CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS558)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. In the U.S first written submission, the United States demonstrated that China's measures that impose additional duties on U.S. products are plainly inconsistent with the fundamental WTO obligations to provide Most-Favored-Nation (MFN) treatment and treatment no less favorable than that set out in China's Schedule of Concessions (Schedule), as set out, respectively, in Articles I and II of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).[1] The U.S. first written submission also anticipated China's justification for its additional duties and showed that it is baseless.[2] In particular, China's justification is baseless as there is no relevant U.S. safeguard. Accordingly, the rights and obligations under Article XIX of the GATT 1994 and the WTO *Agreement on Safeguards* (Safeguards Agreement) are not applicable in this proceeding.

2. China's first written submission fails to rebut the U.S. *prima facie* case. Instead, in an attempt to justify its additional duties, China advances a baseless interpretation of Article XIX of the GATT 1994 and the Safeguards Agreement. Incredibly, China argues that because *it* considers certain U.S. security measures as "safeguard" measures, Article 8.2 of the Safeguards Agreement authorizes its additional duties.

3. In this submission, the United States will first provide, in Section II, brief background on the U.S. security measures cited by China to justify its additional duties.

4. The United States will then briefly explain, in Section III, why China's measures are inconsistent with its obligations under Articles I and II of the GATT 1994.

5. In Section IV.A of this submission, the United States demonstrates that invocation is a precondition to applying a safeguard measure. This is clear from the text of Article XIX of the GATT 1994, its context, and in light of the object and purpose of the GATT 1994. The United States then explains that this interpretation of Article XIX is confirmed by an adopted GATT 1947 Working Party report. The U.S. interpretation of Article XIX is further confirmed by the negotiating history of the provision – including explicit discussions regarding notification and invocation.

6. In Section IV.B of this submission, the United States demonstrates that the text of the Safeguards Agreement makes clear that invocation is a precondition to applying a safeguard measure. This is clear from the text of Articles 1, 11, and 12 of the Safeguards Agreement. The United States then explains that this interpretation of the Safeguards Agreement is confirmed by the object and purpose of the agreement. The U.S. interpretation of the Safeguards Agreement is further confirmed by the negotiating history of the agreement.

7. In Section IV.C of this submission, the United States establishes that the Safeguards Agreement only applies to measures taken pursuant to Article XIX of the GATT 1994. As the

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[1] *See* First Written Submission of the United States of America (U.S. First Written Submission) (May 2, 2019), paras. 32-67.

[2] U.S. First Written Submission, paras. 68-88.

United States explains in Section II of this submission, the U.S. security measures cited by China to justify its additional duties were taken pursuant to Article XXI of the GATT 1994. Accordingly, the U.S. security measures do not fall within the scope of the Safeguards Agreement. Furthermore, in Section IV.C of this submission, the United States demonstrates that, as a legal matter, the U.S. security measures cannot meet the conditions of Article XIX of the GATT 1994 because they were taken pursuant to Article XXI of the GATT 1994.

8. In Section IV.D, the United States demonstrates that China's approach has no basis in the WTO Agreement. Instead, China derives its approach from the reasoning of the Appellate Body's report in *Indonesia – Iron or Steel Products*, which is not applicable here. Even under China's suggested approach, an application of the Appellate Body's reasoning in *Indonesia – Iron or Steel Products* would confirm that there is no relevant U.S. safeguard measure. China's argument that the existence of a safeguard measure is an "objective" question misses the point. The United States concludes this Section by establishing that Article XIX of the GATT 1994 and the Safeguards Agreement link rebalancing measures to safeguard measures.

9. To demonstrate why China's request for a preliminary ruling is baseless, Section V of this submission establishes that the U.S. panel request meets the requirements of Article 6.2 of the DSU[3] by presenting the problem clearly.

10. Finally, the United States explains in Section VI that China's approach would undermine the WTO. Under China's approach, any measure that a Member considers inconsistent with a GATT obligation is a "safeguard." And, on that basis, that Member can decide, for itself, to adopt retaliatory measures. This is a stunning position. It is the understanding of the United States that, before this dispute, no Member that had taken this view of Article XIX. Moreover, China's position would radically undermine the WTO dispute settlement mechanism and the WTO as a whole.

II. BACKGROUND

11. The United States has not invoked Article XIX of the GATT 1994 with respect to the U.S. security measures cited by China to justify its additional duties.[4] Rather, as the United States informed the Council for Trade in Goods (CTG), the U.S. security measures were taken pursuant to Article XXI of the GATT 1994.[5]

[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

[4] *See* China's First Written Submission, para. 2 (June 6, 2019).

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

12. As the United States has previously explained, under U.S. domestic law safeguard measures are authorized by Section 201 of the Trade Act of 1974.[6] In contrast, Section 232 of the Trade Expansion Act of 1962 (Section 232) authorizes the President of the United States, upon receiving a report from the U.S. Secretary of Commerce finding that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the **national security**," to take action that "in the judgment of the President" will "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the **national security**."[7]

13. On April 19 and 26, 2017, the U.S. Department of Commerce (USDOC) initiated investigations under Section 232 into imports of steel and aluminum, respectively.[8] In connection with these investigations, the USDOC solicited written comments from interested parties and held public hearings.[9] The USDOC summarized its findings from these investigations in written reports, and released these reports to the public.[10]

14. On March 8, 2018, the United States acted pursuant to Section 232 and imposed tariffs on certain steel and aluminum imports, effective March 23, 2018.[11] The USDOC also established a process to permit product-specific exclusions from the Section 232 tariffs, based on, among other factors, the national security implications of those imports.[12]

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[6] *See* Opening Statement of the United States of America at the First Substantive Meeting of the Panel with the Parties (U.S. Opening Statement), para. 36 (September 19, 2019); 19 U.S.C. §2251(a) (Exhibit USA-11).

[7] *See* 19 U.S.C. §1862(c)(1)(A) (Exhibit USA-10); Section 232 Regulations, 15 C.F.R., Part 705 (Exhibit USA-25).

[8] U.S. President, Memorandum on Steel Imports and Threats to National Security, April 20, 2017 (Exhibit USA-26); U.S. President, Memorandum on Aluminum Imports and Threats to National Security, April 27, 2017 (Exhibit USA-27).

[9] DOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel (Exhibit USA-28); DOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum (Exhibit USA-29).

[10] U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018 (Exhibit USA-30); U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended", January 17, 2018 (Exhibit USA-31).

[11] Presidential Proclamation 9705 of March 8, 2018 (Exhibit USA-32); Presidential Proclamation 9704 of March 8, 2018 (Exhibit USA-33); Presidential Proclamation 9711 of March 22, 2018 (Exhibit USA-34); Presidential Proclamation 9710 of March 22, 2018 (Exhibit USA-35); Presidential Proclamation 9740 of April 30, 2018 (Exhibit USA-36); Presidential Proclamation 9739 of April 30, 2018 (Exhibit USA-37); Presidential Proclamation 9759 of May 31, 2018 (Exhibit USA-38); Presidential Proclamation 9758 of May 31, 2018 (Exhibit USA-39); Presidential Proclamation 9772 of August 10, 2018 (Exhibit USA-40); Presidential Proclamation 9777 of August 29, 2018 (Exhibit USA-41); Presidential Proclamation 9776 of August 29, 2018 (Exhibit USA-42).

[12] Department of Commerce, Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum"

15. Soon after the United States took action under Section 232, China circulated a communication to the Committee on Safeguards requesting consultations under Article 12.3 of the Safeguards Agreement.[13] In its consultation request, China noted that it "takes the view that the [Section 2332 security measure] of the United States is safeguard measure although it's in the name of national security measure."[14]

16. In response to China's consultation request under Article 12.3 of the Safeguards Agreement, the United States explained that the Section 232 "actions are not safeguard measures, and therefore, there is no basis to conduct consultations under the Agreement on Safeguards with respect to these measures."[15] The U.S. response to China also explained that:

> The United States did not take action pursuant to Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures. It did not submit notifications with respect to these measures because they are not safeguard measures. As evidenced by our recent notifications with respect to solar products and washers, the United States is well aware of its notification obligations for safeguard measures under the *Agreement on Safeguards*.
>
> Article 12.3 of the *Agreement on Safeguards* states that a "Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations" with Members having a substantial interest in exports of the product concerned. However, the United States is not proposing "to apply or extend a safeguard measure" with respect to steel or aluminum, and therefore Article 12.3 does not apply. Accordingly, China's request for consultations pursuant to Article 12.3 has no basis in the *Agreement on Safeguards*.[16]

17. The U.S. communication also expressed that the United States was prepared "to engage in bilateral discussions" but that any "discussions regarding" the Section 232 measures "would not be held pursuant to the *Agreement on Safeguards*".[17]

(Exhibit USA-43); Department of Commerce, Interim Final Rule, "Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum" (Exhibit USA-44).

[13] *See* Request for Consultations Under Article 12.3 of the Agreement on Safeguards, China, G/SG/161 (March 26, 2018).

[14] *Id.*

[15] Communication from the United States in Response to China's Request Circulated on April 5, 2018, C/SG/168 (April 4, 2018).

[16] *Id.*

[17] *Id.*

18. Notwithstanding the fact that the United States did not implement safeguard measures, China persisted on deeming the Section 232 measures as safeguards."[18]

III. CHINA'S MEASURES ARE INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLES I AND II OF THE GATT 1994

19. In the U.S. first written submission, the United States demonstrated that China's measures are inconsistent with Articles I and II of the GATT 1994.[19]

20. China's measures apply additional duties ranging from 15 to 25 percent on 128 tariff lines for products originating in the United States.[20] As demonstrated in the U.S. first written submission, the additional duties for all 128 tariff lines have resulted in tariffs applied to U.S.-originating products that are higher than the rates of duty applied to other WTO Members on an MFN basis.[21] In addition, for 123 of the 128 tariff lines, China's additional duties result in applied tariffs on U.S.-origin products greater than the rates of duty set out in China's Schedule.[22] Furthermore, China has failed to rebut the U.S. *prima facie* case regarding the U.S. claims under Articles I and II of the GATT.

21. Accordingly, the United States has established that China's additional duties breach its obligations under Articles I and II of the GATT 1994.

IV. CHINA HAS NO BASIS FOR ASSERTING THAT ITS ADDITIONAL DUTIES ARE AUTHORIZED BY ARTICLE 8.2 OF THE SAFEGUARDS AGREEMENT BECAUSE THE UNITED STATES HAS NOT ADOPTED A SAFEGUARD MEASURE

22. 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 Article XIX, then it is not entitled to claim that the Safeguards Agreement provides a legal basis for its measure, and that measure is not a safeguard.

