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

(DS559)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

September 24, 2019

TABLE OF REPORTS

Short Form	Full Citation
Indonesia – Iron or Steel Products (Viet Nam) (AB)	*Appellate Body Report, Safeguard on Certain Iron or Steel Products*, WT/DS/490/AB/R, WT/DS/496/AB/R, adopted 27 August 2018
Indonesia – Iron or Steel Products (Viet Nam) (Panel)	*Panel Report, Safeguard on Certain Iron or Steel Products*, WT/DS/490/R, WT/DS/496/R, adopted 27 August 2018, as modified by Appellate Body Report, WT/DS/490/AB/R, WT/DS496/AB/R

Mr. Chairperson, members of the Panel:

1. The United States thanks you for agreeing to serve on this Panel, and we would like to express our gratitude as well to the Secretariat staff assisting you with your work. The United States appreciates this opportunity to present its views on the issues in this dispute.

2. The United States initiated this dispute in response to the European Union's measure that discriminatorily imposes additional duties on goods originating in the United States that exceed the level set out in the European Union's Schedule of Concessions. Significantly, the European Union does not contest these basic features of its additional tariff measures.

3. The European Union's failure to contest these basic features of its measures simplifies this dispute. All that remains for this Panel is to evaluate the argument that the European Union has raised in an attempt to rebut the U.S. *prima facie* case that the European Union measures are inconsistent with Articles I and II of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). In particular, the question is whether the European Union has established that its measure is justified under the safeguards theory raised in its first written submission. For the reasons set out in our first written submission, which we will discuss further today, the European Union's argument is without merit. In particular, the United States has not adopted any relevant safeguard, and, accordingly, the rights and obligations under Article XIX of the GATT 1994 and the WTO *Agreement on Safeguards* ("Safeguards Agreement") are simply inapplicable to the issues in this dispute.

4. As the United States explained in its first written submission, a measure is only a safeguard when it arises under Article XIX of the GATT 1994. That provision requires invocation of the right to apply a safeguard measure with notice under Article XIX:2. Without this invocation and notice from the WTO Member taking action, that Member is not seeking legal authority under Article XIX to suspend its obligations or withdraw or modify its concessions. Therefore, such a measure without invocation is not a safeguard for purposes of Article XIX. Moreover, another WTO Member cannot assert that Article XIX should have been invoked and, on that basis, adopt immediate and unilateral retaliation.

5. But this is exactly the position the European Union is advancing in this dispute. In fact, the European Union plainly states its unprecedented and unsupportable view that the European Union is allowed to adopt retaliatory measures whenever it deems appropriate at the beginning of its first written submission. The EU wrote that "[p]erhaps the United States thought that the European Union would just allow [the United States] to obtain years of free protection for its steel and aluminium industries, while the European Union and other WTO Members would *merely challenge in WTO dispute settlement the legality of these measures*, taken in open disregard for the binding concessions it negotiated in the WTO."[1]

6. In other words, the European Union believes that a measure the United States has implemented is inconsistent with its obligations under the WTO Agreement. And, the EU is currently challenging that measure in a separate WTO dispute. But instead of "merely" following the procedures for dispute settlement under the WTO Agreement that were negotiated

[1] European Union's First Written Submission, para. 1.

and agreed to as the proper course of action when a Member believes another has breached certain obligations, the European Union has decided *for itself* that it needed a way to retaliate immediately, and it is trying to justify that policy decision by advancing a novel and unsupportable interpretation of the Safeguards Agreement and Article XIX of the GATT 1994. In addition to lacking any support in the text of the WTO Agreement, the European Union's position is completely at odds with a basic element of the WTO Agreement that a Member is to utilize WTO dispute settlement if a Member believes a measure implicates WTO rules.

