In the World Trade Organization

Panel Proceedings

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

(DS559)

Second Written Submission

by the European Union

Geneva, 17 March 2020

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TABLE OF CASES CITED

Short Title	Full Case Title and Citation
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
EC – Bananas III (Article 21.5 –Ecuador II/ Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
Indonesia – Iron or Steel Products	Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Continued Suspension	Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued* Dumping *and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375

TABLE OF ABBREVIATIONS

Abbreviation	Full Name
BCI	Business Confidential Information
CTG	Council for Trade in Goods
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
Section 232	Section 232 of the Trade Expansion Act of 1962
USITC	United States International Trade Commission
WTO	World Trade Organization

1. INTRODUCTION

1. Since the first written submissions there is not much evolution in the legal positions of the parties. The US continues to basically tell us that the key issues in this dispute depend purely on its own decisions and choices.

2. For the US, whether the underlying measures are safeguard measures is to be "objectively" determined on the basis of the US "invocation" or perhaps notification. If the US says that it did not "invoke" the safeguards disciplines and/or that it adopted the measures pursuant to its national security legislation, then, apparently, it is *ipso facto* a matter of essential security interests and not a safeguard measure.

3. For the US, whether the EU rebalancing measures at issue in the present proceedings are in fact rebalancing measures, or additional duties in breach of the EU's schedule, is again to be "objectively" determined depending solely on the claims brought or not brought by the US. The US can simply ignore the controlling safeguards provisions and jump directly to Articles II and I of the GATT 1994.

4. Taken as a whole, these arguments form a perfect circle of impunity for the US. A panel's role to make an objective assessment of the matter before it, including of the applicability and conformity with the covered agreements, should be reduced, according to the US, to a mere decorative role, noting the decisions and choices of the US.

5. This cannot be correct. In a rules-based system, it is the adjudicator that has the final say, on the basis of objective considerations, and not the unilateral will of one litigant. This is the cornerstone of the rules-based system.

6. The European Union has come forward and explained, even beyond what is required at this stage of the proceedings and in the present circumstances, what its position is, based on the facts of the case and on sound legal arguments. On that basis, and given the US refusal to engage with the core issues of this case, the task of the Panel is actually facilitated. The way the US presented its case makes it easier to the Panel to reject the US claims and find that the European Union could not violate Articles II and I of the GATT 1994 as long as it validly suspended its obligations under Article 8 of the Agreement on Safeguards.

2. THE UNITED STATES' FAILURE TO MAKE CLAIMS UNDER THE CONTROLLING PROVISIONS

7. In the course of these proceedings, the parties have exchanged a number of detailed legal arguments. One point, however, must not be lost from view. The US has not made any claims under the provisions that govern the measures at issue: Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards. This means that its claims simply cannot succeed.

8. Contrary to the US' arguments, the US could perfectly well have made claims under those provisions without somehow "agreeing" that the underlying US measures are safeguards. When drafting its panel request, the US was not facing a binary choice between, first, accepting that its measures are safeguards and then challenging the EU measures on the basis of the controlling provisions or, second, making claims under Articles I and II of the GATT 1994 only. The US could have included claims under all of those provisions whether or not they considered them applicable. This would have allowed the Panel to deal with the matter appropriately.

9. Instead, for reasons known only to the US, it chose to ignore the facts of its own measures and the facts of the measures at issue, including even their expressly stated basis and objective, and limit its claims in the way that it did. The US has persisted in that choice throughout these proceedings.

10. Having made that choice, the US must bear the consequences. If, as the European Union claims, the controlling provisions *apply* to the measures at issue, there is simply no way for the Panel to find those measures WTO-inconsistent. Because the US made no claims under the controlling provisions, those measures must be presumed to be consistent with them. Therefore – given that a measure lawfully taken under Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards cannot violate Articles I and II of the GATT 1994 – the US claims must fail, as a matter of logic.

11. This is all the more important given the fact that the US is expressly attempting to profit from its decision to omit the controlling provisions. The US is seeking to rely on its own Panel Request to, effectively, reverse the burden of proof.

12. The US argues that including the controlling provisions in its panel request would have meant "anticipating legal arguments raised by the responding

party".[1] The US also suggests that it is solely for the complainant to decide what "the dispute is about".[2]

13. In its opening statement, the US made it plain: because it chose to limit its claims to Articles I and II, "the burden has shifted to the European Union to offer any justification it decides to raise in attempting to rebut the claims of the United States."[3] For the US, because "it is the European Union that believes these provisions are relevant", the European Union must carry the burden of proof.[4] In its responses to questions, the US made it even clearer: according to the US, Article 8.2 of the Agreement on Safeguards is only applicable when the complainant – in this case, the US - considers it applicable.[5]

14. The US errs. The European Union has already explained, in detail, why Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards are not in the nature of affirmative defences. Thus, it was not for the European Union to raise those provisions, and carry the burden of proof under them, as a "justification" to claims made by the US under the GATT 1994. Instead, if those provisions *apply*, it is for the US and the US alone to raise claims under them and to carry the burden of proof under them. This is clear from the text, structure, context, and object and purpose of those provisions.[6]

15. The US is, of course, entitled to its view that those provisions do not apply, and entitled to argue that point before the Panel. But it is most certainly not entitled to decide the question itself simply by asserting that it – one litigant – considers the provisions not to apply. To accept such logic would be the opposite of conducting a legal proceeding, and the opposite of making an objective assessment.

16. Furthermore, the US is most certainly not entitled to re-allocate the burden of proof on the mere basis that it chose not to include certain provisions in its Panel Request.

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1 US' response to Panel Question 1, para. 8.

2 US' response to Panel Question 1, para. 9.

3 US' opening statement at the first substantive meeting, para. 12.

4 US' opening statement at the first substantive meeting, para. 14.

5 US' response to Panel Question 29, para. 66.

6 European Union's first written submission, section 6; EU's opening statement at the first substantive meeting, section 1; EU's responses to Panel Question 1, 11(c), 29, 50 and 51.

17. Imagine, for a moment, that both parties in a hypothetical dispute agree that the underlying measure is a safeguard, and that the measure at issue is a rebalancing measure. Imagine that both points are also, objectively, correct. In such a scenario, could the complainant challenge the rebalancing measure by simply making a claim under Articles I and II, and then expect that it will be up to the respondent to prove that its measure is *consistent* with Articles XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards?

18. Surely, even the US must agree that this would be an impermissible reversal of the burden of proof. Conceptually, it would be no different from making an Article I or II claim against an anti-dumping measure, and then expecting the respondent to positively prove that its measure is *consistent* with all of the provisions of the Anti-Dumping Agreement.

19. The EU submits that this dispute is not different from this hypothetical scenario. Just because the US disagrees with the objective (and asserted) characterisation of the measure at issue, it does not follow that it is entitled to shift the burden of proof and make the EU prove its measure to be WTO-consistent. If it would be possible in this case, it would be possible in every other case, on the mere whim of the complainant. This is not an outcome that this Panel could reasonably sanction.

20. The US responses to questions clearly show why the European Union was right to raise this issue in its first written submission. Not only is the US expressly trying to reverse the burden of proof, it is even trying to altogether preclude the EU from arguing that its measures are rebalancing measures. Thus, the US asserts, "a panel cannot assess whether a measure is a safeguard measure when a responding party seeks to invoke the "right" to "rebalancing" under the Safeguards Agreement as a defense". According to the US, because it decided not to mention the Agreement on Safeguards in its panel request, the provisions of that agreement are not "relevant" to the dispute; therefore, Article 7.2 of the DSU apparently precludes the panel from objectively assessing whether the US measures are safeguards.[7] The European Union requests the Panel not to condone this type of reasoning.

