INDIA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS585)

U.S. RESPONSES TO QUESTIONS FROM THE PANEL TO THE PARTIES BEFORE THE FIRST SUBSTANTIVE MEETING

November 25, 2020

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Argentina – Import Measures (AB)	Appellate Body Reports, *Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
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
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
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US – Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001

TABLE OF EXHIBITS

EXHIBIT NO.	DESCRIPTION
USA-24	Section 201 statute, 19 U.S.C. 2251
USA-25	Section 232 statute, 19 U.S.C. 1862
USA-26	Black's Law Dictionary, 10th edn, B. Garner (ed.) (Thomson Reuters, 2014)

1 INDIA'S PRELIMINARY FINDING REQUEST

1.1 To the United States

1. Please comment on India's assertion, at paragraph 1.5 of its request for a preliminary finding, that "[i]f the US wanted to assert that the [Agreement on Safeguards] is not applicable because there is no underlying safeguard measure taken by the US, it ought to have done so by specifying this crucial claim in its Panel Request".

Response:

1. As an initial matter, the United States notes that the Parties appear to agree that the applicable legal standard for India's preliminary finding request is Article 6.2 of the DSU.[1] As the United States has explained in its prior submissions, the U.S. panel request plainly meets the requirements of Article 6.2 and, therefore, India's preliminary finding request should be rejected.[2]

2. To recall, 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.

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

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

- Article I:I of the GATT 1994, because India fails to extend to products of the United States an advantage, favor, privilege, or immunity granted by India 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;

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[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). India in its Preliminary Finding Request asserts: "The controlling legal standard for the faulty Panel Request is based on Article 6.2, DSU." India's Preliminary Finding Request, para. 4.1. *See also* India's Preliminary Finding Request, Section 4.1 ("Applicable Legal Standard").

[2] *See* U.S. Response to India's Preliminary Finding Request (May 26, 2020), paras. 11-15; *see also* U.S. Comments on India's Additional Submission Regarding India's Preliminary Finding Request (July 8, 2020), paras. 5-9.

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

- Article II:1(b) of the GATT 1994, because India imposes duties or charges in excess of those set forth in India's schedule.[3]

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

5. With respect to India's statement at paragraph 1.5 of its preliminary finding request, India is incorrect that the United States makes any claim under Article 8.2 of the WTO *Agreement on Safeguards* (Safeguards Agreement). While India cites Section VII of the U.S. First Written Submission as the source of a purported claim, the United States in Section VII unambiguously states that these arguments are *preliminary comments* on what the United States understood might be a justification that India would present in its first written submission. Accordingly, the U.S. First Written Submission makes no claim of any sort with respect to the Safeguards Agreement; rather, it simply previews a U.S. rebuttal to an assertion that the United States anticipated India might raise in India's First Written Submission. In contrast, the U.S. First Written Submission does request the Panel make findings of inconsistency with Articles I and II of the GATT 1994, consistent with the legal basis for the U.S. complaint provided in the U.S. panel request.[4]

2. With reference to paragraphs 4.1 and 4.2 of India's request for a preliminary finding, please comment on the following related assertions:

a. [T]he US' decision to deliberately omit the main claim … was done to present the picture that the right to suspend concessions in Article 8.2 [of the Agreement on Safeguards] should be treated as a justification, rather than the controlling provision pertinent to this dispute. (paragraph 4.1)

b. [T]he actual problem is not about whether the duties imposed by the measures at issue violate Article I and Article II, GATT 1994, but about whether India can suspend concessions or other obligations under Article 8.2 [of the Agreement on Safeguards]. (paragraph 4.2)

Response:

6. India's assertions that Article 8.2 of the Safeguards Agreement is the "main claim" and "actual problem" in this dispute have no basis in the legal standard for evaluating India's preliminary finding request, which is Article 6.2 of the DSU. The U.S. comments on India's

[3] *See* WT/DS585/2.

[4] U.S. First Written Submission, para. 74.

request for a preliminary finding[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 providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Accordingly, India's preliminary finding request lacks merit and should be rejected.

7. Furthermore, the DSU envisions that *the complaining party* will identify the measure at issue and the legal provisions in the panel request.[6] 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." Thus, it is incumbent on a respondent to identify other WTO provisions where it considers other WTO provisions are applicable. India has done so by raising Article 8.2 of the Safeguards Agreement in this dispute.[7]

3. At paragraph 4.16 of India's request for a preliminary finding, India states that "the measures at issue were taken pursuant to Article 8.2 [of the Agreement on Safeguards] after informing the WTO Membership (including the US) through notifications to the CTG. The US [first written submission] does not seem to contest this fact". Similarly, at paragraph 3.51 of India's comments on the United States' response to India's request for a preliminary finding, India states that "[t]he US is particularly under an obligation to raise Article 8.2 [of the Agreement on Safeguards] as it was unequivocally aware that India was taking recourse to at least this provision". (emphases original) In the United States' view, 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. Does Article 6.2 of the DSU require the panel request to include these provisions?

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

Response:

[5] *See* U.S. Response to India's Preliminary Finding Request, paras. 16-17; *see also* U.S. Comments on India's Additional Submission Regarding India's Preliminary Finding Request, paras. 12-18.

[6] *See* DSU Article 6.1 ("If *the complaining party* so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel"), and DSU Article 3.3 ("The prompt settlement of situations *in which a Member considers* that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO...") (emphasis added).

[7] India's First Written Submission, para. 39.

8. As noted, the U.S. comments on India's request for a preliminary finding[8] 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 providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Article 6.2 of the DSU does not require that a panel request identify particular WTO provisions or anticipate legal arguments which may be raised by the responding party.

9. Turning to the specific arguments presented by India, as cited in this question, those arguments have no merit. India's notifications to the WTO do not impose any obligation on the United States as the complaining party initiating dispute settlement proceedings to raise Article 8.2 of the Safeguards Agreement. The fact that a matter was notified to the Council for Trade in Goods does not translate into a determination that the matter properly falls within the WTO safeguards regime. India's WTO notifications merely represent India's legal position that the underlying U.S. measure is a safeguard. This is not the U.S. position, and accordingly there is no basis in the DSU for arguing a responding party's legal position somehow changes the claims that must be included in a panel request.

4. **At paragraph 4.30 of its request for a preliminary finding, India states:**

> **[I]t is only when the US challenges India's purported exercise of its right under Article 8.2 [of the Agreement on Safeguards] in its Panel Request and makes out an explicit prima facie case in its [first written submission] that India has failed to correctly exercise its right under Article 8.2 [of the Agreement on Safeguards], [that] India's obligations under consequential provisions [i.e. Articles I and II of the GATT 1994] become relevant. (emphasis original)**

Please comment. In responding to this question, please also comment on India's argument, at paragraph 4.35 of its request for a preliminary finding, that its position in this respect is supported by the findings of the panel in *Indonesia – Iron or Steel Products*.

Response:

10. 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."

11. India's position is not supported by *Indonesia – Iron or Steel Products*. In that dispute, *the complaining parties in their respective panel requests* raised claims under the GATT 1994

[8] *See* U.S. Response to India's Preliminary Finding Request, paras. 11-15; *see also* U.S. Comments on India's Additional Submission Regarding India's Preliminary Finding Request, paras. 5-9.

and the Safeguards Agreement.[9] Here, the U.S. panel request did not raise any claim under the Safeguards Agreement. Thus, the analysis in *Indonesia – Iron or Steel Products* does not and cannot provide any support for India's arguments about what should or should not have been included in the U.S. request for Panel establishment.

12. India's statement at paragraph 4.35 of its request for a preliminary finding concerns the *Indonesia – Iron or Steel Products* panel's order of analysis. India is incorrect that the order of analysis by a panel presented with claims under both the GATT 1994 and Safeguards Agreement is linked to the initial identification of claims by a complaining party in its panel request. Accordingly, the *Indonesia – Iron or Steel Products* panel's order of analysis of the claims raised by the complaining party does not support India's assertion that the U.S. panel request is deficient under Article 6.2 of the DSU.

5. At paragraph 4.31 of its request for a preliminary finding, India states:

> **[T]he US was required to make the controlling claim of inconsistency with Article 8.2 [of the Agreement on Safeguards]. The US' failure to do so results in India continuing to enjoy the presumption of consequent provisions under GATT 1994 being suspended. Similarly, arguments on Articles I:1 and II:1, GATT 1994 that India has breached these consequential provisions do not make out a *prima facie* case that rebuts this presumption when these provisions were technically under suspension at the time of filing the Panel Request. (emphasis original)**

Please comment.

