

***TÜRKİYE — MEASURES CONCERNING ELECTRIC VEHICLES
AND OTHER TYPES OF VEHICLES FROM CHINA***

(DS629)

**RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL
TO THIRD PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING**

October 13, 2025

TABLE OF REPORTS

Short Form	Full Case Title and Citation
<i>Argentina – Import Measures (AB)</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>Dominican Republic – Cigarettes (Panel)</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
<i>Dominican Republic – Safeguard Measures (Panel)</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012
<i>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998
<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>India – Autos (Panel)</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002
<i>India – Quantitative Restrictions (Panel)</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R
<i>Turkey – Textiles (AB)</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999

TABLE OF ABBREVIATIONS

Abbreviation	Definition
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
EV	Electric Vehicle
FTA	Free Trade Agreement
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized System
HTSUS	Harmonized Tariff Schedule of the United States
TRIMs Agreement	Agreement on Trade-Related Investment Measures
WCO	World Customs Organization
WTO	World Trade Organization

TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
US-1	New Shorter Oxford English Dictionary (4th Edition) (1993)
US-2	China’s EV supply chain dominance graphic from <i>Financial Times</i> , “Foreign carmakers confront ‘moment of truth’ in China,” Apr. 21, 2023
US-3	Battery Cell Manufacturing Capacity, GWh (2018-2024) based on BNEF data
US-4	New Shorter Oxford English Dictionary (4th Edition) (1993)

1 ADDITIONAL DUTIES

1. To all third parties: In practice, under which subheading(s) of HS 2012 heading 87.03 were hybrid and electric vehicles classified in your respective applied tariff schedules *prior* to the HS 2017 amendment that created the new categories for these types of vehicles (i.e. in the 2012 version of the HS nomenclature) when imported into your territory?

U.S. Response to Question 1:

1. Prior to the HS 2017 amendment, electric vehicles (EVs) were primarily classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 8703.90.00, which was the category for “Other” under “Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars.”

2. Prior to the HS 2017 amendment, hybrid vehicles could be classified under HTSUS subheadings 8703.21.00, 8703.22.00, 8703.23.00, and 8703.24.00, which were the categories for “Other vehicles, with spark-ignition internal combustion reciprocating piston engine”, depending on cylinder capacity; or HTSUS subheadings 8703.31.00, 8703.32.00, and 8703.33.00, which were the categories for “Other vehicles, with compression-ignition internal combustion piston engine (diesel or semi-diesel)”, depending on cylinder capacity.

2. To all third parties: What is the legal relevance, in WTO law, of the HS correlation tables (Exhibit CHN-21)?

U.S. Response to Question 2:

3. In order to facilitate the implementation of the Harmonized System (HS) amendments, the World Customs Organization (WCO) Secretariat publishes correlation tables for each HS amendment to be used as a guideline. The correlation tables establish the correlation between the previous HS version and the new HS version by showing the relationships between subheadings from the two HS versions. These correlation tables do not have legal status. However, they are an important tool for Members in implementing HS transpositions.

3. To all third parties: What is the legal relevance, in WTO law, of the UN Conversion table (Exhibit CHN-22)? Are there differences with respect to the HS correlation tables that the Panel should be aware of?

U.S. Response to Question 3:

4. The United Nations Statistics Division explains in its Conversion Methodology General Note: “The data conversions have been developed based on the best judgment of the staff at the

Trade Statistics Section (TSS) at the Economic Statistics Branch of the United Nations Statistics Division (UNSD) but have no binding character whatsoever.”¹

5. To all third parties (except Canada): In paragraphs 11 and 12 of its oral statement at the first substantive meeting with the Panel, Canada stated that (original footnotes included):

11. Moreover, Canada notes that while transposing a Member’s Tariff Schedule is a complex and time-consuming process, it is also a mechanical one. HS correlation tables are prepared and approved to identify overlap in product coverage between the HS updates, thus avoiding changes in the scope of a Member’s concessions.⁴ As such, where a Member already has commitments under its existing coverage with respect to a product at issue, this would not change as a result of that Member’s transposition process.

12. In any event, if modifications to the scope of a Member’s concessions were proposed due to the HS update, a Member could decide to enter into consultations and renegotiations pursuant to GATT Article XXVIII, as is recognized in the General Council Decision on HS2007 Transposition Procedures.⁵ Canada notes that Türkiye has not entered into any such renegotiations.

