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**CHINA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE  
UNITED STATES**

REPORT OF THE PANEL

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## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Financial Services</i>	Appellate Body Report, <i>Argentina – Measures Relating to Trade in Goods and Services</i> , <a href="#">WT/DS453/AB/R</a> and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , <a href="#">WT/DS56/AB/R</a> and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , <a href="#">WT/DS367/AB/R</a> , adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Brazil – Taxation</i>	Appellate Body Reports, <i>Brazil – Certain Measures Concerning Taxation and Charges</i> , <a href="#">WT/DS472/AB/R</a> and Add.1 / <a href="#">WT/DS497/AB/R</a> and Add.1, adopted 11 January 2019, DSR 2019:I, p. 7
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , <a href="#">WT/DS139/AB/R</a> , <a href="#">WT/DS142/AB/R</a> , adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , <a href="#">WT/DS139/R</a> , <a href="#">WT/DS142/R</a> , adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , <a href="#">WT/DS207/AB/R</a> , adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , <a href="#">WT/DS339/AB/R</a> / <a href="#">WT/DS340/AB/R</a> / <a href="#">WT/DS342/AB/R</a> , adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , <a href="#">WT/DS339/R</a> , Add.1 and Add.2 / <a href="#">WT/DS340/R</a> , Add.1 and Add.2 / <a href="#">WT/DS342/R</a> , Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, p. 119
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/AB/R</a> and Add.1 / <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , <a href="#">WT/DS363/R</a> and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
<i>China – TRQs</i>	Panel Report, <i>China – Tariff Rate Quotas for Certain Agricultural Products</i> , <a href="#">WT/DS517/R</a> and Add.1, adopted 28 May 2019
<i>Colombia – Frozen Fries (Article 25)</i>	Award of the Arbitrators, <i>Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands – Arbitration under Article 25 of the DSU</i> , <a href="#">WT/DS591/ARB25</a> and Add.1, 21 December 2022
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , <a href="#">WT/DS366/R</a> and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , <a href="#">WT/DS461/AB/R</a> and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , <a href="#">WT/DS302/R</a> , adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
<i>Dominican Republic – Safeguard Measures</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , <a href="#">WT/DS415/R</a> , <a href="#">WT/DS416/R</a> , <a href="#">WT/DS417/R</a> , <a href="#">WT/DS418/R</a> , and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <a href="#">WT/DS27/AB/R</a> , adopted 25 September 1997, DSR 1997:II, p. 591

