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CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS558/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 5 April 2019

General

1. (1) In these proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceedings, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) If China considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. China shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel.

The United States shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceedings, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation. The Panel may grant reasonable extensions of time for the submission of an alternative translation upon a showing of good cause.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. Exhibits submitted by China should be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit in connection with the next submission thus would be numbered USA-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5:00 p.m. (Geneva time) two (2) working days before the first day of each meeting with the Panel.

14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The substantive meetings of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. In the second substantive meeting, China shall be given the opportunity to make its statement first.

b. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.

c. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to approximately one (1) hour. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least five (5) days prior to the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

d. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

e. The Panel may subsequently pose questions to the parties.

f. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

g. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5:00 p.m. (Geneva time) on the second working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

Third-party session

16. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

17. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties and third parties.

18. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the Working Procedures and timetable for the proceedings, to allow sufficient time to ensure availability of interpreters.

19. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session, along with the list of members of its delegation, in advance of this session and no later than 5:00 p.m. (Geneva time) two (2) working days before the third-party session of the meeting with the Panel.

20. The third-party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least five (5) days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third-party session:

   i. Each third party shall submit the final written version of its oral statement, no later than 5:00 p.m. (Geneva time) on the second working day following the meeting.

   ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

   iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

   iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

21. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

22. Each party shall submit a single integrated executive summary. The summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions, its oral statements, and if possible, its responses to questions following the first and second substantive meetings. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

23. Each integrated executive summary shall be limited to no more than 30 pages.

24. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

25. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six (6) pages. If a third-party submission and/or oral statement does not exceed six (6) pages in total, this may serve as the executive summary of that third party's arguments.

Interim review

26. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance

with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

27. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

28. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

29. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceedings:

a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry.

b. Each party and third party shall submit all documents to the Panel in Microsoft Word format and in PDF format as an e-mail attachment, or if impractical, on a CD-ROM or a DVD by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The PDF version shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Email of a document shall constitute electronic service on the Panel, the other party, and the third parties.

c. All emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties in the proceedings. If a CD-ROM/DVD is provided, it shall be filed with the DS Registry (office No. 2047) by 5:00 p.m. (Geneva time) on the due dates established by the Panel.

d. By 5:00 p.m. (Geneva time) on the next working day following the electronic submission, each party and third party shall submit one (1) paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047). If any documents are in a format that is impractical to submit as a paper copy, the party shall inform the Panel and the other party (and third parties if appropriate) accordingly.

e. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the electronic versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.

f. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or on a CD-ROM or DVD.

g. Each party and third party shall submit its documents with the DS Registry by 5:00 p.m. (Geneva time) on the due dates established by the Panel.

h. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

Correction of clerical errors in submissions

30. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING SUBSTANTIVE MEETINGS WITH REMOTE PARTICIPATION

Adopted on 18 February 2022

General

1. These Additional Working Procedures set out terms for holding the substantive meetings of the Panel remotely.

Definitions

2. For the purposes of these Additional Working Procedures:

"Host" means the designated person within the WTO Secretariat responsible for the management of the platform for participants to take part in the meeting with the Panel.

"Participant" means any authorized person taking part in the meeting, including the Members of the Panel, the WTO Secretariat staff involved in the dispute and the organization of the meeting, members of the parties' and third parties' delegations, and interpreters.

"Platform" means the Cisco Webex platform.

Equipment and technical requirements

3. Each party shall be responsible for ensuring that the members of its delegation join the meeting using the designated platform and satisfy the minimum equipment and technical requirements of the platform provider for the effective conduct of the meeting.

4. Technical questions, including the minimum equipment and technical requirements for the usage of the platform, will be addressed in the advance testing sessions between the host and participants provided for in paragraph 7 below.

Technical support

5. (1) The Secretariat has limited ability to offer remote assistance during, and in advance of the meeting. Each party, therefore, is responsible for providing its own technical support to the members of its delegation.

(2) The host will assist participants in accessing and using the platform in preparation for, and during the course of, the meeting with the Panel. The host will prioritize assisting those participants designated as main speakers on the delegations' lists.

Pre-meeting

Registration

6. Each party shall provide to the Panel the list of the members of its delegation on the dedicated form in Annex 1 below, no later than 5:00 p.m. (Geneva time) ten working days before the start of the meeting. The list shall indicate those participants designated as main speakers.

Advance testing

7. The Secretariat will hold two testing sessions with participants before the substantive meeting with the Panel. One of these sessions will be a joint session with all participants in the meeting. These testing sessions will seek to reflect, as far as possible, the conditions of the proposed meeting. Participants should make themselves available for the testing sessions. The Secretariat will be in contact with the participants to set the schedule of the testing sessions in due course.

Confidentiality and security

8. The meeting shall be confidential and the rules of the DSU continue to apply during the remote session of the meeting.

9. Each party shall follow any security and confidentiality protocols set by the Panel in advance of the meeting.

10. The participants shall connect to the meeting through a secure internet connection and shall avoid the use of an open or public internet connection.

Conduct of the meeting

Recording

11. The Secretariat will record the meeting in its entirety. The recording of the meeting shall form part of the panel record.

12. Any recording of the meeting or any part thereof other than that referred to in paragraph 11, through any means, including audio or video recording, or screenshot, is prohibited.

Access to the virtual meeting

13. Participants shall access the virtual meeting in accordance with these Additional Working Procedures.

14. (1) The host will invite participants via email to join the virtual meeting.

(2) For security reasons, access to the virtual meeting will be password-protected and limited to participants. Participants shall not forward or share the virtual meeting link or password with unauthorized persons.

(3) Each party shall ensure that only participants from its delegation access the virtual meeting.

Advance log-on

15. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of the meeting.

(2) To ensure that the meeting starts as scheduled, participants must login to the platform at least 30 minutes in advance of the scheduled start time of the meeting.

(3) Participants will be placed in a virtual lobby where they will remain until the Panel is ready to start the meeting, at which time the host will admit them to the meeting.

Document sharing

16. (1) Before each party takes the floor, it shall email the Panel and other participants at the meeting a provisional written version of its statement, including any exhibits.

(2) Any participant wishing to share a document with the other participants during the meeting – including via screen sharing – shall email the document and confirm that the other participants have received the document, before first referring to the document at the meeting.

Pauses for internal coordination and consultation

17. Parties are free to internally coordinate and consult while the meeting is ongoing so long as it is not disruptive to the proceedings, but they should be aware that the chat feature of the platform is visible to all participants. The Panel may briefly pause a session at any time, on its own initiative or upon request of a party, to enable any necessary internal coordination and consultation.

Participation

18. Participants who are not speaking are expected to have their microphone on mute. They may also wish to turn off their camera to preserve bandwidth. If a participant wishes to take the floor, they should use the "raise a hand" function in the platform. Once the chairperson gives the floor to the participant, they should unmute their microphone and turn their camera on.

Communication breakdown

19. Each party will designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The parties and third parties shall immediately notify the Panel of any technical or connectivity issues affecting the participation of their delegation, or a member of their delegation, in the meeting. To do so, the party that experiences the technical or connectivity issue shall:

(1) if possible, immediately intervene at the meeting and briefly state the nature of the issue experienced; or

(2) if doing so is not possible, immediately contact the host and explain the nature of the issue experienced. The host can be contacted via the platform chat, by sending an email to leslie.stephenson@wto.org, or by telephone at +41 22 739 6148.

20. The Panel may suspend the proceedings until the technical issue is resolved or continue the proceedings with those that are connected.

Relationship with the Working Procedures adopted by the Panel

21. These Additional Working Procedures complement the Working Procedures adopted by the Panel, and to the extent of any conflict between the two, supersede them.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

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

2. Effective April 2, 2018, China applied additional duties of 15 percent or 25 percent on 128 tariff lines for products originating in the United States. The additional duties for all 128 tariff lines resulted in tariffs applied to U.S.-originating products that are higher than the rates of duty applied to other WTO Members on an MFN basis. Moreover, for 123 tariff lines, the additional duties resulted in tariffs applied to U.S.-originating products that exceed the rates of duty set out in China's Schedule.

3. On March 23, 2018, China issued the Ministry of Commerce Notice on Publicly Soliciting Opinions on U.S. Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures ("Opinions Notice"). The Opinions Notice solicited public comment regarding China's proposal to impose additional duties of 15 percent or 25 percent on the 128 tariff lines for products originating in the United States.

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

5. A list of the 128 tariff lines of U.S.-originating products subject to the additional duties is attached to the *Opinions Notice*, with a product description assigned at the 8-digit tariff level. According to the list, 120 tariff lines are subject to additional duties of 15 percent, and 8 tariff lines are subject to additional duties of 25 percent. A list of the same 128 tariff lines is also included as an attachment to the *Implementation Notice*.

6. The 128 tariff lines of U.S.-originating products subject to additional duties fall under 6 different chapters of the Harmonized Tariff Schedule ("HTS") and range from steel and aluminum products to a large number of food and agriculture products. The *Opinions Notice* mentions that the additional duties are intended to "balance the loss inflicted on our country by the U.S. 232 Measures […]."

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

8. As a general matter, China's applied MFN rates are published in an annual tariff plan. By matching individual 8-digit tariff lines, the United States was able to ascertain the applied MFN rates for the 128 tariff lines at issue in this dispute. The second number the United States referenced for each tariff line is China's applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018. As stated in paragraph 4 of the *Implementation Notice*, China will calculate the additional duties *in addition to* the "current applied tariff rate." The third figure the

United States referenced is China's additional duty rate on the U.S.-origin product since the effective date of April 2, 2018. This number is given in the *Implementation Notice* as 15 percent for 120 tariff lines and 25 percent for 8 tariff lines. Read together, the three numbers the United States referenced for each tariff line – (1) China's applied MFN rate; (2) China's applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018; and (3) China's additional duty rate on U.S.-originating products effective as of April 2, 2018 – demonstrate that for all 128 tariff lines at issue in this dispute, China is applying duties higher than its MFN commitments.

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

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

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

12. Read together, the three figures the United States referenced for each tariff lines – (1) China's bound rate; (2) China's applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018; and (3) China's additional duty rate on the U.S.-originating products effective as of April 2, 2018 – demonstrate that for 123 tariff lines at issue in this dispute, China exceeded its bound rate commitments.

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

13. China's measure is inconsistent with Article I:1 of GATT 1994 because it fails to extend to certain products of the United States an advantage granted by China to like products originating in other countries.

14. First, China's measure is explicitly covered by the text of Article I:1. A "customs duty" is a charge, such as those in China's measure, that is imposed on imports at the border. The terms "tariff", "customs duty", and "import duty," as used in the economics and international trade law, are interchangeable, at least for purposes of the matters at issue in this dispute.

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

16. In this dispute, China's measure imposes an additional 15 percent or 25 percent duty on certain goods of the United States. A comparison of China's applied MFN rate, its applied tariff rate on U.S.-originating products *before* the additional duties took effect on April 2, 2018, and its additional duty rate on U.S.-originating products effective as of April 2, 2018, demonstrate that for

all 128 tariff lines at issue in this dispute, China's rate of duty applied to U.S. originating products is above its MFN rate.

17. Second, each U.S. product subject to China's measure is "like" a product from other countries not subject to the additional duties within the meaning of Article I:1. As explained, China's measure discriminates against U.S products on the basis of origin. Thus, China's measure differentiates among products not on the basis of physical characteristics, end-use, or consumer preferences, but rather on a distinction that is not relevant to a "like product" analysis. In circumstances where the only distinction between two sets of products is the country of origin, it may be presumed that the two sets are "like products." Numerous Appellate Body and panel reports have adopted this analysis.

18. China's measure imposes additional duties only on products originating in the United States, and leaves unchanged the rate duty applicable to other countries, including all other WTO Members. U.S origin is the only criterion used by the measure for imposing additional duties on U.S. products covered by the 128 tariff lines, but not products from other countries entered under the same tariff lines. Thus, the like product element of Article I:1 is satisfied.

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

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

21. In this dispute, for 128 tariff lines, China subjects products from other countries to a certain duty rate. U.S.-originating products that fall under the same tariff lines, however, are subject to the additional duties on top of that duty rate.

22. By providing a lower rate of duty to the like products of other countries as compared to U.S. products, China is granting these products an advantage within the meaning of GATT Article I:1.

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

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

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

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

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

27. China's measure is inconsistent with its obligations under Article II:1 of the GATT 1994, which requires WTO Members to exempt products of another WTO Member from duties in excess of those set forth in their Schedule of Concessions and accord treatment no less favourable than what is provided for in that Schedule.

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

29. In other words, if a measure results in the imposition of duties (x) that are in excess of the duties provided for in the Schedule (y), the measure breaches the obligations under Article II:1(a) and (b) of the GATT 1994. Additionally, establishing a breach of Article II:1(b) necessarily entails a breach of Article II:1(a). For this reason, the United States turns first to paragraph (b) in Article II:1 of the GATT 1994.

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

31. The distinction between the first and second sentence concerns whether the duties in question constitute "ordinary customs duties" or "other duties or charges." For purposes of this dispute, it is legally immaterial whether the additional duties constitute "ordinary customs duties" or "other duties or charges" because, under either characterization, the duties exceed China's rates bound in its schedule. With respect to the first sentence of Article II:1(b), for 123 tariff lines at issue, China has imposed duties in excess of the bound rate commitments found in its Schedule.

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

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

33. The introductory language in China's measure indicates that it may attempt to assert a defense based on some type of theory that its additional duties are justified under the WTO Agreement on Safeguards ("the Safeguards Agreement"). In the event that China attempts to present such a defense, the United States will respond to China's arguments in subsequent submissions.

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

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

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

Agreement elaborates on the rights and obligations in Article XIX. Article 1 of the Safeguards Agreement states "[t]his Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of the GATT 1994."

37. One of the requirements from Article XIX that the Safeguards Agreement elaborates upon is that the right to apply a safeguard measure requires invocation of Article XIX through written notice of that invocation to other WTO Members. If that right is not exercised with the appropriate notice invoking this authority, a measure cannot be considered a safeguard under Article XIX and the Safeguards Agreement. Moreover, China cannot exercise the rights of the United States under Article XIX. If the United States did not invoke Article XIX, that is simply the end of the matter.

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

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. INVOCATION IS A CONDITION PRECEDENT TO APPLY A SAFEGUARD MEASURE UNDER GATT ARTICLE XIX AND THE WTO AGREEMENT ON SAFEGUARDS

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

40. First, Article 1 of the Safeguards Agreement defines a safeguard as "to mean those measures provided for in Article XIX of GATT 1994." Second, Article XIX of the GATT 1994, in relevant part, provides:

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

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

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

II. CHINA'S ARGUMENT THAT THE APPLICABILITY OF THE SAFEGUARDS AGREEMENT IS AN "OBJECTIVE QUESTION" MISSES THE POINT

43. China argues that the U.S. position is incorrect because the applicability of the Safeguards Agreement must involve an "objective question." This argument completely misses the point. The

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

44. Whether or not a Member has invoked the Safeguards Agreement is an objective question, involving what actually happened in the past. And here, the United States did not invoke any rights under Article XIX. And, indeed, China presents no factual evidence to the contrary.

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

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

47. In fact, the Appellate Body in *Indonesia – Iron and Steel Products* adopted a multi-step analysis for the existence and application of safeguard measures. "In carrying out this analysis," the Appellate Body mentioned, "it is important to distinguish between the features that determine whether a measure can be properly characterized as a safeguard measure from the conditions that must be met in order for the measure to be consistent with the Agreement on Safeguards and the GATT 1994. Put differently, it would be improper to conflate factors pertaining to the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines with the substantive conditions and procedural requirements that determine the WTO-*consistency* of a safeguard measure."

48. Under the first step of that analysis, a WTO Member must invoke the right under Article XIX for a measure to be a safeguard within the meaning of Article 1 of the Safeguards Agreement. Of course, as in *Indonesia – Iron and Steel Products*, this is not enough for the measure to be a safeguard as it still needs to meet the other requirements before moving onto a determination whether the safeguard measure was lawfully applied. But if the first and crucial step involving invocation does not take place, the measure cannot be a safeguard and another WTO Member's characterization is immaterial.

III. CHINA'S APPROACH FAILS UNDER ITS OWN TEST

49. Significantly, even under the approach China urges this Panel to adopt, the relevant factors still support the United States' position. The U.S. security measures were imposed under domestic law addressing threats to national security and not Section 201 of the Trade Act of 1974 that the United States uses to impose import relief in the form of a safeguard measure. Moreover, the underlying procedures to impose the U.S. security measures involved the U.S. Department of Commerce with engagement from the U.S. Department of Defense and not the U.S. International Trade Commission, which is the only competent authority in the United States authorized to investigate whether a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to a domestic industry that produces like or directly competitive products for the purpose of applying a safeguard measure.

50. Accordingly, were the Panel to evaluate the U.S. security measures under the factors proposed by China, it would find that the United States' characterization of the measure under its domestic law is as a national security matter, the procedures did not involve the only competent authority that can administer a safeguards investigation, and of course, there was no notification to the WTO

Committee on Safeguards because the United States, unlike the implementing Member in *Indonesia – Iron and Steel Products*, did not invoke Article XIX of the GATT 1994.

IV. CHINA'S ERRONEOUS APPROACH WOULD UNDERMINE THE RULES-BASED TRADING SYSTEM

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

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

I. THE PLAIN MEANING OF THE TEXT OF GATT 1994 ARTICLE XIX ESTABLISHES THAT INVOCATION IS A PRECONDITION TO APPLYING A SAFEGUARD MEASURE

52. 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. 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 a situation "that arises unexpectedly and requires urgent action."

53. 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. 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. 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.

54. 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)

55. 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." The term "pursuant" means "in accordance with". And the term "propose" means to "[p]ut forward or present for consideration" or "discussion". 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.

56. 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**.

57. 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:

> 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.

58. 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.

II. THE CONTEXT OF ARTICLE XIX CONFIRMS THAT INVOCATION IS A PRECONDITION TO APPLYING A SAFEGUARD MEASURE

59. The context provided by other provisions of the WTO Agreement confirms that invocation is a precondition to applying a safeguard measure. 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.

60. 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, Article XXIV, Article XVIII, Article II, and Article XXVII. 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).

III. THE NEGOTIATING HISTORY OF ARTICLE XIX CONFIRMS THAT INVOCATION IS A PRECONDITION TO APPLYING A SAFEGUARD MEASURE

61. 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 a provision titled "Emergency Action on Imports of Particular Products".

62. As originally drafted, the predecessor to Article XIX included an invocation requirement. 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 notice requirement. Led by the United States, the drafters agreed to keep the requirement.

63. In the course of negotiations, 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. 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." 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." The drafters agreed with pausing the discussion on Article 29 until a new draft was presented by the rapporteur.

64. 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
>
> > 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.

65. 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.

66. On November 20, 1946, the drafters issued a report that included a revised Article 29 that retained the prior notice requirement. This version of Article 29 was included in the London Report and it became Article 34 in the draft Charter of the ITO. 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.

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

IV. THE TEXT OF THE SAFEGUARDS AGREEMENT ESTABLISHES THAT INVOCATION IS A PRECONDITION TO APPLYING A SAFEGUARD MEASURE

68. 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.

69. First, the General Provision in Article 1 reaffirms that the Safeguards Agreement only applies to measures that invoke Article XIX. 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.

70. 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.

71. Second, Article 12 of the Safeguards Agreement reinforces the requirement of invocation as a precondition to action under Article XIX. Article 12.1 of the Safeguards Agreement contains requirements concerning notifications and consultation, and provides that 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.

72. 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." 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.

73. 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 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.

74. 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.

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

V. THE NEGOTIATING HISTORY OF THE SAFEGUARDS AGREEMENT CONFIRMS THAT INVOCATION IS A PRECONDITION TO APPLYING A SAFEGUARD MEASURE

76. 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. 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"**. 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."

77. 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. 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." Among the issues highlighted for consideration were "transparency," "coverage," "compensation and retaliation," and "notification."

78. 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 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**."

79. 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).

80. 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.

VI. THE U.S. SECTION 232 MEASURES CITED BY CHINA DO NOT FALL WITHIN THE SCOPE OF THE SAFEGUARDS AGREEMENT

81. 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.

82. 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.

VII. THE SAFEGUARDS AGREEMENT ONLY APPLIES TO MEASURES TAKEN PURSUANT TO ARTICLE XIX OF THE GATT 1994

83. 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."

84. 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." "Taken" is the past participle of the verb "take," which can be defined as "[h]ave an intended result; succeed, be effective, take effect." "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.)." Definitions of the word "pursuant" – used as an adverb in Article 11.1(c) – include "[w]ith to: in consequence of, in accordance with."

85. 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.

86. 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.

87. 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 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.

VIII. CHINA HAS NO BASIS FOR ASSERTING THAT ITS ADDITIONAL DUTIES ARE AUTHORIZED BY ARTICLE 8.2 OF THE SAFEGUARDS AGREEMENT

88. 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. Accordingly, the rights and obligations under Article XIX of the GATT 1994 and the Safeguards Agreement are not applicable in this proceeding.

89. 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.

90. 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*. 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. 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. 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.

91. 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." 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. 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."

92. Furthermore, even under China's suggested approach, there is no U.S. safeguard measure. 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 identified three factors it considered relevant for a panel to assess, among other relevant factors, in determining the existence of a safeguard measure.

93. Regarding the first factor (domestic law), safeguard measures in the United States are authorized by Section 201 of the Trade Act of 1974. 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. 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**."

94. 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. 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.

95. 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.

