CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS558)

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

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EC – Tariff Preferences (India) (AB)	*Appellate Body Report, European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004
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
US – Wool Shirts and Blouses (India) (AB)	*Appellate Body Report, United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997

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 China's measure that discriminatorily imposes additional duties on goods originating in the United States that exceed the level set out in China's Schedule of Concessions. Significantly, China does not contest these basic features of the United States' claims related to most-favored-nation treatment (MFN) or for almost all of tariff lines identified as exceeding China's bound rate. China does not appear to dispute this as part of its fabricated safeguards defense that implies the measure in question breaches China's obligations under Articles I and II of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

3. China's failure to contest these basic features of the United States' claims simplifies this dispute.

4. All that remains for this Panel is to evaluate the argument that China has raised in defense of its measure. In particular, the question is whether China 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, no such defense is available to China. 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 Safeguards Agreement are simply inapplicable to the issues in this dispute.

5. 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, and that 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, the implemented measure 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.

6. Moreover, China does not even attempt to address the serious consequences that attend its view of the WTO Agreement. This omission is remarkable, as it suggests that China has no answer to the U.S. point that the test China urges the Panel to adopt in this dispute would transform *any* measure imposing duties *into a safeguard* and automatic allow retaliation against the implementing Member. Not only is such an interpretation baseless, it would mean that any retaliating Member could nonsensically assert, *in its judgment*, that another Member's measure is a safeguard that justifies retaliatory measures that otherwise would contravene basic obligations under the GATT 1994. Prior to the current situation, no WTO Member had ever contended that it had the right to adopt retaliatory measures under this self-declared safeguard theory. China's erroneous position would be comical if not for the clear and immediate threat it presents to the multilateral trading system.

7. In sum, China'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 on the rules-based trading system if adopted.

I. CHINA'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

8. In our first written submission, we explained that China's measure imposes duties in excess of its bound rates on U.S.-originating products only. China does not challenge the factual or legal basis of the U.S. claims. Instead, China asserts a defense under Article XIX and the Safeguards Agreement. China has the burden of any "safeguards" defense, and in the circumstances of this dispute, China cannot establish this defense because there is no U.S. safeguard relevant to the matters in this dispute.

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

9. China's does not challenge that its measure applies additional duties of 15 percent or 25 percent on 128 tariff lines for products originating in the United States. Accordingly, as demonstrated in the U.S. first written submission, the additional duties for all 128 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 a MFN basis. In addition, China believes that only a few of its 128 tariff lines do not result in duties applied to U.S.-originating products in excess of the rates of duty set out in China's Schedule. As such, China does not dispute the United States' claim with respect to almost all of the tariff lines in question.

10. Accordingly, the United States has established, without any rebuttal from China, that U.S.-originating products do not receive an advantage, favor, privilege or immunity granted by China with respect to customs duties and other charges imposed on or in connection with the importation of products from other Members; that China accords less favorable treatment to products originating in the United States than what is provided for in China's schedule; and that China imposes duties or charges in excess of those set forth in China's schedule.

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

11. China's first written submission appears to confuse certain concepts in an attempt to alleviate the burden of defending 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 China to offer any defense it decides to raise in attempting to rebut the claims of the United States.

12. Specifically, according to China, the United States "failed to establish a *prima facie* case of inconsistency with Article I and II of GATT 1994 without presenting evidence and argument sufficient to establish a presumption that China's measures are not consistent with Article XIX of

GATT 1994 and the Safeguard Agreement."[1] This proposition is unsupportable. The U.S. claim does not assert a breach of any right or obligation under the 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. To the extent that China believes these provisions are relevant, China is the party asserting that proposition and must carry the burden to establish the point.

13. The WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (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 complaining party. In this system of complaining and responding parties, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense."[3] Indeed, China apparently agrees with this basic principle, as China quotes this line from the Appellate Body's report in *US – Wool Shirts and Blouses* in its first written submission. Here, China is asserting the relevance of Article XIX and the Safeguards Agreement to this dispute, and thus China bears the burden of proof to establish their application as a defense to the measure it has imposed.

14. Accordingly, a complainant that presents a *prima facie* case creates a rebuttable presumption the burden of which shifts to the respondent to disapprove. In other words, once a WTO Member establishes a *prima facie* case with sufficient evidence to raise a presumption in favor of its claim, the defending party will need to rebut that presumption with any defense it may present. Failing that, the measure will be found inconsistent with its obligations under the WTO Agreement.

15. Furthermore, contrary to China'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 China has breached, and the legal and factual support for this assertion. As such, the United States provided adequate evidence and legal argument to demonstrate that China's retaliatory measure applies additional duties only against U.S.-originating products and those duties exceed its bound rates.

