RUSSIA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS566)

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

January 30, 2020

TABLE OF REPORTS AND AWARDS

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-6	Section 232 statute, 19 U.S.C 1862
USA-7	Section 201 statute, 19 U.S.C 2251
USA-8	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-9	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
USA-10	Black's Law Dictionary, 10th edn, B. Garner (ed.) (Thomson Reuters, 2014)
USA-11	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)

1. PRELIMINARY RULING REQUEST

1.1 To both parties

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

Response:

1. As an initial matter, the United States observes that 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. 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.

2. 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.

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

- Article I:I of the GATT 1994, because Russia fails to extend to products of the United States an advantage, favor, privilege, or immunity granted by Russia 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 Russia accords less favorable treatment to products originating in the United States than that provided in Russia's schedule of concessions; and

- Article II:1(b) of the GATT 1994, because Russia 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 Russia's additional duties measures are inconsistent with Russia's WTO obligations under Articles I and II of the

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

[2] *See* WT/DS566/2.

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.

4. Turkey, therefore, is incorrect in arguing that the U.S. panel request "has not articulated the correct legal basis for challenging Russia's measures." In addition to specifying the legal claims – and thereby meeting the requirement of Article 6.2 – the U.S. panel request explains why the United States considers the challenged measures to be inconsistent with Russia's WTO obligations.

5. 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 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 request in this dispute and China's preliminary ruling request in DS558.

6. Despite the straightforward application of Article 6.2 to the U.S. panel request, Turkey puts forth the flawed argument that the United States did not comply with Article 6.2 of the DSU because the United States did not challenge Russia's measures "under provisions pertaining to the safeguards disciplines." Turkey is merely pointing to additional claims that, in its view, the United States could have presented. But that it not the legal standard under Article 6.2.

7. 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."

8. As the United States has explained throughout this proceeding, this dispute is about Russia'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 Turkey with respect to Russia's preliminary ruling request are baseless.

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

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

[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.

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

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

Response:

9. The U.S. response to Russia's request for a preliminary ruling[5] and the U.S. response to question 1 demonstrate that the U.S. panel request meets the requirements of Article 6.2 of the DSU by presenting the problem clearly. Accordingly, Russia's request for a preliminary ruling should be rejected.

10. Regarding the Appellate Body's report in *EC – Tariffs*, the U.S. response to Russia's preliminary ruling request explains why that dispute is not relevant to the Panel's assessment of whether the U.S. panel request meets the requirements of Article 6.2 of the DSU.[6]

3. At paragraph 49 of its first written submission, Russia argues:

> **[T]he measure at issue here is "unmistakably" taken under the Safeguards Agreement disciplines. The United States knew it and 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, whose isolated consideration by the Panel would be incomplete for the purposes of satisfactory resolution of the matter. 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.**

Please comment. **In particular, please respond to Russia's suggestion that the United States should have identified Article 8.2 of the Agreement on Safeguards in its panel request because it "knew" that Russia's additional duties measure was adopted pursuant to that provision.**

[5] *See* Response of the United States of America to Russia's Request for a Preliminary Ruling ("U.S. Response to Russia's Preliminary Ruling Request") (June 25, 2019).

[6] *Id.*, paras. 11-13.

Response:

11. The U.S. response to Russia's request for a preliminary ruling [7] and the U.S. response to question 1 demonstrate that the U.S. panel request meets the requirements of Article 6.2 of the DSU by presenting the problem clearly.

12. By suggesting that the United States "should have identified Article 8.2 of the Safeguards Agreement", Russia is pointing to additional claims that, in its 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 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.

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

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

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

13. As the United States explained in the U.S. response to question 1, Article 6.2 of the DSU 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."

1.3 To Russia

5. In paragraphs 48 - 49 of its first written submission, Russia draws an analogy between the facts of the present proceedings and those in *EC – Tariff Preferences*, which concerned the Enabling Clause. In *EC – Tariff Preferences*, the Appellate Body considered that the Enabling Clause is a "defence" (Appellate Body Report, *EC – Tariff Preferences*, para. 106), whereas Russia maintains in its first written submission that Articles XIX of the GATT 1994 and 8.2 of the Agreement on Safeguards are not defences. At the first substantive meeting, Russia reiterated that Article 8.2 of the Agreement on Safeguards is not a defence. Please comment on the legal significance, if any, of the difference between your arguments in this case and the legal characterization of the Enabling Clause in *EC – Tariff Preferences*.

[7] *See* U.S. Response to Russia's Preliminary Ruling Request.

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

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

8. With reference to paragraph 49 of its first written submission, is Russia of the view that a complaining party must always identify, in its panel request, any possible provisions of the covered agreements that may shield or otherwise exempt a challenged measure from WTO inconsistency (for example, Article III:8 of the GATT 1994)?

Please explain the legal basis for your answer.

