CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS558)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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USA-2	*Ministry of Commerce Notice on Publicly Soliciting Opinions on U.S. Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures* (Trade Relief and Investigation Bureau of the Ministry of Commerce, issued March 23, 2018)
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I. INTRODUCTION

1. The United States has brought this dispute to address measures adopted by China that are plainly inconsistent with the fundamental WTO obligations to provide Most-Favored-Nation treatment (MFN) and treatment no less favorable than that provided for in a Member's Schedule of Concessions, as set out respectively in Articles I and II of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

2. In particular, China has imposed additional duties on U.S. products with an annual trade value of approximately 3 billion dollars. China's measures imposing these additional duties breach China's MFN obligations under Article I of the GATT 1994, and China's commitments under Article II of the GATT 1994 to abide by China's tariff concessions.

3. China apparently has adopted these additional duties in response to certain U.S. measures that China asserts are inconsistent with WTO rules. China is challenging those U.S. measures in a separate, ongoing dispute,[1] and those measures are not at issue in this proceeding. What China cannot do under the WTO system is to adopt unilateral retaliation simply because China is concerned with certain U.S. measures.

4. The United States understands that China may intend to present an affirmative defense under the WTO Agreement on Safeguards ("Safeguards Agreement"). The United States has not invoked the WTO safeguard provisions, and the rights and obligations under the Safeguards Agreement are simply not applicable. Rather, this dispute involves a unilateral decision by China to adopt retaliatory measures, and this decision cannot be justified under WTO rules.

II. FACTUAL AND PROCEDURAL BACKGROUND

5. Effective April 2, 2018, the People's Republic of China ("China") applied additional duties of 15 percent or 25 percent on 128 tariff lines for products originating in the United States.[2] The additional duties for all 128 tariff lines resulted in tariffs applied to U.S.-originating products that are higher than the rates of duty applied to other WTO Members on a most-favored nation ("MFN") basis. Moreover, for all 128 tariff lines, the additional duties resulted in tariffs applied to U.S.-originating products that exceed the rates of duty set out in China's Schedule.

6. On March 23, 2018, China issued the *Ministry of Commerce Notice on Publicly Soliciting Opinions on U.S. Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures* ("*Opinions Notice*").[3] The *Opinions Notice* solicited public comment

[1] *United States – Certain Measures on Steel and Aluminium Products*, DS544.

[2] *State Council Customs Tariff Commission Notice on Suspension of Duty Concession Obligations on Some Imported Products Originating from the United States* (State Council Customs Tariff Commission, Shui Wei Hui [2018] No. 13, issued April 1, 2018, effective April 2, 2018) (Exhibit USA-1).

[3] *Ministry of Commerce Notice on Publicly Soliciting Opinions on U.S. Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures* (Trade Relief and Investigation Bureau of the Ministry of Commerce, issued March 23, 2018) (Exhibit USA-2).

regarding China's proposal to impose additional duties of 15 percent or 25 percent on the 128 tariff lines for products originating in the United States.

7. On April 1, 2018, the day immediately following the close of the eight-day public comment period,[4] China issued the *State Council Customs Tariff Commission Notice on Suspension of Duty Concession Obligations on Some Imported Products Originating from the United States* ("*Implementation Notice*").[5] The *Implementation Notice* imposed the additional duties with an effective date of April 2, 2018. The *Implementation Notice* indicated that the relevant duties of 15 percent or 25 percent apply *in addition to* the currently applied tariff rates, and will be assessed on an *ad valorem* basis.[6] Specifically, for each tariff line, "the imposed additional tariff rate" is added to the "current applied tariff rate," and the sum is multiplied by the "dutiable value" in order to calculate the duties owed.[7]

8. A list of the 128 tariff lines of U.S.-originating products subject to the additional duties is attached to the *Opinions Notice*, with a product description assigned at the 8-digit tariff level. According to the list, 120 tariff lines are subject to additional duties of 15 percent, and 8 tariff lines are subject to additional duties of 25 percent. A list of the same 128 tariff lines is also included as an attachment to the *Implementation Notice*. With respect to the product descriptions for each tariff line, the United States has noted various discrepancies between the lists in the *Opinions Notice* and the *Implementation Notice*.[8]

9. The 128 tariff lines of U.S.-originating products subject to additional duties fall under 6 different chapters of the Harmonized Tariff Schedule ("HTS")[9] and range from steel and aluminum products to a large number of food and agriculture products.[10] China has not explained its rationale for selecting these products. The *Opinions Notice* mentions that the

[4] The *Implementation Notice* does not contain information regarding the results of the eight-day public comment process. China has not made the comments available to the public. In a statement published on April 2, 2018, a spokesperson claimed, without citing any details, that "many people expressed their support for the measure and product list," and stated that China decided to implement the additional duties "after evaluation." *Ministry of Commerce Spokesman Issues Statement on China's Decision to Impose tariffs on Certain Imported Products from the United States* (Ministry of Commerce, published April 2, 2018) (Exhibit USA-3).

[5] *Implementation Notice*, (Exhibit USA-1).

[6] *Id*., paragraph 4 (Exhibit USA-1).

[7] *Id*. (Exhibit USA-1). The mathematical formula is given as: "Tariff = dutiable value × (current applied tariff rate + imposed additional tariff rate)." Paragraph 4 also provides that in addition to import tariffs, U.S.-originating products will be subject to the import consumption tax and import-stage value-added tax.

[8] For 88 out of the 128 products listed in Attachment 1 of the *Implementation Notice*, the 8-digit tariff line matches a product description in Attachment 1 of the *Opinions Notice*, but the product description is not verbatim. *See Implementation Notice*, Attachment 1 (Exhibit USA-1) and *Opinions Notice*, Attachment 1 (Exhibit USA-2).

