

TURKEY– ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS561)

**U.S. Responses to Questions from the Panel to the Parties
After the First Substantive Meeting**

January 30, 2020

TABLE OF REPORTS AND AWARDS

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| <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 – 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 – Fasteners (China) (AB)</i> | Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011 |
| <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>Indonesia – Iron or Steel Products (AB)</i> | Appellate Body Reports, <i>Indonesia – Safeguard on Certain Iron or Steel Product</i> , WT/DS490/AB/R, WT/DS496/AB/R, and Add. 1, adopted 27 August 2018 |
| <i>Indonesia – Iron or Steel Products (Panel)</i> | Panel Report, <i>Indonesia – Safeguard on Certain Iron or Steel Product</i> , WT/DS490/R, WT/DS496/R, and Add. 1, adopted 27 August 2018 |
| <i>US – Countervailing Measures (China) (AB)</i> | Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015 |
| <i>US – Wool Shirts and Blouses (AB)</i> | Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1 |

TABLE OF EXHIBITS

| Exhibit No. | Description |
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| USA-10 | Section 232 statute, 19 U.S.C 1862 |
| USA-11 | Section 201 statute, 19 U.S.C §2251 |
| USA-12 | Presidential Proclamation 9694 of January 23, 2018, To Facilitate Positive Adjustment to Competition From Imports of Large Residential Washers, (excerpted), 83 Fed. Reg. 3,553 (January 23,2018) |
| USA-13 | <i>The New Shorter Oxford English Dictionary</i> , 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts) |
| USA-14 | Black’s Law Dictionary, 10th edn, B. Garner (ed.) (Thomson Reuters, 2014) |
| USA-15 | <i>The New Shorter Oxford English Dictionary</i> , 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts) |

1 TERMS OF REFERENCE

1. In paragraph 36 of its third-party submission, China argues that

[I]f 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'".

Similarly, in paragraphs 52 and 53 of its third-party submission, Russia argues that:

The United States was aware but still disregarded Article 8.2 of the Safeguards Agreement by including in its Panel Request only claims under Articles I and II of the GATT 1994. Their isolated consideration by the Panel would be deficient for the purposes of satisfactory resolution of the matter. The United States alludes to the issues arising out of the Safeguards Agreement in Part VI of its FWS by merely saying that it would not apply, whereby, also given the respective defect in the Panel Request, it did not articulate a clear claim or argument under Article 8.2 of the Safeguards Agreement. By doing so, the United States thwarts the effective resolution of the present dispute by misleading the Panel as to the relevant legal and factual background of the dispute.

Hence, the United States failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" under Article 6.2 of the DSU because its Panel Request did not include the claims on the alleged inconsistency of Turkey's measures with the Safeguards Agreement. Thus, the Panel should dismiss all of the United States' claims as it failed to present the problem clearly.

Please comment.

Response:

1. The arguments presented by China and Russia are meritless because the U.S. panel request meets the requirements of Article 6.2 of the DSU¹ by presenting the problem clearly. Article 6.2 of the DSU sets forth the content of a request for the establishment of a panel in order to bring a "matter" (in the terms of Article 7.1) within the Panel's terms of reference. China and Russia are pointing to additional claims that, in their view, the United States could have presented. But this would not make the U.S. panel request deficient in content under DSU Article 6.2; it would (if China and Russia were correct) lead the Panel to conclude the U.S.

¹ *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

claims in the panel request are not substantively made out, and the Panel cannot make a finding of breach under any other provision not included in the U.S. panel request.

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

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

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

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

- Article I:I of the GATT 1994, because Turkey fails to extend to products of the United States an advantage, favor, privilege, or immunity granted by Turkey with respect to customs duties and charges of any kind imposed or in connection with the importation of products originating in the territory of other Members;
- Article II:1(a) of the GATT 1994, because Turkey accords less favorable treatment to products originating in the United States than that provided in Turkey's schedule of concessions; and
- Article II:1(b) of the GATT 1994, because Turkey imposes duties or charges in excess of those set forth in Russia's schedule.²

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

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

6. At this point, we think it is important to pause and note that in one report, the Appellate Body apparently departed from the text of Article 6.2. Specifically, in that one report, the Appellate Body stated the view that Article 6.2 requires a panel request to explain "how or why the measure at issue is considered by the complaining Member to be violating the WTO

² See WT/DS561/2.

obligation in question.”³ This was either loose drafting, or plain legal error. As the United States explained⁴ before the Dispute Settlement Body on October 28, 2019, the Appellate Body’s incorrect interpretation has made disputes more complicated by encouraging procedural challenges, such as the preliminary ruling requests by China in DS558 and Russia in DS566.

7. Despite the straightforward application of Article 6.2 to the U.S. panel request, China and Russia put forth the flawed argument that the United States did not comply with Article 6.2 of the DSU because the United States did not cite to a WTO Agreement that the U.S. considers has no relevance in this dispute. China and Russia are merely pointing to additional claims that, in their view, the United States could have presented. But that is not the legal standard under Article 6.2.

8. Furthermore, Article 6.2 does not require that a panel request anticipate legal arguments raised by the responding party. Rather, in Appendix 3, paragraph 4, the DSU reflects that “[b]efore the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.”

9. As the United States has explained throughout this proceeding, this dispute is about Turkey’s WTO commitments under Articles I and II of the GATT 1994. That is the legal basis for the U.S. claims, and that basis was presented clearly in the U.S. panel request. Accordingly, the arguments presented by China and Russia regarding Article 6.2 of the DSU are baseless.

2 MEASURE AT ISSUE

2.1 To the United States

2. Please submit your comments, if any, on Exhibits TUR-48 and TUR-49 submitted by Turkey at the first substantive meeting.

Response:

10. In connection with the negotiations regarding a trade agreement between the U.S., Mexico, and Canada (“USMCA”), the United States announced an agreement with Canada and Mexico to remove the Section 232 tariffs for steel and aluminum imports from those countries and for the removal of all retaliatory tariffs imposed on American goods by those countries. At the first substantive meeting, Turkey provided a copy of the joint statements issued by the U.S. and Canada (Exhibit TUR-48), and by the U.S. and Mexico (Exhibit TUR-49).

11. As the United States indicated during the first substantive meeting of the parties, the agreements between the United States and Canada, and between the United States and Mexico, were undertaken pursuant to negotiations in connection with the USMCA. Parties are entitled to

³ *EC – Selected Customs Matters* (AB), para. 130; *China – Raw Materials* (AB), para. 226; *US – Countervailing Measures (China)* (AB), para. 4.9.

⁴ WT/DSB/M/436.

enter into such agreements that provide for arrangements and obligations to each other that may implicate WTO disciplines or that are completely outside of them.

12. Accordingly, Exhibits TUR-48 and TUR-49 do not offer support for Turkey's safeguards theory. Nor do they respond to the U.S. claims under Articles I and II of the GATT 1994.

3. At paragraph 7 of its first written submission, the United States argues that Turkey issued the "Decision on Implementation" on 25 June 2018. We note that paragraph 8 of the United States' first written submission refers to Article 4 of the same Decision, which in turn stipulates: "[t]his Decision shall enter into force on the date of its publication, effective [21 June 2018]" (Exhibit USA-1). Could the United States clarify whether the date of issuance is different from the date of the publication of the Decision on Implementation? If so, what is the legal significance of this difference?

Response:

13. The United States confirms that the *Decision on Implementation* entered into force on June 21, 2018 (*i.e.*, the date of its official publication). The *Decision on Implementation* was subsequently published publically on June 25, 2018. For the matters at issue in this dispute, the time difference between issuance and publication has no legal significance.

4. At footnote 28 of its first written submission, Turkey argues:

In its First Written Submission, the United States refers to 477 tariff lines at the 12-digit level (see para. 5). However, the United States appears to have omitted two tariff lines, namely, 2208.90.91.10.00 and 2208.90.99.1000. Hence, the total number of tariff lines is 479 rather than 477. Please comment.

Response:

14. The United States referenced the 2018 and 2019 editions of the Turkish Import Table to identify the MFN rates at issue in this dispute. Turkey publishes the Import Table on an annual basis each December. The Import Table provides HS codes, product descriptions, duties applicable to countries with which Turkey maintains free trade agreements, and duties applied to "All Other Nations." In this dispute, the United States specifically referenced duties applied to "All Other Nations."

15. Regarding the two tariff codes that Turkey asserts that the United States omitted, these tariff codes are not included in the batch of 59 tariff codes under subheading 2208 in the 2018 nor 2019 Turkish Import Tables. Rather, they are included in isolation, and out of sequence, in the 2018 and 2019 Turkish Import Tables. The MFN rate for the two tariff codes is 70 percent (in contrast to the 0 percent rate for all other 59 codes under subheading 2208) and additional duties were either 70 percent or 140 percent, such that the applied duty exceeds both the MFN

rate and the bound rate of 102 percent. Thus, Turkey has clarified that these two tariff codes exceed both their MFN rates and bindings.

- 5. With reference to paragraph 2.20 of Turkey's first written submission, please comment on Turkey's argument that it "reduced its additional duties effective as of 21 May 2019, to the level prior to 15 August 2018". What is the legal significance of this reduction for the Panel's analysis in these proceedings?**

Response:

16. Turkey's reduction of additional duties, from generally doubled rates back to the rates stipulated in the *Decision of Implementation*, is not legally significant as it occurred well after the establishment of the Panel in this dispute. The DSB established the Panel on January 28, 2019, and set its terms of reference to examine the matter in the U.S. panel request, not a different matter existing on some other date.

- 6. At footnote 37 of its first written submission, Turkey argues:**

Turkey wishes to correct a few minor inaccuracies. In Exhibits USA-6, USA-7 and USA-8, for the product in row 56 (210690920000), the MFN duty is 12.8 (not 58.5) per cent. In Exhibit USA-6 and USA-7, for the product in row 169 (and in row 170 in Exhibit USA-8) (392690979012), the MFN duty is 0 (not 6.5) per cent. Furthermore, in Exhibits USA-7 and USA-8, for products in rows 141, 142, 143 and 144 (2704.00), the additional duty is 10 (not 13.7) per cent.

Please comment.

Response:

17. Regarding HS code 210690920000, the United States observes that this tariff code does not appear in the 2018 nor the 2019 Turkish Import Table. HS code 210690920000 does appear in Turkey's Customs Entry Tariff Schedule, but that document does not contain any MFN rates. The United States, therefore, inputs a 58.5 percent MFN rate to match this code's rate to the 58.5 percent MFN rate the 2018 and 2019 Turkish Import Tables indicate for the other ten codes under the identical six-digit subheading of 210690 that are subject to *ad valorem* duties.

18. Turkey does not provide a source for its assertion that the allegedly correct MFN rate is 12.8 percent. In the event that Turkey's assertion is correct, any additional duties applied in combination with a 12.8 percent MFN rate would remain in breach of Article I of the GATT 1994. However, neither original additional duties of 10 percent, nor revised additional duties of 20 percent, applied in combination with a 12.8 percent MFN rate, would exceed the bound rate of 53 percent for HS code 210690920000.

19. Regarding HS code 392690979012, Turkey's assertion has no impact on the U.S. claim regarding Article I of the GATT. The United States notes that the value that appears in the MFN

rate column for this tariff code in the 2018 and 2019 Turkish Import Tables is 6.5 percent, as are all MFN rates for the 34 codes under 392690.

20. Finally, Turkey's assertion related to HS code 2704.00 is correct. We note, however, that Turkey's clarification has no impact on the U.S. claims in this dispute.