Response:

13. The U.S. comments on India's request for a preliminary finding[10] 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 providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly. There is no basis in the text of the DSU for India's assertion that there is a requirement to identify Article 8.2 as "the controlling claim." Rather, the DSU envisions that *the complaining party* will identify the measure at issue and the legal provisions in the panel request.[11]

[9] WT/DS490/2 and WT/DS496/3.

[10] *See* U.S. Response to India's Preliminary Finding Request, paras. 11-15; *see also* U.S. Comments on India's Additional Submission Regarding India's Preliminary Finding Request, paras. 5-9.

[11] *See* DSU Article 6.1 ("If *the complaining party* so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel"), and DSU Article 3.3 ("The prompt settlement of situations *in which a Member considers* that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO...") (emphasis added).

14. The question of which party bears the burden with regard to India's asserted justification is a distinct issue. The United States in its first written submission establishes a *prima facie* case that India breached its obligations under Articles I and II of the GATT 1994.[12] As the United States has explained, to rebut this case, India has the initial burden of showing that the Safeguards Agreement applies as the party asserting that proposition.[13]

6. At paragraph 4.47 of its request for a preliminary finding, India states the following:

> **The question of whether the measures at issue violate Articles I:1, II:1(a) and II:1(b), GATT 1994 presupposes that these claims are applicable.[67] India recalls that the plain text reading of Article 8.2 [of the Agreement on Safeguards] permit[s] the suspension of these obligations. Hence, by the very terms of Article 8.2 [of the Agreement on Safeguards] a finding on measures at issue being applied pursuant to this provision must necessarily lead to a finding that Articles I:1, II:1(a) and II:1(b), GATT 1994 do not apply. This *status quo* could have been different *only if* the US had made an express claim and explicit arguments on India's exercise of Article 8.2 [of the Agreement on Safeguards] not being consistent with, or conforming to, the substantive and procedural requirements laid out therein. (emphases original)**
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> **67. Appellate Body Report, *EC – Tariff Preferences*, para. 110. See also, para. 4.35 above.**

Please comment.

Response:

15. The United States recalls that the applicable legal standard for evaluating India's preliminary finding request is Article 6.2 of the DSU. The U.S. comments on India's request for a preliminary finding[14] 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 providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

16. With respect to India's assertion at paragraph 4.47, the U.S. panel request does not "presuppose" anything. Rather, the U.S. panel request raises the WTO provisions which the United States believes are breached by India's measures. If India believes that Articles I and II

[12] U.S. First Written Submission, Section V (demonstrating that India's measure is inconsistent with Article I:1 of GATT 1994 because it fails to extend to certain products of the United States an advantage granted by India to like products originating in other countries) and Section VI (demonstrating that India's measure is inconsistent with Article II:1 by imposing duties on products originating in the United States in excess of India's bound rate and provides less favorable treatment to such products).

[13] *See* U.S. Response to India's Preliminary Finding Request, paras. 19-22; *see also* U.S. Comments on India's Additional Submission Regarding India's Preliminary Finding Request, paras. 19-21.

[14] *See* U.S. Response to India's Preliminary Finding Request, paras. 11-15; *see also* U.S. Comments on India's Additional Submission Regarding India's Preliminary Finding Request, paras. 5-9.

of the GATT 1994 are somehow inapplicable, India has every opportunity to raise this argument in its submissions (as India has done.)

7. Please comment on India's assertion, at paragraph 3.4 of India's comments on the United States' response to India's request for a preliminary finding, that "[t]he specific form of the US' claim regarding Article 8.2 [of the Agreement on Safeguards] … could not have been reasonably anticipated when reading the Panel Request, which, is purportedly about *India's* measures violating *Articles I and II, GATT 1994*". (emphases original)

Response:

17. As an initial matter, India is incorrect that the United States has made a claim under Article 8.2 of the Safeguards Agreement. As clearly specified in the U.S. panel request, consistent with Article 6.2 of the DSU, the legal basis for the U.S. complaint is Articles I and II of the GATT 1994.

18. India's statement appears to concern its assertion that it lacked adequate notice as to the nature of the U.S. complaint, which India connects to the general notion of due process.[15] As the United States has explained, due process standards are reflected in the text of the DSU.[16] Specifically, the requirements of Article 6.2 to identify the measure at issue and include a brief summary of the legal basis of the complaint sufficient to present the problem clearly serve the twin purposes of establishing and defining a panel's jurisdiction and *providing notice to the responding party* and potential third parties as to the nature of the dispute.[17] As the United States has explained, the U.S. panel request meets the requirements of Article 6.2 and, therefore, India's assertions on lack of adequate notice do not have merit.[18]

19. Moreover, given that the United States' panel request made no claim under the Safeguards Agreement, it is patently obvious on the face of the U.S. panel request that the United States does not believe that this dispute involves any alleged breach of the Safeguards Agreement. Accordingly, India's argument that it somehow lacked notice of anything relevant to the outcome of this dispute cannot be sustained.

8. Please comment on the following argument, made by India at paragraph 3.31 of its comments on the United States' response to India's request for a preliminary finding:

> **[A] complainant cannot bring a dispute under provisions of the GATT 1994 if those provisions *are necessarily altered* by another provision. In such situations the latter provision necessarily forms a critical component of the legal basis sufficient to present the problem clearly, especially if the complainant also seeks to argue that**

[15] *See* India's Preliminary Finding Request, Section 4.2.2.

[16] *See* U.S. Comments on India's Additional Submission Regarding India's Preliminary Finding Request, para. 21.

[17] *See Argentina – Import Measures (AB)*, para. 5.39.

[18] *See* U.S. Response to India's Request for a Preliminary Finding, paras. 11-15.

the measure is not justified under that provision. The complainant is under an obligation in such cases to explicitly articulate the claim in the panel request and elaborate the dimensions of its case in the written submissions. (emphasis original)

Response:

20. The U.S. comments on India's request for a preliminary finding[19] 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 providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

21. India's argument that Articles I and II of the GATT 1994 are somehow "altered" by the Safeguards Agreement is completely without merit. The WTO Agreement is a single undertaking.[20] Depending on the arguments presented by the parties, any relevant WTO provision may need to be construed in evaluating compliance with specific obligations, such as those in Articles I and II of the GATT 1994. Aside from the fact that the WTO Agreement is a single undertaking, there is no separate concept of "alteration" that describes the relationship between various provisions of the WTO Agreement.

22. Rather, by using the word "alter", India simply means that India believes that India is excused from its Article I and II obligations in the specific facts of this case, due to India's view that the underlying U.S. measure is a safeguard. India is free to raise this argument, as it has done in India's First Written Submission. But there is no basis in the DSU for any argument that the U.S. panel request needed to rebut India's argument. Rather, all the U.S. panel request was required to do was to specify the U.S. claims.

9. Please comment on India's assertion, at paragraph 3.50 of its comments to the United States' response to India's request for a preliminary finding, that Article 8.2 of the Agreement on Safeguards "is an independent right which suspends the application of GATT obligations. Consequently, the US was required to make its case on this provision if it chose to depend on suspended obligations for its legal basis".

Response:

23. India's assertion has no basis in the applicable legal standard for its preliminary ruling request, which is Article 6.2 of the DSU. Article 6.2 does not impose an obligation on the complaining Member to raise particular provisions of the WTO Agreement. Rather, it is for the complaining Member to identify the measure at issue and the legal provisions in the panel request.

24. India's argument about "independent rights" – like India's similar argument about "alteration" – has no foundation in the WTO Agreement nor any apparent legal basis. Rather, it

[19] *See* U.S. Response to India's Preliminary Finding Request, paras. 11-15; *see also* U.S. Comments on India's Additional Submission Regarding India's Preliminary Finding Request, paras. 5-9.

[20] *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement), Article II:2.

is just verbiage that India believes is pertinent to describing the relationship between GATT Articles I and II and the Safeguards Agreement. Regardless of how one might describe that relationship, there was no basis in the DSU for asserting that the United States was required to include a provision of the WTO Agreement that the United States does not believe is applicable to the U.S. legal claims.

3. ORDER OF ANALYSIS

3.1 To both parties

20. At paragraph 120 of its first written submission, India states:

> **[R]ebalancing measures are not first in violation of the original obligations under other GATT provisions, and then being justified by Article XIX of GATT 1994 and the Safeguard Agreement. They do not violate the obligations under other GATT provisions in the first place, if taken pursuant to Article XIX of GATT 1994 and the Agreement on Safeguards.**

What implications, if any, does this argument have for the Panel's order of analysis?

