EUROPEAN UNION – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS559)

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

January 30, 2020

TABLE OF REPORTS

SHORT FORM	FULL CITATION
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
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
EC – Selected Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
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 – Countervailing Measures (China) (AB)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015
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

Exhibit No.	Description
USA-9	Section 232 statute, 19 U.S.C § 1862
USA-10	Section 201 statute, 19 U.S.C § 2251
USA-11	Presidential Proclamation 9694 of January 23, 2018, To Facilitate Positive Adjustment to Competition From Imports of Large Residential Washers, (excerpted), 83 Fed. Reg. 3,553 (January 23,2018)
USA-12	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
USA-13	Black's Law Dictionary, 10th edn, B. Garner (ed.) (Thomson Reuters, 2014)
USA-14	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)

1 TERMS OF REFERENCE

1. In paragraph 36 of its third party submission, China argues that

> **[I]f a complainant purposely ignored the clear legal basis under the WTO legal framework of a measure at issue by not including a claim based on such provisions in its panel request, it runs the risk of not conveying the "legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the DSU, and not notifying the respondent "the nature of its case". This is true when the legal basis of the measure at issue is positive obligations under the WTO legal framework, not 'exceptions'".**

Similarly, in paragraphs 51 and 52 of its third-party submission, Russia argues that:

> **The United States was aware but still disregarded Article 8.2 of the Safeguards Agreement by including in its Panel Request only claims under Articles I and II of the GATT 1994. Their isolated consideration by the Panel would be deficient for the purposes of satisfactory resolution of the matter. The United States alludes to the issues arising out of the Safeguards Agreement in Part VI of its FWS by merely saying that it would not apply, whereby, also given the respective defect in the Panel Request, it did not articulate a clear claim or argument under Article 8.2 of the Safeguards Agreement. By doing so, the United States thwarts the effective resolution of the present dispute by misguiding the Panel as to the relevant legal and factual background of the dispute.**
>
> **Hence, the United States failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" under Article 6.2 of the DSU because its Panel Request did not include the claims on the alleged inconsistency of the European Union's measures with the Safeguards Agreement. Thus, the Panel should dismiss all of the United States' claims as it failed to present the problem clearly.**

Please comment.

Response:

1. The arguments presented by China and Russia are meritless because the U.S. panel request meets the requirements of Article 6.2 of the DSU[1] by presenting the problem clearly. Article 6.2 of the DSU sets forth the content of a request for the establishment of a panel in order to bring a "matter" (in the terms of Article 7.1) within the Panel's terms of reference. China and

[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU")

Russia are pointing to additional claims that, in their view, the United States could have presented. But this would not make the U.S. panel request deficient in content under DSU Article 6.2; it would (if China and Russia were correct) lead the Panel to conclude the U.S. claims in the panel request are not substantively made out, and the Panel cannot make a finding of breach under any other provision not included in the U.S. panel request.

2. In relevant part, Article 6.2 provides that a request to establish a panel:

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

3. To provide the brief summary required by Article 6.2, it is sufficient for a complaining Member in its panel request to specify the legal claims under the WTO provisions that it considers are breached by the identified measures.

4. In this dispute, the U.S. panel request identified the legal instrument through which the European Union imposes the additional duties. The U.S. panel request then explained why the United States considers that the European Union's additional duties are inconsistent with the European Union's WTO obligations:

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

- Article II:1(a) of the GATT 1994, because the European Union accords less favorable treatment to products originating in the United States than that provided in the European Union's schedule of concessions; and

- Article II:1(b) of the GATT 1994, because the European Union imposes duties or charges in excess of those set forth in Russia's schedule.[2]

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

5. China and Russia, therefore, are incorrect in arguing that the U.S. panel request does not meet the requirements of Article 6.2 of the DSU. In addition to specifying the legal claims – and thereby meeting the requirement of Article 6.2 – the U.S. panel request explains why the

[2] *See* WT/DS561/2

United States considers the challenged measures to be inconsistent with the European Union's WTO obligations.