23. As shown below, invocation is a precondition to applying a safeguard. This is clear from the text of Article XIX of the GATT 1994, its context, and in light of the object and purpose of the GATT 1994. The text of the Safeguards Agreement also makes clear that invocation is a precondition to applying a safeguard measure. An adopted GATT 1947 Working Party report, and supplementary means of interpretation, also confirm that invocation is a precondition to

[18] *See, e.g.*, Communication from China describing the U.S. security measures under Section 232 as safeguards, G/L/1218 (April 3, 2018).

[19] *See* U.S. First Written Submission, paras. 32 – 67.

[20] *See* U.S. First Written Submission, para. 5.

[21] *See* U.S. First Written Submission, para. 5.

[22] *See* U.S. Responses to Panel Questions to the Parties After the First Substantive Meeting, Question 12.

applying a safeguard. Contrary to China's arguments, its approach has no basis in the text of the WTO Agreement.

A. Article XIX of the GATT 1994 Makes Clear that Advance Notice by a Member Intending to Suspend an Obligation or Withdraw or Modify a Concession is a Precondition to Applying a Safeguard Measure

24. The invocation requirement in Article XIX of the GATT 1994 to apply a safeguard measure stems from the provisions of Article XIX requiring a Member to provide notice of a proposed action. Absent this invocation, a Member is not free to exercise its right to take a safeguard measure and that measure cannot fall under the WTO's safeguards disciplines. This interpretation is clear from the text of Article XIX.

25. Before discussing the text, the United States takes this opportunity to make two observations that should help to frame the following analysis. First, Article XIX does not define the term "safeguard measure," nor does it contain any definitions of comparable terms. Rather, Article XIX establishes a process that authorizes a Member to suspend obligations or withdraw concessions in certain circumstances. The first mandatory step in the process is that the Member that wishes to depart from its GATT 1994 obligations must **invoke** Article XIX by notifying all other WTO Members. The requirement for invocation before any other steps in the process are applicable is reflected in every paragraph of Article XIX, as well as in the Safeguards Agreement.

26. Second, the United States has used the term "invoke" to refer to the notice requirements in Article XIX and the Safeguards Agreement. The United States uses the term "invoke" according to its ordinary meaning. The term "invocation" refers to "the act of calling on for authority or justification" and "the act of enforcing or using a legal right."[23] In the context of safeguards, invocation refers to a Member basing an action on Article XIX of the GATT. For instance, a June 1950 communication from Cuba to the CONTRACTING PARTIES is entitled: "Letter from the Cuban Government *invoking* Article XIX". In that communication, Cuba informed the CONTRACTING PARTIES that it "has decided to make use of its rights under Article XIX, without prior consultation with the Contracting Parties, in accordance with the provisions" in Article XIX:2, because Cuba "considers that delay would cause grave damage to the national producers affected which it would be very difficult, if not impossible, to repair."[24] This is but one of many examples in the practice under the GATT 1947 of a Contracting Party *invoking* its rights under Article XIX.

27. Similarly, a 1987 Background Note by the GATT Secretariat on Article XIX uses the term "invoke" in the same manner as the United States. In paragraph 12 of the Note, the GATT Secretariat explains that Table 1 of the Note provides a summary "showing the countries

[23] Black's Law Dictionary, 10th edn., B. Garner (ed.) (Thomson Reuters, 2014) at 958 (Exhibit USA-14).

[24] GATT/CP/71/Add.1 (June 26, 1950).

invoking" Article XIX actions.[25] And in paragraph 13 of the Note, the Secretariat observes that at the time when the Note was drafted, "Australia [was] by the far the country which . . . **invoked** the greatest number of Article XIX actions."[26] Finally, in a section of the Note with the heading "Period when actions were **invoked**", the Secretariat uses the term "invoke" numerous times:

> 1970-1979 represents the period when the greatest number of actions were **invoked** (47 actions). The period 1960-1969 has 35 actions and the current period, 1980-present, so far has 33 actions. It is interesting to note that Australia, for instance, **invoked** 17 and 15 actions during the periods 1970-1979 and 1960-1969 respectively, but only 2 before 1960 and 4 starting from 1980. The pattern for the United States is different. It **invoked** 11 actions between 1950-1959 and 9 actions between 1970-1979, with relatively few in 1960-1969 and the current period. The pattern for Canada again is different. It **invoked** 13 actions during 1970-1979, with relatively few in other periods. The European Communities has **invoked** the greatest number of Article XIX actions during the current period (11 actions). Actions before 1979 were notified in the name of individual Member States.[27]

28. Given the common usage of the term "invoke," China's difficulties with the term "invoke" or "invocation" are simply not credible.

1. The Text Of GATT 1994 Article XIX In Its Context, And In The Light Of The Agreement's Object And Purpose, Establishes That Invocation is a Precondition to Applying a Safeguard Measure

a. *The Plain Meaning of the Text of GATT 1994 Article XIX Establishes That Invocation is a Precondition to Applying Safeguard Measure*

29. The text of GATT 1994 Article XIX, in its context and in the light of the agreement's object and purpose, establishes that invocation is a precondition to applying a safeguard measure.[28] The title of Article XIX, "Emergency Action on Imports of Particular Products", does not focus on any particular type of measure, nor does it reference any type of obligation. Instead, the article sets out rules for how a Member may choose to take action that would otherwise be inconsistent with obligations under the GATT 1994 affecting imports of particular products. Further, the term "emergency" in the title of Article XIX implies that safeguard measures are meant to address exigent circumstances. The ordinary meaning of "emergency" is

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

[26] *Id.*, para. 13.

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

[28] *See* Article 31(1) & (2) of the Vienna Convention on the Law of Treaties (Vienna Convention).

a situation "that arises unexpectedly and requires urgent action."[29] As discussed below at Section IV.C of this submission, China's flawed approach reduces the title of Article XIX to inutility.[30]

30. The text Article XIX:1(a) 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.

31. Article XIX:1(a) allows a WTO Member to deviate from its obligations under the GATT 1994 if the conditions set out in that provision are present. For analytical purposes, Article XIX:1(a) can be divided into two parts. The first part sets out the conditions that, if present, would give a Member the right to apply a safeguard.[31] Where those conditions are present, the second part establishes the right of a Member to apply a safeguard (*i.e.*, "the contracting party shall be free") and sets out requirements for the application of a safeguard.[32] Accordingly, Article XIX:1(a) establishes a right – the right to suspend obligations or modify or withdraw concessions – in the sense that Article XIX:1(a) permits a Member, when it has invoked this provision and under certain conditions, to take action that would otherwise be inconsistent with its WTO obligations.

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[29] *See* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 806 (defining "emergency" as "1 A situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action") (Exhibit USA-45).

[30] *US – Gasoline (AB)*, at 23 ("One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.") *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.57 ("[T]he principle of effective treaty interpretation requires us to give meaning to every term of the provision").

[31] *See* Article XIX:1(a) ("If, as a result of unforeseen developments and the effect of the obligations incurred by a contracting party under this Agreement . . . 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").

[32] *See* Article XIX:1(a) (noting that a Member may "suspend the obligation in whole or in part or to withdraw or modify the [GATT] concession" with "respect" to the "like or directly competitive product" that meets the circumstances and conditions of the first part of Article XIX:1(a), and to "the extent and for such time as may be necessary to prevent or remedy such injury".).

32. Under Article XIX:2, a Member's ability to take action pursuant to Article XIX:1 is **conditioned** on invocation with notice to other Members before that Member can take action. The first sentence of Article XIX:2 provides:

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

33. The ordinary meaning of the terms in the first sentence of Article XIX:2 show that invocation is a precondition to applying a safeguard. The term "before" is defined as "preceding an event."[33] The term "pursuant" means "in accordance with".[34] And the term "propose" means to "[p]ut forward or present for consideration" or "discussion".[35] Thus, invocation and notice from the WTO Member proposing to take action must precede "action pursuant to" paragraph 1. Without such notice, a Member is not seeking legal authority pursuant to Article XIX to suspend an obligation or to withdraw or modify a concession.

34. Of note, the third sentence of Article XIX:2 provides a limited exception to the consultation requirement:

> In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally **without prior consultation**, on the condition that consultation shall be effected immediately after taking such action.

Critically, this exception to act "without prior consultation" does **not** apply to the requirement in Article XIX:2, first sentence, to invoke Article XIX by providing notice to Members in writing. Thus, the requirement to provide notice is **unconditional**.

35. The text of Article XIX:3(a) of the GATT 1994 also shows that invocation is a **precondition** to applying a safeguard measure. Under that provision, if the consultations envisioned by Article XIX:2 fail to address the concerns of affected Members, affected Members can suspend substantially equivalent concessions or other obligations. These envisioned consultations are triggered by the invocation and notice provision under Article XIX:2. In full, Article XIX:3(a) provides:

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[33] *See* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 205 (defining "before" as "Earlier in time; previously" and "preceding an event") (Exhibit USA-47).

[34] *See* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 2, 422 (defining the term "pursuant" as "in accordance with") (Exhibit USA-48).

[35] *See* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 2,381 (defining the term "propose" as "Put forward or present for consideration, discussion") (Exhibit USA-49).

> If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which **proposes to take or continue** the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which **written notice** of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1(b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

36. Thus, in terms of Article XIX:3(a), **without notice** of a proposed action, a Member "which proposes to take or continue the action shall [**not**] be free to do so." That is, **without invocation**, a Member cannot take (and has not taken) action pursuant to Article XIX.

37. Accordingly, the text is clear that absent invocation of the right to take action pursuant to Article XIX of the GATT, a measure cannot be characterized as a safeguard measure.

b. *The Context of Article XIX Confirms that Invocation is a Precondition to Applying a Safeguard Measure*

38. The context provided by other provisions of the WTO Agreement confirms that invocation is a precondition to applying a safeguard measure. In particular, as explained below, a number of rebalancing provisions in the WTO Agreement confirm that Article XIX of the GATT 1994 establishes a right that must be **invoked** by a Member taking action under that provision. Although the requirements vary, these provisions contemplate a Member exercising a right through invocation and contain structural similarities to Article XIX.

39. Specifically, the following provisions of the GATT 1994 contemplate a Member affirmatively exercising the right to modify or withdraw a tariff concession or to suspend an obligation through **invocation**: Article XXVIII,[36] Article XXIV, Article XVIII, Article II, and Article XXVII.[37] In addition, rebalancing provisions in other WTO agreements reflect a similar structure by which a Member may **invoke** the right to modify or withdraw a tariff concession or to suspend an obligation, including: Article XXI of the *General Agreement on Trade in Services* (GATS), Article 5 of the *Agreement on Agriculture* (Agriculture Agreement), and Article 6 of the *Agreement on Textiles and Clothing* (Textiles Agreement).

