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TURKEY – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS561/R.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX D

COMMUNICATION BY THE PANEL ON REQUESTS FOR ENHANCED THIRD PARTY RIGHTS

ANNEX E

TABLE OF RELEVANT DUTY RATES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

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 Turkey 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. Turkey 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 Turkey should be numbered TUR-1, TUR-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 Turkey to present its point of view. In the second substantive meeting, Turkey 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 saskia.shuster@wto.org, or by telephone at +41 22 739 5415.

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 Turkey 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. On June 25, 2018, Turkey issued its *Decision on Implementation of Additional Financial Obligations for the Import of Certain Products Originating in the United States of America* ("Decision on Implementation"). According to a statement made by a Turkish official, Turkey imposed additional duties on U.S.-origin products in response to U.S. national security actions taken pursuant to Section 232 of the Trade Expansion Act of 1962.

3. Article 1 of the Decision on Implementation states that the "purpose" of the Turkish measure is "to collect additional duties on the import of some products originating" in the United States. Thus, the Turkish measure explicitly discriminates against certain U.S. products **exclusively** on the basis of origin. Article 4 of the Decision on Implementation provides that the additional duties "shall enter into force" on June 21, 2018.

4. On August 15, 2018, Turkey issued the *Decision to Amend the Decision to Impose Additional Financial Liabilities on the Import of Some Products Originating From the United States of America* ("Decision to Amend"). Article 1 of the Decision to Amend modifies the additional duties stipulated in the Decision on Implementation. The Decision to Amend does not indicate any country other than the United States to which the additional duties apply.

5. Turkey's additional duties apply to all U.S.-origin products classified within the 22 four- and six-digit tariff lines listed in the measure. Turkey publishes MFN rates at the 12-digit level. The United States examined Turkey's 2018 and 2019 MFN schedules. Both of these schedules indicate that the 22 four- and six-digit tariff lines subject to the additional duties encompass a total of 479 tariff lines at the 12-digit level. Thus, the MFN and bound rate analysis presented here applies to all 479 tariff lines, not simply the 22 tariff lines listed in the measure.

6. Accordingly, Turkey has applied additional duties ranging from four to 70 percent on 479 tariff lines of products originating in the United States, effective June 21, 2018. Turkey then applied amended additional duties ranging from 4 to a 140 percent on the same 479 tariff lines of products originating in the United States, effective August 15, 2018.

7. The United States demonstrates that Turkey exceeded its MFN commitments by referencing three figures for each tariff code: (A) Turkey's applied MFN rate; (B) Turkey's additional duty that applied to the MFN rate; and (C) the sum of those two duty values. Read together, these three numbers demonstrate that Turkey's additional duties on the U.S.-origin product exceed Turkey's MFN commitments.

8. The United States demonstrates that Turkey exceeded its bound rate commitments by referencing two figures for each tariff line: (C) the sum of Turkey's applied MFN rate and the additional duty rate, and (D) Turkey's bound rate commitment. Turkey's bound rates are set at the 10-digit level. The United States identified a bound rate for each of the 479 tariff lines at issue.

9. Read together, the two figures referenced for each tariff line demonstrate the following. First, during the June 21, 2018 to August 14, 2018 period, Turkey exceeded its bound rate commitments for 115 of the 479 tariff lines. Second, during the August 15, 2018 to December 31, 2018 period, Turkey exceeded its bound rate commitments on 210 of the 479 tariff lines. Third, during the period January 1, 2019 and thereafter, Turkey exceeded its bound rate commitments on 210 of the 479 tariff lines.

10. On July 16, 2018, the United States requested consultations with Turkey pursuant to Article 4 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXIII of the GATT 1994. Pursuant to this request, Turkey and the United States held consultations August 29, 2018. Following the request for consultations, Turkey amended the additional duties measure to increase the rates of duty for 21 out of the 22 tariff lines affected by the additional duties measure. On October 18, 2018, the United States requested supplemental consultations with Turkey. The United States held supplemental consultations with Turkey on November 14, 2018.

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

11. Turkey'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 Turkey to like products originating in other countries.

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

13. 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.

14. In the measure at issue in this dispute, Turkey's measure imposes additional duties ranging from 4 to a 140 percent on the same 479 tariff lines of products originating in the United States, effective August 15, 2018. For the 479 tariff lines at issue in this dispute, the sum total of 's applied MFN rate and its additional duty demonstrate that Turkey's rate of duty applied to U.S. originating products is above its MFN rate.

15. Second, each U.S. product subject to Turkey's measure is "like" a product from other countries not subject to the additional duties within the meaning of Article I:1. As explained in section II, Turkey's measure discriminates against U.S products on the basis of origin. Thus, Turkey'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.

16. Turkey'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 477 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.

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

17. Turkey'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.

18. An evaluation of a claim under Article II:1(a) and (b) involves an identification of the (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.

19. 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.

20. 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.

21. 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.

22. 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 Turkey's rates bound in Turkey's schedule.

23. With respect to the first sentence of Article II:1(b), from June 21, 2018 to August 14, 2018, Turkey **exceeded** its bound rate commitments for 115 of the 479 tariff lines at issue in this dispute. In addition, from August 15, 2018 to December 31, 2018, Turkey **exceeded** its bound rate commitments on 210 of the 479 tariff lines at issue in this dispute. Finally, from January 1, 2019 and thereafter, Turkey has **exceeded** its bound rate commitments on 210 of the 479 tariff lines at issue in this dispute.

24. Given Turkey'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, Turkey has correspondingly accorded less favourable treatment to these products and breached Article II:1(a) as well.

III. IN THE EVENT TURKEY 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

25. Turkey 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 Turkey attempts to present such a defense, the United States will respond to Turkey's arguments in subsequent submissions.

26. 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.

27. 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.

28. 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.

29. 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."

30. 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.

31. 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, Turkey 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.

32. 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 PRECONDITION TO APPLYING A SAFEGUARD MEASURE UNDER GATT ARTICLE XIX AND THE WTO AGREEMENT ON SAFEGUARDS

33. The first step to determine whether a WTO Member has applied a safeguard measure under Article XIX of the GATT 1994 and the Safeguards Agreement is to identify whether the Member in question has **invoked** the right to take action pursuant to these provisions. Absent this invocation, a measure cannot fall under the WTO's safeguard disciplines.

34. First, Article 1 of the Safeguards Agreement provides that the Safeguards 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."

35. This proposition is clear from the text and structure of Article XIX of the GATT 1994. For instance, Article XIX:1(a) 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, that Member has the discretion to invoke the right reserved to it under Article XIX. The Appellate Body has expressed support for this analytical approach.

36. In *Indonesia – Iron or Steel Products*, the Appellate Body reasoned that the phrase "shall be free" in Article XIX:1(a) accords 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 to invoke Article XIX to implement a safeguard measure. Absent a Member's invocation of Article XIX, however, a measure cannot constitute a safeguard under WTO safeguard disciplines.

37. The text of Article XIX:2 of the GATT 1994 confirms the U.S. position regarding invocation. Under that provision, a Member's ability to take action pursuant to Article XIX is conditioned on invocation with notice to other Members before that Member can take action. In relevant part, 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)

38. Accordingly, without invocation, and without notice of that invocation, a Member has not taken and is not "free" to "take action pursuant" to Article XIX.

39. Similarly, the text and structure of Article XIX:3(a) of the GATT 1994 further support the U.S. position. Under that provision, if the consultations envisioned by Article XIX:2 fail to address the concerns of affected Members, then affected Members can suspend substantially equivalent concessions or other obligations. Invocation and notice, however, is the triggering condition for the consultation.

40. Third, multiple provisions in the Safeguards Agreement also support the necessity for invocation and notice. For instance, the first sentence of Article 8.1 of the Safeguards Agreement provides:

> A Member **proposing** to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavor to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members who would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. (emphasis added)

41. According to its ordinary meaning, the term "propose" means to "suggest or state (a possible plan or action) for consideration." How does a Member "propose" to apply or extend a safeguard measure? Through invocation of the WTO's safeguards provisions and notice.

42. Finally, consider Article 8.3 of the Safeguards Agreement. In relevant part, Article 8.3 provides that a "Member **proposing** to apply or extend a safeguard measure shall provide adequate opportunity for prior consultation with those Members having a substantial interest as exporters" of the product concerned. Again, this reference to "proposing" supports the U.S. position regarding invocation. The term "proposing" presumes the existence of a notification by a Member seeking to take action pursuant to Article XIX and the Safeguards Agreement.

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

43. According to its ordinary meaning, the term "propose" means to "suggest or state (a possible plan or action) for consideration." How does a Member "propose" to apply or extend a safeguard measure? Through invocation of the WTO's safeguards provisions and notice.

Finally, consider Article 8.3 of the Safeguards Agreement. In relevant part, Article 8.3 provides that a "Member **proposing** to apply or extend a safeguard measure shall provide adequate opportunity for prior consultation with those Members having a substantial interest as exporters" of the product concerned. Again, this reference to "proposing" supports the U.S. position regarding invocation. The term "proposing" presumes the existence of a notification by a Member seeking to take action pursuant to Article XIX and the Safeguards Agreement.

44. We now turn to Turkey's specific arguments in support of its flawed interpretation of the WTO's safeguards provisions. According to Turkey, "the existence of a safeguard measure is based on an objective examination." This argument completely misses the point.

45. The United States agrees that the applicability of the WTO's safeguards disciplines to a particular matter requires an "objective examination." As the United States has explained throughout this proceeding, the first step in the analysis is the objective examination of whether a Member has invoked the right to take action pursuant to Article XIX. In fact, the examination of whether a Member has taken an action in the past – here, the invocation of the safeguards agreement – is the type of objective analysis evaluated in every dispute settlement proceeding. It is no different than the analysis of whether a Member has adopted a measure that increases duties on the products of another Member.

46. Here, an objective examination shows that the United States has not invoked Article XIX; therefore, any objective examination must conclude with the determination that Article 8.2 of the Safeguards Agreement is simply not applicable in this dispute.

III. TURKEY RELIES ON WTO REPORTS THAT ARE NOT RELEVANT HERE

47. Turkey's failure to ground its justification on the relevant text of the WTO Agreement is a fatal flaw of its approach. Instead, Turkey derives its legal theory from the reasoning of panel and

Appellate Body reports in *Indonesia – Iron or Steel Products*. That dispute, however, is not applicable here because it did not address a situation where a Member has **not** invoked Article XIX of the GATT 1994.

48. The panel and Appellate Body reports in *Indonesia – Iron or Steel Products* do not support Turkey's extreme position. For instance, in that dispute, the panel recognized that a "fundamental question" was whether the measure should properly be considered a safeguard measure within the meaning of Article 1 of the Safeguards Agreement. The panel pointed out that "not *any* measure suspending, withdrawing or modifying a GATT obligation or concession will fall within the scope of Article XIX:1(a)."

49. And, in *Indonesia – Iron or Steel Products*, the disputing parties concurred that the Indonesian measure at issue was a safeguard measure. Why? Because the dispute followed invocation and notification under Article XIX and the Safeguards Agreement. Thus, in that dispute, the disputing parties concurred that the measure at issue in that dispute met what – in most situations – is the fundamental criterion for establishing the existence of a safeguard measure: namely, that the Member taking action **invokes** Article XIX of the GATT 1994 as the legal basis for its measure.

50. Furthermore, the Appellate Body in *Indonesia – Iron or Steel Products* adopted a multi-step analysis to determine whether the measure at issue was a safeguard measure under Article XIX. Under the first step of that analysis, a WTO Member must **invoke** the right under Article XIX for a measure to be considered a safeguard within the meaning of Article 1 of the Safeguards Agreement. Of course, as in *Indonesia – Iron or Steel Products*, invocation is not a sufficient condition for the measure to fall under the WTO safeguards discipline because the measure still needs to meet the other conditions of Article XIX and the Safeguards Agreement. But if the first step of invocation and notification does not take place, the measure is **not** a measure taken pursuant to Article XIX.

IV. TURKEY'S APPROACH FAILS UNDER ITS OWN TEST

51. Significantly, even under the analytical approach that Turkey urges the Panel to adopt, the relevant factors still support the U.S. position. Turkey derives its legal theory from the Appellate Body's report in *Indonesia – Iron or Steel Products*. In that dispute, the Appellate Body reasoned that as part of an assessment of whether a measure presents the features of a safeguard measure, a panel should:

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

52. Regarding the first factor (domestic law), the U.S. security measures were imposed under 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**." In contrast, under U.S. domestic law, safeguards measures are taken pursuant to Section 201 of the Trade Act of 1974.

53. Regarding the second factor (domestic procedures), the Bureau of Industry and Security of the U.S. Department of Commerce conducted the investigation pursuant to Section 232. The mission of the Bureau of Industry and Security is to protect the security of the United States, including its national security, cyber security, and homeland security. In contrast, the U.S. International Trade Commission is the only competent authority in the United States authorized to conduct safeguards investigations.

54. 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 relevant safeguard because the United States did not invoke Article XIX of the GATT 1994.

55. Accordingly, were the Panel to assess the U.S. security measures under the factors suggested by Turkey, it would conclude that the U.S. security measures do not qualify as safeguard measures under Article XIX of the GATT 1994.

V. ADOPTING TURKEY'S APPROACH WOULD UNDERMINE THE WTO

56. Turkey has taken the position that any measure that a Member deems inconsistent with a GATT obligation is a "safeguard." And, on that basis, that Member can decide to adopt retaliatory measures disguised as "rebalancing" measures.

57. This is a stunning position. It is our understanding that, since 1947, no Member has ever taken this view of Article XIX of the GATT 1994. Nor, since 1995, of Article XIX plus the WTO Safeguards Agreement. Moreover, Turkey's position would radically undermine the WTO dispute settlement mechanism and the WTO as a whole.

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 SAFEGUARD MEASURE

58. 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."

59. 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.

60. 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)

61. 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.

62. 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**.

63. 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.

64. 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

65. 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.

