

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

**(DS559)**

**FIRST WRITTEN SUBMISSION  
OF THE UNITED STATES OF AMERICA**

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| <i>China – Publications and Audiovisual Products (Panel)</i> | Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, adopted 19 January 2010, as modified by Appellate Body Report, WT/DS363/AB/R |
| <i>Colombia – Ports of Entry (Panel)</i>                     | Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R, adopted 20 May 2009  |
| <i>EC – Bananas III (Panel)</i>                              | Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R, adopted 25 September 1997, as modified by Appellate Body Report, WT/DS27/AB/R   |
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| <i>Spain – Unroasted Coffee</i>                              | GATT Panel Report, <i>Spain – Tariff Treatment of Unroasted Coffee</i> , L/5135, adopted 11 June 1981, BISD 28S/102   |
| <i>US – Fur Felt Hats</i>                                    | GATT Working Party Report, <i>Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade</i> , adopted 22 October 1951, GATT/CP/106                                       |
| <i>US – Line Pipe (AB)</i>                                   | Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002   |
| <i>US – Non-Rubber Footwear</i>                              | GATT Panel Report, <i>United States – Countervailing Duties on Non-Rubber Footwear from Brazil</i> , SCM/94, adopted 13 June 1995, BISD 42S/208   |

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| USA-2       | <i>Commission Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724,</i> ” Official Journal of the European Union, L158/5, June 21, 2018   |
| USA-3       | Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union’s rights for the application and enforcement of international trade rules and amending Council Regulation (EC) 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization, Official Journal of the European Union, L189/50, dated June 27, 2014 |
| USA-4       | Regulation (EU) 2015/1843 of the European Parliament and the Council of 6 October 2015 laying down Union Procedures in the field of the common commercial policy in order to ensure the exercise of the Union’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJL 272/1, October 16, 2015   |
| USA-5       | <i>Commission Implementing Regulation (EU) 2017/1925 of 12 October 2017 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff,</i> ” L OJ 282/1, October 31, 2017  |
| USA-6       | <i>Commission Implementing Regulation (EU) 2018/1602 of 11 October 2018 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (the “2019 Common Customs Tariff”)</i>   |
| USA-7       | Rectification and Modification of Schedules, Schedule CLXXV – European Union,” (G/MA/TAR/RS/506), October 17, 2017 and at corrigenda 1 and 2  |
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## I. INTRODUCTION

1. The United States has brought this dispute to address the European Union's (EU) measures 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, the EU has imposed additional duties on U.S. products with an annual trade value of approximately 3.2 billion dollars. The EU's measures imposing these additional duties breach its MFN obligations under Article I of the GATT 1994, and the EU's commitments under Article II of the GATT 1994 to abide by its tariff concessions.

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

4. The United States understands that the EU 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 the EU to adopt retaliatory measures, and this decision cannot be justified under WTO rules.

## II. FACTUAL AND PROCEDURAL BACKGROUND

5. Effective June 22, 2018, the European Union applied additional duties of 10 percent and 25 percent on 182 tariff lines for products originating in the United States.<sup>2</sup> For all 182 tariff lines, the additional duties result in applied tariffs on U.S.-origin products greater than the rates of duty applied to other WTO Members on a most-favored nation (MFN) basis. For 180 tariff lines, the additional duties also result in applied tariffs on U.S.-origin products greater than the rates of duty set out in the European Union's Schedule. The United States provides more details below on the measure at issue, the products in question, the process of implementation, and the European Union's stated basis for adopting these measures. The United States will then demonstrate that the additional duties result in applied tariffs on U.S.-origin products that are in excess of the European Union's MFN and bound rate commitments.

6. On May 16, 2018, the European Commission (Commission) issued *Commission Implementing Regulation (EU) 2018/724 of 16 May 2018 on certain commercial policy measures concerning certain products originating in the United States of America* ("Regulation

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<sup>1</sup> *United States – Certain Measures on Steel and Aluminium Products*, DS548.

<sup>2</sup> "*Commission Implementing Regulation (EU) 2018/724 of 16 May 2018 on certain commercial policy measures concerning certain products originating in the United States of America*," Official Journal of the European Union, L122/14, May 17, 2018 (Exhibit USA-1).