3. THE ADDITIONAL DUTIES TO BE APPLIED IN THE SECOND STAGE OF REBALANCING ARE NOT IN THE PANEL'S TERMS OF REFERENCE

[7] US' response to Panel Question 11, para. 24.

21. As the European Union has explained in detail in response to the Panel's Question 3, the US has made claims only against the additional duties that are currently applied, and not against any element of the suspension. In particular, the US has made no claims against the duties that are to be applied in the second stage of rebalancing. The US has confirmed this clearly at several points in its submissions.

22. Nevertheless, in response to a question by the Panel, the US now attempts to expand its claims to also cover the second stage of duties. This is an impermissible attempt to expand the scope of the dispute.[8]

23. The US now claims that those duties are in the terms of reference due to the mere fact that its panel request refers to measures which include Annex I and Annex II. However, under Articles 6.2 and 7.1 of the DSU, a mere blanket reference to a measure does not mean that claims can be presumed to have been made against every aspect of that measure. Instead, what delimits the terms of reference are the specific complaints raised by the complainant. In that respect, not only has the US failed to make any specific claims against the second stage of duties; it has expressly excluded them from this dispute. This is clear from numerous US statements in previous submissions.[9] Indeed, even in the very paragraph in which the US seeks to expand the scope of the dispute to the second stage of duties, it states that "the United States is not expressly pursuing claims on [products… that would be subject to… the additional duties… at a future date]".[10]

24. There is no sense in which any panel findings on the first stage of duties would "apply" also to the second stage of duties, and the US fails to explain why the opposite should be true. Panel findings apply only to the measures at issue, and to the extent that those measures have been challenged.

25. Consequently, whatever findings the Panel may make regarding the measures at issue, they would not apply with respect to the second stage of duties.

4. ORDER OF ANALYSIS AND BURDEN OF PROOF

8 Appellate Body Report, *India – Patents (US)*, paras. 92-93.

9 EU's response to Panel Question 3, para. 5.

10 US' response to Panel Question 2, para. 10.

26. The US keeps coming back to its assertion that the Panel should start with the claims of the complainant before assessing the European Union's "defence".[11]

27. However, the European Union agrees with the US that the Panel can properly assess the more specific claim before assessing the more general claim. Article II:1(b) is, indeed, more specific, as it proscribes a specific type of less favourable treatment (duties in excess of bound rates) which will also constitute less favourable treatment under Article II:1(a) (the latter being a consequential claim).

28. The European Union recalls 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.

29. First, Article 8.2 of the Agreement on Safeguards is the more specific provision.

30. Second, beginning the analysis with Article 8.2 offers possibilities to exercise judicial economy. If the Panel were to find that Article 8.2 applies to the measures at issue, it would be impossible for the US to succeed in its claims under Article I and II of the GATT 1994, because the US would have failed to even make a claim under the controlling provisions. Beginning with Articles I and II of the GATT 1994 offers no such possibilities, in any circumstances. This is because a measure that is consistent with Article 8.2 (including a measure that is presumed to be consistent with that provision because no claim to the contrary has been made, as in this case) cannot be inconsistent with Articles I and II of the GATT 1994.

31. Third, the applicability of a covered agreement is a threshold issue, which should, as a general matter, be assessed first. This question of applicability is always an objective question that is never entirely in the hands of either litigant acting unilaterally.

32. The European Union has explained at length in its previous submissions why Article XIX and the Agreement on Safeguards are not in the nature of an affirmative defence. However, the US continues to allege that:

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[11] US' responses to the Panel's questions, para. 12.

> because the European Union is affirming the relevance of the Safeguards Agreement to this dispute, the European Union carries the burden of establishing its relevance.[12]

33. However, later on the US seems to acknowledge that it is not up to the European Union to make a case under the Agreement on Safeguards as long as the US intentionally omitted to include claims under the controlling provisions:

> the United States was not arguing that it was the European Union's burden to show that it met the specific requirements for an alleged rebalancing measure.[13]

5. THE AGREEMENT ON SAFEGUARDS APPLIES TO THE UNDERLYING US MEASURES AND TO THE MEASURES AT ISSUE

34. The US' arguments concerning the applicability of the Agreement on Safeguards are entirely misguided and contradictory.

35. The European Union has shown, and the US has failed to rebut, that the underlying US measures are safeguards. As already explained above, it follows that the US cannot, in any circumstances, show that the measure violates Articles I and II of the GATT 1994. This is because, as already explained, a rebalancing measure taken in response to a safeguard measure is governed by Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards, and the US has failed to make any claims on the basis of those provisions.

36. In its first written submission, the European Union has set out very carefully, in extensive detail, and on the basis of ample evidence, the legal and factual reasons why the underlying US measures are safeguards. The fact that the US measures possess the two required "constituent features", as explained by the Appellate Body in *Indonesia – Iron or Steel Products*, is sufficient to find that they are safeguards. Nevertheless, the European Union has identified numerous additional reasons. To summarise the main points raised by the European Union:

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[12] US' responses to the Panel questions, para. 69.

[13] US' responses to the Panel questions, paras. 80 and 81.

- whether a measure falls under the Agreement on Safeguards or Article XIX of the GATT 1994 is an objective question, that cannot be unilaterally decided by the adopting Member;[14]
- the US measures suspend at least one GATT obligation, in whole or in part, or withdraw or modify at least one GATT concession;[15]
- those measures have "a demonstrable link to the objective of preventing or remedying injury" to the US domestic industries (they are designed to prevent or remedy a decline in the respective domestic industries caused by imports, and to provide a "relief" to those industries from competition with imports; they aim to enable the respective domestic industries to increase their production capacity or capacity utilization and profitability, and to prevent the closures of production facilities);[16]
- they purport to be based on a consideration typical to a safeguard measure: whether there are increased imports of the product at issue;[17]
- they repeatedly discuss whether imports take place "in such quantities and under such circumstances" as to cause or threaten serious injury and impair national security, i.e. in language corresponding to the references to imports in certain "quantities" and under certain "conditions" in Article XIX.1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards;[18]
- they refer to a number of precedents (earlier trade remedy measures against steel or aluminium products), which include safeguard measures;[19]
- they affirm that unforeseen developments (e.g. in the form of "dramatic changes in the steel industry since 2001") occurred;[20]

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14 European Union's first written submission, section 4.1.

15 2.5.2, 2.6.2 and 4.2.

16 2.5.3, 2.6.3, 4.3.

17 Sections 2.5.4 and 2.6.4, paras. 206-207.

18 Sections 2.5.4 and 2.6.4, para. 208 – 210.

19 Sections 2.5.5 and 2.6.5, para. 211.

20 Section 2.5.6, paras. 212-213.

- the agreements with Canada and Mexico implicitly recognize that the US measures are in the nature of safeguards, and that they can be rebalanced by the affected exporting party.[21]

37. The US has chosen, for the most part, not to engage with any of these legal or factual points. Instead, the US argument boils down to the following. First, the US gets to choose whether or not the Agreement on Safeguards applies. Second, the Agreement on Safeguards only applies if the adopting Member takes an action called "invocation", not defined by the US. Third, the findings of the Appellate Body in *Indonesia – Iron or Steel Products* do not "apply" in this dispute. Fourth, Article 11.1(c) of the Agreement on Safeguards allows the US to unilaterally remove measures from the scope of the Agreement on Safeguards, and prior case law on the relationship between different covered agreements is irrelevant. Fifth, according to the US, the EU position is wrong because it would make any increased duty into a safeguard.

