In the World Trade Organization

Panel Proceeding

European Union — Additional Duties on Certain Products from the United States

(DS559)

Replies by the European Union to the Questions from the Panel after the First Substantive Meeting

Geneva, 30 January 2020

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TABLE OF ABBREVIATIONS

Abbreviations	Full name
AD Agreement	Anti-Dumping Agreement
CN	The Combined Nomenclature
CTG	Council for Trade in Goods
DSU	Dispute Settlement Understanding
EU	European Union
FWS	First Written Submission
GATT 1994	General Agreement on Tariffs and Trade of 1994
ILC	International Law Commission
MFN	Most Favored Nation
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

I. TERMS OF REFERENCE

Question 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 51 and 52 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 misguiding 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 the European Union'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.

1. The European Union recalls that, unlike some of the other respondents in the Additional Duties disputes, it has not raised Article 6.2 of the DSU. Nor has the European Union requested the Panel to make a preliminary ruling. Nevertheless, the Panel would have the inherent authority, when exercising its adjudicative function, to do so, should it consider it appropriate.[1]

2. The European Union refers, in particular, to Section 6 of its first written submission and paras. 1-16 of its opening statement at the first substantive meeting. The European Union agrees with Russia and China that the US' decision to ignore the controlling provisions in this dispute, which are Article XIX:3(a) of the GATT 1994

[1] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.

and Article 8.2 of the Agreement on Safeguards, and to instead raise claims only under Articles I and II of the GATT 1994, means that those claims cannot succeed.

3. Given the specific circumstances of this dispute, the "legal basis of the complaint" that was presented in the US' Panel Request is simply incapable, on its face, of leading to any finding of WTO-inconsistency. In particular, it is impossible for the United States to make a *prima facie* case of inconsistency with the conditions for the right of suspension in Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards when it failed to make any claims under those provisions.[2] The US' attempt to short-circuit the Panel's assessment of the dispute by deliberately ignoring the controlling provisions cannot succeed.

4. Therefore, the Panel should dismiss the US' claims under Articles I and II of the GATT 1994 as incomplete and incapable of leading to a finding of WTO-inconsistency. In the European Union's view, the Panel can do so even without finding, for example, that the steel and aluminium measures are in fact safeguards. The absence of a reference to the controlling provisions in the Consultations Request and Panel Request means that the Panel must dismiss the US case, whether on a preliminary basis or otherwise.[3]

II. MEASURES AT ISSUE

II.2 *To the European Union*

Question 3

[Advance Question No. 2] In paragraph 10 of its first written submission, the United States notes that "[s]eparately, Regulation 2018/886 provided for the second stage of additional duties … to be applied as of June 1, 2021, or at such a time as a certain WTO dispute settlement body ruling were made". Please comment on the United States' reference to these additional duties in its panel request and in the first written submission.

5. The US has made claims only against the additional duties that are currently applied, and not against any element of the suspension. In particular, while the cited paragraph does refer to the second stage of additional duties which are to be applied as of 2021, the US has not made any claims against those duties. This is clear from the Consultations and Panel Requests, para 1. ("EU's imposition of additional duties on certain products originating in the United States"), from other

[2] European Union's first written submission, section 6.4.

[3] European Union's first written submission, para. 253.

paragraphs of the United States' first written submission (para. 13, "Annex I of the regulation targeted 182 CN codes…"), from Exhibit USA-8 which lists "all 182 CN codes at issue in this dispute",[4] as well as from the US' Opening Statement at the First Substantive Meeting, para. 10 (referring repeatedly to the "182 tariff lines at issue").

III. ORDER OF ANALYSIS

III.1 *To both parties*

Question 4

[Advance Question No. 3] 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 by assessing the European Union's argument concerning the applicability of Article 8.2 of the Agreement on Safeguards to the measure 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 the European Union's arguments under Article 8.2 of the Agreement on Safeguards only if it were to make findings that the measure at issue is inconsistent with Articles I or II of the GATT 1994?*

6. The European Union will address sub-questions (a) and (b) together.

7. The Panel should begin by assessing the applicability of Article 8.2 of the Agreement on Safeguards (as well as Article XIX:3(a) of the GATT 1994, to which the European Union will not further specifically refer in the remainder of this response, but the arguments are equally valid with respect to that provision). There are several reasons for this.

8. First, Article 8.2 of the Agreement on Safeguards is the more specific provision. The United States appears to agree with the principle that more specific provisions should be assessed first, because it presents its claim under Article II:1(b) of the GATT 1994 before its claim under Article II:1(a) of the GATT 1994.[5]

9. Second, beginning the analysis with Article 8.2 offers possibilities to exercise judicial economy. As the European Union has explained, if the Panel were to find that Article 8.2 applies to the measures at issue, it would be impossible for the US to succeed in its claims under Article I and II of the GATT 1994, because the United

[4] United States' first written submission, para. 15.

[5] United States' first written submission, paras. 44, 53 – 55.

States would have failed to even make a claim under the controlling provisions. In this scenario, the Panel could dispense with any further analysis, either under the specific requirements of Article 8.2 of the Agreement on Safeguards (since the United States has not made any claim under that provision), or under Articles I and II of the GATT 1994 (since a measure that is consistent with the controlling provision of Article 8.2 of the Agreement on Safeguards cannot be inconsistent with Articles I and II of the GATT 1994).

10. Beginning with Articles I and II of the GATT 1994 offers no such possibilities, in any circumstances. Even if the Panel were to first apply Articles I and II in total isolation from Article 8.2 of the Agreement on Safeguards, regardless of what it concluded, it would still ultimately have to decide, at a minimum, whether or not Article 8.2 applies to the measures at issue. This is because a measure that is consistent with Article 8.2 (including a measure that is presumed to be consistent with that provision because no claim to the contrary has been made, as in this case) cannot be inconsistent with Articles I and II of the GATT 1994. Thus, it would be simply pointless for the Panel to begin its analysis with Articles I and II.

11. Third, the applicability of a covered agreement is a threshold issue which should, as a general matter, be assessed first.[6] There is no disagreement about the applicability of Articles I and II of the GATT. There is, however, a disagreement about the applicability of Article 8.2 of the Agreement on Safeguards. Thus, given that the Panel is facing a threshold question of applicability of a certain agreement and of certain provisions, this is where the Panel should start.

12. To clarify, the European Union refers here to the "applicability" of certain agreements or provisions in the narrow sense, i.e. not to their abstract nature as "applicable law" but to their actual capacity of controlling a certain type of measure (e.g. the "applicability" of the AD Agreement to anti-dumping measures or of the SPS Agreement to SPS measures). In this sense, Article 11 of the DSU refers to the applicability of the "**relevant**" covered agreement (i.e. in the narrow sense). This same question of applicability in the narrow sense can be posed not just with respect to an agreement, but also to a specific provision, such as Article 5.7 of the SPS Agreement.[7]

13. This question of applicability is always an objective question that is never entirely in the hands of either litigant acting unilaterally. Whichever party argues that an agreement or a provision does or does not apply, Article 11 of the DSU ultimately

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

7 European Union's first written submission, para. 249, referring to relevant jurisprudence.

requires the Panel to make an objective assessment of that question. When there is a dispute about applicability, the Panel should, as a rule, first work out what is applicable and only then apply the provisions at issue.

14. Fourth, as the European Union has previously explained,[8] the EU measures at issue take two steps. First, they suspend the application of certain tariff concessions to the US. Second, they impose additional duties on certain products. The suspension is controlled by Article 8.2 of the Agreement on Safeguards. The suspension conceptually precedes the additional duties (because it is the legal basis for the additional duties), it is broader in scope,[9] and it occurred before the additional duties came into force, through a distinct measure.[10] Thus, the Panel should begin with the suspension, and therefore with Article 8.2, before addressing the additional duties under Articles I and II of the GATT 1994.

c. If you consider that the Panel should begin its analysis by assessing the European Union'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?

15. As previously explained, if the Panel finds (as it should) that Article 8.2 applies, it can no longer make any findings of WTO-inconsistency, either under the specific requirements of Article 8.2 of the Agreement on Safeguards (since the United States has not made any claim under that provision), or under Articles I and II of the GATT 1994 (since a measure that is consistent, or even presumed consistent, with the controlling provision of Article 8.2 of the Agreement on Safeguards cannot be inconsistent with Articles I and II of the GATT 1994).

16. Thus, were the Panel to find that Article 8.2 applies, its analysis under Articles I and II of the GATT 1994 would be brief. Nevertheless, this does not mean that the Panel would not, or could not, examine the US claims under those provisions. After finding that Article 8.2 is the controlling provision with which the measures at issue

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8 European Union's opening statement at the first substantive meeting, para. 8.

9 European Union's first written submission, para. 266 ("The European Union has not yet exercised its rights of suspension in its entirety. It has done so only with respect to the United States' safeguard measures on two steel products at issue: 'carbon and alloy flat products' and 'carbon and alloy long products'. With respect to these products, the United States' safeguard measures have not been taken as a result of an absolute increase in imports.").

10 European Union's first written submission, paras. 287 ("In this case, the European Union suspended the application of its concessions on the basis of its notification to the Council of Trade in Goods on 18 May 2018. As Article 8.2 provides, that suspension takes place "upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods." Thus, by operation of WTO law, the European Union suspended the concessions described in that notification on 18 June 2018.") and 293 ("It should also be noted that the European Union did not exercise its rights of suspension under Article 8.3, and did not put any of the tariffs in Annexes I or II of Regulation 2018/724 in effect in its municipal law, until 22 June 2018, when Regulation 2018/886 entered into force.").

are consistent (or presumed consistent), the Panel should conclude that the United States has failed to show that those measures are inconsistent with Articles I and II of the GATT 1994. This would amount to an examination, and rejection, of the United States' claims.

III.3 *To the European Union*

Question 6

[Advance Question No. 4] When arguing its claims under Article II:1(a) and II:1(b) of the GATT 1994, the United States commences its analysis by Article II:1(b). In paragraph 54 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 adopted by the United States.

17. The European Union first notes that the United States is not making a self-standing claim under Article II:1(a) of the GATT 1994 against any measure. In other words, the claim under Article II:1(a) is purely consequential, and it applies to the same product scope as the claim under Article II:1(b) (i.e. exclusively to the 182 tariff lines to which additional duties are currently applied).

18. On the basis of that understanding, the European Union agrees with the United States that the Panel can properly assess the more specific claim before assessing the more general claim. Article II:1(b) is, indeed, more specific, as it proscribes a specific type of less favourable treatment (duties in excess of bound rates) which will also constitute less favourable treatment under Article II:1(a).[11]

19. As explained in response to Question 4, the European Union considers that the same approach of addressing the more specific provision before the more general provision should guide the Panel's order of analysis between Articles 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, on the one hand, and Articles I and II of the GATT 1994, on the other hand.

IV. CLAIM UNDER ARTICLE I OF THE GATT 1994

IV.1 *To the European Union*

Question 7

[11] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

[Advance Question No. 5] At paragraph 15 of its first written submission, the United States argues:

> *Read together, the three figures the United States presents in Exhibit USA-8 for each tariff line – (A) the European Union's applied MFN rate; (B) the European Union's additional duty; and (C) the sum of those two values – demonstrate that for all 182 CN codes at issue in this dispute, the European Union exceeded its MFN commitments.*

Please comment. In particular, to the extent that you disagree with the United States' allegation in the above-mentioned paragraph, please identify the CN codes for which the combination of the European Union's applied MFN rate and the European Union's additional duty would not exceed the European Union's MFN commitments.