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[36] *See* U.S. Responses to Questions After the First Substantive Meeting. paras. 91-93.

[37] The United States first addresses Article XXVIII because it is referred to in other provisions of the GATT 1994. Also of note, the procedural mechanism for certifying tariff rate changes in the authentic texts of Member Schedules expressly applies to modifications resulting from action under these GATT 1994 provisions. *Procedures for Modification and Rectification of Schedules of Tariff Concessions* (Certification Procedures), L/4962, March 28, 1980, para. 1 (providing for certification of changes in the authentic texts of Schedules reflecting modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII, and Article XXVIII of the GATT 1994). The Certification Procedures form part of the GATT 1994. GATT 1994, para. 1(b)(iv).

Article XXVIII of the GATT 1994

40. Article XXVIII (Modification of Schedules) of the GATT 1994 permits Members to modify or withdraw tariff concessions reflected in their Schedules of Concessions through negotiation and agreement with certain other Members. Like Article XIX of the GATT 1994, for a measure to fall under Article XXVIII, a Member must **invoke** Article XXVIII as the legal basis for implementing a measure to modify or withdraw a concession in its Schedule. Without **invoking** Article XXVIII, and meeting the requirements of Article XXVIII, a Member would not be considered to take action pursuant to Article XXVIII.

41. Article XXVIII provides that an importing Member may modify its Schedule if certain requirements set out in that provision are met. Thus, the structure of Article XXVIII is similar to the structure of Article XIX in allowing a Member to propose to invoke a right. That is, Article XXVIII:3(a) authorizes a Member **proposing** to "modify or withdraw" a tariff concession to implement the proposed modification even if no agreement is reached between the importing Member and the affected Member. Similarly, Article XIX:3(a) allows an importing Member **proposing** to take a safeguard measure to implement the proposed measure even if no agreement is reached between the importing Member and the affected Members. Under both provisions, "proposing" involves invocation of the right.

42. Like Article XIX, the proposed modification or withdrawal under Article XXVIII triggers discussions between the invoking Member and certain other Members. Article XIX:2 provides that the invoking Member "shall afford the [Members] and those [Members] having a substantial interest as exporters of the product concerned an opportunity to **consult** with it in respect of the proposed action."[38] Similarly, Article XXVIII:1 provides for "negotiation and agreement" with a defined set of Members and "consultation" with other substantially interested Members. The trigger for consultations or negotiations is another structural similarity between Article XIX and Article XXVIII.

43. Then, the offsetting action authorized by Article XXVIII in cases where agreement is not reached is similar in structure to the offsetting action authorized by Article XIX. Article XXVIII:3(a) allows certain Members affected by an importing Member's modification or withdrawal to take offsetting action under certain conditions. In relevant part, Article XXVIII:3(a) provides that certain affected Members:

> **[s]hall then be free** not later than six months after such action [*i.e.*, modification of schedules] is taken, **to withdraw**, upon the expiration of thirty days from the day on which the written notice of such withdrawal is received by the contracting parties, **substantially equivalent concessions** initially negotiated with the applicant contracting party.[39]

[38] Emphasis added.

[39] Emphasis added.

44. Article XIX:3(a) also allows certain Members affected by an importing Member's safeguard measure to take offsetting action under certain conditions:

> If agreement among the interested [Members] with respect to the action is not reached, the [Member] which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, **the affected [Members] shall then be free**, not later than ninety days after such action is taken, **to suspend**, upon the expiration of thirty days from the day on which written notice of such suspension is received by the [Members], the application to the trade of the contracting party taking such action…**of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the [Members] do not disapprove**.[40]

Therefore, the provision for offsetting actions supports that Article XIX and Article XXVIII are similarly structured.

Article XXIV of the GATT 1994

45. Article XXIV of the GATT 1994 provides that if, in the formation of a customs union or a free-trade area, a Member proposes to increase a duty rate above the bound rate, the renegotiation procedures in Article XXVIII shall apply.[41] Therefore, a Member seeking to exercise the right to modify or withdraw a tariff concession pursuant to Article XXIV must follow the same procedures detailed above with respect to Article XXVIII and, as such, the parallels to Article XIX are equally applicable.

Article XVIII of the GATT 1994

46. Article XVIII (Governmental Assistance to Economic Development) of the GATT 1994 is another rebalancing provision that permits certain developing Members to renegotiate tariff concessions (Article XVIII:A) or to implement an otherwise inconsistent measure for the purposes of promoting the establishment of a particular domestic industry (Article XVIII:C). Subject to certain requirements, Article XVIII provides that qualifying developing Members seeking recourse to these provisions "**shall be free** to deviate temporarily from the provisions of the other Articles of this Agreement."[42] Both Sections A and C of Article XVIII require the Member seeking modification to **invoke** these provisions by notifying Members,[43] and in certain

[40] Emphasis added.

[41] GATT 1994 Article XXIV:6 (If, in the formation of a customs union or a free-trade area, a Member "...proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union."). *See also Understanding on the Interpretation of Article XXIV of the GATT 1994* (affirming that the procedure must be commenced before the proposed modification or withdrawal).

[42] GATT 1994 Article XVII:4(a) (emphasis added).

[43] GATT 1994 Article XVIII:7(a) (providing that the Member seeking modification under Section A "shall notify [Members]" of a proposed modification or withdrawal); GATT 1994, Article XVIII:14 (providing that a Member

circumstances permit implementation of the proposed measure even absent agreement.[44] Affected Members may withdraw substantially equivalent concessions.[45] In fact, the drafters of Article XVIII expressly intended these provisions to operate similar to Article XIX in the context of special circumstances related to economic development:

> The recognition of this general concept [that economic development is consistent with the objectives of the GATT] led the Working Party to the conclusion that a suitable solution could be found in an application to the special circumstances of economic development of the **principle underlying Article XIX**…[46]

Article II:5 of the GATT 1994

47. Article II:5 provides for consultations and negotiations for compensatory adjustment in the event that a domestic court ruling on classification does not accord the treatment required by a negotiated concession. In light of its retroactive nature (*i.e.*, renegotiation takes place *after* the change resulting from a domestic ruling), the structure of Article II:5 differs from other WTO rebalancing provisions in providing that an affected Member shall bring the matter to the attention of the Member which has made the classification ruling. Article II:5 must still be **invoked**, however, by the Member making the ruling, who "**declares** that such treatment cannot be accorded" because of the domestic ruling. Like other rebalancing provisions, Article II:5 contemplates negotiations with affected Members for compensatory adjustment.

Article XXVII of the GATT 1994

48. Article XXVII (Withholding or Withdrawal of Concessions) of the GATT 1994 provides the right to withhold or withdraw a concession made during negotiations with respect to a government which has not become a Member or has ceased to be a Member of the GATT 1994. Like GATT 1994 Article XIX and other rebalancing provisions, Article XXVII requires **invocation** by a Member and provides for notice and consultations with concerned Members upon request:

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seeking modification under Section C "shall notify [Members] of the special difficulties which it meets …and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties").

[44] Under Section A, even where negotiations do not result in agreement, the Member seeking modification "shall be free" to modify or withdraw concessions where there is a multilateral determination that the compensatory adjustment offered is adequate, or that the Member made every reasonable effort to offer adequate compensation. GATT 1994 Article XVIII:7(a) and (b). Section C also allows the possibility for the modifying Member to introduce the proposed measure where agreement is not reached after informing the Members. GATT 1994 Article XVIII:17.

[45] GATT 1994 Article XVIII:7(b) and 21. Drafters expressly revised Article XVIII:A to correspond to Article XXVIII:4(d). *GATT Report of the Review Working Party II on Tariffs, Schedules and Customs Administration*, L/329, February 24, 1955, paras. 22-23.

[46] *Report of the Review Working Party on Quantitative Restrictions*, L/332/Rev.1 and Addenda, March 2, 4, and 5, 1955, 3S/170, 179-180, paras. 35-36 (emphasis added).

> Any [Member] **shall at any time be free** to withhold or to withdraw in whole or in part any concession…in respect of which such [Member] determines that it was initially negotiated with a government which has not become, or has ceased to be, a [Member]. A [Member] taking such action **shall notify** the [Members] and, upon request, **consult** with [Members] which may have a substantial interest in the product concerned.[47]

Article XXI of the GATS

49. GATS Article XXI (Modification of Schedules) is the equivalent in the services context of Article XXVIII of the GATT 1994, permitting modification or withdrawal of a commitment in a Member's Schedule. GATS Article XXI affords a Member the right to modify or withdraw a commitment at any time in accordance with certain time frames and procedures.[48] The modifying Member "shall notify its intent to modify or withdraw" prior to implementation[49] and enter into negotiations for compensation with affected Members upon request.[50] While there are some structural differences to GATT Article XXVIII, such as the availability of arbitration proceedings in the event of disagreement, GATS Article XXI similarly contemplates offsetting by affected Members.[51]

Article 5 of the Agriculture Agreement

50. Article 5 of the Agriculture Agreement, titled "Special Safeguard Provisions", sets out a safeguard mechanism for agricultural product. Members have the right to impose an additional duty temporarily, subject to certain substantive and procedural requirements.[52] Although Article 5 differs from the safeguard mechanisms in Article XIX of the GATT 1994, the Safeguard Agreement, and the Textiles Agreement (*i.e.*, there is no conditional injury test), like these provisions and other rebalancing provisions, Article 5 contemplates **invocation** and advance notice in writing and consultations with interested Members.[53] Notably, Members

[47] Emphasis added.

[48] GATS Art. XXI:1(a) ("A Member…may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article."). As in the goods context, services schedule modifications are subject to certification procedures. *See Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules)*, S/L/80, adopted October 29, 1999.

[49] GATS Art. XXI:1(b).

[50] GATS Art. XXI:2(a).

[51] GATS Art. XXI:4(b) ("If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings…").

[52] *Agreement on Agriculture* Article 5(1).

[53] *Agreement on Agriculture* Article 5(7).

taking measures under Article 5 may not have recourse to Article XIX of the GATT 1994 or Article 8(2) of the Safeguard Agreement.[54]

Article 6 of the Textiles Agreement

51. The transitional safeguard mechanism in Article 6 of the Textiles Agreement reflects the same features of **invocation**, notice, and consultations with affected Members. Indeed, the text refers explicitly to the Member "invoking the action."[55] As such, the key feature of invocation by a Member is evident in this context as well.