38. In the remainder of this section, the European Union will address these erroneous US arguments in turn.

5.1. THE US CANNOT DECIDE FOR ITSELF WHETHER A COVERED AGREEMENT APPLIES

39. The US takes great care to emphasize its agreement that whether or not its measures are safeguards is an objective question. However, for the US, that objective question is to be decided by simply enquiring about the preferences and choices of the US.

40. Thus, the US states that it "agrees that the applicability of the Safeguards Agreement to a particular matter is an "objective question." However, the "specific content of that objective question" is "whether a Member has sought to invoke its right under Article XIX."[22]

41. It is pure sophistry to describe this as an "objective" question. Essentially, for the US, the only "objective" question that the Panel may decide is whether the US considers its measures to be safeguards. This is not an objective assessment, because the only thing it pertains to is entirely subjective.

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[21] Paras. 214-215.

[22] US' opening statement at the first substantive meeting, para. 30.

42. Similarly, the US claims to agree that "the classification of a measure under municipal law is not determinative of the applicable WTO obligation" and that the way in which a Member "characterizes" its own measures is "legally irrelevant".[23] The US even asserts that this is a reason why the EU measures at issue are not rebalancing measures.[24] However, the US plainly contradicts these statements with the position it has taken with respect to its own measures in these proceedings and in the *US – Steel and Aluminium* disputes.

43. Thus, the US has argued that the Panel's assessment of the safeguards question should begin and end with "whether the United States invoked Article XIX of the GATT 1994 in connection with this dispute",[25] i.e. with the way in which the United States characterised its own measure. In *US – Steel and Aluminium*, the US has gone even further, stating that "a Member must *intend* to exercise the rights provided for under Article XIX of the GATT 1994 and the Agreement on Safeguards in order for the disciplines under that provision and agreement to apply."[26] All this is irreconcilable with the statement that the way in which a Member "characterizes" its own measures is "legally irrelevant".[27]

44. Next, the US has argued that, even though the alleged lack of "invocation" is sufficient to settle the question, its position is further supported by the fact that it decided to base its measures on Section 232, instead of Section 201, and by the fact that the investigation was conducted by the U.S. Department of Commerce, and not by the International Trade Commission.[28] This is, again, irreconcilable with the statement that "the classification of a measure under municipal law is not determinative of the applicable WTO obligation".

45. The US falls into a similarly hopeless contradiction when discussing the alleged relevance of the terms "proposing to apply" in Article 8 of the Agreement on Safeguards. For the US, it seems, the EU measures at issue cannot be rebalancing measures under Article 8.2 of the Agreement on

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23 US' response to Panel Question 11, para. 19; see also para. 63, and the responses to Questions 30, 39, and 47.

24 US' response to Panel Question 11, para. 19.

25 US' response to Panel Question 17, para. 39.

26 US' responses to Panel Questions in DS548, para. 45 (available at https://ustr.gov/sites/default/files/enforcement/DS/US.As.Pnl.Qs1.(DS548).fin.(public).pdf).

27 US' response to Panel Question 11, para. 19; see also para. 63, and the responses to Questions 30, 39, and 47).

28 US response to Question 17, paras. 40 – 42.

Safeguards because the US has not "proposed to apply" a safeguard measure, a question that depends *entirely* on the unilateral decision of the United States to "exercise the right… to apply a safeguard measure", which is done "through invocation".[29]

46. However, just as Article 8.1 requires the Member "proposing to apply" a safeguard measure to comply with certain requirements (for example, the obligation to ensure substantial equivalence), so too does Article 8.2 impose certain requirements on a Member *proposing* to suspend concessions in response. Indeed, even the notification form used by Members under Articles 8.2 and 12.5 of the Agreement on Safeguards is entitled "Immediate notification under article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of *proposed* suspension of concessions and other obligations referred to in paragraph 2 of article 8 of the Agreement on Safeguards".[30]

47. Therefore, following the logic of the US argument, if the decisive question is what the adopting Member is "proposing" to do, in its own mind, then the EU measure would be a rebalancing measure under Article 8.2 for the mere reason that the European Union "proposed" it as such. Of course, the European Union has not attempted such an argument, and neither should the US, because it is clearly wrong.

48. Finally, the US seems to misunderstand the EU's position on these matters. The European Union has never accepted that "the United States has not sought to exercise a right to exceed its tariff bindings through GATT 1994 Article XIX".[31] The European Union has clearly contested that assertion by claiming, and showing, that the US measures are safeguard measures to which Article XIX applies. The US might have a different understanding of what it means to "seek to exercise a right". In the European Union's view, when a Member takes a measure that is objectively a safeguard, it is thereby "seeking to exercise" the right to take a safeguard measure, whatever it subjectively *thinks* it is doing, whatever it *claims* to be doing, and whether or not what it is doing is *consistent* with the Agreement on Safeguards.

49. This is, in fact, the core of the disagreement between the parties: for the European Union, the applicability of the Agreement on Safeguards is actually

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29 US' response to Panel Question 11, paras. 20-23.

30 Exhibit EU-42.

31 US' response to Panel Question 11, para. 24.

an objective question; for the US, it is a question of the way in which the US itself decides to classify its own measure.

5.2. THE US ARGUMENTS ON "INVOCATION" ARE MISGUIDED

50. When explaining why, in its view, the Agreement on Safeguards does not apply to the US steel and aluminium measures, the central reason the US gives is the absence of "invocation". The US never clearly explains what it thinks "invocation" means. When it does shed some further light on the notion of "invocation", it does so in a piecemeal and contradictory manner. In the European Union's view, the lack of clarity is telling. Ultimately, it demonstrates the weakness of the argument.

51. The "invocation" argument makes its first appearance in the US first written submission. There, the US argued that, for the safeguard provisions to apply, "a Member must invoke the protections of Article XIX" "with the required notice".[32] The US went on to explain that the notification referred to in Article 12.1 of the Agreement on Safeguards is an "essential step that must occur for a measure **to be** a safeguard" (emphasis added).[33] In practical terms, in this case, "if the United States did not invoke Article XIX with the required notification, that is simply the end of the matter."[34] Thus, while the US position on invocation was far from clear, it seemed that, for the US, a Member "invokes" Article XIX and the Agreement on Safeguards by notifying the measure as a safeguard.

52. During the first meeting and in responses to questions, the parties exchanged arguments on the meaning of the concept of "invocation", and how it relates to the notification obligations Article XIX of the GATT 1994 and Article 12 of the Agreement on Safeguards. The EU argued, *inter alia*, that the US notion of "invocation" is vague, that notification is an obligation and that it cannot be constitutive of a safeguard because that would make the obligation to notify redundant, and because the notification provisions show that a measure can be a safeguard measure even before it is notified.[35]

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32 US' first written submission, paras. 60 and 63.

33 US' first written submission, paras. 65 – 67.

34 US' first written submission, para. 66.

35 EU's opening statement at the first substantive meeting, paras. 31 – 33; EU's responses to Questions 19, 20, 53 and 54.

53. The US, meanwhile, flip-flopped between different positions concerning whether or not "invocation" occurs through notification.