96. 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.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

97. The United States initiated this dispute in response to China's measure that imposes additional duties on and discriminates against goods originating in the United States, in violation of its obligations in Articles I and II of the GATT 1994. By and large, China does not contest the factual basis of the U.S. claims. Nor does China raise legal arguments to defend its measure in terms of the failure to accord MFN treatment and the imposition of duties in excess of the bound rate in China's Schedule.

98. Instead, China attempts to justify its measure under Article 8.2 of the Safeguards Agreement. The key question, therefore, is whether WTO safeguards disciplines – provided in Article XIX of the GATT 1994 and the Safeguards Agreement – apply. As the United States has explained over the

course of these proceedings, the rights and obligations under the safeguards disciplines are not applicable here.

99. At the outset, the United States would like to emphasize a key point regarding terminology. The United States has framed the issue in this dispute as whether, as China contends, the safeguards disciplines *apply* to the U.S. essential security measures. In contrast, China frames the issue as whether the U.S. essential security measures are, in fact, "safeguard measures." However, China's framing easily slides into an erroneous mode of analysis. In particular, China's approach implies that one can look at aspects of an adopted measure, and –without any consideration of how that measure fits into Article XIX's specific language – determine whether the measure is subject to Article XIX. This proposition is incorrect.

100. In fact, Article XIX of the GATT 1994 does not define the term "safeguard measure." Instead, Article 1 of the Safeguards Agreement defines "safeguard measures" as "those measures provided for in Article XIX of GATT 1994." And what exactly does Article XIX "provide for"? Article XIX provides for an "emergency *action*" that a Member is "free" to take after meeting the conditions in Article XIX:2. In particular, Article XIX:2 provides that, before taking an action under Article XIX:1, a Member "shall give notice in writing" and "shall afford…an opportunity to consult with it in respect of the proposed *action*." Article XIX is therefore concerned with *action,* and the consequences and procedures surrounding that action, rather than on a particular type of measure.

101. Indeed, the action permitted under the emergency procedures in Article XIX is framed with extraordinary breadth: the suspension of concessions or other obligations. In other words, any measure that would otherwise breach any obligation under the GATT 1994 could be subject to Article XIX, as long as the Member that proposes to adopt the measure seeks to exercise its right under Article XIX. Thus, the text of the WTO Agreement is clear: there is no special type of measure that, without considering the specific wording of Article XIX, can somehow be defined as a "safeguard measure."

102. Moreover, another WTO Member cannot assert that Article XIX should have been invoked and, on that basis, adopt a measure that is plainly inconsistent with fundamental WTO obligations. But that is exactly the approach China asks the Panel to adopt.

103. In other words, China believes that certain U.S. national security measures are inconsistent with U.S. obligations under the WTO Agreement notwithstanding that those measures were taken pursuant to Article XXI of the GATT 1994. China is challenging those U.S. measures in a separate dispute. However, instead of following the WTO's dispute settlement procedures, China decided to impose additional duties on U.S. products that are plainly inconsistent with its obligations under Articles I and II of the GATT 1994.

104. Besides lacking any support in the text of the WTO Agreement, China's position is fundamentally at odds with the basic element of the WTO Agreement that a Member is to utilize the WTO's dispute settlement procedures if a Member believes that another Member's measure is inconsistent with WTO rules.

I. CHINA'S ADDITIONAL DUTIES MEASURE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLES I AND II OF THE GATT 1994

105. The United States has established the facts and demonstrated that China's measure is plainly inconsistent with the fundamental WTO obligations to provide MFN treatment, and to abide by the tariff concessions in a Member's Schedule, as set out respectively in Articles I and II of the GATT 1994.

106. China has failed to rebut the U.S. *prima facie* case by challenging the factual or legal basis of the U.S. claims. With respect to the U.S. claim under Article I, China does not dispute that its measure imposes additional duties only on U.S.-origin goods for all 128 lines. Then, regarding the U.S. claim under Article II, China does not contest that its measure results in duties in excess of its bound rates for 123 of 128 tariff lines.

107. Further, China has not raised any interpretive arguments regarding the U.S. claims under Articles I and II. Instead, China relies entirely on its flawed theory under Article 8.2 of the Safeguards

Agreement to defend its additional duties measure. This defense itself implies that the measure in question *prima facie* breaches China's obligations under Articles I and II, as China appears to acknowledge.

II. THE FUNDAMENTAL LEGAL ISSUE REGARDING CHINA'S ALLEGED JUSTIFICATION FOR ITS ADDITIONAL DUTIES MEASURE IS WHETHER THE SAFEGUARDS AGREEMENT APPLIES

108. China asserts that it has implemented the measure at issue under Article 8 of the Safeguards Agreement. Because China has presented this argument, it bears the burden to establish it. China has failed to meet this burden because the Safeguards Agreement does not apply.

A. China has no basis for trying to avoid its burden of proof to establish that the Safeguard Agreement applies.

109. China continues to assert that the United States somehow carries a burden with respect to a provision it has not raised. The key point on burden of proof is that China has raised safeguards disciplines to rebut the U.S. *prima facie* case of a breach of the GATT 1994. Therefore, China must establish that (1) the safeguards disciplines are applicable and that (2) its challenged measure is justified under the safeguards disciplines. The U.S. panel request does not assert a breach of any WTO provision on safeguards. It is China – not the United States – that is arguing that the safeguards disciplines are applicable, and therefore it is China's burden to establish the truth of this assertion.

B. The safeguards disciplines apply where a Member seeks to invoke its rights under Article XIX of the GATT 1994.

110. China's attempt to justify its additional duties as a measure taken under Article 8.2 of the Safeguards Agreement and Article XIX:3(a) of the GATT 1994 is baseless. As the United States has explained in prior submissions, Article XIX of the GATT 1994 establishes a Member's right (but not obligation) under certain conditions to deviate from its WTO obligations and take an emergency action. A key condition precedent to the exercise of that right is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult. This invocation requirement is established by the ordinary meaning of each paragraph of Article XIX, the context provided by numerous other WTO provisions, and the object and purpose of the GATT 1994 to provide "reciprocal and mutually advantageous" arrangements directed to the "substantial reduction" of tariffs. This requirement is confirmed by the negotiating history of Article XIX and the Safeguards Agreement. Thus, without invocation, a Member cannot and has not taken action pursuant to Article XIX and the safeguards disciplines do not apply.

111. Article XIX:1 provides that if certain conditions are met, a Member "shall be free" "to suspend an obligation or to withdraw or modify a concession." Thus, when a Member believes that the conditions in Article XIX:1(a) are met, the Member has the discretion to invoke the right reserved to it under Article XIX. Under Article XIX:2, a Member's ability to take action pursuant to Article XIX:1 is conditioned on invocation through notice to other Members of a proposed action under Article XIX. 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 and may not take the proposed action "in accordance with" that provision.

112. The third sentence of Article XIX:2 also supports the interpretation that invocation is a condition precedent for action under Article XIX. The third sentence of Article XIX:2 provides a *limited exception* to the consultation requirement. Notably, this exception does *not* permit Members to take action without providing "notice." This exception to the consultation requirement – but not the notice requirement – establishes that Article XIX requires a Member to invoke through notice its right to take a safeguard action as a condition precedent to action under that provision.

113. The terms of Article XIX:3 of the GATT 1994 also show that invocation is a precondition for a Member's exercise of its right to take action under Article XIX and to the application of safeguards rules to that action. Under this 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, underscoring that invocation through notice is a condition precedent to action under Article XIX.

114. Numerous provisions of the GATT 1994 and other WTO covered agreements contemplate a Member affirmatively exercising the right to modify or withdraw a tariff concession or to suspend an obligation through invocation. 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. These provisions of the GATT 1994 and other WTO agreements are important context for interpreting Article XIX.

115. The Safeguards Agreement, which provides context for Article XIX of the GATT 1994, also supports that invocation of Article XIX through written notice is a condition precedent to a Member's exercise of its right to take action under Article XIX. Both Article 1 and Article 11.1(a) refer to Article XIX in its entirety in describing, respectively, the scope of application for the rules established in the Safeguards Agreement and when a Member may take or seek any emergency action on imports of particular products as set forth in Article XIX of the GATT 1994. By referring to Article XIX in its entirety – including the requirement of invocation through notice set forth at Article XIX:2 – Article 1 and Article 11.1(a) of the Safeguards Agreement support that invocation through written notice is a condition precedent to a Member's exercise of its right to take action under Article XIX and the application of safeguards rules to that action.

116. Article 11.1(c) of the Safeguards Agreement also supports that invocation of Article XIX is a necessary precondition to a Member's exercise of its right to take action under Article XIX and the application of safeguards rules to that action. This provision states in relevant part 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." This provision is context which confirms that the Member adopting a measure decides what type of mechanisms for otherwise GATT-inconsistent measures are applicable.

117. China points to "[t]he relationship between Article XIX:2 of GATT 1994 and Article 12 of the Safeguard[s] Agreement" as undermining the U.S. position that the requirement to give notice in Article XIX is different from the notification requirements in Article 12. China misperceives the relationship between Article 12 and Article XIX. In contrast to Article XIX's requirement for invocation, Article 12 identifies certain notification requirements that apply once Article XIX has been invoked. Article 12 sets forth procedural requirements to expand the scope of information a Member provides to other Members after it has made the decision to invoke WTO safeguards provisions.

118. China also argues that the counter-notification provision in Article 12.8 of the Safeguards Agreement "directly contradicts" the U.S. interpretation that invocation is a condition precedent for taking an action under Article XIX. Article 12.8 states "[a]ny Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions *dealt with in this Agreement* that have not been notified by other Members that are required by this Agreement to make such notifications." As the words "dealt with in this Agreement" and "required by this Agreement to make such notifications" make clear, this provision relates only to notifications that Members are required to make by the Safeguards Agreement. And to recall, the Safeguards Agreement applies to "safeguard measures", defined as those measures provided for in Article XIX. Nothing in the text of Article 12.8 indicates that a Member may invoke another Member's Article XIX rights through a counter-notification.

C. Here, the United States did not invoke Article XIX and therefore the Safeguards Agreement does not apply.

119. Here, the record objectively establishes that the United States has not invoked Article XIX. Further, the United States has invoked a WTO right to take a measure, namely under Article XXI, a completely different provision of the GATT 1994. China does not dispute these key facts. Nonetheless, China claims that safeguards disciplines are applicable, arguing that safeguards disciplines apply when a measure has the "constituent features" identified in the Appellate Body report in *Indonesia – Iron or Steel Products*. China continues to fail to recognize the unusual circumstance addressed by that report and that the report did not purport to identify all of the conditions precedent for application of the safeguards disciplines. Thus, the reasoning in that report is not applicable to the issue in this dispute.

D. China's approach cannot be sustained in light of the relevant context of the GATT 1994 and the DSU.

120. China's approach also cannot be sustained under an interpretation in light of the relevant context of the GATT 1994 and the DSU. Pursuant to DSU Articles 11 and 3.2, panels are to interpret and apply relevant provisions of WTO covered agreements in accordance with the customary rules of interpretation of public international law. Those rules are reflected in Articles 31 to 33 of the *Vienna Convention on the Law of Treaties* (Vienna Convention). Article 31(1) provides that a treaty shall be interpreted in accordance with the ordinary meaning of the terms of the treaty in their context and in light of the treaty's object and purpose.

121. Thus, other provisions of the GATT 1994 are important context for interpreting Article XIX of the GATT 1994. Article XXIII of the GATT 1994 establishes procedures for a Member seeking to address, among other things, perceived violations of the GATT 1994. Accordingly, if a Member believes that another Member's measure is inconsistent with an obligation in the GATT 1994, Article XXIII of the GATT 1994 makes clear that the method to address such a concern is through recourse to the procedures in Article XXIII.

122. Further, as the WTO Agreement is a single undertaking, the DSU is relevant context for interpreting the terms of GATT 1994 Article XIX and the Safeguards Agreement within the meaning of Vienna Convention Article 31. In particular, the DSU establishes detailed procedures for a Member seeking to address perceived violations of obligations in the WTO covered agreements.

123. Here, China's approach directly conflicts with DSU Article 23 (Strengthening of the Multilateral System). 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.

124. China's approach – that a Member can deem another Member's measure a safeguard measure and, on that basis, adopt retaliatory measures – is plainly contrary to the text of Article XIX and the Safeguards Agreement considered in light of the relevant context of GATT 1994 Article XXIII and DSU Article 23.

E. Under China's approach, any measure that breaches a Member's GATT obligations can be construed as a safeguard measure and give rise to a "right" to "rebalancing" for another Member. Such an argument risks undermining the legitimacy of the WTO and its dispute settlement system.

125. China's proposed approach risks undermining the legitimacy of the WTO and its dispute settlement system. To recall, China argues that it has the right to take retaliatory measures because certain U.S. Section 232 measures allegedly "suspend a GATT obligation or withdraw or modify a GATT concession." China adds an argument that the U.S. Section 232 measures present the second "constituent feature" because, in its view, the Section 232 measures are "'designed to prevent or remedy serious injury' to the U.S. steel and aluminum industries." This second alleged feature, however, provides no meaningful limitation on China's position on a unilateral right to retaliate for an alleged breach of the GATT 1994. Almost any trade-related measure will have some effects with respect to domestic industries. And, it is China itself that is attributing such a "design" to the U.S. measures.

126. As the United States has explained, if a Member does not invoke Article XIX, the Member has decided *not* to act upon the right to seek permission under Article XIX. Accordingly, if a Member imposed duties on a non-MFN basis or in excess of its tariff bindings and did *not* invoke Article XIX, then the Member would be in breach of its GATT obligations, and other Members could seek to impose countermeasures following recourse to multilateral dispute settlement rules. That is how the system is designed to work, as evident from the DSU.

127. In fact, China has brought a separate dispute challenging the U.S. Section 232 measures in the WTO. However, rather than waiting for a decision in that dispute, China unilaterally decided that the United States is taking action under Article XIX, unilaterally decided that the U.S. measures are inconsistent with the safeguards disciplines, and unilaterally retaliated against those measures.

128. Under China's proposed approach, any Member could determine, for itself, that almost any measure was an action taken under Article XIX, and adopt retaliatory measures as so-called "rebalancing" measures.

III. EVEN IF THE SAFEGUARDS AGREEMENT WAS APPLICABLE, CHINA HAS NO BASIS FOR ASSERTING THAT ITS ADDITIONAL DUTIES MEASURE IS AUTHORIZED BY ARTICLE 8.2 OF THE SAFEGUARDS AGREEMENT BECAUSE THE UNITED STATES HAS NOT ADOPTED A "SAFEGUARD MEASURE"

129. As the United States has just explained, the Safeguards Agreement does not apply because the United States has not invoked its right to apply a safeguard. However, even if the Panel were to apply safeguards disciplines, China's justification would fail. Contrary to China's claim, a measure taken pursuant to Article XXI cannot fall within the scope of the Safeguards Agreement, and this interpretation is clearly supported by the text of the Safeguards Agreement.

130. 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). In relevant part, Article 11.1(c) of the Safeguards Agreement 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."

131. The ordinary meaning establishes that Article 11.1(c) is triggered – and the Safeguards Agreement "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. The U.S. Section 232 measures cited by China were sought, taken or maintained pursuant to 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. Therefore, no "right" of "rebalancing" can arise for another Member, including China.

132. Therefore, the exercise of the right – through invocation – to take action under Article XIX is a precondition not only for a measure to constitute a safeguard but for another Member to implement a rebalancing measure under Article 8.2. Because the United States has not sought to exercise a right to exceed its tariff bindings through GATT 1994 Article XIX, no consequent "right to rebalancing" can arise for another Member.

EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

133. The United States will close by elaborating on three key issues. First, as the United States has explained, the U.S. interpretation that invocation is a condition precedent to a Member's exercise of its right under Article XIX is supported by **Article 11.1(c) of the Safeguards Agreement**. This provision confirms that the Safeguards Agreement does not apply where a Member seeks, takes, or maintains a measure pursuant to a provision of the GATT 1994 other than Article XIX, such as Article XXI. China has clearly avoided taking a position on whether Article 11.1(c) would allow for safeguards disciplines to apply in a situation where a Member has "sought, taken or maintained" a measure pursuant to Article XXI. China avoids this issue because the United States has clearly invoked Article XXI with respect to the Section 232 measures – indicating that it is taking or at the very least seeking to take the measures pursuant to Article XXI – meaning that the Safeguards Agreement, including Article 8.2, does not apply to China's additional duties measure.

134. **With regard to the point on the exercise of a right** under Article XIX of the GATT 1994, the Panel has asked whether characterizing the application of a safeguard as the exercise of a "right" means that it is solely for a Member to decide to "trigger the applicability of the WTO rules on safeguards to its measure." As an initial matter, the United States would note that characterizing the invocation of the WTO safeguards provisions as a right flows directly from the text of Article XIX. To recall, Article XIX states that a Member "shall be free" to take a safeguard action, subject to certain conditions. This is a language of rights, as opposed to language of obligations.

135. Turning to Article XIX, as noted, any Member has the right to attempt to employ Article XIX to seek to temporarily withdraw, modify, or suspend a GATT 1994 obligation. This decision on whether to invoke Article XIX does not, as China argues, somehow unilaterally determine whether

GATT rules apply to the measure that the Member seeks to take. To the contrary, any measure involved in a safeguards situation is already disciplined by GATT rules. In fact, the measure is *inconsistent* with an obligation set out in the GATT 1994. Further, the Member wishing to adopt the measure acknowledges this inconsistency by proposing to withdraw, modify, or suspend the obligation through its invocation of Article XIX. Thus, with *or without* an invocation of the right to try to temporarily withdraw, modify, or suspend a GATT obligation, the measure sought to be taken is, *by definition,* inconsistent with GATT obligations.

136. China of course asserts it has a fundamental right to retaliate – which China labels as "rebalancing" – whenever China unilaterally decides that an alleged breach of the GATT 1994 is a "safeguard measure". But what China misses is that it is the initial exercise of a right by a Member seeking to adopt a safeguard that in turn leads to the consultation requirements and then triggers the right of the exporting Member to rebalance in the event the two Members are not able to reach agreement in the consultations.

137. We will now turn to the systemic implication of China's position that a Member may unilaterally decide that another Member's measure is an action taken under Article XIX, may unilaterally decide that that measure is inconsistent with safeguards disciplines, and may immediately and unilaterally retaliate against that measure. Under China's approach that the safeguards disciplines apply to any measure that presents two "constituent features", almost any measure that is alleged to be WTO-inconsistent could fall within the safeguards disciplines and allow for such retaliation. China's approach would fundamentally reverse the basic rule, as provided in the GATT 1994 and the DSU, that retaliatory measures, if appropriate, should be adopted *after* dispute settlement. The reversal of this basic rule would amount to a fundamental change in the world trading system since the adoption of the GATT 1994 over 70 years ago. This reversal would be inconsistent with the text of WTO Agreement, and would fundamentally undermine the WTO system.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S QUESTIONS AFTER THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

Excerpt from U.S. Response to the Panel Question 73

138. 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 Safeguards Agreement "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. This result is confirmed by the negotiating history of the Safeguards Agreement.

139. In particular, although early draft text of the Safeguards Agreement would have permitted Members to take safeguard measures under Article XIX "only in a situation in which other GATT provisions do not provide remedies", this approach was abandoned by July 1990, when the draft text was changed to provide that the agreement "do[es] not prejudice" a Member's ability to take action pursuant to provisions of the GATT 1994 other than Article XIX. As the July 1990 draft Agreement on Safeguards provided in relevant part:

> The provisions of paragraph 1 [defining a safeguard measure] above *do not prejudice* the rights and obligations of contracting parties regarding trade-restrictive measures taken in conformity with specific provisions of the General Agreement other than Article XIX, protocols, and agreements and arrangements negotiated under the auspices of GATT.

140. Although the phrasing and placement of this provision changed as the negotiations went along, subsequent drafts of the Safeguards Agreement continued to reflect negotiators' underlying intent to prevent the terms of the Safeguards Agreement from prejudicing Members' rights under other GATT provisions. As the October 1990 draft text stated in relevant part:

> No trade-restrictive measure shall be sought or taken by a contracting party unless it conforms with the provisions of Article XIX as interpreted by the provisions of this agreement, or is consistent with other provisions of the General Agreement, or protocols

> and agreements or arrangements concluded within the framework of the General Agreement.

141. With this text, the October 1990 draft continues to make clear – like the July 1990 draft – that the availability of Article XIX as a release from obligations does not constrain a Member's ability to take action pursuant to other provisions of the GATT 1994. So much is clear based on the use of the word "or" in the draft text quoted above, which confirms that Members could seek or take trade-restrictive measures that were either in conformity with Article XIX or consistent with other provisions of the General Agreement (including Article XXI).

142. The same meaning is clear in the December 1991 draft Safeguards Agreement, in which the text that became Article 11.1(c) was moved, rephrased, and divided into parts, to read in relevant part:

> (c) Measures sought, taken or maintained by a contracting party pursuant to other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement are not included in the scope of this agreement.

143. Subparagraph (c) of the December 1991 draft is similar to Article 11.1(c), particularly its reference to measures "sought, taken or maintained . . . pursuant to" other provisions of the General Agreement. By referring to measures sought, taken, or maintained "pursuant to" other provisions of the General Agreement – a change from the October 1990 draft's reference to measures "consistent with" other provisions of the General Agreement, and the July 1990 draft's reference to measures "taken in conformity with" specific provisions of the General Agreement – the December 1991 draft Safeguards Agreement underscores that the Safeguards Agreement does not apply to 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.