2018/724”).<sup>3</sup> *Regulation 2018/724* instructed the Commission to notify the WTO by May 18, 2018 that the European Union would apply additional duties on a range of products imported from the United States. Specifically, the regulation provided that the European Union would apply a 25 percent additional duty on U.S. goods classified in 182 eight-digit combined nomenclature codes (“CN codes”) of the European Union’s Common Customs Tariff, as listed in Annex I of *Regulation 2018/724*, with an effective date for the additional duties of June 20, 2018. The Commission characterized this as “stage one” of additional duties to be imposed on the United States.

7. *Regulation 2018/724* also established a second stage of additional duties, 10 percent, 25 percent, 35 percent, or 50 percent on goods of the United States classified in 158 eight-digit CN codes of the European Union’s Common Customs Tariff, as listed in Annex II of *Regulation 2018/724*, with an effective date for imposition of the additional duties of March 23, 2021. The Commission indicated that the additional duties of both Annexes I and II would remain in effect for unlimited duration and that a future implementing regulation would be necessary to make the additional duties under Annex I effective.

8. On June 20, 2018, the Commission issued the future implementing regulation: *Commission Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724 (“Regulation 2018/886”).*<sup>4</sup> *Regulation 2018/886* amended a clerical error in *Regulation 2018/724* and implemented certain provisions of *Regulation 2018/724*.<sup>5</sup> Specifically with respect to the clerical error, *Regulation 2018/886* corrected the additional duty for one CN code, CN 9504 40 00 (playing cards), in Annex I of *Regulation 2018/724* and revised that duty downward from 25 percent to 10 percent.

9. *Regulation 2018/886* imposed the Annex I additional duties of 10 percent and 25 percent for all 182 CN codes, effective as of June 22, 2018.<sup>6</sup> These Annex I additional duties came into force for unlimited duration.

10. Separately, *Regulation 2018/886* provided for the second stage of additional duties of 10 percent, 25 percent, 35 percent and 50 percent for 158 CN codes listed in Annex II to be applied as of June 1, 2021, or at such a time as a certain WTO dispute settlement body ruling were made. The Annex II additional duties are scheduled to enter into force in 2021.

11. In sum, *Regulations 2018/724* and *2018/886* in combination are the primary measures at issue in this dispute.

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<sup>3</sup> *Id.*

<sup>4</sup> “*Commission Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724,*” Official Journal of the European Union, L158/5, June 21, 2018 (Exhibit USA-2).

<sup>5</sup> Article 4 (Exhibit USA-1).

<sup>6</sup> Article 3(2) stipulates “20 June 2018” as the effective for the tariff, whereas Recital 4(a) stipulates “from the date of entry into force of this Regulation.” Entry into force of this regulation is June 22, 2018 (Exhibit USA-2).

12. For statutory authority to implement these measures, the European Union relied on Article 4(2)(c) and 4(3) of *Regulation (EU) No. 654/2014 of the European Parliament and of the Council of May 15, 2014* (“*Regulation 654/2014*”),<sup>7</sup> which is the legal authority for the European Union to suspend concessions under international trade agreements.<sup>8</sup> The European Union cited economic factors as the rationale for the imposition of the additional duties and for the selection of the particular CN codes and the precise mix of imported products originating in the United States to which additional duties would be applied.<sup>9</sup> Specifically, the European Union referenced “proportionality” and the “relief to the steel and aluminum Union Industries” that the additional duties would provide.<sup>10</sup> The EU also explained that the “measures should apply to imports of products originating in the United States on which the Union is not substantially dependent for its supply.”<sup>11</sup>

13. Annex I of the regulations targeted 182 CN codes covering 17 chapters of the European Union Common Customs Tariff, concentrating on chapter 73, articles of iron and steel (33 percent of the lines at issue); chapter 72, steel (22 percent of the lines at issue); chapter 10, rice (9 percent of lines at issue); and chapter 24, prepared vegetables and fruits (8 percent of the lines at issue). In selecting the amount of trade covered by the additional duties, and the rate of *ad valorem* duties, the European Union pointed to the “United States’ tariff increase of 25 percent on imports of ‘carbon and alloy flat products’.”<sup>12</sup>

14. Exhibit USA-8 to this submission demonstrates that the European Union exceeded its MFN commitments for each CN code. In particular, for each tariff line, Exhibit USA-8 shows: (A) the European Union’s applied MFN rate;<sup>13</sup> (B) the European Union’s additional duty rate on

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<sup>7</sup> Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union’s rights for the application and enforcement of international trade rules and amending Council Regulation (EC) 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization, Official Journal of the European Union, L189/50, dated June 27, 2014 (Exhibit USA-3).