Please comment on the nexus between the transposition of WTO Schedules of concessions to reflect new version of the Harmonized System and Article XXVIII of the GATT 1994 that was described by Canada.

U.S. Response to Question 5:

5. The WCO periodically reviews the HS nomenclature to take account of changes in technology and patterns in international trade, and recommends amendments to it.² WTO Members then transpose HS updates into their WTO Schedules. As part of this transposition exercise, the WTO General Council decides on specific procedures to introduce and certify HS changes to Members’ Schedules. Therefore, the HS transposition process reflects the continuation of tariff commitments in Members’ WTO Schedules, not substantive modifications.

6. There are procedures available to WTO Members seeking to modify or withdraw their tariff commitments, as provided in Article XXVIII of the GATT 1994.

6. To all third parties: What is the distinguishing element between “ordinary customs duties” and “other duties and charges” within the meaning of Article II:1(b) of the GATT

¹ United Nations Statistics Division, “Correlation and conversion tables used in UN Comtrade”, <https://unstats.un.org/unsd/classifications/Econ/corr-notes/HS2022%20conversion%20to%20earlier%20HS%20versions%20and%20other%20classifications%20%20-%20v.1.0.pdf>.

² International Convention on the Harmonized Commodity Description and Coding System, Article 7.1(a).

1994? In your response please also comment on the panel’s statement in *Dominican Republic – Safeguard Measures* that:

the expression “ordinary customs duties” in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute “customs duties” in the strict sense of the term (*stricto sensu*) and that this expression does not cover possible extraordinary or exceptional duties collected in customs.⁶

U.S. Response to Question 6:

7. The GATT 1994 does not define the term “ordinary customs duties.” The United States understands that an ordinary customs duty means a tax imposed on a good upon its importation, typically calculated based on either the value of the good (such as *ad valorem* duties) or the volume of the good (such as specific duties) at the time of importation, and is typically set out in a Member’s domestic tariff schedule.

8. “Other duties and charges”, on the other hand, forms a residual category that includes any financial assessment imposed on a good upon its importation of goods that do not qualify as ordinary customs duties.³ According to paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994:

In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any “other duties or charges” levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of “other duties or charges”.

7. To all third parties: Does a valid *prima facie* case under Article XX of the GATT 1994 require a respondent to justify, under the relevant subparagraphs, each individual inconsistency that has been established?

U.S. Response to Question 7:

9. A responding party seeking to establish that a measure is justified under GATT Article XX bears the burden of demonstrating that the particular measure satisfies the requirements of both the chapeau and the relevant subparagraph(s) of Article XX.

8. To all third parties: For the justification of a measure under Article XX of the GATT 1994, is the same difference in treatment that results in an MFN violation relevant to the chapeau or should it only be considered in the subparagraphs?

U.S. Response to Question 8:

³ See *Dominican Republic – Safeguard Measures (Panel)*, paras. 7.79-7.85.

10. To the extent that the question’s reference to “an MFN violation” refers to an alleged inconsistency with GATT 1994 Article I:1, the text of Article XX clearly states, “*nothing* in this Agreement [the GATT 1994] shall be construed to prevent the adoption or enforcement by any contracting party of measures” that are covered under at least one of the subparagraphs of Article XX, “[s]ubject to the requirement” in the chapeau.

11. Accordingly, a measure that is consistent with the exceptions set out under Article XX of GATT 1994 is not an “MFN violation”. With respect to a difference in treatment that is alleged to result in an inconsistency with GATT 1994 Article I:1, the different treatment may be relevant to the analysis under either or both of the subparagraphs and the chapeau of Article XX.

12. For example, a difference in treatment between products of two countries may be based on distinctions drawn in the challenged measure between the products of those countries, including the production or process methods, for purposes of advancing the Member’s values and regulatory scheme. That is, the difference in treatment may result from the Member’s goal to protect, secure compliance with, conserve, etc., one of the values listed in the subparagraphs of Article XX. Accordingly, if there are relevant distinctions between products of, or conditions in, China and other Members, this may be relevant to demonstrate that the measures adopted by Türkiye are necessary to promote its values.