Response:

14. Questions 6 through 8 are addressed to Russia.

2. THE MEASURE AT ISSUE

2.1 To the United States

9. At paragraphs 183 – 184 of its first written submission, Russia argues:

> **Exhibit USA-2 is not an original source but a compilation from different documents, most notably from WTO Tariff Analysis Online. Even blinking the fact for the purposes of this argument that this is not an official source for MFN rates applied by the Russian Federation, the United States did not provide for the specific excerpts from the respective online database in the form of an exhibit, which would be in the spirit of paragraph 7(4) of the Working Procedures of the Panel**.
>
> **The United States also acknowledges that this exhibit does not refer to the applied MFN rates by stating that "Russia's applied MFN rates are published at the 10-digit level in the Common Customs Tariff of the Eurasian Economic Union … which is excerpted in Exhibit USA-3". Hence, Exhibit USA-2 does not contain evidence regarding the applied MFN rate**.
>
> **Please comment on Russia's arguments concerning the completeness, and correctness, of Exhibit USA-2**.

Response:

15. All data in Exhibit USA-2 are **correct**: the comparison of Russia's applied MFN rate to its additional duties is correct, as well as the data concerning Russia's Schedule of Concessions. Notably, Russia has not identified any data errors with Exhibit USA-2. Rather, Russia argues that Exhibit USA-2 is allegedly deficient because it is not "an original source but a compilation from different documents, most notably from WTO Tariff Analysis Online."

16. As an initial matter, the United States did not asserted that Exhibit USA-2 is an "original source." In fact, footnote 1 of Exhibit USA-2 notes that the MFN and bound rates are obtained from "WTO Tariff Analysis Online." The MFN rates in Exhibit USA-2, however, are actually sourced from the *Common Customs Tariff of the Eurasian Economic Union*, which is an original source. In any event, and most fundamentally, there is no rule of evidence in WTO dispute settlement that only "original sources" – which is not even a defined term – can be the basis for presenting facts and evidence to a WTO panel. Finally, it is the understanding of the United States that there is no "original source" **comparing** Russia's additional duties on U.S.-origin products with the applied MFN rate for each tariff line at issue.

17. Furthermore, Russia incorrectly asserts that the United States has not provided evidence comparing "the additional duties in question with the applied MFN rates for the same products."[8] This argument is **baseless**: Exhibit USA-2, which the United States provided with the U.S. first written submission, compares Russia's additional duties with the applied MFN rate

10. At paragraphs 185 - 186 of its first written submission, Russia argues:

> **As for Exhibit USA-3, it is equally not indicative enough to demonstrate the MFN rates applied by the Russian Federation as of the time when the Panel was established. This piece of evidence is flawed for the following reasons. First, instead to referring to the relevant parts of the document, it embodies, at best, a table of contents of the Common Customs Tariff of the Eurasian Economic Union (hereinafter "EAEU Customs Tariff"). It is virtually not possible to discern from Exhibit USA-3 the applied tariff MFN rates matching the 79 tariff lines in question.**
>
> **Secondly, even if the United States would argue that Exhibit USA-3 is properly submitted before the Panel because it contains hyperlinks to particular chapters of the EAEU Customs Tariff, the Panel should not consider this piece of evidence. Those hyperlinks lead to the excerpts of the EAEU Customs Tariff in Russian. Had the United States intended the Panel to pay due regard to this piece of evidence, it should have**

[8] First Written Submission by the Russian Federation ("Russia's First Written Submission") (June 6, 2019), para. 182.

translated it into the working language of the proceedings according to paragraph 6 of the Working Procedures of the Panel.

Please comment on Russia's arguments concerning the completeness, and correctness, of Exhibit USA-3.

Response:

18. The U.S. claim regarding Article I of the GATT does **not** rely on Exhibit USA-3.[9] Rather, it is in Exhibit USA-2 where the United States demonstrates that Russia's additional duties on U.S. products result in applied rates of duty in excess of Russia's MFN rate for all 79 tariff lines at issue in this dispute.[10]

19. The United States observes that Exhibit USA-3 provides the English translation of the titles of the HS chapters of *The Common Customs Tariff of the Eurasian Customs Union*. The United States provided this for the Panel's reference. The actual **tariff codes** at issue, however, are included in Exhibit USA-2. Nonetheless, as Russia pointed out, the hyperlinks in Exhibit USA-3 lead to Russian language excerpts of *The Common Customs Tariff of the Eurasian Customs Union*. To address this clerical mistake, and consistent with Rule 5(1) of the Panel's Adopted Working Procedures, during the first substantive meeting of the parties the United States provided the Panel with Exhibit USA-4, which translates the excerpts from the hyperlink.

2.2 To Russia

11. With reference to exhibits USA-1 and RUS-1, we note that the English translations submitted by the parties are not identical. In particular, the parties translate the title of Decree No. 788 differently. Could Russia confirm whether the Panel in these proceedings should refer to the language of the translation submitted by the United States?

12. At paragraph 183 of its first written submission, Russia asserts that "Exhibit USA-2 is not an original source but a compilation from different documents, most notably from WTO Tariff Analysis Online".