[9] Seven tariff lines fall under HTS Chapter 2 ("Meat and edible offal"); 78 tariff lines fall under HTS Chapter 8 ("Edible fruit and nuts; peel of citrus fruit or melons"); three tariff lines fall under HTS Chapter 12 ("Oil seeds and oleaginous fruits; miscellaneous grains, seeds, and fruit; industrial or medicinal plants; straw and fodder"); six tariff lines fall under HS Chapter 22 ("Beverages, spirits, and vinegar"); 33 tariff lines fall under HTS Chapter 73 ("Articles of iron and steel"); and 1 tariff line falls under HTS Chapter 76 ("Aluminum and articles thereof"). *See Implementation Notice*, Attachment 1 (Exhibit USA-1).

[10] *Implementation Notice*, Attachment 1 (Exhibit USA-1).

additional duties are intended to "balance the loss inflicted on our country by the U.S. 232 Measures […]."[11] This statement was repeated by a spokesperson from China's Ministry of Commerce ("MOFCOM") on April 2, 2018.[12]

10. As noted above, China applied additional duties of 15 percent or 25 percent on 128 tariff lines for products originating in the United States that took effect on April 2, 2018, and remain in force. As the United States demonstrates in its Exhibits USA-14 and USA-15, for all 128 tariff lines, the additional duties on U.S.-originating products result in applied tariffs that are higher than China's MFN and bound rate commitments.

11. The United States will show that China has breached its MFN commitments, through Exhibits USA-14 and USA-15 to this submission, by referencing three numbers for each tariff line at issue: (1) China's applied MFN rate; (2) China's applied tariff rate on the U.S.-originating products *before* the additional duties took effect on April 2, 2018;[13] and (3) China's additional duty rate on the U.S.-originating products following the April 2nd effective date.

12. As a general matter, China's applied MFN rates are published in an annual tariff plan. To identify the applied MFN rates for 2018, the United States referenced the *State Council Customs Tariff Commission Notice on the 2018 Tariff Adjustment Plan* ("*2018 Tariff Plan*")[14] (effective January 1, 2018 through December 31, 2018). To identify the applied MFN rates for 2019, the United States referenced the *State Council Customs Tariff Commission Notice on the 2019 Adjustment Plan for Import and Export Provisional Duty Rates etc.* ("*2019 Tariff Plan*")[15] (effective January 1, 2019 through December 31, 2019). These annual tariff plans are issued by the State Council Customs Tariff Commission and implemented by the General Administration of Customs.[16] By matching individual 8-digit tariff lines, the United States was able to ascertain the applied MFN rates for the 128 tariff lines at issue in this dispute.

13. For 112 of the 128 tariff lines at issue, the applied MFN rate in 2018 and 2019 is effectively a *permanent duty rate*, meaning that the duty rate does not expire at the end of the calendar year. Permanent duty rates are published in an appendix of the annual tariff plan.[17]

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[11] *Opinions Notice* (Exhibit USA-2).

[12] *Ministry of Commerce Spokesman Issues Statement on China's Decision to Impose Tariffs on Certain Imported Products from the United States* (Ministry of Commerce, published April 2, 2018) (Exhibit USA-3).

[13] As the United States describes at Paragraph 15 below, for a portion of the 128 tariff lines at issue, China has also applied *other additional* duties on U.S.-origin products, effective July 6, 2018.

[14] *State Council Customs Tariff Commission Notice on the 2018 Tariff Adjustment Plan* (State Council Customs Tariff Commission, Shui Wei Hui [2017] No. 27, issued December 12, 2017) (Exhibit USA-4).

[15] *State Council Customs Tariff Commission Notice on the 2019 Adjustment Plan for Import and Export Provisional Duty Rates Etc.* (State Council Customs Tariff Commission, Shui Wei Hui [2018] No. 65, issued December 22, 2018, effective January 1, 2019) (Exhibit USA-5).

[16] For implementation of the *2018 Tariff Plan*, the *General Administration of Customs Public Notice 2017 No. 65 (Public Notice on Tariff Adjustment Plan for 2018)* (General Administration of Customs, Public Notice [2017] No. 65, issued December 25, 2017) (Exhibit USA-6); for implementation of the *2019 Tariff Plan*, the *General Administration of Customs Public Notice 2018 No. 212 (Public Notice on Tariff Adjustment Plan for 2019)* (General Administration of Customs, Public Notice 2018 No. 212, issued December 28, 2018) (Exhibit USA-7).

[17] *2018 Tariff Plan*, Appendix 6 (Exhibit USA-4); *2019 Tariff Plan*, Appendix 5 (Exhibit USA-5).

China modified a large number of permanent duty rates in the *2019 Tariff Plan*. As a result, for four of the tariff lines in this dispute (73044110, 73044190, 73044910, and 73044990) permanent duty rates were lowered from 10 percent to 8 percent for 2019.[18]

14. For the remaining 16 of the 128 tariff lines, China's applied MFN rate in 2018 and 2019 is a *provisional duty rate*, meaning that the duty rate expires at the end of the calendar year unless renewed by the subsequent annual tariff plan.[19] Provisional duty rates are determined in an appendix of China's annual tariff plan.[20] The same 16 tariff lines are listed in the *2018 Tariff Plan* and *2019 Tariff Plan*.[21]

15. Based on the approach described above, the United States identified the applied MFN rate for each of the 128 tariff lines at issue in this dispute, which is shown in the columns labeled "MFN" and "Provisional Duty Rate (MFN)" in Exhibits USA-14 (for 2018) and USA-15 (for 2019).

16. The second number the United States referenced for each tariff line is China's applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018. As stated in paragraph 4 of the *Implementation Notice*, China will calculate the additional duties *in addition to* the "current applied tariff rate."