Response:

25. A retaliatory measure purportedly taken pursuant to Article 8 of the Safeguards Agreement cannot represent a suspension of "substantially equivalent concessions or other obligations under GATT 1994" where another WTO Member has not previously invoked Article XIX of the GATT 1994 to apply a safeguard measure. India's first written submission acknowledges as much when concluding that retaliatory measures "do not violate the obligations under other GATT provisions in the first place, ***if*** *taken pursuant to Article XIX of GATT 1994 and the Agreement on Safeguards*."[21] A retaliatory measure cannot be taken pursuant to Article XIX of the GATT 1944 if there is no underlying safeguard measure. Where a WTO Member in the first instance has not invoked Article XIX of the GATT, such that it has not applied a safeguard measure, no "right of suspension" under Article 8.2 exists for other WTO Members. Accordingly, other WTO Members would have no authority to take action under Article XIX of the GATT 1994 or the Agreement on Safeguards, and WTO safeguards disciplines would not be applicable to any dispute arising under the DSU in this context.

26. 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 India's defense first. The DSU does not specify the order of analysis that a panel must adopt, and instead leaves this matter up to the Panel's determination.

[21] India First Written Submission, para. 120 (emphasis added).

3.2 To the United States

21. Please comment on India's reference, at paragraph 113 of its first written submission, to the panel report in Dominican Republic – Safeguard Measures. In your view, what are the implications, if any, of that decision for the present proceedings, and in particular on the Panel's order of analysis?

Response:

27. India's analogy to the panel report in *Dominican Republic – Safeguard Measure* is misplaced for the following reasons. Contrary to the posture of the United States in the current dispute, the Dominican Republic actually implemented the measure in question under its "domestic legislation on safeguards … [as those] instruments constitute the implementation of the Safeguards Agreement and of Article XIX of the GATT 1994 at [its] national level."[22] Moreover, the panel highlighted the Dominican Republic's incongruous argument against the applicability of Article XIX and the Safeguards Agreement after the Dominican Republic specifically invoked those disciplines when applying its measure. In particular, the panel noted the problematic nature in a dispute when:

> a Member should refuse that a measure which it has taken be described as a safeguard despite the fact that the measure:
>
> (i) was taken by the Member with the stated objective of remedying a situation of serious injury to the domestic industry brought about by an increase in imports;
>
> (ii) was the result of a procedure based, inter alia, on the rules and procedures of Article XIX of the GATT 1994 and the Agreement on Safeguards; and
>
> (iii) was notified as a safeguard measure by the Member taking it to the WTO Committee on Safeguards and under the procedures provided for in Article XIX of the GATT 1994 and the Agreement on Safeguards.[23]

28. Additionally, the panel noted how the Dominican Republic "expressly invoked Article 9 of the Agreement on Safeguards as the legal justification under the WTO agreements for excluding imports from Colombia, Indonesia, Mexico and Panama from the application of the impugned measures."[24] In other words, the panel questioned how the WTO safeguard disciplines were not applicable in that dispute when the Dominican Republic ***actually*** invoked them to apply its measure.

29. Conversely, in the current dispute, the domestic authority in the United States for application of a safeguard measure, Section 201 of the Trade Act of 1974, has no connection to

[22] *Dominican Republic – Safeguard Measure*, para. 2.1.

[23] *Dominican Republic – Safeguard Measure*, para. 7.56.

[24] *Dominican Republic – Safeguard Measure*, para. 7.71.

this dispute or the dispute that India has brought against the United States (DS547). Unlike the Dominican Republic, the United States has not implemented the relevant measures under its domestic legislation on safeguards. Furthermore, the United States informed Members that it was adopting a national security measure, and did not invoke its rights under Article XIX of the GATT 1994 to apply a safeguard measure. Without such an invocation, WTO safeguard disciplines are not applicable to this dispute. As such, India's analogy to the panel report in *Dominican Republic – Safeguard Measure* is not relevant to the matter confronting this Panel and, in particular, does not bear on the question concerning the Panel's order of analysis.

5. ARGUMENTS CONCERNING THE SAFEGUARDS REGIME

5.1 To both parties

26. At paragraph 1 of its first written submission, India asserts that its Additional Duties measure was adopted "pursuant to Article XIX:3 of the GATT 1994 and Article 8.2 of the WTO Agreement on Safeguards". Please provide your views on the legal standard that a panel should apply when examining whether a measure falls within the scope of Article 8.2 of the Agreement on Safeguards. In this connection:

a. Which are the steps that a panel should undertake in its examination and in which order?

b. Is it possible for a panel to determine that the measure at issue in a dispute falls within the scope of Article 8.2 of the Agreement on Safeguards, without first finding that there exists a safeguard measure in response to which the measure at issue was adopted?

c. If the existence of a safeguard measure adopted by another Member is a threshold question, is it relevant to the *applicability* of the Agreement on Safeguards, or to the *consistency* of a measure allegedly adopted under Article 8.2 of the Agreement on Safeguards with that provision?

d. Can a panel examine whether a measure is a safeguard measure even if (a) that measure was not identified in the panel request, and/or (b) the Agreement on Safeguards was not identified in the panel request? In this respect, is it relevant that the Section 232 measures are currently being examined by another panel (*United States – Steel and Aluminium Products (India)* (DS547))?

Response:

30. Regarding the analytical steps to assess whether a measure falls within Article 8.2 of the Safeguards Agreement, the relevant provisions set out a right that arises for an affected exporting Member when a safeguard measure is applied and no agreement has been reached by the Members concerned. Of the "Members concerned" identified in Article 8.1, one is the "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 the scope of 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,[25] which in turn is determined by an invocation to Article XIX of the GATT 1994, as further described below.

31. Articles 8.1 and 8.2 contain cross-references to "the provisions of" and "consultations under" Article 12.3. Article 12.3 describes consultations being offered by a "Member proposing to apply or extend a safeguard measure," and Article 12.2 also refers to certain "notifications" by a "Member **proposing** to apply or extend a safeguard measure."[26] 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."[27] These provisions all describe the same sequence of a Member proposing to take action, affording the opportunity to consult, and applying such a measure.

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

33. Consistent with the above, a panel cannot determine that 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 where a complaining party, having exercised its right under GATT 1994 Article XIX and the Safeguards Agreement, subsequently seeks to challenge the conformity of a retaliatory measure with Article 8.2.

34. Where the existence of a safeguard measure is a threshold question, the key issue – which must be addressed first – is the *applicability* of the Safeguards Agreement (and not the question of consistency with that agreement's provisions). A Member allegedly applying a retaliatory measure under Article 8.2 of the Safeguards Agreement may follow all of the procedural requirements under the Safeguards Agreement but this consistency does not conjure the existence of an underlying measure that qualifies as a safeguard to retaliate against. In other words, a retaliatory measure that otherwise conforms to Article 8.2 is meaningless unless an underlying safeguard measure exists in the first instance. Accordingly, the existence of a

[25] 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").

[26] 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).

[27] GATT 1994 Article XIX:2 ("Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action.") (emphasis added).

safeguard measure is a threshold question in a WTO dispute, and conflating applicability with conformity would be legal error.

35. In fact, the Appellate Body in *Indonesia – Iron and Steel Products* recognized this distinction, as well as the primacy of applicability, when adopting a multi-step analysis for the existence and application of safeguard measures. "In carrying out this analysis," the Appellate Body mentioned, "it is important to distinguish between the features that determine whether a measure can be properly characterized as a safeguard measure from the conditions that must be met in order for the measure to be consistent with the Agreement on Safeguards and the GATT 1994. Put differently, it would be improper to conflate factors pertaining to the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines with the substantive conditions and procedural requirements that determine the WTO-*consistency* of a safeguard measure."[28]

36. Under the first step of that analysis, a WTO Member must invoke the right under Article XIX for a measure to be a safeguard within the meaning of Article 1 of the Safeguards Agreement. Of course, as in *Indonesia – Iron and Steel Products*, this is not enough for the measure to be a safeguard as the measure still needs to meet the other requirements before moving onto a determination whether the safeguard measure was lawfully applied. But if the first and crucial step involving invocation and notification does not take place, the measure cannot be a safeguard and another WTO Member's characterization or alleged conformity with Article 8.2 of the Safeguards Agreement is immaterial.

37. Finally, a measure does not become a safeguard measure simply because a responding party seeks to invoke, on its own initiative, the "right of suspension" as a defense under the Safeguards Agreement. Because the United States has not sought to exercise a right to suspend its tariff concessions through GATT 1994 Article XIX (a fact India 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, as India has done in DS547.

27. In the context of its objective assessment of the applicability of the relevant covered agreement(s) to the facts of this case pursuant to Article 11 of the DSU, should this Panel take into account any decision that the panel in *United States – Steel and Aluminium Products (India)* (DS547) might make concerning the legal characterization of the Section 232 measures?