6. At this point, we think it is important to pause and note that in one report, the Appellate Body apparently departed from, the text of Article 6.2. Specifically, in that one report, the Appellate Body stated the view that Article 6.2 requires a panel request to explain "how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question."[3] This was either loose drafting, or plain legal error. As the United States explained[4] before the Dispute Settlement Body on October 28, 2019, the Appellate Body's incorrect interpretation has made disputes more complicated by encouraging procedural challenges, such as the preliminary ruling requests by China in DS558 and Russia in DS566.

7. Despite the straightforward application of Article 6.2 to the U.S. panel request, China and Russia put forth the flawed argument that the United States did not comply with Article 6.2 of the DSU because the United States did not cite to a WTO Agreement that the U.S. considers has no relevance in this dispute. China and Russia are merely pointing to additional claims that, in their view, the United States could have presented. But that is not the legal standard under Article 6.2.

8. Furthermore, Article 6.2 does not require that a panel request anticipate legal arguments raised by the responding party. Rather, in Appendix 3, paragraph 4, the DSU reflects that "[b]efore the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments."

9. As the United States has explained throughout this proceeding, this dispute is about the European Union's WTO commitments under Articles I and II of the GATT 1994. That is the legal basis for the U.S. claims, and that basis was presented clearly in the U.S. panel request. Accordingly, the arguments presented by China and Russia regarding Article 6.2 of the DSU are baseless.

2 THE MEASURE ARE ISSUE

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

2. In paragraph 10 of its first written submission, the United States notes that "[s]eparately, Regulation 2018/886 provided for the second stage of additional duties … to be applied as of June 1, 2021, or at such a time as a certain WTO dispute settlement body ruling were made". The United States only appears to refer to the additional duties already in force when developing its arguments that the measure at issue exceeds the EU applied MFN rate and bound rate commitments (United States' first written submission, paragraphs 14-17). The United States

[3] *EC – Selected Customs Matters* (AB), para. 130; *China – Raw Materials* (AB), para. 226; *US – Countervailing Measures (China)* (AB), para. 4.9

[4] WT/DSB/M/436

submitted a table comparing the tariff treatment of certain products from the United States (as a result of the sum of the additional duties already in force and the applied MFN rate) with the European Union applied MFN rate and bound rate commitments (Exhibit USA-8). This table does not refer to the additional duties that are applicable as of 1 June 2021.

Please clarify whether you are challenging only the additional duties already in force or whether you are also requesting findings and recommendations in respect of the duties to be applied as of 1 June 2021.

Response:

10. Both sets of duties fall within the Panel's terms of reference, as the U.S. panel request refers to the measures in question and those measures include Annex I and Annex II for products from the United States that are currently subject to the European Union's additional duties and those that would be at a future date. However, the United States is not expressly pursing claims on latter because a finding as to the former would apply to both.

2.2 To the European Union

3. In paragraph 10 of its first written submission, the United States notes that "[s]eparately, *Regulation 2018/886* provided for the second stage of additional duties … to be applied as of June 1, 2021, or at such a time as a certain WTO dispute settlement body ruling were made".

Please comment on the United States' reference to these additional duties in its panel request and in the first written submission.

Response:

11. This question is addressed to EU.

3 ORDER OF ANALYSIS

3.1 To both parties

4. 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 EU'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 EU'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 EU'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:

12. 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 the European Union's defense first.

3.2 To the United States

5. At paragraph 59 of its opening oral statement, the European Union argued that "given the relationship between the relevant provisions of the Agreement on Safeguards and the GATT 1994, the only way to find an inconsistency with Articles I or II of the GATT 1994 in this case would be to first find an inconsistency with the controlling provisions".

Please comment.

Response:

13. The United States has brought claims against the European Union under Article I and Article II of the GATT 1994 based on the additional duties it has imposed only on U.S. originating goods that exceed its bound rates. The European Union may raise any defense it believes will justify the *prima facie* case of breach the United States has established in this dispute. Following the usual course, the Panel should examine whether there has been a breach of WTO obligations and then consider whether a responding party has meet its burden to establish that a defense applies.