Short Title	Full Case Title and Citation
EC – Chicken Cuts	Panel Reports, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , <a href="#">WT/DS269/R</a> (Brazil) / <a href="#">WT/DS286/R</a> (Thailand), adopted 27 September 2005, as modified by Appellate Body Report <a href="#">WT/DS269/AB/R</a> , <a href="#">WT/DS286/AB/R</a> , DSR 2005:XIX, p. 9295 / DSR 2005:XX, p. 9721
EC – Seal Products	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , <a href="#">WT/DS400/AB/R</a> / <a href="#">WT/DS401/AB/R</a> , adopted 18 June 2014, DSR 2014:I, p. 7
EC – Selected Customs Matters	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , <a href="#">WT/DS315/AB/R</a> , adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tariff Preferences	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , <a href="#">WT/DS246/AB/R</a> , adopted 20 April 2004, DSR 2004:III, p. 925
EU – PET (Pakistan)	Panel Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , <a href="#">WT/DS486/R</a> , Add.1 and Corr.1, adopted 28 May 2018, as modified by Appellate Body Report <a href="#">WT/DS486/AB/R</a> , DSR 2018:IV, p. 1739
India – Additional Import Duties	Appellate Body Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , <a href="#">WT/DS360/AB/R</a> , adopted 17 November 2008, DSR 2008:XX, p. 8223
India – Patents (US)	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , <a href="#">WT/DS50/AB/R</a> , adopted 16 January 1998, DSR 1998:I, p. 9
Indonesia – Autos	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , <a href="#">WT/DS54/R</a> , <a href="#">WT/DS55/R</a> , <a href="#">WT/DS59/R</a> , <a href="#">WT/DS64/R</a> , Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Iron or Steel Products	Appellate Body Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , <a href="#">WT/DS490/AB/R</a> , <a href="#">WT/DS496/AB/R</a> , and Add.1, adopted 27 August 2018, DSR 2018:VII, p. 3393
Korea – Dairy	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , <a href="#">WT/DS98/AB/R</a> , adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Pneumatic Valves (Japan)	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , <a href="#">WT/DS504/AB/R</a> and Add.1, adopted 30 September 2019, DSR 2019:XI, p. 5637
Saudi Arabia – IPRs	Panel Report, <i>Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights</i> , <a href="#">WT/DS567/R</a> and Add.1, circulated to WTO Members on 16 June 2020, dispute terminated while appeal pending
Spain – Unroasted Coffee	GATT Panel Report, <i>Spain – Tariff Treatment of Unroasted Coffee</i> , L/5135, adopted 11 June 1981, BISD 28S/102
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines</i> , <a href="#">WT/DS371/RW</a> and Add.1, circulated to WTO Members 12 November 2018, appealed 9 January 2019
Thailand – H-Beams	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , <a href="#">WT/DS122/AB/R</a> , adopted 5 April 2001, DSR 2001:VII, p. 2701
US – Line Pipe	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , <a href="#">WT/DS202/AB/R</a> , adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Non-Rubber Footwear	GATT Panel Report, <i>United States – Countervailing Duties on Non-Rubber Footwear from Brazil</i> , SCM/94, adopted 13 June 1995, BISD 42S/208
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Poultry (China)	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010, DSR 2010:V, p. 1909
US – Steel and Aluminium Products (China)	Panel Report, <i>United States – Certain Measures on Steel and Aluminium Products</i> , <a href="#">WT/DS544/R</a> , Add.1 and Suppl.1, circulated to WTO Members 9 December 2022, appealed 26 January 2023
US – Steel Safeguards	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , adopted 10 December 2003, DSR 2003:VII, p. 3117

## EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Title	Short title (where applicable)
USA-1	<i>Notice on Suspension of Duty Concession Obligations on Some Imported Products Originating from the United States</i> (State Council Customs Tariff Commission 2018 Shui Wei Hui No. 13, issued 1 April 2018)	Implementation Notice
USA-2	<i>Notice on Publicly Soliciting Opinions on US Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures</i> (Ministry of Commerce Trade Remedy and Investigation Bureau, issued 23 March 2018)	Opinions Notice
USA-9	<i>Announcement on Imposing Tariffs on Some Goods Originating in the United States</i> (Ministry of Commerce 2018 Public Notice No. 55, issued 16 June 2018)	
USA-10	<i>Announcement on Imposing Tariff on Some Goods Originating in the United States</i> (Ministry of Commerce 2018 Public Notice No. 64, issued 8 August 2018)	
USA-12	<i>Announcement on Levying Tariffs on Goods and Commodity Imports from the United States</i> (Ministry of Commerce 2018 Public Notice No. 69, issued 18 September 2018)	
USA-14	United States' Table Presenting Tariff Lines and Bound Rates Affected By the Chinese Measure (2018)	
USA-15	United States' Table Presenting Tariff Lines and Bound Rates Affected By the Chinese Measure (2019)	
USA-16	United States' Table Identifying Discrepancies Between China's Opinions Notice and Implementation Notice	
USA-17	United States' Table Presenting Tariff Lines and Bound Rates Affected By the Chinese Measure (2018) Without Other Additional Duties	
USA-18	United States' Table Presenting Tariff Lines and Bound Rates Affected By the Chinese Measure (2019) Without Other Additional Duties	
USA-20, CHN-23	Trade Expansion Act, Public Law No. 87-794, 76 Stat. 877 (1962), United States Code, Title 19, Section 1862	Section 232
USA-25	United States Code of Federal Regulations, Title 15, Part 705	
USA-30, CHN-8	United States Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, <i>The Effect of Imports of Steel on the National Security, An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended</i> (11 January 2018)	Section 232 investigation into steel imports
USA-31, CHN-9	United States Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, <i>The Effect of Imports of Aluminum on the National Security, An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended</i> (17 January 2018)	Section 232 investigation into aluminium imports
USA-32, CHN-5	Proclamation 9705 of 8 March 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 51 (15 March 2018), p. 11625	Proclamation 9705
USA-33, CHN-6	Proclamation 9704 of 8 March 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 51 (15 March 2018), p. 11619	Proclamation 9704
USA-34, CHN-10	Proclamation 9711 of 22 March 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 60 (28 March 2018), p. 13361	Proclamation 9711
USA-35	Proclamation 9710 of 22 March 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 60 (28 March 2018), p. 13355	Proclamation 9710
USA-36, CHN-11	Proclamation 9740 of 30 April 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 88 (7 May 2018), p. 20683	Proclamation 9740
USA-37	Proclamation 9739 of 30 April 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 88 (7 May 2018), p. 20677	Proclamation 9739
USA-38, CHN-12	Proclamation 9759 of 31 May 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 108 (5 June 2018), p. 25857	Proclamation 9759