2.2 To Turkey

- 7. Please submit your comments, if any, on Exhibit USA-9 submitted by the United States at the first substantive meeting.**
- 8. With reference to Exhibits USA-1 and TUR-41, we note that the English translations submitted by the parties are not identical. In particular, the parties translate the title of the legal instruments differently. Could Turkey confirm whether the Panel in these proceedings should refer to the language of the translation submitted by the United States?**
- 9. With reference to paragraph 11 of the United States' first written submission, please comment on the United States' statement that "[n]either the Decision on Implementation nor the Decision to Amend exempts any of the products at the 12-digit level from additional duties".**
- 10. With reference to paragraph 15 and footnote 14 of the United States' first written submission, please indicate whether you agree with the methodology used by the United States to identify Turkey's bound rates at the 12-digit HTS line.**

Response:

21. Questions 7 through 10 are addressed to Turkey.

3. ORDER OF ANALYSIS

3.1 To both parties

- 11. Concerning the order of analysis to be followed by the Panel in these proceedings:**
 - a. Should the Panel begin its analysis by assessing the United States' claims under Articles I and II of the GATT 1994, or should it begin by assessing Turkey's arguments concerning the applicability of Article 8.2 of the Agreement on Safeguards to the measures at issue?**
 - b. If you consider that the Panel should first examine the United States' claims under Articles I and II of the GATT 1994, should the Panel examine Turkey's arguments under Article 8.2 of the Agreement on Safeguards only if it were to make findings that the measures at issue are inconsistent with Articles I or II of the GATT 1994?**

- c. **If you consider that the Panel should begin its analysis by assessing Turkey's arguments concerning Article 8.2 of the Agreement on Safeguards, should the Panel examine the United States' claims under Articles I and II only if it were to find that that provision does not apply to the measure at issue?**

Response:

22. In WTO dispute settlement, a panel generally begins its assessment by examining the claims of the complainant before assessing the respondent's defense. We do not see this dispute presenting a situation that would merit the Panel beginning its analysis by assessing Turkey's defense first.

3.2 To Turkey

12. **In arguing its claims under Articles II:1(a) and II:1(b) of the GATT 1994, the United States commences its analysis with Article II:1(b). In paragraph 53 of its first written submission, the United States argues 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 has also established a breach of the latter."**

Please comment on this assertion in the light of the order of analysis chosen by the United States.

Response:

23. This question is addressed to Turkey.

4. CLAIM UNDER ARTICLE I OF THE GATT 1994

To Turkey

13. **At paragraph 30 of its first written submission, the United States argues:**

Turkey's measure imposes additional duties only on products originating in the United States, and leaves unchanged the rate [of] duty applicable to other countries, including all other WTO Members. Specifically, Turkey's measure applies additional duties ranging from four to 140 percent to certain products originating in the United States. The measure, however, does not apply these additional duties on "like products" from other countries. In other words, U.S.[.] origin is the only criterion used by the measure for imposing additional duties on U.S. products covered by 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.

Please comment.

Response:

24. This question is addressed to Turkey.

5. Claim under Article II of the GATT 1994

5.1 To Turkey

14. At paragraph 54 of its first written submission, the United States argues:

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 to these products and breached Article II:1(a) as well.

Please comment.

Response:

25. This question is addressed to Turkey.

6. ARGUMENTS CONCERNING THE SAFEGUARDS REGIME

6.1 To both parties

15. In paragraph 1.7 of its first written submission, Turkey submits:

The proper legal basis for this dispute, as noted above, 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.

- a. What is the applicable legal standard under Article 8.2 of the Agreement on Safeguards? In particular, what are the analytical steps that a Panel must take in assessing whether a measure falls within Article 8.2?**
- b. Can a panel determine whether a measure falls under Article 8.2 of the Agreement on Safeguards without determining whether an underlying safeguard measure exists? Or is the existence of an underlying safeguard measure a threshold question?**
- c. If you consider that the existence of an underlying safeguard measure is a threshold question, can, or should, a panel examine whether the underlying measure is a safeguard measure even if it was not identified in the panel request and/or the Agreement on Safeguards was not identified in the panel request?**

Response:

26. As an initial matter, the United States observes that Turkey’s characterization of its additional duties as “rebalancing measures” is legally irrelevant. As the United States explained during the first substantive meeting of the parties, the classification of a measure under municipal law is not determinative of the applicable WTO obligation.

27. Regarding the analytical steps to assess whether a measure falls within Article 8.2 of the Safeguards Agreement, this provision sets out a right arising for an affected exporting Member if a safeguard measure is applied and no agreement has been reached by the Members concerned. The other “Member concerned” is that identified in Article 8.1 – that is, a “Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure”. Thus, the first step in assessing whether a measure “falls within Article 8.2” (in the words of the question) is to examine whether a Member is “proposing to apply” or is “seeking an extension of a safeguard measure” under Article 8.1, and then subsequently “the measure is applied”.⁵

28. Articles 8.1 and 8.2 contain cross-references to “the provisions of” and “consultations under” Article 12.3. Article 12.3 describes consultations being offered by a “Member *proposing* to apply or extend a safeguard measure”, and Article 12.2 also refers to certain “notifications” by a “Member *proposing* to apply or extend a safeguard measure”.⁶ This language parallels GATT 1994 Article XIX:2, which establishes that “[b]efore ... tak[ing] action”, a Member “shall” give notice in writing and afford an opportunity to consult “in respect of the *proposed* action”.⁷ These provisions all describe the same sequence of a Member proposing to take action, affording the opportunity to consult, and then taking action to apply a safeguard measure.

29. Accordingly, a WTO Member cannot implement rebalancing measures under Article 8.2 of the Safeguards Agreement **unless** another Member has proposed to apply or extend a safeguard measure and then has applied that measure.

30. Regarding question 15(b), a panel cannot determine whether a retaliatory measure falls under Article 8.2 of the Safeguards Agreement without first determining whether a safeguard measure exists. The exercise of the right – through invocation – to apply a safeguard measure is a **precondition** not only for a measure to constitute a safeguard but for another Member to implement a retaliatory measure under Article 8.2 of the Safeguards Agreement. Thus, the existence of a safeguard measure would be a threshold question in a dispute in which a complaining party, having exercised its right under GATT 1994 Article XIX and the Safeguards

⁵ Safeguards Agreement, Art. 8.2 (right to suspend concessions arises if no agreement is reached and must be exercised “not later than 90 days after the measure is applied”; right to suspend concession is “to the trade of the Member applying the safeguard measure”).

⁶ Safeguards Agreement, Art. 12.3 (“Member proposing to apply or extend a safeguard measure shall provide...”), Art. 12.2 (first sentence: “Member proposing to apply or extend a safeguard measure shall provide...”; third sentence: “the Member proposing to apply or extend the measure”).

⁷ GATT 1994 Article XIX:2 (“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.”).

Agreement to take safeguard action, subsequently seeks to challenge the conformity of a rebalancing measure with Article 8.2.

31. Finally, regarding question 15(c), a panel cannot assess whether a measure is a safeguard measure when a responding party seeks to invoke the “right” to “rebalancing” under the Safeguards Agreement as a defense. Article 7.2 of the DSU provides that “[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.” Here, the Safeguards Agreement and Article 8.2 is not a “relevant provision[] of a[] covered agreement”. Because the United States has not sought to exercise a right to exceed its tariff bindings through GATT 1994 Article XIX (a fact Turkey does not contest), no “right” to “rebalancing” can arise for another Member. Instead, to the extent such a Member considers that the United States has no legal basis to exceed its tariff bindings, it may pursue a claim of breach or non-violation nullification or impairment.

16. In paragraph 10 of its third-party submission, Japan states that:

[T]he 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 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. It would be, therefore, incorrect to treat the Appellate Body’s statement as a “definition” or “case law” on the scope of the Agreement on Safeguards.

Additionally, in paragraph 11, Japan submits that “significant evidentiary value must also be ascribed to some important factors, such as the status of fulfilment of the notification requirements under Article 12 of the Agreement on Safeguards”.

Please comment.

Response:

32. Before addressing Japan’s comments on *Indonesia – Iron or Steel Products*, the United States would like to provide some background on that dispute.

33. As a third-party participant in *Indonesia – Iron or Steel Products*, the United States agreed with the disputing parties 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.⁸ Article XIX:2 of the GATT 1994 and Article 12 of the Safeguards Agreement make clear that advance notice by a Member intending to suspend an obligation or withdraw a concession is a precondition to applying a safeguard measure. In *Indonesia – Iron or Steel Products*, Indonesia did notify other Members that it intended to adopt a safeguard measure, and thus did invoke Article XIX of the

⁸ See Exhibit USA-9, para. 2.

GATT 1994. In most situations, the question of whether the WTO’s safeguards disciplines applied would have been resolved by this fact.

34. *Indonesia – Iron or Steel Products*, however, presented unusual circumstances, stemming from the fact that Indonesia did not have tariff bindings with respect to the products covered by the Indonesian measure. Despite this, Indonesia conducted an investigation with a view to complying with its obligations under the Safeguards Agreement and imposed a duty in light of the outcome of that investigation.⁹ Furthermore, the parties in that dispute consistently argued that the duty at issue was a safeguard measure.¹⁰ Accordingly, the panel was placed in the position of assessing whether the Indonesian measure at issue involved suspension of an obligation or modification of a concession, and thus whether Article XIX or the Safeguards Agreement applied to the measure at issue.

35. The *Indonesia – Iron or Steel Products* panel proceeded to find that Indonesia had no binding tariff obligation with respect to the good at issue.¹¹ The panel reasoned that Indonesia’s obligations under Article II of the GATT 1994 did not preclude the application of the specific duty on imports of the good at issue; thus, to apply the measure at issue, Indonesia did not suspend, withdraw, or modify its obligations under Article II of the GATT 1994.¹² For these reasons, the panel found that Indonesia’s specific duty on the good at issue was not a measure within the scope of Article XIX of the GATT 1994, or the Safeguards Agreement. The Appellate Body affirmed the panel’s conclusion.

36. This dispute presents a fundamentally different scenario from *Indonesia – Iron or Steel Products*. The central question in this dispute is whether Turkey has any justification for its apparent breach of Articles I and II of the GATT 1994. As the United States explained in the U.S. opening statement, Turkey’s legal theory has no basis on the text of the WTO Agreement.¹³ Instead, Turkey asserts that “the governing standard for determining whether a measure is a safeguard measure is the standard developed by the Appellate Body in *Indonesia – Iron or Steel Products*.”¹⁴ As discussed above, the reasoning from the Appellate Body’s report in that dispute is simply not applicable here.

37. Moreover, as Japan correctly asserts in paragraph 10 of 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.”¹⁵ Rather, as the Appellate Body reasoned in *Indonesia – Iron or Steel Products*, “whether a particular measure constitutes a

⁹ *Indonesia – Iron or Steel Products (Panel)*, fn. 84 and para. 7.47.

¹⁰ *Id.*

¹¹ *Id.*, para. 7.18.

¹² *Id.*

¹³ See First Written Submission of the United States of America (“U.S. First Written Submission”), May 2, 2019, paras. 12-48.

¹⁴ Turkey’s First Written Submission (June 6, 2019), para. 4.8.

¹⁵ Third-Party Submission of Japan (June 20, 2019), para.10.

safeguard measure for purposes of WTO law can be determined only on a case-by-case basis.”¹⁶ Accordingly, given the unusual circumstances presented in *Indonesia – Iron or Steel Products*, the Appellate Body determined whether the WTO’s safeguards disciplines applied to the measure at issue in that dispute. As Japan mentioned in paragraph 10 of its third-party written submission, the **action** (*i.e.*, suspension, withdrawal, or modification of a GATT concession) and **purpose** (*i.e.*, suspension, withdrawal, or modification must be designed to prevent or remedy serious injury) factors used by the Appellate Body in its test are “*necessary – but not sufficient – to find a given measure to constitute a safeguard measure.*”¹⁷

38. Japan’s assertions in paragraph 11 of its third-party written submission further support the U.S. position. According to Japan,

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**. Indeed, to apply only the “two key features test” could **confuse** an assessment of whether the WTO’s safeguard disciplines apply to a measure.¹⁸

Thus, Japan argues that the Panel should ascribe “significant evidentiary value” to “some important factors,” such as notification to the WTO Committee on Safeguards. In this dispute, the U.S. has not notified the WTO Committee on Safeguards of any proposed action or safeguard measure taken because the United States did not invoke Article XIX of the GATT 1994 as the basis for action on imports.