3.3 To EU

6. In arguing its claims under Articles II:1(a) and II:1(b) of the GATT 1994, the United States commences its analysis with Article II:1(b). In paragraph 54 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 on this assertion in the light of the order of analysis adopted by the United States.

Response:

14. This question is addressed to EU.

4 CLAIM UNDER ARTICLE I OF THE GATT 1994

4.1 To EU

7. At paragraph 15 of its first written submission, the United States argues:

> **Read together, the three figures the United States presents in Exhibit USA-8 for each tariff line – (A) the European Union's applied MFN rate; (B) the European Union's additional duty; and (C) the sum of those two values – demonstrate that for all 182 CN codes at issue in this dispute, the European Union exceeded its MFN commitments.**
>
> **Please comment. In particular, to the extent that you disagree with the United States' allegation in the above-mentioned paragraph, please identify the CN codes for which the combination of the European Union's applied MFN rate and the European Union's additional duty would not exceed the European Union's MFN commitments.**
>
> **Please also identify any other discrepancies or errors you may find.**

Response:

15. This question is addressed to the EU.

8. At paragraph 31 of its first written submission, the United States argues:

> **The European Union'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, the European Union's measure applies an additional 10 to 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 182 tariff codes, but not products from other countries entered under the same tariff codes. Thus, the like product element of Article I:1 is satisfied.**
>
> **Please comment.**

Response:

16. This question is addressed to the EU.

5 CLAIM UNDER ARTICLE II OF THE GATT 1994

5.1 To EU

9. At paragraph 55 of its first written submission, the United States argues:

> **Given the European Union'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, the European Union has correspondingly accorded less favourable to these products and breached Article II:1(a) as well.**
>
> **Please comment.**

Response:

17. This question is addressed to the EU.

10. At paragraph 17 of its first written submission, the United States argues:

> **Read together, the two figures in Exhibit USA-8 – (C) the sum of the applied European Union's MFN rate and the European Union's additional duty and (D) the European Union's bound rate commitment – demonstrate that for 180 of the 182 CN codes at issue in this dispute, the European Union exceeded its bound rate commitments.**

Please comment. In particular, to the extent that you disagree with the United States' allegation in this paragraph, please identify the CN codes for which the combination of the European Union's MFN rate with the additional duty does not exceed the European Union's bound rate commitments.

Response:

18. This question is addressed to the EU.

6 ARGUMENTS CONCERNING THE SAFEGUARDS REGIME

6.1 To both parties

11. In paragraph 221 of its first written submission, the European Union submits that its additional duties measure "states expressly and clearly that it reflects the existence of Article 8 of the Agreement on Safeguards and, by extension, Article XIX:3(a) of the GATT 1994".

> **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?

Response:

19. As an initial matter, the United States observes that whether the European Union'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.

20. 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".[5]

21. 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".[6] 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".[7] 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.

[5] 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").

[6] 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").

[7] 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.").

22. 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.

23. Regarding question 11(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.

24. Finally, regarding question 11(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 the European Union 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.

12. 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.

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

26. 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.

27. *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.[8] Furthermore, the parties in that dispute consistently argued that the duty at issue was a safeguard measure.[9] 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.

28. The *Indonesia – Iron or Steel Products* panel proceeded to find that Indonesia had no binding tariff obligation with respect to the good at issue.[10] 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.[11] 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.

29. This dispute presents a fundamentally different scenario from *Indonesia – Iron or Steel Products*. The central question in this dispute is whether the European Union 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, the European Union's legal theory has no basis on the text of the WTO Agreement. Instead, the European Union asserts that the test to determine whether a measure constitutes a safeguard measure is the standard developed by the Appellate Body in *Indonesia – Iron or Steel Products*. As discussed above, the reasoning from the Appellate Body's report in that dispute is simply not applicable here.

30. 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

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

[9] *Id*.