Response:

38. 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 reflect the views of another adjudicator. Rather, the DSU requires a panel to examine the applicability of and conformity with the covered agreements (Article 11) through the application of customary rules of interpretation of public

[28] *Indonesia – Iron or Steel Products (Viet Nam) (AB)*, para. 5.57 (emphasis in the original).

international law to the covered agreements (DSU Article 3.2). Under those customary rules of interpretation, the findings of a concurrent panel are not part of the analysis.

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

> **[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. (emphases original)**

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. 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?

Response:

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

40. As a third-party participant in *Indonesia – Iron or Steel Products*, the United States agreed with the disputing parties that the Indonesian measure at issue met what, in most circumstances, is the fundamental criterion for establishing the existence of a safeguard measure: namely, that the Member adopting a measure invokes Article XIX of the GATT 1994 as the basis for suspending an obligation or withdrawing or modifying a concession. Article XIX:2 of the GATT 1994 and Article 12 of the Safeguards Agreement make clear that advance notice by a Member intending to suspend an obligation or withdraw a concession is a precondition to applying a safeguard measure. In *Indonesia – Iron or Steel Products*, Indonesia did notify other Members that it intended to adopt a safeguard measure, and thus did invoke Article XIX of the GATT 1994.[29] In most situations, the question of whether the WTO's safeguards disciplines applied would have been resolved by this fact.

41. *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

[29] *See* WTO Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, & G/SG/N/11/IDN/14 (July 28, 2014). *See also Indonesia – Iron or Steel Products (Panel)*, para. 2.2. and fn. 12 (discussing the measures at issue and citing notices to the Committee on Safeguards).

complying with its obligations under the Safeguards Agreement and imposed a duty in light of the outcome of that investigation.[30] Furthermore, the parties in that dispute consistently argued that the duty at issue was a safeguard measure.[31] 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.

42. The *Indonesia – Iron or Steel Products* panel proceeded to find that Indonesia had no binding tariff obligation with respect to the good at issue.[32] 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.[33] 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.

43. This dispute presents a fundamentally different scenario from *Indonesia – Iron or Steel Products*. The central question in this dispute is whether India has any justification for its apparent breach of Articles I and II of the GATT 1994. To date, India has offered no justification. Instead, India derives its approach from the Appellate Body's in *Indonesia – Iron or Steel Products*.[34] As discussed above, the reasoning from the Appellate Body's report in that dispute is simply not applicable here.

44. 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."[35] 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."[36] 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

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

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

[32] *Indonesia – Iron or Steel Products (Panel)*, para. 7.18.

[33] *Indonesia – Iron or Steel Products (Panel)*, para. 7.18.

[34] India's First Written Submission, paras. 57-58.

[35] Third-Party Submission of Japan (May 19, 2020), para.10.

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

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."[37]

45. 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.[38]

46. 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.

29. In your view, is it the case that any measure that raises duties beyond a Member's bindings is a "suspension of concessions"?

Response:

47. 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 exhibits that understanding by invoking a provision of the WTO Agreement that allows for a suspension of concessions. 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.

48. The United States would highlight that over the course of the WTO, and before that the GATT 1947, numerous disputes have involved alleged breaches of a tariff commitment. The well-established and proper terminology is that such disputes involve an inconsistency with Article II; the terminology is not that the Member has "suspended a concession." It is only India

[37] 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.") (emphasis added), para. 5.60.

[38] Third-Party Submission of Japan, para. 11.

and any of its supporters in this particular dispute that advocate for the view that any measure that departs from an Article II commitment can be termed a "suspension of concessions."

30. In *Indonesia – Iron or Steel Products*, the Appellate Body indicated that, when examining whether a measure is a safeguard, a panel should "evaluate and give due consideration to" the factors mentioned in paragraph 5.60 of its Report in the same dispute, including the manner in which a measure was adopted and its characterization in a Member's municipal law. Please provide your views on how a panel should undertake that evaluation and consideration.

Response:

49. 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*, where a Member invoked the Safeguard Agreement but in fact had no relevant obligations to suspend, it could make sense for such panel to use the factors in its assessment of the measure at issue.

50. But here, the factors listed in paragraph 5.60 would not be helpful in the Panel's assessment of whether India's additional duties are consistent with its obligations under Articles I and II of the GATT. Rather, in its assessment of India's justification for its measures, the first step the Panel should take is to determine whether the United States invoked Article XIX of the GATT 1994 in connection with this dispute. The United States has not, and this fact is not contested by India. Thus, the factors used in *Indonesia – Iron or Steel Products* are simply not applicable here.

51. Even if the Panel were to further assess India's justification by applying the factors to the U.S. Section 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.[39] 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.[40]

[39] 19 U.S.C. § 2251 (Exhibit USA-24).

[40] 19 U.S.C. § 2251(a) (Exhibit USA-24).

52. 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.[41] 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**."[42]

53. 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.[43] 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.

54. 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. On the contrary, the United States has stated in numerous communications to WTO committees that these measures are national security measures.[44]

31. In paragraph 56 of its first written submission, the United States submits that "a measure cannot constitute a safeguard under the WTO Agreement [on Safeguards] unless a Member that departs from its GATT 1994 obligations invokes the right to implement a safeguard measure and provides the required notice to other exporting Members of such action". Please provide your views on the need for invocation and notification by the adopting Member in order for a measure to be a safeguard within the scope of the Agreement on Safeguards. In doing so, please indicate whether the 1993 Decision on Notification Procedures is of any relevance.

Response:

55. Article 1 of the Safeguards Agreement provides:

[41] 19 U.S.C. § 1862 (Exhibit USA-25).

[42] 19 U.S.C. § 1862(c)(1)(A) (emphasis added) (Exhibit USA-25).

[43] *See* 19 U.S.C. § 2251(a).

[44] *See* U.S. statements in the WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27; WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27; WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2; U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018), at 3; and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018.

> This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

56. An integral feature of the right to invoke Article XIX, as noted previously, is the requirement of invocation as a precondition to taking action pursuant to Article XIX. The rules in the Safeguards Agreement identify certain requirements that a Member must satisfy after deciding to take or seek a safeguard measure. This includes a Member's obligation to notify other Members of its decision to institute an investigation under its domestic safeguards authority, to notify other Members after finding serious injury to a domestic industry based on such an investigation, and to notify other Members after the decision to apply a safeguard measure.

57. The Safeguard Agreement identifies certain notification requirements at different temporal stages of a safeguard investigation. Article 12.1 of the Safeguards Agreement contains requirements concerning notifications and consultation, and provides that:

> A Member shall immediately notify the Committee on Safeguards upon:
>
> (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
>
> (b) making a finding of serious injury or threat thereof caused by increased imports; and
>
> (c) taking a decision to apply or extend a safeguard measure.

58. Accordingly, there are three milestones over the course of a safeguards investigation that a Member must notify to the Committee on Safeguards. A Member must provide a notification when: (a) initiating a safeguards investigation under its domestic authority, (b) making a finding that increased imports are causing or threatening serious injury to a domestic industry, and (c) deciding to impose a safeguard measure based on an investigation that results in a finding of serious injury.

59. In addition, Article 12.6 requires that Members "notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them." In other words, it is clear that a Member has invoked Article XIX to apply or extend a safeguard measure and followed the procedural requirements in the Safeguards Agreement when it notifies a decision according to Article 12.1(c) and it has taken that decision under a provision of the safeguards laws, regulations, and administrative proceedings it previously notified under Article 12.6. Consistent with this, other Members understand when a safeguard measure has been imposed because the implementing Member will provide notice of the measure taken under "laws, regulations and administrative procedures" it already notified as its domestic authority to apply a safeguard measure.

60. The ability of other Members to take action under Article 8.2 of the Safeguards Agreement is dependent on an implementing Member actually invoking Article XIX. The rules

regarding notification of that invocation, as established above, appear in Article 12 of the Safeguards Agreement. Importantly, however, invocation through notice permits the exercise of a Member's right under Article XIX, and Article 12 does not purport to alter this right.

61. In this dispute, the United States has not adopted a safeguard measure – as that term is used in Article XIX and the Safeguards Agreement – because the United States has not invoked Article XIX of the GATT 1994. The absence of any invocation is clear and uncontested -- the United States has not sent a notification to the Committee on Safeguards or taken any action under a domestic authority that it previously notified under Article 12.6. Consequently, the actions that would inform other Members of a decision to invoke Article XIX (invocation of Article XIX and notification of a decision to apply a safeguard measure and adoption of the measure under domestic authority that has been notified under Article 12.6) are absent from this dispute. Since there has been no invocation, India's failure to identify where and how the United States has taken a measure "provided for in" Article XIX means that it cannot rely on Article 8.2 of the Safeguards Agreement to justify its retaliation against the United States.