17. Could any measure that raises duties above a bound rate be considered a "suspension of concessions"?

Response:

39. No; it is not the case that any measure that raises duties above a bound rate can be considered a suspension of concessions under Article XIX of the GATT 1994. The term “suspension of concessions” applies to situations where the Member adopting the measure understands that it is departing from WTO obligations, and invokes a provision of the WTO Agreement that specifically allows for a suspension of concessions. As the United States explained in the U.S. first written submission,¹⁹ for a measure to fall under the WTO’s safeguards disciplines the importing Member must invoke Article XIX of the GATT 1994 to exercise a right to suspend obligations or withdraw or modify tariff concessions. Similarly, when a Member invokes DSU Article 22.7 upon adopting a measure inconsistent with its tariff

¹⁶ *Indonesia – Iron or Steel Products (AB)*, para. 5.57.

¹⁷ Third-Party Submission of Japan, para. 10. (Emphasis in the original); *see also Indonesia – Iron or Steel Products (AB)* (noting that “in order to constitute one of the ‘measures provided for in Article XIX,’ a measure must present certain constituent features, **absent** which it could **not** be considered a safeguard measure.” Turkey, however, fails to address this aspect of the Appellate Body’s reasoning.) (emphasis added), para. 5.60.

¹⁸ Third-Party Submission of Japan, para. 11 (emphasis added).

¹⁹ *See* U.S. First Written Submission, paras. 56-76.

bindings, it is “suspending concessions.” Absent this type of invocation, a Member is not “suspending concessions”; Rather, the Member is simply adopting a measure that it is inconsistent with Article II of the GATT 1994.

40. The United States would highlight that over the course of the WTO, and before that the GATT 1947, numerous disputes have involved alleged breaches of a tariff commitment. The well-established and proper terminology is that such disputes involve an inconsistency with Article II; the terminology **is not** that the Member has “suspended a concession.” It is only Turkey and its supporters in this particular dispute that apparently advocate for the view that any measure that departs from an Article II commitment can be termed a “suspension of concessions.”

18. Is any and every measure that (a) suspends an obligation or modifies or withdraws a concession (b) for the purpose of protecting a domestic industry against serious injury or the threat thereof from an increase in imports *always and necessarily* a safeguard?

Response:

41. No. As the United States has argued throughout this dispute, and as indicated in the U.S. response to question 17, for a measure to be a safeguard, the importing Member must invoke Article XIX of the GATT 1994 to exercise a right to suspend obligations or withdraw or modify tariff concessions. Absent such invocation, a Member will not have a basis for that measure under Article XIX or the Safeguards Agreement.²⁰

19. In *Indonesia – Iron or Steel Products*, the Appellate Body referred to two constituent features of safeguard measures. Are there any other characteristics that a measure must have in order to be a safeguard falling within Article XIX:1 of the GATT 1994 and the Agreement on Safeguards, or absent which a measure cannot be characterized as a safeguard?

Response:

42. The first step to determine whether a measure falls under Article XIX of the GATT 1994 and the Safeguards Agreement is to identify whether the importing Member has invoked the right to take action pursuant to these provisions. Absent this invocation (in the terms of Article XIX:2, providing notice and an opportunity to consult; in the terms of the Safeguards Agreement, providing notification and an opportunity to consult), a measure cannot be characterized as a safeguard measure, nor would it fall under the WTO’s safeguards disciplines.

²⁰ We also note the question tracks the formulation of the Appellate Body report in *Indonesia – Iron or Steel Products* by referring to a “measure” that suspends an obligation or modifies or withdraws a concession. But it is not a “measure” (a domestic instrument) that itself accomplishes the WTO legal effect of suspension, modification, or withdrawal. As GATT 1994 Article XIX:1 establishes, a Member accrues such a right in a specified circumstance (“the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession”). The measure is the extent to which the Member chooses domestically to exercise the right.

In addition to this first condition, the two conditions in Article XIX:1 would also need to be present for a measure to be characterized as a safeguard.

20. Article 2.2 of the Agreement on Safeguards states that "[s]afeguard measures shall be applied to a product being imported irrespective of its source". In the view of the parties, is non-discriminatory application a "constituent element" of a safeguard measure?

Response:

43. Article 2.2 of the Safeguards Agreement provides that safeguard measures “shall be applied to a product being imported irrespective of its source.” Non-discriminatory application of a safeguard measure, then, is a requirement that safeguard measures have to meet in order to comply with the obligations of the Safeguards Agreement. In fact, Article 2 is titled “Conditions”, and Article 2.1 reiterates one of the conditions (or “constituent elements,” as the Appellate Body phrased the terms in *Indonesia – Iron or Steel Products*) set out in GATT 1994 Article XIX:1 (increased imports and injury).

21. With reference to paragraph 5.60 of the Appellate Body's report in *Indonesia – Iron or Steel Products*, please comment on how, in your view, a panel should "evaluate and give due consideration to" the factors mentioned in that paragraph, including the manner in which a measure was adopted and its characterization in a Member's municipal law.

Response:

44. How a panel “evaluates and gives consideration” to the factors (domestic law, domestic procedures, and notifications) listed in paragraph 5.60 of the Appellate Body’s report in *Indonesia – Iron or Steel Products* depends on the circumstances of a particular dispute. For instance, if a panel were to confront a factual scenario similar to *Indonesia – Iron or Steel Products*, it could make sense for such panel to use the factors in its assessment of the measure at issue.

45. Here, the factors listed in paragraph 5.60 would not be helpful in the Panel’s assessment of whether Turkey’s additional duties are consistent with its obligations under Articles I and II of the GATT. In addition, in its assessment of Turkey’s justification for its measures, the first step the Panel should take is to determine whether the United States invoked Article XIX of the GATT 1994 in connection with this dispute. The United States has not, and this fact is not contested by Turkey. Thus, the Panel’s inquiry can end there.

46. Even if the Panel were to further assess Turkey’s justification by applying the factors to the U.S. 232 measures, the Panel would find that the application of the factors supports the U.S. position. Regarding the first factor (domestic law), safeguard measures in the United States are authorized by Section 201 of the Trade Act of 1974.²¹ In relevant part, Section 201 allows the

²¹ 19 U.S.C. §§2251, *et seq.*

President of the United States to take action if “the United States International Trade Commission” determines that

an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article, the President, in accordance with this part, shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.²²

47. In contrast, under U.S. domestic law, the U.S. national security measures are authorized by Section 232 of the Trade Expansion Act of 1962.²³ 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**.”²⁴

48. Regarding the second factor (domestic procedures), the U.S. International Trade Commission is the only competent authority in the United States authorized to conduct safeguards investigations.²⁵ 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.

49. 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.

22. The Appellate Body in *Indonesia – Iron or Steel Products* held that for a measure to be a safeguard, it must be designed to remedy (or prevent) serious injury. Is the purpose of a measure an objective element or a subjective characteristic, entirely within the power of the regulating Member to decide? If so, is the existence of a safeguard measure really an "objective" question?

Response:

50. In the United States, the purpose of a safeguard measure is an objective element that can be deduced from the text of the measure. For instance, the text of the U.S. statute that authorizes

²² 19 U.S.C. §2251(a) (Exhibit USA-11).

²³ 19 U.S.C. §§1862, *et seq.*

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

²⁵ *See* 19 U.S.C. §2251(a).

the imposition of safeguard measures explicitly states the purpose of the statute. In relevant part, the U.S. statute that authorizes a safeguard measure provides that, if certain conditions are met, the President of the United States shall take action to “facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”²⁶ In addition, a Presidential Proclamation that implements a U.S. safeguard measure also states the purpose of the measure.²⁷

23. In paragraph 4.69 of its first written submission, Turkey states:

[T]he steel and aluminium measures were regarded, at the highest level of the US Government, as bargaining chips for economic or trade benefits to be wrangled from trading partners on entirely different products. In Turkey's view, it is obvious that this approach reflects the pursuit of traditional trade policy goals rather than national security measures.

- a. Is the objective of (preventing or) remedying injury the exclusive aim that a measure must pursue in order to be characterized as falling under the discipline of the Agreement on Safeguards?**
- b. Can a measure pursue other objectives at the same time (for instance, the protection of national security) and still fall within the scope of the Agreement on Safeguards?**

Response:

51. Turkey’s argument is not relevant to the Panel’s assessment of the matter in this dispute. As the United States has explained throughout this dispute, for a measure to fall under the WTO’s safeguards disciplines the importing Member must invoke Article XIX of the GATT 1994 to exercise a right to suspend obligations or withdraw or modify tariff concessions. Absent such invocation, a measure cannot fall under the WTO’s safeguards disciplines.

52. Furthermore, the Safeguards Agreement **only applies** to measures taken pursuant to Article XIX of the GATT. In relevant part, Article 11.1(c) of the Safeguards Agreement provides

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

²⁶ 19 U.S.C. §2251(a) (Exhibit USA-11).

²⁷ See Proclamation 9694 of January 23, 2018 (noting that the proclamation aims to “facilitate positive adjustment to competition from imports of large residential washers”). (Exhibit USA-12).

53. Accordingly, 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.

24. **At paragraph 3 of its oral statement at the third-party session, New Zealand argued that:**

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.

In your view, does the fulfilment of the notification requirements laid down in Article 12 of the Agreement on Safeguards relate to the applicability of the safeguards regime to a specific measure, or to the consistency of a safeguard measure with the relevant provisions of the Agreement on Safeguards?

Response:

54. The requirement to invoke GATT 1994 Article XIX flows from its provisions on providing notice of a proposed action, which is then repeated and elaborated in the notice requirement of Article 12 of the Safeguards Agreement. These elaborated notification requirements may relate to both applicability of the WTO’s safeguards disciplines and consistency of a measure with the Safeguards Agreement.

55. Regarding application, Article XIX:2 of the GATT 1994 provides that invocation by a Member proposing to suspend an obligation or to modify or withdraw a concession is a precondition to applying a safeguard measure. 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**.²⁸

Thus, before a Member may take a proposed action, it “shall” give notice and afford an opportunity to consult. The third sentence of Article XIX:2 provides a limited exception to consulting in cases of “critical circumstances”, but critically, this exception *does not apply* to the requirement to give notice in writing. Thus, in terms of Article XIX:3, without notice of a proposed action, a Member “which proposes to take or continue the action shall [**not**] be free to

²⁸ Emphasis added.

do so.” That is, without invocation, a Member cannot take and has not taken action pursuant to Article XIX.

56. Regarding consistency, any measure for which the coverage of Article XIX and the Safeguards Agreement is invoked must meet the obligations set out in the Agreement on Safeguards, including the obligations in Article 12. Thus, a claim may be brought asserting that the importing Member’s notification does not meet the requirements set out in Articles 12.2 or 12.3 of the Safeguards Agreement.

25. Is a measure already a safeguard before it is notified to the Committee on Safeguards? Or does a measure become a safeguard only the moment in which it is notified to the Committee on Safeguards?