54. On the one hand, in its opening statement at the first substantive meeting, the US continued to referred to "invocation, *in the form of a notice*" (emphasis added)[36], and stated that "without invocation, and without notification of that invocation, a Member has not invoked the right under Article XIX".[37] It added that "if the first and crucial step involving invocation and notification does not take place, the measure cannot be a safeguard".[38] Even in its responses to questions, the US appears to argue that the absence of a notification means, in itself, that the measure is not "action pursuant to Article XIX".[39]

55. On the other hand, in different parts of its responses, the US seems to backtrack from that position. Thus, the US states that "once the importing Member invokes Article XIX as the basis for a proposed measure, the WTO's safeguards disciplines for notifications attach to that proposed action."[40] In this case, the US did not notify its steel and aluminium measures "because [it] did not invoke Article XIX".[41] These statements suggest that "invocation" is something that occurs *separately* from, and *prior* to the notification of a safeguard. Later on, the US explicitly states that, in its view, invocation and notification are not synonymous; rather, "a Member informs others of its decision to invoke… with the notification", such that the notification is "a procedural mechanism to inform other WTO Members" of that "invocation".[42]

56. The version of the US position in which "invocation" occurs *through* notification is simply impossible to reconcile with the fact that Article XIX of the GATT 1994 and the Agreement on Safeguards impose an *obligation* to notify. As pointed out by Panel Question 43, if WTO-consistent notification is what made a measure into a safeguard, it would be logically impossible for a safeguard to be inconsistent with the notification obligations. This might be why, in response to Question 43, the US backtracks from its previous view

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36 US' opening statement at the first substantive meeting, para. 27.

37 US' opening statement at the first substantive meeting, para. 26.

38 US' opening statement at the first substantive meeting, para. 38.

39 US' response to Question 20, para. 49.

40 US' response to Question 20, para. 49.

41 US' response to Question 20, para. 43.

42 US' response to Panel Question 43, para. 96.

that "invocation" occurs through notification ("invocation, in the form of a notice").

57. However, even the more recent version of the US argument, in which "invocation" is distinct from notification, is untenable, because it makes the notion of "invocation" utterly empty. We no longer know when, how, and in what form this allegedly crucial step of "invocation" is supposed to take place.

58. For example, while the US raises these issues as reasons why the steel and aluminium measures are supposedly not safeguards, the US does not seem to argue that "invocation" is a result of the use, or non-use, of certain domestic legal procedures or domestic legal bases. Indeed, the US repeatedly agrees that "the classification of a measure under municipal law is not determinative of the applicable WTO law."[43] The US also seems to accept that its refusal to consult concerning the steel and aluminium measures does not constitute "invocation", because it is only relevant "to the extent the Safeguards Agreement applies in the first instance."[44] Furthermore, the US states that placing a matter on the agenda of the Council for Trade in Goods is not determinative for whether a measure falls within the safeguards regime.[45] To the European Union, this would seem to exhaust all the possibilities for tangible real-world events connected to the taking of a measure that one could attempt to describe as "invocation".

59. Instead, the concept of "invocation" that the US is presenting to the Panel appears to be little more than *ex post* rationalisation for litigation purposes. It seems to mean the qualification of a measure as a safeguard by the adopting Member at the moment of its choosing, possibly even in the context of WTO litigation. In Question 41, the Panel directly asked the US to explain how "invocation" is supposed to take place, and whether it is different from notification of the measure to the WTO. In response, the US explains, vaguely but tellingly, that invocation "occurs with the exercise of an available right to justify the taking of a particular action, especially when relied on in the face of a challenge to that action."[46]

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43 US' responses to Panel Questions paras. 19, 70, 84 and 106.

44 US' response to Panel Question 28, para 64.

45 US' response to Panel Question 26, para 62.

46 US' response to Panel Question 41, para. 86.

60. Thus, for the US, "invocation" means that, when a Member's measure is legally challenged, such as in WTO panel proceedings, that Member gets to decide which provision it has "invoked", and therefore which provision applies. As explained above, the US is not saying that any particular past event connected to the US steel and aluminium measure could have constituted or demonstrated that "invocation" took place. Rather, the US is saying that, because it has so far not itself "invoked" Article XIX and the Agreement on Safeguards, those measures are not safeguards.

61. The "right" to take a safeguard measure is, for the US, something that a "Member may call upon as authority or justification for action […] it *has taken*",[47] (emphasis added), i.e. in the past. Thus, "invocation" appears to be retroactive. Moreover, "invocation" is exclusively "for the Member implementing a measure";[48] i.e., "it is for the Member taking the action to determine whether it will seek to avail itself of that right by satisfying the relevant conditions (the first of which is notice, or invocation)."[49] Thus, to the US, "invocation" is not a specific real-world event or circumstance that objectively constitutes (alone or with other events or circumstances) a safeguard, but rather a purely unilateral decision of the adopting Member to qualify a past measure as a safeguard. Thus, "invocation" is a "condition" for the existence of a safeguard measure that is in the sole control of the adopting Member. On this basis, the US is arguing that a measure cannot be a safeguard unless the adopting Member "invokes" Article XIX and the Agreement on Safeguards.[50]

62. With this in mind, it is highly misleading for the US to assert that it is not its position that an importing Member itself decides whether a measure is a safeguard,[51] and that "invocation" is a simple "objective" question about something that happened in the past.[52]

63. There is no authority whatsoever for the US "invocation" argument. As the US accepts, the term "invoke" does not appear in Article XIX or in the Agreement on Safeguards. The jurisprudence cited by the US does not lend

47 US' response to Panel Question 41, paras. 88 – 90.

48 US' response to Panel Question 41, para. 90.

49 US' response to Panel Question 41, para. 71.

50 US' response to Panel Question 42, paras 91 and 95.

51 US' response to Panel Question 42, para. 91.

52 US' opening statement at the first meeting, para. 31.

any credence to the argument either, because it concerns something different: the *obligations* imposed on safeguard-imposing Members. Thus, for example, in *Indonesia - Iron or Steel Products*, the Appellate Body explained that a Member is free to exercise its right to impose a safeguard measure (which means it may, but need not do so) "if the conditions set out in the first part of Article XIX:1(a) are met".[53]

64. Contrary to what the US suggests,[54] this is not a reference to "invocation" as a constituent feature of a safeguard. Rather, it is simply a reference to the requirements for the *WTO-consistent* imposition of a safeguard listed in Article XIX:1(a), i.e. to WTO obligations listed in that provision, such as those on unforeseen developments, increased quantities, injury or threat of injury, etc. As the EU explains at length in response to Panel Question 54, it does not follows from the terms "shall be free", or from the position that Article XIX can be said to create "rights", 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 clearly shows, there is no "right" to adopt a safeguard measure independently from the legal requirements that apply to safeguard measures.

65. In this respect, the US is not just misreading the jurisprudence, but also attempting to confuse the obligations applicable to safeguard measures and the constituent features of safeguard measures, something that the Appellate Body expressly warned against in *Indonesia-Iron or Steel Products.* The EU refers, in this respect, to its response to Panel Questions 53 and 54, as well as to paras. 177-184 of its first written submission.

66. Another reason why the US "invocation" argument is clearly wrong is that it would mean that rebalancing under Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards would be impossible or WTO-inconsistent for the mere reason that the safeguard-imposing Member chose not to label the measure as a safeguard. The European Union has already pointed this out,[55] and the Panel has asked several questions on this issue. Surprisingly, the US does not see a problem. It expressly admits that this would be the consequence of its "invocation" argument. For the US, for the

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53 Appellate Body Report, *Indonesia - Iron or Steel Products*, para. 5.55.

54 US' response to Panel Question 41, para. 90.

55 European Union's first written submission, para. 170; EU's opening statement at the first substantive meeting, para. 28.

mere reason that the safeguard-imposing Member did not choose to "invoke" Article XIX, the measure would not be a safeguard, and therefore the rebalancing measure would not have a basis in the Agreement on Safeguards, making it "WTO-inconsistent ab initio".[56]

67. Thus, it is clearly the logic of the US argument that the safeguard-imposing Member holds all the cards: its unilateral decision not to "invoke" Article XIX and the Agreement on Safeguards means, *ipso facto*, that its measure is not a safeguard which means in turn, *ipso facto*, that the rebalancing measure is WTO-inconsistent.