Please elaborate on the factual and legal significance of this assertion.

Response:

20. Questions 11 and 12 are addressed to Russia.

[9] *See* First Written Submission of the United States of America ("U.S. First Written Submission") (May 2, 2019), paras. 5-10.

[10] *See* U.S. First Written Submission, (noting that in Exhibit USA-2 the United States demonstrates that the measure at issue is inconsistent with Russia's obligations under Articles I and II of the GATT 1994), para. 8.

3. ORDER OF ANALYSIS

3.1 To both parties

13. 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 should it begin by assessing Russia's arguments 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 Russia'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 Russia'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:

21. 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 Russia's defense first.

3.2 To Russia

14. In arguing its claims under Article II:1(a) and II:1(b) of the GATT 1994, the United States commences its analysis with Article II:1(b). In paragraph 45 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:

22. This question is addressed to Russia.

4. CLAIM UNDER ARTICLE I OF THE GATT 1994

4.1 To Russia

15. At paragraph 8 of its first written submission, the United States, referring to Exhibits USA-2, argues that "Russia's additional duties on [US]-origin products result in applied rates of duty in excess of Russia's MFN … commitments for all 79 tariff lines at issue in this dispute".

a. Please comment.

b. To the extent that you disagree with the United States' allegation in this paragraph, please identify the tariff lines for which Russia's additional duty would not exceed Russia's MFN commitments.

c. Please also indicate whether, in your view, Exhibit USA-2 contains any other factual errors.

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

> **Russia'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, Russia's measure applies additional duties ranging from 25 to 40 percent 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 79 tariff lines, but not products from other countries entered under the same tariff lines. Thus, the like product element of Article I:1 is satisfied.**

Please comment.

17. Please comment on Exhibits USA-4 and USA-5 submitted by the United States together with its opening oral statement at the first substantive meeting.

Response:

23. Questions 15 through 17 are addressed to Russia.

5 CLAIM UNDER ARTICLE II OF THE GATT 1994

5.1 To Russia

18. At paragraph 46 of its first written submission, the United States argues:

> **Given Russia'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, Russia has correspondingly treatment accorded less favourable to these products and breached Article II:1(a) as well.**

Please comment.

19. At paragraph 8 of its first written submission, the United States, referring to Exhibits USA-2, argues that "Russia's additional duties on [US]-origin products result in applied rates of duty in excess of Russia's … bound rate commitments for all 79 tariff lines at issue in this dispute".

a. Please comment.

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

Please also identify any other discrepancies or errors you may find.

Response:

24. Questions 18 and 19 are addressed to Russia.

6 ARGUMENTS CONCERNING THE SAFEGUARDS REGIME

6.1 To both parties

20. In paragraph 53 of its first written submission, Russia submits:

> **In its presentation of facts and legal issues, the United States deliberately overlooks that the Russian Federation has implemented its essential right under Article 8.2 of the Safeguards Agreement to rebalance the effects of the United States' safeguards on bilateral trade between the Russian Federation and the United States. Resolution No. 788 unequivocally states that it has been issued in response to the United States' safeguard measures. The text of the Resolution No. 788 along with that of the Russian Federation's Notification on 18 May 2018 also indicates that the measure at issue was taken under Article 8.2 of the Safeguards Agreement.**

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, or should, 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:

25. As an initial matter, the United States observes that Russia'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 classification of a measure under municipal law is not determinative of the applicable WTO obligation.

26. 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".[11]

27. Articles 8.1 and 8.2 contains 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".[12] 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".[13] 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.

[11] 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").

[12] 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") (emphasis added).

[13] 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

28. 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.

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

30. Finally, regarding question 15(c), a panel cannot assess whether a measure is a safeguard measure when a responding party seeks to invoke the "right" to "rebalancing" under the Safeguards Agreement as a defense. Article 7.2 of the DSU provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Here, the Safeguards Agreement and Article 8.2 is not a "relevant provision[] of a[] covered agreement". Because the United States has not sought to exercise a right to exceed its tariff bindings through GATT 1994 Article XIX (a fact Russia 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.

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

Response:

31. 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.

32. Here, the factors listed in paragraph 5.60 would not be helpful in the Panel's assessment of whether Russia's additional duties are consistent with its obligations under Articles I and II of the GATT. In addition, in its assessment of Russia's justification for its measures, the first step

substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action.") (emphasis added).

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 Russia. Thus, the Panel's inquiry can end there.

33. Even if the Panel were to further assess Russia'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.[14] In relevant part, Section 201 allows the President of the United States to take action if "the United States International Trade Commission" determines that:

> an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.[15]

34. 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.[16] 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**."[17]

35. 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.[18] 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.

36. 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.

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[14] 19 U.S.C. §§2251, *et seq.*

[15] 19 U.S.C. §2251(a) (Exhibit USA-7).

[16] 19 U.S.C. §§1862, *et seq.*

[17] 19 U.S.C. §1862(c)(1)(A) (emphasis added) (Exhibit USA-6).