Panel Exhibit	Title	Short title (where applicable)
USA-39, CHN-13	Proclamation 9758 of 31 May 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 108 (5 June 2018), p. 25849	Proclamation 9758
USA-40	Proclamation 9772 of 10 August 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 158 (15 August 2018), p. 40429	Proclamation 9772
USA-41	Proclamation 9777 of 29 August 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 171 (4 September 2018), p. 45025	Proclamation 9777
USA-42	Proclamation 9776 of 29 August 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 171 (4 September 2018), p. 45019	Proclamation 9776
USA-44	Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, United States Federal Register, Vol. 83, No. 176 (11 September 2018), p. 46026	BIS rule of 11 September 2018
CHN-1	Council for Trade in Goods and Committee on Safeguards, 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 Article 8.2 of the Agreement on Safeguards, G/L/1218-G/SG/N/12/CHN/1	
CHN-2	Committee on Safeguards, Imposition of a safeguard measure by the United States on imports of steel – Request for consultations under Article 12.3 of the Agreement on Safeguards, G/SG/162	
CHN-3	Committee on Safeguards, Imposition of a safeguard measure by the United States on imports of aluminum – Request for consultations under Article 12.3 of the Agreement on Safeguards, G/SG/161	
CHN-4	United States' communication (4 April 2018)	
CHN-14	Memorandum from the United States Secretary of Defense, Memorandum for Secretary of Commerce responding to the Steel and Aluminum Policy Recommendations	United States Secretary of Defense Memorandum



**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
MFN	Most-Favoured Nation
GATT 1994	General Agreement on Tariffs and Trade 1994
MOFCOM	Ministry of Commerce of China
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

## 1 INTRODUCTION

### 1.1 Complaint by the United States

1.1. On 16 July 2018, the United States requested consultations with China pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) concerning China's imposition of additional duties on certain products originating in the United States.<sup>1</sup>

1.2. Consultations were held on 29 August 2018 but failed to resolve the dispute.

### 1.2 Panel establishment and composition

1.3. On 18 October 2018, the United States requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.<sup>2</sup> At its meeting on 21 November 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the United States in document WT/DS558/2, in accordance with Article 6 of the DSU.<sup>3</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS558/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>4</sup>

1.5. On 7 January 2019, the United States requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 25 January 2019, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr William Ehlers  
Members: Mr Cristian Espinosa Cañizares  
Ms Mónica Rolong

1.6. Brazil, Canada, Egypt, the European Union, Guatemala, India, Indonesia, Japan, Kazakhstan, Mexico, New Zealand, Norway, the Russian Federation, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, Türkiye<sup>5</sup>, Ukraine, and the Bolivarian Republic of Venezuela reserved their rights to participate in the Panel proceedings as third parties.<sup>6</sup>

### 1.3 Panel proceedings

#### 1.3.1 General

1.7. The Panel held an organizational meeting with the parties on 12 March 2019.

1.8. After consulting with the parties, the Panel adopted its Working Procedures<sup>7</sup> and partial timetable on 5 April 2019. The Panel revised its timetable several times throughout the proceedings in consultation with the parties.<sup>8</sup>

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<sup>1</sup> See Request for consultations by the United States, WT/DS558/1 (United States' consultations request), p. 1.

<sup>2</sup> Request for the establishment of a panel by the United States, WT/DS558/2 (United States' panel request), p. 2.

