokes Article XIX as the basis for a proposed measure, the WTO's safeguards disciplines for notifications attach to that proposed action. If a Member has not provided notice in writing to Members of a proposed action, or has denied other Members the opportunity to consult, the Member's measure (whatever its characterization domestically) is not action pursuant to Article XIX, and the Member will not have a legal basis in Article XIX for exceeding its tariff commitments.

67. With regard to the "notification to the Committee" – GATT Article XIX specifies notification to the "contracting parties;" the issue of whether notification to Members through another mechanism or committee would qualify is not presented in this dispute. As is undisputed, the United States did not invoke Article XIX in any document or communication; rather, the United States has invoked Article XXI of the GATT 1994.

34. Please comment on the relevance, if any, of the 1993 Decision on Notification Procedures[24] for the Panel's assessment of the United States' argument concerning invocation of the Agreement on Safeguards through notification.

Response:

68. In the U.S. response to question 52, the United States elaborates on the U.S. argument concerning the term "invocation." Regarding the Decision on Notification Procedures, the United States is of the view that it is of limited value to the Panel's assessment of the U.S. arguments concerning the **applicability** of the WTO's safeguards regime because it does not specifically address the obligations in Article XIX and the Safeguards Agreement. Rather, the Decision on Notification Procedures addresses general obligations to notify "trade measures affecting the operation of GATT 1994."[25]

35. Does Article 8 of the Agreement on Safeguards allow Members to impose rebalancing measures even in response to measures about which there is or may be doubt whether they are safeguard measures? Please explain the legal basis for your response. Is the unqualified reference to "measure" in the final sentence of Article 8.1 of the Agreement on Safeguards relevant for the purposes of answering this question?

Response:

69. As the United States explained above, Article XIX:3(a) of the GATT 1994 and Article 8 of the Safeguards Agreement explicitly link rebalancing measures to safeguard measures.

70. Regarding question 35, the reference to "measure" in the second sentence of Article 8.1 of the Safeguard Agreement is not "unqualified"; the use of the definite article "the" indicates the relevant measure has been identified previously. The term "the measure" in the second sentence refers to the terms "safeguard measure" in the first sentence of Article 8.1. To see this relationship, it is useful to look at the two sentences together:

> A Member proposing to apply a **safeguard measure** or seeking an extension of a **safeguard measure** shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by **such a measure**, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members

[24] Decision on Notification Procedures, adopted by the Committee on Trade Negotiations on 15 December 1993, as annexed to the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, done at Marrakesh on 15 April 1994

[25] Decision on Notification Procedures (noting that "Members affirm their commitments to obligations under the Multilateral Trade Agreements" regarding "publication and notice."), page 1, MTN/FA III-3 (1993)

> concerned may agree on any adequate means of trade compensation for the adverse effects of **the measure** on their trade.[26]

71. Thus, in sequence, Article 8.1, first sentence, identifies a "safeguard measure" (twice). Article 8.1, first sentence, then further refers to "such a measure", referring back to the safeguard measure. Finally, Article 8.1, second sentence, refers to "the measure" and its effects on the Members' trade, referring back to "such a measure" and "safeguard measure". Accordingly, the text and structure of Article XIX and Article 8 support the U.S. position: rebalancing measures can only be taken in response to a safeguard measure.

36. In a situation where two Members disagree about the existence of an underlying safeguard measure, and an exporting Member decides to adopt a measure under Article 8 of the Agreement on Safeguards because it considers an underlying safeguard measure to exist, what would happen if that disagreement were resolved, through dispute settlement, by a panel (and/or the Appellate Body) finding that the underlying measure was not a safeguard? What would be the implications of such a finding for the legality of any rebalancing measure taken prior to that finding? For instance, would such a finding make any rebalancing measure WTO-inconsistent, or would it render any rebalancing measure WTO-inconsistent *ab initio*?

Response:

72. If a disagreement on whether an underlying measure is a safeguard were resolved through a report adopted by the DSB, a "rebalancing" measure taken prior to that finding would be *revealed* as not having a basis in the Safeguards Agreement. That is, because the importing Member's measure was not a safeguard (for example, because it had not invoked Article XIX as the basis to take an action), the other Member had no right *at the time of* its "rebalancing" action to take action pursuant to Article 8.2. Thus, in the terms of the question, the "rebalancing" action would have been WTO-inconsistent *ab initio*.

37. Article 8.2 of the Agreement on Safeguards reads, in relevant part: "… Members shall be free … to suspend … the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods (CTG) does not disapprove".

a. Please confirm whether China's additional duties measure was placed on the agenda of the CTG, and by whom.

b. Is it necessary to place an alleged rebalancing measure on the CTG's agenda in order for Article 8.2 of the Agreement on Safeguards to apply?

[26] Emphasis added.

c. If so, which Member bears the burden of placing the measure on the CTG's agenda (e.g. the Member adopting the measure, or a Member concerned about the measure)?

d. Please comment on the meaning of the phrase "does not disapprove". In particular, does disapproval presume consideration of the measure at a meeting of the CTG? Does disapproval require a positive act or decision by the CTG? And would disapproval be taken by consensus, reverse consensus, or some other method?