[18] *See* 19 U.S.C. §2251(a).

22. 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?

Response:

37. No. As the United States has argued throughout this dispute, and as indicated in the U.S. response to question 17, 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.[19]

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

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

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

Please comment on these statements.

Response:

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

39. 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

[19] We also note the question tracks the formulation of the Appellate Body report in *Indonesia – Iron or 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.

basis for suspending an obligation or withdrawing or modifying a concession.[20] 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.

40. *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.[21] Furthermore, the parties in that dispute consistently argued that the duty at issue was a safeguard measure.[22] 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.

41. The *Indonesia – Iron or Steel Products* panel proceeded to find that Indonesia had no binding tariff obligation with respect to the good at issue.[23] 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.[24] 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.

42. This dispute presents a fundamentally different scenario from *Indonesia – Iron or Steel Products*. The central question in this dispute is whether Russia 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, Russia's legal theory has no basis on the text of the WTO Agreement.[25] Instead, Russia derives its approach from the Appellate Body's in *Indonesia – Iron or Steel Products*.[26] As discussed above, the reasoning from the Appellate Body's report in that dispute is simply not applicable here.

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[20] *See* Exhibit USA-5, para. 2.

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

[22] *Id.*

[23] *Id*., para. 7.18

[24] *Id.*

[25] *See* U.S. First Written Submission, paras. 12-48.

[26] Russia's First Written Submission, paras. 105-113.

43. Moreover, as Japan correctly asserts in paragraph 10 of its third-party submission, the Appellate Body "did not attempt to propose a comprehensive definition of a safeguard measure or ultimately to decide the scope of the Agreement on Safeguards."[27] 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."[28] 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."[29]

44. 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.[30]

45. 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.

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

Response:

46. 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

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

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

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

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

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," as the Appellate Body phrased the terms in *Indonesia – Iron or Steel Products*) set out in GATT 1994 Article XIX:1 (increased imports and injury).

25. 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?

a. Please explain the legal basis for your response.

b. Is the unqualified reference to "measure" in the final sentence of Article 8.1 of the Agreement on Safeguards relevant for the purposes of answering this question?

Response:

47. Regarding question 25(a), Article 8 of the Safeguards Agreement explicitly links rebalancing measures to safeguard measures. Thus, Article 8.2 of the Safeguards Agreement does not allow Members to impose rebalancing measures in responses to measures "about which there is or may be doubt whether they are safeguard measures". Article 8.2 reaffirms the right in Article XIX:3(a) of the GATT of "affected" exporting Members to retaliate against a WTO Member taking a safeguards measures against their products. The terms "with respect to the action" in Article XIX:3(a) link the action contemplated in that provision with the emergency action contemplated in Article XIX:1(a).

48. Similarly, the text of Article 8 of the Safeguards Agreement explicitly links rebalancing measures to a safeguard measure. Article 8.2 states that, once the timetables set out in that provision are met, "the affected exporting Members shall be free" to "suspend" the "application of substantially equivalent concessions or other obligations" to "the trade of the Member **applying the safeguard measure**, the suspension of which the Council for the Trade in Goods does not disapprove."[31] In addition, Article 8.2 refers to Article 12.3 of the Safeguards Agreement, which, in relevant part, provides that a "Member proposing to apply or extend a **safeguard measure** shall provide adequate opportunity for prior consultations" with Members having a "substantial interest as exporters" of the product concerned.[32] Accordingly, the text of Article 8.2 establishes that rebalancing measures can only be taken in response to a safeguard measure.

49. The context of Article 8.2 further supports the U.S. position. Article 8.1 of the Safeguards Agreement explicitly refers to a "Member proposing to apply a **safeguard measure** or seeking an extension of a **safeguard measure**."[33] Article 8.1 also refers to the consultations envisioned by Article 12.3 of the Safeguards Agreement, which, as discussed above, are initiated

[31] Emphasis added.

[32] Emphasis added.

[33] Emphasis added.

by the Member proposing to apply or extend a safeguard measure. Similarly, Article 8.3 of the Safeguards Agreement explicitly refers to safeguards, noting that "the right of suspension" in Article 8.2 cannot be exercised for the "first three years that a **safeguard measure** is in effect" if "the **safeguard measure**" was taken in response to an absolute increase in imports.[34]

50. Regarding question 25(b), 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.[35]

51. 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 Member's 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.

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

Response:

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

[34] Emphasis added.

[35] Emphasis added.

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

Response:

53. In the United States, the purpose of a safeguard measure is an objective element that can be deduced from the text of the measure. For instance, the text of the U.S. statute that authorizes the imposition of safeguard measures explicitly states the purpose of the statute. In relevant part, the U.S. statute that authorizes a safeguard measure provides that, if certain conditions are met, the President of the United States shall take action to "facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[36] In addition, a Presidential Proclamation that implements a U.S. safeguard measure also states the purpose of the measure.[37]

28. 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?