Response:

57. As an initial matter, the United States would note that the phrase “is a measure already a safeguard” perhaps reflects an incorrect legal viewpoint – one advocated by Turkey and its supporters in this dispute. Specifically, for the phrasing to be correct within the GATT 1994 framework, it must be shorthand for the question of “whether the disciplines of Article XIX apply to the measure.” What is not correct is to view a “safeguard” as any measure that is inconsistent with a WTO obligation, and which is arguably taken to protect domestic producers. Indeed, the term safeguard measure simply means a measure subject to Article XIX. This is plain from the text of Article XIX, and is specifically stated in Article 1 of the Safeguards Agreement.

58. And, without invocation, the Article XIX does not apply to a measure. Once the importing Member invokes Article XIX as the basis for a proposed measure, the WTO’s safeguards disciplines for notifications attach to that proposed action. If a Member has not provided notice in writing to Members of a proposed action, or has denied other Members the opportunity to consult, the Member’s measure (whatever its characterization domestically) is not action pursuant to Article XIX, and the Member will not have a legal basis in Article XIX for exceeding its tariff commitments.

With regard to the “notification to the Committee” – GATT Article XIX specifies notification to the “contracting parties;” the issue of whether notification to Members through another mechanism or committee would qualify is not presented in this dispute. As is undisputed, the United States did not invoke Article XIX in any document or communication; rather, the United States has invoked Article XXI of the GATT 1994.

26. Please comment on the relevance, if any, of the 1993 Decision on Notification Procedures²⁹ for the Panel’s assessment of the United States’ argument concerning invocation of the Agreement on Safeguards through notification.

²⁹ Decision on Notification Procedures, adopted by the Committee on Trade Negotiations on 15 December 1993, as annexed to the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, done at Marrakesh on 15 April 1994.

Response:

59. In the U.S. response to question 50, the United States elaborates on the U.S. argument concerning the term “invocation.” Regarding the Decision on Notification Procedures, the United States is of the view that it is of limited value to the Panel’s assessment of the U.S. arguments concerning the **applicability** of the WTO’s safeguards regime because it does not specifically address the obligations in Article XIX and the Safeguards Agreement. Rather, the Decision on Notification Procedures addresses general obligations to notify “trade measures affecting the operation of GATT 1994.”³⁰

27. What, if anything, are the "constituent features" of a rebalancing measure under Article 8.2 of the Agreement on Safeguards? Are there any constituent features absent which a measure could not be characterized as a rebalancing measure?

Response:

60. In the U.S. response to question 16, the United States explained why, due to the unusual circumstances in *Indonesia – Iron or Steel Products*, the Appellate Body came up with the “constituent features” test. As the United States explained in the U.S. response to question 16, the Appellate Body’s reasoning in *Indonesia – Iron or Steel Products* is not applicable here. Thus, the United States is of the view that it is not helpful to the resolution of this dispute to engage in a discussion regarding the application of the Appellate Body’s “constituent features” reasoning to provisions of the WTO Agreement.

61. Regarding rebalancing measures, the text of Article XIX:3(a) of the GATT 1994 and Article 8 of the Safeguards Agreement make clear that a Member is not free to impose a rebalancing measure unless (a) the importing Member has provided notice of a proposed action, (b) the importing Member has imposed a safeguard measure, and (c) the affected exporting Members have met the requirements set out in Article 8 of the Safeguards Agreement.

28. At the third-party session, China argued that there are two constituent elements to a rebalancing measure under Article 8.2 of the Agreement on Safeguards: (a) it must suspend concessions or other obligations in response to another measure (which itself may or may not be a safeguard); and (b) it must be designed to rebalance concessions and obligations.

a. Please comment.

b. If accepted, would this approach enable WTO Members to impose rebalancing measures under Article 8.2 of the Agreement on Safeguards in response to any measure that affects market access, irrespective of whether the latter is a safeguard measure?

³⁰ Decision on Notification Procedures (noting that “Members affirm their commitments to obligations under the Multilateral Trade Agreements” regarding “publication and notice.”), page 1, MTN/FA III-3 (1993).

Response:

62. China’s assertion that a WTO Member may implement a measure under Article 8.2 of the Safeguards Agreement in response to another Member’s measure which **may not** be a safeguard is baseless. Article 8.2 of the Safeguards Agreement reaffirms the right in Article XIX:3(a) of the GATT 1994 of “affected” exporting Members to retaliate against a WTO Member taking a safeguards measure against their products. The terms “with respect to the action” in Article XIX:3(a) link the action contemplated in that provision with the emergency action contemplated in Article XIX:1(a).

63. Similarly, the text of Article 8 of the Safeguards Agreement explicitly links rebalancing measures to a safeguard measure. Article 8.2 states that, once the timetables set out in that provision are met, “the affected exporting Members shall be free” to “suspend” the “application of substantially equivalent concessions or other obligations” to “the trade of the Member **applying the safeguard measure**, the suspension of which the Council for the Trade in Goods does not disapprove.”³¹ In addition, Article 8.2 refers to Article 12.3 of the Safeguards Agreement, which, in relevant part, provides that a “Member proposing to apply or extend a **safeguard measure** shall provide adequate opportunity for prior consultations” with Members having a “substantial interest as exporters” of the product concerned.³² Accordingly, the text of Article 8.2 establishes that rebalancing measures can only be taken in response to a safeguard measure.

64. The context of Article 8.2 further supports the U.S. position. Article 8.1 of the Safeguards Agreement explicitly refers to a “Member proposing to apply a **safeguard measure** or seeking an extension of a **safeguard measure**.”³³ Article 8.1 also refers to the consultations envisioned by Article 12.3 of the Safeguards Agreement, which, as discussed above, are initiated by the Member proposing to apply or extend a safeguard measure. Similarly, Article 8.3 of the Safeguards Agreement explicitly refers to safeguards, noting that “the right of suspension” in Article 8.2 cannot be exercised for the “first three years that a **safeguard measure** is in effect” if “the **safeguard measure**” was taken in response to an absolute increase in imports.³⁴ China’s attempt to divorce rebalancing measures from safeguard measures is fundamentally at odds with the text of Article XIX and the Safeguards Agreement.

65. If the Panel were to adopt China’s approach, it would endorse the view that WTO Members may invoke Article 8.2 of the Safeguards Agreement as the legal basis to retaliate against any measure that affects market access—regardless of whether the latter is a safeguard measure. China’s approach is stunning. Besides not having any basis on the text of Article 8.2 of the Safeguards Agreement, such an approach would undermine the WTO.

³¹ Emphasis added.

³² Emphasis added.

³³ Emphasis added.

³⁴ Emphasis added.

- 29. Does Article 8 of the Agreement on Safeguards allow Members to impose rebalancing measures even in response to measures about which there is or may be doubt whether they are safeguard measures?**
- a. Please explain the legal basis for your response.**
- b. Is the unqualified reference to "measure" in the final sentence of Article 8.1 of the Agreement on Safeguards relevant for the purposes of answering this question?**

Response:

66. As the United States explained in the U.S. response to question 28, Article XIX:3(a) of the GATT 1994 and Article 8 of the Safeguards Agreement explicitly link rebalancing measures to safeguard measures.

67. Regarding question 29(b), the reference to “measure” in the second sentence of Article 8.1 of the Safeguard Agreement is not “unqualified”; the use of the definite article “the” indicates the relevant measure has been identified previously. The term “the measure” in the second sentence refers to the term “safeguard measure” in the first sentence of Article 8.1. To see this relationship, it is useful to look at the two sentences together:

A Member proposing to apply a **safeguard measure** or seeking an extension of a **safeguard measure** shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by **such a measure**, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of **the measure** on their trade.³⁵

68. Thus, in sequence, Article 8.1, first sentence, identifies a “safeguard measure” (twice). Article 8.1, first sentence, then further refers to “such a measure”, referring back to the safeguard measure. Finally, Article 8.1, second sentence, refers to “the measure” and its effects on the Members’ trade, referring back to “such a measure” and “safeguard measure”. Accordingly, the text and structure of Article XIX and Article 8 support the U.S. position: rebalancing measures can only be taken in response to a safeguard measure.

- 30. During the third-party session, the European Union suggested that the time-frames provided for in Article 8 of the Agreement on Safeguards indicate that a Member may adopt a rebalancing measure in response to an underlying measure whose characterization as a safeguard is disputed. Please comment.**

Response:

³⁵ Emphasis added.

69. The European Union’s suggestion is baseless. As the United States explained in the U.S. responses to questions 28 and 29, the text and structure of Article XIX of the GATT and Article 8 of the Safeguards Agreement establish that rebalancing measures are linked to safeguard measures.

31. In a situation where two Members disagree about the existence of an underlying safeguard measure, and an exporting Member decides to adopt a measure under Article 8 of the Agreement on Safeguards because it considers an underlying safeguard measure to exist, what would happen if that disagreement were resolved, through dispute settlement, by a panel (and/or the Appellate Body) finding that the underlying measure was not a safeguard? What would be the implications of such a finding for the legality of any rebalancing measure taken prior to that finding? For instance, would such a finding make any rebalancing measure WTO-inconsistent, or would it render any rebalancing measure WTO-inconsistent *ab initio*?

Response:

70. If a disagreement on whether an underlying measure is a safeguard were resolved through a report adopted by the DSB, a “rebalancing” measure taken prior to that finding would be *revealed* as not having a basis in the Safeguards Agreement. That is, because the importing Member’s measure was not a safeguard (for example, because it had not invoked Article XIX as the basis to take an action), the other Member had no right *at the time of* its “rebalancing” action to take action pursuant to Article 8.2. Thus, in the terms of the question, the “rebalancing” action would have been WTO-inconsistent *ab initio*.

32. Article 23 of the DSU provides that WTO Members shall not make unilateral determinations that another Member has acted inconsistently with its WTO obligations. Please comment on whether this provision is relevant in the present dispute, and in particular its implications, if any, for Turkey's statement at the first substantive meeting that a Member may adopt a rebalancing measure under Article 8.2 of the Agreement on Safeguards even if there is a dispute about whether an underlying safeguard measure exists.

Response:

71. In relevant part, Article 23.2(a) provides that Members shall “not make a determination to the effect that a violation” of the covered agreements “except through recourse to dispute settlement in accordance with the rules and procedures” of the DSU. In creating the WTO’s dispute settlement system, Members established a mechanism to resolve an allegation by one Member that another Member’s measure appears to be inconsistent with obligations under the WTO Agreement.

72. Accordingly, if a Member believes that another Member’s measure is WTO-inconsistent, DSU Article 23 makes clear that the method to address this concern is with consultations and, if necessary, a request to initiate dispute settlement proceedings. Members have understood this straightforward approach since the establishment of the WTO. Turkey, however, appears to

believe that it has discovered an alternative to the course set out in the DSU. Under Turkey’s approach, any measure that a Member **deems** inconsistent with a GATT obligation is a “safeguard.” And, on that basis, that Member can decide, **for itself**, to adopt retaliatory measures disguised as “rebalancing measures.” This is a stunning position. As the United States explained during the first substantive meeting of the parties, the United States is not aware of any Member that had taken this view since the founding of the WTO.

- 33. Article 8.2 of the Agreement on Safeguards reads, in relevant part: "... Members shall be free ... to suspend ... the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove".**
- a. Please confirm whether Turkey's additional duties measure was placed on the agenda of the CTG, and by whom.**
 - b. Is it necessary to place an alleged rebalancing measure on the CTG's agenda in order for Article 8.2 of the Agreement on Safeguards to apply?**
 - c. If so, which Member bears the burden of placing the measure on the CTG's agenda (e.g. the Member adopting the measure, or a Member concerned about the measure)?**
 - d. Please comment on the meaning of the phrase "does not disapprove". In particular, does disapproval presume consideration of the measure at a meeting of the CTG? Does disapproval require a positive act or decision by the CTG? And would disapproval be taken by consensus, reverse consensus, or some other method?**

Response:

73. Turkey’s additional duties measure was not placed on the agenda of the Council for Trade in Goods. In a dispute where Article XIX of the GATT 1994 and the Safeguards Agreement were actually applicable, it would be necessary for a Member exercising its right to suspend the application of substantially equivalent concessions or other obligations to provide written notice of such suspension to the Council for Trade in Goods, as provided in Article 8.2 of the Safeguards Agreement. Article 8.2 also contemplates the Council for Trade in Goods having an opportunity to “disapprove” of the Member’s suspension.