Response:

73. Irrespective of whether China satisfied its burden in this regard, the fact that a matter was placed on the agenda for consideration at a meeting of the Council for Trade in Goods does not translate into a determination that the matter properly falls within the WTO safeguards regime. The Council for Trade in Goods may opt to place a matter on the agenda, allow debate, and take no action to disapprove the proposed suspension. This is not an endorsement of the suspension or applicability of WTO safeguards disciplines. Additionally, as disapproval requires consensus, China's view would create a situation where a Member could adopt a retaliatory measure and then block disapproval, thereby frustrating the ability of the Council for Trade in Goods to consider the matter as envisioned in Article 8.2 of the Safeguards Agreement.

38. What, if anything, are the "constituent features" of a rebalancing measure under Article 8.2 of the Agreement on Safeguards? Are there any constituent features absent which a measure could not be characterized as a rebalancing measure?

Response:

74. In the U.S. response to question 25, the United States explained why, due to the unusual circumstances in *Indonesia – Iron or Steel Products*, the Appellate Body came up with the "constituent features" test. As the United States explained in the U.S. response to question 25, the Appellate Body's reasoning in *Indonesia – Iron or Steel Products* is not applicable here. Thus, the United States is of the view that it is not helpful to the resolution of this dispute to engage in a discussion regarding the application of the "constituent features" test to provisions of the WTO Agreement.

75. Regarding rebalancing measures, the text of Article XIX:3(a) of the GATT 1994 and Article 8 of the Safeguards Agreement make clear that a Member is not free to impose a rebalancing measure unless (a) the importing Member has provided notice of a proposed action, (b) the importing Member has imposed a safeguard measure, and (c) the affected exporting Members have met the requirements set out in Article 8 of the Safeguards Agreement.

39. In order to conduct an "objective assessment" under Article 11 of the DSU, does the Panel need to assess the reason(s) or motivation for China adopting its additional duties measure?

Response:

76. China's reasons or motivations for imposing the retaliatory measures at issue are not relevant to the Panel's duty to make an objective assessment of the matter before it, including the applicability in this dispute of the Safeguards Agreement. An "objective assessment" under DSU Article 11, as the standard by which a measure is examined for WTO-consistency, requires an independent evaluation without regard to the reasons or motivations of the Member implementing the measure.

40. For the purposes of the present proceedings, should the Panel take into account the United States' decision not to consult concerning its Section 232 duties under the Agreement on Safeguards? If so, how?

Response:

77. The Panel should consider the U.S. decision not to consult under the Safeguards Agreement as part of the larger question about the covered agreements applicable to this dispute. The question of whether the Safeguards Agreement is relevant to the discriminatory tariffs China has applied only against the United States and in excess of its bound rates is at the center of China's attempt to justify its retaliatory measure. A decision whether or not to consult under the Safeguards Agreement is only relevant to the extent the Safeguards Agreement applies in the first instance.

78. A simple hypothetical will help illuminate this point, and reveal the absurdity of China's argument. Suppose that, instead of an antidumping measure, a Member implements a measure to address an unfair trade practice that is **completely unrelated to** the sale of a product in an importing country for a price that is less than the price of that product in the market of the exporting country. An unfair trade practice could, for example, involve a competition issue related to a foreign company's abuse of market power, which would be outside the scope of the Antidumping Agreement. As such, a measure implemented to penalize that company for its unfair trade practice would not arise under the Antidumping Agreement. An exporting Member's attempt to recast the measure as an antidumping measure and seek consultations under the Antidumping Agreement would be nonsensical. The importing Member in this hypothetical would have no obligation to provide an opportunity for consultations under an agreement that is inapplicable to the measure at issue. This is the exact position the United States finds itself in this dispute and the Panel's recognition of this point is important for resolution of the larger question regarding applicability noted above.

41. In paragraph 7 of its third-party submission, Switzerland argues that "if a complainant considers that the respondent has failed to comply with the requirements applicable to Members taking rebalancing measures [under Article 8.2 of the Agreement on Safeguards], it is for the complainant to make a *prima facie* case of violation of Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards". In the light of this argument, please comment on the correct allocation of the burden of proof in assessing China's arguments under Article 8.2 of the Agreement on Safeguards.

Response:

79. Switzerland's argument is premised on a complainant considering that Article 8.2 is applicable to a dispute. Because the United States does not consider that Article 8.2 is applicable to this dispute, Switzerland's argument is not relevant to the Panel's assessment of whether the United States has established a presumption that China's additional duties are inconsistent with China's obligations under Articles I and II of the GATT 1994.

80. China's first written submission confuses matters related to the concept of burden of proof. According to China, it does not "bear the burden of proving that Article XIX of the GATT 1994 and the Agreement on Safeguards apply to the measures at issue in this dispute." However, as in other dispute settlement proceedings in which the complaining party has raised a presumption of WTO-inconsistency, the burden has now shifted to China to bring evidence and argument to rebut the presumption established by the United States.[27]

81. The U.S. panel request does not assert a breach of any WTO provision on safeguards. The United States, therefore, is not responsible for providing proof of such a breach. Rather, to the extent that China believes that a WTO safeguards provision is relevant, China, as the party asserting that proposition, carries the burden to establish it.