13. Similarly, as relevant in this dispute, the chapeau of Article XX provides that any measure purportedly justified under an Article XX subparagraph must not be applied in a manner which would constitute “arbitrary or unjustifiable discrimination between countries *where the same conditions prevail*” (emphasis added). As explained in our third-party submission, based on its ordinary meaning, the text in the chapeau may be understood as prohibiting an exercise of unpredictable or indefensible discernment or distinction as between countries that have the same state, mode of being, or nature. Accordingly, if there are differences in the conditions that prevail in China, it may be entirely logical for Türkiye to exercise distinction with respect to China in the application of the measures at issue.

9. To all third parties: In the Panel’s interpretation and application of Article XX of the GATT 1994 as raised by Türkiye, what is the role of commitments Türkiye has undertaken in other international instruments such as the Paris Convention or the Glasgow Declaration?

U.S. Response to Question 9:

14. The United States understands that Türkiye has referred to its ratification of the Paris Agreement and its signatory status with respect to the Glasgow Declaration primarily to demonstrate that the “protect[ing] human, animal or plant life or health” and “the conservation of exhaustible natural resources”, within the meaning of GATT Article XX(b) and (g), are objectives being pursued by Türkiye.

15. As part of assessing whether the additional duties are justified under GATT Article XX(b) and (g), the Panel’s task includes determining whether the additional duties were

adopted or enforced to “protect human, animal or plant life or health”, or “relat[e] to the conservation of exhaustible natural resources.” Türkiye’s commitments under these international instruments may provide some context as factual evidence, though not necessarily demonstrating the requisite relationships between the objectives under Article XX(b) and (g) and the specific measures at issue.

10. To Switzerland: In paragraph 12 of its oral statement, Switzerland stated that (original footnote included):

When examining the relationship between the challenged measures, considering their design (including their content, structure, and expected operation) and the proclaimed objective,⁷ it will be relevant for the Panel to take into account the existence of such “cascading” objectives and to *assess the relationship of the immediate objective with the broader goal of reducing GHG emissions.* [emphasis added]

Please elaborate on how the Panel is to assess the relationship of the immediate objective with the broader goal of reducing GHG emission.

U.S. Response to Question 10:

16. This question is directed to Switzerland.

2. IMPORT PERMIT LICENSING SCHEME

11. To all third parties: In what circumstances (if any) would the fact that domestic market requirements are enforced with respect to imported products through an import licensing scheme constitute discrimination inconsistent with Article III:4 of the GATT 1994?

U.S. Response to Question 11:

17. To the extent that an import licensing scheme is a measure “affecting the internal sale, offering for sale, purchase, transportation, distribution or use” of products within the meaning of Article III:4 of the GATT 1994, it would be inconsistent with Article III:4 if the Member does not impose equivalent (and no-more-favorable) limitations on the internal sale, offering for sale, purchase, transportation, storage, distribution and use of like domestic products. The mere fact of application of a domestic regulatory scheme to imports through controls at the border, such as import licensing, would not itself constitute less favorable treatment inconsistent with Article III:4.

18. To clarify, whereas Article XI:1 of the GATT 1994 applies to certain prohibitions or restrictions instituted or maintained on the *importation* of products—which is distinct from the scope of Article III:4 (*i.e.*, *internal* laws, regulations, and requirements affecting *imported* products)—it is possible for a particular law, regulation, or other measure to have one aspect that prohibits or restricts importation and another aspect that leads to less favorable treatment after importation. The fact that both aspects appear in one legal instrument does not mean that only one of the two GATT provisions could be invoked.

12. To all third parties: The Panel refers to China’s arguments in paragraph 183 of its first written submission that “importers that cannot meet the conditions required to obtain an import permit certificate are prohibited from importing Chinese EVs and externally rechargeable hybrid vehicles” and that “(t)his in itself has limiting effects” and to Türkiye’s argument in paragraph 3.122 of its first written submission that “it is simply not enough for China to point to the mere existence of conditions for the issuance of an import permit under the IPLS and, on that basis, claim a violation of Article XI.” In light of these statements, does non-automatic licensing *per se* have limiting effects on importation inconsistent with Article XI:1 of the GATT 1994? If not – in what circumstances would a non-automatic import licensing scheme be inconsistent with Article XI:1?