Please also identify any other discrepancies or errors you may find.

20. There are certain limited discrepancies with respect to two tariff lines. In the EU's Schedule,[12] tariff lines 7322 90 00 and 7324 10 00 are sub-divided, each into two categories (ex-outs). For each of these eight-digit lines, the bound rate for one of the ex-outs is "Free", while for the other ex-out it is the rate identified in Exhibit USA-8 (3.2% and 2.7% respectively). For all of these goods, the additional duty applied by the EU measures at issue is 25%. Specifically:

Tariff line	Description	Bound rate	Additional duty
7322 90 00	-Other		
7322 90 00 ex01	--Air heaters and not air distributors (excluding parts thereof), for use in civil aircraft	Free	+25%
7322 90 00 ex02	--Other	3,2 %	+25%
7324 10 00	-Sinks and washbasins, of stainless steel		
7324 10 00ex01	--For use in civil aircraft	Free	+25%
7324 10 00ex02	--Other	2,7 %	+25%

21. Apart from this, the European Union has not identified any factual error in the figures presented in Exhibit USA-8.

22. Nevertheless, for all the legal reasons explained in its submissions, the EU disagrees that the exhibit demonstrates that the EU departed from its "MFN commitments".

23. The European Union understands the term "MFN commitments" to refer to the tariff concessions in the EU's Schedule. As the additional duties are based on a valid *suspension* of the EU's concessions to the trade of the Member applying the

[12] G/MA/TAR/RS/506.

safeguard measure (the United States), the EU cannot be said to have "exceeded" its "MFN commitments" with respect to the United States. Rather, the EU's concessions to the United States have been suspended. Given that the EU acted within the framework of that suspension, there was no "commitment" or "concession" towards the United States for the European Union to "exceed" or otherwise violate.

Question 8

[Advance Question No. 6] At paragraph 31 of its first written submission, the United States argues:

The European Union'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, the European Union's measure applies an additional 10 to 25 percent duty 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 the 182 tariff codes, but not products from other countries entered under the same tariff codes. Thus, the like product element of Article I:1 is satisfied.

Please comment.

24. The European Union does not argue that US products covered by one of the 182 tariff lines at issue are unlike non-US products covered by the same tariff lines.

25. However, the European Union disagrees that the US origin of the products covered by the measures at issue is the "only criterion used by the measure for imposing additional duties". First, as explained in section 8.1 of the EU's first written submission, the measure at issue is consistent with Article I:1 of the GATT 1994 because it is consistent with the Agreement on Safeguards and Article XIX of the GATT 1994. Thus, the European Union has not arbitrarily chosen to increase the duties on certain US products. Rather, with respect to those products the EU has suspended the application of its concessions and other obligations (including the MFN obligation) to the trade of the US. Second, the European Union did not select the specific products subject to the suspension and to the additional duties exclusively on the basis of their US origin. The selection was based on considerations grounded in the controlling provisions (Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994), including the need to ensure substantial equivalence of concessions or other obligations. These considerations are explained in detail of Annex III of the EU's notification under Article 12.5 of the

Agreement on Safeguards[13], as well as in the recitals of Regulations 2018/724 and 2018/886.[14]

V. CLAIM UNDER ARTICLE II OF THE GATT 1994

V.1 *To the European Union*

Question 9

[Advance Question No. 7] At paragraph 55 of its first written submission, the United States argues:

Given the European Union'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, the European Union has correspondingly accorded less favourable to these products and breached Article II:1(a) as well.

Please comment.

26. First, the European Union notes that by framing its claims in this way the US agrees with the principle that the more specific provision should be analysed first. Thus, to be consistent with itself, the US should have fully applied this principle in the present case and start with claims under Article 8.2 of the Agreement on Safeguards.

27. Second, the European Union notes that the US is making a consequential claim and does not advance separate arguments for the inconsistency of the measures at issue with Article II:1(a) of the GATT 1994.

28. Third, the European Union has already explained in its written submissions that it did not breach the provisions of Articles II:1(b) and (a) of the GATT 1994. The European Union has adopted measures that are consistent with its obligations under Articles II:1 and XIX:3(a) of the GATT 1994 and Articles 8.2 and 8.3 of the Agreement on Safeguards.

29. The US cannot hope to prosper by simply choosing, when framing it claims, to completely disregard the controlling provisions. Indeed, although the US was aware of the nature of the challenged measures (suspension of concessions) and of their legal basis, it deliberately picked certain provisions of the covered agreements

[13] Exhibit EU-41.

[14] Exhibits USA-1 and USA-2.

when challenging them, while not raising any claims under Article 8.2 of the Agreement on Safeguards.

30. The US challenges the consistency of the measures at issue with respect to obligations that were suspended in accordance with Article 8.2. Because such obligations were suspended in first place, they cannot be violated.

31. Thus, the fact the US does not challenge the consistency of the measures at issue with the controlling provisions renders the task of the Panel straightforward, as it can easily dismiss the US claims under Article II of the GATT 1994.

Question 10

[Advance Question No. 8] At paragraph 17 of its first written submission, the United States argues:

Read together, the two figures in Exhibit USA-8 – (C) the sum of the applied European Union's MFN rate and the European Union's additional duty and (D) the European Union's bound rate commitment – demonstrate that for 180 of the 182 CN codes at issue in this dispute, the European Union exceeded its bound rate commitments.

Please comment. In particular, to the extent that you disagree with the United States' allegation in this paragraph, please identify the CN codes for which the combination of the European Union's MFN rate with the additional duty does not exceed the European Union's bound rate commitments.

32. The European Union refers to its response to Question 7.

33. The European Union also recalls the EU measures at issue take two steps. First, they suspend the application of certain tariff concessions to the US. Second, they impose additional duties on certain products. The suspension conceptually precedes the additional duties (because it is the legal basis for the additional duties), it is broader in scope, and it occurred before the additional duties came into force, through a distinct measure.

34. Thus, once the European Union has suspended its obligations it was entitled to apply duties that would correspond to substantially equivalent concessions. This does not amount to a violation of MFN or to the imposition of duties in excess of the concessions in the EU's Schedule. The European Union also refers to its response to question no. 9.

VI. ARGUMENTS CONCERNING THE SAFEGUARDS

VI.1 *To both parties*

Question 11

[Advance Question No. 9] In paragraph 221 of its first written submission, the European Union submits that its additional duties measure "states expressly and clearly that it reflects the existence of Article 8 of the Agreement on Safeguards and, by extension, Article XIX:3(a) of the GATT 1994".

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?

35. First, it is important to distinguish between the requirements that must be fulfilled in order for a provision to apply to or control a particular measure (which seems to be the subject of the Panel's question) and the legal standard that is applicable under that provision, i.e. the requirements or disciplines imposed by the provision. The EU will not address the question of the various procedural and substantive requirements imposed on rebalancing measures by Article 8.2.

36. In order to determine whether or not a measure falls within Article 8.2, a panel must make an objective assessment of all the facts and evidence. Just as there are certain objective, constituent features of safeguard measures, there are also certain objective elements which determine whether a measure falls within Article 8.2. In the EU's view, there are two such elements. The first is the suspension of the application of concessions or other obligations under the GATT 1994; the second is the absence of either a measure taken by the safeguard-imposing Member, or of an agreement on adequate means of trade compensation, designed to and capable of maintaining a substantially equivalent level of concessions.

37. The first of those elements follows from the wording of Article 8.2: the suspension of the application of concessions or other obligations under the GATT 1994 to the trade of the safeguard-imposing Member is precisely that which the affected exporting Members "shall be free" to do. Regardless of whether or not the various procedural and substantive obligations conditioning the exercise of the right of suspension (e.g. substantial equivalence, notification, various time periods) are met, a constituent feature of an Article 8.2 measure is that it suspends the application of concessions or other obligations.

38. The measures at issue suspend the application of concessions or other obligations not only because they impose additional duties to certain US products, but because they explicitly suspend the EU's concessions or other obligations with respect to the United States. To recall, the suspension conceptually precedes the additional duties

(because it is the legal basis for the additional duties), it is broader in scope,[15] and it occurred before the additional duties came into force, through a distinct measure.[16]

39. The second constituent feature follows from a systematic reading of Articles 8.1 and 8.2, both of which deal with the "level of concessions and other obligations". The overarching requirement of those provisions is to ensure a level of concessions and other obligations between the safeguard-imposing Member and affected exporting Members that is "substantially equivalent" to that existing under GATT 1994, i.e. to that which preceded the safeguard measure.

40. The two provisions should be read as a sequence designed to ensure the fulfilment of that overarching requirement. Article 8.1 places the primary responsibility to ensure substantial equivalence on the shoulders of the safeguard-imposing Member itself, unilaterally (for example, by providing an additional substantially equivalent concession to rebalance the concessions that are suspended through the safeguard measures). It is the Member "proposing to apply a safeguard measure" that shall "endeavor to maintain" substantial equivalence. Article 8.1 imagines that this can be achieved in the framework of the consultations required by Article 12.3.

41. Article 12.3, in turn, refers to the possibility of Members "reaching an understanding on ways to achieve the objective set out in [Article 8.1]", i.e. the objective of substantial equivalence. This already signals, as does the second sentence of Article 8.1, that if the safeguard-imposing Member fails to ensure substantial equivalence unilaterally, the Members concerned may agree on "any adequate means of trade compensation" in order to achieve the same objective.

42. Article 8.2 then deals with the scenario in which substantial equivalence is ensured neither by the safeguard-imposing Member itself, nor by an agreement with the affected exporting Members. In that scenario, each affected exporting Member is explicitly entitled to ensure substantial equivalence itself by adopting a rebalancing

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15 European Union's first written submission, para. 266 ("The European Union has not yet exercised its rights of suspension in its entirety. It has done so only with respect to the United States' safeguard measures on two steel products at issue: 'carbon and alloy flat products' and 'carbon and alloy long products'. With respect to these products, the United States' safeguard measures have not been taken as a result of an absolute increase in imports.").

16 European Union's first written submission, paras. 287 ("In this case, the European Union suspended the application of its concessions on the basis of its notification to the Council of Trade in Goods on 18 May 2018. As Article 8.2 provides, that suspension takes place "upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods." Thus, by operation of WTO law, the European Union suspended the concessions described in that notification on 18 June 2019.") and 293 ("It should also be noted that the European Union did not exercise its rights of suspension under Article 8.3, and did not put any of the tariffs in Annexes I or II of Regulation 2018/724 in effect in its municipal law, until 22 June 2018, when Regulation 2018/886 entered into force.").

measure, unilaterally, and contingent on meeting certain substantive and procedural conditions.

43. This reading shows that, in order for Article 8.2 to apply, it is necessary that the first steps of the sequence, described in Article 8.1, did not take place. In other words, the rebalancing Member can suspend the application of concessions or other obligations only if there was no unilateral measure by the safeguard-imposing Member, nor an agreement with the safeguard-imposing Member, designed to and capable of ensuring substantial equivalence of concessions with the affected exporting Member seeking to rebalance.