<sup>8</sup> “Regulation 654/2014 amends Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community’s right under international trade rules, in particular those established under the auspices of the World Trade Organization,” OJL 349, December 31, 1994, p. 71 (Exhibit USA-3) and was later codified by “Regulation (EU) 2015/1843 of the European Parliament and the Council of 6 October 2015 laying down Union Procedures in the field of the common commercial policy in order to ensure the exercise of the Union’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization,” OJL 272/1, October 16, 2015 (Exhibit USA-4).

<sup>9</sup> *Regulation 2018/724* (Exhibit USA-1).

<sup>10</sup> *Id.* at paragraphs 7 and 18.

<sup>11</sup> *Id.* at paragraph 19.

<sup>12</sup> *Id.* at paragraph 13.

<sup>13</sup> “*Commission Implementing Regulation (EU) 2017/1925 of 12 October 2017 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff*,” L OJ 282/1, October 31, 2017 (Exhibit USA-5). The 2018 Common Customs Tariff was updated effective January 1, 2019 by *Commission Implementing Regulation (EU) 2018/1602 of 11 October 2018 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff* (the “2019 Common Customs Tariff”) (Exhibit USA-6). No changes to any of the 182 tariff lines were observed.



the U.S.-origin product, effective June 22, 2018;<sup>14</sup> and (C) the sum of the applied MFN rate and the European Union’s additional duty.<sup>15</sup>

15. Read together, the three figures the United States presents in Exhibit USA-8 for each tariff line – (A) the European Union’s applied MFN rate; (B) the European Union’s additional duty; and (C) the sum of those two values – demonstrate that for all 182 CN codes at issue in this dispute, the European Union exceeded its MFN commitments.

16. Exhibit USA-8 also demonstrates that the European Union exceeded its bound rate commitments by comparing two figures for each CN code: (C) the sum of the applied EU’s MFN rate and the EU’s additional duty; and (D) the European Union’s bound rate commitment. To reference the European Union’s bound rate commitments, the United States relied on the WTO’s Consolidated Tariff Schedule (CTS), as accessed through the WTO’s Trade Analysis Online (TAO) portal,<sup>16</sup> and then cross referenced data contained therein against the European Union’s most recent rectification and modification schedule.<sup>17</sup>

17. Read together, the two figures in Exhibit USA-8 – (C) the sum of the applied European Union’s MFN rate and the European Union’s additional duty and (D) the European Union’s bound rate commitment – demonstrate that for 180 of the 182 CN codes at issue in this dispute, the European Union exceeded its bound rate commitments.

18. On July 16, 2018, the United States requested consultations with the European Union 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, the European Union and the United States held consultations in Geneva on August 28, 2018. The parties failed to reach a mutually satisfactory resolution to this dispute.

19. 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.

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“Commission Implementing Regulation (EU) 2018/1602 of 11 October 2018 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff,” L OJ 273/1, October 31, 2018 (Exhibit USA-6).

<sup>14</sup> *Regulations 2018/724 and 2018/886.*

<sup>15</sup> The column for MFN rates is based on *Commission Implementing Regulation (EU) 2017/1925 of 12 October 2017 amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff* (the “2018 Common Customs Tariff”). The column for the “additional duty” is based on *Regulations 2018/724 and 2018/886.*

<sup>16</sup> CTS is the WTO’s Consolidated Tariff Schedules database, a collection of tariff concessions (*i.e.*, bound rates) made by all WTO members. Information in CTS is accessible via TAO and TDF at differing levels of detail. TAO is the WTO’s Tariff Analysis Online platform, which allows detailed access to the WTO’s applied and bound rate databases at the eight digit level.

<sup>17</sup> “Rectification and Modification of Schedules, Schedule CLXXV – European Union,” (G/MA/TAR/RS/506), October 17, 2017 and at corrigenda 1 and 2 (Exhibit USA-7).

### III. STANDARD OF REVIEW AND RULES OF INTERPRETATION

20. 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.

21. 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.