[10] *Id*., para. 7.18

[11] *Id*.

or ultimately to decide the scope of the Agreement on Safeguards."[12] 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."[13] 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."[14]

31. 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.[15]

32. 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.

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

33. 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, 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

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

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

[14] 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." The European Union, however, fails to address this aspect of the Appellate Body's reasoning.) (emphasis added), para. 5.60.]

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

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.

34. 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 the EU 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.

14. 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?

35. No. As the United States has argued throughout this dispute, and as indicated in the U.S. response to question 13, 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 concessions. Absent such invocation, a Member will not have a basis for that measure under Article XIX or the Safeguards Agreement.[16]

15. 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?

36. 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.

[16] We also note the question tracks the formulation of the Appellate Body report in *Indonesia – Iron and Steel Products* by referring to a "measure" that suspends an obligation or modifies or withdraws a concession. But it is not a "measure" (a domestic instrument) that itself accomplishes the WTO legal effect of suspension, modification, or withdrawal. As GATT 1994 Article XIX:1 establishes, a Member accrues such a right in a specified circumstance ("the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession"). The measure is the extent to which the Member chooses domestically to exercise the right.

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.

16. 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?

37. 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 entitled "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).

17. 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.

38. 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.

39. Here, the factors listed in paragraph 5.60 would not be helpful in the Panel's assessment of whether the European Union's additional duties are consistent with its obligations under Articles I and II of the GATT. In addition, in its assessment of the European Union'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 the European Union. Thus, the Panel's inquiry can end there.

40. Even if the Panel were to further assess the European Union'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.[17] In relevant part, Section 201 allows the President of the United States to take action if "the United States International Trade Commission" determines that

[17] 19 U.S.C. §§2251, *et seq*

> 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.[18]

41. 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.[19] 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**."[20]

42. 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.[21] 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.

43. 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.

18. 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?

44. 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

[18] 19 U.S.C. §2251(a) (Exhibit USA-10)

[19] 19 U.S.C. §§1862, *et seq*

[20] 19 U.S.C. §1862(c)(1)(A) (emphasis added) (Exhibit USA-9)

[21] *See* 19 U.S.C. §2251(a)

social benefits than costs."[22] In addition, a Presidential Proclamation that implements a U.S. safeguard measure also states the purpose of the measure.[23]

19. 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?

45. 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.

46. 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**.[24]

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.

[22] 19 U.S.C. §2251(a) (Exhibit USA-10)

[23] *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-11)

[24] Emphasis added.

47. 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.

20. 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?

48. 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 the European Union 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.

49. And, without invocation, the 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.

50. 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.

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

51. In the U.S. response to question 41, 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]

22. 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?

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

53. Regarding question 22, 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 term "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 concerned may agree on any adequate means of trade compensation for the adverse effects of **the measure** on their trade.[26]

54. 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.

23. During the first substantive meeting, the European Union suggested that the time-frames provided for in Article 8 of the Agreement on Safeguards indicate that a Member may adopt a rebalancing measure in response to an underlying measure whose characterization as a safeguard is disputed. Please comment on this argument.

[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)

[26] Emphasis added.

55. The European Union's suggestion is baseless. As the United States explained in the U.S. responses to question 22, the text and structure of Article XIX of the GATT and Article 8 of the Safeguards Agreement establish that rebalancing measures are linked to safeguard measures.

24. 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?

56. 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*.

25. 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?

57. In the U.S. response to question 14, 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 14, 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.

58. 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.

26. 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 the European Union'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?

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?

59. The EU's additional duties measure was not placed on the agenda of the Council for Trade in Goods. In a dispute where Article XIX of the GATT 1994 and the Safeguards Agreement were actually applicable, it would be necessary for a Member exercising its right to suspend the application of substantially equivalent concessions or other obligations to provide written notice of such suspension to the Council for Trade in Goods, as provided in Article 8.2 of the Safeguards Agreement. Article 8.2 also contemplates the Council for Trade in Goods having an opportunity to "disapprove" of the Member's suspension.