7. Additionally, the European Union has not considered the serious consequences that attend its view of the WTO Agreement. Omission of this consideration is remarkable, as it suggests that the European Union has not evaluated whether the test it urges the Panel to adopt in this dispute would transform *any* measure inconsistent with a GATT obligation or concession *into a safeguard*, based solely on the judgment of any other Member. And as a result, under the European Union's theory, in those circumstances a Member could decide for itself to adopt retaliatory measures. Prior to the current situation, no WTO Member had ever contended that it had the right to adopt retaliatory measures based on its own unilateral assertion that another Member had adopted a safeguard. The European Union's erroneous position would be comical if not for the clear and immediate threat it presents to the rules-based trading system.

8. In sum, the European Union's position in this dispute is untenable for multiple reasons. It lacks any support in the relevant text, is unprecedented in the history of the GATT and WTO system, and would have disastrous effects if adopted.

I. THE EUROPEAN UNION'S MEASURE BREACHES ITS WTO OBLIGATIONS BY APPLYING WITHOUT JUSTIFICATION ADDITIONAL DUTIES IN EXCESS OF ITS BOUND RATES AGAINST PRODUCTS ORIGINATING ONLY IN THE UNITED STATES

9. In our first written submission, we explained that the European Union's measure imposes duties in excess of its bound rates on U.S.-originating products only. The European Union does not challenge the factual basis of the U.S. claims. Instead, the European Union responds by asserting that its measures are allowed under Article XIX and the Safeguards Agreement. The European Union has presented this argument, and thus has the burden of argument and evidence to establish it. But even aside from any question of burden in this circumstance, the European Union cannot establish this justification because there is no U.S. safeguard relevant to the matters in this dispute.

A. The European Union's Additional Duties Breach the European Union's obligations under Article I and Article II of the GATT 1994.

10. The European Union does not challenge that its measure applies additional duties of 25 percent on 181 tariff lines at issue, and 10 percent on the remaining tariff line at issue, for products originating in the United States. Accordingly, as demonstrated in the U.S. first written submission, the additional duties for all 182 tariff lines have resulted in tariffs applied to U.S.-originating products that are higher than the rates of duty applied to other WTO Members on an MFN basis. In addition, of the 182 tariff lines at issue, all but two apply rates of duty to U.S.-

originating products in excess of the European Union's Schedule. As such, the European Union does not dispute the United States' factual claim with respect to the tariff lines in question.

11. Accordingly, the United States has established, that U.S.-originating products do not receive an advantage, favor, privilege or immunity granted by the European Union with respect to customs duties and other charges imposed on or in connection with the importation of products from other Members; that the European Union accords less favorable treatment to products originating in the United States than what is provided for in the European Union's schedule; and that the European Union imposes duties or charges in excess of those set forth in the European Union's schedule.

B. The European Union Has the Burden of Establishing a Justification for Its Breach of Article I and II of the GATT 1994

12. The European Union's first written submission appears to confuse certain concepts in an attempt to alleviate the burden of justifying its additional duties. A straightforward approach to burden of proof and making out a *prima facie* case, however, shows that the burden has shifted to the European Union to offer any justification it decides to raise in attempting to rebut the claims of the United States.

13. As an initial matter, the European Union erroneously mixes the requirements for a panel request under Article 6.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), and issues regarding the burden of proof. For example, the European Union contends that the United States has failed to discharge its burden of proof" because the U.S. panel request does not cite the provisions in the GATT 1994 and the Safeguards Agreement relevant to the European Union's purported justification. This proposition is illogical and unsupportable. The U.S. panel request appropriately cites the provisions of the WTO Agreement with respect to which the United States believes the European Union's tariff measures are inconsistent. In these circumstances, of course the panel request would not cite to safeguard provisions in the WTO Agreement. Indeed, there is no relevant U.S. safeguard, and Article XIX or the Safeguards Agreement are not ***relevant*** to this dispute.

14. The burden of proof is a separate issue, not related to the requirements under Article 6.2 of the DSU. On this issue, it is the European Union that believes these provisions are relevant. Accordingly, the European Union, as the party asserting that proposition, must carry the burden to establish the point.