74. The primary method for the Council for Trade in Goods to consider whether to “disapprove” a Member’s suspension is by placing the matter on the agenda for its meeting. The burden for ensuring that a matter is placed on the agenda, as with the burden of providing the written notice under Article 8.2, falls on the Member seeking to suspend substantially equivalent concessions.

75. The phrase “does not disapprove” presumes some form of consideration by the Council for Trade in Goods. As noted above, this generally would occur when a Member places a matter

on the agenda for a meeting of the Council for Trade in Goods. A Member's failure to place a matter on the agenda would prevent meaningful consideration by the Council for Trade in Goods. Since disapproval in this context requires a positive act or decision by the Council for Trade in Goods, the inability to take that act or decision because the matter was never presented forecloses the possibility envisioned in Article 8.2 of the Safeguards Agreement and does not satisfy the burden on the Member seeking the suspension.

76. Separately, the fact that a matter was placed on the agenda for consideration at a meeting of the Council for Trade in Goods does not translate into a determination that the matter properly falls within the WTO safeguards regime. The Council for Trade in Goods may opt to place a matter on the agenda, allow debate, and take no action to disapprove the proposed suspension. This is not an endorsement of the suspension or applicability of WTO safeguards disciplines. Moreover, as disapproval requires consensus, Turkey's view would create a situation where a Member could adopt a retaliatory measure and then block disapproval, thereby creating the very problem identified above about the inability to proceed in the manner Article 8.2 of the Safeguards Agreement envisions.

34. In order to conduct an "objective assessment" under Article 11 of the DSU, does the Panel need to assess the reason(s) or motivation for Turkey adopting its additional duties measure?

Response:

77. Turkey's reasons or motivations for imposing the retaliatory measures at issue are not relevant to the Panel's duty to make an objective assessment of the matter before it, including the applicability in this dispute of the Safeguards Agreement. An "objective assessment" under DSU Article 11, as the standard by which a measure is examined for WTO-consistency, requires an independent evaluation without regard to the reasons or motivations of the Member implementing the measure.

35. For the purposes of the present proceedings, should the Panel take into account the United States' decision not to consult concerning its Section 232 duties under the Agreement on Safeguards? If so, how?

Response:

78. The Panel should consider the U.S. decision not to consult under the Safeguards Agreement as part of the larger question about the covered agreements applicable to this dispute. The question of whether the Safeguards Agreement is relevant to the discriminatory tariffs Turkey has applied only against the United States and in excess of its bound rates is at the center of Turkey's attempt to justify its retaliatory measure. A decision whether or not to consult under the Safeguards Agreement is only relevant to the extent the Safeguards Agreement applies in the first instance.

36. Can a measure fall within the scope of more than one covered agreement, or more than one "regime" within a single agreement? For example, could a measure be covered by *both* Article I and Article VI of the GATT 1994? If so, would the

Member maintaining such a measure have the right to choose under which "regime" or covered agreement its measure is reviewed in WTO dispute settlement proceedings?

Response:

79. As a theoretical matter, a measure could fall within the scope of more than one covered agreement. But that is not the case with the substantive obligations of the Safeguards Agreement. As the United States explained in the U.S. response to question 23, the Safeguards Agreement **only applies** to measures taken pursuant to Article XIX of the GATT because this provision affords a Member the right, in certain circumstances, to take action that otherwise would be inconsistent with its commitments.³⁶ It is for the Member taking the action to determine whether it will seek to avail itself of that right by satisfying the relevant conditions (the first of which is notice, or invocation).

37. In paragraph 7 of its third-party submission, Switzerland argues that "if a complainant considers that the respondent has failed to comply with the requirements applicable to Members taking rebalancing measures [under Article 8.2 of the Agreement on Safeguards], 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".

In the light of this argument, please comment on the correct allocation of the burden of proof in assessing Turkey's arguments under Article 8.2 of the Agreement on Safeguards.

Response:

80. Switzerland's argument is premised on a complainant considering that Article 8.2 is applicable to a dispute. Because the United States does not consider that Article 8.2 is applicable to this dispute, Switzerland's argument is not relevant to the Panel's assessment of whether the United States has established a presumption that Turkey's additional duties are inconsistent with Turkey's obligations under Articles I and II of the GATT 1994.

81. Turkey's first written submission confuses matters related to the concept of burden of proof. According to Turkey, it does not "bear the burden of proving that Article XIX of the GATT 1994 and the Agreement on Safeguards apply to the measures at issue in this dispute."³⁷ However, as in other dispute settlement proceedings in which the complaining party has raised a presumption of WTO-inconsistency, the burden has now shifted to Turkey to bring evidence and argument to rebut the presumption established by the United States.³⁸

³⁶ See Article 11.1(c) of the Safeguards Agreement.

³⁷ Turkey's First Written Submission, para. 4.31.

³⁸ See *US – Wool Shirts and Blouses (India) (AB)* (noting that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."), page 14.

82. The U.S. panel request does not assert a breach of any WTO provision on safeguards. The United States, therefore, is not responsible for providing proof of such a breach. Rather, to the extent that Turkey believes that a WTO safeguards provision is relevant, Turkey, as the party asserting that proposition, carries the burden to establish it.

83. In *US – Wool Shirts and Blouses*, the Appellate Body observed that “it is a generally accepted canon of evidence in civil law, common law, and, in fact, most jurisdictions that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”³⁹ Accordingly, because Turkey is affirming the relevance of the Safeguards Agreement to this dispute, Turkey carries the burden of establishing its relevance.

38. In paragraph 8 of its third-party submission, Norway states that the "'prior step' of determining the applicability of the relevant covered agreements is one frequently faced by panels and the Appellate Body", and cites a number of cases where this issue has arisen. Please comment on the relevance, if any, of these cases for the Panel's analysis in the present proceedings.

Response:

84. The disputes cited by Norway are not relevant here. Norway relies on those disputes to demonstrate the proposition that the classification of a measure under municipal law is not determinative of the applicable WTO obligation. The United States does not disagree with that limited proposition.

39. In paragraph 56 of its third-party submission, Russia argues that, in *EC – Fasteners (China)*, the Appellate Body ruled on a "similar issue" to the one facing the Panel in this dispute. Specifically, Russia recalled the following statement by the Appellate Body:

We thus consider that the Panel's finding under Article I:1 of the GATT 1994 lacks an essential step in the sequence of its legal analysis, that is, the determination of whether and under what circumstances an anti-dumping measure that is inconsistent with the Anti-Dumping Agreement may be reviewed under Article I:1 of the GATT 1994 in the absence of a review under Article VI of the GATT 1994.

As we explained above, China did not claim before the Panel that Article 9(5) of the Basic AD Regulation is inconsistent with Article VI of the GATT 1994, nor did the parties present arguments in this dispute in respect of the relationship between the provisions of the Anti-Dumping Agreement and those of Articles VI and I of the GATT 1994. Thus, we do not consider it appropriate to explore further ourselves the

³⁹ *US – Wool Shirts and Blouses (India) (AB)*, page 14.

**implications of the absence of a claim under Article VI of the GATT 1994
for a claim under Article I:1 of the GATT 1994.**

**Please comment on the relevance of this passage for the Panel's analysis in the
present proceedings.**

Response:

85. The passage from *EC – Fasteners* is not relevant for the Panel's analysis because the factual circumstances of this dispute are fundamentally different. In *EC – Fasteners*, the legal characterization of the challenged measures was not disputed by the parties. Neither the EC nor China questioned whether the measures at issue in that dispute were antidumping measures. Accordingly, whether the measures at issue were subject to the WTO's antidumping disciplines was not contested before the panel. Here, the parties disagree on whether the WTO's safeguards disciplines apply to Turkey's additional duties.

86. In addition, *EC – Fasteners* presented the Appellate Body with an actual order of analysis issue. In the Appellate Body's view, a preliminary question that had to be addressed before assessing China's claim under Article I of the GATT was whether the EC's antidumping duty was imposed consistently with Article VI of the GATT.⁴⁰ Here, as explained in the U.S. response to question 11, the Panel has not been presented with an actual order of analysis issue.

87. Finally, in *EC – Fasteners*, the Appellate Body considered that review under Article I of the GATT 1994 was not necessary for purposes of resolving that dispute because the Appellate Body had already upheld the panel's findings that the EC's antidumping measure was inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement.

40. In the parties' view, do 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 the GATT 1994, and particularly for whether the former can be considered a "defence" to an inconsistency under the latter?

Response:

88. No. Article 11.1(c) of the Safeguards Agreement provides useful guidance for understanding the relationship between that agreement and the GATT 1994. Article 11.1(c) of the Safeguards Agreement provides:

This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 **other than Article XIX**, and Multilateral Trade Agreements in Annex 1A other than this

⁴⁰ *EC – Fasteners (China) (AB)*, para 392.

Agreement, pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

89. Thus, if the measure is sought, taken, or maintained pursuant to Article XIX, the Safeguards Agreement applies; if the measure is sought, taken, or maintained pursuant to other provisions of GATT 1994, the Safeguards Agreement does *not* apply. Regarding the disputes referenced by Turkey, the United States does not consider that they provide guidance for the Panel's assessment in this dispute. As noted in the U.S. response to question 39, *EC – Fasteners* is not applicable here.

41. Please comment on Japan's statement, at paragraph 17 of its third-party submission, that Article XXVIII of the GATT 1994 "provides important context for the proper approach to and interpretation of Article XIX of the GATT 1994".

Response:

90. Japan's comment further supports the U.S. view. Article XXVIII sets out certain procedures for a Member to modify its schedule of concessions. That is, Article XXVIII provides that an importing Member may modify its Schedule of Concessions if certain procedural and substantive requirements set out in that provision are met. Thus, the structure of Article XXVIII is similar to the structure Article XIX. For instance, Article XXVIII:3(a) authorizes a Member **proposing** to "modify or withdraw" a modification of schedules to implement the proposed modification even if no agreement is reached between the importing Member and the affected Member. Similarly, Article XIX:3(a) allows an importing Member **proposing** to take a safeguard measure to implement the proposed measure even if no agreement is reached between the importing Member and the affected Members.

91. In addition, Article XXVIII:3(a) allows certain Members affected by an importing Member's modification of schedules to take offsetting action under certain conditions. In relevant part, Article XXVIII:3(a) provides that certain Members affected by a modification of schedules:

. . . shall then be free not later than six months after such action [*i.e.*, modification of schedules] is taken, to withdraw, upon the expiration of thirty days from the day on which the **written notice** of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.⁴¹

Article XIX:3(a) also allows certain Members affected by an importing Member's safeguard measure to take offsetting action under certain conditions. In fact, the actions authorized by Articles XIX:3(a) and XXVIII:3(a) are structured in a similar manner.

92. In short, Japan's observation is correct. Like Article XIX of the GATT 1994, for a measure to fall under Article XXVIII of the GATT 1994 a Member has to invoke Article XXVIII

⁴¹ Emphasis added.

as the **legal basis** for implementing a measure to modify its schedules. Without invoking Article XVIII, and meeting the requirements of Article XXVIII, a Member would not be considered to take action pursuant to Article XXVIII.