17. Furthermore, on top of the additional duties imposed by the *Implementation Notice*, China has applied *other additional* duties of 25 percent, 10 percent, or 5 percent on a total of over 5,000 tariff lines, and 112 of these tariff lines overlap with the tariff lines listed in the *Implementation Notice*, increasing the total additional duties for these items. For 81 of the 128 tariff lines, effective July 6, 2018, China applied an *other additional* duty of 25 percent on U.S.-originating products, as announced by the June 16, 2018 MOFCOM *Announcement on Imposing Tariffs on Some Goods Originating in the US*.[22] For 1 of the 128 tariff lines, effective August 23, 2018, China applied an *other additional* duty of 25 percent on the U.S.-origin product, as announced by the August 8, 2018 MOFCOM *Announcement on Imposing Tariffs on Some Goods Originating in the US*.[23] Finally, on August 3, 2018, MOFCOM issued four lists of other products in the *Announcement on Levying Tariffs on goods and Commodity Imports from the*

[18] *Id.*

[19] *See 2018 Tariff* Plan, Appendix 1 (Exhibit USA-4) and *2019 Tariff Plan*, Appendix 1 (Exhibit USA-5). The *Regulation of the People's Republic of China on Import and Export Duties*, which serves as the legal basis for the annual tariff plans, provides that provisional duty rate adjustments endure during a "specific time limit." *See Regulation of the People's Republic of China on Import and Export Duties* (State Council, Order No. 392, issued November 23, 2003, effective January 1, 2004, amended March 1, 2017, in State Council Order No. 676), Article 9 (Exhibit USA-8).

[20] *2019 Tariff Plan*, Appendix 1 (Exhibit USA-5); *2018 Tariff Plan*, Appendix 1 (Exhibit USA-4).

[21] There are 706 tariff lines listed in the *2019 Tariff Plan* as subject to provisional duty rates, compared with 948 tariff lines in the *2018 Tariff Plan*. For the tariff lines at issue in this dispute, however, the same 16 tariff lines are assigned a provisional duty rate in 2018 and 2019, and the duty rates are unchanged.

[22] *Announcement on Imposing Tariffs on Some Goods Originating in the US* (Ministry of Commerce, 2018 Public Notice No. 55, issued June 16, 2018, effective July 6, 2018) (Exhibit USA-9).

[23] *Announcement on Imposing Tariffs on Some Goods Originating in the US* (Ministry of Commerce, 2018 Public Notice No. 64, issued August 8, 2018, effective August 23, 2018) (Exhibit USA-10).

U.S.[24] Subsequently, an *other additional* duty of 10 percent was applied to products on List 1 and 2, and 5 percent on products on List 3 and 4, effective September 24, 2018, according to the September 18, 2018 MOFCOM *Announcement on Levying Tariffs on goods and Commodity Imports from the U.S.*[25] Based on the September 18, 2018 *Announcement on Levying Tariffs on goods and Commodity Imports from the U.S.*, 20 of 128 tariff lines assessed additional duties according to the *Implementation Notice* face an *other additional* duty of 10 percent while another 10 of the 128 tariff lines face an *other additional* duty of 5 percent.

18. Therefore, for 81 tariff lines, as of July 6, 2018, the "current applied tariff rate" is calculated as the sum of this *other additional* duty of 25 percent *and* the applied MFN rate. For 1 tariff line, as of August 23, 2018, the "current applied tariff rate" is calculated as the sum of this *other additional* duty of 25 percent *and* the applied MFN rate. For 20 tariff lines, as of September 24, 2018, the "current applied tariff rate" is calculated as the sum of this *other additional* duty of 10 percent *and* the applied MFN rate. For 10 tariff lines, as of September 24, 2018, the "current applied tariff rate" is calculated as the sum of this *other additional* duty of 5 percent *and* the applied MFN rate.

19. The *other additional* duty is accounted for in the column labeled "Additional Tariffs on U.S.-Origin Goods" in Exhibits USA-14 (for 2018) and USA-15 (2019).

20. The third figure the United States referenced in Exhibits USA-14 and USA-15 for each tariff line is China's additional duty rate on the U.S.-origin product since the effective date of April 2, 2018. This number is given in the *Implementation Notice* as 15 percent for 120 tariff lines and 25 percent for 8 tariff lines. The additional duty rate for each tariff line is shown in the column labeled "Additional Duty" Exhibits USA-14 (for 2018) and USA-15 (for 2019).

21. Read together, the three numbers the United States referenced for each tariff line – (1) China's applied MFN rate; (2) China's applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018; and (3) China's additional duty rate on U.S.-originating products effective as of April 2, 2018 – demonstrate that for all 128 tariff lines at issue in this dispute, China is applying duties higher than its MFN commitments. This is the case for the 16 tariff lines subject to provisional duty applied MFN rates, as well as for the 112 tariff lines subject to permanent duty applied MFN rates.

22. Moreover, the United States will demonstrate that China has exceeded its bound rate commitments by referencing three figures for each tariff line: (1) China's bound rate commitment; (2) China's applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018; and (3) China's additional duty rate on U.S.-originating products effective as of April 2, 2018.

23. With respect to China's bound rate commitments, the United States relied on China's WTO accession documents and the Consolidated Tariff Schedules (CTS) database accessible *via*

[24] *Announcement on Levying Tariffs on goods and Commodity Imports from the U.S.* (Ministry of Commerce, 2018 Public Notice No. 63, issued August 3, 2018) (Exhibit USA-11).

[25] *Announcement on Levying Tariffs on goods and Commodity Imports from the U.S.* (Ministry of Commerce, 2018 Public Notice No. 69, issued September 18, 2018, effective September 24, 2018) (Exhibit USA-12).

the WTO's Tariff Download Facility (TDF) and Tariff Analysis Online.[26] China's bound rate commitments are defined in the *Report of the Working Party on the Accession of China Addendum Schedule CLII – People's Republic of China, Part I – Schedule of Concessions and Commitments on Goods*.[27] China's bound rates are set at the HTS 8-digit level. However, China has not updated its schedule of tariff bindings since its accession,[28] and available tariff binding data in TAO uses the 1996 revision of the Harmonized System. China has obtained waivers from updating its bound rate commitments to conform to HS2002, HS2007, HS2012, and HS2017, which obscures whether China has continued to meet its commitments since the harmonized system and China's domestic tariff schedule have undergone substantial revisions over the past 20 years.[29]

24. Nevertheless, the United States has isolated the first six digits of each 8-digit tariff line subject to China's additional duties measure. The United States converted these 6-digit HS lines from HS2017 to HS1996 using a conversion table published by the United Nations Statistics Division.[30] The United States then compared these HS1996 six-digit codes to CTS data from TDF to identify the highest tariff binding for all lines under each 6-digit subheading. The United States adopted this maximum bound rate as the bound rate for all 8-digit HTS lines falling under that subheading.