82. In *US – Wool Shirts and Blouses*, the Appellate Body observed that 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 defending, who asserts the affirmative of a particular claim or defence."[28] Accordingly, because China is affirming the relevance of the Safeguards Agreement to this dispute, China carries the burden of establishing its relevance.

42. In paragraph 15 of its third-party submission, the European Union states that it:

> **[C]onsiders that Article XIX:3(a) and Article 8 of the Agreement on Safeguards are not to be characterized as an "affirmative defence" or assimilated to the provisions of, for example, Article XX of the GATT 1994. If the United States wished to assert that the measure at issue is inconsistent with these provisions it was required to properly include them in the Consultations Request and Panel Request. Furthermore, the measure at issue is presumed to be WTO consistent and the United States, as the complainant, has the burden of demonstrating that this is not the case.**

Additionally, in paragraph 33 of its third-party submission, the European Union submits that "there is clearly no sense in which Article 8.1 [of the Agreement on Safeguards] can be characterized as an 'affirmative defence'".

[27] *See US – Wool Shirts and Blouses* (India) (AB) (noting that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."), page 14.

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

Please comment.

Response:

83. The European Union and certain third-party Members have confused matters by mischaracterizing the U.S. position. As the United States explained during the first substantive meeting of the parties, by "affirmative defense" the U.S. simply meant that that the supposed applicability of Article XIX is an issue the European Union or China raised in an attempt to justify its additional duties. The United States was not arguing that it was China's burden to show that it met the specific requirements for an alleged rebalancing measure.

43. In paragraph 8 of its third-party submission, Norway states that the "'prior step' of determining the applicability of the relevant covered agreements is one frequently faced by panels and the Appellate Body", and cites a number of cases where this issue has arisen. Please comment on the relevance, if any, of these cases for the Panel's analysis in the present proceedings.

Response:

84. The disputes cited by Norway are not relevant here. Norway relies on those disputes to demonstrate the proposition that the classification of a measure under municipal law is not determinative of the applicable WTO obligation. The United States does not disagree with that limited proposition.

44. Can a measure fall within the scope of more than one covered agreement, or more than one "regime" within a single agreement? For example, could a measure be covered by *both* Article I and Article VI of the GATT 1994? If so, would the Member maintaining such a measure have the right to choose under which "regime" or covered agreement its measure is reviewed in WTO dispute settlement proceedings?

Response:

85. As a theoretical matter, a measure could fall within the scope of more than one covered agreement. But that is not the case with the substantive obligations of the Safeguard Agreement. As the United States has explained in its responses, the Safeguards Agreement **only applies** to measures taken pursuant to Article XIX of the GATT because this provision affords a Member the right, in certain circumstances, to take action that otherwise would be inconsistent with its commitments.[29] It is for the Member taking the action to determine whether it will seek to avail itself of that right by satisfying the relevant conditions (the first of which is notice, or invocation).

[29] *See* Article 11.1(c) of the Safeguards Agreement.

45. In paragraph 56 of its third-party submission, Russia argues that, in *EC – Fasteners (China)*, the Appellate Body ruled on a "similar issue" to the one facing the Panel in this dispute. Specifically, Russia recalled the following statement by the Appellate Body:

> **We thus consider that the Panel's finding under Article I:1 of the GATT 1994 lacks an essential step in the sequence of its legal analysis, that is, the determination of whether and under what circumstances an anti-dumping measure that is inconsistent with the Anti-Dumping Agreement may be reviewed under Article I:1 of the GATT 1994 in the absence of a review under Article VI of the GATT 1994.**
>
> **As we explained above, China did not claim before the Panel that Article 9(5) of the Basic AD Regulation is inconsistent with Article VI of the GATT 1994, nor did the parties present arguments in this dispute in respect of the relationship between the provisions of the Anti-Dumping Agreement and those of Articles VI and I of the GATT 1994. Thus, we do not consider it appropriate to explore further ourselves the implications of the absence of a claim under Article VI of the GATT 1994 for a claim under Article I:1 of the GATT 1994.**

Please comment on the relevance of this passage for the Panel's analysis in the present proceedings.

Response:

86. The passage from *EC – Fasteners* is not relevant for the Panel's analysis because the factual circumstances of this dispute are fundamentally different. In *EC – Fasteners*, the legal characterization of the challenged measures was not disputed by the parties. Neither the EC nor China in that dispute questioned whether the measures at issue were antidumping measures. Accordingly, whether the measures at issue were subject to the WTO's antidumping disciplines was not contested before the panel. Here, the parties disagree on whether the WTO's safeguards disciplines apply to China's additional duties.

87. In addition, *EC – Fasteners* presented the Appellate Body with an actual order of analysis issue. In the Appellate Body's view, a preliminary question that had to be addressed before assessing China's claim under Article I of the GATT was whether the EC's antidumping duty was imposed consistently with Article VI of the GATT. Here, as explained in the U.S. response to question 18, the Panel has not been presented with an actual order of analysis issue.