6.2 To the United States

42. In paragraph 56 of its first written submission, the United States notes that Turkey "may attempt to assert an affirmative defense based on some type of theory that its additional duties are justified under the *WTO Agreement on Safeguards*".

- a. Does the United States consider that Turkey's arguments that its additional duties measure falls under Article 8.2 of the Agreement of Safeguards is an "affirmative defense"?**
- b. If the answer to question (a) is in the affirmative, please explain the legal basis for your assertion that an invocation by Turkey of the Agreement on Safeguards would be in the nature of an affirmative defence.**
- c. Please elaborate on the meaning of the term affirmative defence, and explain what, in your view, would be the implications of characterizing a provision of the covered agreements as an affirmative defence.**
- d. Please comment on the European Union's argument, at paragraph 27 of its third-party submission, that Article 11 of the Agreement on Safeguards "obviously disproves" that the Agreement on Safeguards "can be characterized as in the nature of an 'affirmative defence'".**

Response:

93. Turkey and certain third-party Members have confused matters by mischaracterizing the U.S. position. As the United States explained during the first substantive meeting of the parties, by "affirmative defense" the U.S. simply meant that that the supposed applicability of Article XIX is an issue Turkey raised in an attempt to justify its additional duties. The United States was not arguing that it was Turkey's burden to show that it met the specific requirements for an alleged rebalancing measure.

43. With reference to paragraphs 1.9 and 1.11 of Turkey's first written submission, please comment on Turkey's argument that "in this case the United States must bring a claim of violation under Article 8 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994", and that because the United States "has not brought its claims under the correct legal provisions of the covered agreements, those claims should be dismissed *in toto*". (emphasis added)

Response:

94. The U.S. response to question 1 establishes that the U.S. panel request meets the requirements of Article 6.2 of the DSU by presenting the problem clearly.

44. In paragraphs 4.32 – 4.33 of its first written submission, Turkey argues:

Turkey'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, Turkey does not invoke any "exception", but rather identifies the correct legal regime that applies to the measures at issue. This regime displaces other GATT provisions, such as Articles I and II, that might have applied to Turkey's measures, if the safeguards regime did not.

... [I]f a WTO Member believes that another WTO Member has improperly imposed a safeguard measure, or 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.

Please comment.

Response:

95. As the United States explained during the first substantive meeting and in the U.S. response to question 42, Turkey and certain third-party Members have confused matters by mischaracterizing the U.S. position. By “affirmative defense” the U.S. simply meant that that the supposed applicability of Article XIX is an issue Turkey raised in an attempt to justify its additional duties. The United States was not arguing that it was Turkey’s burden to show that it met the specific requirements for an alleged rebalancing measure.

96. Regarding Turkey’s assertions on burden of proof, see the U.S. response to question 37.

45. In paragraph 1.19 of its first written submission, Turkey argues:

... If a complainant takes issue with the manner in which the respondent has suspended equivalent concessions, it must challenge this suspension under the applicable provisions, Article 8.2 of the Agreement on Safeguards and/or Article XIX:3(a) of the GATT 1994, and must make a *prima facie* case of violation.

Please comment.

Response:

97. The U.S. initiated this dispute in response to Turkey’s measures that impose additional duties on U.S. products that are plainly inconsistent with Articles I and II of the GATT 1994.

Consequently, the U.S. panel request did not assert a breach of any WTO provision on safeguards. Accordingly, Turkey’s assertion that the United States is responsible for making “a *prima facie* case of” a violation of Article 8.2 or Article XIX:3(a) is incorrect. Rather, to the extent that Turkey believes that a WTO safeguards provision is relevant, Turkey, as the party asserting that proposition, carries the burden to establish it.

46. What, if anything, is the legal relevance of Turkey explicitly adopting its additional duties measure under Article 8.2 of the Agreement on Safeguards and notifying it to the WTO as such?

Response:

98. Turkey’s characterization of its additional duties as “rebalancing measures” is legally irrelevant. As the United States explained during the first substantive meeting of the parties, the United States does not disagree with the proposition that the classification of a measure under municipal law is not determinative of the applicable WTO obligation.

47. In paragraphs 4.13 – 4.15 of its first written submission, Turkey argues:

[I]t is ... not for the responding Member to determine, through its domestic law and through the categorization or nomenclature of the measure to what extent WTO law applies, or, indeed, which provisions of WTO law apply. Pursuant to Article 11 of the DSU, it is a panel's duty to "make an objective assessment of the matter before it, including an objective assessment of ... *the applicability of and conformity with the relevant covered agreements*".

...

The Appellate Body and WTO panels have also applied this principle to safeguard measures. 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". According to the Appellate Body, this assessment is part of a panel's duty under Article 11 of the DSU. (emphasis in the original)

- a. Please comment on this argument.
- b. In your view what, if any, is the relevance of the Appellate Body's report in *Indonesia – Iron or Steel Products* for the Panel's analysis in the present proceedings?

Response:

99. Regarding 47(a), the United States recalls that the U.S. does not disagree with the proposition that the classification of a measure under municipal law is not determinative of the applicable WTO law.

100. Regarding 47(b), the U.S. response to question 16 explains why the Appellate Body's report in *Indonesia – Iron or Steel Products* is not relevant for the Panel's assessment in this dispute.

48. In paragraphs 4.16 – 4.17 of its first written submission, Turkey argues:

In *Dominican Republic – Safeguard Measures*, the panel examined the legal characterization of the measures at issue as safeguard measures, given that one of the parties had contested this characterization. In *Indonesia – Iron or Steel Products* and *India – Iron and Steel Products*, the panels decided to conduct this assessment, even though the two disputing parties had agreed that the measures at issue constituted safeguard measures.

In light of these fundamental principles, the United States' arguments in Section VI of its submission are fundamentally flawed. In a nutshell, the United States argues that its measures on steel and aluminium are not safeguard measures, because it subjectively does not wish these measures to fall under WTO safeguard rules and because it has not labelled these measures as "safeguard" measures under domestic law.

Please comment.

Response:

101. Turkey mischaracterizes the U.S. position. Throughout this dispute, the United States has consistently argued that invocation is a precondition to applying a safeguard measure under Article XIX of the GATT 1994 and the Safeguards Agreement. And during the first meeting of the parties the United States also made clear that the U.S. does not disagree with the proposition that the classification of a measure under municipal law is not determinative of the applicable WTO law. Thus, Turkey's assertion is **not** correct.

102. Regarding the panel report in *Dominican Republic – Safeguard Measures*, that report is no more helpful to the Panel's evaluation in this dispute than the Appellate Body's report in *Indonesia – Iron or Steel Products*. Neither dispute addresses the circumstances of this dispute. In particular, in *Dominican Republic – Safeguard Measures*, the respondent actually **invoked** Article XIX of the GATT 1994.⁴² Of course, as the United States has stressed throughout this dispute, invocation is a necessary but not a sufficient condition for the application of a safeguard measure.

⁴² *Dominican Republic – Safeguard Measures* (Panel), para. 7.38.

103. In short, neither *Indonesia – Iron or Steel Products* nor the *Dominican Republic – Safeguard Measures* address a scenario where a Member 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.” Accordingly, these reports are not relevant in this dispute.

- 49. In paragraph 62 of its first written submission, the United States argues that "a Member must invoke the protections of Article XIX [of the GATT 1994] for the safeguard provisions to apply". Subsequently, in paragraph 64, the United States submits that notification under Article 12 of the Agreement on Safeguards "constitutes an essential step that must occur for a measure to be a safeguard".**
- a. Is the position of the United States that an importing Member itself decides whether a measure is a safeguard, and exercises this choice by making (or not making) a notification under Article 12 of the Agreement on Safeguards?**
 - b. Please comment on the European Union's argument, at paragraph 55 of its third-party submission, that "the notification of a safeguard is ... a condition qualifying the exercise of the right to impose a safeguard measure, rather than a 'constituent feature' of a safeguard measure".**

Response:

104. The U.S. position is not that “an importing Member itself decides whether a measure” falls under the WTO’s safeguards disciplines. Rather, the position of the United States is that invocation of Article XIX and the Safeguards Agreement is a precondition for a Member to implement a measure that falls under the WTO’s safeguards disciplines. Importantly, that means it is also a precondition for another Member to retaliate under Article 8.2 of the Safeguards Agreement.

105. Furthermore, whether or not a Member has invoked the Safeguard Agreement is an objective matter – though not a difficult one – which can be decided in WTO dispute settlement, the same as for any factual matter. Thus, to the extent Turkey is arguing that the panel must take as a given anything stated in the U.S. dispute settlement submissions, this is incorrect. Rather, here, the record is clear that the United States never invoked Article XIX of the GATT 1994.

106. The European Union’s comment regarding notification being “a condition qualifying the exercise of the right to impose a safeguard measure” supports the U.S. position. Without meeting the notice requirement, or “condition”, in Article XIX and the Safeguards Agreement, a Member does not have the right to impose a safeguard measure. Accordingly, for a measure to fall under the WTO’s safeguards disciplines the importing Member must invoke Article XIX of the GATT 1994 to exercise its right to suspend obligations or withdraw or modify tariff concessions. Absent such invocation, a measure cannot fall under the WTO’s safeguards disciplines.

107. Regarding the European Union’s reference to the “constituent features” test used by the Appellate Body in *Indonesia – Iron or Steel Products*, the U.S. response to question 16 explains why the Appellate Body’s reasoning in that dispute is not applicable here.

50. How does a Member “invoke” Article XIX of the GATT 1994? What, if anything, is the difference between invocation, on the one hand, and notification, on the other hand?

Response:

108. As an initial matter, the United States observes that the term “invoke” does not appear in Article XIX of the GATT 1994 nor in the Safeguards Agreement. Thus, the United States is using the term “invoke” according to its ordinary meaning, which is supported by dictionary definitions of the term. According to the Oxford English Dictionary, the verb “invoke” simply means “to cite as authority”⁴³ and Black’s Law Dictionary defines “invocation” as “the act of calling on for **authority or justification**” and “the act of enforcing or **using a legal right**.”⁴⁴ In other words, invocation occurs with the exercise of an available right to take a particular action.

109. Article XIX of the GATT 1994 and the Safeguards Agreement fit neatly within the description above. This is clear from the text of the relevant provisions and the purpose of the “emergency action” those provisions authorize a Member to take that otherwise would be contrary to its obligations. Moreover, this view is aligned with the Appellate Body’s interpretation regarding the meaning of these provisions.

110. Article 1 of 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.” Article XIX of the GATT 1994 provides for measures that a Member may take when a product is imported into the territory of that Member in increased quantities and under conditions as to cause or threaten serious injury to the domestic producers of like or directly competitive products in that territory. Specifically, under Article XIX:1(a), a Member “shall be free” to suspend its WTO obligations with respect to the product at issue to prevent or remedy the injury in question by completing invocation of this right with the notice provided for in Article XIX:2 of the GATT 1994.

111. That a Member “shall be free” to suspend its WTO obligations under Article XIX of the GATT 1994 represents a right the Member may call upon as authority or justification for action that its WTO obligations would otherwise preclude. In other words, it serves as the legal basis that relieves a Member from obligations that would prevent it from taking the action in question. This right, therefore, is enshrined in the text and is consistent with Article XIX’s purpose concerning the appropriate need of protecting domestic industries from the serious injury caused by increased imports that may come with reductions in barriers to international trade.

⁴³ The New Shorter Oxford English Dictionary, (Exhibit USA-13).

⁴⁴ Black’s Law Dictionary, (Exhibit USA-14).