66. 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

67. 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".

68. 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.

69. 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.

70. 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.

71. 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.

72. 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.

73. 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

74. 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.

75. 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.

76. 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.

77. Second, Article XIX 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.

78. 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.

79. 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.

80. 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, Turkey'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.

81. 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

82. 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.

83. 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." 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.

84. 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."

85. 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**."

86. 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).

87. 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 TURKEY DO NOT FALL WITHIN THE SCOPE OF THE SAFEGUARDS AGREEMENT

88. Turkey's suggestion that the U.S. security measures under Section 232 of the Trade Expansion Act of 1962 (Section 232) are safeguards cannot justify Turkey'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.

89. 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 Turkey 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 Turkey 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

90. 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."

91. 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."

92. 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.

93. 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.

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

95. The central question in this dispute is whether Turkey has any justification for breaching Articles I and II of the GATT 1994. Turkey 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.

96. As detailed below, Turkey's characterization of its additional duties as rebalancing measures is flawed in several respects. First, Turkey 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 Turkey'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 Turkey'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, Turkey is mistaken that the time limits in Article 8.2 of the Safeguards Agreement support its argument for unilateral rebalancing measures. For these reasons, Turkey's justification for its breach of Articles I and II of the GATT 1994 must be rejected.

97. Turkey does not ground its justification on the relevant text of the WTO Agreement. Instead, Turkey 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.

98. 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.

99. Moreover, Turkey 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."

100. Furthermore, even under Turkey's suggested approach, there is no U.S. safeguard measure. As discussed, Turkey 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.

101. 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**."

102. 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.

103. 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.

104. Accordingly, were the Panel to assess the U.S. security measures under the Appellate Body's reasoning as suggested by Turkey, 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

105. The United States initiated this dispute in response to Turkey'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, Turkey does not contest the factual basis of the U.S. claims. Nor does Turkey 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 Turkey's Schedule.

106. Instead, Turkey 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.

107. At the outset, the United States would like to emphasize a key point regarding terminology. This issue is important because the terminology can influence, either subtly or more directly, the

main legal question at issue in this dispute. The discussion in these proceedings sometimes has been framed as whether there is a "safeguard measure." The use of this phrasing, however, is misleading. The more appropriate framing is whether the safeguards disciplines *apply*.

108. 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 does Article XIX say? 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.

109. 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 *potentially* be subject to Article XIX, if it applies. Thus, the text of the WTO Agreement is clear: there is no special type of measure that, standing alone, can somehow be defined as a "safeguard measure." Rather, the proper understanding is that Article XIX and the Safeguards Agreement do not apply to specific "types" of measures, but only apply when all the circumstances described in Article XIX apply. And, as the United States has explained throughout this proceeding, the text of Article XIX makes clear that the key circumstance for deciding whether Article XIX applies is whether the Member adopting the measure that would otherwise be GATT-inconsistent invokes its rights under Article XIX to take a measure that would otherwise be inconsistent with its WTO commitments. For this reason, the United States will frame the legal question at issue as whether the safeguards disciplines apply – and not whether or not there exists a relevant "safeguard measure."

110. Turning to this question of whether the safeguards disciplines apply in this dispute, again, the answer is 'no.' As the United States has explained, Article XIX of the GATT 1994 and the Safeguards Agreement make clear that invocation through notice is a fundamental, condition precedent for a Member's exercise of its right to take action under Article XIX, and for the application of safeguards disciplines to that action. The United States plainly has not invoked Article XIX and, therefore, the safeguards disciplines do not apply.

111. 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 Turkey asks the Panel to adopt.

112. In other words, Turkey 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. Turkey is challenging those U.S. measures in a separate dispute. However, instead of following the WTO's dispute settlement procedures, Turkey 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. And Turkey is now seeking to justify its additional duties by advancing a baseless interpretation of Article XIX of the GATT 1994 and the Safeguards Agreement.

113. Besides lacking any support in the text of the WTO Agreement, Turkey'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. TURKEY'S ADDITIONAL DUTIES MEASURE IS INCONSISTENT WITH ITS OBLIGATIONS UNDER ARTICLES I AND II OF THE GATT 1994

114. The United States has established the facts and demonstrated that Turkey'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.

115. Turkey has failed to rebut the U.S. *prima facie* case by challenging the factual or legal basis of the U.S. claims. Indeed, Turkey has noted that "the factual descriptions of the measures set out in the United States' First Written Submission are broadly accurate."

116. While Turkey attempts to revise down the number of tariff lines affected by its measure in asserting that the Panel must evaluate Presidential Decision 1130/2019 – a measure adopted *after* panel establishment – this 2019 measure is legally insignificant as it is clearly outside the Panel's terms of reference. The 2019 measure is not identified in the U.S. panel request, and the DSB established the Panel to examine the matter in that request.

117. Turkey grounds its argument in prior appellate reports arguing that panels may consider post-establishment measures that do not change the "essence" of the measure at issue. The United States has explained that this approach has no basis in the text of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), particularly Articles 6.2 and 7.1. Moreover, even under the incorrect "essence" approach, the 2019 measure may not be considered as it would change the "essence" of the measure under review. That is, Turkey alleges that the 2019 measure reduces the duty rates for certain tariff lines. This could *materially* impact the content of the measure being reviewed and therefore the U.S. claims under Article II.

118. Further, Turkey has not raised any interpretive arguments regarding the U.S. claims under Articles I and II. In fact, with respect to Article II, Turkey has stated that it does not object to the U.S. methodology for identifying bound rates, and has confirmed that a violation of Article II:I(b) would result in a consequential violation of Article II:I(a).

119. Instead of raising arguments under Articles I and II, Turkey 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 Turkey's obligations under Articles I and II.

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

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

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

121. Turkey continues to assert that its Article 8.2 argument cannot be characterized as a "defense" or "justification", and therefore 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 Turkey has raised safeguards disciplines to rebut the U.S. *prima facie* case of a breach of the GATT 1994. Therefore, Turkey 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 Turkey – not the United States – that is arguing that the safeguards disciplines are applicable, and therefore it is Turkey'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.

122. Turkey'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.

123. 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 Agreement on Safeguards. Thus, without invocation, a Member cannot and has not taken action pursuant to Article XIX and the safeguards disciplines do not apply.

124. 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.

125. 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.

126. 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.

127. 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.

128. Numerous 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. 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 an important context for interpreting Article XIX.

129. 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 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.

130. 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.

131. Turkey attempts to dismiss the requirement to give notice in Article XIX as a procedural requirement, comparing the requirement to the publication requirement in Article 3.1 of the

Safeguards Agreement. Turkey's attempt to compare the notice requirement in Article XIX to the publication requirement in the Safeguards Agreement is unavailing.

132. Article 1 of the Safeguards Agreement provides that the 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*." Therefore, requirements that are set forth only in the Safeguards Agreement cannot address whether a measure is one "provided for in Article XIX of GATT 1994" and are fundamentally different from the requirement to give notice in writing in Article XIX.

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

133. Here, 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. Turkey does not dispute these key facts. Nonetheless, Turkey 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*. Turkey continues to fail to recognize the unusual circumstance addressed by that report and even that the report did not purport to identify all of the conditions precedent for application of the safeguards disciplines.

134. The Appellate Body did not address the requirement to give notice in Article XIX in any detail, because in fact *Indonesia sought to invoke its rights under Article XIX*. Turkey's argument is simply unavailing.

D. Turkey's approach cannot be sustained in light of the relevant context of the DSU.

135. Turkey's approach also cannot be sustained under an interpretation in light of the relevant context of 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.

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

137. 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.

138. Turkey'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 DSU Article 23.

E. Under Turkey'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.

139. Under Turkey's argument, any measure that breaches a Member's GATT obligation can be construed as a safeguard measure and give rise to a "right" to "rebalance" for another Member. In particular, Turkey argues that it has the right to take retaliatory measures because certain U.S. Section 232 measures allegedly "suspend, in whole or in part, a GATT obligation" or "withdraw … a GATT concession." Turkey adds an argument that the U.S. Section 232 measures present the second "constituent feature" because, in its view, Section 232 measures "pursue the 'specific objective' of

preventing or remedying serious injury to the domestic industry." This second alleged feature, however, provides no meaningful limitation on Turkey'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 here, it is Turkey itself that is attributing such a "design" to the U.S. measures.

140. Contrary to Turkey's contentions, if a Member imposes duties on a non-MFN basis or in excess of its tariff bindings, and it does *not* invoke Article XIX, then the Member would simply be in breach of its GATT obligation. Other Members could then 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.

141. Instead, it is Turkey's proposed approach that risks undermining the legitimacy of the WTO and its dispute settlement system. In such a system, 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, TURKEY 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"

142. 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, Turkey's justification would.

143. Contrary to Turkey'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.

144. 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 Agreement. Under that provision, only measures sought, taken, or maintained pursuant to Article XIX fall within the scope of the Safeguards Agreement. Where a Member invokes Article XXI (a provision of GATT 1994 other than Article XIX) as the basis for its action, the Safeguards Agreement "does not apply."

145. In attempting to argue that Article 11.1(c) does not preclude the application of the Safeguards Agreement, Turkey suggests an understanding of the terms "sought, taken or maintained" that primarily focuses on the temporal aspects of these terms. However, Article 11.1(c) confirms that the Safeguards Agreement "does not apply" to such measures, and the terms "sought, taken or maintained" are not simply temporal in nature. Further, these terms confirm that the Safeguards Agreement does not constrain a Member's ability to take action – or to seek to take action, or to maintain action – pursuant to provisions of the GATT 1994 other than Article XIX, such as Article XXI.

146. 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.

147. The U.S. Section 232 measures cited by Turkey 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 Turkey simply do not fall within the scope of the Safeguards Agreement. Therefore, no "right" of "rebalancing" can arise for another Member, including Turkey.

148. 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 Article XIX, no "right" to "rebalancing" can arise for another Member.

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

149. Given Turkey's comment in its closing statement about Article 12.8 of the Safeguards Agreement – that the United States has not provided a response to Turkey's argument regarding this provision – we would like to address this issue briefly before turning to our prepared remarks.

150. Turkey points to the counter-notification provision as undermining the U.S. argument that invocation is a condition precedent for the applicability of safeguards disciplines. That is not the case. We want to draw your attention to the text of Article 12.8. It reads "…all laws, regulations, administrative procedures and any measures or actions *dealt with in this Agreement* that have 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" make clear, this provision relates only to notifications that Members are required to make under the Safeguards Agreement. By its terms, this provision does not envision a Member notifying the Committee on Safeguards of another Member's invocation pursuant to Article XIX:2 of the GATT 1994.

151. Further to that, Article 12.8 permits counter-notification where a measure or action is required to be notified under the Safeguards Agreement. Article 12.1 requires notification of "taking a decision to apply" a "measure". That is not the same thing as giving notice of a proposed suspension, modification or withdrawal of a WTO obligation or concessions under Article XIX of the GATT 1994.

152. The United States will close by elaborating on two key issues. First, 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."

153. 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.

154. The starting point, which Turkey continually ignores in all its argumentation, is that any measure involved in a safeguards situation is already disciplined. In fact, the measure is highly disciplined – it is inconsistent with an obligation set out in the GATT 1994. Further, the Member wishing to adopt the measure must acknowledge this inconsistency, and seek permission to suspend the obligation through its invocation of Article XIX. Thus, with *or without* an invocation of the right to try to obtain temporary permission to suspend a GATT obligation, the measure sought to be taken is, *by definition,* inconsistent with GATT obligations.

155. It is only the Member that wishes to adopt a safeguard that can choose to attempt to exercise the right, and thereby choose to enter into the process of trying to obtain the temporary permission to suspend the relevant obligation. That process involves consultations with other trading partners. And, of special interest to Turkey in this dispute, the process can lead to rebalancing measures if no agreement is reached in those consultations.

156. Despite the clear language in Article XIX, Turkey is unwilling to acknowledge that invocation of the safeguards provisions is the right of the Member wishing to adopt a safeguard. Ignoring the text, Turkey tries to frame the issue in terms of fairness. According to Turkey, it must have the "right to rely on Article 8" or the "right to rebalance". Otherwise, what is a Member in Turkey's position to do?

157. The answer, however, is simple – Article XIX does not provide special, super penalties for certain types of measures; rather the measures involved under Article XIX are essentially just breaches of the GATT 1994. And the right to take a rebalancing measure is not a general one involving breaches of GATT obligations, it only applies in the specific context of the proceedings described in Article XIX, following the invocation of those procedures by the Member seeking to adopt a safeguard.

158. Accordingly, as for any asserted breach of the GATT 1994, Turkey has a clear path for relief – namely, to pursue dispute settlement under the DSU. In fact, Turkey has done so by bringing a

separate dispute. So in the situation in this dispute, there is no unfairness to Turkey. As for any Member claiming a breach of a WTO obligation, Turkey must wait for a decision in the separate dispute it has brought against the United States concerning those measures *before* taking retaliatory action. Turkey does not like this answer. But this is how the system is designed to work.

159. We will now turn to the systemic implication of Turkey'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 the safeguards disciplines, and may immediately and unilaterally retaliate against that measure. Under Turkey'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.

160. Turkey's approach would fundamentally reverse the basic rule, as stated in the DSU, that no Member shall unilaterally declare another Member in breach of the WTO and unilaterally adopt retaliatory measures without first proceeding with dispute settlement. It is difficult to imagine any outcome more corrosive to the operation of 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 78

161. 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.

162. 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.

163. 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.

164. 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).

165. 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.

166. 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.

167. 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 96

168. 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.

169. 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.

170. 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 TÜRKIYE

1 INTRODUCTION

1.1. This integrated executive summary contains the arguments presented by the Republic of Türkiye (Türkiye) in its written submissions, oral statements, responses to questions, and comments on the United States' responses in the present proceedings.