15. The DSU establishes a system by which one WTO Member can bring forward representations concerning a measure taken by another Member, and if necessary, have the DSB establish a panel to consider the matter the party identifies.[2] In the light of those representations, the responding party may choose to bring forward facts or arguments in rebuttal, including the relevance of other provisions or other covered agreements to the claim asserted by the

[2] *See* Article 3.3 of the DSU ("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 and the maintenance of a proper balance between the rights and obligations of Members."); *see also* Article 6 of the DSU.

complaining party. And, DSU Article 7.2 is clear that the Panel should proceed to address the provisions of a covered agreement cited by the parties to the dispute.

16. In any event, we do not see this dispute as turning on academic questions of which party bears the burden of proof on a particular matter. As the United States has explained, the European Union's purported safeguards justification fails *ab initio* because the United States never invoked its rights under the WTO safeguard provisions. This factual issue is not in dispute.

17. In sum, contrary to the European Union's contentions, the United States has more than satisfied its burden to establish a *prima facie* case in this dispute. The U.S. first written submission addressed the measure at issue, identified the obligations that the European Union has breached, and the legal and factual support for this assertion. And although not required, the U.S. first written submission rebutted the safeguard justification that the European Union ultimately presented in its first submission. As such, the United States provided more than sufficient evidence and legal argument to warrant panel findings that the European Union has breached its obligations under Article I and Article II of the GATT 1994.

C. The European Union has no Basis for Asserting that Its Additional Duties Can be Justified Under the GATT 1994 or Safeguards Agreement

18. We now turn to the European Union's argument that Article XIX of the GATT 1994 and the Safeguards Agreement are applicable to this dispute. In short, they are not. The United States did not invoke its right to apply a safeguard measure in relation to any matter relevant to this dispute. The exercise of that right is a condition precedent, not only for a measure to constitute a safeguard under the disciplines of the WTO, but for another Member permissibly to engage in unilateral retaliation under these disciplines.

19. Article 1 of the Safeguards Agreement "establishes rules for the application of safeguard measures" and provides a definition that a safeguard measure "shall be understood to mean those measures provided for in Article XIX of GATT 1994." Incredibly, the European Union does not even reference the text of this definition in its first written submission.

20. Despite the European Union's omission, it is clear that this text carries significance. Starting with this definition of a "safeguard", the GATT 1994 and the Safeguards Agreement set out a simple and syllogistic approach to determine whether a measure constitutes a safeguard under the WTO Agreement. The first (and, in this dispute, only applicable) step in the process, according the text of the Safeguards Agreement, is to ascertain whether a Member has actually invoked its right to apply a safeguard measure under Article XIX of the GATT 1994.

21. Where a Member has not taken action to invoke this right, then the rights and obligations triggered by that invocation are simply not relevant to the particular matter. Because the rights and obligations under the WTO safeguards provisions are inapplicable, a Member cannot assert Article 8.2 of the Safeguards Agreement as justification for unilateral retaliation.

1. Invocation is a Condition Precedent to Apply a Safeguard Measure Under GATT Article XIX and the WTO Agreement on Safeguards

22. Despite the European Union's contrary assertions, the first step to determine whether a WTO Member has applied a safeguard measure under Article XIX and the Safeguards Agreement is identifying whether the Member in question has invoked the right under these provisions. Absent this invocation, a measure does not and cannot fall under the WTO's safeguard disciplines. The reason for this is simple. The text of the relevant provisions establishes this to be the case.

23. First, as noted above, Article 1 of the Safeguards Agreement defines a safeguard "to mean those measures provided for in Article XIX of GATT 1994."

24. Second, Article XIX of the GATT 1994, in relevant part,[3] provides:

> If … any product is being imported into the territory of [a] contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party *shall be free*, in respect of such product, … to suspend [its] obligation in whole or in part or to withdraw or modify [its] concession.