16. The burden thus shifts to China to present any argument in defense of its measure, where failure to provide such a defense must result in the Panel finding the measure at issue to be WTO-inconsistent.

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[1] China's First Written Submission, para. 73.

[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.

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

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

17. We now turn to China'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.

18. 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, China does not even reference this definition in its first written submission.

19. Despite China's omission, willful or otherwise, 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.

20. 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

21. Despite China'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.

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

23. Second, Article XIX of the GATT 1994, in relevant part,[4] provides:

[4] 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.

> 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.

24. 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."[5] 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.

25. 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 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.

26. China's failure to ground its approach in the text of the Safeguards Agreement and Article XIX conveniently overlooks the actual definition of a safeguard for purposes of the WTO Agreement and ignores that, under the relevant text, invocation of Article XIX is a condition precedent for a measure to constitute a safeguard.

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

27. China argues that the U.S. position is incorrect because the applicability of the Safeguard 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 to withdraw concessions. If not, then a safeguard is not

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

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.

28. China apparently takes the position that the first step in this analysis does not involve an objective question. China, however, has no basis for this position. 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.

29. At best, perhaps China 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, China presents no factual evidence to the contrary.

30. In its written submission, China 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 rights 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.

31. Moreover, the reasoning in the reports cited by China do not even support China'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)."[6]

32. The Appellate Body report in this dispute also noted the importance of applying the text of the WTO Agreement, and thus does not support China'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."[7] Similar to the panel, the Appellate Body stated that "a plain reading of Article XIX:1(a) suggests that the 'measures provided for' in that provision are measures that *suspend a GATT obligation* and/or *withdraw or modify a GATT concession*…. In other words, the action contemplated under Article XIX:1(a) consists of the suspension, in whole or in part, of a GATT obligation or the withdrawal from or modification of a GATT concession. Absent such a

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

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

suspension, withdrawal, or modification, we fail to see how a measure could be characterized as a safeguard."[8]

33. 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.

34. 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 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."[9]

35. 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. China's Approach Fails Under its own Test

36. Significantly, even under the approach China urges this Panel to adopt, the relevant factors still support the United States' position. 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.

37. Accordingly, were the Panel to evaluate the U.S. security measures under the factors proposed by China, it would find that the United States' characterization of the measure under its

[8] *Id.* para. 5.55 (emphasis in original).

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

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.

38. China, for all its arguments, does not actually apply the factors it considers relevant to the U.S. security measures it references.

39. Notwithstanding that China 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 China's unilateral retaliation is an unjustified breach of GATT Articles I and II.

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

40. 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. China'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 China espouses. As noted above, any measure with dutiable consequences – such as ordinary customs duties, other duties or charges, fees or charges for services rendered, antidumping duties, anti-subsidy duties, balance-of-payments duties, or others – represents a tariff barrier and restricts imports of a product that competes with the products of a domestic producer. The potential effect of a measure is not the touchstone to determine what qualifies as a safeguard. If that were the case, the term would have no meaning and the authority to define what constitutes a safeguard measure would belong to the WTO Member *seeking to challenge the measure*. Or, that WTO Member could simply characterize any measure it dislikes as a safeguard and immediately retaliate in a unilateral fashion without having to initiate dispute settlement proceedings.

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

D. China's Preliminary Ruling Request is Baseless

42. We turn finally to China's request for a preliminary ruling. China presents no colorable basis that the United States was required to identify in its panel request a provision in the WTO Agreement that the United States considers irrelevant to the outcome of the dispute.

43. Instead, China offers the Appellate Body's report in *EC – Tariff Preferences* as support for its position. As the United States will explain in more detail below, the Appellate Body's

finding in *EC – Tariff Preferences* is based on significantly different factual circumstances from this dispute and, to the extent it applies, contradicts the position China advances in its preliminary rulings request. In any event, the United States has more than satisfied the basic requirements of the DSU, and the claims in its panel request squarely fall within the Panel's terms of reference.

44. The United States begins, as the Appellate Body did in *EC – Tariff Preferences*, by recalling that the burden of proof allocation in WTO dispute settlement. As noted above, the general rule is that the burden of proof for a defense to a *prima facie* claim of WTO-consistency falls on the respondent as the party "assert[ing] the affirmative of a particular ... defense. From this allocation of the burden of proof, it is normally for the respondent, first, to *raise* the defense and, second, to *prove* that the challenged measure meets the requirements of the defense provision."[10] To be clear, this rule that represents the standard burden of proof allocation in WTO dispute settlement proceedings applies to this dispute.[11]

45. In this dispute, China has asserted that certain permissive provisions of the Safeguards Agreement and Article XIX are relevant. Because China would have the provisions considered as justification for the retaliatory measure it has imposed, it is for China to demonstrate their applicability. As mentioned above, the failure to establish this defense, in light of the *prima facie* case the United States has presented—and which China does not dispute—would require the Panel to find the measure at issue to be WTO-inconsistent.