60. The primary method for the Council for Trade in Goods to consider whether to "disapprove" a Member's suspension is by placing the matter on the agenda for its meeting. The burden for ensuring that a matter is placed on the agenda, as with the burden of providing the written notice under Article 8.2, falls on the Member seeking to suspend substantially equivalent concessions.

61. The phrase "does not disapprove" presumes some form of consideration by the Council for Trade in Goods. As noted above, this generally would occur when a Member places a matter on the agenda for a meeting of the Council for Trade in Goods. A Member's failure to place a matter on the agenda would prevent meaningful consideration by the Council for Trade in Goods. Since disapproval in this context requires a positive act or decision by the Council for Trade in Goods, the inability to take that act or decision because the matter was never presented forecloses the possibility envisioned in Article 8.2 of the Safeguards Agreement and does not satisfy the burden on the Member seeking the suspension.

62. Separately, 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. Moreover, as disapproval requires consensus, the European Union's view would create a situation where a Member could adopt a retaliatory measure and then block disapproval, thereby

creating the very problem identified above about the inability to proceed in the manner Article 8.2 of the Safeguards Agreement envisions.

27. 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 the European Union adopting its additional duties measure?

63. The European Union'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.

28. 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?

64. 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 the European Union has applied only against the United States and in excess of its bound rates is at the center of the European Union'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.

65. A simple hypothetical will help illuminate this point, and reveal the absurdity of the European Union'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.

29. 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 the European Union's arguments under Article 8.2 of the Agreement on Safeguards.

66. 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 the European Union's additional duties are inconsistent with the European Union's obligations under Articles I and II of the GATT 1994.

67. The European Union's first written submission confuses matters related to the concept of burden of proof. According to the European Union, 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 the European Union to bring evidence and argument to rebut the presumption established by the United States.[27]

68. 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 the European Union believes that a WTO safeguards provision is relevant, the European Union, as the party asserting that proposition, carries the burden to establish it.

69. In *US – Wool Shirts and Blouses*, the Appellate Body observed 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 the European Union is affirming the relevance of the Safeguards Agreement to this dispute, the European Union carries the burden of establishing its relevance.

30. 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.

70. 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

[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.

determinative of the applicable WTO obligation. The United States does not disagree with that limited proposition.

31. 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?

71. 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 Safeguards Agreement. As the United States explained in the U.S. response to question 23, 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).

32. In paragraph 55 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.

72. 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 questioned whether the measures at issue in that dispute were antidumping measures.

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

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 the European Union's additional duties.

73. 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 11, the Panel has not been presented with an actual order of analysis issue.

74. 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.

33. 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?

75. 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.

76. 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 the European Union, 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 32, *EC – Fasteners* is not applicable here.

34. 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".

77. 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.

78. 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.

79. 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>

35. In paragraph 57 of its first written submission, the United States notes that the European Union "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 the European Union'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 the European Union of the Agreement on Safeguards would be in the nature of an affirmative defence.

[30] Emphasis added.

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 236 of its first written submission, that Article 11 of the Agreement on Safeguards "obviously disproves" that the Agreement on Safeguards "can be characterized as in the nature of an 'affirmative defence'".

80. 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 raised in an attempt to justify its additional duties. The United States was not arguing that it was the European Union's burden to show that it met the specific requirements for an alleged rebalancing measure.

36. In paragraph 223 of its first written 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 241 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'".

Please comment.

81. 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 the European Union's burden to show that it met the specific requirements for an alleged rebalancing measure.

37. In paragraph 254 of its first written submission, the European Union states that "[o]nly in the unlikely event that the Panel would fail to reach such a conclusion [i.e. that the United States should have raised Article XIX of the GATT 1994 and Article 8.2 of the Agreement on Safeguards in its consultations and panel request] does the European Union, in the alternative, place these provisions within the Panel's terms of reference".

Please comment.

82. As noted above, this inverts the standard burden of proof in dispute settlement proceedings. The United States has brought claims against the European Union under Article I and Article II of the GATT 1994, and not under WTO safeguards disciplines, because the latter are relevant to this dispute, if at all, as a defense the European Union has raised to justify its discriminatory tariffs in excess of its bound rates.