U.S. Response to Question 12:

19. In the context of GATT Article XI:1, the ordinary meaning of the term “restriction” can capture a number of forms of measures. The pertinent definition of “restriction” in relation to the acts of importation or exportation is “a limitation on action, a limiting condition or regulation.”⁴ Prior reports have correctly reached this interpretation. The panel in *India – Quantitative Restrictions* reasoned that “[t]he scope of the term ‘restriction’ is . . . broad, as seen in its ordinary meaning.”⁵ The panel in *India – Autos* reached the same conclusion, finding that “any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1.”⁶ The reports in *China – Raw Materials* and *Argentina – Import Measures* also correctly reasoned that “restriction” refers to “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation” and thus “refers generally to something that has a limiting effect.”⁷

20. Further, Article XI:1 applies to *any* “restriction,” including those “made effective through quotas, import or export licenses *or other measures*.”⁸ As stated in that article, only measures that take the form of “duties, taxes, or other charges” fall outside the scope of Article XI:1.”⁹

21. Where a non-automatic import licensing scheme constitutes a limitation on action or a limiting condition on importation – and does not constitute “duties, taxes, or other charges” within the meaning of Article XI:1, or constitute one or more of the exemptions under Article

⁴ *New Shorter Oxford English Dictionary* (4th Edition) (1993), vol. 2, p. 2569 (Exhibit US-1).

⁵ *India – Quantitative Restrictions (Panel)*, para. 5.128.

⁶ *India – Autos (Panel)*, para. 7.265 (original emphasis omitted); *see also Dominican Republic – Cigarettes (Panel)*, para. 7.269 (citing same).

⁷ *See China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553); *Argentina – Import Measures (AB)*, para. 5.217 (quoting same).

⁸ Emphasis added.

⁹ Article XI:2 contains a list of restrictions or prohibitions that are not prohibited under Article XI:1, and measures complying with certain other provisions of the WTO Agreements also may not be found to breach Article XI:1. *See Argentina – Import Measures (AB)*, paras. 5.219-5.221.

XI:2 – the measure may raise concerns under Article XI:1. However, it would be necessary to further consider whether the conditions for issuance of a license have another valid basis, for example, in order to apply equivalent restrictions on domestic products, or restrictions excluded from Article XI by virtue of paragraph 2, or others.

13. To all third parties: We note that to determine whether the challenged measures were trade-related investment measures under the TRIMs Agreement, prior panels considered evidence that these measures pursued the promotion and development of specific industries and assessed whether they had “investment objectives and investment features”⁸. In your view, what factors can be used to discern the underlying investment objective of a measure?

14. To all third parties: If the IPLS requires importers to make investments in Türkiye to obtain an import permit, how should this affect the characterization of the IPLS as a trade-related investment measure (TRIM)?

U.S. Response to Questions 13 and 14:

22. The U.S. response addresses Questions 13 and 14 together, as they both relate to determining whether a measure is a “trade-related investment measure” within the scope of the TRIMs Agreement.

23. The TRIMs Agreement does not define “trade-related investment measure” or otherwise specify the scope of the term. The text of the TRIMs Agreement does not limit the type of “investment” at issue in an “investment measure.” An ordinary meaning of the term “invest” is to “expend (money, effort) in something from which a return or profit is expected, now esp. in the purchase of property, shares, etc., for the sake of interest, dividends, or profits accruing from them.”¹⁰ In other words, an investment is an expending of money in order to realize a profit. The definition confirms the traditional identification of investing in property or the stock market, but recognizes that such are only examples how one may invest.

24. Thus, based on the ordinary meaning of the term “trade-related investment measure,” to the extent that the Panel finds that (i) the IPLS requires importers to expend money in Türkiye in certain ways as a condition for importation, which importers must do to make a profit, and (ii) the requirement is related to trade (e.g., because it is a condition that importers must fulfill in order to import EVs and externally rechargeable hybrid vehicles into Türkiye), the IPLS may constitute a trade-related investment measure within the meaning of the TRIMs Agreement.

15. To all third parties: Please comment on paragraphs 3.155 and 3.156 of Türkiye’s first written submission, where Türkiye states the following (emphasis original):

Article X:3(a) requires that the *administration* of trade regulations be reasonable, impartial and uniform. The emphasis is on the administration of trade regulations, to be distinguished from their substantive content.

¹⁰ *New Shorter Oxford English Dictionary* (4th Edition) (1993), vol. 1, p. 1410 (Exhibit US-4).