Summary and Conclusions

52. Like Article XIX of the GATT 1994, several rebalancing provisions of the WTO Agreement allow a Member to modify or withdraw tariff concessions or suspend obligations through **invoking** that legal right and following the relevant requirements. Without invoking the respective provision and meeting these requirements, a Member would not be considered to take action pursuant to that provision. Therefore, the rebalancing provisions discussed above confirm that Article XIX of the GATT 1994 establishes a right that must be **invoked** by a Member taking action under that provision. As the United States has explained, under China's theory that it may judge for itself that Article XIX applies in this proceeding, any Member would be free to take rebalancing measures under any of the provisions discussed above. There is no text in these provisions that would support such an approach, and the United States is not aware of any past examples of these provisions being interpreted in such a manner.

c. *The Object And Purpose of GATT 1994 Confirm That Invocation is a Precondition to Applying a Safeguard Measure*

53. The object and purpose of the GATT 1994 also confirm that invocation is a precondition to applying a safeguard measure. The object and purpose of the GATT 1994 is set out in the agreement's Preamble. That Preamble provides, among other things, that the GATT 1994 is "directed to the **substantial reduction** of **tariffs** and other barriers to trade and to the elimination of discriminatory treatment in international commerce".[56] As the United States explained in *US – Fur Felt Hats* (the first dispute under the GATT 1947 concerning Article XIX), "Article XIX [was] inserted into the Agreement as a safety valve, because it was impossible to be sure that rates of duty agreed at one time might not have to be changed in unforeseen circumstances."[57] Article XIX "contributed to a larger measure of **tariff reduction** than would have been the case."[58] Thus, with the reference to tariff reductions that are "substantial", the contracting parties acknowledged that Article XIX allowed them to negotiate substantial reductions in tariffs.

[54] *Agreement on Agriculture* Article 5(8).

[55] *Agreement on Textiles and Clothing* Article 6(7) (The Agreement terminated January 1, 2005).

[56] GATT 1994, pmbl. (emphasis added).

[57] GATT/CP.5/SR.14, p. 2 (November 17, 1950).

[58] *Id*. (emphasis added).

54. Consistent with this language, the provisions of the GATT 1994 are part of a single undertaking in which it is contemplated that Members will make use of GATT provisions consistent with their text. As discussed above at Section IV.A.1.a., the text of Article XIX establishes that invocation is a precondition to applying a safeguard. Accordingly, the object and purpose of the GATT 1994, as set forth in the agreement's Preamble, establishes that invocation is a precondition to applying a safeguard.

55. In sum, the text of GATT 1994 Article XIX, in context and in the light of the agreement's object and purpose, establishes that invocation is a precondition to applying a safeguard.

2. An Adopted GATT 1947 Working Party Report Confirms That Invocation is a Precondition to Applying a Safeguard Measure

56. That invocation is a precondition to applying a safeguard measure is confirmed by the Working Party's report in the *US – Fur Felt Hats* dispute between the United States and Czechoslovakia. In that dispute, the United States invoked Article XIX with respect to a proposal to withdraw a tariff concession concerning certain hats.[59] After notifying the CONTRACTING PARTIES, the United States entered into consultations with affected contracting parties, including Czechoslovakia.[60] The United States reached agreement with the affected contracting parties except for Czechoslovakia. Czechoslovakia then initiated a complaint, which was discussed by the CONTRACTING PARTIES and referred to a "specially appointed working party for detailed study."[61]

57. Czechoslovakia claimed that the United States "failed to fulfil the requirements of Article XIX."[62] In particular, Czechoslovakia asserted that "the conditions required by Article XIX before a concession could be withdrawn had not been proved by the United States."[63] Thus, Czechoslovakia suggested "that the United States Government revoke its intention" to apply a safeguard.[64]

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[59] *See* Communication by the United States to the CONTRACTING PARTIES (noting that in accordance with the findings of the U.S. Tariff Commission – the predecessor agency to the U.S. International Trade Commission – and "pursuant to the provisions of Article XIX of the General Agreement, the Government of the United States finds it necessary to withdraw the concessions on" certain hats. The U.S. communication also provides that the proposed "action is being taken in accordance with the provisions of the last sentence of paragraph 2 of Article XIX" and that the U.S. "Government is prepared to afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it immediately in respect of the proposed action."), GATT/CP/83, p. 2 (October 19, 1950).

[60] *See US – Fur Felt Hats (GATT Panel)*, preface.

[61] *US – Fur Felt Hats (GATT Panel)*, preface

[62] *US – Fur Felt Hats (GATT Panel)*, p.4.

[63] GATT/CP.5/SR.14, p. 2 (November 17, 1950).

[64] *US – Fur Felt Hats (GATT Panel)*, Appendix B.

58. In its report, the Working Party set out the requirements of Article XIX. According to the Working Party, in "attempting to appraise whether the requirements of Article XIX had been fulfilled," it "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 Article XIX.[65] The Working Party reasoned that "three sets of conditions have to be fulfilled" to meet the requirements of Article XIX. After listing the first two conditions, the Working Party listed the third:

> (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.[66]

59. The Working Party's reasoning on the requirements of Article XIX:2 is relevant in this dispute. In particular, the Working Party observed that the U.S. "notification was sent to the CONTRACTING PARTIES" before the U.S. took action and that while "the United States Government **invoked** the second procedure" of Article XIX:2, "by giving notice more than a month before" taking action the U.S. "enabled exporting countries to enter into consultation[s] before the duties were actually raised."[67]

60. Although Czechoslovakia did not agree with the conclusions of the Working Party's report, it was approved by the CONTRACTING PARTIES "as embodying their collective view" and, because of its value in relation to the interpretation of Article XIX, the CONTRACTING PARTIES published it.[68]

61. As the Working Party explained, the notification requirement of Article XIX is one of the "conditions" that qualifies the exercise "of the right to suspend an obligation or to withdraw or modify a concession" under Article XIX.[69] As explained above in Section IV.A.1.a., the invocation requirement in Article XIX of the GATT 1994 stems from the provisions on providing notice of a proposed action. Accordingly, the Working Party's reasoning confirms that invocation of Article XIX of the GATT 1994 is a precondition to applying a safeguard.

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[65] *Id*, para. 3 (emphasis added).

[66] *Id*., para 4.

[67] *Id*., para. 42.

[68] *Id*., preface.

[69] *US – Fur Felt Hats (GATT Panel)*, para. 3.

3. Negotiating History Confirms That Invocation is a Precondition to Applying a Safeguard Measure

62. While not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirms that invocation is a precondition to applying a safeguard measure.[70] In particular, the United States draws the Panel's attention to the negotiating history of the GATT 1947, as such materials may constitute historical background against which the GATT 1994 was agreed.[71]

a. *The Negotiating History of Article XIX Confirms That Invocation is a Precondition to Applying a Safeguard Measure*

63. The drafting history of Article XIX of the GATT 1994 dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). In 1946, the United States proposed a draft charter for the ITO, which included the following provision:

> Article 29 (Emergency Action on Imports of Particular Products):
>
> > 1. If, as a result of unforeseen developments and the effect of the obligations incurred under this Chapter, including the tariff concessions granted pursuant to Article 18, any product is being imported into the territory of any Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar products, the Member shall be free to withdraw the concession, or suspend the obligation, in respect of such product, in whole or in part, or to modify the concession to the extent and for such time as may be necessary to prevent such injury.
> >
> > 2. Before any Member shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the Organization as far in advance as may be practicable and shall afford the Organization, and other Members having a substantial interest as exporters of the product concerned, an opportunity to consult with it in respect of the proposed action. If agreement among the interested Members with respect to the proposed action is not reached, the Member which proposes to take action shall, nevertheless, be free to do so, and if such action is taken the other affected Members shall then be free, within sixty days after such action is taken, to suspend on sixty day's written notice to the

[70] *See* Vienna Convention, Article 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.").

[71] *EC – Computer Equipment (AB)*, para. 86 ("With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.").

> Organization the application to the trade of the Member taking such action, of any of the obligations or concessions under this Chapter the suspension of which the Organization does not recommend against.[72]

64. As originally drafted, the predecessor to Article XIX included an invocation requirement. As explained above Section IV.A.1.a, the invocation requirement in Article XIX stems from the provisions on providing notice of a proposed action. During the negotiations on the text of the proposed ITO provision that became Article XIX, however, some drafters suggested removing the notification requirement. Led by the United States, the drafters agreed to keep the notification requirement.

65. At the outset of the first discussion on draft ITO Article 29, the United States discussed the notification requirement. After introducing Article 29 as the topic of discussion, the Chairman asked the United States to outline its views.[73] The United States observed that:

> The purpose of the Article, generally speaking, is to give some flexibility to the commitments undertaken in Chapter IV. Some provision of this kind seems necessary in order that countries will not find themselves in such a rigid position that they could not deal with situations of an emergency character. Therefore, the Article would provide for a modification of commitments to meet such temporary situation. In order to safeguard the right given and in order to prevent abuse of it, the Article would provide that **before** any action is taken under an exception, the member concerned would have to **notify** the organization and consult with them, and with other interested members.
>
> It provides, further, that, if no agreement were reached on the proposed action, any Member who was decisive could take compensatory action by withdrawing concessions from the Member that had **invoked** the clause.[74]

66. During the same meeting, the United Kingdom expressed concerns with the timing of the notification requirement. Specifically, the United Kingdom asserted that:

> we have doubts about the provision for **prior notice** of the emergency measures to be taken. It is precisely in the case of sudden influxes of imports, such as those which are envisaged by this Article, that **prior notice** and procedural delays would be most difficult to contemplate. Not only is almost immediate action likely to be needed in such cases, but any prior publicity with regard to the intended action would be likely to lead to

[72] Suggested Charter for an International Trade Organization for the United Nations, U.S. Department of State (September 1946) (Exhibit USA-50).

[73] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PV/7 (Nov. 1, 1946), p. 3 (Exhibit USA-53)

[74] *Id*. p.4.