<sup>3</sup> See DSB, Minutes of the meeting held on 21 November 2018, WT/DSB/M/421, para. 13.4.

<sup>4</sup> Constitution note of the Panel, WT/DS558/3.

<sup>5</sup> Formerly "Turkey" (see WT/INF/43/Rev.23).

<sup>6</sup> Constitution note of the Panel, WT/DS558/3.

<sup>7</sup> See Working Procedures of the Panel (Annex A-1).

<sup>8</sup> The timetable was revised on 11 June 2019, 17 June 2019, 7 February 2020, 16 November 2020, 23 November 2020, 18 February 2022, 28 April 2022, 3 May 2022, 23 November 2022, and 25 May 2023.

1.9. The Panel held a first substantive meeting with the parties on 19 and 20 September 2019. A session with the third parties took place on 19 September 2019. Prior to the first substantive meeting, on 9 September 2019, the Panel sent the parties and the third parties a list of questions to be answered orally at the meeting. Following the meeting, on 29 November 2019, the Panel sent written questions to the parties and the third parties.

1.10. The second substantive meeting was originally scheduled to take place on 25-26 June 2020. However, due to the COVID-19 pandemic and related restrictions on travel and in-person meetings, it was not possible to physically meet with the parties at the WTO premises on the scheduled dates. In consultation with the parties, the Panel postponed the second substantive meeting several times to a date to be determined. Meanwhile, on 16 November 2020, the Panel sent the parties a list of questions to which it sought responses in writing.

1.11. On 17 December 2021, after further consultations with the parties, the Panel communicated its decision that, taking into account the delays already occasioned by COVID-19, as well as the uncertainty about the evolution of the pandemic, scheduling a second substantive meeting in virtual format would strike an appropriate balance between the efficient conduct of the proceedings and the parties' due process rights.<sup>9</sup>

1.12. On 8 February 2022, after consultations with the parties, the Panel scheduled the second substantive meeting through virtual means for 15 and 16 March 2022, and issued draft Additional Working Procedures Concerning Substantive Meetings with Remote Participation to the parties. On 18 February 2022, the Panel adopted its Additional Working Procedures Concerning Substantive Meetings with Remote Participation.<sup>10</sup>

1.13. The Panel held its second substantive meeting with the parties virtually on 15 and 16 March 2022 via the Cisco Webex platform. Prior to the second substantive meeting, on 8 March 2022, the Panel sent the parties a list of questions to be answered orally at the meeting.

1.14. On 28 April 2022, the Panel sent the parties a list of questions to which it sought answers in writing.

1.15. On 15 December 2022, the Panel issued the draft descriptive part of its Report to the parties. On the same day, and following the circulation of the panel report in *US – Steel and Aluminium Products (China)*, the Panel sought the parties' views on the findings in that report concerning the applicability of the WTO safeguards regime to the United States' Section 232 measures, and on the relevance of those findings for this Panel's analysis.

1.16. The Panel issued its Interim Report to the parties on 25 May 2023. The Panel issued its Final Report to the parties on 1 August 2023.

### **1.3.2 Requests for enhanced third-party rights**

1.17. The Panel received communications from Canada<sup>11</sup>, Türkiye<sup>12</sup>, the Russian Federation<sup>13</sup>, the European Union<sup>14</sup>, and Mexico<sup>15</sup>, asking that the Panel exercise its discretion under Article 12.1 of the DSU to grant all third parties additional rights to those provided under Article 10 of the DSU. The requesting third parties asked the Panel to allow all third parties: (i) to receive copies of all of the parties' written submissions, their oral statements, rebuttals, and answers to questions from the Panel and each other, through all the stages of the proceedings; (ii) to be present for the entirety of all substantive meetings of the Panel with the parties; (iii) to review the draft summary of their own arguments in the descriptive part of the Panel Report; and (iv) to make a brief oral statement during the second substantive meeting.

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<sup>9</sup> Panel's communication to the parties (17 December 2021).

<sup>10</sup> Annex A-2.

<sup>11</sup> Canada's communication (15 March 2019).

<sup>12</sup> Türkiye's communication (18 March 2019).

<sup>13</sup> Russian Federation's communication (19 March 2019).