1.2. In this dispute, the United States challenges duties imposed by Türkiye on certain United States goods in June and August 2018. These duties were imposed by Türkiye in response to safeguard measures on steel and aluminium products that were introduced by the United States in March 2018 and subsequently modified on several occasions, including by increasing the additional duties on steel products from Türkiye in August 2018.[1]

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. This is precisely the purpose of the Turkish measures at issue in this dispute.[2]

1.4. The United States adopted its safeguard measures without complying with its obligation 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. 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, in order to seek agreement on compensation.[3]

1.5. Thus, Türkiye had no choice other than to proceed to the suspension of equivalent concessions in order to defend its legitimate economic interests. The additional duties adopted by Türkiye that are being challenged by the United States in the present proceedings constitute this suspension of equivalent concessions. Türkiye duly notified these actions and their legal basis to the WTO membership.[4] Hence, the United States, along with the rest of the WTO membership, was fully aware of Türkiye's approach to this matter.[5]

1.6. 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 this dispute suffers from a fundamental flaw. The proper legal basis for this dispute is the WTO legal regime governing safeguard measures. Article 8 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 establish an affirmative right of 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.[6]

1.7. The United States argues that the measure at issue is not a safeguard measure and that, therefore, neither its additional duties nor the Turkish additional duties fall under the Agreement on

[1] Türkiye's First Written Submission, paras. 1.1-1.2.
[2] Türkiye's First Written Submission, para. 1.2.
[3] Türkiye's First Written Submission, para. 1.4.
[4] See Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/L/1242, G/SG/N/12/TUR/6, 22 May 2018; Immediate Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, G/L/1242/Suppl. 1, G/SG/N/12/TUR/6/Suppl.1, 15 August 2018, See also Türkiye's First Written Submission, para. 1.6.
[5] Türkiye's First Written Submission, para. 1.5.
[6] Türkiye's First Written Submission, para. 1.7.

Safeguards or Article XIX of the GATT 1994. As the United States has not brought its claims under the correct legal provisions of the covered agreements, those claims should be dismissed *in toto*.[7]

1.8. Where Article XIX of the GATT 1994 and the Agreement on Safeguards apply, no direct stand-alone claims under Articles I and II (or XI) of the GATT 1994 may be brought. This is because, under Article XIX:1(a) of the GATT 1994, Members are "free … to suspend [any GATT] obligation in whole or in part or to withdraw or modify the concession". In these circumstances, claims under Articles I, II, and XI are merely subsidiary claims. A violation of these provisions may be found only after an assessment of claims under Article XIX of the GATT 1994 and the Agreement on Safeguards.[8]

1.9. The United States attempts to circumvent these basic rules by arguing that the applicability of the Agreement on Safeguards reflects an "affirmative defence" by Türkiye. The United States thus argues that, once it has "demonstrated" a violation of Articles I and II of the GATT 1994, it is for Türkiye to demonstrate, by way of justification, that its measures fall under Article XIX of the GATT 1994 and the Agreement on Safeguards, and to demonstrate further that its measures comply with these obligations.[9]

1.10. That is incorrect. The applicability of a particular provision, or of an entire agreement, to a measure is a threshold question to be resolved by a panel or the Appellate Body, according to their core functions set out in Articles 11 and 17.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This question of applicability of an entire set of disciplines (e.g. safeguards) is fundamentally distinct from an "affirmative defence", under which a defendant has the burden of demonstrating that its measures comply with the relevant exception.[10]

1.11. The United States cannot compensate for its failure to raise safeguards-related claims by labelling the provisions of the Agreement on Safeguards as "affirmative defences". Rather, in the event that the Panel were to determine – as it should – that both the United States' measures on steel and aluminium and the Turkish measures at issue in this dispute fall under Article XIX of the GATT 1994 and the Agreement on Safeguards, the Panel would have no choice but to end its analysis at that juncture and to reject the United States' claims.[11]

1.12. Türkiye's integrated executive summary is structured as follows: In Section 2, Türkiye summarises the key facts in this dispute. In Section 3, Türkiye summarises the United States' legal claims. In Section 4, Türkiye summarises its own legal arguments. In Section 5, Türkiye summarises its conclusions and requests for findings.

2 FACTUAL BACKGROUND

2.1 The United States' Section 232 measures

2.1. The United States Department of Commerce (DOC) conducted two investigations on the basis of Section 232 of the 1962 Trade Expansion Act (Section 232). 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 the United States' 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.[12]

2.2. The reports of these two investigations form the legal basis for the Presidential Proclamations by means of which the President of the United States imposed the United States' import restrictions on steel and aluminium products. In total, between March 2018 and August 2018, the President issued 11 of these Presidential Proclamations.[13] The precise form and extent of the import measures, as set out in the Proclamations, evolved over time, as did the list of countries temporarily and then definitively exempted from the measures.[14] In addition, Türkiye understands that the United States

[7] Türkiye's First Written Submission, para. 1.11.
[8] Türkiye's First Written Submission, para. 1.16.
[9] Türkiye's First Written Submission, para. 1.17.
[10] Türkiye's First Written Submission, para. 1.18.
[11] Türkiye's First Written Submission, para. 1.20.
[12] Türkiye's First Written Submission, para. 2.8.
[13] Türkiye's First Written Submission, para. 2.9.
[14] Türkiye's First Written Submission, para. 2.9.

has lifted its steel and aluminium tariffs on Canada and Mexico, based on agreements it concluded recently with these Members.[15]

2.3. The United States' safeguard measures consist of:

- additional duties on a wide range of steel and aluminium products, duties which are well above the United States' tariff bindings in the United States' GATT Schedule of Concessions;[16]
- quantitative restrictions, on steel or aluminium, or both;[17] and
- certain unpublished measures in the form of voluntary export restraints.[18]

2.2 Türkiye's measures

2.4. Following the initial imposition of the United States' safeguard measures in March 2018, Türkiye and certain other affected Members informed the United States that they considered these measures to be safeguard measures and, therefore, requested an opportunity to consult with the United States pursuant to Article 12.3 of the Agreement on Safeguards.[19]

2.5. Türkiye and other affected Members sought to communicate with the United States on the nature of the measures and requested consultations with the United States. However, the United States continued to insist that its measures were not in fact safeguard measures and refused to consult so as to maintain substantially equivalent concessions.[20]

2.6. Therefore, Türkiye and other affected Members were left with no choice but to exercise their right to suspend equivalent concessions or other obligations. As a result, on 21 May 2018, Türkiye notified the Council for Trade in Goods and the Committee on Safeguards to this effect, pursuant to Article 12.5 of the Agreement on Safeguards, reserving its right to put into effect certain additional duties as of 21 June 2018.[21]

2.7. On 15 August 2018, without further explanation, the United States doubled the duty applicable to imports of steel from Türkiye. In response, and in order to maintain a level of substantially equivalent concessions, Türkiye was compelled to revise the additional duties so as to reflect the increased United States' safeguard duties. As a result, on 15 August 2018, Türkiye notified the WTO and other WTO Members that it reserved its right to impose additional duties in the amount equivalent to the amount of the US increased additional duties for Türkiye. Türkiye put these

[15] Türkiye's First Written Submission, para. 2.9.

[16] Türkiye's First Written Submission, para. 2.6. The measures include: (i) additional duty of 25 per cent *ad valorem* that applies to steel products originating in all countries, except Argentina, Australia, Brazil and South Korea; (ii) additional duty of 50 per cent *ad valorem* that applied to steel products originating in Türkiye; and (iii) additional duty of 10 per cent *ad valorem* that applies to aluminium articles originating in all countries, except Argentina and Australia. See Presidential Proclamation 9705, para. 8, clause (2) as amended; Presidential Proclamation 9772; Presidential Proclamation 9704, para. 7, clause (2), as amended.

[17] Türkiye's First Written Submission, para. 2.6. The measures include: (i) country-specific quantitative limitations on steel goods that apply to Argentina, Brazil, and South Korea; and (ii) country-specific quantitative limitations on imports of aluminium goods that apply to Argentina. See Presidential Proclamation 9740 clause (1), Annex (Part B); Presidential Proclamation 9759, paras. 4-5, clauses (1), (2); Presidential Proclamation 9758, clause (2), Annex (Part B).

[18] Türkiye's First Written Submission, para. 2.6. The measures include various unpublished voluntary export restraints, orderly marketing arrangements, and similar measures, such as export moderation and export price monitoring, agreed upon between the United States and certain other WTO Members, such as Australia, Argentina, Brazil, Canada, Mexico, and South Korea. See Presidential Proclamation 9740 para. 4; Presidential Proclamation 9759, paras. 4-5; Presidential Proclamation 9758, para. 5; Presidential Proclamation 9893 of 19 May 2019, paras. 4-6; Presidential Proclamation 9894 of 19 May 2019, paras. 5-7; Joint Statement by the United States and Canada on Section 232 Duties on Steel and Aluminium; and Joint Statement by the United States and Mexico on Section 232 Duties on Steel and Aluminium.

[19] Türkiye's First Written Submission, para. 2.11.

[20] Türkiye's First Written Submission, paras. 2.12-2.16.

[21] Türkiye's First Written Submission, para. 2.16.

measures into effect on the same day, with respect to the same products that were subject to the initial set of suspensions of concessions.[22]

2.8. On 21 May 2019, the United States announced that it was reducing the steel duty safeguard applicable to Türkiye from 50 per cent back to the original level of 25 per cent. Effectively, this meant that the United States returned the safeguard duties back to the level they had been prior to August 2018. Subsequently, Türkiye also reduced its additional duties effective as of 21 May 2019, to the level prior to 15 August 2018.[23]

3 SUMMARY OF THE UNITED STATES' CLAIMS UNDER ARTICLES I:1, II:1(A) AND II:1(B) OF THE GATT 1994

3.1. The claims placed before the Panel by the United States are based on Articles I:1, II:1(a) and II:1(b) of the GATT 1994.

3.2. First, the United States argues that Türkiye has acted inconsistently with the most-favoured-nation treatment obligation in Article I:1 of the GATT 1994, because it has imposed the additional duties on the United States alone, but has not imposed any such additional duties on any other Member.[24]

3.3. Second, the United States further argues that Türkiye violates Article II:1(b), first or second sentence, and consequentially Article II:1(a). Under Article II:1(b), first sentence, the United States claims that Türkiye has exceeded its tariff bindings. Under Article II:1(b), second sentence, the United States claims that Türkiye is applying other duties and charges not recorded in Türkiye's GATT Schedule.[25] Finally, the United States asserts that, "[s]ince Article II:1(b) proscribes the type of measures that are equally inconsistent with Article II:1(a), in demonstrating a breach of the former, the United States also established a breach of the latter".[26]

3.4. As Türkiye demonstrates below, none of the provisions invoked by the United States is applicable to Türkiye's measures. Instead, these measures fall under Article XIX of the GATT 1994 and under the Agreement on Safeguards, because they reflect a suspension of equivalent concessions within the meaning of Article 8 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994. This is because, in turn, the measures on steel and aluminium imposed by the United States are safeguard measures within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards.

4 TÜRKIYE'S LEGAL ARGUMENTS

4.1 The United States' Section 232 measures are safeguard measures within the meaning of Article XIX of the GATT1994 and the Agreement on Safeguards

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

4.1. The term "safeguard measure" is not explicitly defined in the text of WTO covered agreements. According to Article 1 of the Agreement on Safeguards, the agreement contains rules "for the application of safeguard measures *which shall be understood to mean those measures provided for in Article XIX of GATT 1994*" (emphasis added). The existence of a safeguard measure within the meaning of Article 1 and Article XIX of the GATT 1994 is thus a threshold issue. A panel is required to make that determination independently and on an objective basis. As prior cases demonstrate, a panel may decide independently whether a measure constitutes a safeguard measure even when both parties agree that the measure is a safeguard measure.[27]

4.2. Given the absence of an explicit definition in the text of the WTO agreements, the governing standard for determining whether a measure is a safeguard measure is the standard clarified by the

[22] Türkiye's First Written Submission, paras. 2.18-2.19.
[23] Türkiye's First Written Submission, para. 2.20.
[24] United States' First Written Submission, paras. 22-38.
[25] United States' First Written Submission, paras. 39-55.
[26] United States' First Written Submission, para. 53.
[27] Türkiye's First Written Submission, para. 4.7.

Appellate Body in *Indonesia – Iron or Steel Products*. The Appellate Body has identified the following two 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";[28] 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".[29]

4.3. The Appellate Body has provided specific guidance on the second element. Thus, the Appellate Body has emphasized that, for a WTO safeguard to exist, the suspension of a GATT obligation "must be designed to pursue a specific objective, namely preventing or remedying serious injury to the Member's domestic industry".[30] The Appellate Body also stated that there must be a "demonstrable link" between the obligations being suspended, on the one hand, and the objective of preventing or remedying serious injury to the domestic industry, on the other hand.

4.4. Whether this link exists should be examined by the Panel in order to determine which aspects are "the most central" to the measure.[31] In determining these "most central" aspects, the Appellate Body noted that a panel should "evaluate and give due consideration to all relevant factors". These "relevant factors" include 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. At the same time, the Appellate Body added that "no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure".[32]

4.5. As Türkiye explains below, the United States' measures satisfy both prongs of the Appellate Body's test. The measure suspends or withdraws concessions, and this suspension is designed to prevent or remedy serious injury. As a threshold point, Türkiye first addresses an important systemic point raised in the United States' submission, i.e., the United States' self-invocation theory.