44. In this case, it is undisputed that the United States took no steps to ensure the substantial equivalence of concessions or other obligations, whether unilaterally, bilaterally or multilaterally. Indeed, the United States rejected the European Union's attempt to reach an understanding on how to achieve the objective of Article 8.1 by expressly refusing to engage in any consultations on the basis of the Agreement on Safeguards.[17]

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?

45. In the European Union's view, it would certainly be permissible for this Panel to first find that the United States' measures are indeed safeguards (after properly coordinating with the Panel in *US — Steel and Aluminium Products*), and to proceed in its interpretation and application of Article 8.2 on that basis. Of course, it should be kept in mind that the US has failed to make any claims under Article 8.2. Therefore, any subsequent "application" of that provision should be limited to the question of applicability. If Article 8.2 applies – regardless of whether or not all the substantive and procedural disciplines contained in that provision are met – it is impossible for the United States' claims under Articles I and II of the GATT 1994 to succeed.

46. Nevertheless, it is not necessary for the Panel to find, as a preliminary matter, that the US measures are safeguards.

[17] European Union's first written submission, paras. 274 – 280 and Exhibits EU-42 and EU-43.

47. The central issue in this dispute is the objective characterisation of the measure at issue, and not the objective characterization of the United States' safeguard measures. In the EU's view, the Panel can and should make such an objective characterisation of the measures at issue on the basis of the elements identified in the EU's response to sub-question (a).

48. The EU notes that it is the very purpose of Article 8.2 to enable affected exporting Members to rebalance (i.e. maintain substantial equivalence) without waiting for a multilateral determination that the underlying measure is a safeguard. Article 8.2 foresees that suspension must take place within strict deadlines shortly after the application of the underlying safeguard measure. Moreover, under certain circumstances (as outlined in Article 8.3) the right of suspension can even be *exercised* immediately. If those Members, faced with a safeguard measure that is mislabelled by the adopting Member in a self-serving manner, had to wait for a multilateral finding that the measure is indeed a safeguard, they would be effectively deprived of their rights under Articles 8.2 and 8.3. Therefore, requiring a prior finding that the underlying measure is a safeguard would be not just unnecessary, but even incompatible with Articles 8.2 and 8.3. By analogy, when deciding whether Article 8.2 *applies* (as opposed to whether or not all of the requirements in Article 8.2 have been met), WTO panels are not required to make such a prior finding.

49. The EU also notes that the second sentence of Article 8.1, referring to the agreement between the Members concerned on adequate means of trade compensation in order to ensure substantially equivalent concessions or other obligations, refers generally to "the measure", and not to "the safeguard measure". This provides some support for the view that it may not be legally necessary to previously characterise the underlying measure as a safeguard in order for the rebalancing measure (triggered precisely by the failure to reach such an agreement) to fall within Article 8.2.

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?

50. Should the Panel consider it necessary or appropriate to decide whether the underlying US measures are safeguard measures, it would be entitled to make that determination. The fact that those measures and the Agreement on Safeguards are

not identified in the Panel Request does not affect that conclusion. The question of the applicability of certain covered agreements and their provisions is an objective question for the Panel to decide. These questions cannot be unilaterally determined by either litigant.

51. This would be especially true should the Panel consider it necessary to decide this question in order to assess the applicability of Article 8.2 to the measures at issue. In that scenario, if it was held that the United States' unilateral decision to frame its own Panel Request in a particular way prevented the Panel from assessing whether the underlying measure is a safeguard and hence from assessing the applicability of Article 8.2, the European Union's rights under Article 8.2 would be not just diminished, but entirely disregarded. This would be contrary to Article 3.2 of the DSU.

52. The EU has identified a large body of jurisprudence which shows that unilateral decisions of complainants to omit certain relevant provisions from panel requests cannot enable those complainants to exclude controlling provisions from the Panel's assessment, reverse the burden of proof, or prevent panels from making an objective assessment of the applicability of the covered agreements and their provisions.[18] Thus, for example, even when a complainant in an SPS case failed to refer to Article 5.7 of the SPS Agreement, the panel was still entitled to assess whether the measure fell within that provision and whether it was inconsistent with it, and the burden of showing an inconsistency with that provision remained on the complainant.[19] Similarly, in *EC-Tariff Preferences*, the Appellate Body considered that a complainant's choice to raise a claim under Article I of the GATT 1994 without referring to the Enabling Clause, in circumstances where the measure at issue was taken pursuant to the Enabling Clause, not only did not prevent the Panel from looking at the Enabling Clause but even suggested that the complainant failed to convey the "legal basis of the complaint sufficient to present the problem clearly".[20]

53. The European Union also recalls that, under Article 11 of the DSU, panels must make an objective assessment of the matter, including of the applicability of the relevant covered agreements. The Appellate Body has explained that a panel could not be expected to make an 'objective assessment of the matter', as required by

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18 European Union's first written submission, section 6.4.

19 European Union's first written submission, para. 249.

20 Appellate Body Report, *EC-Tariff Preferences*, para. 110; see also para. 113.

Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims.[21]

54. Indeed, the Appellate Body Report in *Indonesia – Iron or Steel Products* is a recent example of a case in which it was rightly decided that whether or not the Agreement on Safeguards applies to a measure is a question to be objectively decided by the panel, even if that means contradicting the views of both of the parties on that question.[22]

55. This jurisprudence clearly shows that there are many circumstances in which a panel would be not only entitled, but required, to apply *provisions* and assess *facts* (which could include measures) that have not been specifically raised in the complainant's Panel Request. In the EU's view, this is certainly the case with respect to a measure taken under Article 8.2 of the Agreement on Safeguards, such as the one at issue in this dispute. It would be impossible to even begin objectively assessing the WTO-consistency of such a measure if the complainant was in a position to unilaterally exclude the Agreement on Safeguards from the Panel's terms of reference. This would enable one party, in this case the United States, to decide unilaterally what the applicable law is and what the relevant facts are, in violation of the Panel's duty to conduct an objective assessment under Article 11 of the DSU.

56. While the measures at issue in this dispute are not taken on the basis of any "affirmative defence", taken to its logical conclusion, such an interpretation would also mean that complainants could prevent respondents from raising a defence, for example under Article XX of the GATT 1994. It could equally be argued that, since neither Article XX nor certain facts pertaining to an Article XX defence were mentioned in the panel request, the Panel would not have the authority to assess that provision and those facts.

Question 12

[Advance Question No. 14] 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

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21 Appellate Body Report, *Argentina - Footwear (EC)*, para. 74.

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

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.

57. Japan's position seems to be a mere nuancing of the US position. Japan itself maintained in *Canada — Renewable Energy / Canada — Feed-in Tariff Program* that the manner in which municipal law characterizes a measure is not determinative for its characterization under the covered agreements.[23]

58. The European Union recalls that the two defining features of a safeguard measure are that (i) it suspends at least one GATT obligation, in whole or in part, or withdraws or modifies at least one GATT concession and (ii) has "a demonstrable link to the objective of preventing or remedying injury" to the adopting Member's domestic industry.

59. The European Union agrees that there are other factors which may be taken into account, such as the domestic procedures that lead to the adoption of the respective measures or the fulfilment of the notification requirements. However, such additional elements should be assessed on a case-by-case basis and cannot be determinative in themselves. The non-fulfilment of the notification requirements in itself may be a violation of the Agreement on Safeguards, but not a defining characteristic. Otherwise, by simply not notifying its safeguards measure a Member may unilaterally evade the control of the multilaterally agreed provisions of the Agreement on Safeguards, which is precisely what the United States attempts to do in the Steel and Aluminium and the Additional Duties cases.

60. The fulfilment of notification requirements, just like the domestic procedures followed, are in the hands of the adopting Member. Along these lines, there is abundant case law besides *Indonesia – Iron or Steel Products* which overwhelmingly confirms that the characterisation of a measure under a Member's municipal law is not dispositive of the question of whether or not that measure is governed by the provisions of a particular agreement. In *US — Large Civil Aircraft (2nd complaint)* the Appellate Body stated that:

> The US legislative and regulatory framework indicates that procurement contracts are the instruments used when the US Government intends to make a purchase. The label given to an instrument under municipal law, however, is not

[23] Appellate Body Report, *Canada — Renewable Energy / Canada — Feed-in Tariff Program*, para. 5.127.

> dispositive and cannot be the end of our analysis […].[24] (footnotes omitted)

61. Similarly, in Canada — *Renewable Energy / Canada — Feed-in Tariff Program* the Appellate Body confirmed that:

> Finally, Japan suggests that the Panel erred by assuming that, if a measure is characterized in a particular manner under domestic law (e.g. as a government purchase), it can never be characterized in a different manner under WTO law. We understand Japan to be arguing that the Panel erred in finding that the characterization of a measure under domestic law is dispositive of its legal characterization under WTO law. Japan is correct in arguing that the manner in which municipal law characterizes a measure is not determinative for its characterization under the covered agreements.[25] (footnotes omitted)

Question 13

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

62. No, that is not the case. In fact, the measures at issue in the present proceedings comprise two distinct steps.

63. The European Union understands that the Panel is concerned with the limits of characterizing a certain measure as a rebalancing measure. These concerns are perfectly legitimate.

64. In the particular circumstances of the case at hand, which is a re-balancing case, the measures at issue constitute a suspension of concessions. This can be easily ascertained from their design, structure and operation. To recall, the European Union has raised its duties as a second step, after suspending concessions, as per the provisions of Article 8.2 of the Agreement on Safeguards.

65. To recall, in line with Article XIX:3(a) and Article 8.2, the EU measures at issue take two steps, which are important to distinguish. First, they suspend the application of certain tariff concessions to the US. Second, they impose additional duties on some of the products at issue. This distinction is particularly clear in view of the fact that the list of US products for which the European Union has suspended the application of concessions is broader than the list of products on which it has actually imposed

[24] Appellate Body Report, *US — Large Civil Aircraft (2nd complaint)*, para. 593.

[25] Appellate Body Report, *Canada — Renewable Energy / Canada — Feed-in Tariff Program*, para. 5.127.

additional duties, i.e. for which the additional duties at issue in this dispute are currently in force. Moreover, the suspension occurred before the additional duties came into force, through a distinct measure.

Question 14

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?

66. The European Union considers that these two defining characteristics must be present in order for a measure to constitute a safeguard measure. There are additional elements, such as the domestic procedures, the fulfilment of the notification requirements or elements pertaining to the legality of a safeguard measure (e.g. increase in imports, whether imports take place "in such quantities and under such circumstances" as to cause or threaten serious injury, unforeseen developments)[26] that may be used in order to reach a final conclusion.

Question 15

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?

67. The European Union refers to its responses to questions no 12 and 14. Apart from the two constituent features clearly identified by the Appellate Body, there are no other necessary elements that each and every measure must have in order to be considered a safeguard. Certainly, elements that are under the sole control of the adopting Member, such as the choice of domestic legal bases or procedures, or the choice to notify or not notify, cannot be determinative in that sense.

Question 16

[26] See also section 4.4 of the EU's first written submission.

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?