25. The text makes clear that a Member which finds that increased imports of a product have caused or threaten serious injury to domestic producers of that product may, *in its discretion*, invoke the right reserved to it and apply a safeguard measure. The phrase "shall be free" establishes that the decision is up to that Member. The Appellate Body in *Indonesia – Iron and Steel Products* reasoned similarly that the words "shall be free" in Article XIX "simply accord to a Member the '**freedom**' to exercise its right to impose a safeguard measure by suspending a GATT obligation or withdrawing or modifying a GATT concession if the conditions set out in the first part of Article XIX:1(a) are met."[4] Accordingly, a Member may elect, as its right, to invoke Article XIX and implement a safeguard measure. Absent a Member's invocation of that right, however, the safeguard provision is not relevant, and a measure cannot constitute a safeguard.

26. A Member's ability to exercise that right, at a minimum, requires invocation with notice to other Members under Article XIX:1(b) before the Member can take the action to apply a safeguard measure. Without invocation, and without notification of that invocation, a Member has not invoked the right under Article XIX and, therefore, is not "free" to suspend any obligation, in whole or in part, or withdraw or modify any concession. A measure that is applied

[3] The omitted text relates to the conditions and circumstances that must be satisfied, not to invoke the *right* to apply a safeguard measure, but to ensure that the safeguard measure applied is in a WTO-consistent manner. In other words, these conditions and circumstances do not address the question of whether a measure is a safeguard but whether a safeguard measure is WTO-consistent.

[4] *Indonesia – Iron and Steel Products (Viet Nam) (AB)*, para. 5.55, FN 188 (emphasis added).

without invocation of the right through notification to other Members may *or may not* be inconsistent with certain WTO obligations, but it is not magically transformed into a safeguard measure because another Member wants to characterize it that way.

27. The requirement for invocation as a triggering condition is further reflected in the other relevant provisions of Article XIX of the GATT 1994 and the Safeguards Agreement. Article XIX:2 and XIX:3(a) establish that invocation, in the form of notice, is a condition precedent to taking action in the form of a safeguard measure and, importantly, a condition precedent for another Member to retaliate. Specifically, Article XIX:2 states that "[b]efore any [Member] shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to [Members] as far in advance as may be practicable…." Article XIX:3, in turn, provides that "[i]f agreement among the interested [Members] with respect to the action is not reached, the Member 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 [Members] *shall **then** be free*, … to suspend … substantially equivalent concessions or other obligations under this Agreement…."

28. Accordingly, notification is a triggering event after which, and only after which, another Member can suspend substantially equivalent concessions or other obligations under this provision. Articles 8 and 12 of the Safeguards Agreement establish the same. Under Article 12 of the Safeguards Agreement, a Member shall provide immediate notification of a safeguards investigation and Article 8 makes clear that a "Member *proposing to apply a safeguard measure* or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations … in accordance with the provisions of paragraph 3 of Article 12." Where no agreement is reached under these provisions, an exporting Member shall be free to suspend substantially equivalent concessions if the Member applying a measure has invoked Article XIX and, therefore, actually implemented a safeguard measure.

29. To summarize, the European Union has not grounded its novel interpretation n the text of the Safeguards Agreement and Article XIX. The actual agreement makes clear that invocation of Article XIX is a condition precedent for a measure to constitute a safeguard.

2. The European Union's Argument that the Applicability of the Safeguards Agreement is an "Objective Question" Misses the Point

30. The European Union argues that the U.S. position is incorrect because the applicability of the Safeguards Agreement must involve an "objective question." This argument completely misses the point. The United States agrees that the applicability of the Safeguards Agreement to a particular matter is an "objective question." The United States disagrees, however, on the specific content of that objective question. As the United States explained in its first submission, the first step in the analysis is the "objective question" of whether a Member has sought to invoke its right under Article XIX to suspend its obligations or withdraw concessions. If not, then a safeguard is not involved. If so, the "objective question" will turn to whether the measure at issue meets additional elements required for meeting the definition of a safeguard.