144. In the final text of the Safeguards Agreement, this text was again rephrased to emphasize this point. Specifically, the December 1991 draft language stating that measures sought, taken, or maintained pursuant to other provisions of the GATT 1994 "are not included in the scope of" the Safeguards Agreement was replaced with a more definite statement that the Safeguards Agreement "does not apply" to such measures. By stating that the Agreement "does not apply" to such measures, this final text makes even clearer that a Member's ability to seek, take, or maintain safeguard measures does not constrain a Member's ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI. And that where a Member has sought, taken or maintained action pursuant to an "other provision of the GATT 1994," as the United States has explained, the Safeguards Agreement "does not apply."

Excerpt from U.S. Response to the Panel Question 89

145. A Member's exercise of the right to take emergency action by invoking Article XIX of the GATT 1994 is conceptually distinct from the specific notification requirements provided in the Safeguards Agreement. Furthermore, while Article XIX invocation through notice and Article 12 notifications are conceptually distinct, a Member's notification under Article 12 may serve to inform other Members of a decision to invoke Article XIX.

146. In this dispute, however, the conceptual distinction does not appear relevant, because it is undisputed that the United States did not invoke its right under Article XIX, nor – since the Safeguards Agreement is inapplicable – did the United States provide any of the specific notifications set out in the Safeguard Agreement.

147. For context, the United States notes that the distinction might be relevant in a situation where, for example, a Member invoked Article XIX by providing the notice in writing under Article XIX:2, but did not meet all of the notification requirements under Article 12 of the Safeguards Agreement. In that hypothetical situation, the Safeguards Agreement would apply, but another Member might raise an issue with respect to compliance with a specific aspect of Article 12.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. Introduction

1. This dispute concerns China's measures in response to the U.S. tariffs on imported steel and aluminum products which in fact constitutes a safeguard measure. Contrary to the claims of the United States, China's measures were taken pursuant to and are consistent with Article XIX:3 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994") and Article 8.2 of the WTO Agreement on Safeguards (the "Safeguard Agreement").

II. Measures at issue

2. On March 23, 2018, China issued the *Ministry of Commerce Notice on Publicly Soliciting Opinions on U.S. Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures* (the "Opinions Notice"). The Opinions Notice specifically stated that China's measures were in response to the U.S. tariffs on imported steel and aluminum products under the Section 232 measures, which "in fact constitutes a safeguard measure". The intended suspension of concessions and other obligations in China's measures are based on, *inter alia*, the relevant provisions of the Safeguard Agreement, and are "substantially equivalent" to balance the damage of interests to China caused by the U.S. Section 232 measures.[1]

3. On March 26, 2018, China notified the WTO Committee on Safeguard that it formally requested consultations with the United States pursuant to Article 12.3 and 8.1 of the Safeguard Agreement and Article XIX:2 of GATT 1994 with respect to the United States' safeguard measures on steel and aluminum, respectively. In these requests, China stated that it takes the view that the measure of the United States "is safeguard measure although it's in the name of national security measure."[2]

4. On March 29, 2018, pursuant to Article 12.5 of the Safeguard Agreement, China notified the Council for Trade in Goods of proposed suspension of concessions and other obligations referred to in Article 8.2 of the Safeguard Agreement. In this notification, China made it clear that it takes the view that the Section 232 measures on steel and aluminum products of the United States are safeguard measures although it's in the name of national security. It was further clarified that the proposed suspension of substantially equivalent concessions and other obligations by China was pursuant to Article XIX:3 of GATT 1994 and Article 8.2 of the Safeguard Agreement.[3]

5. On April 1, 2018, China issued the *State Council Customs Tariff Commission Notice on Suspension of Duty Concession Obligations on Some Imported Products Originating from the United States* (the "Implementation Notice"). The Implementation Notice suspended tariff concession obligations on some imported products originating from the United States, effective on April 2, 2018, by imposing additional import tariff rates of 15% or 25% respectively on 128 tariff lines. It is stated in the Implementation Notice that the additional import tariff rates were to balance the losses to China caused by the U.S. Section 232 Measures on imported steel and aluminum products.[4]

6. China's "other additional duties" raised by the United States are not included by the United States in its panel request, are not part of or related to China's measures at issue, and they do not form part of "the matter referred to the DSB" and fall outside of the terms of reference of this Panel. In addition, the "other additional duties" were imposed by China unrelated to China's measures at issue, and at a time after the imposition of the additional duties as result of China's measures at issue. Therefore, the Panel does not need to and should not consider

[1] China's First Written Submission, para. 8.
[2] China's First Written Submission, para. 9.
[3] China's First Written Submission, para. 10.
[4] China's First Written Submission, para. 11.

the "other additional duties" in the Panel's assessment of the consistency of China's measures at issue with the Articles II:1(a) and II:1(b) of the GATT 1994.[5]

III. The Claim of The United States under Article I And II Of GATT 1994 Failed to Meet the Requirements of Article 6.2 of the DSU and Are Not Within the Panel's Terms of Reference

7. Article 6.2 of the DSU requires that the panel request of the complainant provide a "brief summary of the legal basis of the complaint" that is sufficient to "present the problem clearly", and thus notify the parties "the nature of its case", and the Appellate Body has explained that a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".[6] A brief summary of the legal basis of the complaint must "aim to explain succinctly *how or why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question". Whether "*how or why*" has been succinctly explained would necessarily depend on *the nature* of the obligation in the covered agreement claimed to have been violated.[7]

8. China's measures at issue are not *stand-alone* measures. China, as well as certain other WTO Members, believe that the U.S. measures constitute safeguard measures as provided for in Article XIX of the GATT 1994, based on solid factual and legal analysis of the specific features of the U.S. measures in relation to the WTO safeguards provisions. Pursuant to Article XIX:3 of the GATT 1994 and Article 8 of the Safeguard Agreement, China took the measures at issue in this dispute to act in response to the U.S. safeguard measures, in order to restore the substantially equivalent level of concessions under GATT 1994 between China and the United States.[8]

9. The legal basis has been expressly specified in China's measures at issue, and has been notified by China to the WTO for the knowledge of all the WTO Members, including the United States. Therefore, the United States was well aware that China's measures at issue were plainly taken pursuant to Article XIX:3 of GATT 1994 and Article 8.2 of the Safeguard Agreement.[9] The United States does not have the right to challenge China's measures in a way that totally disregard its correct nature and legal basis. However, in its panel request, the United States has challenged China's measure as a *stand-alone* measure, and the United States claimed China's measures at issue inconsistent with Article I and II of the GATT 1994 without regard to Article XIX of the GATT 1994 or the Safeguard Agreement at all. The failure of the United States to invoke Article XIX of GATT 1994 and the Safeguard Agreement in its panel request is a fundamental defect, which results its claim under Article I and II of GATT 1994 not within the Panel's terms of reference.[10]

10. Article XIX and the Safeguard Agreement are not exceptions or mere "affirmative defense" available to respondents for justification of its violation of other GATT 1994 obligations, such as Article I and II of the GATT 1994.[11] The safeguard regime under Article XIX of GATT 1994 and the Safeguard Agreement shares fundamental nature and structure with the transitional safeguards regime under Article 6 of the Agreement on Textiles and Clothing (the "ATC"). The legal status of the transitional safeguard mechanism under Article 6 of ATC has been examined by the Panel and the Appellate Body in *US-Wool Shirts and Blouses*, and Article 6 of ATC was not found to be a limited exception or an affirmative defense. Similar to Article 6 of ATC, Article XIX of GATT 1994 and Safeguard Agreement explicitly establish positive obligations for Members applying safeguard measures, as well as for Members affected by such measures in taking re-balancing measures. Therefore, they are not mere "affirmative defense" available to respondents in the dispute cases.[12] The relationship between Article XIX of GATT 1994 and

[5] China's First Written Submission, para. 156, China's response to Panel's question 17.

[6] China's oral statement in the Panel's first substantive meeting with the parties, para 14, quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162,

[7] China's oral statement in the Panel's first substantive meeting with the parties, para 17, quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

[8] China's oral statement in the Panel's first substantive meeting with the parties, paras. 2-5.

[9] China's First Written Submission, para. 13.

[10] China's oral statement in the Panel's first substantive meeting with the parties, paras. 7 and 8, China's First Written Submission para. 17.

[11] China's First Written Submission, para. 15.

[12] China's First Written Submission, paras. 23-30.

the Safeguard Agreement and Article I and II of GATT 1994 is not dependent on and does not change because of the way the United States chose to frame its claims in its Panel Request in this dispute.[13]

11. When measures at issue in dispute are plainly taken pursuant to Article XIX of GATT 1994 and the Safeguard Agreement, the relevant concessions and obligations under other GATT 1994 provisions, such as those under Article I and II of GATT 1994, are necessarily suspended, withdrawn or modified, and therefore are not eligible to be assessed independent from the safeguard provisions.[14] Measures taken pursuant to Article XIX of GATT 1994 and the Safeguard Agreement would necessarily alter the scope of the relevant concessions or obligations established by other GATT 1994 provisions. Such relationship suggests that the safeguard measures/rebalancing measures are not first in violation of the original obligations under other GATT provisions, and then being justified by Article XIX of GATT 1994 and the Safeguard Agreement. They do not violate the obligations under other GATT provisions in the first place, if taken pursuant to Article XIX of GATT 1994 and the Safeguard Agreement.[15] In such a situation, a breach of Article I and Article II of the GATT 1994 cannot be claimed or established based on these provisions alone, without taking into account the suspensions of concessions or obligations pursuant to Article XIX of the GATT 1994 and the Safeguard Agreement.[16]

12. When measures at issue in dispute are plainly taken pursuant to Article XIX of GATT 1994 and the Safeguard Agreement, the "legal basis of the complaint" and "problem" that should be presented clearly in the panel request, as provided for in Article 6.2 of the DSU, are not violation of obligations under Article I and II of the GATT 1994 as *stand-alone* obligations, but whether the "suspension", "withdrawal" or "modification" of obligations under these GATT provisions by the measures taken pursuant to the WTO safeguards disciplines are consistent with such disciplines.[17]

13. The legal relationship between these provisions stipulates that measures taken pursuant to the WTO safeguard provisions, such as China's measures at issue in this dispute, are not first in violation of Article I and II of the GATT 1994, and then could be justified under the WTO safeguard provisions. China's measures simply would not violate Article I and II of the GATT 1994 in the absence of the non-applicability of or inconsistency with the WTO safeguard provisions by the measures.

14. On the face of the Panel Request, the United States is claiming measures explicitly taken pursuant to Article 8.2 of the Safeguards Agreement is directly in violation of Article I and II of the GATT 1994, because China's measures are deemed by the United States not to be taken pursuant to Article 8.2 of the Safeguards Agreement.[18] Therefore, it is apparent that the U.S. claims in its panel request in relation to Article I and II of GATT 1994 are *inextricably linked* to its consideration that Article XIX of GATT 1994 and the Safeguards Agreement do not apply in this dispute, which clearly forms an important and integral part of the "problem" the United States considered, and an important and integral part of "the nature of the case" of the United States, and therefore an important and integral part of the "legal basis" of the complaint of the United States under Article I and II of the GATT 1994. By failing to include this integral part of its claim on the violation of Article I and II of the GATT 1994 in its panel request, the United States could not meet the obligation incumbent upon the complainant to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" under Article 6.2 of the DSU.[19] China and third parties, by reading the U.S. Panel Request, cannot ascertain the legal basis of the United States how China's measures taken pursuant to safeguard rebalancing provisions would violate Articles I and II of the GATT 1994. Therefore,

[13] China's Second Written Submission, paras. 15-18 and 26.
[14] China's First Written Submission, paras. 31-36.
[15] China's First Written Submission, para. 41.
[16] China's Oral Statement in the Panel's first substantive meeting with the parties, para 22,
[17] China's oral statement in the Panel's first substantive meeting with the parties, para 25,
[18] China's Second Written Submission, paras. 30-32 and 38.
[19] China's oral statement in the Panel's first substantive meeting with the parties, para. 30; China's Second Written Submission, paras. 44-49,

the U.S. Panel Request fails to satisfy the due process purpose requirement under Article 6.2 of the DSU.[20]

15. For a challenge of China's measure, which is explicitly and unambiguously taken pursuant to Article XIX:3 of the GATT 1994 and Article 8 of the Safeguard Agreement, in order to "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed", a challenge cannot be simply based on Article I and II of the GATT 1994. Otherwise, such a challenge would be ignoring *the nature* of the obligations under Article I and II of the GATT 1994, in light of their relationship with Article XIX of the GATT 1994 and the Safeguard Agreement. The Panel Request of the United States does not appropriately "connect" the challenged measure with Article I and II of the GATT 1994, and evades the "problem" and "the nature of the case", and therefore fails to provide "brief summary of the legal basis of the complaint" as required by Article 6.2 of the DSU.[21]

16. The analytical approach and findings by the Appellate Body in *EC – Tariff Preferences* case provide useful guidance in the analysis of the U.S. claim in the current dispute. In that dispute, the Appellate Body found that if the complainant failed to raise the enabling clause in the panel request, its claim of inconsistency with Article I:1 of the GATT 1994 is not a proper claim before the Panel, because the panel request "would not convey the 'legal basis of the complaint sufficient to present the problem clearly'".[22]

17. In *EC – Tariff Preferences*. the Appellate Body found that even though the complainant just wanted to allege inconsistency with one particular provision of the GATT 1994, if the complainant also seeks to argue the measure is not justified under another WTO provision which is the legal basis of the measure, allegation in the Panel Request under the former provision alone might be "insufficient for the complainant in WTO dispute settlement", and the complainant "must allege more than mere inconsistency with" the former provision. The Appellate Body found that a complaining party "must, in its request for the establishment of a panel" to identify the other provision forming the legal basis of the measure "thereby 'notif[y] the parties and third parties of the nature of [its] case'". The WTO jurisprudence clearly shows that the complainant does not have a total freedom to decide not to include a provision in its Panel Request simply because it chooses not to make a claim under such provision. Whether the inclusion of such a provision in the Panel Request is required by Article 6.2 of the DSU depends on its legal relationship with the provisions under which claims are made and the facts of a particular dispute, and subject to the scrutiny of a WTO Panel.[23] Therefore, when an *inextricable* link for a claim is missing from the Panel Request, a brief summary of the legal basis of the complaint cannot be deemed as properly provided, and the problem cannot be deemed as clearly presented, and the legal requirements of Article 6.2 of the DSU are not satisfied.[24]

18. There are overwhelming similarities of the relevant facts in *EC – Tariff Preferences* case and the current dispute.

19. In *EC – Tariff Preferences*, every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I if it meets the requirements of the Enabling Clause. In the current dispute, every rebalancing measures taken by Members pursuant to Article XIX:3 of GATT 1994 and Article 8.2 of the Safeguard Agreement would be in violation of Article I of GATT 1994, or be in violation of Article II of GATT 1994, if assessed based on Articles I and II alone, but would not be in violation of Article I or Article II if it meets the requirements in Article XIX:3 and Article 8.2.[25]

[20] China's oral statement in the Panel's second substantive meeting with the parties, para. 20.

[21] China's oral statement in the Panel's first substantive meeting with the parties, para 27,

[22] China's First Written Submission, para. 47, China's Second Written Submission, para. 57, quoting Appellate Body Report, *EC – Tariff Preferences,*, para. 110.

[23] China's First Written Submission, para. 50, quoting Appellate Body Report, *EC – Tariff Preferences*, para. 110 and 113,

[24] China's oral statement in the Panel's second substantive meeting with the parties, para 21, quoting Appellate Body Report, *EC – Tariff Preferences*, para. 118.

[25] China's First Written Submission, paras. 47 and 48,

20. In *EC – Tariff Preferences*, the EC measure at issue "is plainly taken pursuant to the Enabling Clause". In the current dispute, China's measures at issue are plainly taken pursuant to Article XIX:3 of GATT 1994 and Article 8.2 of the Safeguard Agreement, which is well known to the United States.[26]

21. In *EC – Tariff Preferences*, the Enabling Clause sets forth extensive requirements for the Members. In the current dispute, extensive requirements are set forth in Article XIX of GATT 1994 and Article 8.2 of the Safeguard Agreement in relation to the rebalancing measures taken by Members, both substantively and procedurally.[27]

22. In the *EC – Tariff Preferences*, based on these elements considered, the Appellate Body found that, since the claim by the complainant of inconsistency with Article I is inextricably linked with its argument that the measures do not satisfy the conditions in the Enabling Clause, the complainant was required to, *inter alia*, identify, in its request for the establishment of a panel, which obligations in the Enabling Clause the EC measures are alleged to have contravened. Similarly, in the current dispute, the claim by the United States of inconsistency with Article I and II with respect to China's measures is inextricably linked with its argument that the measures do not satisfy the conditions in the Safeguard disciplines, and therefore the United States is required to identify in its panel request how China's measures do not satisfy the Safeguard disciplines.[28] The United States failed to do so.

23. The United States is not entitled to leave the safeguard provisions out of its panel request simply because it does not agree the measure can be justified under the provisions.[29] In addition, as the legal basis of China's measures, the WTO safeguard provisions are clearly relevant to China's measures at issue,[30] and the relevance is to be determined based on objective examination by the Panel, not by subjective consideration by a Member.[31]

24. The analytical approach and findings made by the Appellate Body in *EC – Tariff Preferences* case apply to the analysis in the present dispute regardless of the difference in the legal characterization between the Enabling Clause, which the Appellate Body found to be a "defence", and Articles XIX of the GATT 1994 and Article 8.2 of the Safeguards Agreement which are not mere "defences". The analysis and determination by the Appellate Body in *EC – Tariff Preferences* case was not *because* the Enabling Clause is a "defence", but rather *despite* the Enabling Clause is a "defence".[32] In addition, the analytical approach applied by the Appellate Body in *EC – Tariff Preferences* case is a general approach that would apply in all disputes where issues concerning Article 6.2 of the DSU are raised, and does not only apply to disputes concerning Enabling Clause.[33]

25. The non-applicability of the WTO safeguard provisions on China's measures at issue is an extricable link to plainly connect China's measures with a claim of violation of Article I and II of the GATT 1994, absent of which a proper claim to the satisfaction of the requirements of Article 6.2 of the DSU cannot be made before the Panel. Therefore, the non-applicability of the WTO safeguard provisions is an integral part of the legal basis of the claim, not itself an argument.[34]

26. In the analysis of China's preliminary ruling request, the threshold issue of whether the Panel Request meets the requirements of Article 6.2 of the DSU and the substantive issue of whether a properly filed claim can be substantiated should not be confused. Panel should not first analyze and determine on the substantive issue that whether the WTO safeguard disciplines indeed apply to China's measures at issue, even though such an issue is not included in the U.S. Panel Request at all, either as a claim or as part of the "legal basis" of a claim, and then based on such substantive determination, turns back to its analysis and determination on the

[26] China's First Written Submission, paras. 49 and 50,
[27] China's First Written Submission, paras. 51 and 52,
[28] China's First Written Submission, paras. 53 and 54,
[29] China's First Written Submission, paras. 56 and 57, quoting Appellate Body Report, *Brazil – Taxation*, para 5.366.
[30] China's oral statement in the Panel's first substantive meeting with the parties, para 32,
[31] China's oral statement in the Panel's first substantive meeting with the parties, para 34,
[32] China's response to Panel's question 5, paras. 7-10.
[33] China's response to Panel's question 5, paras. 11-14.
[34] China's Second Written Submission, para. 53,

threshold issue that whether the U.S. Panel Request meets the requirement of Article 6.2 of the DSU. Such an approach would be to examine the sufficiency of a Panel Request, not on the basis of the Panel Request itself, but on the basis of the assumption the Panel Request is sufficient in the first place. This plainly conflates the proper order of analysis.[35]

IV. Order of Analysis

27. The Panel should first examine China's measures at issue in relation to Article 8.2 of the Safeguards Agreement, and only when the Panel was to find that this provision does not apply to the measures at issue, the Panel would turn to and would need to turn to examine the claims of the United States under Articles I and II of the GATT 1994. This order of analysis is based on the correct understanding of the legal relationship between the WTO safeguards disciplines and Articles I and II of the GATT 1994. A measure taken pursuant to and consistent with Article 8.2 of the Safeguards Agreement "suspend the application of" other obligations under GATT 1994, and would not constitute a violation of these other obligations, including Articles I and II of GATT 1994. Alternative order of analysis is not a correct reflection of the legal relationship between the relevant provisions.[36]

V. Article 8.2 of the Safeguards Agreement Applies to China's Measures at Issue

28. China believes the relevant analytical approach taken and principles established by the Appellate Body concerning the applicability of safeguard disciplines in *Indonesia – Iron or Steel Products* case would provide useful guidance in determining whether a measure falls within Article 8.2. The Panel would need to first identify the "constituent features" of a measure under Article 8.2 of the Safeguards Agreement, and then analyze, based on the facts before it, whether "constituent features" of Article 8.2 measure are present for the measures at issue.[37]

29. In *Indonesia – Iron or Steel Products* case, the Appellate Body relied on the plain meaning of the relevant provision to identify two "constituent features" of a safeguard measure. The Appellate Body first identified a feature of the measure concerning the type of "action" contemplated in the provision, and then identified another feature of the measure concerning the purpose or objective of the "action", and reasoned that the "action" must have "demonstrable link" to that specific "objective". The Appellate Body distinguished factors included in the provision into those pertaining to the "legal characterization" of a measure for purposes of determining *the applicability* of the WTO safeguard disciplines, and those that are the "substantive conditions" and "procedural requirements" that determine the *WTO-consistency* of a safeguard measure, and cautioned they should not be conflated.[38]

30. Applying the analytical approach by the Appellate Body, based on plain reading of Article 8.2 of the Safeguards Agreement, suspension of the concessions or other obligations under GATT 1994 is apparently the "action" contemplated. Reading together Article 8.2 with Article 8.1, which provides for trade compensation for the purpose "to maintain" a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between the Member taking the safeguard measure and the affected exporting Members, the "objective" of the "action" provided in Article 8.2 is, for the affected exporting Members, "to maintain a substantially equivalent level of concessions and other obligations", "to the trade of the Member applying the safeguard measure". For a measure to be subject to Article 8.2 disciplines, there must be a demonstrable link between the "action" of suspension of concessions or other obligations and such an objective. These are the legal characteristics or "constituent features" of an Article 8.2 measure for the determination of *the applicability* of the WTO safeguard disciplines on a measure.[39]

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[35] China's response to Panel's question 1.