68. No, the non-discriminatory application is not a constituent element, but rather a condition for the legality of a safeguard measure. Thus, the panel in *Argentina – Footwear* explained that Article 2.2 sets out the "most-favoured nation principle which… *governs the imposition* of safeguard measures on products from all sources of supply" (emphasis added).[27]

69. Indeed, Article 2.2 of the Agreement on Safeguards provides that such measures should be applied to the imported product irrespective of its source. At the same time, Article 9.1 compels the adopting Member to exclude certain developing countries, if the specified *de minimis* thresholds are respected. The panel in *Dominican Republic – Safeguard Measures* explained that "Articles 9.1 and 2.2 of the Agreement on Safeguards, read together, *impose an obligation* to apply the measures to products of any origin, except those origins that meet the requirements set out in Article 9.1" (emphasis added).[28]

70. Clearly, if a measure could escape scrutiny under the Agreement on Safeguards (because that agreement would be somehow inapplicable) by failing to respect the MFN principle, that principle would no longer "govern the imposition of safeguard measures", and the Agreement on Safeguards would effectively cease to impose any *obligation* to apply safeguard measures to product of any origin.

Question 17

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.

71. A panel may consider in its analysis elements such as the manner in which a measure was adopted and its characterization in the respective Member's municipal law. However, a panel may not base its conclusions solely or predominantly on those elements, which are subjective by their very nature, not dispositive, and may

[27] Panel Report, *Argentina – Footwear (EC)*, para. 8.88.

[28] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.375.

allow Members to evade the disciplines of the Agreement on Safeguards and in particular the provisions allowing, under certain conditions, for re-balancing.

72. Thus, a panel should make an objective assessment of the matter before it, including of the applicability and conformity with the Agreement on Safeguards, in light of the guidance provided by the Appellate Body with regard to the two defining features and the additional elements. While those additional elements can be considered, for example as confirming or supporting the analysis, the Appellate Body has clearly explained that what defines a safeguard measure are the two constituent features.

Question 18

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?

73. The purpose of a measure can and should be objectively assessed by a panel in WTO litigation. This is the standard envisaged by Article 11 of the DSU. It is true, as a general rule, irrespective of the provisions of the covered agreements at stake. For instance, a measure that is not taken "for the protection of" a Member's essential security interests (because, for instance, it is taken for something else, like to remedy or prevent serious injury to the domestic industry) cannot benefit from a justification under Article XXI of the GATT 1994. Instead, the purpose of such a measure will reveal that we may be in the presence of a safeguard measure.

74. There are several relevant cases when the Appellate Body confirmed that. For instance, in the context of the SPS Agreement, it clarified that whether a measure is an SPS measure according to Annex 1(a) of the SPS Agreement:

> must be ascertained not only from the objectives of the measure as expressed by the responding party, but also from the text and structure of the relevant measure, its surrounding regulatory context, and the way in which it is designed and applied.[29]

Question 19

[29] Appellate Body Report, *Australia – Apples*, para. 173.

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?

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

76. Thus, the US' decision to breach the obligation to properly notify its safeguard measure[30] cannot mean that the Agreement on Safeguards does not apply. Accepting the United States' view would, of course, make large swaths of WTO law completely ineffective, because 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.

77. The Appellate Body has made clear that the notification of a safeguard measure is an obligation, i.e. a condition qualifying the exercise of the right to impose a safeguard measure, rather than a "constituent feature"[31] of a safeguard measure. That obligation, or condition, is imposed by Article XIX of the GATT 1994 and by the Agreement on Safeguards. Specifically, the Appellate Body found that Article 12.1 of the Agreement on Safeguards "sets out three separate obligations to make notification to the Committee on Safeguards, each of which is triggered "upon" the occurrence of an event specified in one of the three subparagraphs".[32]

78. This simple fact is clear even from the materials cited by the United States. Notification is a "prerequisite" for taking a safeguard because it is a legal obligation

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30 United States' first written submission, section VI.A.

31 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60 ("any relevant notifications to the WTO Committee on Safeguards").

32 Appellate Body Report, *US – Wheat Gluten*, para. 102.

that must be complied with before a safeguard measure may be applied in conformity with the Agreement on Safeguards.[33] In precisely the same way, it is a "condition which qualifies the exercise of the right" to take a safeguard measure.[34] As the GATT panel cited by the United States confirms explicitly, "the contracting party taking action under Article XIX must give notice in writing to the Contracting Parties before taking action."[35] This is a straightforward obligation under Article XIX and the Agreement on Safeguards, nothing more and nothing less. A Member proposing to apply a safeguard measure must first notify it, then consult on it, and only then may it apply it, assuming the other applicable conditions have been met. There is no basis whatsoever to claim that these obligations only apply to measures which the imposing Member has benevolently decided to call safeguards.

Question 20

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?

79. A measure is a safeguard if and when it has the objective characteristics of a safeguard, as set out by the Appellate Body in the *Indonesia – Iron or Steel Products* report. The timing of the notification of the measure, or indeed the very existence (or not) of a notification, does not decide whether or not the measure is a safeguard.

80. Moreover, it is clear from the Agreement on Safeguards and from the jurisprudence that a measure can indeed be a safeguard even before notification. This further disproves the US claim that the measure's characterization as a safeguard hinges on the existence or absence of a notification.

81. Article 12.1(c) of the Agreement on Safeguards requires Members to immediately notify the Committee on Safeguards upon "taking a decision to apply… a safeguard measure." A "decision to apply" a safeguard measure typically precedes the measure's actual application, sometimes by several months. In particular cases, panels have considered claims on whether a delay of several days, weeks or months between adoption and notification complies with the requirement of

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33 United States' first written submission, para. 66.

34 United States' first written submission, para. 67.

35 United States' first written submission, para. 67, referring to GATT Working Party Report, *US – Fur Felt Hats*, GATT/CP/106, paras. 3-4.

"immediate" notification.[36] In each of those cases, however, it was clear that the measure was subject to the Agreement on Safeguards, including the disciplines of Article 12, immediately upon adoption, i.e. *before* notification. It is also clear that the measure that must be notified under Article 12.1(c) is a *safeguard* measure.[37]

82. Thus, the measure's characterization as a safeguard precedes the obligation to notify both logically (because only safeguard measures are required to be notified under Article 12.1(c)) and temporally (because the obligation to notify is triggered after the decision to apply a safeguard measure is taken[38]).

83. Indeed, holding that notification is a necessary prerequisite for the *existence* of a safeguard would render the *obligation* to notify pointless. Under that interpretation, if a measure was not notified, it would not be subject to the obligation because it would not be a safeguard measure in the first place. If it was notified and *therefore* a safeguard, then there could be no violation of the obligation. Hence, that interpretation reduces the notification obligations in Article 12 to inutility, contrary to the well-established rule of effectiveness in treaty interpretation.[39]

Question 21

Please comment on the relevance, if any, of the 1993 Decision on Notification Procedures[40] for the Panel's assessment of the United States' argument concerning invocation of the Agreement on Safeguards through notification.

84. The Decision on Notification Procedures is, first of all, legally relevant because it is a binding decision taken by the Ministerial Conference, and annexed to the Uruguay Round agreements.

85. In substantive terms, the Decision is relevant for two reasons. First, it confirms in several places that notification, including the notification of safeguard measures and actions, is an obligation, i.e. not a constituent feature of a safeguard measure.

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36 For example, Panel Reports, *Ukraine – Passenger Cars*, para. 7.494 (referring to Article 12.1(b), which makes no material difference); *Korea- Dairy*, para. 7.145.

37 Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.417 (referring to the "obligation on Members to notify their safeguard measures" based on Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards).

38 Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.433 ("Article XIX:2 of the GATT 1994, therefore, read in conjunction with Article 12.1(c) of the Agreement on Safeguards, determines the obligation to notify a definitive measure before it is applied but not necessarily before it is adopted.").

39 Appellate Body Report, *US - Gasoline*, para. 21.

40 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.

86. Second, it states expressly that notification is "without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the Multilateral Trade Agreements…" This strongly suggests that, in the view of the Membership, the presence or absence of a notification is not determinative of whether the rights and obligations under the Agreement on Safeguards are relevant, i.e. of whether that agreement applies.

Question 22

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? Please explain the legal basis for your response. 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?

87. As the European Union has explained, a measure that has the objective characteristics of a safeguard measure is a safeguard measure, regardless of whether the Member taking it considers it to be a safeguard or characterises it as such. In circumstances where that Member does not characterise the measure as a safeguard, it may often be the case that there is some "doubt" as to whether the measure is a safeguard. This is because, first, there will inevitably be disagreement on the measure's proper characterisation; second, even the affected Members may not immediately have access to all the information relevant to that question.

88. Nevertheless, the existence of this sort of "doubt" cannot prevent Members from exercising their rights under Article 8.2. To require absolute certainty would mean in effect that, whenever the adopting Member chooses not to characterise the measure as a safeguard, rebalancing would be impossible.

89. Moreover, as we have learned in *Indonesia – Iron or Steel Products*, a measure may not be a safeguard even where both Members agree that it is a safeguard. Thus, there can be "doubt" even in the face of agreement among the Members involved. To say that the existence of "doubt" as to the applicability of the Agreement on Safeguards prevents Members from rebalancing would reduce Article 8.2 to inutility.

90. Indeed, one could very often raise "doubts" as to the applicability of any number of provisions in the covered agreements, or even those agreements themselves. This cannot *ex ante* prevent Members from exercising their rights or fulfilling their obligations, as long as they do so in good faith, on the basis of what they see as the best interpretation of the covered agreements. To put it simply, faced with what it considers objectively to be a safeguard measure, an affected exporting Member

may rebalance on the basis of Article 8.2. As with any measure, a WTO dispute can be brought against such rebalancing, and it will be up to a panel and/or the Appellate Body to decide the issue.

91. With respect to the latter part of the question, as the European Union pointed out above, Article 8.1 provides some support for the view that a rebalancing measure may legitimately be taken in the face of uncertainty as to the characterisation of the underlying measure as a safeguard. The second sentence of Article 8.1, concerning the agreement(s) between the Members concerned on adequate means of trade compensation in order to ensure substantially equivalent concessions or other obligations, refers generally to "the measure", and not to "the safeguard measure". This suggests that it is not legally necessary to previously characterise the underlying measure as a safeguard in order for the rebalancing measure to be taken on the basis of Article 8.2. Similarly, the final sentence of Article 8.1 also refers to "the measure".

Question 23

During the first substantive meeting, 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 on this argument.

92. Indeed, the time-frames in Article 8.2 show that a rebalancing measure must be taken shortly after the introduction of the underlying measure. Thus, the suspension of the application of substantially equivalent concessions or other obligations must occur not later than 90 days after the underlying measure is applied. Also, the suspension must previously be notified to the Council for Trade in Goods.

93. It is highly unlikely that, in such a short time-frame following the application of the underlying measure, any disagreement on its proper characterisation will be resolved, either among the parties or before a WTO adjudicator. In such a scenario, there are only two conclusions that one could draw from the existence of those time-frames in Article 8.2. Either the Member adopting the underlying measure has a veto right over the other Member's exercise of its rebalancing rights (i.e. by disputing the characterisation of the measure as a safeguard, that Member is able to prevent the adoption of the rebalancing measure, effectively forever), or the rebalancing can take place according to the proper time-frames even in the face of disagreement over the characterisation of the underlying measure.