54. In the U.S. response to question 23 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 we explained above, 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 Appellate Body's "constituent features" reasoning to provisions of the WTO Agreement.

55. 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.

29. 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 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

[36] 19 U.S.C. §2251(a) (Exhibit USA-7).

[37] *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-8).

instance, would such a finding make any rebalancing measure WTO-inconsistent, or would it render any rebalancing measure WTO-inconsistent *ab initio*?

Response:

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*.

30. Is a measure already a safeguard before it is notified to the Committee on Safeguards? Does a measure become a safeguard only the moment in which it is notified to the Committee on Safeguards? In answering this question, please comment on the argument, made by the European Union during the third-party session, that the language of Article 12.1(c) of the Agreement on Safeguards shows that safeguards exist prior to their notification to the WTO.

Response:

57. 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 Russia 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.

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

59. 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.

31. 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 Russia adopting its additional duties measure?

Response:

60. Russia'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.

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

Response:

61. 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 Russia has applied only against the United States and in excess of its bound rates is at the center of Russia'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.

33. 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 Russia's arguments under Article 8.2 of the Agreement on Safeguards.

Response:

62. 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 Russia's additional duties are inconsistent with Russia's obligations under Articles I and II of the GATT 1994.

63. Russia's first written submission confuses matters related to the concept of burden of proof. According to Russia, the United States "failed to discharge" its burden of proof because the U.S. did not "properly qualify" Russia's additional duties "as a measure taken under Article 8.2 of the Safeguards Agreement."[38] 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 Russia to bring evidence and argument to rebut the presumption established by the United States.[39]

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

65. In its first written submission,[40] Russia agrees with the observation by the Appellate Body in *US – Wool Shirts and Blouses* that that "it is a generally accepted cannon of evidence in civil law, common law, and, in fact, most jurisdictions that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[41] Accordingly, because Russia is affirming the relevance of the Safeguards Agreement to this dispute, Russia carries the burden of establishing its relevance.

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

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

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

Please comment.

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[38] Russia's First Written Submission, paras. 51 and 62.

[39] *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.

[40] Russia's First Written Submission, para. 62.

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

Response:

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

35. In paragraph 8 of its third-party submission, Norway states that the "'prior step' of determining the applicability of the relevant covered agreements is one frequently faced by panels and the Appellate Body", and cites a number of cases where this issue has arisen.

Please comment on the relevance, if any, of these cases for the Panel's analysis in the present proceedings.

Response:

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

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

Response:

68. 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.

69. In addition, Article XXVIII:3(a) allows certain Members 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.[42]

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.

70. 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.

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

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

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

Response:

71. 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.

72. 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

[42] Emphasis added.

> 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**.[43]

73. 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.

74. 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.

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

Response:

75. 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. 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.

76. Accordingly, only measures sought, taken, or maintained "pursuant to … Article XIX" fall within the scope of the Safeguards Agreement.

39. 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

[43] Emphasis added.

relationship between the Agreement on Safeguards and the GATT 1994, and particularly for whether the former can be considered a "defence" to an inconsistency under the latter?

Response:

77. 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.

78. 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 Russia, 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 54, *EC – Fasteners* is not applicable here.

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

Response:

79. 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 is taking the measure with the intent of invoking a provision of the WTO Agreement that allows for a suspension of concessions. As the United States explained in the U.S. first written submission,[44] for a measure to fall under the WTO's safeguards disciplines the importing Member must invoke Article XIX of the GATT 1994 to exercise a right to suspend obligations or withdraw or modify tariff concessions. Similarly, when a Member invokes DSU Article 22.7 upon adopting a measure inconsistent with its tariff bindings, it is "suspending concessions." Absent this type of invocation, a Member is not "suspending concessions"; rather, the Member is simply adopting a measure that it is inconsistent with Article II of the GATT 1994.

80. 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

[44] *See* U.S. First Written Submission, paras. 56-76.

Article II; the terminology **is not** that the Member has "suspended a concession." It is only Russia 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."

41. 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 Russia'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?

Response:

81. 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.

82. 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.

83. 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.

84. 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, Russia'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.

42. Please comment on the relevance, if any, of the 1993 Decision on Notification Procedures[45] for the Panel's assessment of the United States' argument concerning invocation of the Agreement on Safeguards through notification.

Response:

85. In the U.S. response to question 44, 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."[46]

6.2 To the United States

43. In paragraph 48 of its first written submission, the United States notes that Russia "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 Russia's argument that its additional duties measure falls under Article 8.2 of the Agreement of Safeguards is an affirmative defence?

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

[46] 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).

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

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

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

Response:

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

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

Response:

87. 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" [47] 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**."[48] In other words, invocation occurs with the exercise of an available right to take a particular action.

88. 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.

89. 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

[47] The New Shorter Oxford English Dictionary, (Exhibit USA-13).

[48] Black's Law Dictionary, (Exhibit USA-14).

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.

90. 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.