88. Finally, in *EC – Fasteners*, the Appellate Body considered that review under Article I of the GATT 1994 was not necessary for purposes of resolving that dispute because the Appellate Body had already upheld the panel's findings that the EC's antidumping measure was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

46. In the parties' view, do past cases concerning the relationship between the Anti-Dumping Agreement and the GATT 1994 provide useful guidance to understand the relationship between the Agreement on Safeguards and the GATT 1994, and particularly for whether the former can be considered a "defence" to an inconsistency under the latter?

Response:

89. No. Article 11.1(c) of the Safeguards Agreement provides useful guidance for understanding the relationship between that agreement and the GATT 1994. Article 11.1(c) of the Safeguards Agreement 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.

90. Thus, if the measure is **sought, taken, or maintained** "pursuant to … Article XIX" the Safeguards Agreement applies; if the measure is sought, taken, or maintained pursuant to other provisions of GATT 1994, the Safeguards Agreement does *not* apply. Regarding the disputes referenced by China, the the United States does not consider that they provide guidance for the Panel's assessment in this dispute. As noted in the U.S. response to question 39, *EC – Fasteners* is not applicable here.

47. Please comment on Japan's statement, at paragraph 17 of its third-party submission, that Article XXVIII of the GATT 1994 "provides important context for the proper approach to and interpretation of Article XIX of the GATT 1994".

Response:

91. Japan's comment further supports the U.S. view. Article XXVIII sets out certain procedures for a Member to modify its schedule of concessions. That is, Article XXVIII provides that an importing Member may modify its Schedule of Concessions if certain procedural and substantive requirements set out in that provision are met. Thus, the structure of Article XXVIII is similar to the structure Article XIX. For instance, Article XXVIII:3(a) authorizes a Member **proposing** to "modify or withdraw" a modification of schedules to implement the proposed modification even if no agreement is reached between the importing Member and the affected Member. Similarly, Article XIX:3(a) allows an importing Member **proposing** to take a safeguard measure to implement the proposed measure even if no agreement is reached between the importing Member and the affected Members.

92. In addition, Article XXVIII:3(a) allows certain Member affected by an importing Member's modification of schedules to take offsetting action under certain conditions. In relevant part, Article XXVIII:3(a) provides that certain Members affected by a modification of schedules:

> . . . shall then be free not later than six months after such action [*i.e.*, modification of schedules] is taken, to withdraw, upon the expiration of thirty days from the day on which the **written notice** of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.[30]

Article XIX:3(a) also allows certain Members affected by an importing Member's safeguard measure to take offsetting action under certain conditions. In fact, the actions authorized by Articles XIX:3(a) and XXVIII:3(a) are structured in a similar manner.

93. In short, Japan's observation is correct. Like Article XIX of the GATT 1994, for a measure to fall under Article XXVIII of the GATT 1994 a Member has to invoke Article XXVIII as the **legal basis** for implementing a measure to modify its schedules. Without invoking Article XVIII, and meeting the requirements of Article XXVIII, a Member would not be considered to take action pursuant to Article XXVIII.

6.2 <u>To the United States</u>

48. In paragraph 68 of its first written submission, the United States notes that China "may attempt to assert an affirmative defense based on some type of theory that its additional duties are justified under the *WTO Agreement on Safeguards*".

a. Does the United States consider that China's argument that its additional duties measure falls under Article 8.2 of the Agreement of Safeguards is an affirmative defence?

b. If the answer to question (a) is in the affirmative, please explain the legal basis for your assertion that an invocation by China of the Agreement on Safeguards would be in the nature of an affirmative defence.

c. Please elaborate on the meaning of the term affirmative defence, and explain what, in your view, would be the implications of characterizing a provision of the covered agreements as an affirmative defence.

d. Please comment on the European Union's Argument, at paragraph 28 of its third-party submission, that Article 11 of the Agreement on Safeguards "obviously disproves" that the Agreement on Safeguards "is simply concerned with 'affirmative defences'".

<u>Response</u>:

94. China and certain third-party Members have confused matters by mischaracterizing the U.S. position. As the United States explained during the first substantive meeting of the parties, by "affirmative defense" the U.S. simply meant that that the supposed applicability of Article XIX is an issue China raised in an attempt to justify its additional duties. The United States was

[30] Emphasis added.

not arguing that it was China's burden to show that it met the specific requirements for an alleged rebalancing measure.

49. What, if anything, is the legal relevance of China explicitly adopting its additional duties measure under Article 8.2 of the Agreement on Safeguards and notifying it to the WTO as such?

Response:

95. China's characterization of its additional duties as "rebalancing measures" is legally irrelevant. As the United States explained during the first substantive meeting of the parties, the United States does not disagree with the proposition that the classification of a measure under municipal law is not determinative of the applicable WTO obligation.

50. At paragraph 94 of its first written submission, China cites the following passage from paragraph 5.33 of the Appellate Body Report in *Indonesia – Iron or Steel Products*:

> **[A] panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims.**

a. Please comment on this argument.

b. In your view, what, if anything, is the relevance of the Appellate Body's report in *Indonesia – Iron or Steel Products* for the Panel's analysis in the present case?

Response:

96. Regarding 50(a), the United States recalls that the U.S. does not disagree with the proposition that the classification of a measure under municipal law is not determinative of the applicable WTO law.