31. The question of whether or not a Member has taken a certain action in the past – here, the invocation of the safeguard agreement – is the standard type of objective question evaluated in

every dispute settlement proceeding. It is no different than the question of, for example, whether a Member has adopted a measure increasing duties, or whether a Member has notified a TBT measure to the TBT Committee.

32. At best, perhaps the European Union does not understand the U.S. position. In particular, the United States is not arguing that the statements in the first U.S. submission regarding an absence of invocation is a proposition that cannot be questioned. Nor is the United States arguing that the invocation of Article XIX rights can occur, or can be disavowed, in a dispute settlement submission. To the contrary, whether or not a Member has invoked the Safeguards Agreement is an objective question, involving what actually happened in the past. And here, the United States did not invoke any rights under Article XIX. And, indeed, the European Union presents no factual evidence to the contrary.

33. In its first written submission, the European Union relies on findings in other disputes. Those disputes, however, are inapplicable; they simply do not address a situation where a Member has never invoked its right to adopt a safeguard under Article XIX. That no prior reports address the current situation is completely unsurprising. To the knowledge of the United States, this is the first time that any Member has ever asserted the right to adopt unilateral retaliation simply on the basis that it viewed another Member as adopting a safeguard.

34. Moreover, the reasoning in the reports cited by the European Union do not even support the European Union's positions. In *Indonesia – Iron and Steel Products*, the panel recognized that a "fundamental question" arising in the dispute was whether the measure should properly be considered a safeguard measure within the meaning of Article 1 of the Safeguards Agreement. The panel pointed out that "not *any* measure suspending, withdrawing or modifying a GATT obligation or concession will fall within the scope of Article XIX:1(a)."[5]

35. The Appellate Body report in that dispute also noted the importance of applying the text of the WTO Agreement, and thus does not support the European Union's approach of inventing tests not found in the agreement. In particular, the Appellate Body relied on the relevant text in Article 1 of the Safeguards Agreement, specifying that safeguards are "measures provided for in Article XIX of GATT 1994."[6]

36. Notably, the Appellate Body was reviewing a situation where both parties to the dispute believed the measure at issue was a safeguard and the dispute followed invocation and notification under Article XIX and the Safeguards Agreement. The framework in *Indonesia – Iron and Steel Products*, accordingly, is fully consistent with the proposition that invocation and notification under Article XIX are a necessary but not a sufficient condition to impose a safeguard measure.

37. In fact, the Appellate Body in *Indonesia – Iron and Steel Products* adopted 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

[5] *Indonesia – Iron and Steel Products (Viet Nam) (Panel)*, para. 7.14 (emphasis in original).

[6] *Indonesia – Iron or Steel Products (Viet Nam) (AB)*, para. 5.54.

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."[7]

38. Under the first step of that analysis, as stressed above, 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 it 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 is immaterial.

3. The European Union's Approach Fails Under its own Test

39. Significantly, even under the approach the European Union urges this Panel to adopt, the relevant factors in question still support the United States' position. As an initial matter, the European Union does not recite the factors identified by the Appellate Body in *Indonesia – Iron and Steel Products* that a panel should evaluate under the test the European Union proposes. It is harmful enough to its position not to *apply* the relevant factors but even worse for the European Union not to *identify* each of the factors in the first place.

40. Presumably, the European Union does not recite the relevant factors because their identification and application undermines its characterization of the U.S. security measures as a safeguard. It is uncontested that the U.S. security measures were imposed under domestic law addressing threats to national security and not Section 201 of the Trade Act of 1974 that the United States uses to impose import relief in the form of a safeguard measure. Moreover, the underlying procedures to impose the U.S. security measures involved the U.S. Department of Commerce with engagement from the U.S. Department of Defense and not the U.S. International Trade Commission, which is the only competent authority in the United States authorized to investigate whether a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to a domestic industry that produces like or directly competitive products for the purpose of applying a safeguard measure.