4.1.2 Contrary to the United States' arguments, whether a measure is a safeguard measure is to be determined on the basis of an objective analysis

4.1.2.1 The United States' self-invocation theory is inconsistent with Article 11 of the DSU

4.6. Throughout this dispute, the United States has argued that its measures on steel and aluminium are not safeguard measures. This is because the United States did not intend for these measures to fall under WTO safeguard rules and because it has not labelled these measures as "safeguard" measures for purposes of domestic law. The United States has also argued that, in order for the Safeguard Agreement to apply, a Member must "invoke" the WTO safeguard rules by submitting a notification to the WTO Safeguard Committee under Article 12.1 of the Safeguards Agreement.[33]

4.7. The United States' self-invocation theory is fundamentally flawed. It is inconsistent with: (i) the explicit rules in Article 11 of the DSU; (ii) a long-standing approach of the Appellate Body and previous panels to determine objectively the applicability of WTO covered agreements to challenged measures;[34] and (iii) the objective features of "safeguard measures" outlined in Article XIX:1(a) of the GATT 1994, as recently clarified by the Appellate Body in *Indonesia – Iron or Steel Products.*[35]

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[28] Türkiye's First Written Submission, para. 4.8. See also Appellate Body Report, *Indonesia – Iron or Steel Products,* para. 5.60.

[29] Türkiye's First Written Submission, para. 4.8. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.60 and 5.64.

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

[31] Türkiye's First Written Submission, para. 4.9. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.56, 5.58, 5.60, 5.64, 5.68, and 5.70.

[32] Türkiye's First Written Submission, para.4.10. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

[33] Türkiye's First Written Submission, para. 4.20.

[34] Türkiye's First Written Submission, para. 4.18.

[35] Contrary to its arguments in these proceedings, the United States noted in *Indonesia – Iron or Steel Products* that "the Panel was entitled to examine *on its own motion* whether the measure at issue constitute[d]

4.8. First, pursuant to Article 11 of the DSU, the determination of whether WTO law applies or which specific provisions of WTO law apply to a given measure does not belong to a Member, under its domestic law, but rather to a WTO panel. The panel's objective assessment focuses on the objective features of a measure, such as its design structure and intended operation, rather than on any unilateral domestic categorization of the measure.[36] The Appellate Body and prior panels have used this approach on several occasions to determine the applicability of WTO safeguard rules to the measure at issue.

4.9. For instance, in *Indonesia – Iron or Steel Products*, the Appellate Body confirmed that "[a] panel's assessment of claims brought under the Agreement on Safeguards may … require a threshold examination of whether the measure at issue qualifies as a safeguard measure within the meaning of Article XIX of the GATT 1994".[37] According to the Appellate Body, this assessment is part of a panel's duty under Article 11 of the DSU.[38]

4.10. This applies regardless of whether the parties disagree on the proper legal characterization. Thus, in *Dominican Republic – Safeguard Measures* the complainant characterized the measures at issue as safeguard measures, and the respondent contested this characterization.[39] In contrast, in *Indonesia – Iron or Steel Products* and *India – Iron and Steel Products*, *all disputing parties* agreed that the measures at issue constituted safeguard measures.[40] *In both instances*, the panel conducted its own independent assessment of whether the measures were safeguard measures.

4.11. Second, in a consistent line of previous decisions, the Appellate Body and prior panels have found that the categorization of a measure under domestic law is not dispositive for its categorization under WTO law.[41] For instance, in *China – Auto Parts*, the Appellate Body examined whether a specific charge at issue fell under Articles II:1(b) or III:2 of the GATT 1994 and clarified that "a degree of caution must be exercised in attributing decisive weight to characteristics *that fall exclusively within the control of WTO Members*, 'because otherwise Members could determine by themselves which of the provisions would apply to their charges'".[42] In the same case, the Appellate Body noted that "the way in which a Member's domestic law characterizes its own measures, although useful, cannot be dispositive of the characterization of such measures under WTO law".[43]

4.12. In sum, the United States' self-invocation theory is inconsistent with Article 11 of the DSU and well-settled WTO dispute settlement practice. In the following Section, Türkiye demonstrates that this theory also has no basis in WTO safeguard disciplines.

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a safeguard measure". This examination can be meaningful only if it is based on objective features of the challenged measure, rather than on the regulating Member's subjective, unilateral determination of the legal character of that measure. Türkiye's First Written Submission, para. 4.18, citing Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.28. (emphasis added)

[36] Türkiye's First Written Submission, para. 4.14. See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 593 and Appellate Body Report, *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, para. 5.127.

[37] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.

[38] Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.32-5.33.

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

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

[41] See Türkiye's response to Panel Question 62; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.

[42] Türkiye's response to Panel Question 22. See also Appellate Body Report, *China – Auto Parts*, para. 178. (emphasis added)

[43] The Appellate Body explained as follows:

> [A] panel's determination of whether a specific charge falls under Article II:1(b) or Article III:2 of the GATT 1994 must be made in the light of the characteristics of the measure and the circumstances of the case. … A panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics. Having done so, the panel must then seek to identify the leading or core features of the measure at issue, those that define its "centre of gravity" for purposes of characterizing the charge that it imposes as an ordinary customs duty or an internal charge.
>
> See Appellate Body Report, *China – Auto Parts*, para. 178; and Türkiye's response to Panel Question 22.

4.1.2.2 The United States' self-invocation theory has no basis in WTO safeguard rules

4.13. One of the key elements of the United States' position is that WTO law contains no definition of the term "safeguard". Instead, the United States argues, Article XIX establishes merely a "process" for the invocation of safeguard rules, in which the first step for a regulating Member is to notify its measure.[44]

4.14. This is incorrect. As Türkiye explained in Section 4.1.1, the Appellate Body has identified two definitional features of a safeguard measure: (i) the nature of a safeguard (i.e., suspension of a GATT obligation); and (ii) its purpose. These features are grounded in the text of Article XIX:1(a), its context, object and purpose, and are also confirmed by the negotiating history of the Agreement on Safeguards.[45]

4.15. Nothing in the text of Article XIX or the Agreement on Safeguards suggests that notice is a condition precedent for the applicability of WTO safeguard rules. In reality, the United States appears to ignore that 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 substantive and procedural requirements of a safeguard measure.[46] The "notice" referred to by the United States is not a question of the *definition* or the *existence* of a safeguard measure, but rather a question of *compliance* with a procedural rule applicable to safeguard measures. Put differently, a failure to notify a safeguard measure does not prevent the measure from being a safeguard measure. Instead, a failure to notify a safeguard measure is a violation of the requirements that a safeguard measure must satisfy in order to be consistent with WTO law.

4.16. To further illustrate the distinction between *definition/existence* and *compliance*, consider other requirements under WTO safeguard disciplines. An incorrect or a missing determination of unforeseen developments, or increased imports, or serious injury, does not mean that WTO safeguard rules do not apply. Rather, the measure is still a safeguard measure as long as it meets the definitional criteria explained above. The measure will, however, be inconsistent with Article XIX of the GATT 1994 and the relevant provisions of the Agreement on Safeguards.

4.17. Any other conclusion would lead to unreasonable results. A Member could avoid the applicability of potentially onerous rules simply by violating them.[47] The same conclusion holds true for procedural requirements, as explicitly noted by the Appellate Body.[48] It would not be meaningful to argue that a safeguard measure for which the importing Member did not comply with the procedural requirements of Article 12 of the Agreement on Safeguards ceases to be, for this reason, a safeguard measure. In keeping with this logic, in *Indonesia – Iron or Steel Products*, the Appellate Body referred to notifications to the WTO Committee on Safeguards as a relevant, but not decisive, factor in determining the applicability of WTO safeguard rules.[49]

4.18. Next, the United States also relies on the wording of Article 11.1(c) of the Agreement on Safeguards to argue that an importing Member can decide unilaterally whether a measure falls within the WTO safeguard rules. However, Article 11.1(c) indicates nothing of this sort. Article 11.1 distinguishes between "emergency action[s] on imports … as set forth in Article XIX of GATT 1994"[50], and "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX"[51]. The first category refers to safeguard measures. The second category refers to measures taken under other GATT permissive provisions, such as Articles VI, XX, or XXI. According to Article 11 of the DSU, whether a measure falls under the scope of Articles 11.1(a) or 11.1(c) must

[44] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.15. See also United States' second written submission, paras. 52-54.

[45] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.18.

[46] Türkiye's First Written Submission, para. 4.21; Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.20. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57.

[47] Türkiye's First Written Submission, para. 4.22.

[48] Türkiye's First Written Submission, para. 4.23. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57.

[49] Türkiye's response to Panel Question 24. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

[50] Article 11.1(a) of the Agreement on Safeguards.

[51] Article 11.1(c) of the Agreement on Safeguards.

be determined objectively by analysing the design, structure, and expected operation of the measure, in particular whether the measure possesses the constituent features of a safeguard measure or a "rebalancing measure" within the meaning of Articles XIX or Article 8.2.[52]

4.19. Türkiye's arguments are also supported by how the Agreement on Safeguards disciplines so-called "grey area" measures. These measures are explicitly prohibited by Article 11.1(b) of the Agreement on Safeguards. The drafters of the Agreement on Safeguards decided to regulate these "grey area measures" along with "standard" safeguard measures because "grey area" measures pursue the same "purpose" as standard safeguard measures. Like standard safeguard measures, "grey area" measures are intended to prevent or to remedy serious injury to the regulating Member's domestic industry, caused or threatened by increased imports. The sole difference is that "grey area" measures take forms that differ from the forms of "standard" safeguard measures (i.e. import tariffs or import quotas).[53]

4.20. As an example, consider voluntary export restraints. These measures do not take the same form as standard safeguard measures. Without an explicit rule, voluntary export restraints would thus escape the strictures of the Agreement on Safeguards. Complainants and treaty interpreters would therefore have to go through the effort of searching elsewhere in the covered agreements for legal provisions to address these measures. In order to avoid this scenario, the drafters included "grey area" measures within the scope of the Agreement on Safeguards and prohibited them in Article 11.1(b).[54]

4.21. Türkiye argues that there are no notification obligations for grey area measures. Because these measures are explicitly prohibited, Members obviously do not notify them under WTO safeguard rules. And yet, WTO safeguard rules, in particular Article 11.1(b), apply to these measures. This demonstrates that "notification" is not necessary to trigger the application of the Agreement on Safeguards. If this is true for "grey area" measures, Türkiye fails to see why this should not be the case also for standard safeguard measures.[55]

4.22. As another contextual argument, Türkiye notes that, based on Article 12.8 of the Agreement on Safeguard, "measures or actions" dealt with in the Agreement on Safeguards can be "counter-notified" by other Members. This scenario can occur only if the importing Member has not previously notified these measures, despite its obligation to do so. If the United States were correct that notification by the importing Member is a constituent feature of a safeguard measure without which WTO safeguard rules would not apply, Article 12.8 would have no purpose or logic.[56] The absence of a notification by the importing Member would mean that the measure would not be a safeguard measure. As a result, there would therefore be nothing to "counter-notify", and Article 12.8 would never apply.

4.23. Moreover, the United States incorrectly construes the negotiating history of Article XIX and the Agreement on Safeguards. The United States refers to the views of various negotiators as to whether a notification under Article XIX had to be submitted prior to taking a safeguard action, or after the adoption of this action, especially in critical circumstances in which the measure had to be taken urgently.[57] However, nothing in these discussions suggests that the various notification requirements in Article XIX (or the Agreement on Safeguards) are one of the constituent features of a safeguard measure. On the contrary, during the Uruguay Round, some drafts of the Agreement on Safeguards contained an explicit definition of the term "safeguard measure", which reflected the same elements that the Appellate Body has subsequently used to define these measures. This confirms that the drafters of the Agreement on Safeguards had a very clear understanding of the objective constituent features of a safeguard.[58]

4.24. Finally, recall that the United States collapses the distinction between the *definitional elements* of a safeguard measure and the *requirements* that a safeguard measure must satisfy. This failure to

[52] Türkiye's response to Panel Question 23.
[53] See Article 11.1(b) of the Agreement on Safeguard; and Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.38.
[54] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.39.
[55] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.40.
[56] Türkiye's Opening Statement at the Second Substantive Meeting, paras. 2.24-2.25.
[57] See, *inter alia*, United States' second written submission, paras. 64-74.
[58] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.44.

distinguish between these two concepts undermines the United States' other arguments. For example, the United States alleges that the GATT 1947 Working Party in the *US – Fur Felt Hats* dispute defined the term "safeguard measure" and, in so doing, referred to the notification condition.[59] That is incorrect. Indeed, in that case, both parties agreed that the measure at issue was a safeguard measure. The Working Party, therefore, merely explained the applicable requirements under Article XIX, both substantive and procedural (including notification), and then proceeded to analyse the complainant's claims. Furthermore, the Working Party did not attach any particular importance to the notification requirement. The *US – Fur Felt Hats* report is thus inapposite to the dispute at hand.[60]

4.1.2.3 The United States measures satisfy the legal definition of a safeguard measure in Article XIX, as interpreted by the Appellate Body

4.25. The United States' Section 232 measures on steel and aluminum clearly satisfy the two definitional features of a safeguard measure, that is: (1) the suspension of concessions; and (2) that the measure be designed to remedy or prevent serious injury.[61]

4.26. The US import measures clearly meet the first definitional criterion of safeguard measures, because they "suspend, in whole or in part, a GATT obligation" or "withdraw … a GATT concession" of the United States within the meaning of Article XIX:1(a) of the GATT 1994.