[36] China's response to Panel's question 18, and China's Second Written Submission, paras. 62-66,

[37] China's response to Panel's question 24, para. 48,

[38] China's response to Panel's question 24, paras. 49 and 50, quoting Appellate Body Report, *Indonesia – Iron or Steel Products*, para 5.57.

[39] China's response to Panel's question 24, paras. 51-53, and China's Second Written Submission, paras. 104 and 105.

31. Other elements in Article 8.2, including "no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12", "not later than 90 days after the measure is applied", "upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods", and "the suspension of which the Council for Trade in Goods does not disapprove", are "substantive conditions" or "procedural requirements" not relating to the applicability of Article 8.2. In addition, whether the suspension under Article 8.2 is indeed "substantially equivalent" to those by the safeguard measure is a "substantive condition" relating to the WTO-consistency, not part of legal characterization of the measure.[40]

32. The use of the phrases "to propose" or "proposing to" in Article XIX of the GATT 1994 and Articles 8 and 12 of the Agreement on Safeguards is not relevant for the purposes of determining the applicability of the provisions. From the structure of these provisions, it is clear that the phrases should be read in light of the temporal requirement in the provisions, and reflect the procedural requirements in the provisions that a safeguard measure, or action pursuant to Article XIX:1, could not be actually taken by a Member before a notice is given and a consultation opportunity is afforded. A safeguard measure taken by a Member without observing such procedural requirement would be in violation of this procedural obligations, but would not make the safeguard disciplines not applicable to the measure.

33. It is true that measure under Article 8.2 cannot be used to counteract or rebalance any type of measure taken by another Member, but only safeguard measure. However, whether a measure is a safeguard measure is not determined by self-label by a Member, and the temporal condition in Article 8.2 requires Members to take rebalancing measures "not later than 90 days after" a safeguard measure is applied, making clear the affected Members would not be provided with certainty whether the underlying measure is objectively a safeguard measure when the rebalancing measures are taken as authorized under Article 8.2. Therefore, the Panel can determine whether a measure falls under Article 8.2 of the Agreement on Safeguards by objectively assess if the measure is "designed" to rebalance concessions and obligations with suspensions of concessions and other obligations by a safeguard measure, without determining whether an underlying safeguard measure indeed objectively exists. Whether the underlying measure is indeed objectively a safeguard measure should be part of the panel's examination of the consistency with Article 8.2 of the measure at issue.[41]

34. The object and purpose of the Safeguards Agreement does not support leaving the affected Members' right to take rebalancing measures in the control of Members applying safeguard measures. Rebalancing right of Members affected by a safeguard measure under Article 8.2 is an important part of the overall rights and obligations in the multilateral safeguard disciplines. For the rebalancing right under Article 8.2 of the Safeguards Agreement to have its intended function, it is important to notice that Article 8.2 leaves such right in the hands of the Members affected, not in the hands of the Member imposing the safeguard measure. If a Member's right to take rebalancing measures is subject to another Member's action to label or notify its measures as safeguard measures, the right of Members under Article 8.2 could easily be deprived, contrary to the object and purpose of the Safeguards Agreement.[42]

35. The proposition of the United States that in order to characterize a measure as rebalancing measure, all of the requirements for the imposition of the rebalancing measure in Article 8 of the Safeguards Agreement need to be satisfied conflated the features of measures relating to the *applicability* of the Safeguards Agreement with conditions and requirements relating to the *consistency* with the Safeguards Agreement.[43]

36. The non-applicability of Article 8.2 of the Safeguards Agreement is an inextricable link of China's measures to the claim of the United State for violation of Article I and II of the GATT 1994. The United States needs to first discharge its burden to substantiate it and failed to do so. The United States merely compared China's measures with the concessions and

[40] China's response to Panel's question 24, paras. 54 and 55.

[41] China's response to Panel's question 24, paras. 56-60, and China's Second Written Submission, paras. 107 and 108.

[42] China's Second Written Submission, paras. 109-113.

[43] China's Second Written Submission, para. 87, quoting Appellate Body Report, *Indonesia – Iron or Steel Products*, para 5.62.

obligations under Article I and II of the GATT 1994, without regard to the safeguard disciplines, which does not serve to establish a *prima facie* case of the U.S. claim of *violation* of Article I and II of the GATT 1994.[44]

37. China agrees that there must be an underlying safeguard measure as provided for in Article XIX of the GATT 1994 for the affected Member to have the right to take rebalancing measures under Article 8.2. However, whether a Member has the "right" to implement a rebalancing measure is an issue relating to the consistency with Article 8.2, not the applicability of the provision. This is consistent with the findings of the Appellate Body that the factors relating to the "right" of a Member to apply a safeguard measure are the substantive conditions and procedural requirements, failing which the safeguard measures applied are *inconsistent* with the safeguard provisions, but the lack of "right" does not make the WTO safeguard disciplines *inapplicable* to the measure.[45]

38. China's measures at issue imposed additional import duties in excess of China's bound duty rates for certain products in its Schedules of Concessions and therefore suspended the relevant concessions. In addition, the suspension of the concessions by China's measures only applies to the imports from the United States, and suspended the MFN obligations in relation to the United States concerning the products covered by China's measures. This "action" taken by China through the measures at issue thus suspended China's concessions and other obligations under Article I and II of the GATT 1994 and satisfies the first of the "constituent features" of measure under Article 8.2 of the Safeguards Agreement.[46]

39. The official documents and calculation of the amount of suspension as well as the consultation request and notification within WTO relating to China's measures at issue all point to the fact that the suspension of concessions and obligations are clearly designed for a single and specific purpose, rebalancing the substantially equivalent level of concessions and obligations to the trade of the United States for its application of a safeguard measure. There is clearly a "demonstrable link" between the "action" of suspension and such an objective.[47]

40. Therefore, China's measures at issue present both "constituent features" of a measure under Article 8.2 of the Safeguards Agreement and the provision applies.

VI. The Measures of the United States Constitute Safeguards Measures Provided for in Article XIX of the GATT 1994

41. As the Appellate Body affirmed in *Indonesia – Iron or Steel Products*, the nature of a measure is an objective question to be evaluated by the Panel. The Appellate Body emphasized that "the description of a measure proffered by a party and 'the label given to [it] under municipal law' are 'not dispositive' of the proper legal characterization of that measure under the covered agreements."[48] The Appellate Body identified two "constituent features" that must be present in order for a panel to properly determine that a measure constitutes a safeguard measure. First, the measure must be an action that " suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession." Second, the measure 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.[49]

42. The Appellate Body elaborated that a panel should evaluate and give due consideration to all relevant factors, and a panel must identify all the aspects of the measure that may have a

[44] China's Second Written Submission, paras. 72-81,

[45] China's Second Written Submission, paras. 90-95, quoting Appellate Body Report, *US – Line Pipe*, para. 84.

[46] China's Second Written Submission, para. 116.

[47] China's Second Written Submission, paras. 117 and 118.

[48] China's First Written Submission, paras. 93 and 94, quoting Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.

[49] China's First Written Submission, paras. 95-97, quoting Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.55 and 5.60.

bearing on its legal characterization, recognize which of those aspects are the most central to that measure.[50]

43. Thus, in the current dispute, the panel is required to assess objectively whether the U.S. Section 232 measures constitute safeguard measures. The panel should first determine whether the Section 232 measures "suspend a GATT obligation, in whole or in part, or withdraw or modify a GATT concession", and second, whether the measures are "designed to prevent or remedy serious injury" to the U.S. steel and aluminum industries.

44. The Section 232 measures impose duties on steel and aluminum imports that exceed the applicable bound rates set forth in the HTSUS in violation of Article II of the GATT 1994, and present the first of the two requisite "constituent features" of a safeguard measure identified by the Appellate Body in *Indonesia – Iron or Steel Products*. The additional import duties of 25 percent on steel imports and 10 percent on aluminum imports are covered by Article II:1(b) because they constitute "ordinary customs duties", and effective "on … importation." Alternatively, if the Section 232 measures are not "ordinary customs duties", since they are not measures covered by Article II:2, they must be "other duties or charges … imposed on or in connection with importation" imposed inconsistently with paragraph 1(b) of Article II because no such "other duty or charge" was recorded in the HTSUS consistently with the Understanding on Interpretation of Article II:1(b) of the GATT 1994.[51]

45. There is ample evidence demonstrating that the withdrawal or modifications of GATT concessions under the Section 232 measures are "designed to prevent or remedy serious injury" to the U.S. steel and aluminum industries, and the measures present the second "constituent feature" identified by the Appellate Body in *Indonesia – Iron or Steel Products*.

46. The second sentence of Section 232 focuses on factors relating to the "impact of foreign competition on the economic welfare of domestic industries", which contemplates a broad inquiry into the effects of increased imports on the state of a domestic industry. The inquiry into whether "domestic industries" are suffering from "serious effects" due to "excessive imports" contemplated by Section 232, second sentence, mirrors the inquiry under Articles 2 and 4 of the Safeguard Agreement into whether a "domestic industry" is suffering from "serious injury" due to "increased quantities" of imports. The contents of the Section 232 Reports, which underlie the Section 232 measures, affirm that it is the factors in the second sentence of Section 232 that drive the analysis and conclusions of both Reports.[52]

47. The overall conclusion of the Steel Report and Aluminum Report further confirms that the prevention or remediation of serious injury to the domestic steel and aluminum industry is a central and independent aspect of the Section 232 measures. This overall conclusion of the reports is based on several subsidiary findings, and the analysis underlying these subsidiary findings coincides with the "relevant factors" identified in Article 4.2(a) of the Safeguard Agreement. There is a "demonstrable link" between the recommendations provided in the Steel Report and Aluminum Report and the objective of preventing or remedying injury to the domestic steel and aluminum industry.[53]

48. The proclamations issued based on the determinations of the Section 232 Reports confirm that the Section 232 measures are properly characterized as safeguard measures designed to address the effects of increased imports on domestic industries. In addition, a memorandum prepared by the U.S. Department of Defense demonstrates a central objective of the Section 232 Measures is to protect and remedy the condition of the domestic U.S. industries for their own sake, and not merely insofar as these industries are necessary to meet national defence requirements. And public statements made by U.S. government official indicate a demonstrable link between the Section 232 measures and the objective of protecting domestic industries.[54]

[50] China's First Written Submission, paras. 93 and 94, quoting Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 98-100.
[51] China's First Written Submission, paras. 103-110.
[52] China's First Written Submission, paras. 112-115.
[53] China's First Written Submission, paras. 116-133.
[54] China's First Written Submission, paras. 134-148.

49. All the evidences establish that the Section 232 measures "suspend a GATT obligation, in whole or in part, or withdraw or modify a GATT concession" and have a demonstrable link to the objective of remedying serious injury to domestic industries caused by increased imports. The U.S. Section 232 measures are therefore safeguard measures.

50. In *Indonesia – Iron or Steel Products*, no element or feature other than the two "constituent features" has been identified by the Appellate Body as also relating to legal characterization of a safeguard measure. This suggests the two "constituent features" identified are not only necessary, but also sufficient. If a measure designed for the specific and narrowly construed purpose of preventing or remedying the injury suffered by the domestic industry caused by increased imports could be regarded as not a safeguard measure in some way, it would make it easy for Members to evade the application of the substantive conditions and procedural requirements under the WTO safeguard disciplines, which would run contrary to the object and purpose of the Safeguards Agreement "to re-establish multilateral control over safeguards and eliminate measures that escape such control" as sets out in its preamble.[55]

51. The United States argued that its measures are not safeguard measures because it did not invoke the safeguard provisions in applying its measures, and it did not notify the measures to the WTO as such. However, Label under municipal law for a measure is not dispositive of the proper legal characterization of a measure, and the notification requirement under Article 12 of the Safeguard Agreement is an obligation that Members applying safeguard measures have to follow in order to apply the safeguard measures in conformity with the safeguard discipline.[56]

52. Notification is one of the "all relevant factors" that "a panel should evaluate and give due consideration to determine whether a measure at issue present the two "constituent features", not in and of itself dispositive. The notification requirement under Article 12 of the Safeguards Agreement is clearly a procedural requirement for the Member taking a safeguard measure, failing which a safeguard measure won't be consistent with the Member's obligation. When a Member fails to make notification and violates its notification obligation, such failure does not change the contents and substance of the measure itself, either in terms of the action taken or the objective of such action, and does not renders WTO safeguard disciplines non-applicable to the measure.[57]

53. Article 12 of the Safeguards Agreement "clarified and reinforced" the requirements in Article XIX:2 of the GATT 1994 with detailed and specific requirements in relation to the time and contents of notification, as well as in relation to the conducts of consultation, and there are no separate sets of notifications under Article XIX:2 and Article 12. The legal relationship between Article XIX:2 and Article 12 of the Safeguards Agreement does not support the proposition of the United States that they serve distinct and different legal purpose respectively for the *applicability* of the safeguard disciplines and the *consistency* with the safeguard disciplines.[58]

54. In fact, the text of Article XIX:2 itself makes it clear the notification requirement has nothing to do with the existence of a safeguard measure. Article XIX:2 provides that "[b]efore any [Member] shall take action *pursuant to the provisions of paragraph 1* [i.e. Article XIX:1], it shall give notice in writing to the [Members] as far in advance as may be practicable …". Already it is clear from the text that a safeguard measure - the "action" described in Article XIX:1 - exists independently of the obligation to notify in Article XIX:2.[59]

55. Further, the counter-notification provision in Article 12.8 of the Safeguards Agreement further clarifies that even if a Member failed to meet its notification requirement for a safeguard measure, this does not render the measure falling outside of the scope of measures "dealt

[55] China's response to Panel's questions 25 and 28.
[56] China's oral statement in the Panel's first substantive meeting with the parties, paras. 41-43.
[57] China's response to Panel's questions 25 and 34.
[58] China's Second Written Submission, paras. 142-144.
[59] China's oral statement in the Panel's second substantive meeting with the parties, para. 42.

with in this Agreement". Other Members are entitled to treat such measures as safeguard measures and notify the Committee on Safeguards instead.[60]

56. Article 11 of the DSU requires the assessment of facts and applicability of the covered agreement by the Panel to be "objective", therefore going beyond the domestic labelling of the measure by a Member or the title of the relevant municipal law of a Member. The Panel's "independent and objective" assessment of these factors would need to reveal "the design, structure, and expected operation of the measure as a whole", regardless of its domestic labelling.**[61]** The actual purpose of a measure is subject to the objective assessment by the Panel, not determined by self-declaration by a Member. Otherwise, it would leave the applicability of covered agreements to the subjective characterization by a Member, running afoul of the right specifically bestowed on the Panel by Article 11 of the DSU.[62]

57. The phrase "shall be free" in Article XIX of the GATT 1994 sets out a "right" for the Members. However, the right so set out is not unlimited, and does not support the interpretation that when a measure is actually taken, a Member can decide the non-application of the safeguard disciplines by not invoking through notification Article XIX of the GATT 1994. The Appellate Body has found that such "freedom" granted in Article XIX:1(a) is the right within the limitations that has been specifically provided for therein, and is not subject to interpretation that goes beyond its scope. The text of Article XIX:1(a) indicates that "shall be free" grants Members a right to decide on its own or at its discretion, when the relevant conditions are met, whether to impose a safeguard measure or not to impose a safeguard measure. However, when the Member exercised this right and decided to impose the type of action (suspension, withdrawal or modification of concessions or obligations), for the specific objective (to prevent or remedy injury to the domestic industry caused by increased imports), the "freedom" granted to it has already been exercised. Nothing in the legal text suggests that when the measure is already and actually taken, "shall be free" granted the Member a second layer of right to decide at its own discretion whether safeguard disciplines should or should not apply to the measure it indeed imposed, through its choice whether to notify the measure as such.[63]

58. The proposition that "shall be free" stipulates that it rests solely on a Member to decide whether to trigger the applicability of the WTO rules on safeguards to its measure runs in direct contradiction to the object and purpose of the Safeguards Agreement, and also runs in direct contradiction to the provision in Article 11 of the DSU, which provides that the applicability of the relevant covered agreements and provisions is subject to the objective assessment and determination of the Panels, not Members.[64]

59. Article 11.1(c) of the Safeguards Agreement 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". The ordinary meaning of the phrase "pursuant to" in Article 11.1(c) requires that the measure is consistent with the relevant legal basis, and requires that there must be a genuine connection between the measure and the provision of the GATT 1994 other than Article XIX. The words "sought, taken or maintained" modify the word "measures", and do not modify the phrase "pursuant to". Therefore, the genuine connection between the measure and the provision of the GATT 1994 other than Article XIX must be objectively in existence, and could not be conclusively established by the "invocation" of the Members at their own will or choice.[65]

60. Article 11 of DSU provides that a panel is under a duty to examine, as part of its "objective assessment", whether the provisions of the covered agreements are "applicable" to the measures at issue and are "relevant" to the dispute case. Article 11 of the DSU provides as context that Article 11.1(c) of the Safeguards Agreement does not provide the Members the unilateral right to determine that the Safeguards Agreement does not apply to its measures

[60] China's response to Panel's question 34, and China's Second Written Submission, paras. 145 and 146.
[61] China's response to Panel's question 30.
[62] China's response to Panel's question 31.
[63] China's response to Panel's question 60.
[64] China's response to Panel's question 70.
[65] China's response to Panel's question 73, paras. 23-27.

by simply not "invoking" Article XIX, or by simply "invoking" other provisions of the GATT 1994.[66]

61. Article 11.1(a) and Article 11.1(c) could be interpreted coherently. If a measure is objectively a measure provided for or set forth in Article XIX of GATT 1994, that measure could not at the same time be "pursuant to provisions of GATT 1994 other than Article XIX" as in Article 11.1(c), and, by the provisions of Article 11.1(a), the Safeguards Agreement would apply to that measure. On the other hand, if there is objectively a genuine connection between the measure and provisions of GATT 1994 other than Article XIX, the measure is not objectively a measure provided for or set forth in Article XIX of GATT 1994, and the Safeguards Agreement does not apply to that measure. Such examination of the measures should be based on objective criteria, and based on objective legal characteristics of the measures.[67]

62. Article 11.1(c) does not provide that it is for the Member adopting a measure to decide what type of mechanisms for otherwise GATT-inconsistent measures are applicable, as argued by the United States. Such interpretation would run in direct contradiction to the object and purpose of the Safeguards Agreement.

VII. Conclusion

63. For the reasons set forth above, China requests that the Panel to reject the claims of the United States that China's measures at issue are inconsistent with China's obligations under Article I:1, II:1(a) and II:1(b) of GATT 1994.

[66] China's response to Panel's question 73, para. 29.
[67] China's response to Panel's question 73, para. 31.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE UNITED STATES' FAILURE TO REFER IN ITS CONSULTATIONS REQUEST OR PANEL REQUEST TO THE SPECIFIC CONTROLLING PROVISIONS, WHICH ARE ARTICLE 8 OF THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:3(A) OF THE GATT 1994

1. The US fails to refer to the provisions that control the question of permissible rebalancing in response to a safeguard measures: Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards. It believes that, in doing so, it can convince the Panel to close its eyes to the fact that the US measure is a safeguard, and push the Panel into treating the controlling provisions as so-called "affirmative defences".

2. The US errs when arguing that Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards are so-called "affirmative defences", assimilated for example to Article XX of the GATT 1994.

3. Article XIX:3(a) (which refers to rebalancing), just like XIX:1(a) (which refers to the right to impose a safeguard), provide that, if the requirements are met, Members "shall be free" to suspend the relevant obligations. This is not a question of "justifying" a "violation". In other words, these provisions are not affirmative defences, but enable the taking of an action (i.e. suspend the obligation).

4. In that sense, both of these provisions are similar to Article XXVIII of the GATT 1994 (modification of schedules) which provides that a party which proposes to modify or withdraw a concession "shall be free to do so". Modifying a concession alters the content of that Member's obligations. It does not violate those obligations, such that justification would be called for. The legal position is also similar with respect to anti-dumping or countervailing measures taken under Article VI of the GATT. Article VI does not "justify" a violation of Articles I and II; rather, it provides for the possibility to take an action which does not constitute a violation. The US also errs when arguing that the Agreement on Safeguards as a whole be characterised as a mere "affirmative defence". This is incorrect, because that Agreement is full of provisions which are simply in the nature of obligations.

5. Cases such as *US – 1916 Act*, *Australia – Apples*, *EC – Seal Products* and *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* show that the present Additional Duties cases are not an isolated instance, but rather a type of situation that has occurred in the past. In those cases, the WTO adjudicating bodies did not shy away from fulfilling their duties and deciding on the applicability of the covered agreements. Logically, such an analysis took place upfront, before the substance of the different claims was reached.

6. The European Union considers that past cases concerning the relationship between the Anti-Dumping Agreement and the GATT 1994 provide useful guidance to understand the relationship between the Agreement on Safeguards and certain provisions of the GATT 1994. In particular, the European Union considers that those cases provide support to its legal position that the Agreement on Safeguards is not in the nature of an affirmative defence to an alleged violation of Articles I or II of the GATT 1994.