22. 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 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.”<sup>18</sup>

### IV. THE EUROPEAN UNION’S MEASURE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE I:1 OF THE GATT 1994

23. In the discussion below, the United States establishes that the European Union’s measure is explicitly covered by the text of Article I:1 of GATT 1994. In addition, we establish that the

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<sup>18</sup> 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.

products originating in the United States subject to the European Union’s measure are “like products” with respect to products of other countries. Finally, we establish that the European Union’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**

24. The European Union’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 the European Union 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)

25. 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
- that such “advantage, favour, privilege, or immunity” is not extended “immediately” and “unconditionally” to subject imports.<sup>19</sup>

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

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<sup>19</sup> 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.

## **1. The European Union’s Measure is Explicitly Covered by the Text of Article I:1 of GATT 1994**

26. The European Union’s measure is explicitly covered by the text of Article I:1. A “customs duty” is a charge, such as those in the European Union’s measure, that is imposed on imports at the border.<sup>20</sup> 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.<sup>21</sup> Therefore, “Customs duties and charges of any kind imposed on or in connection with importation” would include the duties imposed by the European Union’s measure at issue.

27. 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.<sup>22</sup> 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.

28. In the measure at issue in this dispute, the European Union’s measure imposes an additional 10 to 25 percent duty on certain goods of the United States. As shown in Exhibit USA-8, for each of the 182 CN codes at issue in this dispute, the sum total of the European Union’s applied MFN rate and its additional duty demonstrate that for all 182 CN codes at issue in this dispute, the European Union rate of duty applied to U.S. originating products is above its MFN rate.

## **2. U.S. Products Subject to the European Union’s Measure are “Like Products” with respect to Products of Other Countries**

29. Each U.S. product subject to the European Union’s measure is “like” a product from other countries not subject to the additional duties within the meaning of Article I:1. As explained, the European Union’s measure discriminates against U.S products on the basis of origin. Thus, the European Union’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, the European Union’s measure makes distinctions between products on the basis of origin.

30. 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

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<sup>20</sup> 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](https://en.oxforddictionaries.com/definition/customs_duty)

<sup>21</sup> See, e.g., Definition of “customs duties” from the Penguin Dictionary of Economics, 7<sup>th</sup> 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.

<sup>22</sup> *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.

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.”<sup>23</sup> (emphasis added)

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.<sup>24</sup> (emphasis added)

31. The European Union’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 Members. Specifically, the European Union’s measure applies an additional 10 to 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 182 tariff codes, but not products from other countries entered under the same tariff codes. Thus, the like product element of Article I:1 is satisfied.

### **3. The European Union’s Lower Duties on Like Products from Other Countries Constitutes an “Advantage” Within the Meaning of Article I:1 of GATT 1994**

32. The European Union’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

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<sup>23</sup> *China – Publications and Audiovisual Products* (Panel), para. 7.1446, citing Panel Report on *Indonesia – Autos*, para. 14.113

<sup>24</sup> *Canada – Autos*, Panel, para. 10.74

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.

33. When considering the ordinary meaning of the term “advantage”<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

34. In this dispute, for 182 tariff lines, the European Union subjects products from other countries to a certain duty rate.<sup>28</sup> U.S. 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 codes is in Exhibit USA-8.

35. The European Union’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, the European Union is granting these products an advantage within the meaning of GATT Article I:1.

#### **4. The Advantage Accorded by the European Union to Products from Other Countries is Not Extended “Immediately” and “Unconditionally” to “Like Products” Originating in the U.S.**

36. Article I:1 requires that the European Union 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 the European Union’s measure is not “accorded immediately and unconditionally” to like products from the United States.

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<sup>25</sup> 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.”).

<sup>26</sup> 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.

<sup>27</sup> Panel Report, *EC – Bananas III*, (Honduras and Guatemala), para. 7.239.

<sup>28</sup> Exhibit USA-8 lists all the tariff lines that are subject to the European Union’s additional duties.

37. The ordinary meaning of the term “immediately”<sup>29</sup> 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.

38. Similarly, the term “unconditionally”<sup>30</sup> does not raise any interpretative issues in this proceeding. The EU additional duties apply without respect to any sort of conditions.

39. The European Union’s additional duties measure went into effect on June 22, 2018. Thus, the European Union 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**

40. As demonstrated above, the European Union’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. THE EUROPEAN UNION’S MEASURE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLE II OF THE GATT 1994**

40. The European Union’s measure imposes duties on products originating in the United States in excess of the European Union’s bound rate and provides less favourable treatment to such products. Accordingly, the European Union’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 those set forth in their Schedule of Concessions and accord treatment no less favourable than what is provided for in that Schedule.