97. Regarding 50(b), the U.S. response to question 25 explains why the Appellate Body's report in *Indonesia – Iron or Steel Products* is not relevant for the Panel's assessment in this dispute.

51. In paragraph 7 of its first written submission, China submits that:

> **The United States has … failed to establish a prima facie case that Article XIX of GATT 1994 and the Safeguard Agreement are not applicable on China's measures at issue, because it has failed to properly construe the allocation of burden of proof, and it has not made a proper argument to substantiate its claim.**

Please comment.

Response:

98. The U.S. initiated this dispute in response to China's measures that impose additional duties on U.S. products that are plainly inconsistent with Articles I and II of the GATT 1994. Consequently, the U.S. panel request did not assert a breach of any WTO provision on safeguards. Accordingly, China's assertion that the United States failed to make a *prima facie* case of a violation of Article 8.2 or Article XIX:3(a) is incorrect. Rather, to the extent that China believes that a WTO safeguards provision is relevant, China, as the party asserting that proposition, carries the burden to establish it.

52. How does a Member "invoke" Article XIX of the GATT 1994? What, if anything, is the difference between invocation, on the one hand, and notification, on the other hand?

Response:

99. As an initial matter, the United States observes that the term "invoke" does not appear in Article XIX of the GATT 1994 nor in the Safeguards Agreement. Thus, the United States is using the term "invoke" according to its ordinary meaning, which is supported by dictionary definitions of the term. According to the Oxford English Dictionary, the verb "invoke" simply means "to cite as authority" [31] and Black's Law Dictionary defines "invocation" as "the act of calling on for **authority or justification**" and "the act of enforcing or **using a legal right**."[32] In other words, invocation occurs with the exercise of an available right to justify the taking of a particular action, especially when relied on in the face of a challenge to that action.

100. Article XIX of the GATT 1994 and the Safeguards Agreement fit neatly within the description above. This is clear from the text of the relevant provisions and the purpose of the "emergency action" those provisions authorize a Member to take that otherwise would be contrary to its obligations. Moreover, this view is aligned with the Appellate Body's interpretation regarding the meaning of these provisions.

101. Article 1 of the Safeguards Agreement "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." Article XIX of the GATT 1994 provides for measures that a Member may take when a product is imported into the territory of that Member in increased quantities and under conditions as to cause or threaten serious injury to the domestic producers of like or directly competitive products in that territory. Specifically, under Article XIX:1(a), a Member "shall be free" to suspend its WTO obligations with respect to the product at issue to prevent or remedy the injury in question by completing invocation of this right with the notice provided for in Article XIX:2 of the GATT 1994.

[31] The New Shorter Oxford English Dictionary, (Exhibit USA-22)

[32] Black's Law Dictionary, (Exhibit USA-23)

102. That a Member "shall be free" to suspend its WTO obligations under Article XIX of the GATT 1994 represents a right the Member may call upon as authority or justification for action that its WTO obligations would otherwise preclude. In other words, it serves as the legal basis that relieves a Member from obligations that would prevent it from taking the action in question. This right, therefore, is enshrined in the text and is consistent with Article XIX's purpose concerning the appropriate need of protecting domestic industries from the serious injury caused by increased imports that may come with reductions in barriers to international trade.

103. The Appellate Body has recognized that these words in Article XIX of the GATT 1994 "simply accord to a Member the 'freedom' to exercise its right to impose a safeguard measure by suspending a GATT obligation or withdrawing or modifying a GATT concession if the conditions set out in the first part of Article XIX:1(a) are met."[33] (It is unclear why the Appellate Body report does not note or discuss the conditions in Article XIX:2, with their explicit cross-reference to Article XIX:1.[34]) As such, the "freedom" to impose a safeguard measure is a right that the Member may call upon as authority to justify action it has taken. However, as with the nature of all rights, it is for the Member implementing a measure to exercise that right and not for another Member to claim the right **should** have been exercised.

53. Under the United States' theory that the WTO safeguards regime must be "invoked" through notification, would it ever be possible for a Member to act inconsistently with the notification obligations in Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards?

Response:

104. As the United States has explained, invocation is required for a Member to exercise its right under the WTO safeguards regime and depart from its obligations, including tariff concessions. Without this invocation, a Member has not exercised its right under Article XIX of the GATT 1994 and the Safeguards Agreement.

105. This does not mean, however, that invocation and notification are synonymous for purposes of the Safeguards Agreement. Instead, a Member informs others of its decision to invoke the WTO safeguard disciplines with the notification. To be sure, Article 12 of the Safeguards Agreement contains elaborated notification obligations but these are procedural in nature and are not the equivalent to the invocation itself. Rather, notification in the Safeguards Agreement constitutes a procedural mechanism to inform other WTO Members that a particular Member has decided to exercise its rights and take action under the authority that the WTO safeguard disciplines provide.

[33] *Indonesia – Iron or Steel Products* (AB), para. 5.55, FN 188.

[34] GATT 1994 Art. XIX:2 ("***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.") (emphasis added).

106. Importantly, the U.S. position does not suggest that is not possible for a Member to act inconsistently with the notification obligations in Article 12 of the Agreement on Safeguards. On the contrary, a Member that invokes the right to apply a safeguard measure under Article XIX of the GATT 1994, and with that invocation departs from its WTO obligations, must "immediately" notify the Committee on Safeguards upon "taking a decision to apply…a safeguard measure."