The substantive content of trade regulations is primarily discernible from the text of the measure, its scope of application and its design, features and revealing architecture. The substantive content of a measure can be challenged on the basis of fundamental provisions such as Article I, III or XI of the GATT 1994.

U.S. Response to Question 15:

25. The United States understands that Türkiye is drawing a distinction between the *administration* and the *substantive content* of trade regulations for purposes of GATT Article X:3.

26. Article X:3(a) provides: “Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.”

27. In this regard, paragraph 1 of Article X, titled “Publication and Administration of Trade Regulations,” describes “[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party,” and requires these to “be published promptly in such a manner as to enable governments and traders to become acquainted with them.” As a report in *EC – Poultry* correctly reasoned, a dispute that relates to the substantive content of the rules themselves, and not to their publication or administration, falls outside the scope of GATT Article X; the WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than GATT Article X.¹¹

28. As a general matter, the United States does not disagree that the substantive content of a trade regulation is primarily discernible from the text of the regulation.

29. At the same time, the administration of a trade regulation may include not only *acts* of administering that regulation, but also *legal instruments* that regulate the application or implementation of such a regulation.¹² That is, the reasonable, impartial, or uniform administration of one measure may be determined by the administrative aspects of that measure or the substantive content of another measure relating to the first measure’s administration.

16. To all third parties: With respect to the alleged violation of Article I:1 of the GATT 1994, Türkiye raises a defence under Article XX(d) “in the alternative”, should the Panel reject Türkiye’s defence under Article XXIV and the Enabling Clause (Türkiye’s first

¹¹ See *EC – Poultry (AB)*, para. 115.

¹² See *EC – Selected Customs Matters (AB)*, para. 200 (“[u]nder Article X:3(a), a distinction must be made between the legal instrument being administered and the legal instrument that regulates the application or implementation of that instrument. While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument.”).

written submission, paragraph 3.198 and footnote 413). In paragraph 97 of its third-party submission, the European Union takes the view that “Article XXIV:5 cannot be invoked for inconsistencies with Article I:1 of the GATT 1994 in respect of measures that can be justified under Article XX.” Please comment on the European Union’s view.

U.S. Response to Question 16:

30. We understand that the EU’s rationale is that “the references to this provision [GATT Article XX] contained in the brackets of Article XXIV:8(a)(i) and (b) of the GATT confirm”¹³ such a view. Article XXIV:8(a)(i) and (b) defines customs union and FTA for purposes of the GATT 1994, including that in a customs union and an FTA, “duties and other restrictive regulations of commerce” are eliminated with respect to substantially all the trade, with the exception of such regulations that are permitted under Articles XI, XII, XIII, XIV, XV and XX, as necessary. The text of Article XXIV:8 does not support the EU’s view that a measure that could be justified under Articles XI, XII, XIII, XIV, XV and XX is not permitted to be justified with reference to Article XXIV.

31. With respect to whether the Panel should reach all or some of Türkiye’s defenses, a panel’s function, pursuant to Article 11 of the DSU, is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. To that end, a panel, in addition to making an objective assessment of the matter before it, “should . . . make such other findings *as will assist the DSB in making the recommendations* or in giving the rulings provided for in the covered agreements.” This role of a panel supports the exercise of judicial economy where appropriate.

18. To the European Union: With regard to paragraphs 97 and 98 of the European Union’s third-party submission, is the European Union’s position that if a respondent raises defences under both Article XX and Article XXIV of the GATT 1994 to justify an alleged violation of Article I:1, a panel should only address the Article XX defence?

U.S. Response to Question 18:

32. This question is directed to the EU.

19. To all third parties: Please comment on Canada’s suggestion in paragraph 32 of its oral statement that the conditions set out by the Appellate Body in *Turkey – Textiles* provide “some guidance in analyzing the application of Article XXIV” but should not be “strictly applied without careful consideration by a panel of the context of the measure at issue.”

20. To all third parties: With regard to paragraph 24 of Australia’s oral statement, paragraph 32 of Japan’s third-party submission and paragraphs 100 and 101 of the European Union’s third-party submission, and assuming that the test elaborated by the Appellate Body in *Turkey – Textiles* applies, does Türkiye have to demonstrate that what was introduced at the time of the formation of the relevant Free Trade Agreements (FTAs)

¹³ EU’s Third-Party Submission, para. 97.

or Customs Union (CU) is the IPLS (as argued by Australia), the exemption of the European Union and Türkiye’s FTA partners from the IPLS (as argued by Japan), or the “non-applicability” of the IPLS to Türkiye’s FTA/CU partners (as argued by the European Union)?