62. Finally, with regard to the Decision on Notification Procedures, that decision 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."[45]

32. What is the relevance of the notification of a measure to the Committee on Safeguards? In particular, can a measure be considered a safeguard in terms of the Agreement on Safeguards *before* such a notification takes place? Or is it only by virtue of such a notification that a measure becomes a safeguard within the scope of the Agreement on Safeguards?

Response:

63. 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, the Member's measure (whatever its characterization domestically) is not an action pursuant to Article XIX, and the Member will not have a legal basis in Article XIX for exceeding its tariff commitments.

64. 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.

[45] 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).

33. Under Article 8 of the Agreement on Safeguards, is a Member entitled to impose a rebalancing measure where the existence of a safeguard measure to which the rebalancing measure responds is disputed, and prior to a DSB ruling on this issue?

Response:

65. The scenario arising under the Panel's question simply does not arise where, as the United States has explained, the WTO Agreement is read correctly as requiring invocation of the right to take a Safeguard under an Article XIX as a requirement for the existence of an Article XIX safeguard measure. Under this correct reading of the Agreement, there is very little (if any) room for disagreement as to the existence or not of a safeguard measure.

66. It is only under India's novel position that any Member supposedly may declare that another Member has adopted a "safeguard," and then take self-help measures by violating WTO obligations without going through the WTO dispute settlement process.

67. Thus, the Panel's question highlights a fundamental, systemic flaw in India's positions – it would reverse the fundamental WTO norm – as reflected for example in Article 23 of the DSU that no Member may declare another Member in breach of the WTO Agreement and take actions in response without first obtaining a DSB finding of inconsistency and a DSB authorization to adopt countermeasures.[46]

34. Article 8.2 of the Agreement on Safeguards provides, 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 does not disapprove". Concerning the role of the Council for Trade in Goods (CTG):

a. Does the above language of Article 8.2 of the Agreement on Safeguards mean that an alleged rebalancing measure must be placed on the CTG's agenda for this provision to apply? If that is the case, is it the adopting Member (in this case, India) that should bear the burden of placing its measure on the CTG's agenda?

b. Was India's additional duties measure placed on the agenda of the CTG? If so, when and by which Member?

c. At paragraph 9 of its third-party submission, Russia submits that "[t]he absence of disapproval by the Council for Trade in Goods confirms the right of the affected Member to suspend the application of concessions or other obligations under the GATT 1994 …" Please comment.

Response:

[46] *See* Article 23.1 of the DSU ("When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.").

68. 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.

69. 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.

70. 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.

71. 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 in its third-party submission 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.

35. With reference to paragraph 16 of India's first written submission, should the Panel take into account the United States' decision not to consult concerning its Section 232 measures under the Agreement on Safeguards? If so, how?

Response:

72. The phrase "the United States' decision not to consult concerning its Section 232 measures under the Agreement on Safeguards" is an inaccurate and perhaps misleading characterization of the facts of this dispute. The United States adopted a national security measure, not a safeguard measure under Article XIX of the GATT 1994. So, of course, the United States did not consult under the Agreement on Safeguards, just as, for example, the United States did not notify the measure as a TBT measure or an SPS measure. In other words, given that the United States did not adopt a safeguard measure, there was no "decision" to be

made on consulting under the Agreement on Safeguards or under any other inapplicable provision of the WTO Agreement.

73. On the other hand, if the United States had chosen to consult under the Agreement on Safeguards, then presumably the United States would have notified Members that it was invoking the Safeguard Agreement, which would then be relevant to India's justification for its measures.

36. At paragraphs 24-26 and 40-44 of its third-party submission, the European Union discusses the relationships between certain provisions of the WTO covered agreements. The European Union argues that these are analogous to the relationship between Articles I and II of the GATT 1994 on the one hand, and Article XIX of the GATT 1994 and the Agreement on Safeguards on the other hand.

Please comment.

Response:

74. The European Union's arguments and analogies are inapplicable to any legal issue in this dispute because the United States has not invoked Article XIX of the GATT 1994.

37. 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:

75. 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.

76. 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.

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.

77. 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.

5.2 To the United States

38. Please comment on India's assertion, at paragraph 1.5 of its request for a preliminary finding, that "a *prima facie* case on the applicability of Article 8.2 [of the Agreement on Safeguards] is sufficient to dismiss the instant terms of reference".

Response:

78. India's view regarding a *prima facie* case on the applicability of Article 8.2, for purposes of its preliminary ruling request, hinges on its earlier statement in the same paragraph that the United States should have included a claim under the Safeguards Agreement if it "wanted to assert that the [Safeguards Agreement] is not applicable" in this dispute. India has the dispute settlement system completely backwards. A Member does not assert claims based on disciplines it considers ***inapplicable***. Instead, a Member includes in a panel request under the DSU only those claims that it considers to apply to the breach of another Member's obligation. As the United States consider the Safeguards Agreement to have no relevance to this dispute, it was under no obligation to assert any safeguard-related claims in its panel request.

79. India has raised duties on imports originating in the United States. It is undisputed that India's additional duties exceed its bound rate under the relevant tariff lines and that they are not applied on imports originating in the territory of other WTO Members. India, however, is defending its retaliatory measure under the theory that the additional duties constitute the suspension of "substantially equivalent concessions or other obligations" pursuant to the Safeguards Agreement. India is entitled, as the responding party in this dispute, to defend its measure under any theory it wishes to advance.

80. What India is not entitled to is a preliminary ruling from the Panel that the United States was required under the DSU to assert a claim that it considers irrelevant to the matter in this dispute. Such an approach would turn dispute settlement proceedings on their head and produce nonsensical results. For example, the number of claims that a complaining party considers relevant is finite and easily recognizable, as they are reflected in that Member's panel request. The number of defenses, including any that are unjustified, based on the responding party's view

of the applicable disciplines, is indeterminate. The appropriateness of a panel request under the DSU, for purposes of a preliminary ruling, cannot turn on such uncertain criteria.

81. Instead, the provisions of the DSU establish the requirements for a panel request. And, in actuality, India has not suggested that it had any difficulty identifying its measure for purposes of this dispute or in presenting its safeguard theory in defense of that measure. Accordingly, it is not entitled to a preliminary ruling.

39. At paragraphs 4.56 and 4.57 of its request for a preliminary finding, India makes the following arguments:

> **Article 8.2 [of the Agreement on Safeguards] does not require a prior finding from another body such as the DSB, the Committee on Safeguards or even the Council for Trade in Goods on whether the underlying measure is a safeguard before the right can be taken recourse to. It leaves this decision, as well as other decisions … to the affected Member's exclusive judgment. Similarly, questions arising from Article 8.3 [of the Agreement on Safeguards] are also exclusively at the judgment of the applying Member <u>at the point in time that a decision was taken to apply a "rebalancing measure</u>".**
>
> **India has no doubt that whether these requirements were met is certainly capable of review under dispute settlement procedures. However, India reiterates that whether a measure at issue meets these requirements or does not is a question of conformity, and not of whether it is correctly characterized under WTO law. (emphases original)**

Please comment.

<u>Response</u>:

82. According to India, the Safeguards Agreement "leaves this decision [to exercise the right of suspension], as well as other decisions" to the affected exporting Member.[47] However, the Safeguards Agreement does not leave to such a Member the decision to unilaterally characterize other Member's measure as a safeguard, or assert that WTO safeguard disciplines apply to a dispute and should have been claimed in another Member's panel request. Clearly, India's interpretation is at odds with GATT Article XIX:1(a) that makes clear that it is the initial Member, not the retaliating Member, that "shall be free" to exercise its right to invoke its right to suspend its obligations. Only after that invocation under Article XIX:1(a) is an affected Member free to suspend "substantially equivalent concessions or other obligations under Article XIX:3(a).

40. At paragraph 112 of its first written submission, India argues that:

[47] *See* India's Preliminary Finding Request, Section 4.56.

> **Members enjoy an autonomous right to apply rebalancing measures, subject to the WTO safeguard regime, compliance with which may be challenged by a complainant. The complaining Member may challenge the measure under normal GATT provisions, such as Article I:1 and II:1(a) and (b), only when it establishes that the challenged measure is inconsistent with that regime.**

Please comment.

Response:

83. In paragraph 112 of its first written submission, India appears to suggest that Members (to use India's terms) "enjoy an autonomous right to apply rebalancing measures" even if an importing Member has not imposed a safeguard measure. India's suggestion, however, is plainly contrary to the text of Article XIX and Article 8 of the Safeguards Agreement, which **explicitly link** rebalancing measures to safeguard measures.