25. Based on this approach, a bound rate for each of the 128 tariff lines at issue is shown in the column labeled "Bound Rate" in Exhibits USA-14 (for 2018) and USA-15 (for 2019).

26. Read together, the three figures the United States referenced for each tariff lines – (1) China's bound rate; (2) China's applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018; and (3) China's additional duty rate on the U.S.-originating products effective as of April 2, 2018 – demonstrate that for all 128 tariff lines at issue in this dispute, China exceeded its bound rate commitments.[31]

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[26] The CTS is a collection of all tariff concessions made by all WTO members (i.e., bound rates). Information in CTS is accessible via the TDF platform at the six-digit level or the TAO platform at the eight-digit level.

[27] *WT/ACC/CHN/49/Add.1*.

[28] *See Certification of Modifications and Rectifications to Schedule CLII – People's Republic of China* (WT/LET/1239).

[29] *Introduction of Harmonized System 2002 Changes Into WTO Schedules of Tariff Concessions, Waiver Decision of 7 December 2016 (*WT/L/996); *Introduction of Harmonized System 2007 Changes Into WTO Schedules of Tariff Concessions, Waiver Decision of 7 December 2016* (WT/L/997*)*; *Introduction of Harmonized System 2012 Changes Into WTO Schedules of Tariff Concessions, Waiver Decision of 7 December 2016* (WT/L/998*)*; *Introduction of Harmonized System 2017 Changes Into WTO Schedules of Concessions, Waiver Decision of 7 December 2016* (WT/L/999).

[30] Correlation and Conversion Tables Used in UN Comtrade (May 2017), United Nations Statistics Division, https://unstats.un.org/unsd/trade/classifications/correspondence-tables.asp (Exhibit USA-13).

[31] The applied rate including additional duties for three tariff lines (08029090, 08044000, 08104000) exceeds China's bound rate commitments only as of July 6, 2018, when China applied the *other additional* duties as announced by the aforementioned *Announcement on Imposing Tariffs on Some Goods Originating in the US* (Ministry of Commerce, 2018 Public Notice No. 55, issued June 16, 2018, effective July 6, 2018) (Exhibit USA-9); *Announcement on Imposing Tariffs on Some Goods Originating in the US* (Ministry of Commerce, 2018 Public Notice No. 64, issued August 8, 2018, effective August 23, 2018) (Exhibit USA-10); *Announcement on Levying*

27. On July 16, 2018, the United States requested consultations with China pursuant to Article 4 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXIII of the GATT 1994. Pursuant to this request, China and the United States held consultations in Geneva on August 29, 2018. The parties failed to reach a mutually satisfactory resolution to this dispute.

28. On October 18, 2018, the United States requested the establishment of a panel pursuant to Article 6 of the DSU. At its meeting on October 29, 2018, the Dispute Settlement Body ("DSB") deferred the establishment of a panel. At its meeting of November 21, 2018, the DSB established this Panel to consider this dispute.

III. STANDARD OF REVIEW AND RULES OF INTERPRETATION

29. The standard of review to be applied by a WTO dispute settlement panel is set forth in Article 11 of the DSU. Article 11 of the DSU provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

30. The purpose of a WTO dispute settlement panel is to make findings necessary to resolve a dispute. Accordingly, Article 3.7 of the DSU provides that the "aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Thus, as set out in Article 11 of the DSU, the Panel is charged with a specific task: assisting the DSB in discharging its responsibilities under the DSU. The Panel assists the DSB through the tasks set out in the Panel's terms of reference, as established by Article 7.1 of the DSU. In particular, the Panel is to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreements, as required by Article 19.1 of the DSU.

31. In assessing the "applicability of and conformity with the covered agreements," Article 3.2 of the DSU provides that the Panel is to apply the "customary rules of interpretation of public international law" to interpret the relevant provisions of the covered agreements. The United States understands that the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects these customary rules. Article 31.1 of the Vienna Convention provides that "[a] treaty

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Tariffs on goods and Commodity Imports from the U.S. (Ministry of Commerce, 2018 Public Notice No. 63, issued August 3, 2018) (Exhibit USA-11); *Announcement on Levying Tariffs on goods and Commodity Imports from the U.S.* (Ministry of Commerce, 2018 Public Notice No. 69, issued September 18, 2018, effective September 24, 2018) (Exhibit USA-12).

shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[32]

IV. CHINA'S MEASURE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE I:1 OF THE GATT 1994

32. In the discussion below, the United States establishes that China's measure is explicitly covered by the text of Article I:1 of GATT 1994. In addition, we establish that the products originating in the United States subject to China's measure are "like products" with respect to products of other countries. Finally, we establish that China's lower duties on like products from other countries constitute an "advantage" that is not extended "immediately" and "unconditionally" to "like products" originating in the United States.

A. Article I:1 of GATT 1994

33. China'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 China to like products originating in other countries. Article I:1 states, in relevant part:

> With respect to customs duties and charges of any kind imposed on or in connection with importation . . . *any* advantage, favour, privilege, or immunity granted by *any* contracting party to *any* product originating in . . . any other country shall be accorded *immediately and unconditionally* to the *like product* originating in or destined for the territories of *all other contracting parties*. (emphasis added)

34. Put simply, in relevant part, Article I:1 prohibits WTO Members from discriminating among like products originating in the territories of different WTO Members. A breach of Article I:1 may be demonstrated by establishing the following elements:

- that the challenged measure is covered by Article I:1;
- that subject imports are "like products" within the meaning of Article I:1;
- that the challenged measure confers an "advantage, favour, privilege, or immunity" to a product originating in (or destined to) another country; and

[32] Regarding "context," Article 31.2 of the Vienna Convention provides that:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

- that such "advantage, favour, privilege, or immunity" is not extended "immediately" and "unconditionally" to subject imports.[33]

In the discussion that follows the United States demonstrates that China's measure meets these four elements and is therefore inconsistent with GATT Article I:1.