U.S. Response to Questions 19 and 20:

33. The U.S. response addresses Questions 19 and 20 together, as they both relate to the Appellate Body’s approach in the report in *Turkey – Textiles* regarding GATT Article XXIV. While we agree with Canada’s note of caution, we consider it does not go far enough. In our view, the Panel should apply the actual text of Article XXIV, rather than a so-called test which appears susceptible to being applied in a way that takes the text of Article XXIV out of context.

34. Article XXIV:5 of the GATT 1994 provides, in relevant part:

Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided that*:

- (a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
- (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; [. . .]

35. Applying Article XXIV:5 to the customs union between Türkiye and the EU, for instance, would mean that the provisions of the GATT 1994—including Article I:1—shall not prevent the formation of that customs union, provided that the duties and other regulations of commerce imposed at the institution of the union in respect of trade with the other WTO

Members shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in Türkiye and the EU prior to the formation of the union.

36. The proviso requires an assessment at a particular point in time: for a customs union, “the duties and other regulations of commerce imposed at the institution”, and for an FTA, “the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation”. However, Article XXIV does not apply only “at the institution” or “at the formation”. Rather, Article XXIV:5 establishes that the Agreement shall not prevent “the formation of a customs union or a free-trade area”. The GATT 1994 could be understood to prevent such a formation if the Agreement did not impose ongoing requirements and provide a commensurate ongoing exemption. For example, Article XXIV:8 sets out the definition of a customs union and a free-trade area as, in part, the elimination of duties and other restrictive regulations of commerce on substantially all the trade between the parties. If the shield or exemption of Article XXIV only applied to changes “at the institution” or “at the formation”, then a party would not be permitted to exempt its agreement partners from new duties or other new restrictive regulations of commerce post-dating the formation of the partnership. This, in turn, could lead to the customs union or free-trade area no longer satisfying the requirements of Article XXIV:8.

37. The better understanding, then, is Article XXIV applies to permit the elimination of duties and other restrictive regulations of commerce both at and after the formation of the customs union or free-trade area where the failure to eliminate such measure would undermine the existence of the union or area, and in that sense prevent its formation.

21. To all third parties: To justify the potential inconsistency of a measure with Article I:1 of the GATT 1994 under either Article XXIV or the Enabling Clause, does the respondent have to refer to specific provisions in all its existing FTAs?

U.S. Response to Question 21:

38. No, it is not necessary to cite to a specific provision in an existing FTA to seek to justify a measure under Article XXIV. A contrary interpretation would mean assuming that each restrictive regulation of commerce is subject to a specific FTA provision or commitment. However, Article XXIV:8 refers to the elimination of duties and other restrictive regulations of commerce, which may be accomplished without elaboration of a specific FTA provision or commitment. It may, however, aid the responding party in justifying the measure, including in light of rebuttal arguments, to identify specific provisions or commitments that demonstrate the need to apply the challenged measure. Given the very different subject matter covered by the Enabling Clause, a responding party should be able to indicate which provisions are capable of justifying the challenged measure.

22. To all third parties: Please comment on Japan’s statements in paragraph 25 of its third-party submission that “the alleged contribution to ‘consumer confidence’ and ‘environmentally sound handling’ is irrelevant in examining the measure’s contribution to ‘securing compliance with specific rules’ in the context of Article XX(d).” What relevance,

if any, should the Panel attach to the potential contribution of these requirements to consumer protection as argued by Türkiye in the context of its analysis under Article XX(d) of the GATT 1994?

U.S. Response to Question 22:

39. As mentioned in our third-party oral statement, in assessing the “necessity” element under Article XX(d) (and XX(b)), some third parties argue that the Panel should apply a balancing test used in certain Appellate Body reports.¹⁴ As explained in both our third-party submission and oral statement, the United States considers that the Panel’s task is to evaluate—based on the ordinary meaning of “necessary” and other terms of GATT Article XX(d)—whether the measures at issue are “necessary” to secure compliance with GATT-consistent laws or regulations, rather than to apply a balancing test that does not strictly apply the actual text of Article XX(d).

¹⁴ U.S. Third-Party Oral Statement, para. 13.