84. Article 8.2 of the Safeguards Agreement reaffirms the right in Article XIX:3(a) of "affected" exporting Members to apply rebalancing measures against a Member that has imposed a safeguard measure. In relevant part, GATT Article XIX:3(a) provides:

> If agreement among the interested contracting parties **with respect to the action** is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the **affected** contracting parties **shall then be free**, no later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action [. . .] of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

85. The terms "with respect to the action" in Article XIX:3(a) link the action contemplated in that provision with the safeguard action contemplated in Article XIX:1(a). As the United States explained in the U.S. first written submission, no U.S. safeguard is related to the matters in this dispute.[48] Accordingly, India was not (to use the terms in Article XIX:3(a)) "affected" by a U.S. safeguard; therefore, India was not "free" to impose rebalancing measures.

86. 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." 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

[48] *See* U.S. First Written Submission, paras. 52-73.

safeguard measure shall provide adequate opportunity for prior consultations" with Members having a "substantial interest as exporters" of the product concerned. Accordingly, India's apparent attempt to divorce rebalancing measures from safeguard measures is fundamentally at odds with the text of Article XIX and the Safeguards Agreement.

41. At paragraph 4.58 of its request for a preliminary finding, India states the following:

> **[C]onsistent with the Appellate Body's findings in *Indonesia – Iron or Steel Products*, whether the measure can be properly characterised as being taken under Article 8.2 [of the Agreement on Safeguards] has just two requirements in India's view:**
>
> - **The measure must suspend substantially equivalent concessions or other obligations to the trade of the Member that is alleged to have taken a safeguard measure; *and***
>
> - **In the absence of an agreement which guarantees adequate trade compensation, the measures at issue are designed to, and are demonstrably linked to the objective of suspending substantially equivalent concessions.**

Response:

87. The Appellate Body's analysis in *Indonesia – Iron or Steel* Products did not concern Article 8.2 of the Safeguards Agreement. As the United States explains in the U.S. response to question 49, the Appellate Body's reasoning in *Indonesia – Iron or Steel Products* concerned whether the panel erred in its interpretation and application of Article 1 of the Safeguards Agreement and Article XIX of the GATT 1994. Accordingly, the Appellate Body's reasoning in *Indonesia – Iron or Steel Products* is not relevant to the Panel's analysis of whether a measure (to use India's terms) "can be properly characterised as being taken under Article 8.2" of the Safeguards Agreement.

42. Please comment on India's assertion, at paragraph 4.67 of its request for a preliminary finding, that "if India has proved Article 8.2 [of the Agreement on Safeguard's] applicability, the matter must end there".

Response:

88. As the United States explains in the U.S. responses to questions one and two, as well as in the U.S. Response to India's Request for a Preliminary Finding,[49] India's request for a preliminary finding fails to establish that the U.S. panel request is deficient. Instead, India relies on arguments that have nothing to do with the applicable legal standard of Article 6.2 of the

[49] *See* U.S. Response to India's Request for a Preliminary Finding, paras. 13-28.

DSU. For instance, in paragraph 4.67 of India's Request for a Preliminary Finding, India incorrectly asserts that

> in presenting a "preemptive rebuttal" in its FWS that the underlying US measure is not a safeguard, the US is clearly seeking to introduce a discussion that it ought to have foreseen. Nothing, in India's view, can now change the express terms of reference. Consequently, if India has proved Article 8.2 AoS' applicability, the matter must end there.

89. India's assertion that the United States is "seeking" to change the Panel's terms of reference is baseless. After presenting the U.S. claims, the U.S. first written submission ends with preliminary comments on what the United States understood could be an asserted justification that India might present in its first written submission—namely, that in the event India attempted to justify its additional duties on a safeguard theory, such justification would be completely without merit because the United States has not adopted a safeguard.[50] In short, Section VII of the U.S. first written submission does not support India's suggestion that the United States is "seeking" to change the Panel's terms of reference.

90. Further, the United States is not seeking findings under Article 8.2 of the Safeguards Agreement. The fact that the United States did not bring a claim under Article 8.2 of the Safeguards Agreement – or under any other WTO provision not specified in the U.S. panel request – simply means that the United States is not seeking findings on those provisions. Rather, as the United States made clear in the U.S panel request, this dispute is about India's WTO commitments under Articles I and II of the GATT 1994.

91. India concludes paragraph 4.67 of its request for a preliminary finding with another erroneous assertion. According to India, it (and not the Panel) decides the applicable law to India's additional duties. India's suggestion is fundamentally at odds with Article 11 of the DSU, which provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the **applicability** of and conformity with the relevant covered agreements".[51] India's numerous assertions in its meritless request for a preliminary finding cannot obfuscate that the U.S. panel request plainly meets the requirements of Article 6.2 of the DSU.

43. With reference to paragraphs 58-59 of the United States' first written submission, 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:

92. As an initial matter, the United States observes that it uses the term "invoke" according to its ordinary meaning, which refers to "the act of calling on for authority or justification" and "the

[50] *See* U.S. First Written Submission, paras. 52-73.

[51] Emphasis added.

act of enforcing or using a legal right."[52] In the context of safeguards, the United States is using the term "invoke" to refer to the notice requirements in Article XIX of the GATT 1994 and the Safeguards Agreement. Thus, invocation refers to a Member basing an action on Article XIX of the GATT 1994.

93. WTO Members (and GATT 1947 contracting parties) have routinely used the terminology of "invoking" Article XIX when adopting a safeguard measure. For instance, a June 1950 communication from Cuba to the CONTRACTING PARTIES is entitled: "Letter from the Cuban Government **invoking** Article XIX".[53] In that communication, Cuba informed the CONTRACTING PARTIES that it had "decided to make use of its rights under Article XIX, without prior consultation with the Contracting Parties, in accordance with the provisions" in Article XIX:2, because Cuba "considers that delay would cause grave damage to the national producers affected which it would be very difficult, if not impossible, to repair."[54] This is but one of many examples in the practice under the GATT 1947 of a Contracting Party **invoking** its rights under Article XIX.

94. Similarly, a 1987 Background Note by the GATT Secretariat on Article XIX uses the term "invoke" in the same manner as the United States. In paragraph 12 of the Note, the GATT Secretariat explains that Table 1 of the Note provides a summary "showing the countries **invoking**" Article XIX actions.[55] And in paragraph 13 of the Note, the Secretariat observes that at the time when the Note was drafted, "Australia [was] by the far the country which . . . **invoked** the greatest number of Article XIX actions."[56] Finally, in a section of the Note with the heading "Period when actions were **invoked**", the Secretariat uses the term "invoke" numerous times:

> 1970-1979 represents the period when the greatest number of actions were **invoked** (47 actions). The period 1960-1969 has 35 actions and the current period, 1980-present, so far has 33 actions. It is interesting to note that Australia, for instance **invoked** 17 and 15 actions during the periods 1970-1979 and 1960-1969 respectively, but only 2 before 1960 and 4 starting from 1980. The pattern for the United States is different. It **invoked** 11 actions between 1950-1959 and 9 actions between 1970-1979, with relatively few in 1960-1969 and the current period. The pattern for Canada again is different. It **invoked** 13 actions during 1970-1979, with relatively few in other periods. The European Communities has **invoked** the greatest number of Article XIX actions during the current period (11 actions). Actions before 1979 were **notified** in the name of individual Member States.[57]

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[52] Black's Law Dictionary, 10th edn., B. Garner (ed.) (Thomson Reuters, 2014) at 958 (Exhibit USA-26).

[53] GATT/CP/71/Add.1 (June 26, 1950) (emphasis added).

[54] *Id.*

[55] Drafting History of Article XIX and its Place in GATT: Background Note by the Secretariat ("Background Note"), para. 12. MTN.CNG/NG9/W/7 (September 16, 1987) (emphasis added).

[56] *Id.*, para. 13 (emphasis added).

[57] *Id.*, para. 16 (emphasis added).

95. In this regard, the United States observes that India also uses the terms "invoke" or "invocation" throughout its first written submission[58] according to the ordinary meaning of these terms.

44. Under the United States' view that the WTO safeguards regime must be "invoked" through notification, can a Member act inconsistently with the notification obligations in Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards?

Response:

96. The notification requirement in Article XIX of the GATT 1994 relates to the applicability of the WTO's safeguards disciplines to a particular measure and to the consistency of a safeguard measure with the relevant provisions of the Agreement on Safeguards.

97. As the United States explained in the U.S. first written submission, the requirement to invoke Article XIX of the GATT 1994 flows from Article XIX's provisions on providing notice of a proposed action, which are then repeated and elaborated in the notice requirements in Article 12 of the Safeguards Agreement.[59]

98. Regarding applicability, 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. In relevant part, Article XIX:2 provides

> Before any contracting party shall take action **pursuant to** the provisions of paragraph 1 of this Article, it shall give **notice in writing** to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the **proposed action**.[60]

99. Thus, before a Member may take a proposed action, it "shall" give notice and afford an opportunity to consult. The third sentence in 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 (*i.e*, invoke Article XIX). 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.