II. BURDEN OF PROOF

7. Because Article 8.2 is not an affirmative defence, it is not for the respondent to raise or to make a case under it. Rather, Article 8.2 is the controlling provision, and the US should have raised it, if it was to have any hope of succeeding in its claims. It failed to do so.

8. Thus, the European Union agrees that it is the complainant that has the burden of making a *prima facie* case of inconsistency with Article 8 of the Agreement on Safeguards. The European Union

recalls that the Agreement on Safeguards is not in the nature of an affirmative defence and the initial onus rests on the complainant, which has to make its case.

III. ORDER OF ANALYSIS

9. The European Union agrees with the US that the Panel can properly assess the more specific claim before assessing the more general claim. Article II:1(b) is, indeed, more specific, as it proscribes a specific type of less favourable treatment (duties in excess of bound rates) which will also constitute less favourable treatment under Article II:1(a) (the latter being a consequential claim).

10. The European Union considers that the same approach of addressing the more specific provision before the more general provision should guide the Panel's order of analysis between Articles 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, on the one hand, and Articles I and II of the GATT 1994, on the other hand.

11. First, Article 8.2 of the Agreement on Safeguards is the more specific provision.

12. Second, beginning the analysis with Article 8.2 offers possibilities to exercise judicial economy. If the Panel were to find that Article 8.2 applies to the measures at issue, it would be impossible for the US to succeed in its claims under Article I and II of the GATT 1994, because the US would have failed to even make a claim under the controlling provisions. Beginning with Articles I and II of the GATT 1994 offers no such possibilities, in any circumstances. This is because a measure that is consistent with Article 8.2 (including a measure that is presumed to be consistent with that provision because no claim to the contrary has been made, as in this case) cannot be inconsistent with Articles I and II of the GATT 1994.

13. Third, the applicability of a covered agreement is a threshold issue which should, as a general matter, be assessed first. This question of applicability is always an objective question that is never entirely in the hands of either litigant acting unilaterally.

IV. THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX OF THE GATT 1994 ARE APPLICABLE TO THE MEASURES ADOPTED BY THE UNITED STATES

14. The EU recalls that, according to settled case-law, and as recently confirmed by the Appellate Body in the specific context of the Agreement on Safeguards, whether or not a measure is subject to the disciplines of the Agreement on Safeguards is an objective question. Contrary to what the US asserts, it is not a question to be decided unilaterally by the Member imposing the safeguard measure.

15. A reason why the characterisation of a measure as a safeguard must be an objective question is that Article XIX and the rules of the Agreement on Safeguards include important and fundamental rights of other WTO Members, notably the right to suspend equivalent GATT obligations such as are at issue in this dispute.

16. In making that objective assessment of whether a measure is a safeguard, the Panel must engage in a case-specific assessment, having regard to all of the relevant facts. In this respect, and again contrary to what the US asserts, the domestic procedures pursuant to which a measure has been adopted are not determinative, and neither are the WTO procedures that have been followed, or not followed, by the adopting Member.

17. The fulfilment of the requirements in Article 12 is a question of consistency, and not a question that decides the applicability of the Agreement on Safeguards. If a Member decides to take a measure that is objectively a safeguard without notifying it, the conclusion is not that Article XIX of the GATT 1994 and the Agreement on Safeguards do not apply. The conclusion is that the measure is WTO-inconsistent.

18. Furthermore, the Appellate Body has previously held that the characterisation of a measure under a Member's municipal law is not dispositive of the question of whether or not that measure is governed by the provisions of a particular agreement.

19. In the context of Article 1 of the Agreement on Safeguards, in order to be a safeguard measure, a measure must have two constituent features. First, it must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, 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 relevant products. The constituent features of a safeguard measure are distinct from and not to be conflated with the conditions that must be met in order for the right to adopt, apply and maintain a safeguard measure to be exercised.

20. If the measures have "a specific objective" of preventing or remedying serious injury to the Member's domestic industry they are subject to the disciplines of the Agreement on Safeguards. If so, even if the measure had some other "aspects" that suggest that it also has another objective, this would not detract from the conclusion that the measure is a safeguard. In such circumstances, whatever other provisions of another agreement that might be applicable would not exempt the measure from complying fully with the conditions set out in the Agreement on Safeguards. In the EU's view, the test to be performed when deciding whether the Agreement on Safeguards applies to a measure is not a "centre of gravity" test.

21. In conducting its assessment the Panel must have regard to the measure "as a whole". The only reasonable outcome of such an objective assessment is to conclude that the US measures are safeguards.

22. The US measures suspend at least one GATT obligation, in whole or in part, or withdraw or modify at least one GATT concession. Indeed, prior to the Section 232 measures the US customs duties on the steel and aluminium products at issue were bound, as well as applied at the level of 0%. However, the US measures provide for a customs duty rate of 25% ad valorem for the relevant steel products and 10% ad valorem for the relevant aluminium products.

23. The US measures have a specific objective of preventing or remedying serious injury to the US domestic steel and aluminium industries caused or threatened by increased imports of the relevant products. Furthermore, this is one of the "most central" aspects of the measures. Finally, this is also a defining characteristic of a safeguard measure. Thus, with the two defining characteristics being cumulatively present, the US measures clearly fall within the scope of the Agreement on Safeguards. This conclusion is clearly supported by an analysis of the "design, structure, and expected operation" of the steel and aluminium measures, as well as by several additional features of those measures. Moreover, those measures were not taken pursuant to any provisions of the GATT 1994 other than Article XIX.

24. The European Union considers that whether the US' Section 232 duties constitute a safeguard measure is the matter before the Panel in *US – Steel and Aluminium Products*, as the measure at issue. The measures at issue in the present proceedings are the measures in the form of additional duties taken by the respondent. It would be permissible, but not necessary, for this Panel to find as a preliminary matter that the US measures are safeguards.

V. WITH REGARD TO THE RE-BALANCING MEASURES AT ISSUE

25. In order to determine whether or not a measure falls within Article 8.2, a panel must make an objective assessment of all the facts and evidence. Just as there are certain objective, constituent features of safeguard measures, there are also certain objective elements which determine whether a measure falls within Article 8.2.

26. In the European Union's view, there are two such elements. The first is the suspension of the application of concessions or other obligations under the GATT 1994; the second is the absence of a unilateral measure by the safeguard-imposing Member, or of an agreement on adequate means of trade compensation, designed to and capable of maintaining a substantially equivalent level of concessions.

27. The European Union notes that it is the very purpose of Article 8.2 to enable affected exporting Members to rebalance (i.e. maintain substantial equivalence) without waiting for a multilateral determination that the underlying measure is a safeguard. Article 8.2 foresees that suspension must take place within strict deadlines shortly after the application of the underlying safeguard measure.

Moreover, under certain circumstances (as outlined in Article 8.3) the right of suspension can even be *exercised* immediately. If those Members, faced with a safeguard measure that is mislabelled by the adopting Member in a self-serving manner, had to wait for a multilateral finding that the measure is indeed a safeguard, they would be effectively deprived of their rights under Articles 8.2 and 8.3.

28. Neither the decision-making rules of the CTG or the GC, nor the requirements of Article 8.2 concerning the absence of disapproval by the CTG, have any bearing whatsoever on the question of whether or not Article 8.2 applies, i.e. whether the measure can properly be considered a rebalancing measure. However it is to be interpreted, the requirement of the absence of a disapproval is no more than an obligation for the rebalancing Member.

29. The existence of "doubt" about whether the underlying measure is a safeguard cannot prevent Members from exercising their rights under Article 8.2. To require absolute certainty would mean in effect that, whenever the adopting Member chooses not to characterise the measure as a safeguard, rebalancing would be impossible. Moreover, as we have learned in *Indonesia – Iron or Steel Products*, a measure may not be a safeguard even where both Members agree that it is a safeguard. Thus, there can be "doubt" even in the face of agreement among the Members involved.

30. Both for the underlying safeguard measure and for the rebalancing measure, the assessment has to be objective, i.e. based on the objective characteristics of the measures as opposed to their unilateral characterisation by the adopting Member. An objective assessment also means that the legal characterisation of a measure cannot depend on the purely subjective intent of the adopting Member.

31. To suspend a concession with respect to another Member or Members means to suspend a promise, or commitment, to act or refrain from acting in a certain way towards that Member or Members. To take the example of duties, to suspend a concession in a Member's Schedule means to suspend the "promise" (towards one or more other Members) not to exceed the bound duty rate.

32. Whether the same Member actually exceeds the duty rate in question is a separate issue. It is possible, for example, that the Member suspends a concession but does not actually increase the relevant duty (or not yet). In this scenario, there would be a suspension, but there would not be any violation of Article II:1(b), because the bound duty would not have been exceeded.

33. There is, however, one very important caveat, and a further distinction between suspensions and violations. A valid suspension, i.e. a suspension taken in compliance with the applicable provisions of the covered agreements, such as a WTO-consistent modification of a schedule under Article XXVIII of the GATT 1994, a WTO-consistent safeguard measure, or a WTO-consistent rebalancing measure, does not amount to or create any violation of the covered agreement, not even a prima facie violation which would then presumably need to be justified.

VI. MEASURES THAT ARE CONSISTENT WITH THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX OF THE GATT 1994 ARE NOT INCONSISTENT WITH ARTICLES I:1, II:1(A) AND (B) OF THE GATT 1994

34. The treaty terms "to suspend the obligation in whole or in part or to withdraw or modify the concession" in Article XIX:1(a) of the GATT 1994 do not mean that the original obligation remains unchanged, but is "violated", with such "violation" being "justified" by Article XIX:1(a). Rather, as the treaty expressly provides, they mean that the original obligation is suspended or altered. Suspending an obligation is not the same thing as violating an obligation (which could then possibly be justified).

35. The relationship between Article XIX of the GATT 1994 and Articles I and II of the GATT 1994 is analogous to the relationship between, for example: (i) Articles I, II and VI of the GATT 1994; and (ii) Article IV of the GATT 1994 and other provisions of that treaty.

36. If the Panel finds (as it should) that Article 8.2 applies, it can no longer make any findings of WTO-inconsistency, either under the specific requirements of Article 8.2 of the Agreement on Safeguards (since the US has not made any claim under that provision), or under Articles I and II of the GATT 1994 (since a measure that is consistent, or even presumed consistent, with the

controlling provision of Article 8.2 of the Agreement on Safeguards cannot be inconsistent with Articles I and II of the GATT 1994).

VII. PROPOSAL ON INTER-PANEL COORDINATION

37. The European Union considers that there is nothing in the DSU that would prevent a form of collaboration among the panels in the *Steel and Aluminium* disputes and those in the *Additional Duties* disputes. This concerns, in particular, certain exchanges of views and harmonization of timetables.

38. Importantly, there is no contagious risk to future disputes, given the particular and indeed unique factual and legal setting of these cases, which are two sides of the same coin.

39. Article 13 of the DSU, among others, may provide a legal basis for such a collaboration, as it provides that "panels may seek information from any relevant source". Such a cooperation would be in line with the objectives of the dispute settlement system to ensure security and predictability of the multilateral trading system (Article 3.2 of the DSU), and to secure a positive solution to the disputes (Article 3.7 of the DSU).

40. Indeed, the fact that panels can, and should, exchange views when deciding an identical or closely related matter, is also supported by Rule 4(3) of the Working Procedures for Appellate Review. Under that provision, members of an Appellate Body division shall exchange views with the other Members before finalizing their report. Under Rule 4(5), this does not interfere with the division's full authority and freedom to hear and decide the appeal.

41. If such an exchange of views is consistent with the DSU, then there would be no reason to hold otherwise for an exchange of views between two panels dealing with the same or closely related matter. This is especially so in the unique circumstances of this case, where panels are addressing the same alleged safeguard measures, either as a measure at issue (*US – Steel and Aluminium Products*) or as the underlying measure which is rebalanced by the measure at issue (the *Additional Duties* disputes).

42. In the same vein, the fact that the Chairman of the four panels in the Additional Duties disputes is the same person speaks to the same reasoning, perfectly justified in the particular circumstances of these disputes. While Article 9.3 of the DSU is about co-complainants, the EU considers that a similar approach is warranted in similar scenarios, and in specific circumstances such the present one.

43. Such cooperation between panels, in the form of a preliminary exchange of views, is aimed at ensuring that each of the panels makes an objective assessment of the matter before it, of the facts of the cases, including of the applicability of and conformity with the covered agreements, as required by Article 11 of the DSU.

44. This is particularly important in the context in which the US is blocking the appointment of new Appellate Body members, and thus of the high possibility that when all these cases will be decided there will be no appeal adjudicator to ensure coherence. Thus, it is even more important, in order to ensure security and predictability to the multilateral trading system (Article 3.2 of the DSU), that panels talk to each other in order to avoid divergent results and fragmentation.

45. The confidentiality obligation in Article 14 of the DSU does not prevent the form of collaboration that the European Union has suggested. While panel deliberations are confidential, the European Union sees this cooperative process, for example, in the form of a meeting or meetings between all panellists in the Steel and Aluminium disputes and in the Additional Duties disputes. Such exchanges of views or concertation would be preliminary, and external to the panel deliberations. Thus, they would not breach the duty of confidentiality in Article 14.1 of the DSU.

46. The European Union considers that it is logical that the Steel and Aluminium panels, which were first invested with the US safeguard measures as the measures at issue before them, should decide first on that matter and only then the Additional Duties panels should decide on the rebalancing measures.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan welcomes this opportunity to present its views as a third party in this dispute. Japan has a systemic interest in ensuring the proper and consistent interpretation of the WTO Agreements, including Article XIX of the General Agreement on Tariffs and Trade ("GATT") 1994, as well as the Agreement on Safeguards.

II. SCOPE OF ARTICLE XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

2. Japan views that, pursuant to the express language of Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), a panel must conduct an independent and objective assessment of whether a WTO agreement applies to a measure at issue, regardless of the alleged characterization of the measure by the Member imposing it. The Appellate Body recently confirmed this interpretation of Article 11, stating that "a panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute".[1] As such, a Member imposing a measure does not alone determine whether the Agreement on Safeguards applies to that measure; instead, this is a legal question that a panel must answer based on its objective assessment.

3. Given that there is no clear textual definition of a "safeguard measure" in the text of the relevant WTO Agreements, it would not be appropriate for panels or the Appellate Body to draft a blanket definition of safeguard measures within the meaning of the Agreement on Safeguards. This conclusion is consistent with the Appellate Body's findings in *Indonesia – Iron or Steel Products* that "whether a particular measure constitutes a safeguard measure for purposes of WTO law can be determined only on a case-by-case basis".[2] Thus, the role of the panel in this dispute is to make a case-specific, objective assessment of whether the particular measures at issue is subject to the disciplines of the Agreement on Safeguards. This assessment should be conducted through*, inter alia*, an interpretation of "safeguard measures" based on the ordinary meaning of the term in its context, and in light of the object and purpose of the relevant agreements[3] (*i.e.*, the Agreement on Safeguards, the GATT 1994 and the other WTO Agreements).

4. Regarding the factors that are "relevant" for a panel's consideration of whether a measure is a safeguard measure, Article 1 of the Agreement on Safeguards, which refers to GATT Article XIX, anticipates certain types of actions (*i.e.*, suspension, withdrawal, or modification of the obligation or concession) implemented for a certain purpose (*i.e.*, to prevent or remedy serious injury to domestic producers). Thus, the key features of a safeguard measure include (1) an action "to suspend the obligation … or to withdraw or modify the concession", and (2) a purpose "to prevent or remedy serious injury to domestic producers". Japan's suggested approach is consistent with the Appellate Body's findings in *Indonesia – Iron or Steel Products*, which listed two factors – one action and one purpose – that are necessary to find a safeguard measure.[4]

5. On the other hand, Japan disagrees with the views of some Members that this statement contains the sole "definition" of a safeguard measure or represents "settled case law" on the applicability of the Agreement on Safeguards.

6. First, the Appellate Body in *Indonesia – Iron or Steel Products* categorized the action and purpose factors as *necessary*, but not *sufficient*, to find a given measure to constitute a safeguard

[1] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.33. (emphasis added)
[2] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57.
[3] Article 31 of the Vienna Convention on the Law of Treaties.
[4] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

measure. 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.

7. Second, treating the action and purpose features raised by the Appellate Body as a comprehensive definition of the applicability of the Agreement on Safeguards could lead to unreasonable outcomes. For example, an anti-dumping measure is usually imposed to protect the domestic industry in the form of duties in excess of a Member's tariff concessions. Treating these two factors as the comprehensive definition of a safeguard measure could therefore result in treating all anti-dumping duties as "safeguards".

8. In Japan's view, significant evidentiary value must also be ascribed to some important factors, such as the status of fulfillment of the notification requirements under Article 12 of the Agreement on Safeguards. The Appellate Body also refers to "relevant notifications to the WTO Committee on Safeguards" as part of "all relevant factors", to which due consideration should be given when determining the applicability of the Agreement on Safeguards.[5]

9. The object and purpose of the Agreement on Safeguards are described in its preamble, and include "the need to clarify and reinforce the disciplines of GATT 1994 … to re-establish multilateral control over safeguards and eliminate measures that escape such control".[6] Japan maintains that, to achieve this objective, a panel's assessment of a measure must prevent a Member from "escaping" the "multilateral control" disciplines of the GATT 1994 and the Agreement on Safeguards through the Member's unilateral characterization of the measure in question as something other than a "safeguard measure".

10. In this regard, the Appellate Body in *Indonesia – Iron or Steel Products* stated that, in determining whether a measure constitutes a safeguard measure, "a panel is called upon to assess the design, structure, and expected operation of the measure as a whole", and "must identify all the aspects of the measure that may have a bearing on its legal characterization [and] recognize which of those aspects are the most central to that measure".[7] It continued that "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", adding that "no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards".[8] The Appellate Body in fact agreed with the panel in that dispute that the measure did not become a covered safeguard measure simply because the Member in question followed its domestic procedures on safeguards and notified the measure as such. Clearly, other considerations are as important or more important than a Member's own characterization of the measure.

11. In Japan's view, the Appellate Body's approach, emphasizing "due consideration to all relevant factors", is generally consistent with the object and purpose of the Agreement on Safeguards because it would not allow a measure at issue to "escape" the WTO agreements' "multilateral control". In other words, a panel's comprehensive evaluation of a measure would ensure that the Member imposing it could not avoid the Agreement on Safeguards' disciplines by merely characterizing the measure as something other than a safeguard measure or not invoking the Agreement on Safeguards in dispute settlement.

12. Therefore, the Panel's assessment of whether the Agreement on Safeguards applies in this dispute must examine the design, structure, and expected operation of the measure at issue as a whole and must give due consideration to all relevant factors. From this perspective, considering the various factors raised by the Parties in these disputes, Japan sees no reason to exclude the Section 232 measures at issue from the scope of the Agreement on Safeguards simply because the United States does not characterize the measures as "safeguard measures".

13. Finally, Article XXVIII, entitled "Modification of Schedules", is another GATT 1994 provision that provides important context for the proper approach to and interpretation of Article XIX of the GATT 1994. First, an Article XXVIII modification must be conducted "on the first day of each

[5] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. (emphasis added)
[6] Emphasis added.
[7] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. (emphasis added)
[8] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. (footnote omitted)

three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast)", and at least "by negotiation" with "contracting parties primarily concerned". The measure at issue in this dispute has not satisfied these procedural requirements.

14. Second, in contrast to Article XIX:1, Article XXVIII does not impose any substantive conditions for the modification or withdrawal of concessions, such as serious injury caused by imports to the relevant domestic industry or the necessity of protecting the relevant domestic industry. It is essentially a political process that allows Members to re-negotiate their commitments. Therefore, Article XXVIII addresses a similar *action* as that in Article XIX, but the process is not otherwise characterized by its *purpose*. The process under Article XXVIII therefore provides the broadest possible legitimate manner in which a Member may seek to withdraw or modify a GATT concession. In the context of the Section 232 measures at issue, however, the United States has conducted no prior negotiations under Article XXVIII. In Japan's view, this further confirms that the relevant enquiry will need to be to assess whether the Member has complied with Article XIX of the GATT 1994 and the Agreement on Safeguards, rather than Article XXVIII.

III. PANEL'S TERMS OF REFERENCE

15. The above issue – the scope of the Agreement on Safeguards – must be separated from the panel's terms of reference. A panel's terms of reference must be understood by reference to the panel request pursuant to Article 6.2 of the DSU – "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". It is common for Members to raise certain defenses, such as those under Article XX of the GATT 1994, and these will be examined by panels even though they were not mentioned in the panel request.

16. The recent Appellate Body decision confirmed that "the use of the phrase 'how or why'" by the Appellate Body in some cases "does not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU", and that "the applicable legal standard" is the text of Article 6.2 of the DSU[9], the objective of which is to: (i) delimit the scope of the panel's jurisdiction; and (ii) ensure due process for the respondent and third parties. [10]In addition, "[t]he sufficiency of a panel request under this standard is to be assessed on a case-by-case basis". [11]

[9] Appellate Body Report, *Korea –Pneumatic Valves*, para. 5.7
[10] Ibid, para. 5.8.
[11] Ibid, para. 5.7.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

1. New Zealand's participation in the current dispute reflects its systemic interest in the issues raised, in particular, the role of notifications under the Safeguards Agreement, and the role of the Panel in determining the legal characterisation of measures in issue.