112. The Appellate Body has recognized that these words in Article XIX of the GATT 1994 “simply accord to a Member the ‘freedom’ to exercise its right to impose a safeguard measure by suspending a GATT obligation or withdrawing or modifying a GATT concession if the conditions set out in the first part of Article XIX:1(a) are met.”⁴⁵ (It is unclear why the Appellate Body report does not note or discuss the conditions in Article XIX:2, with their explicit cross-reference to Article XIX:1.⁴⁶) As such, the “freedom” to impose a safeguard measure is a right that the Member may call upon as authority to justify action it has taken. However, as with the nature of all rights, it is for the Member implementing a measure to exercise that right and not for another Member to claim the right **should** have been exercised.

51. Under the United States' theory that the WTO safeguards regime must be "invoked" through notification, would it ever be possible for a Member to act inconsistently with the notification obligations in Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards?

Response:

113. As the United States has explained, invocation is required for a Member to exercise its right under the WTO safeguards regime and depart from its obligations, including tariff concessions. Without this invocation, a Member has not exercised its right under Article XIX of the GATT 1994 and the Safeguards Agreement.

114. This does not mean, however, that invocation and notification are synonymous for purposes of the Safeguards Agreement. Instead, a Member informs others of its decision to invoke the WTO safeguard disciplines with the notification. Article 12 of the Safeguards Agreement contains elaborated notification obligations but these are procedural in nature and are not the equivalent to the invocation itself. Rather, notification in the Safeguards Agreement constitutes a procedural mechanism to inform other WTO Members that a particular Member has decided to exercise its rights and take action under the authority that the WTO safeguard disciplines provide.

115. Importantly, the U.S. position does not suggest that is not possible for a Member to act inconsistently with the notification obligations in Article 12 of the Agreement on Safeguards. On the contrary, a Member that invokes the right to apply a safeguard measure under Article XIX of the GATT 1994, and with that invocation departs from its WTO obligations, must “immediately” notify the Committee on Safeguards upon “taking a decision to apply... a safeguard measure.”

⁴⁵ *Indonesia – Iron or Steel Products* (AB), para. 5.55, FN 188.

⁴⁶ GATT 1994 Art. XIX:2 (“**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).

116. This is not controversial because the same Member would have already provided an immediate notification when it “initiat[ed] an investigatory process relating to” whether increased quantities of a product are being imported into the Member’s territory as to cause or threaten serious injury to its domestic industry producing like or directly competitive products.

117. A Member that does not provide information consistent with the elaborated notification requirements of the Safeguards Agreement in relation to a safeguard measure under its domestic safeguards authority would breach these procedural obligations. This does not mean, however, that all procedural requirements are coextensive or synonymous with the invocation of this authority. A Member calls upon the authority of Article XIX of the GATT 1994 for the right to impose a safeguard measure and depart from its WTO obligations. In the terms of Article XIX:2, “before ... tak[ing] action **pursuant** to the provisions of paragraph 1 of [Article XIX]”, the Member shall give notice in writing as condition precedent. The Safeguards Agreement has elaborated procedural requirements to expand the scope of information a Member provides to other Members regarding that invocation and proposed action. Accordingly, a Member may breach the additional procedural obligation under the Safeguards Agreement for a notification.

52. Please comment on Turkey's argument, at paragraph 45 of its oral statement, that the Appellate Body in *Indonesia – Iron or Steel Products* "explicitly treated WTO notification as one of many factors to be considered, and clearly not as a definitional feature of a safeguard measure".

Response:

118. Turkey’s exclusive reliance on the Appellate Body’s report in *Indonesia – Iron or Steel Products* is the fatal flaw of its approach. As the United States explained in the U.S. response to question 16, the Appellate Body’s reasoning in *Indonesia – Iron or Steel Products* is not applicable here.

119. Regarding notification, Indonesia **did notify** other Members that it intended to adopt a safeguard measure. In most situations, the question of whether the Safeguards Agreement applied to a measure would have been resolved by this fact. However, in the unusual circumstances of *Indonesia – Iron or Steel Products* (namely, the fact that Indonesia had no tariff binding on the good in question), an added criterion called for examination. Thus, the question was whether Indonesia’s tariff increase involved a suspension of an obligation or withdrawal or modification of a concession—and therefore whether Article XIX and the Safeguards Agreement applied.

120. Accordingly, the Appellate Body developed a test to determine whether the Safeguards Agreement applied to the measure at issue. Given that Indonesia **did notify** other Members that it intended to adopt a safeguard measure, the Appellate Body – in its recitation of factors related to its test – reasoned that not one factor was dispositive.⁴⁷ Thus, Turkey’s assertion regarding

⁴⁷ See *Indonesia – Iron or Steel Products* (AB), para. 5.60.

notification in paragraph 45 of its opening statement is not relevant to the Panel’s assessment of Turkey’s defense.

53. Please comment on Turkey's argument, at paragraph 37 of its oral statement, that in the investigation that lead to the adoption of the United States' Section 232 duties, the United States "analyse[d] classical injury factors in order to gauge the extent of the injury or threat thereof".

Response:

121. As an initial matter, the United States recalls that the U.S. national security measures are not the measures at issue in this dispute. Rather, the U.S. national security measures are the measures at issue in a separate dispute.⁴⁸ Accordingly, it would not be appropriate for the Panel to determine whether the U.S. national security measures are consistent with the WTO obligations of the United States.

122. The argument in paragraph 37 of Turkey’s oral statement – like the rest of Turkey’s legal theory – is based on the reasoning of the Appellate Body’s report in *Indonesia – Iron or Steel Products*. As the United States explained during the first meeting of the parties and in the U.S. response to question 16, the reasoning in that report is not applicable here. Accordingly, Turkey’s argument in paragraph 37 of its oral statement is not relevant to the Panel’s assessment of Turkey’s defense.

123. Moreover, Turkey’s argument in paragraph 37 fails to consider that Section 232 of the Trade Expansion Act of 1962 directs the U.S. Secretary of Commerce and the President of the United States to consider all relevant factors in an investigation taken pursuant to Section 232. 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**.”⁴⁹

124. For purposes of investigations taken pursuant to Section 232, the statute directs the U.S. Secretary of Commerce and the President to consider:

the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in

⁴⁸ DS564.

⁴⁹ 19 U.S.C. 1862(c)(1)(A) (emphasis added) (Exhibit USA-10).

determining whether such weakening of our internal economy may impair the **national security**.⁵⁰

Thus, on its face, the Section 232 statute refers to factors that could also be considered in the injury determination of an antidumping, countervailing duty, or safeguard investigation. However, unlike those trade remedy investigations, the purpose of a Section 232 action is the protection of U.S. national security.

54. In paragraph 4.9 of its first written submission, Turkey argues:

The Appellate Body ... stated there must be a "demonstrable link" between the obligations being suspended and the objective of preventing or remedying serious injury to the domestic industry. This determination is to be conducted by the Panel in order to determine which aspects are "the most central" to the measure. To determine these "most central" aspects, according to the Appellate Body, a panel must:

assess the design, structure, and expected operation of the measure as a whole [and] 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. (footnotes omitted)

Please comment

Response:

125. Turkey's recitation fails to acknowledge three points. First, the Appellate Body's reasoning in *Indonesia – Iron or Steel Products* is not relevant in light of the significant factual differences between that dispute and this one. The U.S. response to question 16 explains why the Appellate Body's reasoning in *Indonesia – Iron or Steel Products* is not relevant here.

126. Second, as Japan correctly asserts in paragraph 10 of 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."⁵¹ 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." On its face, this statement only identifies certain "necessary" features.⁵² Importantly, the Appellate Body did **not** say that a measure presenting both "constituent features" automatically or necessarily qualifies as a safeguard.

⁵⁰ See 19 U.S.C. 1862(d) (emphasis added) (Exhibit USA-10).

⁵¹ Third-Party Submission of Japan (June 20, 2019), para.10.

⁵² The dictionary definition of "constituent" is: "being a part of a whole". <https://www.lexico.com/en/definition/constituent> (first definition).

127. Third, with respect to the relevant factors from *Indonesia – Iron or Steel Products*, Turkey does not actually apply them to the U.S. national security measures. Turkey's failure to conduct a full analysis using its test undercuts its position. As the U.S. explained in the U.S. opening statement and in the U.S. response to question 21, the application of the relevant factors further supports the U.S. position.

55. In paragraph 21 of its third-party submission, the European Union submits that:

[T]he 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).

The European Union then argues that 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 (paragraphs 23-24); and (ii) Article IV of the GATT 1994 and other provisions of that treaty (paragraph 25).

Please comment on the European Union's arguments in this connection, and on the relevance, if any, of the analogies drawn therein.

Response:

128. The European Union's arguments and analogies are irrelevant because the United States has not invoked Article XIX of the GATT.

56. With reference to paragraph 54 of the European Union's third-party submission, please comment on the European Union's assertion that "[u]nder the United States' approach, any number of WTO obligations, including notably those on safeguards, anti-dumping and anti-subsidy measures, could be sidestepped by simply asserting that the measure is something other than what it actually, objectively is".

Response:

129. The European Union mischaracterizes the U.S. position in this proceeding. As the United States has explained throughout this proceeding, the U.S. does not disagree with the proposition that the classification of a measure under municipal law is not determinative of the applicable WTO law.

57. In paragraphs 91 and 92 of its third-party submission, the European Union notes that "the United States has recently agreed to eliminate the additional steel and aluminium tariffs for imports from Canada and Mexico ... these agreements

implicitly recognize that the US measures are in the nature of safeguards, and that they can be rebalanced by the affected exporting party".

- a. **Please comment.**
- b. **Is it relevant for the purpose of the current proceedings that the disputes against Canada and Mexico were initially brought before WTO panels and that a settlement eventually took place in the context of the negotiations of a free trade agreement, as the United States argued at the first substantive meeting?**
- c. **Does a subsequent settlement have a bearing on the legal characterization of the underlying measure?**

Response:

130. As the United States explained in the U.S. response to question 2, the agreements between the United States and Canada, and between the United States and Mexico, were undertaken pursuant to negotiations in connection with the USMCA. Parties are entitled to enter into such agreements that provide for arrangements and obligations to each other that may implicate WTO disciplines or that are completely outside of them. Accordingly, the fact that United States initially challenged the additional duties imposed by Canada and Mexico before WTO panels is not relevant for purposes of this dispute because these agreements do not offer support for Turkey's safeguards theory.

131. Moreover, the agreements between the U.S. and Canada, and between the U.S. and Mexico, have no bearing on the legal characterization of Turkey's additional duties. Nor do they have a bearing on the legal characterization of a measure underlying Turkey's additional duties.

132. As a general matter, Question 57(c) appears to imply that the U.S. national security measures are "the underlying measures" in this dispute. According to its ordinary meaning, the term "underlying" means "lying under or beneath the surface."⁵³ As the United States explained during the meeting of the parties, the U.S. security measures are not the measures at issue in this dispute. Turkey's additional duties are the measures at issue in this dispute. Accordingly, in this dispute, an underlying measure would be a measure beneath Turkey's additional duties. Put another way, an underlying measure in this dispute would be another Turkish measure—for instance, a Turkish measure that authorizes Turkey's additional duties.

6.3 To Turkey

58. In paragraph 4.9 of its first written submission, Turkey argues:

The Appellate Body ... stated there must be a "demonstrable link" between the obligations being suspended and the objective of preventing or remedying serious injury to the domestic industry. This determination is to be conducted by the

⁵³ The New Shorter Oxford English Dictionary (Exhibit USA-15).

Panel in order to determine which aspects are "the most central" to the measure. To determine these "most central" aspects, according to the Appellate Body, a panel must:

assess the design, structure, and expected operation of the measure as a whole [and] 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. (footnotes omitted)

Please comment on how, in your view, a panel should go about "recogniz[ing] which ... aspects [of a measure] are the most central to that measure".