41. Accordingly, were the Panel to evaluate the U.S. security measures under the factors from the test proposed by the European Union, it would find that the United States' characterization of the measure under its domestic law is as a national security matter, the procedures did not involve the only competent authority that can administer a safeguards investigation, and of course, there was no notification to the WTO Committee on Safeguards because the United States, unlike the implementing Member in *Indonesia – Iron and Steel Products*, did not invoke Article XIX of the GATT 1994.

[7] *Id*. (emphasis in original).

42. The European Union, for all its arguments, does not actually apply the factors it considers relevant for its characterization of the U.S. security measures.

43. Notwithstanding that the European Union does not actually apply its own test, the United States repeats that the ultimate "constituent feature" to consider in this dispute is whether the United States has invoked its rights under Article XIX as the condition precedent necessary for a measure to constitute a safeguard. The Appellate Body in *Indonesia – Iron and Steel Products* analyzed an alleged safeguard measure from a different context where this essential step had already occurred. As reiterated above, this is not the case in the current dispute. Accordingly, the measure cannot be a safeguard and the European Union's unilateral retaliation is an unjustified breach of GATT Articles I and II.

4. The European Union's Erroneous Approach Would Undermine the Rules-Based Trading System if Adopted

44. It is axiomatic that measures raising duties almost always entail a benefit to domestic industries producing the articles in question by increasing the price of imports and impacting competition. The European Union's definition of a safeguard as a measure that restricts imports to benefit a domestic industry, however, collapses upon itself and transforms every measure into a safeguard, thereby allowing any WTO Member at any time to unilaterally retaliate under the dubious theory the European Union espouses.

45. Whether the European Union recognizes this, the test it proposes fails in application for purposes of this dispute. In its first written submission, the European Union offers the following:

> For example, if the facts do not demonstrate serious injury but merely injury, or even no injury at all, the conclusion is not that the measure falls outside the scope of the Agreement on Safeguards. Rather, the conclusion is that the measure falls within the scope of the Agreement on Safeguards, but is inconsistent with various provisions of that Agreement. In other words, the focus of the analysis is on the objective of the measure. *Similarly, if the facts demonstrate that there is no absolute or even relative increase in imports, the conclusion is not that the measure falls outside the scope of the Agreement on Safeguards. Rather, the conclusion is that the measure falls within the scope of the Agreement on Safeguards, but is inconsistent with various provisions of that Agreement*.[8]

46. Under the European Union's test, implementation of a measure without consideration of serious injury or increased imports still constitutes a safeguard (just a WTO-inconsistent one). But this approach would cover *at least* all antidumping measures a Member may impose. It therefore proves the United States' view that there is no limiting principle to the European

[8] European Union's First Written Submission, para. 174 (emphasis added).

Union's test that would prevent it from swallowing all measures and allowing unilateral retaliation.

47. Invocation of Article XIX and the Safeguards Agreement, and not the European Union's approach, is the test for determining whether a measure constitutes a safeguard. This is not just because the relevant text dictates it but because the European Union's test would have disastrous consequences.

48. The extreme position the European Union would countenance, and that it asks the Panel to endorse, does not seem compatible with and supportive of a rules-based trading system.

II. CONCLUSION

49. Ultimately, the European Union's position is based on an untenable reading of GATT 1994 Article XIX and the Safeguards Agreement, a misapplication of prior WTO reports, and certain arguments that lack any foundation in logic. Accordingly, there is simply no basis to find that the European Union's measure is anything other than duties applied without justification only against products originating in the United States and that exceed the European Union's bound rates. As such, they are clear breaches of the European Union's obligations under Articles I and II of the GATT 1994.

50. Mr. Chairperson, members of the Panel, this concludes our opening statement. We would be pleased to respond to your questions.