> forestalling and an accelerated rate of importation, and so would tend to defeat the object of the action. We do not, of course, oppose the requirement of notification, nor that of consultation, nor the arrangement for possible subsequent measures to deal with unjustified use of this procedure. But we think that it may be fairly often be necessary for the notification to be simultaneous with, and **not prior**, to the taking of action under this Article.[75]

67. According to the transcripts of this meeting, the Netherlands and India appeared to agree with the U.K.'s views regarding prior notice.[76] In response to the U.K.'s concerns, the United States asserted that while "the draft as it is now framed it does provide for prior notice", it "does not stipulate that it should be very long."[77] Although the issue of prior notice was not resolved at this meeting, the Chairman closed the meeting by observing that there appeared to be "general agreement as to the need for [a] provision for emergency action."[78]

68. On November 9, 1946, the drafters met to discuss a number of outstanding issues, including the prior notification and prior consultation requirements of the second paragraph of Article 29.[79] At the beginning of the meeting, India raised concerns with both requirements and suggested amending Article 29. In India's view, a safeguard action would have to be taken "quickly" to avoid "threatened injury to domestic interests". Thus, India suggested:

> would it not be better if we so re-wrote the section as to require the member concerned to **inform** the Oragnisation and to start this process of consultation **after** taking the action which is needed if the circumstances are so urgent as to make that course necessary? [80]

69. The Chairman noted that the point raised by India was an outstanding issue from their previous meeting, and suggested that the drafters should "see whether in certain circumstances only notice **after** a measure had been taken should be needed."[81] To address the comments from India and the Chairman, the United States observed that:

> The Article as drafted provides for the fact that **before** action is taken notice shall be given as far in advance as may be practicable. . . . . In essence, what the Article provides is that there ought to be advance

[75] *Id*. pp. 7-8. (emphasis added).

[76] *Id*. p. 9. (the Netherlands asserted that "prior notice may not always be practicable" while India observed that "it may not be possible to give long notice").

[77] *Id*., p. 16.

[78] *Id*., p. 16.

[79] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (November 9, 1946) (Exhibit USA-54).

[80] *Id*., p. 5 (emphasis added).

[81] *Id*. (emphasis added).

> notice and as long advance notice as a country can give in all the circumstances. It seems to me it is a desirable principle to retain.[82]

70. In response, India observed that "it is not merely the prior notice that is involved here but also the consultation that members affect in respect of the proposed action".[83] Thus, India suggested that the procedure to invoke the safeguard provision "should be a little more elastic" and that in certain circumstances:

> the procedure should be that the members should be permitted to take action subject to consultation which may take place a little later, and the notice should be issued at once.[84]

71. To address the point raised by India, the Chairman suggested a compromise. Specifically, the Chairman suggested that the drafters agree about **prior notice**, but suggested that to address "exceptional cases" the drafters "have to try to find a formula" that "gives the right in very exceptional cases" to "take immediate action" without prior consultation.[85] The United States agreed with the Chairman, noting that "the Chairman's suggestion that there might be provision made for quicker action in exceptional cases is sound."[86] After the drafters discussed the compromise, the Chairman wrapped up the discussion on Article 29 by observing that, if he saw the remarks of the drafters clearly, that there "will be prior consultation unless exceptional circumstances make it impracticable."[87] The drafters agreed with pausing the discussion on Article 29 until a new draft was presented by the rapporteur.[88]

72. On November 14, 1946, the drafters discussed a revised version of Article 29. At the beginning of the discussion on Article 29, the rapporteur observed that:

> It seemed to be agreed that prior or simultaneous **notice** should in all cases be given, but that with respect to consultation there should be some leeway in critical cases for the action to be taken first and the consultation should follow upon it immediately. It is believed that the draft as it originally stood permitted short notice. In other words, under the original language of the draft it reads

[82] *Id.*

[83] *Id.*, p. 6.

[84] *Id.*

[85] *Id.*, p.7.

[86] *Id.*, p.8.

[87] *Id.*, p. 12.

[88] *Id.*

> Before any Member shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the Organisation as far in advance as may be practicable.
>
> It seems to me that would permit of short notice; it could a[l]most be simultaneous. Therefore, I did not think that any change was needed in that.[89]

73. Regarding prior consultation, the rapporteur noted that new text had been added to Article 29 that would allow action without prior consultation in exceptional circumstances.[90] After the rapporteur finished going over Article 29, the United Kingdom once again expressed concerns with the **prior notice** requirement of Article 29.[91] Specifically, the U.K. asserted that "it is difficult to insist that there must always be prior notice."[92] In the view of the U.K., for some countries it would "be extremely difficult to give prior notice" under certain conditions.[93] Thus, the U.K. suggested amending Article 29 so that "there might be an obligation on a country which acts **without giving notice** to agree to immediate consultation on request."[94] Further, if a country takes action without giving notice, the U.K. suggested that:

> If countries ask for consultation, that country [*i.e.*, country taking action without providing prior notice] should be under an obligation to enter into consultation immediately. It might be worth while to insert a clause to this effect to the draft.

74. After a discussion among the drafters on the U.K.'s suggestion, Canada suggested that it would be helpful for the drafters to hear from the United States since Article 29 was based on a safeguard provision used by the United States in U.S. trade agreements.[95] In response, the United States observed that the United States had "been including clauses similar to this in agreements for a long time" and that, in the United States, "they have almost never been **invoked**, but they have been there in case the emergency should arise, which gives some assurance to the people concerned."[96] The U.K.'s suggestion on striking the prior notice requirement of Article 29 did not get support from the drafters. Instead, the drafters focused the

[89] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (November 14, 1946), p.9 (Exhibit USA-55).

[90] *Id.*

[91] *Id.*, p.13. (emphasis added).

[92] *Id.*

[93] *Id.*

[94] *Id.* (emphasis added).

[95] *Id.*, pp. 15-16.

[96] *Id.*, p.17.

remainder of their discussion concerning Article 29 on the rebalancing aspects of the provision.[97] The U.K. then withdrew its amendment.[98]

75. On November 20, 1946, the drafters issued a report that included a revised Article 29 that retained the prior notice requirement.[99] This version of Article 29 was included in the London Report and it became Article 34 in the draft Charter of the ITO.[100] While the drafters made further revisions to Article 34 during the discussions in New York, Geneva, and Havana, the prior notice requirement was kept by the drafters and found its way to the current Article XIX of the GATT 1994.

76. As the foregoing demonstrates, the drafters of the provision that became Article XIX of the GATT 1994 made the intentional decision to keep the notification requirement. Accordingly, the drafting history of Article XIX of the GATT confirms that invocation is a precondition to applying a safeguard measure.

B. The Safeguards Agreement Makes Clear that Invocation by a Member Exercising its Rights Under Article XIX is a Precondition to Applying a Safeguard Measure

77. As discussed above in Section IV.A, the United States is using the term "invoke" to refer to the notice requirements in Article XIX and the Safeguards Agreement. The United States uses the term "invoke" according to its ordinary meaning. Thus, the term "invocation" refers to "the act of enforcing or using a legal right."[101] In other words, invocation occurs with the exercise of an available right to take a particular action.

78. Accordingly, a Member informs others of its decision to take or seek a safeguard (*i.e.*, invoke) with its notification. Specifically, Article 12 of the Safeguards Agreement contains requirements regarding that notification; these procedural requirements, however, do not condition an invocation. Rather, the notification requirements in the Safeguards Agreement set out requirements to inform WTO Members that a particular Member has decided to *exercise* its rights under the WTO Agreement.

79. The U.S. use of the term "invoke" comports with the understanding that a Member "shall be free" (*i.e.*, may invoke its right) to suspend its WTO obligations under Article XIX of the GATT 1994 if the conditions set out in Article XIX:1(a) are present. As discussed below, during the Tokyo Round negotiators "**stressed the need for more precise criteria for invocation of**

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[97] *Id.*, pp. 16-28.

[98] *Id.*, p.24.

[99] First Session of the Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/57, Add.1, (November 20, 1946), p.1 (Exhibit USA-56).

[100] First Session of the Preparatory Committee of the International Conference on Trade and Employment, p. 33 E/PC/T/33 (November 27, 1946), p.33 (Exhibit USA-57).

[101] Black's Law Dictionary, 10th edn., B. Garner (ed.) (Thomson Reuters, 2014) at 958 (Exhibit USA-14).

the safeguard clause."[102] The text of the Safeguards Agreement reinforces the right enshrined in Article XIX for Members to invoke the safeguards clause of the GATT.

1. Text of the Safeguards Agreement Establishes that Invocation is a Precondition to Applying a Safeguard Measure

a. The Plain Meaning of the Text in the Safeguards Agreement Confirms That Invocation is a Precondition to Applying a Safeguard Measure

80. The text of the Safeguards Agreement further confirms that invocation is a precondition to apply a safeguard measure. The Safeguards Agreement sets out detailed requirements for a Member to follow regarding its application of a safeguard. Three articles of the Safeguards Agreement highlight that invocation of Article XIX is the critical precondition for a Member to exercise its right when departing from its obligations and commitments to prevent or remedy serious injury to a relevant domestic industry.

i. Article 1 of the Safeguards Agreement reinforces the necessity of invocation as a precondition to action under Article XIX.

81. The General Provision in Article 1 reaffirms that the Safeguards Agreement only applies to measures that invoke Article XIX.

82. In full, Article 1 of the Safeguards Agreement provides:

> This Agreement establishes rules for the application of safeguard measures which shall be understood to mean **those measures provided for** in Article XIX of GATT 1994.[103]

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

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[102] *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, 7 April 1987, page 5, para. 14 (emphasis added).

[103] Emphasis added.

ii. Article 12 of the Safeguards Agreement reinforces the requirement of invocation as a precondition to action under Article XIX.

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

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

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

86. In addition, Article 12.6 requires that Members "notify promptly the Committee on Safeguards of **their laws, regulations** and **administrative procedures relating to safeguard measures** as well as any modifications made to them."[104] In other words, it is clear that a Member has invoked Article XIX to apply or extend a safeguard measure and followed the procedural requirements in the Safeguards Agreement **when** it notifies a decision according to Article 12.1(c) **and** it has taken that decision under a provision of the safeguards laws, regulations, and administrative proceedings it previously notified under Article 12.6. Consistent with this, other Members understand when a safeguard measure has been imposed because the implementing Member will provide notice of the measure taken under "laws, regulations and administrative procedures" it already notified as its domestic authority to apply a safeguard measure.

87. The ability of other Members to take action under Article 8.2 of the Safeguards Agreement is dependent on an implementing Member actually invoking Article XIX. The rules regarding notification of that invocation, as established above, appear in Article 12 of the Safeguards Agreement. Since invocation involves the right under Article XIX that existed prior

[104] Emphasis added.

to the adoption of the Safeguards Agreement, the latter does not transform the nature of that right but establishes the steps a Member must take to exercise those rights.

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

iii. Article 11 of the Safeguards Agreement reinforces the requirement of invocation as a precondition to action under Article XIX.