46. In addition to the general rule that applies in this dispute, the United States stresses the significant differences between the facts in *EC – Tariff Preferences* and this matter. In the earlier dispute, India not only considered the Enabling Clause to be relevant but wanted the Panel to examine the consistency of the EC's measure with Article I of the GATT 1994. This is clear from India's panel request that asked the Dispute Settlement Body:

> *to establish a panel to examine whether* (i) the provisions of the EC GSP scheme granting tariff preferences under the special arrangements for combating drug production and trafficking and the special incentive arrangements for the protection of labour rights and the environment, (ii) any implementing rules and regulations, (iii) any amendments to any of the foregoing, and (iv) their application *are consistent with Article I:1 of the GATT 1994 and the requirements set out in paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause*.[12]

47. The United States, however, is not asking this Panel to examine whether China's measure is consistent with the provisions of the Safeguards Agreement, such as Article 8.2, just as it is not asking the Panel to examine whether China's measure is consistent with the WTO Agreement on

[10] *EC – Tariff Preferences (India) (AB)*, para. 104 (emphasis in original).

[11] *See*, *EC – Tariff Preferences (India) (AB)*, para 88.

[12] *EC – Tariff Preferences (India)*, Request for Establishment of a Panel, WT/DS/246/4.

Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the WTO Agreement on Subsidies and Countervailing Measures, or the Agreement on Trade-Related Aspects of Intellectual Property Rights. The reason is because they are not relevant.

48. China's retaliatory measure, and, for that matter, the U.S. security measures, are not safeguards, they are not antidumping measures, and they do not involve countervailing duties or intellectual property protection. The Chinese measure, however, **is** applying additional duties in excess of its Schedule and only on products originating in the United States, which directly implicates Articles I and II of the GATT 1994.

49. In other words, the United States made no claim under the Safeguards Agreement or Article XIX not because it thinks China's measure is inconsistent with those provisions but because the United States (unlike India in *EC – Tariff Preferences*) does not think those provisions are *relevant*.

50. For these reasons, the United States has not brought any claims under irrelevant and unrelated provisions and is under no obligation to do so. Moreover, it is not for China to argue that the United States *should* have brought this dispute under a different provision of the WTO Agreement. To the extent that China disagrees, it is the party "assert[ing] the affirmative of a particular ... defense"[13] and bears that burden.

51. Finally, as the United States pointed out in its response to China's request for a preliminary rulings, and as the Appellate Body recognized in *EC – Tariff Preferences*, the relevance of the Enabling Clause to a WTO dispute entails "particular circumstances…dictating a *special approach*, given the fundamental role of the Enabling Clause in the WTO system as well as its contents."[14] In particular, the "Enabling Clause thus plays a vital role in promoting trade as a means of stimulating economic growth and development. In this respect, the Enabling Clause is not a typical 'exception', or 'defence', in the style of Article XX of the GATT 1994, or of other exception provisions identified by the Appellate Body in previous cases."[15] Unlike this dispute, involving a straightforward application of discriminatory duties in excess of a Member's bound rate, the Appellate Body highlighted that the "special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement" that are not at issue here.[16]

52. As such, the characterization of the measure in this dispute, about which the parties disagree, is the crux of China's defense whereas there was mutual agreement as to the characterization of the measure at issue in *EC – Tariff Preferences.* The Appellate Body specifically observed "that the measure challenged in this dispute is ***unmistakably*** a preferential tariff scheme, granted by a developed-country Member in favour of developing countries, and proclaiming to be in accordance with the GSP" and that it therefore was "clear, on the face of the Regulation and from official, publicly-available explanatory documentation, that the Drug

[13] *EC – Tariff Preferences (India) (AB)*, para. 104.

[14] *Id.* para. 106 (emphasis added).

[15] *Id.*

[16] *Id.* para. 107 (emphasis added).

Arrangements challenged by India in this dispute are part of a preferential tariff scheme implemented by the European Communities pursuant to the authorization in paragraph 2(a) of the Enabling Clause."[17] The facts of these dispute are simply incongruous.

II. CONCLUSION

53. Ultimately, China'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 China's measure is anything other than duties applied without justification only against products originating in the United States and that exceed China's bound rates. As such, they are clear breaches of China's obligations under Articles I and II of the GATT 1994.

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

[17] *Id.* para. 116-117 (emphasis added).