68. This sort of unilateral control over the applicable legal rules is fundamentally inconsistent with the Panel's duty to make an objective assessment, and with the rule-based multilateral trading system as a whole. It cannot be that a single WTO Member can control which legal rules apply to its own advantage. The US also seems to agree with this principle when it thinks it suits it.[57]

69. Furthermore, the US parallels with Article XXVIII of the GATT 1994[58] are not helpful. Article XXVIII does not support the proposition that a Member can decide for itself whether the Agreement on Safeguards applies.

70. To the extent that Articles XIX and XXVIII of the GATT 1994 are comparable, the parallels speak in favour of the EU's position. Thus, as the EU has explained in its first written submission, there is similar language in the two provisions in support of the view that neither of them is a so-called affirmative defence, and that a case against a rebalancing measure can only succeed if it identifies the controlling legal provision.[59]

71. By contrast, at least one key difference between Articles XIX and XXVIII of the GATT 1994 disproves the US' position. While a WTO-consistent safeguard measure produces legal effects in WTO law (notably because it modifies or withdraws a concession), and while it must follow certain WTO procedures (such as notification), it is nevertheless a domestic measure. A modification of schedules under Article XXVIII is a WTO measure, the essence of which is

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56 US' response to Panel Question 24, para. 56.

57 US' response to Panel Question 26, para. 62 ("… European Union's view would create a situation where a Member could adopt a retaliatory measure and then block disapproval, thereby creating the very problem identified above about the inability to proceed in the manner Article 8.2 of the Safeguards Agreement envisions…").

58 US' response to Panel Question 34.

59 European Union's first written submission, paras. 228-230 and 242-244; EU's opening statement at the first substantive meeting, para. 12.

that it modifies the content of a Member's Schedule of Concessions. In practice, the Member modifying its schedule would typically increase a duty to a level reflecting that modification, but this is not an indispensable element of action taken under Article XXVIII. Thus, an "Article XXVIII measure" is taken at the level of the WTO,[60] and may only be taken at the level of the WTO, whereas an "Article XIX measure" (a safeguard) is necessarily taken within a Member's legal order.

72. In any event, neither Article XIX nor Article XXVIII speak of "invocation". Whether either of those provisions apply is an objective question. The requirements listed in those provisions, such as the "conditions" in Article XXVIII:3(a) and XIX:3(a) referred to by the US,[61] are obligations imposed on the Member imposing the measure. If those requirements or "conditions" are not met, the conclusion is not that Articles XIX or XXVIII do not apply, but that the Member acted inconsistently with those provisions.

73. Finally, the European Union points out that the US is plainly incorrect that the Agreement on Safeguards "only applies to measures taken pursuant to Article XIX of the GATT".[62] In this respect, it is clear that at least Article 11.1(b) of the Agreement on Safeguards applies to, and disciplines, measures that are not safeguard measures.

74. In conclusion, while it is highly ambiguous what the US thinks "invocation" is, it seems not to be notification, nor the acceptance of consultations, nor the exercise of certain domestic legal authority or the use of domestic legal procedures, nor any other specific, observable and objective circumstance. It is, rather, a simple unilateral choice by the adopting Member, that may post-date the implementation of the measure, and that cannot be questioned by the opposing party or by the Panel to any meaningful degree. Rather, for the US, the only "objective" assessment that the Panel may undertake is whether the US itself decided to "invoke" Article XIX and the Agreement on Safeguards. This is reminiscent of the US' argument in the accompanying *US – Steel and Aluminium* disputes that its measures are justified by Article XXI

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60 Appellate Body Reports, *EC – Bananas III (Article 21.5 (II))*, para. 385 ("Pursuant to Article XXVIII, a Member may modify or withdraw a concession annexed to the GATT 1994 by negotiation and agreement with other Members that are "primarily concerned", and in consultation with Members that have a substantial interest in the concession.").

61 US' response to Panel Question 34, para. 78.

62 US' response to Panel Question 49, para. 108.

of the GATT 1994 for the mere reason that US "invokes" that provision.[63] In that dispute, the US argues that the Panel may only make an "objective assessment" of whether or not the US has "invoked" Article XXI.

75. Taken as a whole, these arguments form a perfect circle of impunity for the US. Their measures are not safeguard measures, and thus not subject to the disciplines of Article XIX and the Agreement on Safeguards, because the US says so. They cannot be rebalanced under Article XIX:3(a) and Article 8.2 of the Agreement on Safeguards, because the US says so. They cannot be challenged under the GATT because they are national security measures, for the mere reason that the US says so. We ask the Panel, once again, not to condone this type of reasoning.

5.3. THE APPELLATE BODY REPORT IN INDONESIA – IRON OR STEEL PRODUCTS IS HIGHLY PERTINENT TO THE CASE AT HAND, AND IT SUPPORTS THE EU POSITION

76. The Appellate Body's reasoning in *Indonesia – Iron or Steel Products* is applicable in the present case. While in *Indonesia – Iron or Steel Products* the measure at issue was found not to be a safeguard measure, in spite of allegations to the contrary by the parties, in the present case the measure at issue can be found to be a safeguard measure in spite of the US attempts to present it as a (purely) national security measure.

77. The US refers to its own position in *Indonesia – Iron or Steel Products*, which for obvious reasons could not be followed by the Appellate Body. This is a self-serving affirmation, not grounded in law, which the US is making without considering the consequences that the acceptance of such an irrational position will imply for the multilateral trading system.

78. In spite of the clear guidance of the Appellate Body quite to the contrary, the US still maintains that:

> the **fundamental criterion** for establishing the existence of a safeguard measure [is] […] that the Member adopting a measure **invokes Article XIX** of the GATT 1994 as the basis for suspending an obligation or withdrawing or modifying a concession. Article XIX:2 of the GATT 1994 and Article 12 of the Safeguards Agreement make clear that **advance notice** by a

[63] US' responses to Panel Questions in DS548, for example in para. 86 (available at https://ustr.gov/sites/default/files/enforcement/DS/US.As.Pnl.Qs1.(DS548).fin.(public).pdf).

> Member intending to suspend an obligation or withdraw a concession is a precondition to applying a safeguard measure. […] In most situations, the question of whether the WTO's safeguards disciplines applied would have been resolved by this fact.[64]

79. The European Union recalls that, according to settled case-law, and as recently confirmed by the Appellate Body in the specific context of the Agreement on Safeguards, whether or not a measure is subject to the disciplines of the Agreement on Safeguards is an objective question. Contrary to what the US asserts, it is not a question to be decided unilaterally by the Member imposing the safeguard measure by "invoking" Article XIX of the GATT 1994, or by giving "advance notice" in accordance with Article 12 of the Agreement on Safeguards.

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

81. The US seems in fact to agree with the European Union on this point:

> Here, the factors listed in paragraph 5.60 [domestic law, domestic procedures, and notifications] would not be helpful in the Panel's assessment of whether the European Union's additional duties are consistent with its obligations under Articles I and II of the GATT.[65]

82. Indeed, such factors are not amongst the constituent features of a safeguard measure and cannot and should not be given legal weight in isolation from those two features.

83. The Appellate Body rightly noted in *Indonesia – Iron or Steel Products* that, in order to be a safeguard measure, a measure must have two constituent features. First, it must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the relevant products.[66]

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64 US ' responses to the Panel's questions, para. 26 [emphasis added].

65 US' responses to the Panel's questions, para. 38.

66 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

84. As the Appellate Body has explained, there is a difference between the constituent features, relating to the existence, and different conditions pertaining to the legality of a safeguard measure. The US attempts to blur the difference between elements relating to the applicability of the safeguards regime and elements pertaining to the conformity of the US underlying measures with the WTO safeguard disciplines.