4.27. In particular, the additional duties on steel and aluminium products are inconsistent with Article II:1(a), and Article II:1(b), first sentence, or, in the alternative, Article II:1(b), second sentence, of the GATT 1994. This is because these duties impose treatment on the subject products that is less favourable than the treatment contemplated in the relevant parts of the United States' GATT Schedule. In addition, the quantitative limitations imposed on steel articles originating in Argentina, Brazil and South Korea, as well as the quantitative limitations imposed on aluminium articles originating in Argentina are clearly inconsistent with, and, therefore, suspend, the United States' obligations under Article XI:1 of the GATT 1994.[62]

4.28. These import measures also meet the second part of the definition of a safeguard measure, because they pursue the "specific objective" of preventing or remedying serious injury to the domestic industry, through the suspension of GATT obligations. This objective is the "most central" aspect of these measures.[63] To give a few examples:

- The very purpose of the United States' Presidential Proclamations imposing the import measures on steel and aluminum is to limit imports in a manner that will allow the United States' domestic industries to meet the self-defined target of 80 per cent capacity utilization.[64]

- This economic recovery rationale is also visible in the reasoning for why certain countries were temporarily excluded from the import measures, including "shared commitment to addressing global excess capacity for producing steel … [and] the robust economic integration between [the United States and those countries] ".[65]

- The Presidential Proclamations were published on the website of the White House under the rubric "Economy and Jobs", making it clear that they had been adopted with economic concerns in mind.[66]

[59] United States' second written submission, para. 55.
[60] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.48.
[61] Türkiye's Opening Statement, para. 37. See also Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.
[62] Türkiye's First Written Submission, para. 4.49.
[63] Türkiye's First Written Submission, para. 4.50.
[64] Türkiye's Opening Statement, para. 37; Türkiye's First Written Submission para. 4.52.
[65] Türkiye's Opening Statement, para. 37; Türkiye's First Written Submission para. 4.53.
[66] Türkiye's Opening Statement, para. 37; Türkiye's First Written Submission para. 4.55.

- Both the Section 232 Steel and Aluminium Reports, which served as a basis for the United States' safeguard measures, analyse classical injury factors in order to gauge the extent of the injury or threat thereof.[67]

- From the President down to the Secretary of Commerce and senior economic advisors to the President, the record is replete with tweets, press releases, and public statements, such as TV interviews, that confirm, time and time again, that the true purpose of the measures is to protect the domestic industry and to ensure its continued operation and profitability.[68]

- Finally, the Joint Statements of the United States and Mexico as well as Canada, respectively, which settled their respective WTO disputes with respect to the United States' safeguard measures and the rebalancing measures, reveal the fundamentally economic nature of the United States' measures. Among many relevant aspects, these Joint Statements explicitly stipulate the right of the affected exporting countries to take rebalancing measures.[69]

4.29. In sum, all of the relevant materials reveal that the measures at issue were designed to pursue the "specific objective" of improving the economic health of the domestic steel and aluminium industries, and preventing or remedying the injury allegedly caused to them by increased imports of steel and aluminium products. This is no different in any material respect from the objective commonly pursued by any safeguard measure.[70]

4.30. The senior economic advisor to the President also stated that the measures at issue are a bargaining chip to extract economic concessions from trading partners. Mr. Kudlow explained on the TV station CNBC that negotiations with foreign countries about exemptions from the additional duties were linked to reciprocal trade concessions and other economic considerations.[71]

4.31. The United States' position in this dispute, as well as in the parallel DS564 proceeding, has been that its Section 232 measures on steel and aluminum are concerned with national security, and do not pursue any safeguard-related objectives. The United States, however, appears to conflate the meaning of "national security measures" under its domestic law and WTO law. Even if Section 232 measures on steel and aluminium were to be considered as national security measures under US domestic law, this does not mean that these measures also satisfy all of the requirements of Article XXI of the GATT 1994. For instance, these measures were not taken "in time of war or other emergency in international relations", or, at the very least, the United States failed to identify any such emergency. In addition, these measures appear to be very remote from, or even unrelated to, any conceivable "emergency", as well as the United States' "essential security interests", as the primary objective of these measures is to protect the United States' domestic steel and aluminium industries.[72]

4.32. To conclude, the US Section 232 measures at issue clearly fall under the scope of WTO safeguard rules.

4.2 Türkiye's measures are rebalancing measures under Articles XIX:3(a) of the GATT 1994 and 8.2 of the Agreement on Safeguards

4.2.1 Legal standard under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994

4.33. Türkiye's measures at issue are a response to the United States' disguised safeguard measures on steel and aluminum. These measures are thus based on, and well-grounded in, the text of Article XIX:3(a) and Article 8.2 of the Agreement on Safeguards.[73]

[67] Türkiye's Opening Statement, para. 37; Türkiye's First Written Submission paras. 4.56-4.62.
[68] Türkiye's Opening Statement, para. 37; Türkiye's First Written Submission paras. 4.52-4.68.
[69] Türkiye's Opening Statement, para. 37.
[70] Türkiye's First Written Submission, paras. 4.71-4.72.
[71] Türkiye's First Written Submission, para. 4.68.
[72] Türkiye's response to Panel Question 88, para. 2.109.
[73] Türkiye's Opening Statement, para. 34.

4.34. Under these two provisions, Members are explicitly authorized to take temporary "rebalancing measures", to rebalance tariff concessions and other obligations after a safeguard measure has distorted the original equilibrium. Based on the text of Articles XIX:3(a) and 8.2, a rebalancing measure must possess the following key features:

- First, the rebalancing measure must respond to a safeguard measure. Article 8 refers to a situation where "[a] Member [is] proposing to apply a safeguard measure or [is] seeking an extension of a safeguard measure". Article 1 of the Agreement on Safeguards makes it clear that the Agreement "establishes rules for the application of safeguard measures". Thus, a rebalancing measure is defined as a response to a previously imposed or proposed safeguard measure. Put differently, the existence of an underlying safeguard measure is a condition precedent for applying a rebalancing measure under Article 8.2.[74]

- Second, Article 8.2 applies to a particular type of measures, which are "rebalancing measures", that is, "the application of substantially equivalent concessions or other obligations". The purpose, structure, and operation of the measure must, therefore, indicate that it was designed as an Article 8.2 "rebalancing measure". In particular, it must be discernible from the measure itself and its attendant circumstances that the measure was designed to, and has been applied so as to, suspend "concessions or other obligations" that are "substantially equivalent" to those of the underlying safeguard measure. The elements a panel may consider under this criterion include:

    - Whether the text of the measure or the text of a notification provided to the WTO suggest a link to the underlying safeguard measure;

    - Whether the amount of the retaliation, objectively, is linked to the level of suspension in the original measure; or

    - Whether the measure has been implemented after the suspending Member has attempted to agree, with the Member applying the underlying safeguard measure, on trade compensation within the meaning of Article 8.1.

- Finally, the third definitional feature of a measure that falls under Article 8.2 is the absence of an agreement on trade compensation within the meaning of Article 8.1. The absence of an agreement can, of course, be due to any reason, including a disagreement about the precise amount of compensation or – as in this case – a disagreement about the legal qualification of the underlying measure. Clearly, if an agreement has been reached and acted upon, a measure taken by the affected Member can no longer be considered a rebalancing measure.[75]

4.35. Thus, Articles 8.2 and XIX:3 may be considered as a special regime (*lex specialis*) that prescribes the specific steps that a Member may take when its industry is affected by another Member's safeguard action. These steps start with consultations under Article 12.3, and potentially end with rebalancing duties. As a result, until a panel has examined the applicability of the WTO safeguard rules and the consistency of the measure with these rules, no finding of violation of either Article I or Article II of the GATT 1994 can be made.

4.2.2 Türkiye's measures meet the legal test under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994

4.36. Türkiye's measures meet all of the definitional criteria of a rebalancing measure explained in paragraph 4.2.1 above. On the first criterion – the condition-precedent of a prior safeguard measure – the United States' Section 232 measures are safeguard measures. They depart temporarily from the disciplines of, *inter alia*, Articles II:1(a), II:1(b), and XI:1 of the GATT 1994. The "specific

[74] Türkiye's Opening Statement, para. 35; and Türkiye's response to Panel Question 12.
[75] Türkiye's Opening Statement, para. 35; and Türkiye's response to Panel Question 12.

objective" of this "suspension" is to prevent or remedy serious injury to the United States' domestic industries, allegedly caused by increased imports.[76]

4.37. On the second criterion – the nature of Türkiye's measures as rebalancing measures – Türkiye's additional duties were notified to the Council for Trade in Goods and the Committee on Safeguards, pursuant to Article 12.5 of the Agreement on Safeguards. These notifications explain in detail the amount of rebalancing by reference to the United States' underlying safeguard measures and the amount of duties imposed by those measures. It is beyond dispute that these measures suspend "substantially equivalent concessions or other obligations under GATT 1994".[77]

4.38. All of the above confirms that the purpose of Türkiye's measures was to "rebalance" concessions and other obligations within the meaning of Article 8.2. Moreover, as soon as the United States doubled its duties with respect to Türkiye in August 2018, and when it subsequently reduced those duties to their original level in May 2019, Türkiye always mirrored these changes immediately in its own duty rates. This further confirms that Türkiye's measures are nothing else than "rebalancing" measures within the meaning of Article 8.2. Finally, the measures themselves refer to Türkiye's legislation, in particular Law No. 4067, dated 26 January 1995, which implemented the WTO covered agreements, including the Agreement on Safeguards, within Türkiye's legal system.

4.39. Finally, on the third criterion, it is undisputed that no agreement on trade compensation was reached between Türkiye and the United States before Türkiye took its measures. On the contrary, the United States refused to even engage in consultations under the Agreement on Safeguards.[78]

4.3 Contrary to the United States' argument, Türkiye's arguments based on Article XIX of the GATT 1994 and the Agreement on Safeguards are not in the nature of an "affirmative defence"

4.40. Another important systemic argument of the United States is the assertion that Türkiye's reference to the Agreement on Safeguards is in the nature of an "affirmative defence". In particular, the United States has claimed that Türkiye has the burden of proof to demonstrate both the applicability of the WTO safeguards regime and the consistency of its measures with the WTO safeguards rules. According to the United States, Türkiye is required to raise and assert WTO safeguard rules as an "affirmative defence", in response to the United States' claims of violation. Accordingly, the United States' claims of violation need not take into account the WTO safeguard rules and the United States was entitled to file this dispute on the basis of provisions of its choice, which is Articles I and II of the GATT 1994.[79]

4.41. The term "affirmative defence" has a well-established connotation in WTO law. It applies when a complainant has successfully established a violation of a WTO legal provision and a responding Member seeks to justify that violation by relying on a separate provision. The respondent that raises the defence bears the burden to substantiate it. If the respondent fails to satisfy this burden, a previously established violation of a WTO provision stands and the defending Member loses. However, this is not the situation here. Türkiye and other Members in the parallel disputes have argued extensively that this is an incorrect characterization of the WTO safeguard regime.[80]

4.42. Türkiye's reference to the WTO safeguards regime is not an "affirmative defence", because WTO safeguard rules do not constitute an "exception" to GATT disciplines. Rather, Members have an "autonomous right" to apply a safeguard measure, provided that they meet all of the substantive and procedural conditions in Article XIX of the GATT 1994 and the Agreement on Safeguards. Thus, in referring to Article XIX of the GATT 1994 and the Agreement on Safeguards, Türkiye does not invoke any "exception", but rather identifies the correct legal regime that applies to the measures

[76] Türkiye's Opening Statement, para. 37; See also Türkiye's Second Written Submission, paras. 2.24-2.30.
[77] Türkiye's Opening Statement, para. 38; Türkiye's response to Panel Question 12; see also Türkiye's Second Written Submission, paras. 2.24-2.30.
[78] Türkiye's Opening Statement, para. 38.
[79] Türkiye's First Written Submission, para. 4.3; and Türkiye's Second Written Submission, para. 2.1.
[80] Türkiye's Second Written Submission, para. 25.

at issue. This regime displaces other GATT provisions, such as Articles I and II, that might have applied to Türkiye's measures if the safeguards regime did not.[81]

4.43. The legal rules applicable to safeguards – as well as the rules applicable to any suspension of concessions taken in response to safeguards – therefore, establish independent, autonomous rights, not an affirmative defence. Hence, if a WTO Member believes that another WTO Member has improperly imposed a safeguard measure, or that it has improperly suspended equivalent concessions in response to a safeguard measure, it is for the complainant to assert a violation of Article XIX of the GATT 1994 and the Agreement on Safeguards and to satisfy its burden of proof.[82]

4.44. This was explicitly confirmed by, for instance, the panel in *Korea – Dairy*. The panel stated: "[i]n the context of the present dispute, which is concerned with the assessment of the WTO compatibility of a safeguard measure imposed by a national authority, we consider that it is for the European Communities [i.e. complainant] to submit a *prima facie* case of violation of the Agreement on Safeguards, namely, to demonstrate that the Korean safeguard measures are not justified by reference to Articles 2, 4, 5 and 12 of the Agreement on Safeguards".[83] On appeal, the Appellate Body appears to have agreed with the panel's allocation of the burden of proof.[84]

4.45. The complainant cannot invoke non-applicable provisions, such as Articles I and II of the GATT 1994, and require the respondent to demonstrate that the respondent's measures are justified under the Agreement on Safeguards.[85] Doing so would be tantamount to circumventing the basic rules of allocating the burden of proof and the burden of making a *prima facie* case.

4.46. Over twenty years of practice under WTO dispute settlement demonstrates that Türkiye's reading of WTO law is correct. Türkiye is not aware of a single instance in which a complainant has challenged a safeguard measure – or a suspension of concessions in response to a safeguard measure – simply by invoking Articles I, II, or XI of the GATT 1994, and then expecting the defending Member to demonstrate that WTO safeguards rules apply and have been complied with. Rather, in all instances, the complainant presented claims of violation of Article XIX of the GATT 1994 and the Agreement on Safeguards. Claims under non-safeguard-specific provisions of the GATT 1994, such as Articles I, II, or XI, were – if at all – included for subsidiary purposes.[86]

4.47. In keeping with this logic, panels and the Appellate Body in those disputes also first addressed the safeguards-related provisions of WTO law and only then, as claims of a subsidiary nature, other non-safeguard-specific provisions of the GATT 1994. This approach was followed, *inter alia*, in *India – Iron and Steel Products,* where Japan raised claims under both the GATT 1994 and the Agreement on Safeguards. The panel in that dispute addressed the non-safeguard-related claims only once it had found that India did not meet all applicable requirements of Article XIX of the GATT 1994 and the Agreement on Safeguards, and that therefore India could not validly suspend its GATT obligations.[87]

4.48. The United States itself has previously advanced this proposition. For instance, in *US – Wheat Gluten*, the United States explicitly urged the panel to endorse the above-mentioned finding of the panel in *Korea – Dairy*, which stated that the burden of proof in the context of safeguard measures rested with the complainant.[88]

4.49. The same logic has also been followed in the context of other trade remedy disputes, for example, disputes concerning anti-dumping measures. In *EC – Fasteners (China)*, the Appellate

[81] Türkiye's First Written Submission, para. 4.32.
[82] Türkiye's First Written Submission, para. 4.33.
[83] Panel Report, *Korea – Dairy*, para. 7.24.
[84] Appellate Body Report, *Korea – Dairy*, paras. 149, 150; Türkiye's First Written Submission, para. 4.34.
[85] Leaving aside the violation of the basic allocation of the burden of proof, this would also require the defendant to demonstrate compliance with all conceivable provisions and obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards, whether of a substantive or procedural nature. This would be a wholly unworkable standard in practice. See Türkiye's First Written Submission, para. 4.35.
[86] Türkiye's First Written Submission, para. 4.36.
[87] Panel Report, *India – Iron and Steel Products*, paras. 7.408-7.409. See Türkiye's First Written Submission, paras. 4.37-4.38.
[88] Panel Report, *US – Wheat Gluten*, US arguments, Attachment 2-5, para. 14; Türkiye's First Written Submission, para. 4.40.