91. 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."[49] (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.[50]) 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.

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

Response:

92. As noted above, the United States takes the position that 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.

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

[50] 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. 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.

94. 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."

95. 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.

96. 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.

46. In paragraph 98 of its first written submission, Russia argues:

> **The United States misleadingly claims that "in the words of the Appellate Body" a notification under Article XIX is "'a necessary prerequisite to establish a right to apply a safeguard measure' or simply a 'prerequisite for taking such actions'". Nowhere in its Report, did the Appellate Body make such a statement.**

Please comment

Response:

97. Russia mischaracterizing the U.S. argument regarding notification. In particular, we note that Russia misquoted the U.S. written submission, which, correctly quoted, states that

"[n]otification under Article XIX, in the words of the Appellate Body, is 'a necessary prerequisite to establishing a right to apply a safeguard measure' or simply 'a prerequisite for taking such action'."[51]

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

Response:

98. Russia'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.

48. With reference to paragraphs 72 and 73 of Russia's first written submission, please comment on whether and how the relationship between Articles 3.1 and 3.3 of the SPS Agreement, and between Articles 5.1 and 5.7 of the SPS Agreement, sheds light on the relationship between the Agreement on Safeguards and the GATT 1994.

Response:

99. As the United States explained in the U.S. responses to questions 38 and 38, Article 11.1(c) of the Safeguards Agreements provides that it **only applies** to measures taken pursuant to Article XIX of the GATT. Accordingly, the SPS provisions referenced by Russia's do not shed any light regarding the relationship between the Safeguards Agreement and the GATT 1994.

49. In paragraph 74 of its first written submission, Russia submits that:

> **[T]he United States' assertion that the rebalancing right exercised under Article 8.2 of the Safeguards Agreement presents "an affirmative defense" with the consequence that the burden of proof under this Article shifts from the United States to the Russian Federation, is legally flawed. It follows that the claims raised by the United States must fail.**

Please comment

Response:

100. 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 Russia raised in an attempt to justify its additional duties. The United States was not

[51] U.S. First Written Submission, para. 57.

arguing that it was Russia's burden to show that it met the specific requirements for an alleged rebalancing measure.

50. Please comment on Russia's comparison, at paragraphs 26 – 28 of its oral statement at the first substantive meeting, between Article 8.2 of the Agreement on Safeguards and Article 22 of the DSU.

Response:

101. Russia's reliance on DSU Article 22 procedures is misplaced. Article 22.7 provides for adoption of an authorization to suspend concessions by negative consensus. But that does not mean that any Member at any time may put on the agenda a request to suspend concessions in any circumstances and have it approved by negative consensus. In terms of the facts of this dispute, the analogy would be a hypothetical situation where there was no ongoing WTO dispute, and no DSU Article 22.6 award by an arbitrator, but a Member nonetheless submitted a request to suspend concessions. Certainly, no one would argue that such a request was properly before the DSB. Similarly, in this dispute, there is no U.S. safeguard measure, and thus approval or disapproval by the a WTO Committee is simply not an issue.

51. With reference to paragraphs 18 and 29 of Russia's oral statement, please comment on Russia's argument that its additional duties measure benefits from a "presumption of consistency".

Response:

102. In the WTO system, a measure is presumed to be WTO-consistent until the measure is found to be inconsistent as a result of a dispute settlement proceeding. As the United States explained during the first meeting of the parties, the United States has established a presumption that Russia's additional duties are inconsistent with Russia's obligations under Articles I and II of the GATT 1994. Russia, however, has not rebutted that its measures breach Articles I and II of the GATT.

52. During the first substantive meeting, the United States appeared to agree that Russia's additional duties measure would benefit from a presumption of WTO-consistency. Given that the measure was purportedly adopted under Article 8.2 of the Agreement on Safeguards, could it be argued that the United States should have raised a claim under Article 8.2 of the Agreement on Safeguards in order to properly make a prima facie case of WTO-inconsistency? By failing to raise such a claim, would the additional duties measure not continue to benefit from a presumption of consistency with Article 8.2 of the Agreement on Safeguards?

Response:

103. This question appears to confuse two separate matters. First, regarding the suggestion that the U.S. should have raised a claim under Article 8.2 of the Safeguards Agreement, see the U.S. response to question 1. Second, regarding the question of a presumption of WTO-consistency, see the U.S. response to question 51.

53. Please comment on the argumentation in paragraph 20 of Russia's oral statement at the first substantive meeting, and in particular Russia's assertion that, in the specific context of the present proceedings, "the only issue that can be disputed … is the consistency or inconsistency [of the alleged rebalancing measure] with the provisions of the relevant WTO [a]greement authorizing … the suspension itself, in our case with the provisions of Article 8.2 of the Safeguard Agreement".

Response:

104. Russia's characterization of its additional duties as "rebalancing measures" is legally irrelevant. As the United States explained above, the classification of a measure under municipal law is not determinative of the applicable WTO obligation.