<sup>14</sup> European Union's communication (20 March 2019).

<sup>15</sup> Mexico's communication (22 March 2019).

1.18. The Panel sought the parties' views on the requests for enhanced third-party rights. China supported the requests, noting that the measure challenged by the United States in this dispute was similar to those challenged by the same complainant in panel proceedings where the requesting third parties were participating as respondents. According to China, the enhanced rights requested by the third parties would not impose any undue additional burden on the parties to the dispute.<sup>16</sup> The United States opposed the requests, arguing that they were not well founded under the DSU, and that the granting of additional rights to third parties would result in a corresponding imposition of additional obligations on the parties, without the consent of one of them.<sup>17</sup>

1.19. On 5 April 2019, the Panel sent a communication to the parties and the third parties in relation to the requests for enhanced third-party rights. The Panel recalled that it had discretion to grant such requests but declined to do so in the circumstances of this case. In explaining its decision, the Panel noted, *inter alia*, the lack of agreement between the parties and the due process implications of granting enhanced third-party rights. The Panel further noted that the third parties requesting enhanced rights would have an opportunity to fully express their views on the relevant legal issues as third parties in this dispute in accordance with Article 10 of the DSU, and also as respondents in separate panel proceedings concerning the United States' complaints against their own measures.

1.20. The Panel's communication is annexed to this Report.<sup>18</sup>

### 1.3.3 Request for a ruling under Article 6.2 of the DSU

1.21. In its first written submission, China requested the Panel to make a ruling, on a preliminary basis or otherwise, that the claims of the United States were not properly before the Panel as the United States' panel request failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>19</sup> On 25 June 2019, the United States submitted its response, in which it argued that China's request was without merit because the panel request met the requirements of Article 6.2 of the DSU.<sup>20</sup> On 1 July 2019, the Panel received comments on China's request for a preliminary ruling and the United States' response to that request from the European Union, the Russian Federation, and Türkiye.

1.22. On 12 March 2020, the Panel sent a communication to the parties and the third parties in relation to China's request for a ruling under Article 6.2 of the DSU. The Panel noted that the request touched upon "issues that are closely related to the substantive questions raised by the parties in this dispute". In the Panel's view, a preliminary ruling on the issue raised by China might require it to adjudicate the merits of the parties' arguments, including with regard to the applicability of the relevant covered agreements to the measure at issue. The Panel thus concluded that a decision on a preliminary basis would be premature and, accordingly, stated that it would address the issue raised in China's request in its Report.

1.23. The Panel's communication is annexed to this Report.<sup>21</sup> The Panel addresses China's request under Article 6.2 of the DSU in section 7 of this Report.

## 2 FACTUAL ASPECTS

2.1. This section provides an overview of the factual background to the case, describes the measure at issue, and details other factual developments discussed by the parties.

### 2.1 Factual background

2.2. On 23 March 2018, the Ministry of Commerce of China (MOFCOM) issued the Ministry of Commerce Notice on Publicly Soliciting Opinions on US Imported Steel and Aluminum Products 232 Measures and Chinese Countermeasures (Opinions Notice).<sup>22</sup> The Opinions Notice recalled that on 8 March 2018, the United States had announced tariffs on imports of steel and aluminium

<sup>16</sup> China's communications (20, 21, and 26 March 2019).

<sup>17</sup> United States' communications (20, 21, 22, and 26 March 2019).

<sup>18</sup> Communication by the Panel on requests for enhanced third-party rights (Annex D-1).

<sup>19</sup> China's first written submission, para. 62.

<sup>20</sup> United States' response to China's request for a preliminary ruling, paras. 5-13.

<sup>21</sup> Communication by the Panel on China's request for a ruling under Article 6.2 of the DSU (Annex D-2).

<sup>22</sup> Opinions Notice, (Exhibit USA-2), p. 1.

products (Section 232 duties). In the Opinions Notice, MOFCOM expressed the view that the Section 232 duties constitute "a safeguard measure", and indicated China's intention to "suspend the implementation of substantive equal concessions and other obligations to the United States". Through the Opinions Notice, MOFCOM also sought public comments on the import tariffs China proposed to apply on certain products originating in the United States.