Body found 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. Similarly, in *US – Zeroing (Japan)*, the Appellate Body found a violation of Article II of the GATT 1994 only after finding violations of WTO anti-dumping rules.[89]

4.50. In the latter case, the Appellate Body described Articles VI and the Anti-Dumping Agreement as a "safe harbor" with respect to Articles I and II of the GATT 1994. The term "safe harbor" is synonymous with Türkiye's previous argument: 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.[90]

4.51. 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 between general GATT obligations and the safeguard rules. Safeguard measures are one of the three types of trade remedies, which are measures that WTO Members may use to counter injurious imports in particular circumstances. The use of each of these remedies is governed by specific agreements in Annex 1A to the Agreement Establishing the WTO. It would be untenable to argue that one of these specialized agreements, such as the Agreement on Safeguards – but not the other trade remedy agreements – contains no positive obligations, but instead contains only exceptions to be invoked and justified by the Member choosing to apply trade remedy measures.[91]

4.52. The United States made the deliberate choice not to raise any safeguard-related claims. The United States is free to make this choice, but must accept the consequences of that choice. If a panel finds the safeguards-related provisions to be applicable, the panel would normally – assuming the complainant has properly raised claims under Article XIX and the Agreement on Safeguards – assess the consistency of the measure at issue under those provisions.[92]

4.53. If the measures are consistent with those provisions, this necessarily means, by definition, that they are also fully consistent with Articles I and II. In contrast, if the measures are inconsistent with the safeguard rules, then – as a result – Articles I and II have not been validly suspended and can *then, but only then*, be found to have been violated. This means that, until the applicability of, and the consistency of the measure with, the WTO safeguard rules has been determined, there cannot be a finding of violation of either Article I or Article II.[93]

4.54. The legal consequence of the United States' choice in this dispute is that, should the Panel find that Türkiye's measure at issue is in fact a rebalancing measure, and given that the United States has not raised any safeguard-related claims, there can be no finding of violation and the measure is presumed to be WTO-consistent. The Panel will thus have to end its analysis at that juncture and dismiss the United States' case *in toto*.[94]

4.55. Therefore, the proper legal basis for the United States to bring claims in this dispute is under Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards. Should the Panel agree with this position, it must 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.[95]

[89] Appellate Body Report, *EC – Fasteners (China)*, paras. 392-393; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 200, 209; Türkiye's Opening Statement, para. 28; and Türkiye's response to Panel Question 36.

[90] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 209; Türkiye's Opening Statement, para. 28; and Türkiye's response to Panel Question 36.

[91] Türkiye's Opening Statement, para. 30; see also Türkiye's response to Panel Question 36.

[92] Türkiye's Opening Statement, para. 24; see also Türkiye's response to Panel Question 36.

[93] Türkiye's Opening Statement, paras. 24-25; see also Türkiye's response to Panel Question 36.

[94] Appellate Body Report, *EC – Sardines*, para. 278; Türkiye's Opening Statement, para. 27; and Türkiye's response to Panel Question 36.

[95] Türkiye's First Written Submission, para. 4.42.

4.4 The United States has failed to include claims under the Agreement on Safeguards and Article XIX in its panel request and may, therefore, not raise these claims

4.56. The United States has not made out a *prima facie* case that Türkiye's measures are inconsistent with the provisions that Türkiye's measure fall under, that is, Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994.[96]

4.57. The claims put before the Panel by the United States are based on Articles I:1, II:1(a) and II:1(b) of the GATT 1994. However, as Türkiye has demonstrated throughout these proceedings, none of these provisions is applicable to Türkiye's measures.[97]

4.58. The United States has made no effort to formulate any alternative arguments under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994. Thus, in this dispute, the United States has chosen not to formulate any alternative claims, and has based its case exclusively on the proposition that Türkiye's measures fall under Articles I and II. The United States has not formulated any claims under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, neither in its consultations and panel request, nor in its submissions.[98]

4.59. Thus, in the event that the Panel agrees with Türkiye – as Türkiye believes it should – that the measures at issue are not covered by Articles I and II of the GATT 1994, but rather by Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, the Panel must dismiss the United States' complaint *in toto*.[99]

5 CONCLUSION AND REQUEST FOR FINDINGS

5.1. For the above reasons, Türkiye requests the Panel to find that:

- Türkiye's measures fall under Article XIX of the GATT 1994 and the Agreement on Safeguards;
- The United States failed to file claims on a proper legal basis; and
- In the absence of a finding under the Agreement on Safeguards and Article XIX, no findings under Articles I and II of the GATT 1994 can be made.

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[96] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.49.
[97] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.50.
[98] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.51.
[99] Türkiye's Opening Statement at the Second Substantive Meeting, para. 2.53.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. This executive summary integrates the Third Party Written Submission, Oral Statement and Responses to the Panel's Questions by China in this dispute.

I. Order of Analysis

2. China believes the Panel should first examine the measures at issue in relation to Article 8.2 of the Safeguards Agreement, and only when the Panel was to find that that provision does not apply to the measures at issue, the Panel would turn to and would need to turn to examine the United States claims under Articles I and II of the GATT 1994. This is based on the correct understanding of the legal relationship between the WTO safeguards disciplines and Articles I and II of the GATT 1994.

3. Since the measures at issue were explicitly taken pursuant to Article 8.2 of the Safeguards Agreement, unless the Panel first finds that this provision does not apply to the measures at issue, violation of Articles I and II of the GATT 1994 cannot be found or even examined by the Panel. If the Panel finds Article 8.2 of the Safeguards Agreement is applicable to the measures at issue, there would be no need for the Panel to examine the claims of the United States on violation of Articles I and II of the GATT 1994 since the United States has not made a claim of inconsistency of the measures at issue with Article 8.2 of the Safeguards Agreement.

II. Legal Standard Standard in Relation to The Applicability of Article 8.2

4. Following the relevant analytical approach taken and principles established by the Appellate Body concerning the applicability of safeguard disciplines in I*ndonesia – Iron or Steel Products* case, the Panel would need to first identify the "constituent features" of a measure under Article 8.2 of the Safeguards Agreement, and not conflating the factors relating to the legal characterization of a measure with those relating to the WTO-consistency of a measure. Then, the Panel would need to analyse, based on the facts before it, if "constituent features" are present for the measures at issue.

5. Based on plain reading of Article 8.2 of the Safeguards Agreement, the Panel would first need to identify the type of "action" contemplated in the provision. The provision provides Members the freedom "to suspend, ……, the application of substantially equivalent concessions or other obligations under the GATT 1994, to the trade of the Member applying the safeguard measure". Suspension of the concessions or other obligations under the GATT 1994 is apparently the "action" contemplated.

6. In order to identify if the measure at issue suspends concessions or other obligations under the GATT 1994, the Panel would need to compare the measure with the relevant GATT concessions and obligations to determine if a suspension occurred as the result of the measure. Then the Panel would need to turn to identify what is the "objective" of the "action" provided for in Article 8.2 of the Safeguards Agreement, which purposed to keep suspension "substantially equivalent" and "to the trade of the Member applying the safeguard measure". There must be a demonstrable link between the "action" of suspension of concessions or other obligations and such an objective.

7. China believes, as long as the suspension of concessions and other obligation is "designed" to reach such a rebalance with the Member taking a safeguard measure, i.e., this is the clear objective of the action of suspension by a Member, it carries the "objective" feature required under Article 8.2. Whether the underlying measure taken by the target Member of the Article 8.2 measure is indeed objectively a safeguard measure, i.e., carrying the "constituent features" of safeguard measure under Article XIX:1(a) of the GATT 1994, seems to be a "substantive condition" for the consistency with Article 8.2.

8. In order to identify whether the measures at issue present the "objective" feature of an Article 8.2 measure, a panel would need to "assess the design, structure, and expected operation of the measure as a whole", "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 as part of its determination, "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. "

III. Article XIX of the GATT 1994 and the Safeguards Agreement are not "Affirmative Defense" to the Members for the Breach of GATT 1994 Obligations

9. It has been well acknowledged that some provisions of the GATT 1994 such as Articles XX, XXI, and XXIV are "limited exception" available as "affirmative defense" to the respondent.

10. However, GATT provisions establishing positive obligations are not "affirmative defenses". The provisions that alter the scope of the obligations are not "affirmative defenses" . It does not seem to be the case that Article XIX of the GATT 1994 or the Safeguards Agreement have been or should be categorized as "limited exceptions" or "affirmative defenses".

11. Article XIX of the GATT 1994, as clarified and reinforced by the Safeguards Agreement, is an integral part of the GATT 1994, and is part of the rights and obligations of WTO Members under the GATT 1994.

12. Article XIX of the GATT 1994 and Safeguards Agreement explicitly establish positive obligations for Members applying safeguard measures, as well as for Members affected by such measures in taking re-balancing measures. Such as obligation to make proper determination on "unforeseen developments", on imports "in such increased quantities" and "under such conditions", and on serious injury or threaten of serious injury to domestic industry caused by such import, and to observe the obligation of notification, of providing consultation opportunities, and obligation for application irrespective of sources of imports and only for necessary period of time.

13. The fundamental nature and structure of the transitional safeguards regime under Article 6 of the Agreement on Textiles and Clothing (the "ATC") shed light on how to understand the similar provisions as Article XIX of the GATT 1994 and the Safeguards Agreement.

14. Furthermore, as provided in Articles XIX:1(a) and XIX:3(a) of the GATT 1994 and Article 8.2 of the Safeguards Agreement, when safeguard measures or the rebalancing measures by affected Members are imposed, the application of the relevant concessions or obligations under other provisions of the GATT 1994, such as those under Articles I and II, have already been stopped in application, or made inactive, or taken away or changed, and therefore are not eligible to be assessed independently from the safeguard provisions.

15. Measures taken pursuant to Article XIX of the GATT 1994 and the Safeguards Agreement would necessarily alter the scope of the relevant concessions or obligations established by other GATT 1994 provisions. To China, the relationship of safeguard measures/rebalancing measures with other GATT provisions supports the view that safeguard provisions are not exceptions or "affirmative defense".

16. The correct legal characterization of the safeguard provisions means that, in a WTO dispute proceeding concerning safeguard measures or rebalancing measures taken pursuant to the safeguard provisions, it should be up to the complainant to assert inconsistency with the safeguard provisions in its panel request to bring it within the terms of reference of the panel, and the burden is on the complainant to establish a prima facie case that the measures at issue are inconsistent with the safeguard provisions.

IV. United States' Claim Could Not Be Properly Brought Before the Panel if the Complainant Ignored the Clear Legal Basis of the Measures at Issue

17. Article 6.2 of the DSU requires the panel request shall "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly ". The panel request "define the scope of the dispute". Pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the panel request.

18. The panel's terms of reference is a threshold issue. It identifies the measures and the claims that a panel has authority to examine and on which it has authority to make findings, and a panel may consider only those claims that it has authority to consider under its terms of reference.

19. China believes if a complainant purposely ignored the clear legal basis under the WTO legal framework of a measure at issue by not including a claim based on such provisions in its panel request, it runs the risk of not conveying the "legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the DSU, and not notifying the respondent "the nature of its case". This is true when the legal basis of the measure at issue is positive obligations under the WTO legal framework, not "exceptions".

20. As illustrated by the Appellate Body in *EC-Tariff Preferences* case, the complainant must, in its request for the establishment of a panel, identify relevant provisions of the Enabling Clause which the complainant considered have been violated by the measures at issue, in order to "notif[y] the parties and third parties of the nature of [its] case". The Appellate Body is of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the "legal basis of the complaint sufficient to present the problem clearly". Moreover, as the EC measure at issue in that dispute "is plainly taken pursuant to the Enabling Clause", the complaining party should reasonably have articulated its claims of inconsistency with specific provisions of the Enabling Clause at the outset of the dispute as part of its responsibility to "engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute".

21. Following the Appellate Body's view, the United States, by alleging only inconsistency with Articles I and II of the GATT 1994 in its panel request, and purposely ignoring the clear legal basis of the measures, did not convey the "legal basis of the complaint sufficient to present the problem clearly" as required by Article 6.2 of the DSU. The facts suggest that the United States was well aware of the clear legal basis of the measures at issue at the time of bringing the measures to the dispute settlement mechanism, and was fully capable of bringing its claim challenging such legal basis. The United States chose not to do so.

22. Purposely ignoring the clear legal basis of the measures could not be understood as engaging in the dispute settlement procedures in good faith. The fundamental defects of non-compliance with Article 6.2 of the DSU in the panel request could not be left without serious consequences for the purpose of safeguarding the integrity of the WTO dispute settlement mechanism.

23. For the analysis above, China encourages the panel to consider the request of the Turkey for the panel to dismiss the case of the United States.