94. In the EU's view, only the second interpretation would be in line with the ordinary meaning of Article 8.2, its object and purpose (ensuring a substantially equivalent level of concessions), as well as its useful effect.

Question 24

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?

95. The European Union understands this question as asking the following: assuming that a rebalancing measure (a measure suspending concessions) can only be WTO-consistent if adopted in response to a safeguard measure, what would be the implications of finding that it was WTO-inconsistent because the underlying measure was not a safeguard?

96. In the European Union's view, the implications would be the same as for any other measure: a finding of WTO-inconsistency, and a recommendation to comply . Thus, the rebalancing measure would simply be found to be WTO-inconsistent. Any corresponding recommendation to comply could only be prospective.[41] Thus, the question of whether the measure was WTO-inconsistent "ab initio" or only as of the moment of the finding seems somewhat academic.

97. Nevertheless, it could be argued that, in the face of uncertainty as to the objective characterisation of a safeguard measure, a rebalancing measure is WTO-consistent until an adopted WTO finding to the contrary.

98. For example, a Member may impose a measure that appears to be a safeguard. The adopting Member characterises it and even notifies it as a safeguard. An affected exporting Member rebalances on the basis of Article 8.2. However, due to an objective reason unknown to the rebalancing Member and outside its control, a panel may find that the supposed safeguard measure is not a safeguard after all. For example, there is in fact no domestic industry at all, such that the objective of the measure is in fact not to remedy any injury. One could fairly ask the question

[41] Appellate Body Report, *US – Cotton (21.5)*, fn 494.

on what basis the action taken by the rebalancing Member in good faith would have been WTO-inconsistent at the time of adoption, and at any time prior to such a panel finding. The same question could rightly be posed also in the scenario in which the adopting Member does not characterise the underlying measure as a safeguard, but the rebalancing Member has every reason to believe otherwise, again in good faith.

Question 25

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?

99. The European Union refers to its response to Question 11(a).

Question 26

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 (CTG) does not disapprove".

a. Please confirm whether the European Union's additional duties measure was placed on the agenda of the CTG, and by whom.

100. The European Union refers to paras. 149 – 151 of its first written submission, explaining that the EU fulfilled the Article 8.2 requirement to notify the measure to the CTG. To the EU's knowledge, the measure was not placed on the CTG's agenda.

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?

101. No. First of all, what is necessary for Article 8.2 to "apply", i.e. for the measure to fall within the scope of Article 8.2, is that the objective characteristics of a rebalancing measure are present (see the EU's response to Question 11(a)), and no more. Instead, the two references to the CTG in Article 8.2 (the provision of a written notice to the CTG, and the absence of disapproval by the CTG) are

obligations that must be respected by the rebalancing Member. They do not affect the legal characterisation of the rebalancing measure.

102. In any event, Article 8.2 does not require that any items be placed on the CTG's agenda. The rebalancing Member is required by Article 12.5, and indirectly by Article 8.2 (which counts the second 30-day deadline from the moment of the receipt of the written notice), to provide written notice of the proposed suspension to the CTG. That notice is sufficient to inform the CTG, and by extension the WTO Membership to which the notice is circulated[42], of the proposed suspension. The suspension can only be lawfully put in place to the extent the CTG does not disapprove. None of these requirements refer to the placing of an item on the CTG's agenda.

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)?

103. The Member adopting the measure (the suspension) is required to provide written notice of that (proposed) measure to the CTG. Subsequently, any Member, including the Member that adopted the underlying safeguard measure, could formally request that that notice be discussed in a meeting of the CTG. According to Rules 3 and 4 of the CTG's Rules of Procedure,[43] it is open to any Member to propose items for inclusion in the provisional agenda, or to propose them under "Other Business" at the opening of the session. There is, however, no obligation for any Member to do so. Such an obligation would have to be expressly provided in the text of Article 8.2 or elsewhere in the covered agreements. It is not.

104. Instead, Article 8.2 simply conditions the suspension on the absence of a disapproval of the suspension by the CTG (regardless of which Member, or any, asked for the inclusion of the item in the agenda). In terms of "burden", the relevant question in these proceedings is which party bears the burden of proof. Under the clear terms of Article 8.2, it would be the burden of the United States to show that the CTG disapproved of the measure at issue. As the EU has explained in para. 303 of its FWS, the United States has not even attempted to do so. It could in

[42] Exhibit EU-41, p.1 ("The following communication, dated 18 May 2018, is being circulated at the request of the Delegation of the European Union.").

[43] WT/L/79, WT/L/161.

any event not do so, first, because it failed to make any claims under Article 8.2; second, because the CTG did not in fact disapprove.

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?

105. For the CTG to "disapprove" of the suspension, it would need to take action on the basis of its Rules of Procedure and in accordance with the WTO Agreement. This would entail consideration of the measure at a meeting and a positive act, or decision. This decision could only be taken by consensus.

106. The CTG's Rules of Procedure[44] follow the Rules of Procedure of the General Council, except as modified. One of those modifications is to Rule 33 of Chapter VII (Decision-Making), providing that where a decision cannot be arrived at by consensus, the matter at issue shall be referred to the General Council for decision. This means that, even under its own Rules of Procedure, the CTG is not authorised to take decisions in any way other than by consensus.

107. The Agreement on Safeguards does not provide for the disapproval referred to in Article 8.2 to be expressed by any body other than the CTG. In particular, it is questionable if "disapproval" by decision of the General Council would be capable of preventing a suspension under Article 8.2.

108. In any event, however, even if the CTG could refer the matter to the General Council and even if it did so, the decision-making rule would still be consensus. Under Rule 33 of its Rules of Procedure,[45] the General Council is required to take decisions in accordance with the "decision-making provisions of the WTO Agreement, in particular Article IX thereof entitled "Decision-Making"." Article IX of the WTO Agreement provides, as a starting point, that WTO shall continue the practice of decision-making by consensus. There is no specific rule for rebalancing measures under Article 8.2 of the Agreement on Safeguards that would detract from this general rule.

109. A "negative consensus" rule (i.e. that disapproval would occur unless there is a decision by consensus to approve) does not apply to the CTG's decision to

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44 WT/L/79.

45 WT/L/161.

disapprove the proposed suspension of concessions. There is no legal basis for such a rule to apply. Where the covered agreements provide for negative consensus, they do so explicitly, such as in Articles 6.1, 16.4, 17.14 or 22.6 of the DSU.

110. The reference to "disapproval" (as opposed to "approval") in Article 8.2 of the DSU simply confirms that the default rule, in the absence of explicit disapproval by consensus in the CTG, is that the rebalancing measure may proceed. It also confirms that an explicit approval is not required, which fits with the absence of any requirement to even place the rebalancing measure on the agenda of the CTG.

111. In any event, neither the decision-making rules of the CTG or the GC, nor the requirements of Article 8.2 concerning the absence of disapproval by the CTG, have any bearing whatsoever on the question of whether or not Article 8.2 applies, i.e. whether the measure can properly be considered a rebalancing measure. However it is to be interpreted, the requirement of the absence of a disapproval is no more than an obligation for the rebalancing Member. In that respect, the EU underlines once again that the United States has made no claims under Article 8.2 and has not even attempted to argue (even if such an argument would be open to it, *quod non*) that any of the requirements of Article 8.2 have not been met.

Question 27

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 the European Union adopting its additional duties measure?

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

113. On the other hand, an objective assessment may entail taking into account the measure's regulatory objective(s), as part of the assessment of the measure's "design, structure, and expected operation".[46] For example, when assessing the US' safeguard measure, it is relevant that the objective of the measure is to remedy the

[46] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. See also the response to Question 10.

injury caused to domestic industry by allegedly increasing imports. Similarly, when assessing the European Union's rebalancing measure, it may be relevant that the measure was explicitly taken in order to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between the EU and the United States,[47] and that its adoption was based on the fact that the underlying US measure is a safeguard.[48]

Question 28

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?

114. The presence or absence of consultations under the Agreement on Safeguards could be relevant to deciding whether various obligations under that Agreement were met.

115. As the European Union has explained in *US – Steel and Aluminium Products*,[49] the US has acted inconsistently, *inter alia*, with Article 12.1 (by failing to notify the Committee on Safeguards upon taking a decision to apply its safeguard measures) and with Article 12.3 (by failing to provide adequate opportunity for prior consultations). These matters are not at issue in these proceedings.

116. Under Article 8.2 of the Agreement on Safeguards, there is a right to suspend ("rebalance") if no agreement [on any adequate means of trade compensation for the adverse effects of the measure] is reached within 30 days in the consultations under paragraph 3 of Article 12. Thus, hypothetically, a rebalancing Member could be acting inconsistently with Article 8.2 if it suspended concessions without allowing for 30 days of consultations under Article 12.3 (the purpose of which is, inter alia, to reach an understanding on ways to achieve they Article 8.1 objective of maintaining substantially equivalent concessions and other obligations). These matters, are, however, also not an issue in these proceedings, since the United States did not raise any claims under Article 8.2 or any other provision of the Agreement on Safeguards.

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47 See the references to substantial equivalence in the EU's written notice under Article 12.5 (Exhibit EU-41), section 3 and Annex III; in Regulation 2018/724 (Exhibit USA-1), recitals 3, 5, 6, and 10.

48 European Union's written notice under Article 12.5 (Exhibit EU-41), section 2; Regulation 2018/724 (Exhibit USA-1), recitals 1-2; Regulation 2018/886 (Exhibit USA-2), recital 3.

49 See also European Union's first written submission, fn 418.

117. In any event, for the sake of completeness, the European Union has already explained that it fully complied with the Article 8.2 obligation to allow for 30 days of consultations before suspending.[50] In brief, once the US had already adopted its safeguard measures without providing for any opportunity to consult, there was no further requirement for the EU to seek consultations or even to wait for 30 days. Nevertheless, wishing to make as much effort as possible to reach an agreement, the EU actively requested consultations with the United States under the Agreement on Safeguards. After that, the EU waited more than 30 days before notifying its suspension of concessions to the CTG. From the point of view of Article 8.2, the EU's actions were irreproachable.

118. With this in mind, the European Union does not see how the United States' unilateral decision to reject consultations on its safeguard measure could be relevant to any claim made in these proceedings against the EU's rebalancing measures. It certainly does not suggest that the US measures should be objectively characterised as anything other than a safeguard, or that the EU's measure should be objectively characterised as anything other than a rebalancing measure. Both characterisations must be objective, and cannot therefore hinge on a single Member's self-serving decision to characterise its measure in a certain way. The United States cannot be the judge of which legal provisions apply to its measures, and still less of which legal provisions apply to an EU measure. Both issues are for the Panel to decide objectively, having regard of all pertinent facts, and without any deference to the views of either litigant.

119. If anything, the US' refusal to even consult on its safeguard measures under the Agreement on Safeguards further shows that it is indispensable for this Panel to make an objective assessment of the applicable legal provisions. A single Member cannot be permitted to control which WTO legal provisions apply by unilateral and self-serving actions aimed at avoiding legal scrutiny, such as using a different procedure under its domestic law, shirking the WTO notification procedures, failing to allow for consultations, or refusing to engage in consultations. The only way to prevent that outcome would be for the Panel to objectively assess the measures at issue under the actual controlling provisions, despite the United States' choice not to characterise its measures as safeguards.