38. In paragraph 247 of its first written submission, the European Union states that:

> **In this case, it is the United States that might still affirm or will be required to affirm that the measure at issue is inconsistent with, notably, Article 8 of the Agreement on Safeguards. But the United States has not even placed that provision before the Panel, let alone attempted to demonstrate that the measure at issue is inconsistent with it. The United States has therefore failed to discharge its burden of proof, having failed to even cite the relevant treaty provisions necessary to make a prima facie case of inconsistency with the conditions for the right of suspension in Article 8 [of the Agreement on Safeguards].**

Please comment.

83. Applicability of, not consistency with, the Safeguards Agreement is the issue in this dispute. The United States has not exercised its right to apply a safeguard measure and the European Union cannot rely on authority that the United States never invoked to justify its action.

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

84. The European Union'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.

40. In paragraph 169 of its first written submission, the European Union argues that "according to settled case-law … whether or not a measure is subject to the disciplines of the Agreement on Safeguards … is an objective question". In support of this proposition, the European Union cites the Appellate Body's report in *Indonesia – Iron or Steel Products*.

a. Please comment on this argument.

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

85. Whether the Appellate Body in *Indonesia – Iron or Steel Products* describes an objective question is immaterial to this dispute. As the United States has highlighted, the underlying context in that dispute were distinct from the facts in this dispute. Accordingly, the Appellate Body's interpretation regarding an incongruous matter is not illuminating for this dispute and does not provide the Panel useful, or even relevant, guidance.

41. 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?

86. 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.

87. 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.

88. 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.

89. 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.

[31] The New Shorter Oxford English Dictionary, (Exhibit USA-12)

[32] Black's Law Dictionary, (Exhibit USA-13)

90. 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.

42. In paragraph 63 of its first written submission, the United States argues that "a Member must invoke the protections of Article XIX [of the GATT 1994] for the safeguard provisions to apply". Subsequently, in paragraph 65, the United States submits that notification under Article 12 of the Agreement on safeguards "constitutes an essential step that must occur for a measure to be a safeguard".

a. Is the position of the United States that an importing Member itself decides whether a measure is a safeguard, and exercises this choice by making (or not making) a notification under Article 12 of the Agreement on Safeguards?

b. Please comment on the European Union's argument, at paragraph 178 of its first written submission, that "the notification of a safeguard is … a condition qualifying the exercise of the right to impose a safeguard measure, rather than a 'constituent feature' of a safeguard measure".

91. The U.S. position is not that "an importing Member itself decides whether a measure" falls under the WTO's safeguards disciplines. Rather, the position of the United States is that invocation of Article XIX and the Safeguards Agreement is a precondition for a Member to implement a measure that falls under the WTO's safeguards disciplines. Importantly, that means it is also a precondition for another Member to retaliate under Article 8.2 of the Safeguards Agreement.

92. Furthermore, whether or not a Member has invoked the Safeguard Agreement is an objective matter – though not a difficult one – which can be decided in WTO dispute settlement, the same as for any factual matter. Thus, to the extent the European Union is arguing that the panel must take as a given anything stated in the U.S. dispute settlement submissions, this is incorrect. Rather, here, the record is clear that the United States never invoked Article XIX of the GATT 1994.

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[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).

93. The European Union's comment regarding notification being "a condition qualifying the exercise of the right to impose a safeguard measure" supports the U.S. position. Without meeting the notice requirement, or "condition", in Article XIX and the Safeguards Agreement, a Member does not have the right to impose a safeguard measure. Accordingly, for a measure to fall under the WTO's safeguards disciplines the importing Member must invoke Article XIX of the GATT 1994 as justification for suspending an obligation or withdrawing or modifying tariff concessions. Absent such invocation, a measure cannot fall under the WTO's safeguards disciplines.

94. Regarding the European Union's reference to the "constituent features" test used by the Appellate Body in *Indonesia – Iron or Steel Products*, the U.S. response to question 14 explains why the Appellate Body's reasoning in that dispute is not applicable here.