1. China's Measure is Explicitly Covered by the Text of Article I:1 of GATT 1994

35. China's measure is explicitly covered by the text of Article I:1. A "customs duty" is a charge, such as those in China's measure, that is imposed on imports at the border.[34] The terms "tariff", "customs duty", and "import duty," as used in the economics and international trade law, are interchangeable, at least for purposes of the matters at issue in this dispute.[35] Therefore, "Customs duties and charges of any kind imposed on or in connection with importation" would include the duties imposed by China's measure at issue.

36. The MFN obligation of Article I:1 applies to both duties that have been bound as part of a WTO Member's schedule under Article II of GATT 1994 and to unbound duties.[36] It also applies to duties that are set below a bound rate. Thus, Article I:1 requires a WTO Member that applies a duty rate below the bound rate to imports from some WTO Members to apply that same duty rate to imports of "like products" from all WTO Members.

37. In this dispute, China's measure imposes an additional 15 percent or 25 percent duty on certain goods of the United States. As shown in Exhibits USA-14 and USA-15, a comparison of China's applied MFN rate, its applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018, and its additional duty rate on U.S.-originating

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[33] The Appellate Body has expressed support for this analytical approach. *See e.g.*, *European Communities – Seal Products*, Appellate Body Report, para. 5.86, which reads:

> Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.

[34] *See* Oxford Dictionaries (defining "customs duty" as "A duty levied on imported or (now less commonly) exported goods), https://en.oxforddictionaries.com/definition/customs_duty

[35] *See, e.g.*, Definition of "customs duties" from the Penguin Dictionary of Economics, 7th ed., G. Bannock, R.E. Baxter, E. Davis (eds.)(Penguin Books, London, 2003), p.85 ("tariffs, import."); *See also*, Mavroidis, Petros C., *The Regulation of International Trade, Volume 1: GATT* (MIT Press: Cambridge, Massachusetts), 2016 (noting that "The term 'tariffs' (also referred to as 'customs' or 'import duties') can be loosely defined as a monetary burden on imports."), page 133.

[36] *Spain – Tariff Treatment of Unroasted Coffee* (noting that while "Spain had not bound under the GATT its tariff rate on unroasted coffee," the panel nevertheless found "that Article I:1 equally applied to bound and unbound tariff items."), adopted on 11 June 1981, BISD 35S/245.

products effective as of April 2, 2018, demonstrate that for all 128 tariff lines at issue in this dispute, China's rate of duty applied to U.S. originating products is above its MFN rate.

2. U.S. Products Subject to China's Measure are "Like Products" with respect to Products of Other Countries

38. Each U.S. product subject to China's measure is "like" a product from other countries not subject to the additional duties within the meaning of Article I:1. As explained, China's measure discriminates against U.S products on the basis of origin. Thus, China's measure differentiates among products not on the basis of physical characteristics, end-use, or consumer preferences, but rather on a distinction that is not relevant to a "like product" analysis. Instead, China's measure makes distinctions between products on the basis of origin.

39. In circumstances where the only distinction between two sets of products is the country of origin, it may be presumed that the two sets are "like products." Numerous Appellate Body and panel reports have adopted this analysis. For instance, in *China – Publications and Audiovisual Products*, in its discussion of the like product analysis under Article III:4, the panel supported the view that

> where a difference in treatment between domestic and imported products is based *exclusively* on the products' origin, the complaining party need not necessarily identify specific domestic and imported products and establish their likeness in terms of the traditional criteria in order to make a prima facie case of "likeness." Instead, when origin is the sole criterion distinguishing the products, it is sufficient for purposes of satisfying the "like product" requirement for a complaining party to demonstrate that there can or will be domestic products that are "like."[37] (emphasis added)

40. In *Canada – Autos*, in its discussion of the like product analysis under Article III:4, the panel reached the same conclusion, noting:

> [I]t has not been contested that the distinction made between domestic products and imported products in the definition of Canadian value is *based solely* on origin and that, consequently, there are imported products which must be considered to be like the domestic products the costs of which are included in the definition of Canadian value added.[38] (emphasis added)

41. China's measure imposes additional duties only on products originating in the United States, and leaves unchanged the rate duty applicable to other countries, including all other WTO

[37] *China – Publications and Audiovisual Products (Panel)*, para. 7.1446, citing Panel Report on *Indonesia – Autos*, para. 14.113

[38] *Canada – Autos (Panel)*, para. 10.74

Members. Specifically, China's measure applies an additional 15 percent or 25 percent duty to certain products originating in the United States. The measure, however, does not apply these additional duties on "like products" from other countries. In other words, U.S origin is the only criterion used by the measure for imposing additional duties on U.S. products covered by the 128 tariff lines, but not products from other countries entered under the same tariff lines. Thus, the like product element of Article I:1 is satisfied.

3. China's Lower Duties on Like Products from Other Countries Constitutes an "Advantage" Within the Meaning of Article I:1 of GATT 1994

42. China's additional duties measure confers an advantage on like products of other Members because it imposed additional duties on certain U.S. products, while leaving unchanged the rate of duty applicable to goods of all other countries, including all other WTO Members. Article I:1 refers to "*any* advantage" granted by a WTO Member to "*any* product originating in or destined for *any other country*" (emphasis added). Article I:1 requires that an advantage, such as a certain duty rate, granted by a WTO Member to a product from any country be granted to like products from all WTO Members.

43. When considering the ordinary meaning of the term "advantage"[39] in its context, it is evident that providing a lower duty rate constitutes an advantage within the meaning of Article I:1. GATT and WTO panels have interpreted the term "advantage" broadly.[40] For purposes of this dispute, the analytical framework adopted by the panel in *EC – Bananas* is particularly relevant. In its analysis of the term "advantage," that panel determined that a measure that provides "more favorable competitive opportunities" or "affects the competitive relationship" between products of different origin confers an "advantage" in terms of Article I:1.[41]

44. In this dispute, for 128 tariff lines, China subjects products from other countries to a certain duty rate.[42] U.S.-originating products that fall under the same tariff lines, however, are subject to the additional duties on top of that duty rate. The full listing of applicable tariff lines is in Exhibits USA-14 and USA-15.