107. This is not controversial because the same Member would have already provided an immediate notification when it "initiat[ed] an investigatory process relating to" whether increased quantities of a product are being imported into the Member's territory as to cause or threaten serious injury to its domestic industry producing like or directly competitive products.

108. A Member that does not provide information consistent with the elaborated notification requirements of the Safeguards Agreement in relation to a safeguard measure under its domestic safeguards authority would breach these procedural obligations. This does not mean, however, that all procedural requirements are coextensive or synonymous with the invocation of this authority. A Member calls upon the authority of Article XIX of the GATT 1994 for the right to impose a safeguard measure and depart from its WTO obligations. In the terms of Article XIX:2, "before … tak[ing] action pursuant to the provisions of paragraph 1 of [Article XIX]", the Member shall give notice in writing as condition precedent. The Safeguards Agreement has elaborated procedural requirements to expand the scope of information a Member provides to other Members regarding that invocation and proposed action. Accordingly, a Member may breach the additional procedural obligation under the Safeguards Agreement for a notification.

54. In paragraph 22 of its third-party submission, the European Union submits that:

> **[T]he treaty terms "to suspend the obligation in whole or in part or to withdraw or modify the concession" in Article XIX:1(a) of the GATT 1994 do not mean that the original obligation remains unchanged, but is "violated", with such "violation" being "justified" by Article XIX:1(a). Rather, as the treaty expressly provides, they mean that the original obligation is suspended or altered. Suspending an obligation is not the same thing as violating an obligation (which could then possibly be justified).**

The European Union then argues that the relationship between Article XIX of the GATT 1994 and Articles I and II of the GATT 1994 is analogous to the relationship between, for example: (i) Articles I, II and VI of the GATT 1994 (paragraphs 24-25); and (ii) Article IV of the GATT 1994 and other provisions of that treaty (paragraph 26).

Please comment on the European Union's arguments in this connection, and on the relevance, if any, of the analogies drawn therein.

Response:

109. The European Union's arguments and analogies are irrelevant because the United States has not invoked Article XIX of the GATT.

55. At paragraphs 35 – 36 of its first written submission, China argues:

> **… When safeguard measures or rebalancing measures are applied pursuant to Article XIX of GATT and the Safeguard Agreement, the concessions or obligations under other GATT 1994 provisions, in relation to the products imported from the affected Members subject to these measures, no longer stand as they were in absence of such measures. These concessions or obligations are "put to a stop" or become "inactive" temporarily, or are "taken back or away", or "changed" or "altered".**
>
> **This would necessarily mean when a safeguard measure or rebalancing measure is imposed pursuant to Article XIX of GATT 1994 and the Safeguard Agreement, the relevant concessions or obligations under other provisions of GATT 1994, such as those under Article I and II, have already been stopped in application, or made inactive, or taken away or changed, and therefore are not eligible to be assessed independent from the safeguard provisions.**

Please comment.

Response:

110. China's assertion that retaliation under Article XIX of the GATT 1994 and the Safeguards Agreement pauses a Member's obligations under Article I and II of the GATT 1994 is dependent, of course, on the relevance and application of the WTO safeguard disciplines to a particular dispute. The United States has stressed that these disciplines are not relevant to this dispute, that the United States has not invoked Article XIX—not because it believes China's measures are inconsistent with these provisions but because these provisions are **not relevant** to China's measures. Therefore, China cannot take action under Article 8.2 of the Safeguards Agreement where the United States has not, as a condition precedent, exercised its right to apply a safeguard measure. China's assertion about the nature of WTO obligations when a Member retaliates against an actual safeguard measure is equally inapplicable in this dispute for the same reason.

56. In paragraph 89 of its first written submission, China argues that in making an "independent and objective assessment" of whether a measure is a safeguard, a panel "must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure". Please comment.

Response:

111. China's argument is incorrect because it focuses on the "constituent features" of *Indonesia – Iron or Steel Products* and not the invocation under Article XIX of the GATT 1994. As noted previously, the Appellate Body's statements from *Indonesia – Iron or Steel Products* are not relevant to this dispute because the factual context differs significantly from the facts of the current dispute. In this dispute, the United States has not exercised the right to apply a safeguard measure, which represents a necessary "condition precedent" that must be taken before a measure can qualify as a safeguard. For these reasons, the examination of "constituent features" and the "design, structure, and expected operation" of a measure have no bearing in this dispute.

57. In paragraph 153 of its first written submission, China refers to the circumstance that the United States has recently agreed to eliminate the additional steel and aluminium tariffs for imports from Canada and Mexico. China maintains that, through these agreements, "the United States has acknowledged that exporting country affected by its Section 232 measures would be entitled to take retaliatory measures in response to them".

a. Please comment.

b. Is it relevant for the purpose of the current proceedings that the disputes against Canada and Mexico were initially brought before WTO panels and that a settlement eventually took place in the context of the negotiations of a free trade agreement, as the United States argued at the first substantive meeting?

c. Does a subsequent settlement have a bearing on the legal characterization of the underlying measure?