Question 29

[50] European Union's first written submission, section 7.1.

[Advance Question No. 10] 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 the European Union's arguments under Article 8.2 of the Agreement on Safeguards.

120. The European Union has explained in its first written submission that by failing to make a claim under Article 8 of the Agreement on Safeguards, the US has by definition failed to make a *prima facie* case that the European Union's rebalancing measure is inconsistent with any part of that provision.

121. Thus, the European Union agrees with Switzerland that it is the complainant that has the burden of making a prima facie case of inconsistency with Article 8 of the Agreement on Safeguards. The European Union recalls that the Agreement on Safeguards is not in the nature of an affirmative defence and the initial onus rests on the complainant, which has to make its case.

122. The European Union has nevertheless demonstrated that the US has failed to show any inconsistency with Articles 8.2 and 8.3 of the Agreement on Safeguards, and that the EU has complied with all the requirements of those provisions, although not legally required to do so at this stage.[51]

123. The European Union has so proceeded because it wanted to put from the very beginning all legal arguments on the table, so that the Panel is properly and fully informed of the nature and extent of the case it is called to assess.

Question 30

[Advance Question No. 12] 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.

[51] European Union's first written submission, section 7.

124. The European Union considers that the references to the different cases provided by Norway are helpful in the present proceedings. They show that the present Additional Duties cases are not an isolated instance, but rather a type of situation that has occurred in the past. Indeed, Norway offers as examples cases such as *US – 1916 Act*,[52] *Australia – Apples*,[53] *EC – Seal Products*[54] and *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*.[55] Similarly, the EU has referred to a large body of jurisprudence pointing in the same direction.[56]

125. In those cases, the WTO adjudicating bodies did not shy away from fulfilling their duties and deciding on the applicability of the covered agreements. Logically, such an analysis took place upfront, before the substance of the different claims was reached.

Question 31

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?

126. It depends on the provisions in question and on the nature of the measure at issue whether a measure may fall within the scope of more than one covered agreement or within different regimes within the same agreement.

127. In the offered example, the European Union considers that a measure may not fall at the same time under Articles I and VI of the GATT. Indeed, an anti-dumping duty imposed in accordance with Article VI of the GATT 1994 and the Anti-Dumping Agreement does not violate Article I:1.[57] Similarly, a measure may not fall at the same time under the provisions of the SPS and the TBT Agreements.

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52 Appellate Body Report, *US – 1916 Act*, para. 130.

53 Appellate Body Report, *Australia – Apples*, para. 173.

54 Appellate Body Reports, *EC – Seal Products*, para. 5.19.

55 Panel Report, *Thailand – Cigarettes (Philippines) (Philippines – Article 21.5)*, paras. 7.619-7.683.

56 European Union's first written submission, section 6.4.

57 Appellate Body Report, *EC – Fasteners (China)*, paras. 392-398.

128. However, there are situations when a measure may be, at the same time, within the scope of the TBT Agreement and the GATT 1994, or within the scope of the SPS Agreement and the GATT 1994.

129. Furthermore, there may be instances when different aspects of a measure may be governed by different covered agreements.

130. However, in any event, Members cannot unilaterally determine which legal regime governs their measures, because the question of the applicability of the covered agreements (and their provisions) is an objective question.

131. The measures at issue in the present proceedings do not fall under different competing regimes. They are rebalancing measures governed by the safeguards regime. So the respondent (the Member maintaining such a measure) defends its measures under the one and the only applicable regime in the circumstances. The real issue is the fact that the complainant is seeking to avoid the controlling provisions by framing its claims in such a way as to evade the letter and the spirit of the covered agreements.

Question 32

[Advance Question No. 11] In paragraph 55 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 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.

132. The European Union agrees with this observation, and this is a point that we have already made.[58] Indeed, the reasoning on Articles I and VI in *EC – Fasteners (China)* may be assimilated to the reasoning on Articles I/II and XIX:1(a) and XIX:3(a) in this case. In the present case, a suspension is not a violation.

133. An anti-dumping duty imposed in accordance with Article VI of the GATT 1994 and the Anti-Dumping Agreement does not violate Article I:1. That is, it is not a "violation" that is "justified" by Article VI: there is simply no violation.

134. The Appellate Body in *EC – Fasteners (China)* stops short of a question that this Panel will need to address, as it has been raised by the respondents (consequences of the absence of a claim under the controlling provisions – in that case Article VI - on the claim under Article I). In the EU's view, the consequence is that the claim under Articles I and II of the GATT 1994 cannot succeed.

Question 33

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?

135. Yes, the European Union considers that past cases concerning the relationship between the Anti-Dumping Agreement and the GATT 1994 provide useful guidance to understand the relationship between the Agreement on Safeguards and certain provisions of the GATT 1994.

136. In particular, the European Union considers that those cases provide support to our legal position that the Agreement on Safeguards is not in the nature of an affirmative defence to an alleged violation of Articles I or II of the GATT 1994.

137. Finally, the European Union recalls that there is no violation occurring in the present case in first place, as the EU's suspensions were validly *suspended*, in accordance with the provisions of Article 8.2 of the Agreement on Safeguards.

[58] European Union's first written submission, para. 232.

Question 34

[Advance Question No. 13] 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".

138. The European Union finds helpful a reference to Article XXVIII of the GATT 1994 in support of the argument that a suspension is not a violation.[59] Indeed, Article XXVIII is similar to Article XIX in the sense that they both refer to a suspension. Both articles are not in the nature of affirmative defences and in both instances there is no violation to begin with.

139. In light of these considerations, the European Union agrees with Japan, which provides a different, yet related argument: Articles XXVIII and XIX are the two ways for a WTO Member to modify concessions under the GATT. A Member may use either one, or the other. Since it is clear that the US did not follow the Article XXVIII path, this means that the measures at issue in the Steel and Aluminium cases should be assessed under Article XIX.

6.3 *To the European Union*

Question 50

[Advance Question No. 26] In paragraph 241 of its first written submission, the European Union submits that "there is clearly no sense in which Article 8.1 [of the Agreement on Safeguards] can be characterized as an 'affirmative defence'". Please elaborate on this argument. In particular, please explain what relevance the characterization of Article 8.1 as an "affirmative defence" (or not) would have on the proper characterization of Article 8.2.

140. The European Union refers to Article 8.1 in this context because of its close connection with Article 8.2. Because of that connection, what is true of Article 8.1 (the fact that it is not an affirmative defence) must also be true of Article 8.2. The relevance of characterising either of these provisions as an "affirmative defence" lies in, among other things, the allocation of the burden of proof. Because Article 8.2 is not an affirmative defence, it is not for the EU to raise or to make a case under it. Rather, Article 8.2 is the controlling provision, and the United States should have raised it, if it was to have any hope of succeeding in its claims. It failed to do so.

[59] European Union's opening statement at the first substantive meeting, para. 12.

141. The paragraph of the EU's FWS cited in the Question is part of a broader argument about Article 8 as a whole. The argument begins by explaining that Article 8, as a whole, concerns levels of concessions of the safeguard-imposing Member and the affected Members, and that it is not an exception or an affirmative defence.[60] It goes on to illustrate this point in more detail, first with respect to Article 8.1 and then with respect to Article 8.2. With respect to Article 8.1, the EU points out that there is no indication whatsoever that that provision might be an "affirmative defence".[61] The EU illustrates this with a hypothetical agreement between two Members, within the meaning of the final sentence of Article 8.1, which is challenged as WTO-inconsistent by a third Member. This is an example of a scenario in which "there is clearly no sense in which Article 8.1 can be characterised as an "affirmative defence""[62].

142. The argument goes on to address specifically Articles 8.2 and 8.3. It is relevant that Article 8.1 is not an affirmative defence, first, because it lends further support to the fact that Article 8 *as a whole* is not an "affirmative defence"; second, because of the particularly close connection between Articles 8.1 and 8.2. In fact, those two provisions outline a continuum of actions that the Agreement on Safeguards contemplates in order to maintain the "substantial equivalence" of concessions and other obligations between the safeguard-imposing Member and the affected Member(s). Because Articles 8.1 and 8.2 are a single set of closely related and sequential mechanisms for ensuring the same objective, it cannot be that one of them is not an affirmative defence, and the other one is.

143. To recall, as explained in responding to Question 11(a), Articles 8.1 and 8.2 form a series of steps designed to ensure the fulfilment of that overarching requirement. Article 8.1 places the primary responsibility to ensure substantial equivalence on the shoulders of the safeguard-imposing Member itself, unilaterally. If the safeguard-imposing Member fails to ensure substantial equivalence unilaterally, the Members concerned may agree, bilaterally, on "any adequate means of trade compensation" in order to achieve the same objective. Article 8.2 then deals with the scenario in which substantial equivalence is ensured neither by the safeguard-imposing Member itself, nor by an agreement with the exporting Member. In that

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60 European Union's first written submission, para. 239.

61 European Union's first written submission, para. 240. Moreover, the jurisprudence explains that Article 8.1 of the Agreement on Safeguards provides for an *obligation* for the safeguard imposing Member to "endeavour to maintain an equivalent level of concessions", requiring *inter alia* the provision of opportunities to consult under Article 12.3 (Appellate Body Report, *US – Wheat Gluten*, paras. 145 – 146; see also Appellate Body Report, *US – Line Pipe*, paras. 118-119; Panel Report, *Ukraine - Passenger Cars*, paras. 7.551 – 7.552).

62 Ide, para. 241.

scenario, the exporting Member is explicitly entitled to ensure substantial equivalence itself by adopting a rebalancing measure, unilaterally, and contingent on meeting certain substantive and procedural conditions.

144. Nothing in that series of steps suggests an "affirmative defence", to be raised and proven by the respondent in WTO proceedings.

Question 51

[Advance Question No. 27] In paragraph 254 of its first written submission, the European Union states that:

> *Only in the unlikely event that the Panel would fail to reach such a conclusion [i.e. that the United States should have raised Article XIX of the GATT 1994 and Article 8.2 of the Agreement on Safeguards in its consultations and panel request] does the European Union, in the alternative, place these provisions within the Panel's terms of reference".*

a. Please explain the legal basis for a responding party, as opposed to a complaining party, to "place … provisions within the Panel's terms of reference".

b. What would be the legal and practical implications of a responding party, as opposed to a complaining party, to "plac[ing] … provisions within the Panel's terms of reference"?

c. How would the burden of proof be affected in circumstances where a responding party, as opposed to a complaining party, to "place[s] … provisions within the Panel's terms of reference"?