89. The Safeguards Agreement further clarifies that safeguards in the form of "emergency action" are only those that are taken pursuant to and in conformity with Article XIX of the GATT 1994, in accordance with the requirements of the Safeguards Agreement. Specifically, Article 11.1(a) of the Safeguards Agreement declares that:

> [a] Member shall not take or seek any emergency action on imports of particular products **as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.**

90. Moreover, Article 11.1(c), provides that the Safeguards Agreement:

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

91. As explained above in Section II of this submission, the United States did not invoke Article XIX of the GATT 1994 with respect to the U.S. security measures cited by China to justify its additional duties. Instead, the U.S. security measures were taken **pursuant** to Article XXI of the GATT 1994. Accordingly, the Section 232 security measures cannot qualify as safeguards precisely because they were taken pursuant to provisions of the GATT 1994 **other than Article XIX.**

92. According to its ordinary meaning, the phrase "pursuant to" is defined as "consequent and conforming to; in accordance with".[105] As such, Article 11.1(c) confirms that the Safeguards Agreement does **not** apply when a Member seeks, takes, or maintains a measure under a provision **other than** Article XIX. As established above, Article XIX does not apply to a measure when a Member has not invoked this authority as the legal basis for such measure. Accordingly, China cannot justify its retaliatory tariffs under Article 8.2 of the Safeguards Agreement because the United States has not sought, taken, or maintained a measure "pursuant to" Article XIX; therefore, the Safeguards Agreement, including Article 8.2, is inapplicable to China's additional duties.

b. *The object and purpose of the Safeguards Agreement Confirms that Invocation is a Precondition to Applying a Safeguard Measure.*

93. The object and purpose of the Safeguards Agreement, in addition to its text and context, confirm that invocation is a precondition to apply a safeguard measure. The object and purpose of the Safeguards Agreement is set out in the agreement's Preamble. The Preamble shows that the drafters of the Safeguards Agreement had "in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994[.]" In particular, the drafters recognized "the need to **clarify and reinforce** the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control[.]"

94. The Preamble also recognizes the need to "eliminate measures" that previously escaped the disciplines of Article XIX. The drafters of the Safeguards Agreement addressed this concern in Article 11, specifically Article 11.1(b). The first sentence of Article 11.1(b) provides that Members "shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other **similar measures** on the export or the import side."[106] Footnote 4 of the Agreement on Safeguard provides that "[e]xamples of **similar measures** include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection."[107] Thus, the drafters of the Safeguards Agreement were concerned with such "grey-area" measures and prohibited their continued use with Article 11.1(b) of the Safeguards Agreement.

95. As noted above, the Safeguards Agreement clarified and reinforced the disciplines of the GATT 1994, specifically those of Article XIX. This included the precondition in Article XIX that invocation is necessary such that a Member "shall be free" to exercise its rights and apply a measure that departs from its obligations and commitments.

96. The object and purpose of the Safeguards Agreement was to outline the steps, in greater detail than existed previously, that a Member must take to exercise the underlying right to apply

[105] *See* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 2, 422 (defining the phrase "pursuant to" as "consequent and conforming to; in accordance with) (Exhibit USA-48).

[106] Emphasis added.

[107] Emphasis added.

a safeguard measure. As the United States has highlighted above, the text confines this object and purpose to measures that are "provided for in" Article XIX and that the Safeguards Agreement only applies to measures "sought, taken, or maintained" pursuant to Article XIX. Accordingly, the text of the Safeguards Agreement expressly confirms that its provisions do not apply to measures a Member takes under an authority **other than** Article XIX of the GATT 1994.

2. Negotiating History of the Safeguards Agreement Confirms that Invocation is a Precondition to Applying a Safeguard Measure

97. An examination of the relevant negotiating history of the Safeguards Agreement solidifies the understanding of the text reflected above.

98. The negotiating history of the Safeguards Agreement has its origins in the Tokyo Round negotiations and a perceived need to clarify and strengthen the provisions of Article XIX of the GATT 1994. Specifically, "[d]uring the preparatory stage before the Ministerial meeting in Tokyo, the question of the adequacy or otherwise of the existing multilateral safeguard system acquired increased importance as an issue for the negotiations."[108]

99. For example, certain GATT contracting parties "affected by Article XIX measures wanted its provisions to be clarified and re-inforced. They stressed the "need for **more precise criteria for invocation of the safeguard clause"**.[109] The Tokyo Declaration, adopted in September 1973, stated that negotiations should examine "the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results."[110] At the end of the Tokyo Round in April 1979, the negotiations reached an impasse over certain issues and no new text was agreed to.

100. Following the Tokyo Round, on November 29, 1982, the contracting parties issued a Ministerial Declaration concerning the "need for an improved and more efficient safeguard system which provides for greater predictability and clarity and also greater security and equity for both importing and exporting countries."[111] Among the issues highlighted for consideration were "transparency," "coverage," "compensation and retaliation," and "notification."

101. On September 25, 1986, the contracting parties issued the Ministerial Declaration of Punta del Este, Uruguay, thus beginning the Uruguay Round negotiations. Safeguard disciplines were again a topic identified for discussion. Following the principles identified in the Ministerial

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[108] *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (7 April 1987), page 4, para. 14.

[109] *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (7 April 1987), page 5, para. 14 (emphasis added).

[110] *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (7 April 1987), page 5, para. 15; *see also* Declaration of Ministers Approved at Tokyo on 14 September 1973, reprinted in GATT, BISD 20th Supp. at 19, 21 (1974).

[111] *Ministerial Declaration*, L/5424, 29 (November 1982), page 4, para. 1.

Declaration referenced above, the GATT Council of Ministers attempted to overcome the previous impasse regarding the negotiations of safeguard disciplines. In his report regarding developments in this context, the Chairman of the Council noted "a general recognition that safeguard actions **should only be taken if the criteria laid down in Article XIX were met**."[112]

102. The major issues confronted during the renewed negotiations ultimately resulted in key provisions of the Safeguards Agreement. This includes Article 1 (for the understanding that the rules to implement a safeguard measure only apply to measures **provided for** in Article XIX), Article 12 (with respect to the notification requirements), and Article 11 (confirming that the Safeguards Agreement does not apply to a measure sought, taken, or maintained under provision **other than** Article XIX).

103. Accordingly, the negotiating history confirms the plain meaning reflected in the text that the rules in the Safeguards Agreement only apply to measures taken pursuant to Article XIX, that invocation is the touchstone for whether a Member has taken a measure pursuant to Article XIX, and that notification is the procedural mechanism to alert other Members of that invocation.

C. The U.S. Section 232 Measures Cited by China Do Not Fall Within the Scope of the Safeguards Agreement

104. China's suggestion that the U.S. security measures under Section 232 of the Trade Expansion Act of 1962 (Section 232) are safeguards cannot justify China's retaliatory tariffs, and does not assist the Panel's objective assessment of the matter, because United States has not invoked Article XIX. This is clear since the United States has not provided the notification under Article 12.1(c) of the Safeguards Agreement that identifies a measure taken pursuant to a domestic authority already notified to the Committee on Safeguards under Article 12.6 of the Safeguards Agreement. As the United States has explained throughout this dispute, for a measure to fall under the WTO's safeguards disciplines the importing Member must invoke Article XIX of the GATT 1994 to exercise a right to suspend obligations or withdraw or modify tariff concessions. Absent such invocation, a measure cannot fall under the WTO's safeguards disciplines.

105. The United States recalls that the Safeguards Agreement only applies to measures taken pursuant to Article XIX of the GATT, as confirmed in Article 11.1(c) of the Safeguards Agreement. Under that provision, only measures sought, taken, or maintained pursuant to Article XIX fall within the scope of the Safeguards Agreement. Here, the Section 232 measures cited by China were sought, taken or maintained under Article XXI of the GATT 1994 – which is a provision "other than Article XIX"; accordingly, by the plain text of the Safeguards Agreement, the Section 232 measures cited by China simply do not fall within the scope of the Safeguards Agreement.

[112] *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (7 April 1987), page 8, para. 25 (emphasis added).

1. The Safeguards Agreement Only Applies to Measures Taken Pursuant to Article XIX of the GATT 1994

106. In relevant part, Article 11.1(c) of the Agreement on Safeguards provides that the Agreement on Safeguards "does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 **other than** Article XIX."[113]

107. The words "sought, taken or maintained" modify the word "measures" in Article 11.1(c). "Sought" is the past tense and past participle of the verb "seek," which can be defined as "[t]ry or attempt to do."[114] "Taken" is the past participle of the verb "take," which can be defined as "[h]ave an intended result; succeed, be effective, take effect."[115] "Maintained" is the past tense and past participle of the verb "maintain," which can be defined as "[c]ause to continue (a state of affairs, a condition, an activity, etc.)."[116] Definitions of the word "pursuant" – used as an adverb in Article 11.1(c) – include "[w]ith to: in consequence of, in accordance with."[117]

108. With these definitions in mind, the ordinary meaning of the terms in Article 11.1(c) can be understood as "measures [that a Member has] tried to do, succeeded in doing or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX." The ordinary meaning of these terms establishes that Article 11.1(c) is triggered – and the Agreement on Safeguards "does not apply" – when a Member acts (by seeking, taking or maintaining a measure) pursuant to a provision of the GATT 1994 **other than** Article XIX.

109. With these terms, Article 11.1(c) places the emphasis on whether a measure was sought, taken, or maintained under a GATT 1994 provision other than Article XIX. Here, the United States has expressly invoked a provision of GATT 1994 **other than** Article XIX – namely, Article XXI. This is clear from U.S. statements, including those during meetings of the WTO Council for Trade in Goods, that the United States took the action for the protection of its essential security interests pursuant to Article XXI.[118]

110. With this understanding in mind, it is clear that, under Article 11.1(c), the Agreement on Safeguards "does not apply" when a Member has attempted or tried to take a measure in accordance with provisions of the GATT 1994 other than Article XIX, or when the Member has succeeded in taking such a measure or caused such a measure to continue. Here, the United

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[113] Emphasis added.

[114] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2,758 (Exhibit USA-58).

[115] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 3,206 (Exhibit USA-59).

[116] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1,669 (Exhibit USA-60).

[117] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2,422 (Exhibit USA-48.)

[118] WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27; WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27.

States has attempted to take – and succeeded in taking – the Section 232 security measures in accordance with Article XXI of the GATT 1994. Accordingly, under the text of Article 11.1(c), the Agreement on Safeguards "does not apply" here.

111. This result is consistent with Article 1 of the Agreement on Safeguards, which states that "[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 GATT 1994." Here, just as the United States has not "sought, taken, or maintained" a measure pursuant to Article XIX, the United States has also not "applied" a measure "provided for" in Article XIX. Instead, the U.S. Section 232 measures were taken pursuant to Article XXI of the GATT 1994.