41. In the discussion below, the United States demonstrates how the European Union’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**

42. 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;

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<sup>29</sup> See, e.g., Definition of “immediately” from the New Shorter Oxford English Dictionary, 4<sup>th</sup> 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.”).

<sup>30</sup> See, e.g., Definition of “unconditional” from the New Shorter Oxford English Dictionary, 4<sup>th</sup> ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. II, p. 3465 (“Not limited by or subject to conditions; absolute, complete.”).

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.

43. 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.

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

45. 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.

46. 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.

47. 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.

48. 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 the European Union’s rates bound in the EU’s schedule.

49. “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.<sup>31</sup> On its face, the European Union’s measure appears to impose ordinary customs duties.

50. With respect to the first sentence of Article II:1(b), which covers ordinary customs duties, Exhibit USA-8 sets out the European Union’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 the European Union may impose duties for the tariff lines in the measure. Exhibit USA-8 then compares the European Union’s bound rate with the rate imposed on products of the United States, which consists of the European Union’s applied MFN rate plus the additional duties imposed. As established in Exhibit USA-8, for 180 of the 182 tariff lines at issue, the European Union has imposed duties in excess of the bound rate commitments found in its Schedule.

51. In the alternative, to the extent the European Union would argue that its additional duties are not ordinary customs duties, but instead “other duties or charges,” the additional duties are inconsistent with the European Union’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 the European Union schedule and bound as of 1994. The European Union’s additional duties measure of 2018 is of course not reflected in its schedule.

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<sup>31</sup> See *Dominican Republic – Safeguards*, Panel Report, para. 7.79-7.85.

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

**2. The European Union’s Breach of Article II:1(b) of the GATT 1994  
Results in a Breach of Article II:1(a)**

53. 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.

54. 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).<sup>32</sup>

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.<sup>33</sup>

55. Given the European Union’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, the European Union has correspondingly accorded less favourable to these products and breached Article II:1(a) as well.

**B. Conclusion**

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

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<sup>32</sup> *Argentina – Textiles and Apparel*, Appellate Body Report, para. 47.

<sup>33</sup> *Id.* at 45.

**VI. IN THE EVENT THE EUROPEAN UNION 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**

57. As explained above, the European Union’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 the European Union may present in its first submission. In particular, the introductory language in the European Union’s measure<sup>34</sup> 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 the European Union attempts to present such a defense, the United States will respond to the European Union’s arguments in subsequent submissions.

58. 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.

59. 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, then 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.

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

60. 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

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<sup>34</sup> *Regulation 2018/724*, paragraph 1 (Exhibit USA-1).

quantities and under such conditions as to cause serious injury or threat of serious injury to the WTO Member's domestic industry.

61. 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)

62. 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)

63. 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.

64. 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.”

65. 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.

66. Notification under Article XIX, in the words of the Appellate Body, is “a necessary prerequisite to establishing a right to apply a safeguard measure”<sup>35</sup> 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, the European Union 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.

67. 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<sup>36</sup> 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, in critical circumstances, consultation may take place immediately after the measure is taken provisionally.*

68. 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.

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<sup>35</sup> *US – Line Pipe (AB)*, para. 157.

<sup>36</sup> GATT Working Party Report, *US – Fur Felt Hats*, GATT/CP/106, para. 3-4.

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

69. 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.

70. 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.<sup>37</sup>

71. 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.***<sup>38</sup> (emphasis added)

72. 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

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<sup>37</sup> *US – Line Pipe*, Appellate Body Report, para. 69.

<sup>38</sup> *Id.*

lawfully applied) but as an initial matter, with respect to whether the rights and obligations of Article XIX and the Safeguard Agreement apply.

73. Any affirmative defense presented by the European Union 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.

74. Accordingly, under the two-step analysis above for determining the existence and application of a safeguard measure, any EU defense of its measure 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

75. 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.”<sup>39</sup> 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.

76. Moreover, it is not for the European Union or any other Member to second guess the United States’ judgment on this point, nor may the European Union 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.

77. 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.

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<sup>39</sup> *US – Line Pipe (AB)*, para. 82.

## **VII. CONCLUSION**

78. 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.