V. United States Failed to Fulfil the Burden of Proof Requirement

24. Article 8.2 of the Safeguards Agreement as an integral part of the overall rights and obligations under the WTO safeguard disciplines, are not "exceptions" to other GATT provisions or "affirmative defence" for violation of obligation under other GATT provisions. Measures taken pursuant to and consistent with Article 8.2 of the Safeguards Agreement do not violate the obligations under Article I or II of the GATT 1994. Therefore, it should be first up to the United States, as the complainant, to discharge its burden that Article 8.2 of the Safeguards Agreement does not apply to the measures at issue in order to establish a prima facie case of violation of Articles I and II of the GATT 1994.

25. The United States cannot discharge such a burden by simply stating its underlying measures are not safeguard measures, since whether the underlying measures are safeguard measures is not part of the "constituent features" of measures under Article 8.2 of the Safeguards Agreement for the determination of the applicability of this provision. To discharge its burden, the United States need to present evidences and arguments as to why the measures do not present the "constituent features" of Article 8.2 measures.

VI. Whether the U.S. Section 232 Measures on Steel and Aluminum Products Constitute Safeguard Measures

26. China does not believe the panel need to examine whether the U.S. Section 232 measures on certain steel and aluminum products constitute safeguard measures under Article XIX of GATT 1994

in the current dispute. The U.S. Section 232 measures are not measures at issue in the current dispute. The United States has failed to brought a proper claim of whether the measures at issue are consistent with Article XIX:3 of the GATT 1994 and Article 8.2 of the Safeguards Agreement, including whether the measures are in response to a safeguard measure under Article XIX of the GATT 1994.

27. In case the Panel wishes to examine this issue in any way, China does not agree to the argument of the United States that a measure is not a safeguard unless the WTO Member imposing the measure has invoked its right to apply a safeguard measure.

28. As the Appellate Body recently affirmed in *Indonesia – Iron or Steel Products* case, whether a measure is a safeguard measure under Article XIX of the GATT 1994 is an objective question to be evaluated by the Panel in light of the "constituent features" presented by the parties. This clear legal finding by the Appellate Body does not leave room for the argument that it is up to a Member to determine whether the safeguard provisions would apply to its measures in the dispute settlement proceedings by choosing to invoke the safeguard provisions or not when imposing its measures. China does not believe invocation by a Member of Article XIX of the GATT 1994 is a necessary condition for the application of WTO safeguard disciplines on the measure at issue. Invocation is not one of the "constituent features" of a safeguard measure, and the applicability of the WTO safeguard disciplines is an issue properly subject to the objective examination by a Panel, not self-determined by a Member with its domestic labelling of the measure it chose. Such approach runs contrary to Article 6.2 of the DSU which provides the applicability of covered agreements is subject to the objective assessment and determination by the Panels.

29. Panel's assessment is based on specific facts of each case. China would like to reiterate that Panel's assessment in this respect must be "independent and objective" as required by Article 11 of the DSU.

30. Further, China agrees in general with the detailed analysis based on substantial relevant facts by the Turkey in its first written submission that the Section 232 measures on certain steel and aluminum products of the United States carry the "constituent features" of safeguard measures, and therefore constitute safeguard measures under Article XIX of the GATT 1994.

VII. Inter-Panel Coordination

31. China believes the presence of similar issues between DS564 and the present dispute proceeds in parallel would warrant certain type of exchange between the Panels. China does not believe such exchange is specifically prohibited under the DSU.

ANNEX C-2

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-3

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 three-

[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)

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-4

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-5

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

[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. 65.
[11] The US' first written submission, para. 67.

explained in *Indonesia – Iron or Steel Products*, the applicability of the Agreement must be 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

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

obtain relevant information to ensure coherent legal analysis. Generally, interaction between the panels would ensure transparency and due process for the parties.

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-6

INTEGRATED EXECUTIVE 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 Turkey'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 Turkey'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, Turkey'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 Turkey'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, Turkey'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 Turkey'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 Turkey 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. Turkey 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 Turkey and the United States in the sense of Article 8.1 of the Agreement on Safeguards;

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

(iii) Turkey 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 Turkey'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 Turkey 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 561 and DS 564 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.

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

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 as a part of issue of potential inconsistency of Turkey's suspension under Article 8.2 of the Agreement on Safeguards as well as Turkey's suspension itself. It is undisputed fact that the United States applies the import duties in respect of the goods originating from Turkey, as well as some other countries, beyond the rate established in the United States' Schedule. Moreover, Turkey 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 Turkey (*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 DS564 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 DS564 panel's lead insofar as the issue is the proper qualification of the United States' measures.

ANNEX C-7

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 Turkey 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 Turkey. 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/DS561/2". Article 8 of the Agreement on Safeguards is one of the provisions cited by Turkey. 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

[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.

similar to the procedure followed in safeguard investigations constitute additional elements 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

[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.

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.

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.

III. INTER-PANEL COORDINATION

25. To the extent that the determination of the applicability of the Agreement on Safeguards to Turkey'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 (DS564).

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 DS564, 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 DS564 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 DS564.

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 *Turkey – 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 issue 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.

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 Turkey only under Articles I and II of the GATT 1994.[1] In this respect, Turkey 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 Turkey, para. 2.16.
[3] First Written Submission of the United States, para. 76.
[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 Turkey 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 Turkey as in that case Turkey 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 firstly to look into the nature of the measure to understand if the Panel can then continue its analysis of the GATT 1994 violations.

3. CONCLUSIONS

16. 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.

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[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.

ANNEX D

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

ANNEX D-1

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

The Panel refers to the separate communications from Canada[1], Russia[2], the European Union[3], China[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; and (iii) to review the draft summary of their own arguments in the descriptive part of the Panel Report. In addition, the requesting third parties, except for China, also requested the Panel to allow them 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. Turkey supported these requests. For Turkey, 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. Turkey 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 19 March 2019.
[3] Communication dated 20 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, Russia, the European Union, China and Mexico.

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[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 E

TABLE OF RELEVANT DUTY RATES

ANNEX E-1

TABLE OF RELEVANT DUTY RATES

Based on Exhibits USA-6, USA-7, and USA-8; Türkiye's first written submission, para. 2.22 and footnote 37; United States' response to Panel question Nos. 4 and 5; Türkiye's response to Panel question No. 73; the parties' comments on the draft descriptive part of this Report; Türkiye's communication to the Panel of 18 April 2023; the United States' communications to the Panel of 20 March 2023 and 25 April 2023; and the WTO's Consolidated Tariff Schedule (CTS) database.

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
1	08.02	080211100000	43.2	15	10	20
2		080211900000	43.2	15	10	20
3		080212100000	43.2	15	10	20
4		080212900000	43.2	15	10	20
5		080221000000	43.2	43.2	10	20
6		080222000000	43.2	43.2	10	20
7		080231000000	43.2	15	10	20
8		080232000000	43.2	15	10	20
9		080241000000	43.2	43.2	10	20
10		080242000000	43.2	43.2	10	20
11		080251000000	43.2	43.2	10	20
12		080252000000	43.2	43.2	10	20
13		080261000000	43.2	43.2	10	20
14		080262000000	43.2	43.2	10	20
15		080270000000	43.2	43.2	10	20
16		080280000000	43.2	43.2	10	20
17		080290100000	43.2	43.2	10	20
18		080290500011	43.2	43.2	10	20

[1] The United States submitted tables showing Türkiye's 2018 and 2019 MFN rates (Exhibits USA-7 and USA-8). There is, however, no difference between the 2018 and 2019 rates, and so we list them only once in this Table. Neither party has argued that the MFN rates have changed in the years 2020-2022.

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
19		080290500012	43.2	43.2	10	20
20		080290850000	43.2	43.2	10	20
21	10.06	100610100000	45	15	25	50
22		100610300000	45	34	25	50
23		100610500000	45	34	25	50
24		100610710000	45	34	25	50
25		100610790000	45	34	25	50
26		100620110000	45	36	25	50
27		100620130000	45	36	25	50
28		100620150000	45	36	25	50
29		100620170000	45	36	25	50
30		100620920000	45	36	25	50
31		100620940000	45	36	25	50
32		100620960000	45	36	25	50
33		100620980000	45	36	25	50
34		100630210000	45	45	25	50
35		100630230000	45	45	25	50
36		100630250000	45	45	25	50
37		100630270000	45	45	25	50
38		100630420000	45	45	25	50
39		100630440000	45	45	25	50
40		100630460000	45	45	25	50
41		100630480000	45	45	25	50
42		100630610000	45	45	25	50
43		100630630000	45	45	25	50
44		100630650000	45	45	25	50

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
45		100630670000	45	45	25	50
46		100630920000	45	45	25	50
47		100630940000	45	45	25	50
48		100630960000	45	45	25	50
49		100630980000	45	45	25	50
50		100640000000	45	45	25	50
51	2106.90	210690200000	102	17.3 MIN 1 EUR/ %vol/ hl	10	20
52		210690300000	58.5	58.5	10	20
53		210690510000	58.5	58.5	10	20
54		210690550000	58.5	58.5	10	20
55		210690590000	58.5	58.5	10	20
56		210690920000	53	12.8	10	20
57		210690980012	58.5	9 + T1	10	20
58		210690980013	58.5	9 + T1	10	20
59		210690980014	58.5	9 + T1	10	20
60		210690980015	58.5	9 + T1	10	20
61		210690980016	58.5	9	10	20
62		210690980019	58.5	9 + T1	10	20
63	22.08	220820120000	102	0	70	140
64		220820140000	102	0	70	140
65		220820260000	102	0	70	140
66		220820270000	102	0	70	140
67		220820290000	102	0	70	140
68		220820400000	102	0	70	140
69		220820620000	102	0	70	140
70		220820640000	102	0	70	140

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
71		220820860000	102	0	70	140
72		220820870000	102	0	70	140
73		220820890000	102	0	70	140
74		220830110000	85	0	70	140
75		220830190000	85	0	70	140
76		220830300000	85	0	70	140
77		220830410000	85	0	70	140
78		220830490000	85	0	70	140
79		220830610000	85	0	70	140
80		220830690000	85	0	70	140
81		220830710000	85	0	70	140
82		220830790000	85	0	70	140
83		220830820000	85	0	70	140
84		220830880000	85	0	70	140
85		220840110000	102	0.6 EUR/ %vol/ hl + 3.2 EUR/ hl	70	140
86		220840310011	102	0	70	140
87		220840310012	102	0	70	140
88		220840390011	102	0.6 EUR/ %vol/ hl + 3.2 EUR/ hl	70	140
89		220840390012	102	0.6 EUR/ %vol/ hl + 3.2 EUR/ hl	70	140
90		220840510000	102	0.6 EUR/ %vol/ hl	70	140
91		220840910011	102	0	70	140
92		220840910012	102	0	70	140
93		220840990000	102	0.6 EUR/ %vol/ hl	70	140
94		220850110000	85	0	70	140
95		220850190000	85	0	70	140

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
96		220850910000	102	0	70	140
97		220850990000	102	0	70	140
98		220860110000	102	0	70	140
99		220860190000	102	0	70	140
100		220860910000	102	0	70	140
101		220860990000	102	0	70	140
102		220870100000	102	0	70	140
103		220870900000	102	0	70	140
104		220890110000	102	0	70	140
105		220890190000	102	0	70	140
106		220890330000	102	0	70	140
107		220890380000	102	0	70	140
108		220890410000	102	0	70	140
109		220890450000	102	0	70	140
110		220890480011	102	0	70	140
111		220890480019	102	0	70	140
112		220890540000	102	0	70	140
113		220890560000	102	0	70	140
114		220890690000	102	0	70	140
115		220890710011	102	0	70	140
116		220890710019	102	0	70	140
117		220890750000	102	0	70	140
118		220890770000	102	0	70	140
119		220890780000	102	0	70	140
120		220890911000	102	70	70	140
121		220890919000	102	1 EUR/ %vol/ hl + 6.4 EUR/ hl	70	140

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
122		220890991000	102	0	70	140
123		220890999000	102	1 EUR/ %vol/ hl	70	140
124	24.01	240110350000	45	25	30	60
125		240110600000	45	25	30	60
126		240110700000	45	25	30	60
127		240110850000	45	25	30	60
128		240110950000	45	25	30	60
129		240120350000	45	25	30	60
130		240120600000	45	25	30	60
131		240120700000	45	25	30	60
132		240120850000	45	25	30	60
133		240120950000	45	25	30	60
134		240130000011	45	25	30	60
135		240130000019	45	25	30	60
136	27.01	270111000000	Unbound	0	5	13.7
137		270112100000	Unbound	0	5	13.7
138		270112900000	Unbound	0	5	13.7
139		270119000000	Unbound	0	5	13.7
140		270120000011	Unbound	0	5	13.7
141		270120000012	Unbound	0	5	13.7
142		270120000019	Unbound	0	5	13.7
143	2704.00	270400100000	Unbound	0	5	10
144		270400300000	Unbound	0	5	10
145		270400901000	Unbound	0	5	10
146		270400909000	Unbound	0	5	10
147	2713.11	271311000000	Unbound	0	4	4

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
148	33.04	330410001000	62.6	0	30	60
149		330410009000	Unbound	0	30	60
150		330420000000	100	0	30	60
151		330430000000	Unbound	0	30	60
152		330491000000	Unbound	0	30	60
153		330499001000	62.6	0	30	60
154		330499009013	Unbound	0	30	60
155		330499009019	Unbound	0	30	60
156	3904.10	390410000011	35	6.5	25	50
157		390410000019	35	6.5	25	50
158	3908.10	390810000011	33.2	6.5	5	10
159		390810000019	33.2	6.5	5	10
160	39.26	392610000000	Unbound	6.5	30	60
161		392620000011	Unbound	6.5	30	60
162		392620000019	Unbound	6.5	30	60
163		392630000000	Unbound	6.5	30	60
164		392640000000	Unbound	6.5	30	60
165		392690500000	Unbound	6.5	30	60
166		392690920011	Unbound	6.5	30	60
167		392690920019	Unbound	6.5	30	60
168		392690971000	Unbound	6.5	30	60
169		392690972000	Unbound	6.5	30	60
170		392690979011	Unbound	6.5	30	60
171		392690979012	Unbound	0	30	60
172		392690979013	Unbound	6.5	30	60
173		392690979014	Unbound	6.5	30	60