145. The European Union will address all three sub-questions together.

146. Under Article 7.1 of the DSU, the terms of reference of a panel are to examine the matter "in the light of the relevant provisions […] cited by the parties to the dispute". These standard terms of reference also apply to this dispute. Under Article 7.1, even if the "matter that is referred to the DSB" is typically defined by the complainant's request for the establishment of a panel, that matter must be examined in light of provisions raised by *either* party. The legal and practical implications of this are simply that a panel is required to address the provisions cited by both parties when examining the matter. The burden of proof is of course in any event for the asserting party.[63]

147. Both parties can cite provisions, such that those provisions form part of a panel's terms of reference. Typically, a complainant's request for the establishment of a

[63] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

panel will list the provisions with respect to which the complainant makes claims, i.e. the provisions that it alleges the respondent to have infringed. In legal terms, however, the complainant could refer to certain provisions for other reasons as well; Article 6.2 merely requires the panel request to contain the "legal basis" of the complaint.

148. Article 7.1 refers to the provisions cited by the parties, not just by the complainant. This confirms that a respondent can cite provisions as well, and that a panel is required to address those provisions. As the Appellate Body put it, "panels are required to address issues that are put before them by the parties."[64]

149. A respondent could raise provisions and thus place them in the panel's terms of reference in different ways. Respondents could, in some circumstances, make relevant representations to the DSB prior to the establishment to the panel. For example, in *Brazil – Desiccated Coconut*, the panel's (special) terms of reference were to address "the matter referred to the DSB by the Philippines in document WT/DS22/5, taking into account the submission made by Brazil in document WT/DS22/3 and the record of discussions at the meeting of the DSB on 21 February 1996."[65] However, much more simply, respondents can raise relevant provisions during the panel proceedings.

150. It is common, for example, for a respondent to raise a defence under a provision such as Article XX of the GATT 1994, typically in its first written submission. In doing so, the respondent will have "cited… a relevant provision" with respect to the matter referred to the DSB, and thus they will have included that provision in the panel's terms of reference.

151. However, defences or exceptions are by no means the only relevant provisions that respondents could raise. A respondent could also bring to the Panel's attention the controlling provisions which should have been raised by the complainant, and which support the WTO-consistency of the measures at issue even though they are not in the nature of affirmative defences but, for example, provide autonomous legal rights. The complainant's failure to raise such provisions cannot be allowed to have an adverse impact on the respondent's case, such as excluding the provision from consideration or reversing the burden of proof. Several examples of this are listed in Section 6.4 of the EU's first written submission.

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64 Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

65 Panel Report, *Brazil – Desiccated Coconut*, para. 10.

152. In section 6.5 of its first written submission, the EU concluded that Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards are the controlling provisions in this dispute and that, because the United States failed to even raise them, its case must be dismissed. Only in the alternative, should the Panel not make such a finding based directly on the United States' failure to even cite those provisions (and, hence, on the impossibility of any findings of WTO-inconsistency), the European Union raised those provisions itself, i.e. placed them in the Panel's terms of reference. It did so in order to show, on the facts, that the United States failed to demonstrate any WTO-inconsistency, and moreover that the measure at issue complies with all the requirements of those provisions.[66] As the EU made clear, this can in no way affect the burden of proof, which remains squarely on the United States as the party raising claims of WTO-inconsistency.[67]

Question 52

[Advance Question No. 28] In paragraph 185 of its first written submission, the European Union argues that in making an "independent and objective assessment" of whether a measure is a safeguard, a panel "must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure".

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".

153. Before commenting on the methodology that should be followed by the Panel, the EU would like to again clarify the argument in the context of which it made that statement. As the EU explains in the very paragraph cited by the Panel, the test to be performed when deciding whether the Agreement on Safeguards applies to a measure is not a "centre of gravity" test. According to the Appellate Body's findings in *Indonesia – Iron or Steel Products*,[68] what matters for the measure's characterisation as a safeguard is whether it has "**a specific objective**" of preventing or remedying serious injury to the Member's domestic industry (this can be referred to as a "safeguard objective"). If so, even if the measure had some other "aspects" that suggest that it also has another objective, this would not detract from the conclusion that the measure is a safeguard. In such circumstances, whatever other provisions of another agreement that might be

66 European Union's first written submission, section 7.

67 European Union's first written submission, paras. 254-255.

68 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.

applicable would not exempt the measure from complying fully with the conditions set out in the Agreement on Safeguards.[69]

154. In deciding whether "a specific objective" of the measure is a safeguard objective, the measure must be examined as a whole. In particular, the Panel must assess its "design, structure and expected operation".[70] That assessment may, of course, reveal a number of different "aspects" or characteristics of the measure. When addressing the question of whether "a specific objective" of the measure is a safeguard objective, not all of those characteristics will necessarily point in the same direction. It may therefore be relevant that certain characteristics are more "central" than others, i.e. that they feature more prominently in the measure or are more important to the measure. While no facts are *a priori* excluded from such an analysis, what matters most is the content of the measure itself, i.e. its design, structure and expected operation.

155. In this instance, as the EU has explained,[71] such an analysis of the United States' measure shows that, regardless of the United States' own legal characterisation of its safeguard measures, and regardless of whether or not those measures have another objective apart from the safeguard objective, it is "a specific objective", as well as one of the "most central aspects" of the US measures, that it explicitly seeks to prevent or remedy serious injury to the US domestic steel and aluminium industries caused or threatened by increased imports.[72] This conclusion is supported by an analysis of the measures' design, structure and expected operation, as explained in the EU's FWS.[73] For example, while the steel and aluminium reports pay lip service to defence-related production and so-called "critical infrastructure", they are overwhelmingly devoted to the question of "whether imports have harmed or threaten to harm US producers writ large", i.e. to a safeguard objective.[74] In the EU's view, it is clear from any honest reading that this is "the most central aspect", or in any event at least "a specific objective" of the US measures.

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69 European Union's first written submission, para. 185.

70 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. See also the response to Question 10.

71 European Union's first written submission, sections 2 and 4.

72 European Union's first written submission, paras. 198 and 199.

73 European Union's first written submission, paras. 201-203.

74 European Union's first written submission, para. 203., referring to Steel Report (Exhibit EU-15), fn 22.

Question 53

In paragraphs 22 - 25 of its opening oral statement, 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".

Question 54

Does the European Union agree with the United States that Article XIX of the GATT 1994 sets out a "right"?

156. The European Union will respond to Questions 53 and 54 together.

157. The European Union first refers to its response to Question 19, which has to a large extent dealt with the arguments of the United States.

158. The European Union agrees with the US to this extent: Article XIX:1(a) sets out a "right" to suspend its obligation, or withdraw or modify its concessions, if and insofar all the procedural and substantive legal requirements to do so, outlined in that provision as well as in the Agreement on Safeguards, have been met.

159. For example, it has previously been found that "Article XIX:1(a) provides WTO Members with a right to apply a safeguard measure when, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products";[75] however, "the "right to apply such measures arises "only" if these prerequisites are shown to exist."[76]

160. Similarly, in *US – Line Pipe*, the Appellate Body agreed that "the right to apply [safeguard] measures must be respected"[77] but explained that "*[f]or this right to exist*, the WTO Member in question must have determined, as required by Article 2.1 of the Agreement on Safeguards and pursuant to the provisions of Articles 3 and 4 of the Agreement on Safeguards, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry." (emphasis added).

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[75] Panel Report, *India - Iron and Steel Products*, para. 7.85; Appellate Body Report, *US–Steel Safeguards*, para. 264.

[76] Appellate Body Report, *US–Steel Safeguards*, para. 264;

[77] Appellate Body Report, *US – Line Pipe*, para. 83

Moreover, even when such a right does exist, a further enquiry is required: whether the Member has applied that safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment".[78]

161. In other words, Article XIX is not an affirmative defence. Rather, it explicitly entitles the adopting Member to take action. If all the conditions for doing so have been met (which is an objective legal question), then there is no violation which needs to be justified. Instead, the nature of the applicable obligations has (temporarily) changed.[79] The same is true of Article XIX:3(a) and the corresponding provision of Article 8.2 of the Agreement on Safeguards.[80] Of note, there is significant tension between the United States' assertions that Article XIX (and, presumably, the Agreement on Safeguards), (a) provide for an unqualified right, while also (b) being in the nature of an affirmative defence.

162. The EU disagrees with the United States that it follows from the terms "shall be free", or from the position that Article XIX can be said to create "rights" (within the meaning just outlined), that it is up to the safeguard-imposing Member to decide whether Article XIX and the Agreement on Safeguards apply. In other words, as the jurisprudence cited above clearly shows, there is no "right" to adopt a safeguard measure independently from the legal requirements that apply to safeguard measures.

163. Therefore, when spelling out what it sees as the consequences of the "right" in Article XIX, the US does more than read into Article XIX something which is not there. It plainly contradicts the provision, as well as the Appellate Body's case law.

164. The terms "shall be free" simply refer to what the Member may legally do if all the requirements of that provision, and of the Agreement on Safeguards, are met. In other words, and to cite the same Appellate Body authority as the US, the safeguard-imposing Member is free to suspend "if the conditions set out in the first part of Article XIX:1(a) are met".[81] Those terms in no way suggest that it is for the adopting Member itself to decide "in its discretion" whether the Agreement on Safeguards applies.

165. The US' attempt to glean that meaning from Article XIX is unconvincing and misleading. For example, the United States argues that the Members' "discretion"

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78 Appellate Body Report, *US – Line Pipe*, para. 84.

79 European Union's first written submission, section 6.1.

80 European Union's first written submission, section 6.3. See also European Union's opening statement at the first substantive meeting, paras. 11 – 14.

81 US' opening statement at the first substantive meeting, para. 25; Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.55, fn 188.

kicks in when the Member "finds" that increased imports of a product have caused or threaten serious injury. But of course, it is not enough for a Member to make a finding; a Member is "free" to suspend only insofar as it complies with the various obligations in the Agreement on Safeguards, both procedural (including notification) and substantive. This is an objective question.

166. Similarly, in this context, the terms "in its discretion" are an invention of the United States. The United States chooses those words, presumably, because they have an air of subjectivity. But of course, whether or not the conditions for the imposition of a safeguard measure are met is an objective question. It is only when all the legal requirements have been met that a Member is "free" to do anything under Article XIX.

167. The same is true of the term "invoke", so dear to the US. The US does not explain where or how this invocation is meant to take place (in the adopting Member's jurisdiction, within the WTO, in what legal form, by which terms etc.). In any event, neither Article XIX nor the Agreement on Safeguards speak of "invocation". Instead, they refer to the obligation to notify a safeguard measure – one of the many obligations the United States has failed to comply with. As the EU has explained, whether one notifies a safeguard measure or not has no bearing on whether the measure is actually a safeguard. As the Appellate Body made clear, the applicability of the Agreement on Safeguards is an objective question. Thus, the claim that the applicability of Article XIX and the Agreement on Safeguards depend on whether the United States "invoked" them is, again, a pure invention of the United States. It finds no support anywhere in the covered agreements, and certainly not in Article XIX.

Question 55

Please comment on the United States' argument at the first substantive meeting that the European Union's interpretation of Article 8.2 of the Agreement on Safeguards enable 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?

168. It must be emphasized again that the US quarrels with the Appellate Body, not with the European Union. In *Indonesia – Iron or Steel Products*, the Appellate Body clearly set out the two constituent features of a safeguard measure. First, it must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry

caused or threatened by increased imports of the relevant products.[82] That is, it must "have a demonstrable link to the **objective** of preventing or remedying injury"[83] to the adopting Member's domestic industry.

