TURKEY – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

(DS561)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

October 3, 2019

TABLE OF REPORTS

Short Form	Full Citation
Indonesia – Iron or Steel Products (Viet Nam) (AB)	*Appellate Body Report, Safeguard on Certain Iron or Steel Products*, WT/DS/490/AB/R, WT/DS/496/AB/R, adopted 27 August 2018
Indonesia – Iron or Steel Products (Viet Nam) (Panel)	*Panel Report, Safeguard on Certain Iron or Steel Products*, WT/DS/490/R, WT/DS/496/R, adopted 27 August 2018, as modified by Appellate Body Report, WT/DS/490/AB/R, WT/DS496/AB/R
US – Wool Shirts and Blouses (India) (AB)	*Appellate Body Report, United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997

TABLE OF EXHIBITS

Exhibit No.	Description
USA-9	Third Participant Oral Statement of the United States of America,, *Indonesia – Safeguard on Certain Iron or Steel Products, AB-2017/DS489, DS496* (May 8, 2018)

1. Mr. Chairperson, Members of the Panel – on behalf of the United States, we thank you and the Secretariat staff assisting you for your ongoing work in this dispute.

I. INTRODUCTION

2. The United States initiated this dispute in response to Turkey's measures that impose additional duties on U.S. products that are plainly inconsistent with the fundamental WTO obligations to provide Most-Favored-Nation (MFN) treatment and treatment no less favorable than that set out in Turkey's Schedule of Concessions, as set out, respectively, in Articles I and II of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

3. 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. In our first written submission, we anticipated Turkey's excuse and showed that it was baseless. In particular, Turkey's argument is baseless because there is no relevant U.S. safeguard.[1] Accordingly, the rights and obligations under Article XIX of the GATT 1994 and the WTO *Agreement on Safeguards* ("Safeguards Agreement") are not applicable in this proceeding.

4. As the United States explained in the U.S. first written submission, for the WTO safeguard disciplines to apply to a Member's measure, that Member must invoke Article XIX of the GATT 1994. That provision requires invocation of the right to apply a safeguard measure with notice under Article XIX:2. Without this invocation and notice from the WTO Member proposing to take action, a Member is not seeking legal authority pursuant to Article XIX to suspend an obligation or to withdraw or modify a concession. Therefore, without invocation, a

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

measure is not a safeguard measure within the scope of Article XIX. Moreover, another WTO Member cannot assert that Article XIX should have been invoked and, on that basis, adopt measures that are plainly inconsistent with fundamental WTO obligations.

5. But that is exactly the position that Turkey is asking the Panel to adopt. In other words, Turkey believes that the U.S. national security measures are inconsistent with U.S. obligations under the WTO Agreement.[2] Turkey is challenging those U.S. measures in a separate dispute.[3] However, instead of following the WTO's dispute settlement procedures, Turkey decided to impose additional duties on U.S. products that are plainly inconsistent with its obligations under Articles I and II of the GATT 1994. And Turkey is now seeking to justify its additional duties by advancing a baseless interpretation of Article XIX of the GATT 1994 and the Safeguards Agreement.

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

7. Turkey's approach would undermine the WTO. Under Turkey's theory, any measure that a Member deems inconsistent with a GATT obligation could be labeled as a "safeguard." And on that basis, that Member could decide, for *itself*, to adopt retaliatory measures.

[2] *See* Turkey's First Written Submission (June 6, 2019), para. 1.4.

[3] *See US – Steel and Aluminum Products (Turkey)*, WT/DS564/15.

8. Prior to this dispute, no WTO Member had contended that it had the right to adopt rebalancing measures based on its own assertion that another Member had adopted a safeguard. Of course, no Member had ever made such assertion because there is no basis for it in the WTO Agreement.

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

9. In the U.S. first written submission, the United States demonstrated that Turkey's measures are inconsistent with Articles I and II of the GATT 1994.[4]

10. Turkey's measures apply additional duties ranging from four to 140 percent on 477 tariff lines for products originating in the United States.[5] As demonstrated in the U.S. first written submission, the additional duties for all 477tariff lines have resulted in tariffs applied to U.S.-originating products that are higher than the rates of duty applied to other WTO Members on an MFN basis.[6] In addition, for 209 of the 477 tariff lines, Turkey's additional duties result in applied tariffs on U.S.-origin products greater than the rates of duty set out in Turkey's schedule of concessions.[7] Notably, in its first written submission, Turkey notes that the "detailed overview of the 477 affected tariff lines" and "the factual descriptions of the measures set out in the United States' First Written Submission are broadly accurate."[8]

---

[4] *See* U.S. First Written Submission, paras. 5 – 16.