43. 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?

95. 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.

96. 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. 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.

97. 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."

98. 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.

99. 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.

44. In paragraph 230 of its first written 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 232-233); (ii) Article IV of the GATT 1994 and other provisions of that treaty (paragraph 234); (iii) Articles 3.1 and 3.3 of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) (paragraph 248); (iv) Articles 5.1 and 5.7 of the SPS Agreement (paragraph 249); (v) Articles 3.1(a) and 27.4 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) (paragraph 250); and (vi) the first and second parts of Article 2.4 of the Agreement on Technical Barriers to Trade (TBT Agreement).**
>
> **Please comment on the European Union's arguments in this connection, and on the relevance, if any, of the analogies drawn therein.**

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

45. With reference to paragraph 177 of the European Union's first written submission, please comment on the European Union's assertion that "[u]nder the United States' approach, any number of WTO obligations, including notably those on safeguards, anti-dumping and anti-subsidy measures, could be sidestepped by simply asserting that the measure is something other than what it actually, objectively is".

101. The European Union's view ignores that WTO obligations under the covered agreements depend on the **applicability** of those agreements. A Member does not have obligations under the Antidumping Agreement if that Member has not imposed an antidumping measure. Despite this

simple and axiomatic proposition, the European Union argues that a multitude of obligations apply to measures that were not taken pursuant to authorities that give rise to the obligations in the first place.

46. In paragraph 185 of its first written submission, the European Union 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 relevant measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject".

102. As noted above, in WTO dispute settlement proceedings, a panel generally begins its assessment by examining the claims of the complainant before assessing the respondent's defense. The European Union is asking the Panel to leap over the first step to address the defense it has offered in this dispute. The United States reiterates that it does not see this dispute presenting a situation that would merit the Panel beginning its analysis by assessing the European Union's defense first.

47. In paragraphs 214 and 215 of its first written submission, the European Union maintains that "the United States has recently agreed to eliminate the additional steel and aluminium tariffs for imports from Canada and Mexico … these agreements implicitly recognize that the US measures are in the nature of safeguards, and that they can be rebalanced by the affected exporting party".

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?

103. 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 the European Union's safeguards theory.

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

105. As a general matter, Question 47(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. The European Union's additional duties are the measures at issue in this dispute. Accordingly, in this dispute, an underlying measure would be a measure beneath the European Union's additional duties. Put another way, an underlying measure in this dispute would be another Turkish measure—for instance, a Turkish measure that authorizes the European Union's additional duties.

48. In response to the United States' argument at the first substantive meeting that the Section 232 duties were imposed pursuant to a procedure different from the one usually adopted under United States law for safeguards investigations, the European Union maintained that no party can invoke municipal law to justify what would otherwise amount to an inconsistency with its international obligations.

106. 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. However, during the first substantive meeting, the United States also noted that while the European Union's argument relies heavily on Appellate Body's report in *Indonesia – Iron or Steel Products*, the European Union did not actually apply the analysis to the U.S. security measures under Section 232. This lapse on the European Union's part, particularly as it relates to the factors identified in that report, undercuts the position it has taken in this dispute.

49. At the first substantive meeting, the European Union affirmed that the Section 232 duties imposed by the United States are both safeguards as well as measures covered by Article 11.1(b) of the Agreement on Safeguards. Please comment.

107. As the United States has explained throughout this dispute, 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. Absent such invocation, a measure cannot fall under the WTO's safeguards disciplines.

108. Furthermore, the Safeguards Agreement **only applies** to measures taken pursuant to Article XIX of the GATT. In relevant part, 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.

[35] The New Shorter Oxford English Dictionary (Exhibit USA-14)

109. Accordingly, only measures **sought, taken, or maintained** "pursuant to … Article XIX" fall within the scope of the Safeguards Agreement. Here, the Section 232 measures cited by the European Union were "sought, taken or maintained" under Article XXI of the GATT 1994 – which is a provision "**other** than Article XIX"; accordingly, by the plain text of the Safeguards Agreement, the Section 232 measures cited by the European Union simply do not fall within the scope of the Safeguards Agreement.