2. A measure does not need to be notified under Article 12 of the Safeguards Agreement in order to constitute a safeguard measure. In *Indonesia – Iron or Steel Products* the Appellate Body distinguished between those factors that determine whether a measure is *in fact* a safeguard measure, and those factors that will determine whether it is a *WTO consistent* safeguard measure.[1] Notification falls into this latter category. It is a procedural requirement directed at maintaining transparency around the safeguard process, and ensuring that affected Members are given opportunity to engage. A failure to notify a safeguard measure will be inconsistent with the obligations set down in Article XIX GATT and Article 12 of the Safeguards Agreement. It is not, however, determinative of the legal characterisation of the measure, or the applicability of the safeguards regime.

3. Whether a measure is correctly to be characterised as a safeguard is a matter to be determined objectively by a Panel. Article 11 of the DSU requires a panel to carry out an objective assessment of the matter before it, including carrying out an assessment of the legal characterisation of the measures in issue.[2] Where a dispute exists between Members, it can be expected that they may have differing views on the legal characterisation of relevant measures under the covered agreements. It is for a panel to objectively determine these matters, in accordance with its obligations under Article 11. While the parties' own views on the proper legal characterisation of a measure may assist a panel in carrying out this exercise, they are not determinative.

4. In concluding – the giving of notice under Article 12 of the Safeguards Agreement is not an essential step that must be taken for a measure to constitute a safeguard. Where a dispute exists between Members, it is for a panel to reach an outcome in accordance with its obligations under Article 11 DSU. This is to be determined objectively, on a case by case basis, and in light of all relevant facts and circumstances.

[1] Appellate Body Report, *Indonesia – Iron or Steel Products*, at para 5.57.
[2] Appellate Body Report, *Indonesia – Iron or Steel Products*, at para 5.33.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. LEGAL STANDARD GOVERNING THE APPLICABILITY OF WTO OBLIGATIONS

1. It is well-established that municipal law classifications are not determinative of legal questions raised in WTO dispute settlement proceedings, in particular how a measure is characterised under WTO law, including which WTO obligations apply to a measure. As the Appellate Body has explained, "the manner in which the municipal law of a WTO Member classifies an item cannot, in itself, be determinative of the interpretation of provisions of the WTO covered agreements".[1] Instead, the characterisation of a measure under WTO law must be based on the measure's "content and substance", and "not merely on its form or nomenclature".[2]

2. It is not uncommon for a respondent to assert, based on domestic law classifications, that a measure is not subject to particular WTO obligations. In that event, as the panel in *Dominican Republic – Safeguard Measures* has explained, "the determination on applicability [of the provisions of the covered agreements to the challenged measures] must be a prior step to the analysis of whether the impugned measures are consistent with the obligations contained in the cited provision[s]".[3]

3. This "prior step" of determining the applicability of the relevant covered agreements is one frequently faced by panels and the Appellate Body.[4] A Member's characterisation of the measure at issue is not determinative of the applicable WTO obligations. Instead, the assessment is based on the content and substance of the measure, clarified according to: the text and structure of the measure; the surrounding regulatory context; the domestic legal framework in which the measure is adopted; and the design and application of the measure.

4. In sum, if a measure is, in "content and substance", a "safeguard measure", a Member cannot exclude the application of the Safeguards Agreement by characterising the measure as something other than a "safeguard measure" under its own domestic law. Otherwise, the Member's own characterisation of the measure would be determinative of the WTO obligations applicable to the measure. In short, a Member would be able to decide for itself which WTO obligations apply to its measures.

5. Instead, a panel must decide whether a covered agreement – here the Safeguards Agreement – applies to a measure using the substantive criteria in WTO law. *First*, a panel must ascertain the legal standard in the agreement governing the applicability of the agreement. *Second*, a panel must assess the facts, in particular the nature and character of the measures at issue, and apply the legal standard to the relevant facts.

II. LEGAL STANDARD GOVERNING THE APPLICABILITY OF THE SAFEGUARDS AGREEMENT

6. Article 1 of the Safeguards Agreement provides that "this Agreement establishes rules for the application of the safeguard measures which shall be understood to mean those provided for in Article XIX of the GATT 1994". Norway, therefore, turns first to Article XIX to establish the scope of application of the Safeguards Agreement. As the Appellate Body observed in *Indonesia – Iron or Steel Products*, Article XIX is not styled as a definitional provision: "Article XIX:1(a) does not expressly define the scope of measures that fall under the WTO safeguard disciplines".[5] Instead,

[1] Appellate Body Reports, *US – Softwood Lumber IV*, para. 65 and *China – Auto Parts*, footnote 244.
[2] Appellate Body Report, *US – Continued Zeroing*, footnote 87.
[3] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.58, referring to Appellate Body Reports, *China – Auto Parts*, para. 139; *Canada – Autos*, para. 151; and *US – Shrimp*, para. 119.
[4] Appellate Body Report, *US – 1916 Act*, para. 130; Appellate Body Report, *Australia – Apples*, para. 173; Appellate Body Reports, *EC – Seal Products*, para. 5.19, citing Appellate Body Report, *EC – Asbestos*, para. 72; Panel Report, *Thailand – Cigarettes (Philippines) (Philippines – Article 21.5)*, paras. 7.673-7.683.
[5] Appellate Body Report, *Indonesia – Iron or Steel Products,* para. 5.57.

Article XIX serves to impose obligations on the adoption of safeguard measures. These obligations are considerably developed in the Safeguards Agreement.

7. Given the nature of Article XIX, the Appellate Body cautioned against conflating the factors that properly define a safeguard measure (and, hence, the applicability of the Safeguards Agreement), with those that govern the WTO-consistency of such measures. A measure may be properly regarded as a safeguard, even though it does not meet the WTO obligations governing safeguard measures. If this were not the case, a measure could, by definition, be subject to WTO safeguard obligations solely if it complied with those obligations and, correspondingly, there could, by definition, never be a WTO-inconsistent safeguard measure. The Appellate Body rightly rejected this approach.

8. Although the provisions of Article XIX are not definitional, the Appellate Body found that they shed light on the character of a safeguard measure. The Appellate Body found that the types of measures "provided for" in Article XIX are those "designed to secure a specific *objective*, namely preventing or remedying serious injury to the Member's domestic industry".[6] To be a safeguard measure, therefore, a challenged measure must have "a demonstrable link to the objective of preventing or remedying injury".[7]

9. Connected to this objective, the Appellate Body also identified two "constituent features" of a "safeguard measure": (1) it must suspend or withdraw a GATT 1994 obligation or tariff concession; and (2) it must be designed to prevent or remedy serious injury to a domestic industry caused or threatened by increased imports.[8]

10. The Appellate Body found that its view that the application of the Safeguards Agreement turns on the "objective" of the measure was "buttressed" by the preamble to the Agreement, which stresses "the importance of structural adjustment", and reiterates "the need to enhance rather than limit competition in international markets".[9]

11. Article 12.1 of the Safeguards Agreement further confirms the Appellate Body's interpretation. This provision identifies certain acts, by an importing Member, that trigger the application of notification obligations in the Safeguards Agreement. These include the following acts: (1) "initiating an investigatory process relating to serious injury or threat thereof" to a domestic industry, "and the reasons for it"; and (2) "making a finding of serious injury of threat thereof caused by increased imports". These notification obligations underscore the critical role in safeguards actions of a finding of serious injury to a domestic industry, caused by imports.

12. The US argues that the Safeguards Agreement applies to a measure only if the importing Member formally invokes Article XIX of the GATT 1994. In setting out its incorrect interpretation of the term "safeguard measure" under Article 1, the US essentially misunderstands the difference between three distinct questions: (i) whether a measure is a WTO safeguard; (ii) whether the importing Member has the right to apply a safeguard measure; and (iii) whether the measures are applied in a manner consistent with the Safeguards Agreement.

13. Driven by its misunderstanding of the fundamental distinction between these three questions, the US refers to inapplicable jurisprudence in support of its arguments. The US notes, for example, the Appellate Body's statement that: "[n]otification under Article XIX … is 'a necessary prerequisite to establishing a right to apply a safeguard measure'".[10] The US relies on the Appellate Body's statement to conclude erroneously that "[w]ithout an invocation of that right [through notification], a measure does not qualify as a safeguard under the WTO Agreement".[11]

14. However, the Appellate Body's statement simply means that a Member must notify a safeguard measure in order for the safeguard measure to be consistent with the Safeguards Agreement. The Appellate Body is not saying that the Member must notify a measure as a safeguard in order *for the Safeguards Agreement* to *apply* to that measure. Rather, as the Appellate Body explained in *Indonesia – Iron or Steel Products*, the applicability of the Agreement must be

[6] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.
[7] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.
[8] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.
[9] Appellate Body Report, *Indonesia – Iron or Steel Products*, footnote 189.
[10] The US' first written submission, para. 77.
[11] The US' first written submission, para. 79.

objectively determined, separately from the question whether a measure is consistent with the substantive and procedural conditions in Article XIX of the GATT 1994 and the Safeguards Agreement.[12]

15. The US thus draws an incorrect distinction between the question of whether the Safeguards Agreement applies, on the one hand, and the question of whether that safeguard measure has been applied consistently with various requirements, on the other hand.

III. ARTICLE XIX OF THE GATT 1994 AND THE SAFEGUARDS AGREEMENT DO NOT OPERATE AS AN "AFFIRMATIVE DEFENSE"

16. The US seems to treat Article XIX as an "affirmative defense", which applies to "justify" a "violation" of the GATT, in two possible respects. First, Article XIX can be invoked by a Member imposing a measure ("importing Member"), to justify a violation of the GATT 1994; and second, Article XIX can be invoked by a Member imposing retaliatory measures in response ("retaliating Member"), i.e., to justify retaliation measures that would otherwise violate the GATT 1994. However, in both instances, the US argues that, for the "affirmative defense" to be available, the importing Member must have formally invoked Article XIX, when imposing its measure in the first place. If it does not do so, then neither the importing Member, nor the retaliating Member, can rely on Article XIX to justify GATT violations.

17. Norway stresses that Article XIX does not operate as an "affirmative defense". It should be recalled that the term "affirmative defense" is typically used to describe provisions like Article XX, i.e., measures which are invoked by a respondent in order to justify a violation of the GATT 1994. Norway points out that Article XIX and the Safeguards Agreement, by contrast, do not operate in this way. Rather, they establish distinct obligations that apply when a Member wishes to take a safeguard measure. Thus, if the importing Member imposes a safeguard consistent with those obligations, there is no violation of the GATT 1994. In this sense, Article XIX and the Safeguards Agreement operate in the same way as Article VI; they contain their own specific set of obligations that, when particular substantive and procedural conditions are met, displace GATT obligations which would otherwise be applicable.

18. The applicability of the Safeguards Agreement does not depend on the importing Member's invocation, as it would, for example, under Article XX. Rather, the applicability of the Safeguards Agreement is subject to objective determination. The question is whether the measure satisfies the "constituent features" of a safeguard measure, as set out in Article 1 of the Safeguards Agreement.

IV. INTER-PANEL COORDINATION

19. The separate offensive and defensive dispute settlement proceedings originating from the US' additional steel and aluminium tariffs are tightly interlinked. They are based on the same measures imposed by the US, and the legal threshold questions to solve the disputes are identical. There is no procedural obligation for the individual Panels to avoid contradiction. However, in line with the role of the Panels in providing security and predictability to the multilateral trading system as mandated in the DSU Article 3.2, general legal reasoning would require coherence between conclusions spurring from identical issues. We presume that the efforts made to provide for the same Panel Members in the offensive disputes and the same Panel Chair in the defensive disputes reflect this need for coherence.

20. To achieve the desired coherence, it appears logical that the panels should take into consideration the sequencing of the different panel deliberations and reports. The offensive panels were established first, and thus, the Panels in the defensive disputes should be conscious about the Panels´ conclusions in the offensive disputes. This implies a certain interaction between the Panels. Norway is of the opinion that there is no need to search for a specific legal basis for such interaction; the question is rather whether the DSU precludes it - which does not appear to be the case. Contrastingly, Article 13 of the DSU does indeed reflect the need for panels, as described above, to obtain relevant information to ensure coherent legal analysis. Generally, interaction between the panels would ensure transparency and due process for the parties.

[12] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57.

21. The confidentiality obligation set out in Article 14 of the DSU limits, but does not preclude consultations between the Panels. This provision requires the panel deliberations to be confidential, but consultations may be conducted in a limited way, i. e. through reporting of preliminary conclusions and the reasoning behind them. This limited interaction would not reasonably qualify as "panel deliberations".

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. Introduction

1. Russia welcomes this opportunity to present its views as a third party in this dispute.

2. Without prejudice to Russia's position that it is up to a complainant to formulate the measures at issue, identify the legal basis of complaint in its panel request and to choose the sequence of its argumentation as it deems more appropriate, Russia submits that in the dispute before this Panel the United States has articulated the improper legal basis for its claims. Thus, the United States attempts to misguide the Panel as to the relevant legal and factual background of the dispute.

3. The United States appears to relegate China's exercise of essential right under Article 8.2 of the Agreement on Safeguards to counter the disruptive effects of the United States' safeguards on their bilateral trade by not raising concerns about the consistency of the resulted measures with Article 8.2 and by merely asserting that China's measures violate Articles I and II of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

4. With that in mind, Russia addresses particular aspects of this dispute relating to why it is important for a complainant to present the problem underlying the dispute in its entirety, as well as to the interpretation of Article XIX of the GATT 1994 and the Agreement on Safeguards.

II. Order of analysis

5. In Russia's view, the Panel should proceed with the examination of applicability of Article 8.2 of the Agreement on Safeguards to the measures at issue.

6. Russia believes that whether the United States properly formulated its request for establishment of a panel is a jurisdictional matter and should be addressed first. If the Panel concludes that the United States failed to provide the legal basis for its claims properly, its analysis should stop there.

7. If the Panel proceeds beyond these jurisdictional matters, the Panel should consider whether the measures at issue are suspension of obligations in its nature and form that falls under Article 8.2 of the Agreement on Safeguards.

8. The proper order of analysis of the Panel is to start by recognizing that the measures at issue entail a suspension within the meaning of Article 8.2 of the Agreement on Safeguards and that, as a result, China's obligations under Articles I and II of the GATT 1994 were suspended. Since obligations under the said GATT Articles were suspended, there is no legal basis to rule whether or not these obligations were violated as there is nothing to violate.

9. Therefore, there is no need for the Panel to rule whether or not obligations under Articles I and II of the GATT were violated.

III. Terms of Reference

10. This dispute presents not an ordinary situation. The complainant, being aware of the nature of the challenged measures (suspension of concessions) and of the legal basis for their adoption (Article 8.2 of the Agreement on Safeguards) decided not to challenge the consistency of the suspension itself with regard to a potential violation of the provisions under which the measures at issue were adopted (Article 8.2 of the Agreement on Safeguards). Rather, the complainant decided to challenge the consistency of the measures at issue with respect to the obligations which were suspended.

11. Russia submits that it is an inherent right of a complainant to choose what shall be challenged. However, Russia would like to stress that neither China's application of Article 8.2 of the Agreement on Safeguards, nor its compliance therewith is contested by the United States in its request for establishment of a panel. Moreover, there is no panel's or Appellate Body's ruling in either regard. Hence, China's suspension of concessions or other obligations under GATT 1994 pursuant to Article 8.2 of the Agreement on Safeguards shall be presumed to be WTO-consistent. The fact that the Council for Trade in Goods did not disapprove China's suspension upholds this presumption.

12. In this context it should be noted that unlike, for example, provisions of Article 16.4 of the DSU ("within 60 days … the report shall be adopted"), provisions of Article 8.2 of the Agreement on Safeguards do not contain any explicit obligation for positive action on behalf of the Council for Trade in Goods. Furthermore, unlike the provisions of Article 22 of the DSU ("authorization from the DSB to suspend"), provisions of Article 8.2 of the Agreement on Safeguards do not require CTG's expressed authorization or permission in order to suspend concessions or other obligations. It should be noted that a decision to suspend substantially equivalent concessions or other obligations under the GATT 1994 in accordance with Article 8.2 of the Agreement on Safeguards is an individual decision of a WTO Member. Of course, as it is stated in Article 8.2 of the Agreement on Safeguards, there must be no opposition by the CTG to the suspension. A Member may not implement its decision if the CTG disapproves the suspension.

13. A measure taken under Article 8.2 of the Agreement on Safeguards entails a suspension of concessions or other obligations under GATT 1994. In no way, a Member may raise a claim that such a measure violates those commitments and obligations whose application was suspended. In fact, Article 8.2 of the Agreement on Safeguards sets forth conditions under which a Member may lawfully suspend (as opposed to "violate") its concessions or other obligations under GATT 1994. In cases where suspension occurred there can be no potential inconsistences with the obligations which were suspended, since in such cases there is simply nothing to comply with, and thus no element of inconsistency with suspended obligations can be found.

14. In other words, where suspension is concerned, consistency or inconsistency of a Member with the suspended obligations cannot be a disputed issue. Instead, the only issue that can be disputed in such cases is consistency or inconsistency of the suspension itself with WTO obligations of a Member. Only after establishing a prima facie case of inaccuracy of suspension itself under Article 8.2 of the Agreement on Safeguards, the complainant can elaborate on alleged violations of Articles of the GATT 1994 which were not lawfully suspended. And only in such a case a panel may examine such allegations of the complainant, provided that this issue forms part of its terms of reference.

15. Taking into account that the terms of reference of a panel are formed by panel request, and in its Panel Request the United States did not ask for the examination of Article 8.2 of the Agreement on Safeguards (or any other provision of the mentioned Agreement), the Panel is not authorized to make rulings and findings with respect to the compliance by China with the positive obligations contained therein.

16. In sum, the Panel should treat suspension under Article 8.2 of the Agreement on Safeguards as a matter of fact. Furthermore, the Panel is not in a position to rule on the consistency or inconsistency of the challenged measures with obligations under Articles I and II GATT 1994 since these obligations were suspended.

IV. Applicable Legal Standard

17. **First,** Russia submits that being an emergency measure, a safeguard is not contingent upon formal invocation. There is no such obligation under the Agreement on Safeguards and Article XIX of the GATT 1994. Rather, a Member is obliged to notify the imposition of such a measure with a view of ensuring other Members' right for preserving a substantially equivalent level of concessions.

18. It is the treaty language of Article 8.2 of the Agreement on Safeguards that requires that suspension should not be disapproved. China decided to suspend its obligations, took certain procedural steps under Article 8.2 including its notification to the Council for Trade in Goods and received no disapproval. Therefore, there is no question as to whether the suspension took place under Article 8.2 as it was authorized by the Council for Trade in Goods.

19. The fact that the United States has not notified its measures to the WTO pursuant to the Agreement on Safeguards is a procedural flaw of those measures that does not, however, affect in any way the substance of the measures and their qualification as safeguards. Similarly, for example, a technical regulation that has not been properly notified to the TBT Committee does not become less of a technical regulation.

20. In sum, notification *per se* is not a constituent element, absent which a safeguard does not exist. Notification is a legal requirement that should be met among other requirements for such a measure to be WTO-consistent. A measure is a safeguard when it presents two constituent features, as explained by the Appellate Body in *Indonesia - Iron or Steel Products*,[1] and notification is not one of them.

21. **Second,** by assessing the design, structure and expected operation of the measure at issue, the Panel should take into consideration that:

(i) no agreement has been reached by China and the United States in the sense of Article 8.1 of the Agreement on Safeguards;

(ii) China has suspended substantially equivalent concessions or other obligations under GATT 1994 to the trade of the United States;

(iii) China followed all the procedural steps set out in Article 8 of the Agreement on Safeguards while imposing the measures, including the filing of the notification to the Council for Trade in Goods;

(iv) the measures are designed and expected to operate for the purposes of compensation for the adverse effects of the United States' measures on China's trade;

(v) the Council for Trade in Goods did not disapprove the suspension.

22. In Russia's view, there is more than enough evidence on the record to conclude that China suspended its obligations under Article 8.2 of the Agreement on Safeguards.

23. **Third,** Russia submits that Article 8.2 of the Agreement on Safeguards cannot be treated as an affirmative defense by the Panel as this provision's nature is that of a positive rule. The Agreement on Safeguards does not constitute an exception to GATT 1994 obligations. As regards the particularities of the present dispute, Article 8.2 of the Agreement on Safeguards sets forth conditions, *i.e.* positive obligations, under which a WTO Member may lawfully suspend its obligations under the GATT 1994 (not justify violation). Such rules include, *inter alia*, procedural requirements, for example, to submit a notification to the Council of Trade and Goods, and a material obligation that the application of concessions or other obligations under GATT 1994 shall be substantially equivalent to the suspension made by the initial safeguard measure against which such suspension is made. Thus, Article 8.2 of the Agreement on Safeguards contains a clear list of positive obligations and requirements for the suspension of concessions or other obligations under GATT 1994. These provisions cannot be qualified as exceptions from obligations.

24. In sum, since there is no obligation that could be violated (rather, these obligations were suspended), the Panel has neither legal basis to rule on the consistency or inconsistency of the measures at issue with Articles I and II of the GATT 1994, nor legal basis to treat Article 8.2 of the Agreement on Safeguards as an affirmative defense.

V. The relationship between ds 558 and ds 544 disputes

25. Russia's principal position is that the Panel in this dispute should assess the matter before it on its own merits as required by Article 11 of the DSU. The Panel should also act strictly within its terms of reference under Article 7.1 of the DSU. There are also the following nuances the Panel should take into account.

26. On the one hand, Russia's position is that the existence of an underlying measure is not a threshold issue for the determination of the applicability of Article 8.2 of the Agreement on Safeguards. For the resolution of the dispute before this Panel the legal characterization of whether the United States' measures constitute a safeguard measure or not is not required nor is contested

[1] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

as a part of issue of potential inconsistency of China's suspension under Article 8.2 of the Agreement on Safeguards as well as China's suspension itself. It is undisputed fact that the United States applies the import duties in respect of the goods originating from China, as well as some other countries, beyond the rate established in the United States' Schedule. Moreover, China in very clear terms adopted its measures under Article 8.2 of the Agreement on Safeguards. Therefore, the Panel should treat suspension under Article 8.2 of the Agreement on Safeguards as a matter of fact.