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

[6] *See* U.S. First Written Submission, paras. 22 – 38.

[7] See U.S. First Written Submission, para. 6.

[8] *See* Turkey's First Written Submission, para. 2.22.

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

III. TURKEY'S JUSTIFICATION FOR ITS ADDITIONAL DUTIES IS MERITLESS AS THE UNITED STATES HAS NOT ADOPTED A SAFEGUARD

12. Turkey asserts that it has implemented the measures at issue under Article 8 of the Safeguards Agreement.[9] Because Turkey has presented this argument, it bears the burden to establish it.

A. Turkey Bears the Burden of Proving that Article XIX of the GATT 1994 and the Safeguards Agreement Apply to the Measures at Issue

13. Turkey's first written submission confuses matters related to the concept of burden of proof. According to Turkey, the U.S. "bears 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.[10] 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.[11]

14. The U.S. panel request does not assert a breach of any WTO provision on safeguards. Accordingly, the United States 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

---

[9] *Id.*, para. 77.

[10] Turkey's First Written Submission, para. 4.31.

[11] *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.

party asserting that proposition, carries the burden to establish it. Accordingly, Turkey's arguments concerning the burden of proof are baseless.

B. Turkey Has no Basis for Asserting that Its Additional Duties Are Authorized by Article 8.2 of Safeguards Agreement

15. We now turn to Turkey's argument that Article 8.2 of the Safeguards Agreement is applicable to this dispute. In short, it is not.

16. Article 1 of the Safeguards Agreement defines safeguard measures as those "measures provided for in Article XIX of GATT 1994." We would emphasize that the text states "measures provided for" in Article XIX, not measures **defined** in Article XIX. This language reflects that Article XIX does not in fact define a safeguard measure. Rather, Article XIX sets out certain procedures for a Member to suspend GATT obligations. That is, Article XIX provides that an importing Member may suspend GATT obligations if an importing Member meets certain procedural and substantive requirements.

17. The procedural nature of Article XIX is reflected in its title: "Emergency Action on Imports of Particular Products." The title does not focus on any particular type of measure, nor does it reference any type of obligation. Rather, the article sets out procedural and substantive rules for how a Member may choose to take action affecting imports of particular products.

18. For these reasons, Turkey's attempt to divorce the procedural nature of Article XIX from the substantive requirements is fundamentally at odds with the text of the WTO Agreement, as well as with the function that Article XIX serves within the WTO system.

19. Article XIX authorizes Members facing an injurious increase in imports subject to an obligation or concession "to suspend the obligation in whole or in part or to withdraw or modify the concession." The measures can only be "provided for" under Article XIX if the Member taking emergency action invokes that provision.

20. Where a Member has not asserted this right, then the WTO safeguards disciplines are not relevant to the particular matter. Because the WTO safeguards provisions are not applicable in this dispute, Turkey cannot assert that Article 8.2 of the Safeguards Agreement justifies its additional duties.

1. Invocation is a Precondition to Applying a Safeguard Measure Under GATT Article XIX and the WTO Agreement on Safeguards

21. Turkey asserts that invocation is irrelevant to an assessment of whether a Member has implemented a safeguard measure pursuant to Article XIX.[12] Turkey's assertion is baseless. In fact, the first step to determine whether a WTO Member has applied a safeguard measure under Article XIX of the GATT 1994 and the Safeguards Agreement is to identify whether the Member in question has **invoked** the right to take action pursuant to these provisions. Absent this invocation, a measure cannot fall under the WTO's safeguard disciplines.

22. First, Article 1 of the Safeguards Agreement provides that the Safeguards Agreement "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994."

[12] *See* Turkey's First Written Submission, para. 4.11.

23. This proposition is clear from the text and structure of Article XIX of the GATT 1994. For instance, Article XIX:1(a) provides that if certain conditions are met, a Member "shall be free" to suspend an obligation or to withdraw or modify a concession. Thus, when a Member believes that the conditions in Article XIX:1(a) are met, that Member has the discretion to invoke the right reserved to it under Article XIX. The Appellate Body has expressed support for this analytical approach.