169. Therefore, both the characterisation of a measure as a safeguard and the characterisation of a measure as a rebalancing measure depend on the presence of certain objective characteristics of those measures. These characteristics are a great deal more detailed than the US appears to suggest, even in the abstract (i.e. putting aside for the moment the actual US safeguard measures).

170. First, in order to be a safeguard, it is not enough for a measure to constitute a tariff barrier – it must suspend GATT obligations, or withdraw or modify GATT concessions. Second, it is precisely that suspension, withdrawal or modification (and not some other aspect of the measure) that must have a nexus with the safeguard objective. Third, that suspension, withdrawal or modification must be *designed* to achieve the safeguard objective. In other words, the "design, structure, and expected operation" of that suspension, withdrawal or modification must be tailored towards achieving a precise safeguard objective; it is not enough to simply raise trade barriers. Fourth, the safeguard objective is much more specific than simply "protecting" a domestic industry. The objective of the measure must be to address an actually alleged *serious injury* to an *existing* domestic industry by the alleged occurrence of increased imports which allegedly *caused or threatened to cause* that serious injury.

171. In any event, even if it were considered (in the EU's view, incorrectly), that other factors in addition to these two constituent features must be assessed, any reasonable analysis of all the facts of the United States' measures would still comfortably lead to the conclusion that they are safeguards.

172. Even looking beyond the two constituent factors, should the Panel choose to assess whether the US measures are safeguards, it would in any event be required to assess that measure as a whole, keeping all relevant facts in mind, with particular

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82 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60: ("In light of the above, we consider 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. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.")

83 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56: ("… where a measure suspends a GATT obligation or withdraws or modifies a tariff concession, but that suspension, withdrawal, or modification does not have a demonstrable link to the objective of preventing or remedying injury, we do not consider that the measure in question could be characterized as one "provided for" under Article XIX."). See also para. 5.58.

emphasis on the "design, structure, and expected operation" of the measure. When this approach is applied to the US safeguard measures at issues, it is clear there is much more in those measures supporting the conclusion that they are safeguards, beyond the fact that they are (among other things) tariff barriers that are designed to protect a domestic industry. Thus, the Panel is not required to stretch the legal test to its outer limits in this dispute. The US measures fall comfortably in the center.

173. In this respect, the European Union refers to its responses to Questions 27 and 52, as well as to sections 4.2 (showing that the US measures have the Appellate Body's first constituent feature of safeguards), 4.3 (showing that the US measures have the Appellate Body's second constituent feature of safeguards) and 4.4 of the EU's first written submission (showing that, in any event, there are at least five additional features of the US measures showing that they are safeguards: they repeatedly describe the alleged occurrence of an increase in imports, and justify the import adjustments adopted on that basis; they repeatedly discuss whether imports take place "in such quantities and under such circumstances" as to cause or threaten serious injury; they refer to a number of precedents (earlier trade remedy measures against steel or aluminium products), which include safeguard measures; they affirm that unforeseen developments occurred; and the agreements with Canada and Mexico confirm that the United States views the steel and aluminium import adjustments as addressing surges of imports over a certain period of time, that the action taken by the importing party to address such surges must be consulted upon, and can be rebalanced through action by the exporting party in the affected sector).

Question 56

At paragraph 40 of its oral statement at the first substantive meeting, the United States argued that the United States Department of Commerce and the Department of Defense were responsible for conducting the investigation that lead to the adoption of the Section 232 duties, and not the "U.S. International Trade Commission, which is the only competent authority in the United States" authorized to conduct safeguards investigations.

Please comment.

174. First of all, it is incorrect that the Department of Defense was responsible for conducting the investigation. It was merely consulted (indeed, the United States' statement only refers to its "engagement"). The extent of that "engagement" was,

essentially, to tell the Department of Commerce that steel and aluminium imports pose no threat to the national defence.[84] In other words, that "engagement" speaks volumes in support of the EU's argument: the real objective of the US measures, and an end unto itself, is to protect the domestic steel and aluminium industry, writ large, from alleged injury caused or threatened by alleged increased imports. The United States invokes national security as mere window-dressing for disguised safeguard measures.

175. More broadly, the argument cited in the Question is yet another attempt by the United States to make itself the judge of whether or not the Agreement on Safeguards applies. Which domestic legislation is invoked, and which domestic procedure is followed, depends entirely on the unilateral choices of the United States. Because such choices are self-serving and aimed at avoiding legal scrutiny, they can in no circumstances be allowed to determine the applicability of the covered agreements.

176. This common-sense principle is confirmed by the rule of customary international law,[85] as set out in Article 27 of the VCLT and Article 32 of the ILC Articles on State Responsibility, that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[86] The US is of course not explicitly stating that its domestic law required it to violate the Agreement on Safeguards. However, its argument goes even *further* than that. The US is claiming that, because of the particularities of US domestic law, the treaty does not even *apply*. This argument is inconsistent with customary international law. As the International Court of Justice stated:

> Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.[87]

177. Hence, either the United States simply failed to comply with its domestic laws and procedures for taking safeguard actions (which cannot justify its WTO-inconsistent action), or the United States applied certain domestic laws and procedures instead of others to escape scrutiny under the Agreement on Safeguards (which also cannot justify its WTO-inconsistent action).

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84 European Union's first written submission, section 2.4.

85 ICJ Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) [2008] ICJ, Rep 177 para 124.

86 Art 32 ILC Articles on State Responsibility (UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

87 ICJ Elettronica Sicula S.p.A. (ELSI) (United States v Italy) [1989] ICJ Rep 15, para 73.

Question 57

[Advance Question No. 29] In paragraphs 214 and 215 of its first written 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".

Please elaborate on the relevance of these factual developments for the Panel's analysis in the present case.

178. In paras. 214 – 215 of its first written submission, the European Union explained that these factual developments are relevant insofar as they show, together with other factors, that the United States' steel and aluminium measures are safeguards. Those agreements explain that the original steel and aluminium measures (and not just the agreements themselves), much like any other safeguard measure, address surges of imports over a certain period of time, are subject to the obligation to consult, and that they can be rebalanced through action by the exporting party in the affected sector.

179. It is irrelevant that the agreements with Canada and Mexico took place in the context of broader negotiations, or that they formed part of a mutually agreed solution to end WTO disputes. The key point is that the agreements are closely linked to the underlying safeguard measures. They cannot be seen in isolation from those underlying measures, because they were negotiated precisely in order to exempt Canada and Mexico from the additional duties while ensuring that the US steel and aluminium industries will be similarly protected. The agreements are, thus, put in place to address the same concern as the additional duties. They are in fact a replacement for them. Moreover, they make provision for the same level of additional duties on the same products. Thus, what is true for the objective characterisation of the agreements must also be true for the objective characterisation of the original measure.

180. The agreements with Canada and Mexico are also closely comparable to the several country exemptions previously negotiated by the United States, also excluding certain countries from the additional duties while, in most instances, replacing those duties with a quota.[88]

[88] See European Union's first written submission, paras. 33-38 and 85-90.

181. The additional duties, those quotas, and the system that was put in place for Canada and Mexico, are all aimed and designed to achieve the same underlying safeguard objective: protecting the US steel and aluminium industry, writ large, from alleged injury caused or threatened by alleged increased imports. The agreements with Canada and Mexico illustrate that particularly well because they explicitly mimic the rules applicable to safeguards, and in particular Article 8.1 of the Agreement on Safeguards. Thus, the agreements show that there is a Member proposing to apply a safeguard in response to a surge of imports; a suspension of concessions; an action to "address" the surge of imports in order to remedy injury; an attempt to maintain equivalence; an agreement to that effect; and the prospect of specific rebalancing.

182. Of course, the US, Canada and Mexico do not refer to the provisions of the Agreement on Safeguards when designing this system. Nevertheless, the agreements are further proof of how the underlying measure is designed and expected to operate, and how it is seen by the US itself. All of this points to safeguards.

VII. PROPOSALS ON INTER-PANEL COORDINATION

7.1 *To both parties*

Question 58

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 the European Union as in that case the European Union claims the violation of the United States under the Agreement on Safeguard.

a. Please comment on this statement.

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 DS548 US — Steel and Aluminium Products (European Union)? 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?

183. The European Union agrees with this statement by Ukraine.

184. As repeatedly mentioned during the substantive meeting with the Panel, the European Union considers that there is nothing in the DSU that would prevent a form of collaboration among the panels in the Steel and Aluminium disputes and those in the Additional Duties disputes. This concerns, in particular, certain exchanges of views and harmonization of timetables.[89]

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

186. Article 13 of the DSU, among others, may provide a legal basis for such a collaboration, as it provides that "panels may seek information from any relevant source". Similarly, provided the fact that the parties agreed to hold open hearings in DS548 and in certain other Steel and Aluminium disputes (DS552, DS556), the European Union has invited the panellists in DS559 to attend these open hearings, as a first step.[90]

187. The European Union has already explained that such a cooperation would be in line with the objectives of the dispute settlement system to ensure security and predictability of the multilateral trading system (Article 3.2 of the DSU), and to secure a positive solution to the disputes (Article 3.7 of the DSU).[91]

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

189. If such an exchange of views is consistent with the DSU, then there would be no reason to hold otherwise for an exchange of views between two panels dealing with the same or closely related matter. This is especially so in the unique circumstances of this case, where panels are addressing the same alleged safeguard measures, either as a measure at issue (DS548) or as the underlying measure which is rebalanced by the measure at issue (DS559).

190. In the same vein, the fact that the Chairman of the four panels in the Additional Duties disputes is the same person speaks to the same reasoning, perfectly

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89 See e.g. European Union's opening statement at the first substantive meeting, paras. 20 – 26.

90 European Union's letter of 17 October 2019.

91 European Union's opening statement at the first substantive meeting, paras. 20 – 26.

justified in the particular circumstances of these disputes. While Article 9.3 of the DSU is about co-complainants, the EU considers that a similar approach is warranted in similar scenarios, and in specific circumstances such the present one.

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

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

Question 59

Does the confidentiality obligation in Article 14 of the DSU prevent this Panel from consulting with the Panel in DS548 US — Steel and Aluminium Products (European Union)?

193. No, the confidentiality obligation in Article 14 of the DSU does not prevent the form of collaboration that the European Union has suggested.

194. While panel deliberations are confidential, the EU sees this cooperative process, for example, in the form of a meeting or meetings between all panellists in the Steel and Aluminium disputes and in the Additional Duties disputes. Such exchanges of views or concertation would be preliminary, and external to the panel deliberations.[92] Thus, they would not breach the duty of confidentiality in Article 14.1 of the DSU.

Question 60

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 DS548, while the determination of

[92] Thus, the concept of "panel deliberations" in Article 14.1 has been interpreted as "the internal discussion of the Panel with a view to reach its conclusions" or "the work of panels *stricto sensu*", and not aspects of panel proceedings external to that. Panel Reports, *US – Continued Suspension*, para. 7.49, *Canada – Continued Suspension*, para. 7.47.

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?

195. The European Union considers that whether the US' Section 232 duties constitute a safeguard measure is the matter before the Panel in DS548, as the measure at issue. The measures at issue in the present proceedings are the re-balancing measures in the form of additional duties taken by the European Union.