27. At the same time, the issues arising in the present Panel proceedings may overlap to a certain extent with those raised in other disputes brought by certain WTO Members against the United States, including the one initiated by China (*United States – Certain Measures on Steel and Aluminium Products*). This overlap would arise in respect of the proper legal characterization of the United States' measures should the Panel here decide that it needs to rule on legal characterization of the United States' measures regardless of Russia's position that the existence of an underlying measure is not a threshold issue for the determination of the applicability of Article 8.2 of the Agreement on Safeguards.

28. Taking into account that the core issue of dispute DS544 is whether the United States' measures constitute safeguard measures and whether certain GATT 1994 and Agreement on Safeguards' provisions were violated by such United States' measures, issue of whether the United States' Section 232 duties constitute safeguard measures is a question of law in that dispute as it requires analyses of consistency or consistency with the requirements of the claimed treaty provisions.

29. In this regard, Russia reminds that the ultimate goal of the Panel is to make such findings "as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". The achievement of this goal will be seriously prejudiced should the Panel engage in parallel examination of the underlying safeguard measures.

30. Therefore, should the Panel recognize that the question as to "whether the US safeguard measures on imports of aluminium and steel exist" is a question of law in this dispute, the Panel would have to follow the DS544 panel's lead insofar as the issue is the proper qualification of the United States' measures.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SWITZERLAND

I. INTRODUCTION

1. Switzerland exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of Article XIX of the General Agreement on Tariffs and Trade (the GATT 1994) and the Agreement on Safeguards.

2. Switzerland notes that the present dispute relates to measures taken by China in response to the import adjustment measures imposed by the United States on certain steel and aluminium products which are themselves being challenged in ongoing WTO proceedings by seven WTO Members including Switzerland (DS544, DS547, DS548, DS552, DS554, DS556 and DS564). As highlighted in its request for the establishment of a panel in DS556, Switzerland considers that the adjustment measures imposed by the United States on imports of certain steel and aluminium products constitute safeguard measures falling within the scope of the Agreement on Safeguards.

II. GENERAL OBSERVATIONS

3. Switzerland notes that Article XIX of the GATT 1994 establishes *a right* to impose safeguard measures provided that certain conditions and circumstances listed in that provision and in the Agreement on Safeguards are satisfied. These requirements include *inter alia* the obligation for the Member proposing to apply a safeguard measure to endeavour, pursuant to Article 8.1 of the Agreement on Safeguards, to maintain a substantially equivalent level of concessions and other obligations to that existing under the GATT 1994 between it and the Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12 of the Agreement on Safeguards.

4. In the absence of an agreement on adequate means of trade compensation for the adverse effects of the measure, the Agreement on Safeguards grants affected Members the right to suspend the application of substantially equivalent concessions or other obligations under the GATT 1994. The exercise of this "right of suspension", as referred to in Article 8.3 of the Agreement on Safeguards, is subject to the substantive and procedural requirements listed in Article XIX:3 (a) of the GATT 1994 and Article 8 of the Agreement on Safeguards. This right of *suspension* of equivalent concessions of other obligations under the GATT 1994 *to the trade of the Member applying the safeguard measure* sets per definition Article I of the GATT 1994 aside, as well as Article II of the GATT 1994, if the measure is taken in the form of a duty in excess of those set forth in the Member's Schedule.

5. Thus, if a complainant considers that the respondent has failed to comply with the requirements applicable to Members taking rebalancing measures, it is for the complainant to make a *prima facie* case of violation of Article XIX:3 (a) of the GATT 1994 and Article 8 of the Agreement on Safeguards. We note that the United States has not brought any such claims. Thus, if the Panel, making an objective assessment of the matter before it, as provided for under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), finds that Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the case at hand, it would thus need to reject the United States' claims, which are solely based on Article I and Article II of the GATT 1994.

6. Switzerland notes that, even though the United States' panel request does not identify the Agreement on Safeguards, that agreement has been identified by China. The Panel's terms of reference are "to examine, in the light of the relevant provisions cited by the parties to the dispute, the matter referred to the Dispute Settlement Body (DSB) by the United States in document "WT/DS558/2". Article 8 of the Agreement on Safeguards is one of the provisions cited by China. The Panel is therefore required, in accordance with its terms of reference, to examine the matter referred to by the United States in light of that provision.

III. OBSERVATIONS ON THE APPLICABILITY OF THE AGREEMENT ON SAFEGUARDS

a) Principles applicable to the legal characterization of the measures at issue

7. Contrary to what the United States argues in this dispute, the legal characterisation of a measure for the purposes of determining the applicability of a relevant provision or agreement is not an issue to be decided unilaterally by the Member taking the measure. It is an issue that must be determined objectively. In other words, the examination as to whether the provisions of the covered agreements are "applicable" and "relevant" to the case at hand is part of the panel's duty to make an "objective assessment" pursuant to Article 11 of the DSU[1].

8. The Panel's duty to conduct an "objective assessment of the matter" implies that the Panel is not bound by the way the Member concerned characterises the measure in its municipal law. Indeed, the description of the measure by a party and "the label given to [it] under municipal law" "cannot be the end of [the Panel's] analysis"[2] and are "not dispositive" of the proper legal characterization of that measure under the covered agreements"[3]. As the Appellate Body emphasized, "a panel must assess the legal characterization for purposes of the applicability of the relevant agreement on the basis of the 'content and substance' of the measure itself"[4].

9. The Appellate Body noted in *Indonesia – Iron or Steel Products* that the manner in which the measure is characterized under domestic law, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards are relevant factors in such an evaluation. However, "no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards"[5].

10. Thus, the fact that a Member has not "invoked" its right to implement a safeguard measure or has not notified the measure at issue to the WTO Committee on Safeguards does not mean that such measure is not a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards. As emphasized above, the proper legal characterization of a measure has to be based on the content and substance of the measure itself.

b) Constituent features of a safeguard measure

11. On the basis of the text of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 read in its context, in order to be a safeguard measure, a measure must present two constituent features, identified by the Appellate Body in *Indonesia – Iron or Steel Products*.

12. *First*, the measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. This follows from the text of Article XIX:1(a) of the GATT 1994 which refers to measures that suspend a GATT obligation and/or withdraw or modify a GATT concession.

13. *Second,* 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. As the Appellate Body emphasized, "[t]he use of the word 'to' […] indicates that the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must be designed to pursue a specific objective, namely preventing or remedying serious injury to the Member's domestic industry"[6]. Thus, the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must have "a demonstrable link" to the objective of preventing or remedying injury[7].

14. Switzerland considers that additional features, such as the "extraordinary" character of the measure, its complementary relationship with trade remedy measures, its focus on the "import" of the products concerned or the fact that it has been adopted pursuant to a procedure which is very similar to the procedure followed in safeguard investigations constitute additional elements

[1] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.31.
[2] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 593.
[3] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.
[4] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.
[5] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.
[6] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.
[7] Appellate Body Report, *Indonesia – Iron or Steel products*, para. 5.56.

supporting its qualification as a "safeguard measure", even though it is not labelled as a "safeguard measure" in the Member's domestic law.

15. The assessment of whether a measure presents the features highlighted above, and thus constitutes a safeguard measure, is to be made on a case-by-case basis, taking into account the design, structure, and expected operation of the measure as a whole. In order to make such an objective assessment, "a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject"[8].

16. Once it is established that the measure presents those constituent features, that measure falls within the scope of application of Article XIX of the GATT 1994 and the Agreement on Safeguards.

c) Observations regarding the two-step test cited by the United States

17. The United States submits that a two-step analysis is called for under Article XIX of the GATT: the right to apply a safeguard measure as a first step and whether that safeguard measure has been applied consistently with the various requirements as a second. The United States considers that the invocation of Article XIX is a condition precedent that must be established not only with respect to the second step but as an initial matter[9]. The United States refers to the Appellate Body report in *US – Line Pipe* in order to support its arguments.

18. However, in that case, the Appellate Body has not examined the issue of the *existence* of a safeguard measure. The distinction made by the Appellate Body was between two inquiries relating to the *consistency* of a safeguard measure with Article XIX of the GATT 1994 and the Agreement on Safeguards. Both inquiries related to *obligations* laid down in Article XIX of the GATT 1994 and the Agreement on Safeguards, but each inquiry related to a different type of obligations: on the one hand, the obligations that must be satisfied in order for the Member to have the right to apply a safeguard measure and, on the other hand, the obligations relating to the extent of the safeguard measure.

19. The issue of the existence of a safeguard measure must not be confused with the issue of whether such safeguard measure is consistent with the conditions and requirements laid down in Article XIX of the GATT 1994 and in the Agreement on Safeguards. As noted by the Appellate Body in *Indonesia – Iron or Steel Products*, "it would be improper to conflate factors pertaining to the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines with the substantive conditions and procedural requirements that determine the WTO-*consistency* of a safeguard measure"[10].

20. The "right" to apply a safeguard measure refers to the fulfilment of certain *requirements* provided for in Article XIX of the GATT 1994 and the Agreement on Safeguards. The *exercise* of the right to impose a safeguard measure must in turn fulfil certain requirements in order to be "within the limits set out in the treaty"[11]. Accordingly, contrary to what the United States argues, both inquiries identified by the Appellate Body in *US – Line Pipe* related to the WTO-*consistency* of a measure, and not to its legal characterization as a safeguard measure.

d) Notification is not a constituent feature of a safeguard measure

21. The notification requirements laid down in Article 12 of the Agreement on Safeguards are unrelated to the issue of whether a measure constitutes a safeguard measure.

22. As the Appellate Body stated in *Korea – Dairy* regarding the object and purpose of Article 12, "the notification serves essentially a transparency and information purpose"[12]. Thus, the notification requirements constitute "obligations" but are not a "constituent feature" of a safeguard. In other words, they do not determine the existence of a safeguard measure, as argued by the United States.

[8] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.
[9] United States' first written submission, paras. 69 and 72.
[10] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57. (emphasis original)
[11] Appellate Body Report, *Indonesia – Iron or Steel Products*, Fn. 193, referring to Appellate Body Report, *US – Line Pipe*, para. 84.
[12] Appellate Body Report, *Korea - Dairy*, para. 111, referring to the Panel Report, para. 7.126.

23. The notification obligations provided for under Article 12 of the Agreement on Safeguards are thus *conditions* – among others – for a Member to lawfully exert its right to apply a safeguard measure and *not* a constituent feature of a safeguard measure, the absence of which would impede the characterization of the measure as a safeguard. Accordingly, if a Member fails to fulfil its notification obligations under the Agreement on Safeguards, a panel would conclude that the Member concerned acted inconsistently with its obligations under Article 12 of the Agreement on Safeguards and *not* that a safeguard measure does not exist.

24. If the invocation of the right to take a safeguard measure by way of notification were – as argued by the United States – a prerequisite for a safeguard measure to exist, it would suffice for a Member not to notify a measure in order to avoid the application of Article XIX of the GATT 1994 and the Agreement on Safeguards – and thus to circumvent its obligations under these provisions. Doing so would also unilaterally deprive affected Members of their right to take rebalancing measures under Article XIX:3 (a) of the GATT 1994 and Article 8 of the Agreement on Safeguards.

IV. INTER-PANEL COORDINATION

25. To the extent that the determination of the applicability of the Agreement on Safeguards to China's measure depends on whether the underlying measures, namely the US measures on import on steel and aluminium, are safeguard measures, there is a direct link between this dispute and the dispute in which the underlying US measures on imports on steel and aluminium are challenged (DS544).

26. Pursuant to Article 3.2 of the DSU "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system", and, pursuant to Article 3.7 of the DSU, "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute". Contradictory findings in this dispute and in the other disputes concerning measures taken in *response* to the import adjustment measures imposed by the United States on certain steel and aluminium products on the one hand, and disputes concerning these import adjustment measures on the other hand, would not be consistent with those principles.

27. In Switzerland's view, the Panel would act within the bounds of its discretionary authority under Article 13 of the DSU in seeking information from the panel in DS544, as long as it maintains the deliberations confidential as required by Article 14 of the DSU and respects the requirements of due process. In particular, the other panel should not participate in the internal discussions and decision process of this Panel and *vice-versa*.

28. Switzerland notes that another option would be for the Panel not to issue its report until the report of the panel in DS544 has been issued, keeping in mind the rule under Article 12.2 of the DSU that "*[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports* while not unduly delaying the panel process". This would allow the Panel to take into account the findings of the panel in DS544.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TÜRKIYE

1 INTRODUCTION

1.1. This integrated executive summary contains the arguments presented by the Republic of Turkey (Turkey) in its third-party written submissions, oral statements, and responses to panel questions in the parallel "rebalancing" dispute in DS558.

1.2. The United States' safeguard measures were introduced in March 2018 and subsequently modified on several occasions. They take the form of additional duties and quantitative restrictions, as well as a range of additional unpublished "grey area" measures, such as agreements with other countries to restrict their exports to the United States.

1.3. When a WTO Member takes a safeguard measure, Article XIX of the General Agreement on Tariffs and Trade (GATT 1994) and the Agreement on Safeguards explicitly contemplate that other affected Members may impose trade restrictions on the Member imposing the safeguard, in order to restore a balance of equivalent concessions. The respondents' measures challenged in DS558, DS559, and DS566 appear to seek to do this. The United States' safeguard measures were challenged separately by Turkey (DS564), China (DS544), India (DS547), the European Union (EU) (DS548), Norway (DS552), Russia (DS554), and Switzerland (DS556) (Section 232 disputes).

1.4. The United States adopted its safeguard measures without complying with its obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards, including, in particular, the obligation to take into account the trade interests of affected WTO Members. Thus, the United States did not "endeavour to maintain a substantially equivalent level of concessions and other obligations … between it and the exporting Members … affected by [the] measure", contrary to Article 8.1 of the Agreement on Safeguards. The United States also failed to comply with the basic duty to hold consultations, as required by Article 12.3 of the Agreement on Safeguards.

1.5. Thus, Turkey, as well as the other respondents in the rebalancing proceedings, had no choice other than to proceed to the suspension of equivalent concessions in order to defend their legitimate economic interests.

1.6. The United States and the WTO Membership at large were duly notified of these actions and the legal basis for them. Hence, the United States, along with the rest of the WTO Membership, were fully aware of the approach of Turkey, China, the EU, and Russia to this matter and the legal basis for this approach.

1.7. Nevertheless, the United States has brought its claims in the present dispute under Articles I and II of the GATT 1994. As such, the United States' complaint in these disputes suffers from a fundamental flaw. The proper legal basis for these disputes is the WTO legal regime governing safeguard measures. Article 8 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 grant an affirmative right to any WTO Member(s) affected by a safeguard measure to obtain compensation from the importing Member or, in case compensation is not agreed upon, to suspend equivalent concessions.

1.8. A claim under another provision of the GATT 1994 is not a valid alternative to a claim that must be brought under the WTO safeguards regime. Any such claims would have to be rejected as having been brought on an improper legal basis, i.e. under an incorrect or inapplicable provision of WTO law.

1.9. In light of these considerations, should the Panel determine – as it should – that both the United States' measures on steel and aluminium and the respondents' measures at issue in these disputes fall under Article XIX of the GATT 1994 and the Agreement on Safeguards, the Panel has no choice but to end its analysis at that juncture and to reject the United States' claims.

1.10. Given that Turkey has addressed these matters in greater detail in its submissions in the related disputes, Turkey — Additional Duties on Certain Products from the United States (DS561) and United States — Certain Measures on Steel and Aluminium Products (DS564), Turkey attached these submissions to its Third-Party Submissions, as exhibits, TUR-1 and TUR-2 respectively.

2 FACTUAL BACKGROUND

2.1. As noted, the respondents' additional duties were a response to the United States' safeguard measures on steel and aluminium within the meaning of Article 8 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994. In order to fully understand the factual and legal context of the measures at issue, therefore, it is important to start with the United States' underlying safeguard measures.

2.2. The United States' safeguard measures consist of:

- additional duties on a wide range of steel and aluminum products, which are well above the United States' tariff bindings in the United States' GATT Schedule of Concessions;
- quantitative restrictions, on steel or aluminum, or both; and
- certain unpublished measures in the form of voluntary export restraints.

2.3. These safeguard measures were imposed by the President of the United States through a series of Presidential Proclamations, issued between March and August 2018. These Presidential Proclamations were, in turn, based on two investigations conducted by the United States Department of Commerce on the basis of Section 232 of the 1962 Trade Expansion Act. The nominal purpose of these investigations was to determine whether imports of steel and aluminium were entering the United States in a manner that impaired national security. In reality, the investigations essentially determined whether increased steel and aluminium imports were injuring, or threatening to injure, the profitability of the US steel and aluminium industries. In essence, therefore, the investigations were safeguard investigations in all but name.

3 TURKEY'S OBSERVATIONS ON THE PRESENT DISPUTE

3.1 Summary of the Appellate Body's standard for determining the existence of a safeguard measure

3.1. The United States' steel and aluminium measures are safeguard measures within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards. This is because they satisfy the legal standard for determining whether a safeguard measure exists, as explained by the Appellate Body in *Indonesia — Iron or Steel Products*. The Appellate Body identified the two following definitional criteria for the existence of a safeguard measures:

- The "measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession"; and
- 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".[1]

3.2. The Appellate Body emphasized that, to constitute a safeguard measure under WTO law, the suspension of a GATT obligation aimed at preventing or remedying serious injury "must be designed to pursue a specific objective, namely preventing or remedying serious injury to the Member's domestic industry".[2] This specific objective must be "the most central" aspect of the measure.[3] In

[1] Appellate Body Report, *Indonesia — Iron or Steel Products*, para. 5.60 (see also para. 5.64).
[2] Appellate Body Report, *Indonesia — Iron or Steel Products*, paras. 5.56, 5.58. (underlining added)
[3] Appellate Body Report, *Indonesia — Iron or Steel Products*, paras. 5.60, 5.64, 5.68, and 5.70.

its determination of whether a safeguard measure exists, a panel should "evaluate and give due consideration to all relevant factors", none of which is, in and of itself, dispositive.[4]

3.2 Turkey agrees with the respondents that the United States' measures on steel and aluminium are safeguard measures

3.3. The United States' case rests entirely on its erroneous view that its import measures on steel and aluminium, as well as the rebalancing measures at issue in these disputes, fall outside the scope of WTO safeguard rules. The United States' main argument is that, because the United States has failed to notify its safeguard measures in a manner consistent with applicable provisions of the Agreement on Safeguards, not only should these measures escape all WTO safeguard disciplines, but the retaliatory rights of the Members affected by these measures must also be curtailed.

3.4. Turkey trusts that the Panel will reject the United States' position. A Member imposing a measure cannot decide unilaterally whether that measure satisfies the Appellate Body's two-pronged test and is a safeguard measure, subject to the requirements of Article XIX of the GATT 1994 and the Agreement on Safeguards. These are objective inquiries and must be conducted on the basis of objective criteria.

3.5. Consequently, a Member imposing a measure also cannot itself determine, through its domestic law and through the categorization or nomenclature of the measure, to what extent WTO law applies, or, indeed, which provisions of WTO law apply. Pursuant to Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), it is a panel's duty to "make an objective assessment of the matter before it, including an objective assessment of ... *the applicability of and conformity with the relevant covered agreements*" (emphasis added).

3.6. This focus on the objective features of a measure, rather than on any unilateral domestic categorization of it, reflects the general principle of WTO law that has been applied in several WTO disputes.[5] Guided by this principle, in *Dominican Republic – Safeguard Measures*, the panel examined the legal characterization of the measures at issue as safeguard measures, given that one of the parties had contested this characterization.[6] In *Indonesia — Iron or Steel Products* and *India — Iron and Steel Products*, the panels decided to conduct this assessment, even though the two disputing parties had agreed that the measures at issue constituted safeguard measures.[7]

3.7. The United States appears to ignore a key element of the Appellate Body's reasoning in *Indonesia — Iron or Steel Products.* The Appellate Body drew a bright-line distinction between, on the one hand, the objective definitional criteria of a safeguard measure, and, on the other hand, compliance with the conditions (both substantive and procedural, such as notification obligations) required for a WTO-consistent safeguard measure.[8] This means, for instance, that a failure to notify properly a safeguard measure within the meaning of Article 12.1 of the Agreement on Safeguards cannot mean that WTO safeguard rules do not apply. Rather, a measure is still a safeguard measure as long as it meets the definitional criteria explained above. However, such a measure may be inconsistent with Article XIX of the GATT 1994 and the relevant provisions of the Agreement on Safeguards. Any other conclusion would lead to unreasonable results. A Member could avoid the applicability of potentially onerous rules simply by violating them.

3.8. In sum, based on the two objective criteria that the Appellate Body set out in *Indonesia — Iron or Steel Products*, the United States' import measures on steel and aluminium, as well as the respondents' rebalancing measures, fall under the scope of Article XIX of the GATT 1994 and the Agreement on Safeguards.

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[4] Appellate Body Report, *Indonesia — Iron or Steel Products*, para. 5.60.

[5] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 593; Appellate Body Report, *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, para. 5.127; Appellate Body Report, *Indonesia — Iron or Steel Products*, para. 5.32.

[6] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.23-7.24, 7.89.

[7] Panel Report, *Indonesia — Iron or Steel Products*, para. 7.10; and Panel Report, *India — Iron and Steel Products*, paras. 7.29-7.30.