54. In paragraph 59 of its first written submission, Russia argues that, in *EC – Fasteners (China)*, the Appellate Body ruled on a "similar issue" to the one facing the Panel in this dispute. Specifically, Russia recalled the following statement by the Appellate Body:

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

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

Response:

105. 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. 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 Russia's additional duties.

106. 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.[52] Here, as explained in the U.S. response to question 11, the Panel has not been presented with an actual order of analysis issue.

107. 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.

55. With reference to paragraph 109 of Russia's first written submission, please comment on Russia's assertion that "the fact that the measures are not characterized under the domestic law as safeguards is, in and of itself, not dispositive of the question of whether the measure constitutes a safeguard measure".

Response:

108. 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.

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

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

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

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

Response:

[52] *EC – Fasteners (China) (AB)*, para 392.

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

57. At paragraphs 76 – 77 of its first written submission, Russia argues:

> **Being affected by the United States' safeguard measures, the Russian Federation has suspended its obligations under Articles I and II of the GATT 1994 in response to the import adjustments on certain steel and aluminium products by the United States. This suspension is pursuant to the Safeguards Agreement that accords corresponding rights to the affected exporting Members such as the one exercised by [the] Russian Federation in this particular instance.**
>
> **… [T]he Russian Federation has taken the measure at issue under Article 8 of the Safeguards Agreement and, thus, suspended its obligations under Articles I and II of the GATT 1994.**

Please comment.

Response:

110. Russia's characterization of its additional duties as "rebalancing measures" is legally irrelevant. As the United States explained above, the classification of a measure under municipal law is not determinative of the applicable WTO obligation.

58. At paragraph paragraph 110 of its first written submission, Russia argues, citing the Appellate Body's report in *Indonesia – Iron or Steel Safeguards*:

> **[I]t is an objective question whether or not the measures by the United States qualify as measures provided for in Article XIX of GATT 1994 and, thus, are subject to the disciplines of the Safeguards Agreement. Contrary to what the United States claims in paragraphs 50, 57, 59 of its FWS, the Member imposing a safeguard measure cannot decide this unilaterally, and the domestic procedures pursuant to which a measure has been adopted are not determinative. It is rather for the Panel to decide on this question based on the objective assessment as required pursuant to Article 11 of DSU. In making its objective assessment, the Panel must engage in a case-specific analysis by examining all of the relevant facts. (footnotes omitted)**

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 proceedings?

Response:

111. Russia's argument that the applicability of the Safeguards Agreement is an "objective question" completely misses the point. The United States agrees that the applicability of the WTO's safeguards disciplines to a particular matter is an "objective question." As the United States has explained throughout this proceeding, the first step in the analysis is the objective question of whether a Member has invoked the right to take action pursuant to Article XIX of the GATT 1994.

112. In fact, the question of whether a Member has taken an action in the past – here, the invocation of the safeguards agreement – is the type of objective question evaluated in every dispute settlement proceeding. It is no different than the question of, for example, whether a Member has adopted a measure that increases duties on the products of another Member. Here, the United States has not invoked Article XIX (it is an uncontested fact). Thus, as a matter of WTO law, the Safeguards Agreement does not apply.

113. Regarding 58(b), the U.S. response to question 23 explains why the Appellate Body's reasoning in Indonesia – Iron or Steel is not relevant here.

59. In paragraph 126 of its first written submission, Russia argues that in making an "independent and objective assessment" of whether a measure is a safeguard, a panel "must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure".

Please comment.

Response:

114. The U.S. response to question 58(a) address Russia's assertion concerning the Panel making an "objective assessment."

60. In paragraphs 147 - 148 of its first written submission, Russia refers to the circumstance that the United States has recently agreed to eliminate the additional steel and aluminium tariffs for imports from Canada and Mexico. Russia maintains that, through these agreements, "[t]he agreements, therefore, implicitly recognize that the US measures are in the nature of safeguards, and that they can be rebalanced by the affected exporting party, in line with the provisions of Article 8 of the Agreement on Safeguards".

a. Please comment.

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

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

Response:

115. 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 Russia's safeguards theory.

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

117. As a general matter, Question 60(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."[53] 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. Russia's additional duties are the measures at issue in this dispute. Accordingly, in this dispute, an underlying measure would be a measure beneath Russia's additional duties. Put another way, an underlying measure in this dispute would be another Russian measure—for instance, a Russian measure that authorizes Russia's additional duties.

6.3 To Russia

61. In paragraph 126 of its first written submission, Russia 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".

62. In paragraphs 147 - 148 of its first written submission, Russia refers to the circumstance that the United States has recently agreed to eliminate the additional steel and aluminium tariffs for imports from Canada and Mexico. Russia maintains that, through these agreements, "[t]he agreements, therefore, implicitly recognize that the US measures are in the nature of safeguards, and that they can

[53] The New Shorter Oxford English Dictionary (Exhibit USA-11).

be rebalanced by the affected exporting party, in line with the provisions of Article 8 of the Agreement on Safeguards".