112. Under the ordinary meaning of the terms in Article 11.1(c) of the Agreement on Safeguards, whenever a Member has sought, taken, or maintained the measures in question pursuant to a provision of the GATT 1994 **other than** Article XIX – for example, Article XXI – those measures fall outside the scope of the Agreement on Safeguards. Therefore, when a Member has sought or taken an action pursuant to Article XXI, Article 11.1(c) makes clear that the Agreement on Safeguards "does not apply."

2. The U.S. Section 232 Measures Are Not Subject to Article XIX of the GATT Because They Were Taken Pursuant to Article XXI of the GATT 1994

113. Article 11.1(a) of the Agreement on Safeguards refers to "emergency action on imports . . . as set forth in Article XIX" – this language means a safeguard action for which a Member has invoked Article XIX. Thus, Article 11.1(a) provides that when a Member takes or seeks emergency action on imports "as set forth in Article XIX", it must comply with Article XIX and the Agreement on Safeguards.

114. Article 11.1(a) does not indicate, however, that Article XIX and the Agreement on Safeguards are the only applicable provisions to emergency actions. A Member could take any number of actions in response to what it might consider emergencies.

115. As such, a Member may take what might be referred to as "emergency action" under a number of different provisions, including Article XXI. Article 11.1(a) of the Agreement on Safeguards does not limit a Member's choice of action. As provided in Article 11.1(c) of the Agreement on Safeguards, when a Member has "sought, taken or maintained" actions pursuant to provisions of the GATT 1994 or the WTO Agreement other than Article XIX, the Agreement on Safeguards "does not apply".

116. The Section 232 security measures cannot "be found" to fall within the scope of both Article XIX and Article XXI of the GATT 1994. This is because when a Member has invoked Article XXI as the basis for its action – as the United States did with respect to the Section 232 measures – the sole finding that a panel may make is to note this invocation. In that situation, the measures cannot "be found" to fall within the scope of Article XIX. This is also the case because Article 11.1(c), as explained above, **precludes** the application of the Agreement on Safeguards to any measure "sought, taken or maintained" under a provision of the GATT 1994

other than Article XIX. As the United States has taken the measures at issue pursuant to Article XXI, the Agreement on Safeguards "does not apply."

3. Measures Taken Pursuant to Article XXI of the GATT 1994 Do Not Suspend an Obligation or Modify or Withdraw a Concession

117. The phrase "suspend the obligation in whole or in part or to withdraw or modify the concession" appears in Article XIX, while a violation of the GATT 1994 (or a breach of that agreement) typically refers to "the failure of a Member to carry out its obligations" as stated in Article XXIII:1(a).

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

119. In relation to the U.S. Section 232 security measures, the United States has invoked GATT 1994 Article XXI. No obligation or concession may interfere with that right as the text of Article XXI confirms that "[n]othing in this Agreement shall be construed … to prevent" a Member "from taking any action which it considers necessary for the protection of its essential security interests". Accordingly, the United States has not "suspended in whole or in part a GATT obligation or withdrawn or modified a GATT concession" generally or within the meaning of Article XIX.

120. Invocation of Article XXI, therefore, does not entail a **breach** of an obligation under the WTO Agreement. In this respect, a Member's invocation of Article XXI parallels that of a Member properly exercising its right to invoke Article XIX. The reason is that neither invoking Member has "failed to carry out" its obligations. The similarities between Article XIX and Article XXI, however, end here because an invocation of Article XXI also does not entail a **suspension** of an obligation. Instead, the obligation does not apply when a Member invokes Article XXI with respect to a measure it implements.

121. Accordingly, the U.S. Section 232 security measures **cannot** be considered safeguards because they do not suspend an obligation or withdraw or modify a concession under the WTO Agreement. As discussed below in Section IV.D. of this submission, the two conditions the Appellate Body discussed in *Indonesia – Iron or Steel Products* regarding the application of a safeguard measure were: (1) that the measure "must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession," and (2) that "the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject

product."[119] Here, neither condition is satisfied because the United States has invoked Article XXI with respect to the Section 233 security measures; accordingly, there is no suspension of a GATT obligation or withdrawal or modification of a GATT concession.

D. China Has No Basis for Asserting that its Additional Duties are Authorized by Article 8.2 of the Safeguards Agreement

122. The central question in this dispute is whether China has any justification for breaching Articles I and II of the GATT 1994. China attempts to characterize its additional duties as "rebalancing measures" authorized by Article 8.2 of the Safeguards Agreement. This justification lacks merit because such rebalancing measures require the existence of an underlying safeguard measure; here, there is no relevant U.S. safeguard measure.[120] Accordingly, the rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement are not applicable in this proceeding.

123. As detailed below, China's characterization of its additional duties as rebalancing measures is flawed in several respects. First, China derives its legal theory not from the text of the WTO Agreement but from an Appellate Body report that is not applicable in this dispute and, in any event, does not contain a comprehensive definition of a safeguard measure. Even under China's suggested approach to Article 8.2 of the Safeguards Agreement, an application of the Appellate Body's reasoning would confirm that there is no relevant U.S. safeguard measure. With respect to China's argument that a Member may implement rebalancing measures in cases of doubt as to the existence of a safeguard measure, this suggestion is plainly contrary to the text of Article XIX of the GATT 1994 and the Safeguards Agreement. Finally, China is mistaken that the time limits in Article 8.2 of the Safeguards Agreement support its argument for unilateral rebalancing measures. For these reasons, China's justification for its breach of Articles I and II of the GATT 1994 must be rejected.

1. China Relies on an Appellate Body Report that is Not Applicable and, In Any Case, Does Not Contain a Comprehensive Definition of a Safeguard Measure

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

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

[120] *See* First Written Submission of the United States of America ("U.S. First Written Submission") (May 2, 2019), paras. 56 – 76.

125. As an initial matter, *Indonesia – Iron or Steel Products* is simply not applicable because it did not address a situation where a Member has **not** invoked Article XIX of the GATT 1994. In that dispute, the disputing parties agreed that the Indonesian measure at issue met what, in most circumstances, is the fundamental criterion for establishing the existence of a safeguard measure: namely, that the Member adopting a measure invokes Article XIX of the GATT 1994 as the basis for suspending an obligation or withdrawing or modifying a concession.[121] Article XIX:2 of the GATT 1994 and Article 12 of the Safeguards Agreement make clear that advance notice by a Member intending to suspend an obligation or withdraw a concession is a precondition to applying a safeguard measure. In *Indonesia – Iron or Steel Products,* Indonesia **did notify** other Members that it intended to adopt a safeguard measure, and thus did invoke Article XIX of the GATT 1994. In most situations, the question of whether the WTO's safeguards disciplines applied would have been resolved by this fact.

126. *Indonesia – Iron or Steel Products,* however, presented unusual circumstances, stemming from the fact that Indonesia did not have tariff bindings with respect to the products covered by the Indonesian measure. Despite this, Indonesia conducted an investigation with a view to complying with its obligations under the Safeguards Agreement and imposed a duty in light of the outcome of that investigation.[122] Furthermore, the parties in that dispute consistently argued that the duty at issue was a safeguard measure.[123] Accordingly, the panel was placed in the position of assessing whether the Indonesian measure at issue involved suspension of an obligation or modification of a concession, and thus whether Article XIX or the Safeguards Agreement applied to the measure at issue.

127. The *Indonesia – Iron or Steel Products* panel proceeded to find that Indonesia had no binding tariff obligation with respect to the good at issue.[124] The panel reasoned that Indonesia's obligations under Article II of the GATT 1994 did not preclude the application of the specific duty on imports of the good at issue; thus, to apply the measure at issue, Indonesia did not suspend, withdraw, or modify its obligations under Article II of the GATT 1994.[125] For these reasons, the panel found that Indonesia's specific duty on the good at issue was not a measure within the scope of Article XIX of the GATT 1994 or the Safeguards Agreement. The Appellate Body affirmed the panel's conclusion.

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

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[121] *See* Exhibit USA-9, para. 2.

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

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

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

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

129. Moreover, China is mistaken that the Appellate Body in *Indonesia – Iron or Steel Products* established an all-encompassing definition of a safeguard measure. As Japan correctly states in its third-party submission, the Appellate Body "did not attempt to propose a comprehensive definition of a safeguard measure or ultimately to decide the scope of the Agreement on Safeguards."[126] Rather, the Appellate Body noted that "to constitute one of the 'measures provided for in Article XIX', a measure must present certain constituent features, **absent which** it could not be considered a safeguard measure." In other words, the Appellate Body's reasoning only identifies certain "necessary" features.[127] Importantly, the Appellate Body did **not** say that a measure presenting both (to use the terms used by the Appellate Body) "constituent features" automatically or necessarily qualifies as a safeguard measure. Instead, the Appellate Body made explicit that "whether a particular measure constitutes a safeguard measure for purposes of WTO law can be determined only on a case-by-case basis."[128]

130. Given the unusual circumstances in *Indonesia – Iron or Steel Products*, the Appellate Body determined whether the WTO safeguards disciplines applied to the measure at issue in that dispute. But the words used in the report reveal that it was describing "certain constituent" features, not necessarily all of constituent features; or, as Japan mentioned in its third-party written submission, the factors used by the Appellate Body in its test are "*necessary* – but not *sufficient* – to find a given measure to constitute a safeguard measure."[129]

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

2. Even Under China's Suggested Approach to Article 8.2 of the Safeguards Agreement, There is No U.S. Safeguard Measure

132. In its assessment of China's justification for its additional duties measures, the first step the Panel should take is to determine whether the United States invoked Article XIX of the GATT 1994 in connection with this dispute. The United States has not, and this fact is not contested by China. Thus, the Panel's inquiry can end there. Even if the Panel were to further assess China's justification under the Appellate Body reasoning in *Indonesia – Iron or Steel Products*, the application of that reasoning confirms that there is no U.S. safeguard measure.

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[126] Third-Party Submission of Japan (June 20, 2019), para.10.

[127] *See also* The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 488 (defining "constituent" as "A constituent part (of); an element of a complex whole") (Exhibit USA-46).

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

[129] Third-Party Submission of Japan, para. 10 (emphasis in original). *See Indonesia – Iron or Steel Products (AB)* (noting that "in order to constitute one of the 'measures provided for in Article XIX," a measure must present certain constituent features, **absent** which it could **not** be considered a safeguard measure." (emphasis added), para. 5.60.