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[58] *See* India's First Written Submission (noting that "the Panel in the *Dominican Republic - Safeguard Measure* ruled that the safeguard measures **invoked** by the defendant led to the suspension" of certain GATT 1994 obligations), para. 113 (emphasis added).

[59] U.S. First Written Submission, paras. 58.

[60] Emphasis added.

100. Regarding the Panel's question on consistency, any measure for which the coverage of Article XIX of the GATT 1994 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.

45. At paragraph 63 of its first written submission, India argues:

> **It would not be meaningful to argue that a safeguard measure for which the importing Member did not comply with the procedural requirements of Article 12 of the Agreement on Safeguards ceases to be, for this reason, a safeguard measure … This would obviously lead to an unreasonable result, because, once again, a WTO Member could avoid the application of the basic transparency and consultations disciplines in Article 12 simply by violating them.**

Please comment

Response:

101. India's argument in paragraph 63 of its first written submission mischaracterizes the U.S. position. The United States has not suggested that a safeguard measure that is inconsistent with the procedural requirements of Article 12 of the Safeguards Agreement (to use India's words) "ceases to be, for this reason, a safeguard measure". As the United States explains in the U.S. response to question 44, any measure for which the coverage of Article XIX of the GATT 1994 is invoked must meet the obligations set out in the Agreement on Safeguards, including the obligations in Article 12. Accordingly, a safeguard measure that is inconsistent with a provision of Article 12 of the Safeguards Agreement does not, as India asserts, "cease[] to be" a safeguard measure; rather, such a safeguard measure would be *inconsistent* with a provision of Article 12 of the Safeguards Agreement.

46. At paragraph 31 of its first written submission, India states:

> **[W]hen a safeguard measure or rebalancing measure is imposed pursuant to Article XIX of GATT 1994 and the [Agreement on Safeguards], the relevant concessions or obligations under other provisions of GATT 1994, such as those under Article I and II, have already been stopped in application, or made inactive, or taken away or changed, and therefore are not eligible to be assessed independent from the safeguard provisions.**

Does the United States agree with this description of the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards, on the one hand, and Articles I and II of the GATT 1994 on the other hand?

Response:

102. As an initial matter, the United States observes that terms used by India in paragraph 31 of its first written submission do not appear in the text of Article XIX of the GATT 1994. Rather, the correct terms appear in the phrase "suspend the obligation in whole or in part or to withdraw or modify the concession", which is in Article XIX:1(a) of the GATT 1994. Further, a violation of the GATT 1994 (or a breach of that agreement) typically refers to "the failure of a Member to carry out its obligations" as stated in Article XXIII:1(a) of the GATT 1994.

103. Suspension or withdrawal of a Member's obligation as referred to in Article XIX of the GATT is not synonymous with a breach of the GATT 1994. Once a Member has the right to suspend an obligation or withdraw or modify a concession under Article XIX, that Member no longer has to perform those obligations. In other words, the Member does not breach (or "fail to carry out") its obligations within the meaning of Article XXIII:1(a) of the GATT 1994, if the Member's nonfulfillment of those obligations occurs under the circumstances set forth in Article XIX and the Agreement on Safeguards. In that situation, the obligations are suspended, withdrawn, or modified – they are not breached.

104. In this dispute, India has breached its obligations under Articles I and II of the GATT 1994.[61] India attempts to justify its additional duties as "rebalancing" measures. As the United States explained in the U.S. first written submission, India's justification is completely without merit because no U.S. safeguard is related to the matters in this dispute.[62] Accordingly, the rights under Article XIX of the GATT 1994 and the Safeguards Agreement are not applicable in this dispute. Thus, it would be incorrect to refer to India's additional duties as a suspension of concessions.

47. Please comment on the following submission, made by Russia at paragraphs 7 and 8 of its comments on India's request for a preliminary finding:

> **[N]either India's application of Article 8.2 of the [Agreement on Safeguards], nor its compliance therewith is contested by the United States in its request for establishment of a panel. Moreover, there is no panel's or Appellate Body's ruling in either regard. Hence, India's suspension of concessions or other obligations under GATT 1994 pursuant to Article 8.2 of the [Agreement on Safeguards] be presumed to be WTO-consistent.**
>
> . . .
>
> **[T]he only issue that can be disputed in such cases is consistency or inconsistency of the suspension itself with WTO obligations of a Member. Only after establishing a *prima facie* case of inaccuracy of suspension itself under Article 8.2 of the Agreement on Safeguards, the complainant can elaborate on alleged violations of Articles of the GATT 1994 which were not lawfully suspended.**

[61] *See* U.S. First Written Submission, paras. 23-50.

[62] See U.S. First Written Submission, paras. 52-73.

Response:

105. Russia's comments regarding India's justification for its additional duties (*i.e.*, that they are "rebalancing" measures under Article 8.2 of the Safeguards Agreement) are not consistent with the Panel's duty to make an objective assessment of the matter before it, including the applicability in this dispute of the Safeguards Agreement to India's additional duties. An objective assessment under Article 11 of the DSU, the standard by which a measure is examined for WTO-consistency, requires an independent evaluation.

48. At paragraph 42 of its first written submission, India makes the following assertion:

> **A Member imposing a measure may not decide unilaterally whether that measure satisfies the Appellate Body's two-prong test and is a safeguard measure … These are inquiries that are of an objective nature and must be conducted on the basis of objective criteria.**
>
> **Please comment.**

Response:

106. As an initial matter, the United States observes that despite India's assertion relating to the Appellate Body's "two-prong test" in *Indonesia – Iron or Steel Products*, the DSU does **not** assign precedential value to panel or Appellate Body reports adopted by the DSB or interpretations contained in those reports. Instead, the WTO Agreement reserves such weight to authoritative interpretations adopted by WTO Members in the Ministerial Conference or the General Council.[63] The DSU explicitly notes that the dispute settlement system operates without prejudice to this interpretative authority.[64]

107. Regarding the assertions concerning the Appellate Body's reasoning in *Indonesia – Iron or Steel Products* in paragraph 42 of India's first written submission, the question of whether the United States invoked its rights under Article XIX of the GATT 1994 *is* an objective matter to be determined by the Panel: an objective assessment shows that the United States has not invoked Article XIX of the GATT with respect to the U.S. national security measures on steel and aluminum. In fact, as the United States explained in the U.S. first written submission, the record shows that the United States informed the WTO that the U.S. national security measures were taken pursuant to Article XXI of the GATT 1994.[65] And this objective fact is not contested.

[63] WTO Agreement, Art. IX:2.

[64] DSU Art. 3.9.

[65] *See* U.S. First Written Submission, para. 70; *see also* Minutes of the Meeting of the Council for Trade in Goods, March 23 and 26, 2018, at 26 (noting that in response to comments from other Members, the United States provided information relating to the Steel and Aluminum Proclamations issued by the President of the United States, consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on November 30, 1982.), G/C/M/131.

49. At paragraph 57 of its first written submission, India refers to paragraph 5.60 of the Appellate Body's report in *Indonesia – Iron or Steel Products*. In the view of the United States, what, if anything, is the relevance of this paragraph and of the Appellate Body's report in that case more generally, to the present proceedings?

Response:

108. India does not ground its justification for its additional duties on the relevant text of the WTO Agreement. Instead, India derives its justification from the Appellate Body report in *Indonesia – Iron or Steel Products*. The Appellate Body's reasoning in that report is not applicable because this dispute presents a fundamentally different scenario. Moreover, the Appellate Body in *Indonesia – Iron or Steel Products* did not set out a comprehensive definition of a safeguard measure or define the scope of the Safeguards Agreement. As such, the legal basis for India's justification is not sound.

109. The Appellate Body's report in *Indonesia – Iron or Steel Products* is simply not applicable because it did not address a situation where a Member has **not** invoked Article XIX of the GATT 1994. In that dispute, the disputing parties agreed that the Indonesian measure at issue met what, in most circumstances, is the fundamental criterion for establishing the existence of a safeguard measure: namely, that the Member adopting a measure **invokes** Article XIX of the GATT 1994 as the basis for suspending an obligation or withdrawing or modifying a concession.[66] 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.

110. *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.[67] Furthermore, the parties in that dispute consistently argued that the duty at issue was a safeguard measure.[68] Accordingly, the panel was placed in the position of assessing whether the Indonesian measure at issue involved a suspension of an obligation or modification of a concession, and thus whether Article XIX or the Safeguards Agreement applied to the measure at issue.