Response:

112. As the United States has explained, the agreements between the United States and Canada, and between the United States and Mexico, were undertaken pursuant to negotiations in connection with the USMCA. Parties are entitled to enter into such agreements that provide for arrangements and obligations to each other that may implicate WTO disciplines or that are completely outside of them. Accordingly, the fact that United States initially challenged the additional duties imposed by Canada and Mexico before WTO panels is not relevant for purposes of this dispute because these agreements do not offer support for China's safeguards theory.

113. Moreover, the agreements between the U.S. and Canada, and between the U.S. and Mexico, have no bearing on the legal characterization of China's additional duties. Nor do they have a bearing on the legal characterization of a measure underlying China's additional duties.

114. As a general matter, Question 57(c) appears to imply that the U.S. national security measures are "the underlying measures" in this dispute. According to its ordinary meaning, the

term "underlying" means "lying under or beneath the surface."[35] As the United States explained during the meeting of the parties, the U.S. security measures are not the measures at issue in this dispute. China's additional duties are the measures at issue in this dispute. Accordingly, in this dispute, an underlying measure would be a measure beneath China's additional duties. Put another way, an underlying measure in this dispute would be another Turkish measure—for instance, a Turkish measure that authorizes China's additional duties.

6.3 To China

58. In paragraph 89 of its first written submission, China argues that in making an "independent and objective assessment" of whether a measure is a safeguard, a panel "must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure".

Please comment on how, in your view, a panel should go about "recogniz[ing] which … aspects [of a measure] are the most central to that measure.

Response:

115. This question is addressed to China.

59. In paragraph 153 of its first written submission, China refers to the circumstance that the United States has recently agreed to eliminate the additional steel and aluminium tariffs for imports from Canada and Mexico. China maintains that, through these agreements, "the United States has acknowledged that exporting country affected by its Section 232 measures would be entitled to take retaliatory measures in response to them".

Please elaborate on the relevance of these factual developments for the Panel's analysis in the present proceedings.

Response:

116. This question is addressed to China.

60. In paragraphs 23 - 24 of its oral statement at the first substantive meeting, the United States notes that Article XIX of the GATT 1994 provides that, in certain circumstances, Members "shall be free" to suspend certain obligations. In the United States' view, this language indicates that Article XIX sets out a "right" that a Member "may, in its discretion, invoke". Please comment on this argument, and in particular on the United States' interpretation of the words "shall be free".

Response:

[35] The New Shorter Oxford English Dictionary (Exhibit USA-24)

117. This question is addressed to China.

61. Does China agree with the United States that Article XIX of the GATT 1994 sets out a "right"?

Response:

118. This question is addressed to China.

62. Please comment on the United States' argument that China's interpretation of Article 8.2 of the Agreement on Safeguards enables a WTO Member to transform any tariff barrier designed to protect a domestic injury into a safeguard, and thus to retaliate without going through the dispute resolution process?

Response:

119. This question is addressed to China.

63. At paragraph 36 of its oral statement at the first substantive meeting, the United States argued that the United States Department of Commerce and the Department of Defense were responsible for conducting the investigation that lead to the adoption of the Section 232 duties, and indicated that the United States International Trade Commission is the only competent authority in the United States authorized to conduct safeguards investigations. Please comment.

Response:

120. This question is addressed to China.

7 PROPOSALS ON INTER-PANEL COORDINATION

7.1 To Both Parties

64. As the parties are aware, the United States' Section 232 duties are currently being challenged in separate WTO dispute settlement proceedings. Bearing this in mind, please comment on Ukraine's statement, in paragraph 14 of its third-party submission, as follows:

> **Notwithstanding the provision of Article 3.10 of the DSU that "complaints and counter-complaints in regard to distinct matters should not be linked", Ukraine is of the view that the result of this dispute cannot contradict and is tightly connected to the findings of the panel in the ongoing United States – Certain Measures on Steel and Aluminium Products case brought by China as in that case China claims the violation of the United States under the Agreement on Safeguard.**
>
> **a. Please comment on this statement.**

b. What legal tools, if any, does this Panel have, including under the DSU, to ensure that it reaches a conclusion that is coherent with that of the Panel in dispute DS544 US — Steel and Aluminium Products (China)? In particular, could Article 13 of the DSU provide a possible legal basis for this Panel to consult or otherwise engage with the parallel panel hearing the so-called "offensive case" against the United States' Section 232 duties?

Response:

121. As an initial matter, the United States observes that by the Panel stating in this question that it needs to ensure that it reaches a conclusion that is coherent with that of the panel in DS544, the Panel appears to be endorsing China's view that this Panel and the panel in DS544 need to come up with "consistent" rulings. This dispute, however, is distinct from DS544. Accordingly, it would not be appropriate for the Panel to assume that it needs to "ensure that it reaches a conclusion that is coherent" with the conclusion of the panel in DS544.

122. The DSU does not provide for a WTO adjudicator to alter its objective assessment of the matter referred to it by the DSB in order to achieve "consistency" with the view of another adjudicator. Rather, the value of consistency is reflected in the direction of the DSU to the panel to examine the applicability of and conformity with the covered agreements (Article 11) through the application of customary rules of interpretation of public international law to the covered agreements (Article 3.2). That is, the correct application of customary rules of interpretation to the WTO Agreement is the basis on which consistent results may arise.