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
174		392690979015	Unbound	6.5	30	60
175		392690979018	Unbound	6.5	30	60
176	44.01	440110000000	Unbound	0	5	10
177		440112000000	Unbound	0	5	10
178		440121000000	Unbound	0	5	10
179		440122000000	Unbound	0	5	10
180		440131000000	Unbound	0	5	10
181		440139000000	Unbound	0	5	10
182		440140100000	Unbound	0	5	10
183		440140900000	Unbound	0	5	10
184	48.02	480210000000	Unbound	0	10	20
185		480220001111	Unbound	0	10	20
186		480220001119	Unbound	0	10	20
187		480220001911	Unbound	0	10	20
188		480220001919	Unbound	0	10	20
189		480220002100	33.6	0	10	20
190		480220002900	33.6	0	10	20
191		480240100000	Unbound	0	10	20
192		480240901000	Unbound	0	10	20
193		480240909000	Unbound	0	10	20
194		480254001011	33.6	0	10	20
195		480254001019	33.6	0	10	20
196		480254002000	33.6	0	10	20
197		480254003100	33.6	0	10	20
198		480254003200	33.6	0	10	20
199		480254009900	33.6	0	10	20

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
200		480255151000	33.6	0	10	20
201		480255153000	33.6	0	10	20
202		480255155011	33.6	0	10	20
203		480255155019	33.6	0	10	20
204		480255156100	33.6	0	10	20
205		480255156200	33.6	0	10	20
206		480255159911	33.6	0	10	20
207		480255159912	33.6	0	10	20
208		480255159919	33.6	0	10	20
209		480255251000	33.6	0	10	20
210		480255253000	33.6	0	10	20
211		480255255011	33.6	0	10	20
212		480255255019	33.6	0	10	20
213		480255256100	33.6	0	10	20
214		480255256200	33.6	0	10	20
215		480255259911	33.6	0	10	20
216		480255259912	33.6	0	10	20
217		480255259919	33.6	0	10	20
218		480255301000	33.6	0	10	20
219		480255303000	33.6	0	10	20
220		480255305011	33.6	0	10	20
221		480255305019	33.6	0	10	20
222		480255306100	33.6	0	10	20
223		480255306200	33.6	0	10	20
224		480255309911	33.6	0	10	20
225		480255309912	33.6	0	10	20

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
226		480255309919	33.6	0	10	20
227		480255901000	33.6	0	10	20
228		480255903000	33.6	0	10	20
229		480255905011	33.6	0	10	20
230		480255905019	33.6	0	10	20
231		480255906100	33.6	0	10	20
232		480255906200	33.6	0	10	20
233		480255909911	33.6	0	10	20
234		480255909912	33.6	0	10	20
235		480255909919	33.6	0	10	20
236		480256201000	33.6	0	10	20
237		480256202000	33.6	0	10	20
238		480256203100	33.6	0	10	20
239		480256203900	33.6	0	10	20
240		480256209900	33.6	0	10	20
241		480256801000	33.6	0	10	20
242		480256803000	33.6	0	10	20
243		480256805011	33.6	0	10	20
244		480256805019	33.6	0	10	20
245		480256806100	33.6	0	10	20
246		480256806200	33.6	0	10	20
247		480256809911	33.6	0	10	20
248		480256809912	33.6	0	10	20
249		480256809919	33.6	0	10	20
250		480257001000	33.6	0	10	20
251		480257003000	16.2	0	10	20

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
252		480257005000	33.6	0	10	20
253		480257006100	33.6	0	10	20
254		480257006200	33.6	0	10	20
255		480257009900	33.6	0	10	20
256		480258101000	33.6	0	10	20
257		480258103000	16.2	0	10	20
258		480258105011	33.6	0	10	20
259		480258105019	33.6	0	10	20
260		480258106100	33.6	0	10	20
261		480258106200	33.6	0	10	20
262		480258109900	33.6	0	10	20
263		480258901000	33.6	0	10	20
264		480258903000	16.2	0	10	20
265		480258905011	33.6	0	10	20
266		480258905019	33.6	0	10	20
267		480258906100	33.6	0	10	20
268		480258906200	33.6	0	10	20
269		480258909900	33.6	0	10	20
270		480261151111	33.6	0	10	20
271		480261151112	33.6	0	10	20
272		480261151119	33.6	0	10	20
273		480261152100	33.6	0	10	20
274		480261152200	33.6	0	10	20
275		480261152900	33.6	0	10	20
276		480261801100	33.6	0	10	20
277		480261801200	33.6	0	10	20

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
278		480261801300	33.6	0	10	20
279		480261801500	33.6	0	10	20
280		480261801911	33.6	0	10	20
281		480261801919	33.6	0	10	20
282		480261802100	33.6	0	10	20
283		480261802200	33.6	0	10	20
284		480261802900	33.6	0	10	20
285		480262001100	33.6	0	10	20
286		480262001200	33.6	0	10	20
287		480262001300	33.6	0	10	20
288		480262001500	33.6	0	10	20
289		480262001911	33.6	0	10	20
290		480262001919	33.6	0	10	20
291		480262002100	33.6	0	10	20
292		480262002200	33.6	0	10	20
293		480262002900	33.6	0	10	20
294		480269001100	33.6	0	10	20
295		480269001200	33.6	0	10	20
296		480269001300	33.6	0	10	20
297		480269001900	33.6	0	10	20
298		480269002100	33.6	0	10	20
299		480269002200	33.6	0	10	20
300		480269002900	33.6	0	10	20
301		480269003900	33.6	0	10	20
302	48.04	480411111000	23.4	0	10	20
303		480411112000	32.4	0	10	20

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
304		480411151000	23.4	0	10	20
305		480411152000	32.4	0	10	20
306		480411191000	23.4	0	10	20
307		480411192000	32.4	0	10	20
308		480411901011	24.6	0	10	20
309		480411901012	24.6	0	10	20
310		480411901013	24.6	0	10	20
311		480411902000	33.6	0	10	20
312		480419121000	33.6	0	10	20
313		480419122000	33.6	0	10	20
314		480419191000	23.4	0	10	20
315		480419192000	32.4	0	10	20
316		480419301000	33.6	0	10	20
317		480419302000	33.6	0	10	20
318		480419901000	24.6	0	10	20
319		480419902000	33.6	0	10	20
320		480421100000	24.2	0	10	20
321		480421900000	24.6	0	10	20
322		480429100000	24.2	0	10	20
323		480429900000	24.6	0	10	20
324		480431510000	23.4	0	10	20
325		480431581000	32.4	0	10	20
326		480431582000	32.4	0	10	20
327		480431801000	32.4	0	10	20
328		480431802000	32.4	0	10	20
329		480431809000	32.4	0	10	20

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
330		480439511000	23.4	0	10	20
331		480439512000	32.4	0	10	20
332		480439581000	32.4	0	10	20
333		480439582000	32.4	0	10	20
334		480439801000	32.4	0	10	20
335		480439802000	32.4	0	10	20
336		480439809000	32.4	0	10	20
337		480441910000	32.4	0	10	20
338		480441981000	32.4	0	10	20
339		480441982000	32.4	0	10	20
340		480441989000	32.4	0	10	20
341		480442001000	32.4	0	10	20
342		480442002000	32.4	0	10	20
343		480442009000	32.4	0	10	20
344		480449001000	32.4	0	10	20
345		480449002000	32.4	0	10	20
346		480449009000	32.4	0	10	20
347		480451001000	32.4	0	10	20
348		480451002000	32.4	0	10	20
349		480451009000	32.4	0	10	20
350		480452001000	32.4	0	10	20
351		480452002000	32.4	0	10	20
352		480452009000	32.4	0	10	20
353		480459101000	23.4	0	10	20
354		480459102000	32.4	0	10	20
355		480459900000	Unbound	0	10	20

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
356	48.11	481110001000	Unbound	0	25	50
357		481110009000	Unbound	0	25	50
358		481141200000	29.4	0	25	50
359		481141901000	29.4	0	25	50
360		481141909000	29.4	0	25	50
361		481149001000	29.4	0	25	50
362		481149009000	29.4	0	25	50
363		481151001000	Unbound	0	25	50
364		481151009000	Unbound	0	25	50
365		481159001000	Unbound	0	25	50
366		481159009000	Unbound	0	25	50
367		481160001000	Unbound	0	25	50
368		481160009000	Unbound	0	25	50
369		481190001000	21.6	0	25	50
370		481190002000	21.6	0	25	50
371		481190009000	21.6	0	25	50
372	5502.10	550210000000	Unbound	4	30	60
374	7308.90	730890510000	Unbound	0	30	60
375		730890590011	Unbound	0	30	60
376		730890590019	Unbound	0	30	60
376		730890980012	Unbound	0	30	60
377		730890980013	Unbound	0	30	60
378		730890980014	Unbound	0	30	60
379		730890980015	Unbound	0	30	60
380		730890980016	Unbound	0	30	60
381		730890980018	Unbound	0	30	60

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
382	8413.70	841370211000	16.6	0	10	20
383		841370219000	16.6	1.7	10	20
384		841370291000	16.6	0	10	20
385		841370299000	16.6	1.7	10	20
386		841370301000	16.6	0	10	20
387		841370309000	16.6	1.7	10	20
388		841370351000	16.6	0	10	20
389		841370359000	16.6	1.7	10	20
390		841370451000	16.6	0	10	20
391		841370459000	16.6	1.7	10	20
392		841370511000	16.6	0	10	20
393		841370519000	16.6	1.7	10	20
394		841370591000	16.6	0	10	20
395		841370599000	16.6	1.7	10	20
396		841370651000	16.6	0	10	20
397		841370659000	16.6	1.7	10	20
398		841370751000	16.6	0	10	20
399		841370759000	16.6	1.7	10	20
400		841370811000	16.6	0	10	20
401		841370819000	16.6	1.7	10	20
402		841370891000	16.6	0	10	20
403		841370899000	16.6	1.7	10	20
404	8479.89	847989300000	Unbound	1.7	10	20
405		847989600000	Unbound	1.7	10	20
406		847989700000	13.8	1.7	10	20
407		847989971000	Unbound	1.7	10	20

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
408		847989972000	Unbound	1.7	10	20
409		847989973000	13.8	1.7	10	20
410		847989979000	Unbound	1.7	10	20
411	87.03	870310110000	19	5	60	120
412		870310180000	20	10	60	120
413		870321101000	Unbound	10	60	120
414		870321109011	19	10	60	120
415		870321109019	19	10	60	120
416		870321901000	Unbound	10	60	120
417		870321909011	19	10	60	120
418		870321909019	19	10	60	120
419		870322101000	Unbound	10	60	120
420		870322109011	19	10	60	120
421		870322109012	19	10	60	120
422		870322109019	19	10	60	120
423		870322901000	Unbound	10	60	120
424		870322909011	19	10	60	120
425		870322909012	19	10	60	120
426		870322909019	19	10	60	120
427		870323110000	19	10	60	120
428		870323191100	Unbound	10	60	120
429		870323191200	Unbound	10	60	120
430		870323191300	Unbound	10	60	120
431		870323199011	19	10	60	120
432		870323199019	19	10	60	120
433		870323901100	Unbound	10	60	120

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
434		870323901200	Unbound	10	60	120
435		870323901300	Unbound	10	60	120
436		870323909011	19	10	60	120
437		870323909019	19	10	60	120
438		870324101000	Unbound	10	60	120
439		870324109011	19	10	60	120
440		870324109019	19	10	60	120
441		870324901000	Unbound	10	60	120
442		870324909011	19	10	60	120
443		870324909019	19	10	60	120
444		870331101000	Unbound	10	60	120
445		870331109011	19	10	60	120
446		870331109019	19	10	60	120
447		870331901000	Unbound	10	60	120
448		870331909011	19	10	60	120
449		870331909019	19	10	60	120
450		870332110000	19	10	60	120
451		870332191100	Unbound	10	60	120
452		870332191200	Unbound	10	60	120
453		870332191300	Unbound	10	60	120
454		870332199011	19	10	60	120
455		870332199019	19	10	60	120
456		870332901100	Unbound	10	60	120
457		870332901200	Unbound	10	60	120
458		870332901300	Unbound	10	60	120
459		870332909011	19	10	60	120

	4- or 6-Digit HS Code	12-Digit HS Code	Bound Rate	MFN Rate[1]	Additional Duty (until 15 August 2018)	Additional Duty (from 15 August 2018 until 21 May 2019)
460		870332909019	19	10	60	120
461		870333110000	19	10	60	120
462		870333191011	19	10	60	120
463		870333191012	19	10	60	120
464		870333199011	19	10	60	120
465		870333199019	19	10	60	120
466		870333901011	Unbound	10	60	120
467		870333901012	Unbound	10	60	120
468		870333909011	19	10	60	120
469		870333909019	19	10	60	120
470		870340100000	19/20/U[2]	10	60	120
471		870340900000	19/20/U[3]	10	60	120
472		870350000000	19/20/U[4]	10	60	120
473		870360100000	19/20/U[5]	10	60	120
474		870360900000	19	10	60	120
475		870370000000	19	10	60	120
476		870380100000	20	10	60	120
477		870380900000	20	10	60	120
478		870390000000	19	10	60	120
479	9022.19	902219000000	Unbound	0	5	10

[2] See paras. 7.139-7.142 of the Panel's Final Report.
[3] See paras. 7.139-7.142 of the Panel's Final Report.
[4] See paras. 7.143-7.146 of the Panel's Final Report.
[5] See paras. 7.147-7.149 of the Panel's Final Report.