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[39] *See, e.g.*, Definition of "advantage" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 31 ("I Superior position. 1 The position, state, or circumstance of being ahead of another, or having the better of him or her; superiority, esp. in contest or debate. 2 A favouring circumstance; something which gives one a better position. 3 A vantage-ground. 4 A favourable occasion, a chance.").

[40] *See, e.g.*, GATT Panel Report, *US – Non-Rubber Footwear* (finding that "In the view of the Panel, the automatic backdating of the effect of revocation of a pre-existing countervailing duty order, without the necessity of the country subject to the order making a request for an injury review, is properly considered to be an advantage within the meaning of Article I:1.") adopted June 19, 1992, BISD 39S/128, para. 69; *see also*, Panel, *Colombia – Ports of Entry* (noting that the "term 'advantage' within the Article I:1 of the *GATT 1994* has been interpreted broadly by the Appellate Body as well as GATT and WTO panels."), para. 7.340.

[41] Panel Report, *EC – Bananas III*, (Honduras and Guatemala), para. 7.239.

[42] Exhibits USA-14 and USA-15 list all the tariff lines that are subject to China's additional duties.

45. China's additional duties measure imposed additional duties on U.S. products, while not also imposing duties on like products of other countries. By providing a lower rate of duty to the like products of other countries as compared to U.S. products, China is granting these products an advantage within the meaning of GATT Article I:1.

4. The Advantage Accorded by China to Products from Other Countries is Not Extended "Immediately" and "Unconditionally" to "Like Products" Originating in the U.S.

46. Article I:1 requires that China accord to like products from the United States, "immediately and unconditionally," the lower duties that it is providing to products from other countries. The advantage provided by China's measure is not "accorded immediately and unconditionally" to like products from the United States.

47. The ordinary meaning of the term "immediately"[43] does not raise any interpretative issues in this proceeding. When a WTO Member grants an advantage to products from one country, it is required to extend such advantage to like products from all WTO Members at once. When as here, a measure imposes duties on one WTO Member, and leaves duties on other countries unchanged, the measure clearly does not "immediately" accord to that WTO Member an advantage that products originating in other countries enjoy.

48. Similarly, the term "unconditionally"[44] does not raise any interpretative issues in this proceeding. The additional duties apply without respect to any sort of conditions.

49. China's additional duties measure went into effect on April 2, 2018. Thus, China has failed to "immediately and unconditionally" extend to certain products from the United States the advantage that it is providing to like products from other countries.

B. Conclusion

50. As demonstrated above, China's measure meets each element of a breach of Article I:1 of GATT 1994, because it fails to extend to certain products of the United States the advantage granted to like products originating from other countries, including all other WTO Members.

V. CHINA'S MEASURE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE II OF THE GATT 1994

51. China's measure imposes duties on products originating in the United States in excess of China's bound rate and provides less favourable treatment to such products. Accordingly, China's measure is inconsistent with its obligations under Article II:1 of the GATT 1994, which requires WTO Members to exempt products of another WTO Member from duties in excess of

[43] *See, e.g.*, Definition of "immediately" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 1315 ("A *adv.* 1 Without intermediary agency, in direct connection or relation; so as to affect directly. 2 With no person, thing, or distance intervening; next (before or after); closely. 3 Without delay, at once, instantly. B *conj.* At the moment that, as soon as.").

[44] *See, e.g.*, Definition of "unconditional" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. II, p. 3465 ("Not limited by or subject to conditions; absolute, complete.").

those set forth in their Schedule of Concessions and accord treatment no less favourable than what is provided for in that Schedule.

52. In the discussion below, the United States demonstrates how China's measure imposes duties on products of the United States in excess of its Schedule and, therefore, is inconsistent with GATT Article II:1(a) and (b).

A. Article II:1(a) and (b) of the GATT 1994

53. An evaluation of a claim under Article II:1(a) and (b) involves an identification of (1) the treatment to be accorded under the importing Member's Schedule for the products at issue; (2) the treatment actually accorded to those products when originating in the territory of a Member; and lastly (3) whether the measure results in the imposition of duties on such products that are in excess of what is provided for in the importing Member's Schedule.

54. In other words, if a measure results in the imposition of duties (x) that are in excess of the duties provided for in the Schedule (y), the measure breaches the obligations under Article II:1(a) and (b) of the GATT 1994. Simply put, in this context, where x is greater than y, there is a breach of Article II of the GATT 1994.

55. Additionally, as shown in more detail below, establishing a breach of Article II:1(b) necessarily entails a breach of Article II:1(a). For this reason, the United States turns first to paragraph (b) in Article II:1 of the GATT 1994.

1. China's Measure Imposes Duties That Exceed its Bound Rate and Breach Article II:1(b) of the GATT 1994

56. Article II:1(b) states:

> The products described in Part I of the Schedule relating to any [WTO Member], which are the products of territories of other [WTO Members], shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

57. The Understanding on Interpretation of Article II.1(b) of the GATT 1994, in relevant part, provides additional clarity with the following:

> In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of

> concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges."
>
> The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be recorded in the Schedules at the levels applying on this date. At each subsequent renegotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of the incorporation of the new concession in the appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1947 or GATT 1994 shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.
>
> "Other duties or charges" shall be recorded in respect of all tariff bindings.

58. Article II:1(b) is divided into two sentences. Under the first sentence, a WTO Member must exempt the products of another WTO Member from any "ordinary customs duties" in excess of those set forth in its Schedule when such products are imported into the territory of the former. Under the second sentence, a WTO Member must exempt those products from all "other duties or charges" of any kind that are in excess of those imposed as of certain dates.

59. The distinction between the first and second sentence concerns whether the duties in question constitute "ordinary customs duties" or "other duties or charges." For purposes of this dispute, it is legally immaterial whether the additional duties constitute "ordinary customs duties" or "other duties or charges" because, under either characterization, the duties exceed China's rates bound in its schedule.