85. The European Union cannot agree that the constituent features identified by the Appellate Body were a particularity of the *Indonesia – Iron or Steel Products* case:

> the United States explained why, due to the unusual circumstances in Indonesia – Iron or Steel Products, the Appellate Body came up with the "constituent features" test. […] the Appellate Body's reasoning in Indonesia – Iron or Steel Products is not applicable here. Thus, the United States is of the view that it is not helpful to the resolution of this dispute to engage in a discussion regarding the application of the "constituent features" test to provisions of the WTO Agreement.[67]

86. These two constituent features do not depend upon the existence or not of a notification or an "invocation" by the Member adopting the measures at issue. They must be objectively present in the case of each and every safeguard measure. And they certainly are in the underlying US safeguard measures. The Panel can and should reach such a conclusion as part of its objective assessment of the matter before it.

87. The European Union agrees with the US that not every measure that raises duties above a bound rate can be considered a suspension of concessions under Article XIX of the GATT 1994.[68] Indeed, such a conclusion should be reached as result of an objective assessment, based on the design, structure and expected operation of the measure. The adopting Member cannot unilaterally "invoke" certain provisions (or not) and then determine whether it suspends concessions (or not).

88. The underlying US measures suspend concessions. A measure could suspend a concession while at the same time, in a single step, effecting an action that constitutes a violation of a GATT obligation, such as a duty in excess of a bound rate. Thus, the US safeguard measures have, in the European Union's

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[67] US' responses to the Panel's questions, para. 57.

[68] US' responses to the Panel's questions, para. 33.

view, suspended the concessions of the US and (among other things) imposed duties in excess of bound rates, at the same time.

89. However, a valid suspension, i.e. a suspension taken in compliance with the applicable provisions of the covered agreements, such as a WTO-consistent modification of a schedule under Article XXVIII of the GATT 1994, a WTO-consistent safeguard measure, or a WTO-consistent rebalancing measure under Article 8.2 of the Agreement on Safeguards, does not amount to or create any violation of the covered agreements, not even a prima facie violation which would then presumably need to be justified. A valid suspension means that, at least temporarily, the suspending Member does not violate the covered agreements. In the European Union's view, the US' safeguard measures on steel and aluminium suspend concessions, but not validly, because they are WTO-inconsistent for several reasons, as already shown in our submissions.[69]

90. In this respect, a WTO Member's right to suspend a GATT obligation or to withdraw or modify a GATT concession under Article XIX:1(a) is not unqualified. Such emergency action can be taken only "to the extent and for such time as may be necessary" to prevent or remedy serious injury. In the same vein, Articles 5.1 and 7.1 of the Agreement on Safeguards specify, respectively, that safeguard measures shall be applied "only to the extent" and "only for such period of time" as may be "necessary to prevent or remedy serious injury and to facilitate adjustment".[70]

5.4. THE US MISUNDERSTANDS THE RELATIONSHIP BETWEEN THE AGREEMENT ON SAFEGUARDS AND THE OTHER COVERED AGREEMENTS

91. 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.

92. The US considers that the fundamental difference between *EC – Fasteners (China)* and the present case consist of the fact that:

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69 E.g. European Union's first written submission, para. 257.

70 Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.59.

> whether the measures at issue were subject to the WTO's antidumping disciplines was not contested before the panel. Here, the parties disagree on whether the WTO's safeguards disciplines apply to the European Union's additional duties.[71]

93. 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 European Union and the other respondents in the parallel cases: the consequence of the absence of a claim under the controlling provisions – in that case Article VI - on the claim under Article I. In the European Union's view, the consequence is that the US claims under Articles I and II of the GATT 1994 cannot succeed.

94. 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. The fact that the parties did not disagree on the application of the anti-dumping disciplines in *EC – Fasteners (China)* does not automatically lead to the conclusion that the respective analysis is irrelevant, as the US would like to have it.

95. 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 of the GATT 1994. That is, it is not a "violation" of Article I:1 that is "justified" by Article VI: there is simply no violation.

96. The US runs away from the past relevant case law, hiding behind Article 11.1(c):

> Thus, if the measure is sought, taken, or maintained pursuant to Article XIX, the Safeguards Agreement applies; if the measure is sought, taken, or maintained pursuant to other provisions of GATT 1994, the Safeguards Agreement does not apply. Regarding the disputes referenced by the European Union, the United States does not consider that they provide guidance for the Panel's assessment in this dispute.[72]

97. Article 11.1(c) of the Agreement on Safeguards is only mirroring the case law of the Appellate Body concerning safeguard measures. While that case law identifies the defining features of a safeguard measure,[73] Article 11.1(c) tells

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71 US' responses to the Panel's questions, para. 72.

72 US' responses to the Panel's questions, para. 76.

73 Appellate Body Report, *Indonesia - Iron or Steel Products*, para. 5.60.

us which measures are not safeguard measures. They are two sides of the same coin.

98. Thus, Article 11.1(c) cannot serve as a basis for a unilateral determination by a WTO Member as to the applicability or not of an agreement. Instead, whether an agreement applies or not is part of the objective assessment a panel is called to undertake.

99. The European Union considers that, given the facts and evidence, it is very clear that the US underlying measures cannot be considered to have been "sought, taken or maintained" pursuant only to provisions "other than" Article XIX of the GATT 1994.

100. Yet, according to the US, the WTO agreements apply only if the measures at issue were taken "under" or "pursuant to" the respective agreements.[74]

101. The US has already been there before, and brilliantly lost. On this point, the outcome of this case cannot be any different. In *US — 1916 Act (EC)* the US contended that the 1916 Act did not fall within the scope of application of Article VI of the GATT 1994, as it did not "specifically target" dumping. However, the Appellate Body rightly concluded that:

> On the basis of the wording of the 1916 Act, it is clear that the 1916 Act provides for civil and criminal proceedings and penalties when persons import products from another country into the territory of the United States, and sell or offer such products for sale at a price less than the price for which the like products are sold or offered for sale in the country of export or, in certain cases, a third country market. In other words, in the light of the definition of "dumping" set out in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the Anti-Dumping Agreement, the civil and criminal proceedings and penalties contemplated by the 1916 Act require the presence of the constituent elements of "dumping". The constituent elements of "dumping" are built into the essential elements of civil and criminal liability under the 1916 Act. The wording of the 1916 Act also makes clear that these actions can be taken only with respect to conduct which presents the constituent elements of "dumping". It follows that the civil and criminal proceedings and penalties provided for in the 1916 Act are "specific action against dumping". We find, therefore, that Article VI of the GATT 1994 applies to the 1916 Act.[75]

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[74] US' responses to the Panel's questions, para. 101.

[75] Appellate Body Report, *US – 1916 Act (EC)*, para. 130.

102. Similarly, in *US — Offset Act (Byrd Amendment)*, despite the US opposition, the Appellate Body correctly found that the measure at issue is a specific action against dumping and that the relevant controlling provisions thus apply.[76]

103. The European Union has already referred in its previous submissions to other relevant case-law, which overwhelmingly supports our legal positions in the present proceedings.[77]

5.5. IT IS NOT THE EU'S POSITION THAT EVERY INCREASED DUTY IS A SAFEGUARD

104. Contrary to the US assertions, it is not the EU's position that any raised duty is a safeguard.[78] If this was the EU's position, it would have been a simple matter to explain that, because the US duties on steel and aluminium products are over the bound rate, which by definition benefits domestic producers, the measure is a safeguard.

105. Instead, as the EU explains under Panel Question 55, the objective characteristics of a safeguard measure described in Indonesia – Iron or Steel Products, which the US seems to take issue with, are a great deal more detailed than the US suggests. 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.