123. The DSU does not authorize the Panel to "engage with" the panel in DS544 – or, for that matter, any other panel – to help inform its deliberations. Rather, Article 14.1 of the DSU provides that "Panel deliberations shall be confidential." This confidentiality obligation is reinforced in the Working Procedures adopted by the Panel.[36] As the Panel may know, six provisions of the DSU, and two paragraphs of the DSU's appendices, deal with some aspect of confidentiality.[37] The multiple references to confidentiality in the DSU reflect the importance of confidentiality to the WTO's dispute settlement system. And while Article 13 of the DSU allows panels "to seek information and technical advice from any individual or body which it deems appropriate", that right is delimited by the confidentiality obligation in Article 14.1.

[36] *See* Working Procedures Adopted by the Panel (noting that "The deliberations of the Panel and the documents submitted to it shall be kept confidential."), para. 2(1).

[37] *See* DSU Article 4.6 (noting that consultations "shall be **confidential**") (emphasis added); Article 5.2 (noting that proceedings involving good offices, conciliation, and mediation "shall be **confidential**")(emphasis added); Article 13.1 (noting that **confidential** information that is provided to a panel shall not be revealed without authorization); Article 14.1 (noting that "Panel deliberations shall be **confidential**.") (emphasis added); Article 17.10 (noting that the "proceedings of the Appellate Body shall be **confidential**.") (emphasis added); Article 18.2 (noting that "Written submissions to the panel or Appellate Body shall be treated as **confidential**") (emphasis added); paragraph 3 of the Working Procedures set out in Appendix 3 of the DSU (noting that "The deliberations of the panel and the documents submitted to it shall be kept **confidential**") (emphasis added); and paragraph 5 of Appendix 4 (noting that "**Confidential** information provided to the expert review group shall not be releases without formal authorization") (emphasis added).

Accordingly, the DSU and the Panel's own Working Procedures prohibit the Panel from "engaging with" other panels in regards to the Panel's deliberations.

124. The Working Procedures adopted by Panel, however, provide the Panel with some flexibility regarding the handling of confidential information. Specifically, paragraph 2(4) allows the Panel, upon request, to "adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties." Thus, a party to this dispute could request that the Panel adopt additional procedures after consulting with the parties.

65. Does the confidentiality obligation in Article 14 of the DSU prevent this Panel from consulting with the Panel in DS544 US — Steel and Aluminium Products (China)?

Response:

125. The U.S. response to question 64 explains why the confidentiality obligation in Article 14 of the DSU prevents the Panel from consulting with the panel in DS544.

66. Please elaborate on the similarities and differences – if any – between the circumstances of this case (i.e., a parallel dispute concerning the WTO-consistency of the underlying US measure before a separate panel) and the issue of "sequencing" between compliance proceedings under Article 21.5 of the DSU and Article 22.6 DSU arbitrations?

Response:

126. As an initial matter, the United States recalls that the U.S. national security measures are not the "underlying" measures in this dispute. By characterizing the measures at issue in DS544 as the "underlying" measures in this dispute, the Panel appears to be endorsing China's view that this Panel and the panel in DS544 need to come up with "consistent" rulings.

127. This dispute and DS544 are distinct, and the sequencing issue that may arise during the implementation stage of a dispute. First, a compliance proceeding under Article 21.5 of the DSU and a proceeding regarding compensation or suspension of concessions under Article 22 of the DSU are both proceedings of the same dispute. In contrast, this dispute and DS544 are separate disputes. While China has taken the position that this dispute and DS544 are linked, China's position is irrelevant to the Panel's assessment of whether China's additional duties are consistent with China's obligations under Articles I and II of the GATT 1994. Second, during the implementation stage of a dispute, the sequencing issue is mainly driven by the timelines set out in Articles 22.6 and 21.5 of the DSU.[38] In this dispute and DS544, there is not a similar issue regarding potential conflicting timelines.

[38] Upon request, Article 22.6 of the DSU directs the DSB to "grant authorization to suspend concession or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request." In addition, Article 22.6 provides that an arbitration proceeding regarding suspension of concessions or other obligations "shall be completed within 60 days" of the expiration of the reasonable period of

67. Is it the case that the determination of whether the United States' section 232 duties constitute a safeguard measure is a question of law in DS544, while the determination of the same question in the present proceedings is a question of fact? If so, would it be correct to say that nothing prevents the Panel in the present proceedings from making this factual finding?

Response:

128. In WTO dispute settlement, the legal characterization of a measure is generally a legal issue. In other words, the issue of law in a WTO dispute is whether the measure at issue is consistent with a Member's WTO obligations. In this dispute, the issue of law is whether China's additional duties are consistent with China's obligations under Articles I and II of the GATT 1994. Furthermore, with respect to China's asserted justification: As the United States has explained throughout this dispute, it is an uncontested fact that the U.S. has not invoked Article XIX of the GATT 1994. Thus, as a matter of WTO law, the Safeguards Agreement does not apply.

time. The timelines set out in Article 22.6, however, may present a conflict with the completion of a proceeding under Article 21.5 of the DSU.