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

63. Could Russia point to any past practice of the CTG to support its argument, made during the first substantive meeting, that a lack of disapproval of a proposed rebalancing measure would amount to a multilateral authorization of such measure?

64. In paragraphs 29 and 31 – 32 of its oral statement at the first substantive meeting, the United States notes that Article XIX of the GATT 1994 provides that, in certain circumstances, Members "shall be free" to suspend certain obligations. In the United States' view, this language indicates that Article XIX sets out a "right" that a Member "may, in its discretion, invoke". Please comment on this argument, and in particular on the United States' interpretation of the words "shall be free".

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

66. Please comment on the United States' argument that your approach would 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?

67. At paragraph 51 of its oral statement at the first substantive meeting, the United States argued that the Bureau of Industry and Security of the United States Department of Commerce was responsible for conducting the investigation that lead to the adoption of the Section 232 duties, whereas "[i]n contrast, the U.S. International Trade Commission is the only competent authority in the United States authorized to conduct safeguards investigations". Please comment.

Response:

118. Questions 61 through 67 are addressed to Russia.

7 PROPOSALS ON INTER-PANEL COORDINATION

7.1 To both parties

68. As the parties are aware, the U.S. 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 Russian Federation as in that case the Russian Federation claims the violation of the United States under the Agreement on Safeguard.

a. Please comment.

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 DS554 *US — Steel and Aluminium Products (Russia)*? In particular, could Article 13 of the DSU provide a possible legal basis for this Panel to consult or otherwise engage with the parallel panel hearing the so-called "offensive case" against the United States' Section 232 duties?

Response:

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 DS564, the Panel appears to be endorsing the view that this Panel and the panel in DS554 are linked. This dispute, however, is distinct from DS554. 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 DS554.

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 DS554 – 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.[54] As the Panel may know, six provisions of the DSU, and two paragraphs of the DSU's appendices, deal with some aspect of confidentiality.[55] The multiple references to confidentiality in the DSU reflect the importance of

[54] *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).

[55] *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

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.

69. Does the confidentiality confidentiality obligation in Article 14 of the DSU prevent this Panel from consulting with the Panel in DS554 *US — Steel and Aluminium Products (Russia)*?

Response:

122. The U.S. response to question 68 explains why the confidentiality obligation in Article 14 of the DSU prevents the Panel from consulting with the panel in DS564.

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

Response:

123. As an initial matter, the United States recalls that the U.S. national security measures are not the "underlying" measures in this dispute. By characterizing the measures at issue in DS554 as the "underlying" measures in this dispute, the Panel appears to be endorsing the view that this Panel and the panel in DS554 are linked.

124. This dispute and DS554 are distinct, and there are no similarities between this dispute and the sequencing issue that may arise during the implementation stage of a dispute. First, a compliance proceeding under Article 21.5 of the DSU and a proceeding regarding compensation or suspension of concessions under Article 22 of the DSU are both proceedings of the same dispute. In contrast, this dispute and DS554 are separate disputes. While Russia has taken the position that this dispute and DS554 are linked, Russia's position is irrelevant to the Panel's assessment whether Russia's additional duties are consistent with Russia's obligations under Articles I and II of the GATT 1994. Second, during the implementation stage of a dispute, the

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).

sequencing issue is mainly driven by the timelines set out in Articles 22.6 and 21.5 of the DSU.[56] In this dispute and DS554, there is not a similar issue regarding potential conflicting timelines.

71. 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 DS554, while the determination of the same question in the present proceedings is a question of fact? If so, would it be correct to say that nothing prevents the Panel in the present proceedings from making this factual finding?

Response:

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

72. Please comment on Russia's assertion, at paragraph 42 of its oral statement at the first substantive meeting, that "the DS554 [proceedings are] the only appropriate forum to determine whether the United States' import adjustments … [on] aluminium and steel are safeguards".

Response:

126. There is no legal basis for Russia's statement. This dispute and DS554 are completely separate proceedings. In each dispute, the terms of reference are those set out in Article 7 of the DSU. And in accordance with Article 11 of the DSU, the separate panels "should make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Under these provisions, the terms of reference of the panel in DS554 (or any other dispute) do not alter the terms of reference of the Panel in this dispute.

7.3 To Russia

73. With reference paragraph 46 of your oral statement at the first substantive meeting, please elaborate on what "opportunities" this Panel has to "prevent a

[56] Upon request, Article 22.6 of the DSU directs the DSB to "grant authorization to suspend concession or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request." In addition, Article 22.6 provides that an arbitration proceeding regarding suspension of concessions or other obligations "shall be completed within 60 days" of the expiration of the reasonable period of time. The timelines set out in Article 22.6, however, may present a conflict with the completion of a proceeding under Article 21.5 of the DSU.

situation whe[re] the decision within this dispute comes into contradiction with the ruling of the panel in the parallel proceeding (i.e. DS554) on the same matter".

127. This question is addressed to Russia.

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