24. In *Indonesia – Iron or Steel Products*, the Appellate Body reasoned that the phrase "shall be free" in Article XIX:1(a) accords to a "Member the 'freedom' to exercise its right to impose a safeguard measure by suspending a GATT obligation or withdrawing or modifying a GATT concession if the conditions set out in the first part of Article XIX:1(a) are met."[13] Accordingly, a Member may elect to invoke Article XIX to implement a safeguard measure. Absent a Member's invocation of Article XIX, however, a measure cannot constitute a safeguard under WTO safeguard disciplines.

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

> **Before** any contracting party shall take action **pursuant** to the provisions of paragraph 1 of this Article, it **shall give notice** in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial

[13] *Indonesia – Iron and Steel Products (Viet Nam) (AB)*, fn. 188 (emphasis added).

> interest as exporters of the product concerned an opportunity to consult with it in respect of the **proposed** action.[14]

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

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

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

> A Member **proposing** to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavor to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members who would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12.[15]

29. According to its ordinary meaning, the term "propose" means to "suggest or state (a possible plan or action) for consideration."[16] How does a Member "propose" to apply or extend a safeguard measure? Through invocation of the WTO's safeguards provisions and notice.

[14] Emphasis added.

[15] Emphasis added.

[16] Cambridge English Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/propose.

30. Finally, consider Article 8.3 of the Safeguards Agreement. In relevant part, Article 8.3 provides that a "Member **proposing** to apply or extend a safeguard measure shall provide adequate opportunity for prior consultation with those Members having a substantial interest as exporters" of the product concerned.[17] Again, this reference to "proposing" supports the U.S. position regarding invocation. The term "proposing" presumes the existence of a notification by a Member seeking to take action pursuant to Article XIX and the Safeguards Agreement.

31. In short, the text and structure of the WTO's safeguards provisions support the U.S. position.

2. Turkey's Argument that the Applicability of the Safeguards Agreement is an "Objective Examination" Misses the Point

32. We now turn to Turkey's specific arguments in support of its flawed interpretation of the WTO's safeguards provisions. According to Turkey, "the existence of a safeguard measure is based on an objective examination."[18] This argument completely misses the point.

33. The United States agrees that the applicability of the WTO's safeguards disciplines to a particular matter requires an "objective examination." As the United States has explained throughout this proceeding, the first step in the analysis is the objective examination of whether a Member has invoked the right to take action pursuant to Article XIX. In fact, the examination of whether a Member has taken an action in the past – here, the invocation of the safeguards agreement – is the type of objective analysis evaluated in every dispute settlement proceeding. It

[17] Emphasis added.

[18] Turkey's First Written Submission, para. 4.11.

is no different than the analysis of whether a Member has adopted a measure that increases duties on the products of another Member.

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

3. Turkey Mischaracterizes the U.S. Position in *Indonesia – Iron or Steel Products* Regarding Invocation

35. In its first written submission, Turkey mischaracterizes the U.S. position in *Indonesia – Iron or Steel Products* regarding invocation being a precondition for the application of a safeguard measure under Article XIX. According to Turkey, the U.S. position in this dispute is "inconsistent" to the U.S. position as a third party in *Indonesia – Iron or Steel Products*.[19]

36. Turkey's assertion is **false**. For the record, the U.S. took the following position in *Indonesia – Iron or Steel Products*:

> The United States agrees with the disputing parties that the measure at issue meets what – in *most* circumstances – is the most 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 a basis for "suspending [an] obligation" or "withdraw[ing] or modify[ing] [a] concession." Indeed, 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 to modify a concession is a precondition to applying a safeguard

[19] *See* Turkey's First Written Submission, para. 4.18.

measure. In this dispute, Indonesia did notify other Members that it intended to adopt a safeguard measure, and thus did invoke Article XIX. In most situations, the question of whether the Safeguards Agreement applied would be resolved by this fact.[20]

37. Accordingly, the U.S. position in this dispute is fully consistent with the U.S. position in *Indonesia – Iron or Steel Products*. For reference, the United States is providing the Panel with the complete U.S. third participant statement in *Indonesia – Iron or Steel Products*.[21]

4. Turkey Relies on WTO Reports That Are Not Relevant Here

38. Turkey's failure to ground its justification on the relevant text of the WTO Agreement is a fatal flaw of its approach. Instead, Turkey derives its legal theory from the reasoning of panel and Appellate Body reports in *Indonesia – Iron or Steel Products*. That dispute, however, is not applicable here because it did not address a situation where a Member has **not** invoked Article XIX of the GATT 1994.