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[76] Appellate Body Report, *US — Offset Act (Byrd Amendment)*, paras. 242 and following.

[77] European Union's first written submission, section 6.4, European Union's responses to the Panel's questions, para. 124.

[78] US' opening statement at the first meeting, paras. 44-48, US' closing statement at the first meeting, para. 6.

106. Furthermore, the European Union pointed to a number of reasons why the US measures are safeguards. Firstly, they are safeguards because they possess the two constituent features of a safeguard set out by the Appellate Body in *Indonesia – Iron or Steel Products*. First, they suspend at least one GATT obligation, in whole or in part, or withdraw or modify a GATT concession. Second, they are demonstrably linked to the objective of preventing or remedying injury to the US domestic industries.

107. For both of these reasons, the European Union has provided far more than to simply assert that duties have been "raised" and that therefore, "axiomatically", a domestic industry benefits.[79] First, the duties are not just raised but they are set above bound rates. Second, the obligation not to exceed the bound rates is only one obligation that the US measures have suspended, withdrawn or modified; in its first written submission, the European Union has focused on it without prejudice to others, such as the obligations in Articles I and XI of the GATT 1994.[80] Third, while it is true that suspending an obligation, withdrawing or modifying a concession is not necessarily the same as exceeding a bound rate of duty, the Appellate Body has previously based its enquiry of whether a measure suspends obligations, or withdraws or modifies concessions on whether or not bound rates have been exceeded.[81] Fourth, the steel and aluminium measures at issue use as a legal basis a US statute the purpose of which is to impose import restrictions through duties.[82] Fifth, the measures explicitly state that their purpose is to reduce the level imports to a certain level through the use of increased duties and quotas.[83] Thus, with respect to the constituent feature of "suspending at

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79 US' opening statement at the first meeting, para. 44.

80 European Union's first written submission, para. 191.

81 Appellate Body Report, *Indonesia - Iron or Steel Products*, para. 5.56 ("However, the imposition of the specific duty does not suspend any of Indonesia's GATT obligations, nor does it withdraw or modify any of Indonesia's GATT concessions. This is because, as the Panel rightly found and no participant has contested, Indonesia "has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions" and is, therefore, "free to impose any amount of duty it deems appropriate" on that product.") See also Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.75 ("The complainants affirm that the impugned measures also suspend the application of Article II:1(b), second sentence, of the GATT 1994 in that they impose a tariff surcharge other than ordinary customs duties that is not recorded in the Dominican Republic's schedule of concessions...") and 7.88 ("since the impugned measures are not "ordinary customs duties" nor any of the measures provided for in Article II:2 of the GATT 1994, by definition they must be other "duties or charges … not recorded in the Dominican Republic's schedule of concessions Consequently, since they result in the levying of such duties or charges, the impugned measures have suspended the obligations of the Dominican Republic under Article II:1(b), second sentence, of the GATT 1994 with respect to the import duties imposed on the imported products concerned.")

82 European Union's first written submission, para. 189.

83 European Union's first written submission, para. 192.

least one GATT obligation, in whole or in part, or withdrawing or modifying a GATT concession", the US measures do everything that a safeguard measure does. The only difference from a typical safeguard measure is that the adopting Member characterises it as something other than a safeguard.

108. With respect to the objective of preventing or remedying injury, the European Union has provided a wealth of evidence showing that a benefit to domestic producers does not simply "axiomatically" follow from an increased duty. [84] Instead, the US authorities based the steel and aluminium measure on a detailed analysis of existing and threatened injury to a well-defined domestic industry allegedly caused by increased imports. They also tailored the measures in order to achieve a particular capacity utilisation of domestic producers, as well as other protective effects. The measures are overwhelmingly and expressly concerned with improving the "economic welfare" of the domestic steel and aluminium industries, and take specific steps to advance that objective. They also purport to assess a number of injury factors that are typically associated with a serious injury finding under Article 4.2(a) of the Agreement on Safeguards (the rate and amount of the increase in imports, the share of the domestic market taken by increased imports (import penetration), changes in the level of domestic sales, production and productivity, capacity utilization, profits and losses, and employment). On this score, the US steel and aluminium measures simply shout "safeguard" from every page.

109. And there is more. As already summarised above, the EU has provided at least five additional reasons why the US steel and aluminium measures are safeguards:

- they purport to be based on a consideration typical to a safeguard measure: whether there are increased imports of the product at issue;[85]
- they repeatedly discuss whether imports take place "in such quantities and under such circumstances" as to cause or threaten serious injury and impair national security, i.e. in language corresponding to the references to imports in certain "quantities" and under certain

[84] European Union's first written submission, sections 2.5.3, 2.6.3 and 4.3.

[85] European Union's first written submission, sections 2.5.4 and 2.6.4, paras. 206-207.

"conditions" in Article XIX.1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards;[86]

- they refer to a number of precedents (earlier trade remedy measures against steel or aluminium products), which include safeguard measures;[87]
- they affirm that unforeseen developments (e.g. in the form of "dramatic changes in the steel industry since 2001") occurred;[88] and
- the agreements with Canada and Mexico implicitly recognize that the US measures are in the nature of safeguards, and that they can be rebalanced by the affected exporting party.[89]

110. The US castigates the European Union for allegedly not providing a "limiting principle" for its "test".[90] First, unlike the US, the European Union is not inventing a "test". The EU is simply following the interpretation, including the "limiting principles", set out by the Appellate Body in *Indonesia – Iron or Steel Products*. Second, it is not for the European Union to speculate on how any hypothetical measure would fare under the Appellate Body's "test". Thus, for example, there is no need to consider how one should treat a measure that is taken "without consideration of serious injury or increased imports",[91] because the US steel and aluminium measures purport to consider serious injury and increased imports on practically every page. Third, it is ironic that the US considers the European Union's "limiting principles" insufficient, when the *only* limiting principle proposed by the US is its own undefined and self-serving notion of "invocation".[92]

6. THE US HAS FAILED TO SHOW OR EVEN CLAIM THAT ANY OF THE REQUIREMENTS FOR THE EXERCISE OF THE EU'S REBALANCING RIGHTS WAS NOT MET

86 European Union's first written submission, sections 2.5.4 and 2.6.4, para. 208 – 210.

87 European Union's first written submission, sections 2.5.5 and 2.6.5, para. 211.

88 European Union's first written submission, section 2.5.6, paras. 212-213.

89 European Union's first written submission, paras. 214-215.

90 US' opening statement at the first meeting, para. 46.

91 US' opening statement at the first meeting, para. 46.

92 To quote the US, "invocation of Article XIX and the Safeguards Agreement… is the test for determining whether a measure constitutes a safeguard." US' opening statement at the first meeting, para. 47.

111. In its first written submission, the European Union has explained in detail why it considers that the US measures are safeguards,[93] and why the European Union has met all of the requirements of Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards when adopting its rebalancing measures at issue in this dispute (even though the US did not even make claims under these controlling provisions).[94] Because the European Union has taken a lawful rebalancing measure, the additional duties at issue are based on a valid *suspension* of the EU's concessions to the trade of the US. Therefore, there was no "commitment" or "concession" towards the US that the European Union could have "exceeded" or otherwise violated,[95] and the European Union acted consistently with Articles I and II of the GATT 1994.

112. The US does not even attempt to seriously argue that any of the substantive conditions for the WTO-consistency of rebalancing measures have not been met. In fact, the US proposes a test for the WTO-consistency of a rebalancing measure under Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards under which the EU measures at issue tick all the boxes but one – one which simply cannot be, on any reasonable reading, a requirement for the validity of a rebalancing measure.