60. "Ordinary customs duties" typically relate to either the value of imported goods (such as ad valorem duties) or the volume of imported goods (such as specific duties) whereas "other duties and charges" form a residual category that includes any financial responsibilities resulting from the importation of goods that do not qualify as ordinary customs duties. On its face, China's measure appears to impose ordinary customs duties.45

61. With respect to the first sentence of Article II:1(b), which covers ordinary customs duties, Exhibits USA-14 and USA-15 set out China's bound tariff rates in its WTO schedule. Specifically, for purposes of Article II:1(b), the United States has identified the uppermost level constituting the bound rate at which China may impose duties for the tariff lines in the measure. Exhibits USA-14 and USA-15 show China's bound rate with the rate imposed on products of the United States. As established in these exhibits, for all of the 128 tariff lines at issue, China has imposed duties in excess of the bound rate commitments found in its Schedule.

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[45] *See Dominican Republic – Safeguards (Panel)*, paras. 7.79-7.85.

62. In the alternative, to the extent China would argue that its additional duties are not ordinary customs duties, but instead "other duties or charges," the additional duties are inconsistent with China's obligations under the second sentence of Article II.1(b). As noted above, the Understanding required that any such additional duties or charges be reflected in China schedule and bound as of 1994. China's additional duties measure of 2018 is of course not reflected in its schedule.

63. On this basis, China has breached its obligation, under Article II:1(b) of the GATT 1994, not to apply duties in excess of its tariff commitments.

2. China's Breach of Article II:1(b) of the GATT 1994 Results in a Breach of Article II:1(a)

64. Article II:1(a) of the GATT 1994 states:

> Each [Member] shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

65. Since Article II:1(b) proscribes the type of measures that are equally inconsistent with Article II:1(a), in demonstrating a breach of the former, the United States has also established a breach of the latter. As the Appellate Body has recognized:

> The application of customs duties *in excess of* those provided for in a Member's Schedule inconsistent with the first sentence of Article II:1(b), constitutes "less favourable" treatment under the provisions of Article II:1(a).[46]

The Appellate Body has also noted:

> Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is the application of ordinary customs duties in excess of those provided for in the Schedule.[47]

66. Given China's breach of Article II:1(b) through the imposition of the duties in excess of its bound rate on products originating in the United States, China has correspondingly accorded less favourable to these products and breached Article II:1(a) as well.

[46] *Argentina – Textiles and Apparel (AB)*, para. 47.

[47] *Id*. at para. 45.

B. Conclusion

67. With the measure at issue in this dispute, China has imposed duties on products of the United States that exceed China's bound rate for those products. Accordingly, for the reasons above, China has breached its obligations under Article II:1(a) and (b) of the GATT 1994.

VI. IN THE EVENT CHINA ATTEMPTS TO PRESENT AN AFFIRMATIVE DEFENSE BASED ON A SAFEGUARD THEORY, SUCH A DEFENSE WOULD BE COMPLETELY WITHOUT MERIT BECAUSE THE UNITED STATES HAS NOT ADOPTED A SAFEGUARD

68. As explained above, China's additional duties are plainly inconsistent with its obligations under Articles I and II of the GATT 1994. In establishing a *prima facie* case of a WTO breach, the United States has presented all that is required in this first submission. Nonetheless, to assist the Panel, the United States will make some preliminary, but important comments on what it understands may be an affirmative defense that China may present in its first submission. In particular, the introductory language in China's measure[48] indicates that it may attempt to assert an affirmative defense based on some type of theory that its additional duties are justified under the WTO Agreement on Safeguards ("the Safeguards Agreement"). In the event that China attempts to present such a defense, the United States will respond to China's arguments in subsequent submissions.

69. Nonetheless, in this first submission, the United States would emphasize a key, fatal flaw in any affirmative defense based on the Safeguards Agreement: namely, no U.S. safeguard is related to the matters in this dispute. For the Safeguard Agreement to apply to a Member's measure, the Member must invoke the Safeguard Agreement as a justification for suspending GATT 1994 obligations or withdrawing or modifying tariff concessions. The United States has not invoked the Safeguard Agreement in connection with this dispute, and the Safeguard Agreement simply does not apply.

70. As shown in detail below, it is axiomatic that a measure cannot constitute a safeguard under the WTO Agreement 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. If the Member departing from its GATT 1994 obligations does not invoke the Safeguard Agreement, than its measure would be in breach of the relevant GATT 1994 obligation, and the Member would have no defense under Article XIX of the GATT 1994. In these circumstances, another WTO Member affected by the breach would be free to raise the matter bilaterally and/or in WTO dispute settlement. What the affected Member may not do, however, is to announce a unilateral determination that the Safeguard Agreement somehow applies, nor may an affected Member take unilateral, retaliatory action.

[48] *Ministry of Commerce Notice on Publicly Soliciting Opinions on U.S. Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures* (Trade Relief and Investigation Bureau of the Ministry of Commerce, issued March 23, 2018) (Exhibit USA-2).

A. The Disciplines of Article XIX of the GATT 1994 and the WTO Safeguards Agreement Require Invocation of the Right to Apply a Safeguard

71. Article XIX of the GATT 1994 and the Safeguards Agreement establish a WTO Member's right to implement a safeguard measure, temporarily suspending concessions and other obligations, when that WTO Member invokes this right with the required notice indicating that it has determined that a product is being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the WTO Member's domestic industry.

72. Article XIX:1(a) of the GATT 1994 provides that:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that 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, and to the extent and for such time as may be necessary to prevent or remedy such injury, *to suspend the obligation in whole or in part or to withdraw or modify the concession*. (emphasis added)

73. Importantly, Article XIX:2 adds that:

> *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)

74. The essential point that a Member must invoke the protections of Article XIX for the safeguard provisions to apply is reinforced by the text of the Safeguards Agreement.

75. Before discussing the relevant provisions of the Safeguards Agreement, the United States notes that the Safeguards Agreement elaborates on the rights and obligations in Article XIX. Article 1 of the Safeguards Agreement states "[t]his Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of the GATT 1994."