39. The panel and Appellate Body reports in *Indonesia – Iron or Steel Products* do not support Turkey's extreme position. For instance, in that dispute, the panel recognized that a "fundamental question" was whether the measure should properly be considered a safeguard measure within the meaning of Article 1 of the Safeguards Agreement. The panel pointed out

[20] Third Participant Oral Statement of the United States of America ("U.S. Third Party Statement") (May 8, 2018) (Exhibit USA-5), para. 2 (emphasis in original)

[21] *See* Exhibit USA-9.

that "not *any* measure suspending, withdrawing or modifying a GATT obligation or concession will fall within the scope of Article XIX:1(a)."[22]

40. And, in *Indonesia – Iron or Steel Products*, the disputing parties concurred that the Indonesian measure at issue was a safeguard measure. Why? Because the dispute followed invocation and notification under Article XIX and the Safeguards Agreement. Thus, in that dispute, the disputing parties concurred that the measure at issue in that dispute met what – in most situations – is the fundamental criterion for establishing the existence of a safeguard measure: namely, that the Member taking action **invokes** Article XIX of the GATT 1994 as the legal basis for its measure.[23]

41. Furthermore, the Appellate Body in *Indonesia – Iron or Steel Products* adopted a multi-step analysis to determine whether the measure at issue was a safeguard measure under Article XIX.[24] Under the first step of that analysis, a WTO Member must **invoke** the right under Article XIX for a measure to be considered a safeguard within the meaning of Article 1 of the Safeguards Agreement. Of course, as in *Indonesia – Iron or Steel Products*, invocation is not a sufficient condition for the measure to fall under the WTO safeguards discipline because the measure still needs to meet the other conditions of Article XIX and the Safeguards Agreement. But if the first step of invocation and notification does not take place, the measure is **not** a measure taken pursuant to Article XIX.

[22] *Indonesia – Iron and Steel Products (Viet Nam) (Panel)*, para. 7.14 (emphasis in original).

[23] *See* U.S. Third Party Statement, para. 2 (Exhibit USA-9).

[24] *See Indonesia – Iron or Steel Products (Viet Nam) (AB),* para. 5.54.

5. Turkey's Approach Fails Under its own Test

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

> evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the **domestic law** of the Member concerned, the **domestic procedures** that led to the adoption of the measure, and any relevant **notifications** to the WTO Committee on Safeguards.[25]

43. Regarding the first factor (domestic law), the U.S. security measures were imposed under Section 232 of the Trade Expansion Act of 1962.[26] 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**."[27] In contrast, under U.S. domestic law, safeguards measures are taken pursuant to Section 201 of the Trade Act of 1974.[28]

44. Regarding the second factor (domestic procedures), the Bureau of Industry and Security of the U.S. Department of Commerce conducted the investigation pursuant to Section 232. The

---

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

[26] Codified at 19 U.S.C. §1862, *et seq*.

[27] 19 U.S.C. §1862(c)(1)(A) (emphasis added).

[28] Codified at 19 U.S.C. §2251, *et seq*.

mission of the Bureau of Industry and Security is to protect the security of the United States, including its national security, cyber security, and homeland security. In contrast, the U.S. International Trade Commission is the only competent authority in the United States authorized to conduct safeguards investigations.

45. Finally, the application of the third factor (notification to the WTO Committee on Safeguards), further supports the U.S. position. The United States has not notified the WTO Committee on Safeguards of any relevant safeguard because the United States did not invoke Article XIX of the GATT 1994.

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

6. Adopting Turkey's Approach Would Undermine the WTO

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

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

IV. CONCLUSION

49. Ultimately, Turkey's position is based on an untenable reading of Article XIX of the GATT 1994 and the Safeguards Agreement. There is simply no basis to find that Turkey's measure is anything other than duties applied without justification only against products originating in the United States and that exceed Turkey's bound rates. As such, they are clear breaches of Turkey's obligations under Articles I and II of the GATT 1994.