113. The US states that a rebalancing measure will be WTO consistent if:

> […] (a) the importing Member has provided notice of a proposed action, (b) the importing Member has imposed a safeguard measure, and (c) the affected exporting Members have met the requirements set out in Article 8 of the Safeguards Agreement.[96]

114. Point (a) is clearly incorrect, for the reasons already set out above. It is inconceivable that a safeguard-imposing Member could deprive affected exporting Members of their rights under Article 8 of the Agreement on Safeguards at will, simply by violating an obligation in that very agreement (the Article 12 obligation to notify). Yet, this is precisely what would follow from the US argument that a necessary prerequisite for the WTO-consistency of a rebalancing measure is that the underlying safeguard measure was duly notified.

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93 European Union's first written submission, section 4.

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

95 EU's response to Panel Question 7.

96 EU's response to Panel Question 25, para. 58.

115. Instead, the applicability of Article 8 of the Agreement on Safeguards depends on whether the constituent features of a rebalancing measure are present. As the European Union explains in detail in its response to Panel Question 11, the first of those features 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.

116. With respect to the first constituent feature, the measures at issue explicitly suspend the European Union's concessions or other obligations with respect to the United States. In line with Article XIX:3(a) and Article 8.2, 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 some of the relevant products. Thus, the suspension conceptually precedes the additional duties (because it is the legal basis for the additional duties), it is broader in scope,[97] and it occurred before the additional duties came into force, through a distinct measure.[98]

117. With respect to the second, 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.[99]

118. With respect to the remaining elements of the test for the WTO-consistency of rebalancing measure proposed by the US, the European Union has fully established that they are present. The European Union has shown that the

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97 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.").

98 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.").

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

US measures are safeguards. In this regard, as the European Union explained when responding to Panel Questions 11(b) 22 and 23, the disagreement with the US on this issue cannot be determinative. If 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.

119. Furthermore, the European Union has established (even though it is not its burden to do so) that the measures at issue meet the requirements of Article 8.2 of the Agreement on Safeguards. Aside from its argument that Article 8 does not apply because the US did not "invoke" Article XIX and the Agreement on Safeguards, and perhaps (although this is not clear) that Article 8 does not apply because the US did not notify its measure, the US has not even tried to dispute the consistency of the EU measures at issue with any of the requirements of Article 8. Of course, the US cannot properly do so, given that it did not raise claims under that provision.

120. The US does, however, attempt to criticise the EU's measures from the point of view of one procedural obligation: the requirement not to suspend concessions in case of disapproval by the Council for Trade in Goods ("CTG"). In this respect, the European Union refers to its response to Panel Question 26, setting out its detailed views on what that obligation entails.

121. With respect to the US responses, it should be noted that the European Union and the US agree that the CTG's disapproval could only take the form of a "positive act or decision."[100] They also agree that the applicable decision-making rule for the CTG's disapproval is consensus, i.e. a consensus to *disapprove*.[101] However, as explained in detail in its own response, the European Union disagrees with the US' view that the Member proposing to take the rebalancing measure is required to place the measure on the CTG's agenda. This requirement simply does not exist, neither in Article 8 or elsewhere in the Agreement on Safeguards, nor in the Rules of Procedure of the CTG. Rather, any Member is entitled to place that matter on the agenda, like any other matter. In the usual course of events, it would be the safeguard-imposing Member that would have an interest in placing the matter on the agenda. In other words, most naturally, the WTO Member

100 US' response to Panel Question 26, para. 61.

101 US' response to Panel Question 26, para. 62.

wishing to obtain the CTG decision disapproving of the suspension should be the one taking the necessary steps for the CTG to consider the matter within the stipulated timeframe. This is, by the way, the standard manner in which the WTO operates.

122. There are additional reasons why the US view is wrong. First, if there was a positive requirement on the rebalancing Member to place its proposed measure on the agenda of the CTG, the obligation under Articles 8.2 and 12.5 to provide written notice of the proposed suspension to the CTG would be largely redundant. Second, the US theory would, in all likelihood, mean that previous rebalancing measures taken by any number of WTO Members were inconsistent with Article 8.2 from the outset, for the mere reason that the Members adopting them did not actively place them on the agenda of the CTG beforehand.

123. In summary, even putting aside the fact that it failed to make any claims under that provision, the US has provided the Panel with no argument capable of putting into question the consistency of the measures at issue with Article 8.2.

7. THE PANEL IS AUTHORISED AND REQUIRED TO COORDINATE WITH THE PANEL IN *US – STEEL AND ALUMINIUM*

124. The US is from the beginning legally wrong-footed when it alleges that:

> it would not be appropriate for the Panel to assume that it needs to "ensure that it reaches a conclusion that is coherent" with the conclusion of the panel in DS548.

125. Indeed, as the European Union has warned in its previous submissions, the US does not mind achieving fragmentation and it may benefit from contradictory findings in different panel reports, now, as the Appellate Body is no longer operational.[102]

126. However, the US seems to acknowledge that Article 11 of the DSU requires a consistent interpretation and application of the covered agreements, as part of the objective assessment by panels.[103]

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[102] European Union's opening oral statement at the first substantive meeting, para. 26.

[103] US' responses to the Panel's questions, para. 120.

127. Contrary to what the US alleges, the solution suggested by the European Union does not concern panel deliberations. Such exchanges of views or concertation would be preliminary, and external to the panel deliberations.[104] The deliberations as such will remain separate, as the European Union has already explained.[105]

128. Having exhausted all other ideas, the US falls back on alleged confidentiality concerns.[106] But it fails to explain, in the circumstances of this case, how and when confidentiality would be impaired. Instead, like a school student having learned by heart without actually understanding the matter, it quotes different provisions of the DSU where "confidentiality" pops up once one presses the Ctrl+F keys. This is not enough, indeed.

129. As a matter of fact, the US itself requested open hearings and no BCI procedures both in the Steel and Aluminium and the Additional Duties disputes. It further suggested the adoption of additional procedures allowing collaboration.[107] Given 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.[108]

130. Finally, the US limits itself to noting that Rule 4(3) of the Appellate Body's Working Procedures does not formally apply to panel proceedings. This does not prove anything for the panel stage and specifically does not address the question of whether or not that rule informs our understanding of what is permissible (and even advisable) or not under the DSU in general, including with respect to the work of panels.

131. It is as normal as the succession of days and nights that there are legal situations not expressly covered by DSU provisions, or, the case may be, by any other procedural provisions in any other legal system. The DSU does not expressly provide for panellists to hear cases over audio or video link, for

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104 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.

105 European Union's responses to the Panel's questions, paras. 183 – 194.

106 US' responses to the Panel's questions, para. 121.

107 US' responses to the Panel's questions, para. 122.

108 European Union's letter of 17 October 2019.

instance. Yet, it happened several times in the past and, in the current international pandemic context, this may very well happen again.

132. And all that with good reason. Legal rules have a general nature and are meant to cover a lot of different practical situations. The DSU is no exception. It retains such flexibility, first of all, in Article 11 of the DSU, which requires panels to make an objective assessment of the matter before them. Article 13 of the DSU, among others, may also serve as a legal basis for a collaboration of the type suggested by the European Union, as it provides that "panels may seek information from any relevant source". A number of other provisions provide support to our position.[109]

133. The true question actually is "where in the DSU is anything preventing the kind of solution proposed by the European Union?" Nowhere.

8. CONCLUSIONS

134. For the reasons set out in this submission, the European Union requests the Panel to find that the US has failed to demonstrate that the measures at issue are inconsistent with the European Union's obligations under the Agreement on Safeguards and the GATT 1994, as detailed in this submission and in the European Union's previous submissions.

[109] 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). European Union's responses to the Panel's questions, para. 187.