133. As discussed, China derives its legal theory from the Appellate Body's reasoning in *Indonesia – Iron or Steel Products*. In that dispute, the Appellate Body reasoned that as part of an assessment of whether a measure presents the features of a safeguard measure, a panel should:

> evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the **domestic law** of the Member concerned, the **domestic procedures** that led to the adoption of the measure, and any relevant **notifications** to the WTO Committee on Safeguards.[130]

Therefore, the Appellate Body explicitly identified three factors it considered relevant for a panel to assess, among other relevant factors, in determining the existence of a safeguard measure.

134. Regarding the first factor (domestic law), safeguard measures in the United States are authorized by Section 201 of the Trade Act of 1974.[131] In relevant part, Section 201 allows the President of the United States to take action if "the United States International Trade Commission" determines that:

> an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.[132]

135. In contrast, under U.S. domestic law, the U.S. national security measures are authorized by Section 232 of the Trade Expansion Act of 1962.[133] Section 232 authorizes the President of the United States, upon receiving a report from the U.S. Secretary of Commerce finding that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the **national security**," to take action that "in the judgment of the President" will "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the **national security**."[134]

136. Regarding the second factor (domestic procedures), the U.S. International Trade Commission is the only competent authority in the United States authorized to conduct safeguard investigations.[135] In fact, the U.S. International Trade Commission – and its predecessor agency, the U.S. Tariff Commission – have conducted every safeguard investigation since the

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

[131] 19 U.S.C. §§2251, *et seq*.

[132] 19 U.S.C. §2251(a) (Exhibit USA-11).

[133] 19 U.S.C. §§1862, *et seq*.

[134] 19 U.S.C. §1862(c)(1)(A) (emphasis added) (Exhibit USA-10).

[135] *See* 19 U.S.C. §2251(a).

establishment of the multilateral trading system.[136] In contrast, the Bureau of Industry and Security of the U.S. Department of Commerce conducted the investigation regarding the U.S. national security measures.

137. Finally, the application of the third factor (notification to the WTO Committee on Safeguards), further supports the U.S. position. The United States has not notified the WTO Committee on Safeguards of any proposed action or any safeguard measure taken because the United States did not invoke Article XIX of the GATT 1994. Since the creation of the WTO, however, the United States has met its obligations under Article 12 of the Safeguards Agreement.[137]

138. Accordingly, were the Panel to assess the U.S. security measures under the Appellate Body's reasoning as suggested by China, the Panel would conclude that the U.S. security measures do not qualify as safeguard measures under Article XIX of the GATT 1994.

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

139. China argues that the applicability of the Safeguards Agreement is an "objective" question. China, however, fails to identify all the key components of that objective question. As the United States explained, the starting point of the objective evaluation is whether a Member has invoked Article XIX. And as an objective matter, the United States has not. In fact, as detailed above, the United States has invoked Article XXI in relation to the measures raised by China. And this objective fact is not contested. Accordingly, under an objective examination, Article 8.2 of the Safeguards Agreement is not applicable in this proceeding because the United States has not invoked Article XIX of the GATT 1994.

4. Article XIX and the Safeguards Agreement Link Rebalancing Measures to an Underlying Safeguard Measure

140. China argues that the Panel may make a finding with respect to the alleged rebalancing measures *without* determining the existence of an underlying safeguard measure.[138] Were the Panel to make such a determination, China argues that a Member may impose rebalancing measures in cases where there is disagreement as to the existence of a safeguard measure.[139]

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[136] *See* Executive Order 9832, *Prescribing Procedures for the Administration of the Reciprocal Trade Agreements Program* (establishing that the "United States Tariff Commission, upon request of the President, upon its own motion, or upon application of any interested when in the judgment of the Tariff Commission there is good and sufficient reason thereof" would conduct investigations "to determine whether, as a result of unforeseen developments and of the concessions granted on any article by the United States in a trade agreement containing [an escape clause], such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles.") (February 24, 1947) Part I, para.2 (Exhibit USA-51).

[137] *See* Table Presenting U.S. Notifications to WTO Committee on Safeguards Since 1995 (Exhibit USA-52).

[138] *See* China Responses to the First Set of Panel Questions, Question 24, paras. 60, 62.

[139] *See* China Responses to the First Set of Panel Questions, Question 35, paras. 93-97.

These suggestions must be rejected as contrary to the text of Article XIX and the Safeguards Agreement.

141. Article 8.2 of the Safeguards Agreement reaffirms the right in Article XIX:3(a) of the GATT 1994 of "affected" exporting Members to retaliate against a WTO Member taking a safeguards measure against their products. The terms "with respect to the action" in Article XIX:3(a) link the action contemplated in that provision with the emergency action contemplated in Article XIX:1(a).

142. Similarly, the text of Article 8 of the Safeguards Agreement explicitly links rebalancing measures to a safeguard measure. Article 8.2 states that, once the timetables set out in that provision are met, "the affected exporting Members shall be free" to "suspend" the "application of substantially equivalent concessions or other obligations" to "the trade of the Member **applying the safeguard measure**, the suspension of which the Council for the Trade in Goods does not disapprove."[140] In addition, Article 8.2 refers to Article 12.3 of the Safeguards Agreement, which, in relevant part, provides that a "Member proposing to apply or extend a **safeguard measure** shall provide adequate opportunity for prior consultations" with Members having a "substantial interest as exporters" of the product concerned.[141] Accordingly, the text of Article 8.2 establishes that rebalancing measures can only be taken in response to a safeguard measure.

143. The context of Article 8.2 further supports the U.S. position. Article 8.1 of the Safeguards Agreement explicitly refers to a "Member proposing to apply a **safeguard measure** or seeking an extension of a **safeguard measure**."[142] Article 8.1 also refers to the consultations envisioned by Article 12.3 of the Safeguards Agreement, which, as discussed above, are initiated by the Member proposing to apply or extend a safeguard measure. Similarly, Article 8.3 of the Safeguards Agreement explicitly refers to safeguards, noting that "the right of suspension" in Article 8.2 cannot be exercised for the "first three years that a **safeguard measure** is in effect" if "the **safeguard measure**" was taken in response to an absolute increase in imports.[143]

144. Therefore, the attempt by China to divorce rebalancing measures from safeguard measures is fundamentally at odds with the text of Article XIX and the Safeguards Agreement.

5. China Is Mistaken that the Time Limits in Article 8.2 Support Unilateral Rebalancing Measures

145. Finally, China is mistaken that the time limits in Article 8.2 support its position that a Member may impose rebalancing measures in cases where there is disagreement as to the existence of a safeguard measure.[144] Specifically, China suggests that the 90-day period for a

[140] Emphasis added.

[141] Emphasis added.

[142] Emphasis added.

[143] Emphasis added.

[144] *See* China Responses to the First Set of Panel Questions, Questions 25, paras. 59-61, 93-97.

Member to suspend concessions or other obligations shows that there must always be some doubt as to whether a safeguard measure exists because a multilateral determination or dispute settlement outcome could not be assured within this time frame.

146. Under a proper interpretation of Article XIX of the GATT 1994 and Article 8 of the Safeguards Agreement, however, the existence of a safeguard measure could be easily discerned by looking to whether a Member has in fact invoked Article XIX of the GATT 1994. The United States has not, and this fact is not contested by China.

V. CHINA'S PRELIMINARY RULING REQUEST IS BASELESS

147. As the United States has previously explained, the arguments presented by China are meritless because the U.S. panel request meets the requirements of Article 6.2 of the DSU by presenting the problem clearly. Article 6.2 of the DSU sets forth the content of a request for the establishment of a panel in order to bring a "matter" (in the terms of Article 7.1) within the Panel's terms of reference. China is pointing to additional claims that, in its view, the United States could have presented. But this would not make the U.S. panel request deficient in content under DSU Article 6.2; it would (if China were correct) lead the Panel to conclude that the claims in the U.S. panel request are not substantively made out, and the Panel cannot make a finding of breach under any other provision not included in the U.S. panel request.

148. In relevant part, Article 6.2 provides that a request to establish a panel:

> shall indicate whether consultations were held, identify the specific measure at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

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

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

- Article I:I of the GATT 1994, because China fails to extend to products of the United States an advantage, favor, privilege, or immunity granted by China with respect to customs duties and charges of any kind imposed or in connection with the importation of products originating in the territory of other Members;

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

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

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

151. China, therefore, is incorrect in arguing that the U.S. panel request does not meet the requirements of Article 6.2 of the DSU. In addition to specifying the legal claims – and thereby meeting the requirement of Article 6.2 – the U.S. panel request explains why the United States considers the challenged measures to be inconsistent with China's WTO obligations.

VI. CHINA'S APPROACH WOULD UNDERMINE THE WTO

152. Incredibly, in this proceeding China has endorsed the view that any measure that a Member considers inconsistent with a GATT obligation is a "safeguard." And, on that basis, that Member can decide, for itself, to adopt retaliatory measures. This is a stunning position. It is the understanding of the United States that, before this dispute, no Member had taken this view of Article XIX of the GATT 1994.

A. China's Approach Would Endorse "Rebalancing" of Any Perceived Breach

153. In its first written submission, China asserts that "the U.S. 232 measures on imports of steel and aluminum products constitute safeguard measures provided for in Article XIX of GATT 1994."[145] In China's view, the Section 232 measures present the "constituent features" of a safeguard measure and "a central and independent aspect of the Section 232 measures is to prevent or remedy serious injury or the threat thereof to the U.S. domestic steel and aluminum industries."[146] Based on its unilateral characterization of the 232 measures, China argues that it is entitled to adopt "rebalancing measures" under the Safeguards Agreement.

154. In short, under China's approach, a Member can deem, for itself, that another Member's measure is inconsistent with a GATT obligation and that such a measure aims to protect a domestic industry. China's approach to assessing whether a Member has implemented a safeguard measure pursuant to Article XIX could arguably be met by nearly any border measure. Adopting China's approach, therefore, would endorse safeguard "rebalancing" of any perceived breach of the GATT 1994. If adopted by the Panel, China's approach would radically undermine the WTO dispute settlement mechanism and the WTO as a whole.

155. DSU Article 23.2(a) provides that Members shall "not make a determination to the effect that a violation" of the covered agreements "except through recourse to dispute settlement in accordance with the rules and procedures" of the DSU. Accordingly, if a Member believes that another Member's measure is inconsistent with a WTO obligation, DSU Article 23 makes clear that the method to address such a concern is through recourse to the procedures of the DSU.

[145] China's First Written Submission, para. 92.

[146] China's First Written Submission, para. 147.

Under China's approach, however, a Member can deem another Member's measure as inconsistent with a GATT obligation and, on that basis, adopt retaliatory measures.

VII. CONCLUSION

156. For the foregoing reasons, the United States respectfully requests that the Panel find that China's measures that impose additional duties on products originating in the United States are inconsistent with Articles I and II of the GATT 1994.