[8] Appellate Body Report, *Indonesia — Iron or Steel Products*, para. 5.57.

3.3 The United States' complaint should be dismissed in its entirety as the United States based its claims on improper legal provisions

3.9. Should the Panel agree with the respondents, and Turkey, that (i) the United States' measures on steel and aluminium are safeguard measures within the meaning of Article XIX and the Agreement on Safeguards, and (ii) the measures challenged in these disputes fall under Article XIX of the GATT 1994 and Article 8.2 of the Agreement on Safeguards, it should reject the United States' claims under Articles I and II of the GATT 1994 as improper. This is because the United States should have brought its claims under Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards. In addition, the United States cannot be permitted to add these claims at a later stage of the panel proceedings, as these claims were not set out or otherwise mentioned in the United States' consultations and panel requests.

3.10. The United States attempts to circumvent its obligation to make a *prima facie* case of a violation of Article 8.2 of the Agreement on Safeguards and/or Article XIX:3(a) of the GATT 1994 by alleging that the respondents' reference to the Agreement on Safeguards is in the nature of an "affirmative defence". Turkey trusts that the Panel will reject this erroneous argument.

3.11. The WTO safeguards regime – whether in Article XIX or in the Agreement on Safeguards – is not in the nature of an (affirmative defence) exception. Rather, it is a separate, free-standing regime that applies to particular types of measures. Panels occasionally refer to such legal provisions as "autonomous rights", juxtaposing them to exceptions.[9] Other WTO Members that feel aggrieved by such measures, in particular safeguard measures, have to articulate their challenges on the basis of the applicable trade remedy rules (i.e. WTO safeguard rules).

3.12. The term "affirmative defence" does not derive from the text of the covered agreements. Rather, it is a term developed by WTO panels and the Appellate Body to describe the relationship between particular provisions of the covered agreements, provisions that are not at issue in this case. A good example is the relationship between Article XI and Article XX of the GATT 1994. When Article XI has been found to be violated, for instance, as a result of an import prohibition, a respondent *may choose* to invoke Article XX as an affirmative defence. For example, the respondent may argue that the measure pursues a legitimate non-trade purpose, such as public health.

3.13. If the respondent indeed *chooses to invoke* Article XX, it bears the burden of proof to demonstrate that all of the elements of Article XX are met. If it succeeds in doing so, the initial violation of Article XI is excused.

3.14. If the respondent *chooses not to invoke* Article XX – which it is perfectly free to do – then the adjudicating panel is precluded from addressing Article XX. Otherwise, the panel would make a case for the respondent. In these circumstances, the violation of Article XI remains and the respondent has lost the dispute, due to a violation of Article XI. The absence of a finding under Article XX does not change the fact that the initial finding of violation under Article XI exists.

3.15. But this relationship is fundamentally different from the relationship between Articles I and II of the GATT 1994, on the one hand, and the safeguard disciplines in Article XIX of the GATT 1994 and the Agreement on Safeguards, on the other hand.

3.16. This is because, when a measure falls under Article XIX and the Agreement on Safeguards, that measure does not – at the outset of the panel's analysis – fall under Articles I and II. The obligations in these provisions are "suspended", displaced, not applicable, and, therefore, cannot be violated. This is in stark contrast to Article XI in the previous example.

3.17. Moreover, in pointing to Article XIX and the Agreement on Safeguards as the applicable law, the respondent is *not choosing* to raise an affirmative defence. As Turkey explained, there is no violation that would have to be justified by means of an affirmative defence. And the respondent is not exercising any choice. The respondent is instead pointing to what it believes is *the proper*

[9] See, for instance, Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2964-7.2965, 7.2984-7.2998.

applicable law, as the starting point for the panel's legal analysis. And it is incumbent on the panel to ascertain that starting point for its analysis, according to Article 11 of the DSU.

3.18. Prior panel and Appellate Body decisions unambiguously support this approach. In the context of anti-dumping measures, the Appellate Body found in *EC – Fasteners (China)* that, until a finding under Article VI and the Anti-Dumping Agreement has been made, it is not possible to determine whether a measure violates Articles I and II of the GATT 1994.[10] Similarly, in *US – Zeroing (Japan)*, the Appellate Body found a violation of Article II of the GATT only after finding violations of WTO anti-dumping rules.[11]

3.19. In the latter case, the Appellate Body described Articles VI and the Anti-Dumping Agreement as a "safe harbour" with respect to Articles I and II of the GATT 1994.[12] The term "safe harbour" is just another way of saying what Turkey has just explained: that Articles I and II cannot be said to have been violated until the analysis under the anti-dumping rules has been concluded. If the measure is consistent with the anti-dumping rules, there is no violation of Articles I and II. Hence there is no need to invoke an exception, or "affirmative defence".

3.20. The relationship between Articles I and II, on the one hand, and Article VI and the Anti-Dumping Agreement, on the other hand, is fully analogous to the relationship with the safeguard rules.

3.21. Stepping away from the technical language of "affirmative defence", Turkey urges the Panel to consider the following, as a matter of the context and purposes of the relevant texts:

3.22. If the United States' approach in these disputes were to be correct, this would revolutionize the manner in which complainants would from now on challenge trade remedy measures. Complainants could take the very simple route of alleging a violation of Articles I and II, then lean back, and force the respondent to raise, for instance, the Anti-Dumping Agreement as an "affirmative defence". The respondent would have to demonstrate as a negative that its measure does not violate any of the many substantive and procedural obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement.

3.23. This is not only entirely unfeasible but also legally incorrect. It is also contrary to how trade remedy measures have been challenged in the literally hundreds of WTO disputes over the past quarter of a century in the WTO, including in numerous cases initiated by the United States.

3.24. On the basis of the above, Turkey considers that the Panel should begin its analysis by assessing the threshold question of the applicability of the provisions cited by the parties to the measures at issue. Either Articles I and II of the GATT 1994 are applicable or, alternatively, Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards are applicable. Both cannot be directly applicable at the same time.

3.25. In sum, the proper legal basis for the United States to bring claims in these disputes is Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards. Should the Panel agree with this position, it should reject the United States' claims under Articles I and II of the GATT 1994, because these claims are not based on the correct applicable WTO legal provision.

3.4 Proposals on inter-panel coordination

3.26. The dispute settlement proceedings in the Section 232 disputes are closely linked to the rebalancing proceedings. In particular, in both disputes, the determination of whether the United States' import measures on steel and aluminium constitute safeguard measures within the meaning of WTO law is a core element of the respective panel's analysis. In the Section 232 disputes, the panel must assess whether the United States' import measures constitute safeguard measures in order to assess the claims of violations under Article XIX of the GATT 1994 and the Agreement on Safeguards. In the proceedings at hand, in turn, the Panel must assess whether the United States' measures constitute safeguard measures, as part of its assessment of whether the respondent's

[10] Appellate Body Report, *EC – Fasteners (China)*, paras. 392-393.
[11] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 200, 209.
[12] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 209.

measures at issue constitute rebalancing measures pursuant to Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994.

3.27. In these circumstances, it would be of great concern if the two panels were to reach divergent conclusions on the legal characterization of the United States' import measures on steel and aluminium. This would undermine the meaningful operation of the WTO dispute settlement system, especially in the current circumstances in which the Appellate Body is not operational. Absurd consequences could arise if, for instance, the panel in the Section 232 disputes were to decide that the United States' measures are not safeguard measures, while this Panel decided that the United States' measures are safeguard measures, and vice versa.

3.28. In Turkey's view, the most appropriate approach that this Panel should take to avoid the undesirable outcome of divergent views is to delay issuing its report until the panel in the Section 232 proceedings has issued its report. Turkey notes, however, that while this approach would seem reasonable and desirable, the Panel has a duty under Article 11 of the DSU to make its own objective and independent assessment of the matter before it. As explained, this matter necessarily includes the legal characterization of the United States' measures. As the Appellate Body clarified in *US – Continued Zeroing*, "[f]actual findings made in prior disputes do not determine facts in another dispute".[13]

[13] Appellate Body Report, *US – Continued Zeroing*, para. 190.

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE*

1. INTRODUCTION

1. Ukraine welcomes the opportunity to participate as a third party in case *China – Additional Duties on Certain Products from the United States* and to present its views on certain issues raised by parties in this dispute. Ukraine will provide its comments on the interpretation and application of the provisions of the WTO agreements discussed before this Panel.

2. While not taking a final position on the specific merits of this case, Ukraine will provide its views on some of the legal claims advanced by the Parties to the dispute. In particular, Ukraine will make submissions on the following issues:

- whether the United States failed to present proper claims before the Panel by not addressing Article XIX:3 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Safeguards in its panel request; and

- request for preliminary ruling put forward by China.

3. Ukraine reserves the right to raise other issues at the third party hearing with the Panel.

2. CLAIMS REGARDING THE UNITED STATES' FAILURE TO PRESENT PROPER CLAIMS BEFORE THE PANEL

4. This dispute raises an important issue of the panel's terms of reference under Article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") as well as what information in panel request is "sufficient to present the problem clearly" under Article 6.2 of the DSU. Ukraine would like contribute to the understanding of these Articles, outline its vision, and help the Panel in the analysis without making judgments on the facts of the case.

5. Not for the repetition but for the sake of clarity, Ukraine would briefly provide the background of this claim. In this case, the United States challenges the additional duties for some products originating in the United States imposed by the People's Republic of China ("China") only under Articles I and II of the GATT 1994.[1] In this respect, China claims that its measures are taken pursuant to Article XIX:3 of GATT 1994 and Article 8.2 of the Agreement on Safeguard and the United States was aware of this fact as it was explicitly specified in its notification of the measures to the Council for Trade in Goods on 29 March 2019.[2] However, the United States did not to make any claim with regard to the Agreement on Safeguards, because of its belief that it is "within the judgment of the WTO Member imposing the measure" to characterise such measure as being safeguard or not.[3]

6. In this regard, Ukraine would like to put on record the following. First, it is beyond dispute that Article 3.3 of the DSU entitles a Member that considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member to have recourse to the WTO dispute settlement mechanism to be able to redress the violations.

7. Second, it is also clear that a Member is largely self-regulating under Article 3.7 of the DSU and it must be presumed by panels and the Appellate Body that "whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be 'fruitful'."[4]

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* Ukraine requested that its written submission is used as its integrated executive summary.
[1] First Written Submission of the United States, paras. 2, 5.
[2] First Written Submission of China, para. 50.
[3] First Written Submission of the United States, para. 88.
[4] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74.

8. Third, Article 7.2 of the DSU states that "panels shall address the relevant provisions in any covered agreement or agreements cited by the *parties* to the dispute"[5] referring to parties and not a party meaning that panels shall address the provisions of the agreements raised by both parties (complaining and responding).

9. Fourth, it is however settled case law that a panel's terms of reference is determined by the panel request[6] and panels thus cannot rule on the issues that were not included in the panel request. In our case, this means that the Panel cannot rule whether China acted consistently or inconsistently with the Agreement on Safeguards as there were no claims raised by the United States under this Agreement.

10. Fifth, findings in *EC – Tariff Preferences* and *Brazil – Taxation* cases stipulate that when the complaining party is aware that the challenged measure was adopted under the specific agreement, a complaining party is obliged to identify the relevant provisions of this specific agreement in its panel request.[7]

11. Thus, Ukraine sees two plausible scenarios of the situation. On the one hand, there is the loop-hole for the complaining party to escape from its obligation to present the problem clearly under Article 6.2 of the DSU in such cases where we hypothetically presume that a complainant intently fails to address the claim under the specific agreement and simply refers to the GATT 1994 violation when the issue is really governed by that specific agreement. On the other hand, the complaining party is completely right, when we one more time presume, that the claim falls exclusively under GATT 1994 and not under, for example, the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards, etc.

12. It is logically that in the first presumed instance, panel should decline to rule on the violation. However, in the second, it flows that if panel declines to rule, it will deprive the complaining party of its right to "a positive solution to a dispute" under Article 3.7 of the DSU.

13. Leaving the presumption behind, Ukraine therefore believes that the Panel, while making its analysis, should look into the nature of the measure at issue to find whether it is in its terms of reference as was stated in paragraph 9 of this submission.

14. Notwithstanding the provision of Article 3.10 of the DSU that "complaints and counter-complaints in regard to distinct matters should not be linked", Ukraine is of the view that the result of this dispute cannot contradict and is tightly connected to the findings of the panel in the ongoing *United States – Certain Measures on Steel and Aluminium Products* case brought by China as in that case China claims the violation of the United States under the Agreement on Safeguard.

15. To summarize and to make it clear, Ukraine is without prejudice whether the United States measures were safeguard measures or not, Ukraine rather believes that it is the Panel's task first to look into the nature of the measure to understand if the Panel can then continue its analysis of the GATT 1994 violations.

2.1 Comments on the request for preliminary ruling put forward by China

16. Ukraine has already expressed its views that the Panel should first examine the nature of the measure to see if it falls within the Panel's terms of reference. Thus, Ukraine would not repeat its position once again.

17. Here, Ukraine only highlights that insuring the "prompt settlement" of the dispute is necessary to promote "security and predictability in the dispute settlement system".[8] Therefore, the Panel has

[5] DSU, Article 7.2 (emphasis added).

[6] See for example, Appellate Body Report, *EC and certain Member States – Large Civil Aircraft,* para. 639 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 73; Appellate Body Report, *US – Carbon Steel*, para. 125; Appellate Body Report, *US – Continued Zeroing* para. 160).

[7] See for example, Appellate Body Report, *EC – Tariff Preferences*, para. 118; Appellate Body Report, *Brazil – Taxation*, para 5.366.

[8] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

to make an effort to address the issue identified above as soon as practicable namely in its preliminary ruling.

3. CONCLUSIONS

18. Ukraine hopes that its contribution in the present dispute will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the WTO agreements. Ukraine thanks the Panel for the opportunity to share its views and would be happy to provide further comments on the third-party session or answer any questions the Panel may have.

ANNEX D

COMMUNICATIONS BY THE PANEL

ANNEX D-1

COMMUNICATION BY THE PANEL ON REQUESTS FOR ENHANCED THIRD-PARTY RIGHTS

The Panel refers to the separate communications from Canada[1], Turkey[2], Russia[3], the European Union[4], and Mexico[5] (hereafter "the requesting third parties"), asking that the Panel exercise its discretion under Article 12.1 of the DSU to grant all third parties additional rights to those provided in Article 10 of the DSU. In particular, the requesting third parties requested the Panel to grant the following rights: (i) to receive copies of all of the parties' written submissions, their oral statements, rebuttals and answers to questions from the Panel and each other, through all stages of the proceedings; (ii) to be present for the entirety of all substantive meetings of the Panel with the parties; (iii) to review the draft summary of their own arguments in the descriptive part of the Panel Report; and (iv) to make a brief oral statement during the second substantive meeting.

The requesting third parties argue that particular circumstances exist in this dispute that warrant the granting of enhanced third-party rights, including that: (i) the measure that has been challenged by the United States in this dispute is similar to the measures that have been challenged by the United States in the five (5) disputes initiated against the requesting third parties; (ii) the outcome of this dispute may have a significant impact on the Panels' findings and recommendations in the other five (5) disputes initiated by the United States against the requesting third parties; (iii) the number of responding parties as well as third parties participating in these six disputes demonstrates the outcomes of these disputes will have important legal and systemic implications on the entire WTO Membership; and (iv) the enhanced third-party rights requested would not negatively affect due process in general; or specifically, the due process rights of the United States; or would impose any additional burden on the United States.

The Panel requested the parties' views on each of the five (5) requests for enhanced third-party rights. China supported these requests. For China, the similarities between the measure challenged by the United States in this dispute and those in the other five (5) Additional Duties disputes, as well as the fact that the United States has brought, simultaneously to this dispute, disputes against the requesting third parties, constitute special circumstances that warrant the granting of enhanced third-party rights. China also noted that the specific enhanced rights requested by the third parties would not impose any undue additional burden on the parties to this dispute.

The United States, for its part, requested that the Panel deny these requests for enhanced third-party rights. The United States is concerned that the respondents in all six (6) Additional Duties disputes may be using the additional requested rights to function as co-respondents in these disputes. For the United States, these requests are not well founded under the DSU, and the granting of additional rights to third parties would result in a corresponding imposition of additional obligations on the parties. The United States also argued that additional obligations may not be imposed on a disputing party absent its consent.

The Panel understands that it enjoys discretion to grant additional rights to third parties so long as such rights are consistent with the DSU and due process.[6] Prior panels have on occasion exercised this discretion and granted additional third-party rights in certain circumstances, which could, for instance, include situations where the measures at issue result in significant economic benefits for certain third parties[7]; situations where third parties maintained measures similar to the measures

[1] Communication dated 15 March 2019.
[2] Communication dated 18 March 2019.
[3] Communication dated 19 March 2019.
[4] Communication dated 20 March 2019.
[5] Communication dated 22 March 2019.
[6] Appellate Body Reports, *US – FSC (Article 21.5 – EC),* para. 243; *EC – Hormones (Canada)*, para. 154; *US – 1916 Act*, para. 150. *See* also Panel Reports, *EC – Export Subsidies on Sugar*, para. 2.3; *Korea – Nucleoids*, Annex D-2.
[7] Panel Reports, *EC – Bananas III (Guatemala and Honduras),* para. 7.8; *EC – Tariff Preferences*, Annex A, para. 7(a); *EC – Export Subsidies on Sugar*, para. 2.5.

at issue[8]; or where practical considerations arise from a third party's involvement as a party in a parallel panel proceeding.[9] The Panel is not persuaded that the circumstances of the requests before it would warrant the granting of enhanced third-party rights.

The Panel disagrees with the requesting third parties' assertion that the alleged similarity of the challenged measures in the six (6) Additional Duties disputes requires that the Panel grant enhanced third-party rights in this particular dispute. While understanding the interest of the requesting third parties in the outcome of this dispute, the Panel considers that, in addition to their ability to present their views in this dispute as third parties, each of the requesting third parties is the respondent in one of the other five (5) Additional Duties disputes, and will therefore have the opportunity to defend its own challenged measures in its respective panel proceedings.

Although the Panel appreciates the systemic importance of the outcome of these disputes for all third parties, the Panel is not persuaded that the rights provided for in Article 10 of the DSU would not suffice to allow their interests to be fully taken into account. Consistent with Article 10.2 of the DSU, all third parties in panel proceedings may be presumed to have a substantial interest in the matter before the Panel.[10] WTO Members have a collective interest in the interpretation of covered agreements, and panels' interpretations of WTO agreements are, by definition, of systemic importance to WTO Members.[11]

The requesting third parties have also argued that granting their requests would not negatively affect due process or impose any undue additional burden on the parties. The Panel notes that the requesting third parties are asking the Panel to go beyond what is specifically provided for in the DSU, despite the lack of agreement by the parties on the requests. In the Panel's view, this should be enough to raise due process concerns. Furthermore, the Panel notes that the requested enhanced third-party rights would impose upon the parties the additional burdens of processing and reviewing numerous third-party submissions in addition to those foreseen in Article 10 of the DSU, and eventually responding to related questions from the Panel or the other party.

In considering requests for enhanced third-party rights, the Panel must be mindful of the distinction drawn in the DSU between parties and third parties, which should not be blurred.[12] In this respect, the Panel agrees with the United States that, when considering whether the balance of rights and obligations of parties and third parties agreed to in the DSU may be altered, it is important to bear in mind the absence of an agreement of the parties to the dispute. The Panel is not persuaded that the arguments put forward by the requesting third parties justify altering such a balance without the agreement of the parties.[13]

In the light of the foregoing, the Panel declines the requests for enhanced third-party rights submitted by Canada, Turkey, Russia, the European Union and Mexico.

[8] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7(b).
[9] Panel Report, *EC — Hormones (Canada)*, para. 8.17.
[10] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.166.
[11] Panel Report, *India – Solar Cells*, para. 7.35.
[12] Panel Report, *EC- Bananas III (Guatemala and Honduras)*, para. 7.9. See also, Panel Reports, *EC – Tariff Preferences*, Annex A, para. 7(d); *EC –Export Subsidies on Sugar (Australia, Brazil and Thailand)*, para. 2.7; *EC and certain member States – Large Civil Aircraft*, para. 7.166; *Korea – Nucleoids*, Annex D-3.
[13] Numerous panels have denied requests for enhanced third-party rights when one of the parties has objected to such request, e.g. in *EU – Biodiesel (Indonesia)*, *Korea – Radionuclides*, *US – Coated Paper (Indonesia)*, *Indonesia – Import Licensing Regimes*, *US – Washing Machines*, *EC – Seal Products* and *Argentina – Import Measures*.

ANNEX D-2

COMMUNICATION BY THE PANEL ON CHINA'S REQUEST FOR A RULING UNDER ARTICLE 6.2 OF THE DSU

In its first written submission, China requested that the Panel "make a ruling, on a preliminary basis or otherwise, that the claims of the United States are not properly before the Panel".[1] Specifically, China argues that the United States' panel request does not meet the requirements of Article 6.2 of the DSU.

The Panel has carefully considered the arguments on China's request submitted by the parties and the third parties.

China's request touches upon issues that are closely related to the substantive questions raised by the parties in this dispute. In the Panel's view, a preliminary ruling on this issue may require adjudicating upon the merits of the parties' arguments, including with respect to the applicability of the relevant covered agreements to the measures at issue. The Panel thus considers that a decision on a preliminary basis would be premature.

Accordingly, the Panel has decided to address this issue in its Report and therefore declines China's request to make a ruling, on a preliminary basis, that the claims of the United States are not properly before the Panel.

[1] China's first written submission, para. 62.