110. The European Union's contrary position is inconsistent with the plain text of the Safeguards Agreement.

6.3 To the EU

50. In paragraph 241 of its first written 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'". Please elaborate on this argument. In particular, please explain what relevance the characterization of Article 8.1 as an "affirmative defence" (or not) would have on the proper characterization of Article 8.2.

111. This question is addressed to the European Union.

51. In paragraph 254 of its first written submission, the European Union states that:

> **Only in the unlikely event that the Panel would fail to reach such a conclusion [i.e. that the United States should have raised Article XIX of the GATT 1994 and Article 8.2 of the Agreement on Safeguards in its consultations and panel request] does the European Union, in the alternative, place these provisions within the Panel's terms of reference".**

a. Please explain the legal basis for a responding party, as opposed to a complaining party, to "place … provisions within the Panel's terms of reference".

b. What would be the legal and practical implications of a responding party, as opposed to a complaining party, to "plac[ing] … provisions within the Panel's terms of reference"?

c. How would the burden of proof be affected in circumstances where a responding party, as opposed to a complaining party, to "place[s] … provisions within the Panel's terms of reference"?

112. This question is address to the European Union.

52. In paragraph 185 of its first written submission, the European Union 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".

113. This question is addressed to the European Union.

53. In paragraphs 22 - 25 of its opening oral statement, 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".

114. This question is addressed to the European Union.

54. Does the European Union agree with the United States that Article XIX of the GATT 1994 sets out a "right"?

115. This question is addressed to the European Union.

55. Please comment on the United States' argument at the first substantive meeting that the European Union's interpretation of Article 8.2 of the Agreement on Safeguards enable 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?

116. This question is addressed to the European Union.

56. At paragraph 40 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 not the "U.S. International Trade Commission, which is the only competent authority in the United States" authorized to conduct safeguards investigations.

Please comment.

117. This question is addressed to the European Union.

57. In paragraphs 214 and 215 of its first written submission, the European Union notes that "the United States has recently agreed to eliminate the additional steel and aluminium tariffs for imports from Canada and Mexico … these agreements implicitly recognize that the US measures are in the nature of safeguards, and that they can be rebalanced by the affected exporting party".

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

118. This question is addressed to the European Union.

7 PROPOSALS ON INTER-PANEL COORDINATION

7.1 To both parties

58. 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 the European Union as in that case the European Union 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 DS548 US — Steel and Aluminium Products (European Union)? 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?

119. 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 DS548, the Panel appears to be endorsing the European Union's view that this Panel and the panel in DS548 need to come up with "consistent" rulings. This dispute, however, is distinct from DS548. 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 DS548.

120. 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.

121. The DSU does not authorize the Panel to "engage with" the panel in DS548 – 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. 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.

122. 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.

59. Does the confidentiality obligation in Article 14 of the DSU prevent this Panel from consulting with the Panel in DS548 US — Steel and Aluminium Products (European Union)?

123. The U.S. response to question 58 explains why the confidentiality obligation in Article 14 of the DSU prevents the Panel from consulting with the panel in DS548.

60. 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 DS548, 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?

124. 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 the

[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).

European Union's additional duties are consistent with the European Union's obligations under Articles I and II of the GATT 1994. Furthermore, with respect to the European Union'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.

7.2 To the United States

61. With reference to paragraph 22 of the European Union's oral statement at the first substantive meeting, please comment on the European Union's view that Rule 4(3) of the Appellate Body's Working Procedures suggest that this Panel could coordinate or consult with other panels in its consideration of the present dispute.

125. The European Union's reliance on Rule 4(3) of the Appellate Body's Working Procedures is a desperate attempt to find authority, however misaligned with the posture of this dispute, to support its position on panel coordination. By their own terms, the Appellate Body's Working Procedures simply do not apply to panel proceedings.