[66] *See* WTO Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, & G/SG/N/11/IDN/14 (July 28, 2014). *See also Indonesia – Iron or Steel Products (Panel)*, para. 2.2. and fn. 12 (discussing the measures at issue and citing notices to the Committee on Safeguards).

[67] *Indonesia – Iron or Steel Products (Panel)*, fn. 84 and para. 747.

[68] *Id*.

111. The *Indonesia – Iron or Steel Products* panel proceeded to find that Indonesia had no binding tariff obligation with respect to the good at issue.[69] 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.[70] 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.

112. As the Panel is aware, the factual circumstances in this dispute are fundamentally different from *Indonesia – Iron or Steel Products*. Here, the United States did **not** invoke Article XIX of the GATT 1994. Thus, the Appellate Body's reasoning in that dispute is not relevant in this dispute.

113. Moreover, India is mistaken that the Appellate Body in *Indonesia – Iron or Steel Products* established an all-encompassing definition of a safeguard measure.[71] As Japan correctly states in 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."[72] Rather, the Appellate Body noted that "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."[73] In other words, the Appellate Body's reasoning only identifies certain necessary features. Importantly, the Appellate Body did **not** say that a measure presenting both (to use the terms used by the Appellate Body) "constituent features" automatically or necessarily qualifies as a safeguard measure. Instead, the Appellate Body stated that "whether a particular measure constitutes a safeguard measure for purposes of WTO law can be determined only on a case-by-case basis.[74]

114. In fact, the Appellate Body specifically noted the "limited" nature of its inquiry: "our task is limited to the question of whether a measure can constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards if: (i) it does not suspend a GATT obligation or withdraw or modify a tariff concession; or (ii) that suspension, withdrawal, or modification is not designed to prevent or remedy serious injury."[75]

115. Given the unusual circumstances in *Indonesia – Iron or Steel Products*, the Appellate Body determined whether the WTO safeguards disciplines applied to the measure at issue in that dispute. But the words used by the Appellate Body in its report made clear that it was describing

[69] *Id*., para. 7.18.

[70] *Id.*

[71] India's First Written Submission, para. 10.

[72] Third-Party Submission of Japan, para. 10 (May 19, 2020).

[73] *Indonesia – Iron or Steel Products (AB)*, para. 5.60.

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

[75] *Indonesia – Iron or Steel Products (AB)*, para. 5.60 n. 194.

"certain constituent" features, not necessarily all the constituent features, of a safeguard measure.[76] As Japan mentioned in its third-party written submission, the factors used by the Appellate Body in its reasoning are "*necessary* – but not *sufficient* – to find a given measure to constitute a safeguard measure."[77]

116. Therefore, India's justification is not based on the text of the WTO Agreement but on an Appellate Body report that is not applicable in this proceeding and, in any event, does not contain a comprehensive definition of a safeguard measure. As such, India's suggested approach is not helpful to the Panel's assessment of whether India's additional duties are consistent with its obligations under Articles I and II of the GATT 1994.

50. At paragraph 63 of its first written submission, India refers to the Appellate Body's reports in *US – Wheat Gluten* and *US – Line Pipe*. Please comment on the relevance of these reports in the present proceedings.

Response:

117. India relies on the Appellate Body's reports in *US Wheat Gluten* and *US – Line Pipe* to support its assertions in paragraph 63 of its first written submission. As the United States explains in the U.S. response to question 45, India's argument in paragraph 63 mischaracterizes the U.S. position in this dispute. The United States has not suggested that a safeguard measure that is inconsistent with the procedural requirements of Article 12 of the Safeguards Agreement (to use India's words in paragraph 63) "ceases to be, for this reason, a safeguard measure".[78]

118. Rather, the U.S. position in this dispute is that for a measure to be a safeguard, the importing Member must invoke Article XIX of the GATT 1994 to exercise its right to suspend obligations or withdraw or modify tariff concessions.[79] In other words, a measure is not a safeguard under the WTO Agreement unless a Member that departs from its GATT 1994 obligations invokes the right to implement a safeguard measure by providing the required notice to other exporting Members of such action. If a Member has not provided notice in writing to Members of a proposed action, 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 tariff commitments.

119. Moreover, the Appellate Body's reasoning in *US – Wheat Gluten* and *US – Line Pipe* are not applicable in this dispute because they do not address a situation where an importing Member has not invoked Article XIX of the GATT 1994. In both *US – Wheat Gluten* and *US – Line Pipe*, the United States (the importing Member) invoked Article XIX to implement

[76] *See 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." (emphasis added), para. 5.60.

[77] Third-Party Submission of Japan, para. 10 (emphasis in original).

[78] India's First Written Submission, para. 63.

[79] *See* U.S. First Written Submission, paras. 52-73.

safeguard measures.[80] Accordingly, these reports by the Appellate Body would not assist the Panel in its assessment of India's justification for is additional duties.

51. With reference to paragraphs 104-105 of India's first written submission, please comment on India's discussion of certain provisions of the Agreement on Sanitary and Phytosanitary Measures. In the view of the United States, is the relationship between the provisions mentioned by India analogous to the relationship between Articles I and II of the GATT 1994 on the one hand, and Article XIX of the GATT 1994 and the Agreement on Safeguards on the other hand?

Response:

120. In terms of the relationship between a safeguard measure and a GATT provision that has been modified, suspended, or withdrawn by the *application* of the safeguard, the United States refers the Panel to the U.S. response to question 46. Regarding the broader relationship between the Safeguards Agreement and the GATT 1994, Article 11.1(c) of the Safeguards Agreement provides useful guidance for understanding the relationship between those agreements. In full, Article 11.1(c) provides:

> This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 **other than Article XIX**, and Multilateral Trade Agreements in Annex 1A other than this Agreement, pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.[81]

121. 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.

52. At paragraph 127 of its first written submission, India discusses the interpretation of Article 11.1(c) of the Agreement on Safeguards. According to India, the term "pursuant to" as used in that provision, "means 'must conform with' in the context of this provision. Therefore … the US must prove that its measures conform with Article XXI of GATT 1994 to establish that the Agreement [on] Safeguards does not apply".

Please comment

Response:

[80] *See US – Wheat Gluten (AB)*, (noting that the "United States notified the initiation of the investigation, the determination of serious injury, and the decision to apply the safeguard measure to the Committee on Safeguards".), para. 2; *and US – Line Pipe* (AB), (noting that "the United States notified the Committee on Safeguards of its decision to apply a safeguard measure on imports of line pipe".), para. 7.

[81] Emphasis added.

122. As a matter of law, India's argument is fundamentally wrong. The fact that the U.S. national security measures are justified by Article XXI of the GATT 1994 means that the U.S. national security measures *cannot* be safeguards. 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.[82]

123. But in some hypothetical scenario where a measure was not found to be within the scope of Article XXI of the GATT 1994, there is no basis in the text of the WTO Agreement for finding, based on this fact alone, that the measure is thus within the scope of Article XIX of the GATT 1994. Rather, as the United States has explained, Article XIX only applies where a Member invokes that provision as a basis for suspending concessions. And, as is undisputed here, the United States has not invoked Article XIX.

124. Furthermore, India's argument would seem to result in the unsustainable proposition that *any* measure inconsistent with any WTO obligation or concession, and not found to be justified by some other WTO provision, would somehow fall within the scope of the Safeguards Agreement.

53. At paragraph 96 of its third-party submission, the European Union argues that "Article 11.1(c) [of the Agreement on Safeguards] cannot serve as a basis for a unilateral determination by a WTO Member as to the applicability or not of an agreement". In support of this position, the European Union refers to the Appellate Body reports in *US – 1916 Act (EC)* and *US – Offset Act (Byrd Amendment)*.

Please comment on the relevance, if any, of these reports to the present dispute.

Response:

125. The European Union's assertions in paragraph 96 of its third party written submission are part of its broader argument regarding U.S. measures that are **not** at issue in this dispute. Namely, in Section 3.5 of its third party written submission, the European Union makes numerous assertions regarding the U.S. national security measures on steel and aluminum, measures that are **not** at issue in this dispute.[83] India and the European Union are challenging the U.S. national security measures on steel and aluminum in separate disputes,[84] and those measures are not at issue in this proceeding. Accordingly, the European Union's assertions in paragraph 96 (and its broader argument in Section 3.5 of its third party written submission,

[82] Emphasis added.

[83] *See* Third Party Submission of the European Union, paras. 94-103.

[84] *US – Steel and Aluminum Products (India)*, WT/DS547/8; and *US – Steel and Aluminum Products (European Union)*, WT/DS548/14.

including its reference to the Appellate Body reports in *US – 1916 Act (EC)* and *US – Offset Act (Byrd Amendment)*) are not relevant to the Panel's assessment of whether India has any justification for breaching Articles I and II of the GATT 1994.