Response:

133. This question is addressed to Turkey.

59. In paragraphs 22 - 25 of its oral statement at the first substantive meeting, the United States notes that Article XIX of the GATT 1994 provides that, in certain circumstances, Members "shall be free" to suspend certain obligations. In the United States' view, this language indicates that Article XIX sets out a "right" that a Member "may, in its discretion, invoke". Please comment on this argument, and in particular, on the United States' interpretation of the words "shall be free".

Response:

134. This question is addressed to Turkey.

60. Does Turkey agree with the United States that Article XIX of the GATT 1994 sets out a "right"?

Response:

135. This question is addressed to Turkey.

61. Please comment on the United States' argument at the first substantive meeting that Turkey's interpretation of Article 8.2 of the Agreement on Safeguards enables a WTO Member to transform any tariff barrier designed to protect a domestic injury into a safeguard, and thus to retaliate without going through the dispute resolution process?

136. This question is addressed to Turkey.

62. At paragraph 44 of its oral statement at the first substantive meeting, the United States argued:

[T]he 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 safeguard investigations.

Please comment.

Response:

137. This question is addressed to Turkey.

7 PROPOSALS ON INTER-PANEL COORDINATION

7.1 To both parties

63. As the parties are aware, the United States' Section 232 duties are currently being challenged in separate WTO dispute settlement proceedings. Bearing this in mind, please comment on Ukraine's statement, in paragraph 14 of its third-party submission, as follows:

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.

a. Please comment.

b. What legal tools, if any, does this Panel have, including under the DSU, to ensure that it reaches a conclusion that is coherent with that of the Panel in dispute DS564 *US — Steel and Aluminium Products (Turkey)*? In particular, could Article 13 of the DSU provide a possible legal basis for this Panel to consult or otherwise engage with the parallel panel hearing the so-called "offensive case" against the United States' Section 232 duties?

Response:

138. As an initial matter, the United States observes that by the Panel stating in this question that it needs to “ensure that it reaches a conclusion that is coherent with that of the” panel in DS564, the Panel appears to be endorsing Turkey’s view that this Panel and the panel in DS564 need to come up with “consistent” rulings.⁵⁴ This dispute, however, is distinct from DS564.

⁵⁴ Turkey’s Opening Statement, paras. 56-58.

Accordingly, it would not be appropriate for the Panel to assume that it needs to “ensure that it reaches a conclusion that is coherent” with the conclusion of the panel in DS564.

139. The DSU does not provide for a WTO adjudicator to alter its objective assessment of the matter referred to it by the DSB in order to achieve “consistency” with the view of another adjudicator. Rather, the value of consistency is reflected in the direction of the DSU to the panel to examine the applicability of and conformity with the covered agreements (Article 11) through the application of customary rules of interpretation of public international law to the covered agreements (Article 3.2). That is, the correct application of customary rules of interpretation to the WTO Agreement is the basis on which consistent results may arise.

140. The DSU does not authorize the Panel to “engage with” the panel in DS564 – or, for that matter, any other panel – to help inform its deliberations. Rather, Article 14.1 of the DSU provides that “Panel deliberations shall be confidential.” This confidentiality obligation is reinforced in the Working Procedures adopted by the Panel.⁵⁵ As the Panel may know, six provisions of the DSU, and two paragraphs of the DSU’s appendices, deal with some aspect of confidentiality.⁵⁶ The multiple references to confidentiality in the DSU reflect the importance of confidentiality to the WTO’s dispute settlement system. And while Article 13 of the DSU allows panels “to seek information and technical advice from any individual or body which it deems appropriate”, that right is delimited by the confidentiality obligation in Article 14.1. Accordingly, the DSU and the Panel’s own Working Procedures prohibit the Panel from “engaging with” other panels in regards to the Panel’s deliberations.

64. In paragraph 4.46 of its first written submission, Turkey argues:

Turkey has presented extensive arguments on this point in Section 4.4.2 of its First Written Submission in *US – Additional Duties on Steel and Aluminium (DS564)*. As noted, Turkey attaches this submission as Exhibit TUR-40, and respectfully refers the Panel to its arguments in that document.

Could the parties please comment on the relevance for the current proceedings of arguments submitted by Turkey as a party in another WTO dispute?

Response:

⁵⁵ See Working Procedures Adopted by the Panel (noting that “The deliberations of the Panel and the documents submitted to it shall be kept confidential.”), para. 2(1).

⁵⁶ See DSU Article 4.6 (noting that consultations “shall be **confidential**”) (emphasis added); Article 5.2 (noting that proceedings involving good offices, conciliation, and mediation “shall be **confidential**”)(emphasis added); Article 13.1 (noting that **confidential** information that is provided to a panel shall not be revealed without authorization); Article 14.1 (noting that “Panel deliberations shall be **confidential**.”) (emphasis added); Article 17.10 (noting that the “proceedings of the Appellate Body shall be **confidential**.”) (emphasis added); Article 18.2 (noting that “Written submissions to the panel or Appellate Body shall be treated as **confidential**”) (emphasis added); paragraph 3 of the Working Procedures set out in Appendix 3 of the DSU (noting that “The deliberations of the panel and the documents submitted to it shall be kept **confidential**”) (emphasis added); and paragraph 5 of Appendix 4 (noting that “**Confidential** information provided to the expert review group shall not be released without formal authorization”) (emphasis added).

141. The United States has not linked this dispute with *US – Additional Duties on Steel and Aluminium (Turkey)*⁵⁷ because these are separate disputes. Thus, the United States has not sought to bring into this dispute the arguments presented in DS564 by the U.S. and Turkey.

142. Turkey, however, appears to believe that some of its arguments in DS564 are relevant in this dispute. Specifically, Turkey appears to hold the view that its arguments in Section 4.4.2 of Exhibit TUR-40 are relevant to the Panel’s assessment of its defense in this dispute. In Section 4.4.2, Turkey asserts that Article XIX of the GATT 1994 and the Safeguards Agreement are applicable to the measures at issue in DS564 (*i.e.*, the U.S. national security measures). As the United States has explained throughout this dispute, the U.S. national security measures are not at issue in this proceeding. Accordingly, Turkey’s arguments regarding measures that are not at issue in this proceeding are not relevant to the Panel’s analysis of Turkey’s defense.

143. Moreover, Turkey’s arguments in Section 4.4.2 are generally the same arguments presented by Turkey in this dispute regarding the applicability of the WTO’s safeguards disciplines to Turkey’s additional duties. As the United States has demonstrated, Turkey’s legal theory is not based on the text of the WTO’s safeguards disciplines. Rather, Turkey derived its approach from the reasoning in the Appellate Body’s report in *Indonesia – Iron or Steel Products*. As the United States explained during the first meeting of the parties and in the U.S. response to question 16, the Appellate Body’s reasoning in that dispute is not applicable here.

65. Please comment on Turkey's argument, at paragraph 58 of its oral statement, that "it may be advisable for the Panel" to delay making findings until the panel in DS564 US — *Steel and Aluminium Products (Turkey)* has issued its report.

Response:

144. Turkey’s suggestion that the Panel delay this proceeding is at odds with the DSU’s multiple provisions regarding the timely completion of a dispute. For instance, Article 3.3 of the DSU provides that the “prompt settlement” of a dispute “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.” Delaying this proceeding would not lead to a prompt settlement and would continue to negatively impact U.S. interests regarding exports to Turkey.

145. Article 12 of the DSU sets forth specific timelines for a panel’s consideration of a dispute. Article 12.8 provides that, as a general rule, the time period from the composition of the panel to the date the final report is issued to the parties shall not exceed six months. This timeline is reinforced by Article 12.9, which provides that when “the panel considers that it cannot issue its report within six months,” the panel “shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report.” Finally, Article 12.9 provides that in “no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.” While the Panel in

⁵⁷ DS564.

this dispute was established⁵⁸ over nine months ago, the Panel should aim to settle this dispute promptly.

146. Moreover, Turkey’s argument is premised on its view that this Panel and the panel DS564 are assessing the “legal characterization” of the U.S. security measures.⁵⁹ Turkey’s view, however, is not correct. As the United States has explained throughout this proceeding, the U.S. security measures are not the measures at issue in this dispute. Turkey’s attempt to link this dispute with DS564 is inconsistent, at least in spirit, with the statement in Article 3.10 of the DSU that complaints and counter-complaints in regard to distinct matters should not be linked. Because this dispute and DS564 are separate disputes, the Panel should not delay its proceedings.

66. Does the confidentiality obligation in Article 14 of the DSU prevent this Panel from consulting with the Panel in DS564 US — *Steel and Aluminium Products (Turkey)*?

Response:

147. The U.S. response to question 63 explains why the confidentiality obligation in Article 14 of the DSU prevents the Panel from consulting with the panel in DS564.

67. Please elaborate on the similarities and differences – if any – between the circumstances of these proceedings (i.e., a parallel dispute concerning the WTO-consistency of the underlying US measure before a separate panel) and the issue of "sequencing" between compliance proceedings under Article 21.5 of the DSU and Article 22.6 DSU arbitrations?

Response:

148. As an initial matter, the United States recalls that the U.S. national security measures are not the “underlying” measures in this dispute. By characterizing the measures at issue in DS564 as the “underlying” measures in this dispute, the Panel appears to be endorsing Turkey’s view that this Panel and the panel in DS564 need to come up with “consistent” findings.⁶⁰

149. This dispute and DS564 are distinct, and there are no similarities between this dispute and the sequencing issue that may arise during the implementation stage of a dispute. First, a compliance proceeding under Article 21.5 of the DSU and a proceeding regarding compensation or suspension of concessions under Article 22 of the DSU are both proceedings of the same dispute. In contrast, this dispute and DS564 are separate disputes. While Turkey has taken the position that this dispute and DS564 are linked, Turkey’s position is irrelevant to the Panel’s assessment of whether Turkey’s additional duties are consistent with Turkey’s obligations under Articles I and II of the GATT 1994. Second, during the implementation stage of a dispute, the

⁵⁸ The Panel was established on January 28, 2019.

⁵⁹ See Turkey’s Oral Statement (noting that the Panel and the panel in DS564 “have to rule on an identical issue, the legal characterization under WTO law of one and the same measure” (*i.e.*, the U.S. security measures)), para. 57.

⁶⁰ Turkey’s Opening Statement, paras. 56-58.

sequencing issue is mainly driven by the timelines set out in Articles 22.6 and 21.5 of the DSU.⁶¹ In this dispute and DS564, there is no similar issue regarding potential conflicting timelines.

68. Is it the case that the determination of whether the United States' section 232 duties constitute a safeguard measure is a question of law in DS564, while the determination of the same question in the present proceedings is a question of fact? If so, would it be correct to say that nothing prevents the Panel in the present proceedings from making this factual finding?

Response:

150. In WTO dispute settlement, the legal characterization of a measure is generally a legal issue. In other words, the issue of law in a WTO dispute is whether the measure at issue is consistent with a Member's WTO obligations. In this dispute, the issue of law is whether Turkey's additional duties are consistent with Turkey's obligations under Articles I and II of the GATT 1994. Furthermore, with respect to Turkey's asserted justification: as the United States has explained throughout this dispute, it is an uncontested fact that the U.S. has not invoked Article XIX of the GATT 1994. Thus, as a matter of WTO law, the Safeguards Agreement does not apply.

⁶¹ Upon request, Article 22.6 of the DSU directs the DSB to “grant authorization to suspend concession or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request.” In addition, Article 22.6 provides that an arbitration proceeding regarding suspension of concessions or other obligations “shall be completed within 60 days” of the expiration of the reasonable period of time. The timelines set out in Article 22.6, however, may present a conflict with the completion of a proceeding under Article 21.5 of the DSU.