76. One of the requirements from Article XIX that the Safeguards Agreement elaborates upon is that the right to apply a safeguard measure requires invocation of Article XIX through written notice of that invocation to other WTO Members and, as recited in Article 12 of the

Safeguards Agreement, to the Council for Trade in Goods and Committee on Safeguards. Specifically, Article 12.1 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.

This requirement, as the procedural mechanism to invoke Article XIX, constitutes an essential step that must occur for a measure to be a safeguard.

77. Notification under Article XIX, in the words of the Appellate Body, is "a necessary prerequisite to establishing a right to apply a safeguard measure"[49] or simply "a prerequisite for taking such actions." If that right is not exercised with the appropriate notice invoking this authority, a measure cannot be considered a safeguard under Article XIX and the Safeguards Agreement. Moreover, China cannot exercise the rights of the United States under Article XIX. If the United States did not invoke Article XIX with the required notification, that is simply the end of the matter.

78. The understanding that notification was an essential step for a measure to constitute a safeguard was recognized by GATT panels prior to the establishment of the Safeguard Agreement. Under the title "The requirements of Article XXI," a GATT panel[50] stated:

> 3. In attempting to appraise whether the requirements of Article XIX had been fulfilled, the Working Party examined separately *each of the conditions which qualify the exercise of the right to suspend an obligation or to withdraw or modify a concession under that Article*.
>
> 4. Three sets of conditions have to be fulfilled:
>
> …
>
> (c) *The contracting party taking action under Article XIX must give notice in writing to the Contracting Parties before taking action*. It must also give an opportunity to contracting parties substantially interested and to the Contracting Parties to consult with it. As a rule, consultation should take place before the action is taken, but,

[49] *US – Line Pipe (AB)*, para. 157.

[50] GATT Working Party Report, *US – Fur Felt Hats*, GATT/CP/106, paras. 3-4.

> in critical circumstances, consultation may take place immediately after the measure is taken provisionally.

79. Accordingly, as the Appellate Body has acknowledged, the Safeguards Agreement expressly defines safeguard measures as those provided for in Article XIX of the GATT 1994, which in turn makes clear that an importing Member must invoke the right under Article XIX in order to apply a safeguard measure. Without an invocation of that right, a measure does not qualify as a safeguard under the WTO Agreement.

1. Any Affirmative Defense Would Fail Under the First of Two Steps Regarding the Existence and Application of a Safeguard Measure

80. When examining whether a Member may excuse a breach of a GATT 1994 obligation under Article XIX, a two-step analysis is called for: the right to apply a safeguard measure, as the first step, and whether that safeguard measure has been applied consistently with the various requirements, as the second.

81. In particular, the Appellate Body has identified:

> [A] natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against "fair trade" beyond what is necessary to provide extraordinary and temporary relief.[51]

82. Similarly, the Appellate Body has indicated that:

> This natural tension is likewise inherent in two basic inquiries that are conducted in interpreting the Agreement on Safeguards. *These two basic inquiries are: first, is there a right to apply a safeguard measure? And, second, if so, has that right been exercised, through the application of such a measure, within the limits set out in the treaty? These two inquiries are separate and distinct. They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other. First, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure.* ***For this right to exist, the WTO Member in question must have determined****, as required by Article 2.1 of the Agreement on Safeguards and pursuant to the provisions of Articles 3 and 4 of the Agreement on Safeguards,* ***that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry***.[52] (emphasis added)

[51] *US – Line Pipe (AB)*, para. 69.

[52] *Id.*

83. As such, there is a difference between a measure that is not a safeguard in the first place, and an asserted safeguard measure that does not meet the requirements under Article XIX and the Safeguards Agreement to serve as an affirmative defense to a breach of a GATT 1994 obligation. That difference is between whether a Member has attempted to invoke the safeguard provision, and whether, after it invokes the WTO safeguard provision, the safeguard measure was applied lawfully. Invocation of Article XIX is a condition precedent that must be established – not only with respect to the second step (whether a safeguard measure may be lawfully applied) but as an initial matter, with respect to whether the rights and obligations of Article XIX and the Safeguard Agreement apply.

84. Any affirmative defense presented by China would run afoul of the first of the two basic inquiries under the Safeguards Agreement: whether the right to apply a safeguard measure has been invoked. Under the Safeguards Agreement, that right exists only if certain conditions are met including, as noted above, the necessary notice that a WTO Member has determined that a product is being imported in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. Reaching that determination is a necessary prerequisite to establishing a right to apply a safeguard measure.

85. Accordingly, under the two-step analysis above for determining the existence and application of a safeguard measure, any defense of China's measure on these grounds would necessarily be invalid. As established above, and further discussed below, a measure is not a safeguard unless the WTO Member imposing the measure has invoked its right to apply a safeguard.

2. Under the First Step, the Judgment of the WTO Member Applying the Measure Controls

86. The Appellate Body noted, "part of the raison d'être of Article XIX of the GATT 1994 and the Agreement on Safeguards is, unquestionably, that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily."[53] Here, the United States has not in its judgment invoked Article XIX and the Safeguards Agreement with respect to any measure of relevance to this dispute.

87. Moreover, it is not for China or any other Member to second guess the United States' judgment on this point, nor may China or any other Member argue that the DSB should find that a Member must invoke the Safeguards Agreement. Only after a WTO Member determines to invoke the protection of Article XIX of the GATT 1994 may another Member take actions – such as by taking rebalancing measures under the Safeguards Agreement, or by invoking a WTO dispute – in connection with rights and obligations under Article XIX and the Safeguards Agreement.

[53] *US – Line Pipe (AB)*, para. 82.

88. In sum, the right to apply a safeguard measure through invocation of Article XIX falls exclusively within the judgment of the WTO Member imposing the measure and is not subject to re-characterization by another WTO Member for the purpose of unilateral retaliation.

VII. CONCLUSION

89. For the foregoing reasons, the United States respectfully requests that the Panel find that the measures at issue imposes additional duties on products originating in the United States that are inconsistent with Articles I and II of the GATT 1994.