2.3. On 26 March 2018, China notified the WTO Committee on Safeguards of its formal request for consultations with the United States under Articles 12.3 and 8.1 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994. In its notifications, China indicated that it was "exercising its right to trade compensation consultations".<sup>23</sup>

2.4. On 29 March 2018, China notified the WTO Council for Trade in Goods of its proposed suspension of concessions and other obligations with respect to imports from the United States under Article XIX:3 of the GATT 1994 and Article 8.2 of the Agreement on Safeguards. According to this notification, the proposed suspension would consist of an increase in tariffs on selected products originating in the United States, "based on the part of the measures of the United States which were not taken as a result of an absolute increase for the [years 2014-2016]".<sup>24</sup>

2.5. On 1 April 2018, MOFCOM issued the State Council Customs Tariff Commission Notice on Suspension of Duty Concession Obligations on Some Imported Products Originating from the United States (Implementation Notice) "suspend[ing] tariff concession obligations", as of 2 April 2018, for 128 imported products originating from the United States. The Implementation Notice indicated an increase in the tariff rate for each of these 128 products, to be applied in addition to the "current applied base tariff rates".<sup>25</sup>

2.6. On 4 April 2018, the United States informed China that it did not consider there was any basis to conduct consultations under Article 12.3 of the Agreement on Safeguards, as it did not agree with China's characterization of the Section 232 duties as safeguard measures.<sup>26</sup>

## 2.2 Measure at issue

2.7. In its panel request, the United States describes the measure at issue as "China's imposition of additional duties on certain products originating in the United States (the 'additional duties measure')".<sup>27</sup> According to the United States, China imposes the additional duties measure through the Opinions Notice and the Implementation Notice, operating separately or collectively, as well as any amendments, replacements, related measures or implementing measures.<sup>28</sup>

2.8. The Opinions Notice identified 128 tariff codes to which China proposed to apply the additional duties measure. These tariff codes, set out in the Specific Product List attached to the Opinions Notice, comprised products in seven categories: (i) fresh fruit, dried fruit, and nut products; (ii) wine; (iii) denatured ethyl alcohol; (iv) American ginseng; (v) seamless steel tubes; (vi) meat of swine and its products; and (vii) aluminium waste.<sup>29</sup>

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<sup>23</sup> Committee on Safeguards, Imposition of a safeguard measure by the United States on imports of steel – Request for consultations under Article 12.3 of the Agreement on Safeguards, G/SG/162, (Exhibit CHN-2); and Committee on Safeguards, Imposition of a safeguard measure by the United States on imports of aluminum – Request for consultations under Article 12.3 of the Agreement on Safeguards, G/SG/161, (Exhibit CHN-3).

<sup>24</sup> Council for Trade in Goods and Committee on Safeguards, 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 Article 8.2 of the Agreement on Safeguards, G/L/1218-G/SG/N/12/CHN/1, (Exhibit CHN-1), p. 1.

<sup>25</sup> Implementation Notice, (Exhibit USA-1), p. 1.

<sup>26</sup> United States' communication (4 April 2018), (Exhibit CHN-4), p. 1.

<sup>27</sup> United States' panel request, p. 1.

<sup>28</sup> Ibid.

<sup>29</sup> Opinions Notice, (Exhibit USA-2), pp. 2-6.

2.9. The Implementation Notice imposed additional duties on the 128 tariff codes identified in the Opinions Notice.<sup>30</sup> These additional duties were made applicable to "imported products originating from the United States" and assessed on an *ad valorem* basis:

- a. For 120 of these tariff codes, including fruits and derived products, the Implementation Notice imposed an additional tariff rate of 15% on top of the current applied base tariff rates.
- b. For eight of these tariff codes, including pork and derived products<sup>31</sup>, the Implementation Notice imposed an additional tariff rate of 25% on top of the current applied base tariff rates.<sup>32</sup>

### 2.3 Other additional duties

2.10. Subsequent to the Implementation Notice, China imposed certain "other additional duties", i.e. duties on top of the additional duties imposed under the Implementation Notice. The United States maintains that, in total, these other additional duties affect the importation of products falling under 112 of the 128 tariff lines already subject to the additional duties measure.<sup>33</sup> These other additional duties are as follows:

- a. With effect from 6 July 2018, a further additional duty of 25% on imports from the United States that applies to 81 of the 128 tariff lines already subject to the additional duties measure.<sup>34</sup>
- b. With effect from 23 August 2018, a further additional duty of 25% on imports from the United States that applies to one of the 128 tariff lines already subject to the additional duties measure.<sup>35</sup>
- c. With effect from 24 September 2018, a further additional duty of 10% and 5% on imports from the United States falling under, respectively, 20 and 10 of the 128 tariff lines already subject to the additional duties measure.<sup>36</sup>

2.11. China considers that the other additional duties described above are "not measures at issue in this dispute" as they were not included in the United States' panel request.<sup>37</sup> The United States explains that it "included the additional tariffs in order to calculate the sum of duties ... actually applied to" goods originating in the United States.<sup>38</sup> The United States further clarifies that it is not seeking findings and recommendations on these other additional duties.<sup>39</sup> The Panel addresses this issue in its findings in section 7 of the Report.

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<sup>30</sup> The United States has noted discrepancies between the product lists attached to the Opinions Notice and the Implementation Notice. According to the United States, for 88 out of the 128 products listed in the Implementation Notice, the eight-digit tariff line matches a product description in the attachment to the Opinions Notice, but the product description is not verbatim. (See United States' first written submission, para. 8 and fn 8 and United States' Table Identifying Discrepancies Between China's Opinions Notice and Implementation Notice, (Exhibit USA-16)). China considers these differences to be "different ways of describing the same products under the same HTS" that "have no impact on the measures taken". (See China's response to Panel question No. 16).

<sup>31</sup> While the Implementation Notice uses the terms "pork and derived products", the terms used in the Opinions Notice are "meat of swine and its products". The Panel notes that these differently described product categories comprise the same seven tariff codes (02031200, 02031900, 02032190, 02032200, 02032900, 02064100, and 02064900). See also *ibid.*

<sup>32</sup> Implementation Notice, (Exhibit USA-1), p. 1.

<sup>33</sup> United States' first written submission, para. 17.

<sup>34</sup> United States' first written submission, para. 17, referring to *Announcement on Imposing Tariffs on Some Goods Originating in the United States* (Ministry of Commerce 2018 Public Notice No. 55, issued 16 June 2018), (Exhibit USA-9).

<sup>35</sup> United States' first written submission, para. 17, referring to *Announcement on Imposing Tariff on Some Goods Originating in the United States* (Ministry of Commerce 2018 Public Notice No. 64, issued 8 August 2018), (Exhibit USA-10).

<sup>36</sup> United States' first written submission, para. 17, referring to *Announcement on Levying Tariffs on Goods and Commodity Imports from the United States* (Ministry of Commerce 2018 Public Notice No. 69, issued 18 September 2018), (Exhibit USA-12).

<sup>37</sup> China's first written submission, para. 156.

<sup>38</sup> United States' response to Panel question No. 12.

<sup>39</sup> United States' response to Panel question Nos. 12 and 68.

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that China's additional duties measure is inconsistent with China's obligations under Articles I:1, II:1(a), and II:1(b) of the GATT 1994.<sup>40</sup>

3.2. China requests that the Panel reject the United States' claims in this dispute in their entirety.<sup>41</sup>

### 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 22 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

### 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Türkiye, and Ukraine are reflected in their executive summaries, provided in accordance with paragraph 25 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, and C-8).

### 6 INTERIM REVIEW

6.1. On 25 May 2023, the Panel issued its Interim Report to the parties. On 8 June 2023, the parties submitted written requests for review of the Interim Report. Neither party requested an interim review meeting. On 15 June 2023, the United States submitted comments on China's requests for review of the Interim Report. On the same date, China informed the Panel that it did not intend to submit comments on the United States' requests for review of the Interim Report.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's responses to the requests made at the interim review stage.<sup>42</sup>

6.3. At the outset, the Panel notes the parties' requests to modify or expand the Panel's summaries of their arguments. In this Report, the Panel has summarized the parties' arguments concerning the contested issues with a view to placing its reasoning and findings in context. The Panel did not intend to provide extensive descriptions of all the arguments raised by the parties, but only of arguments relevant for the purposes of its objective assessment of the matter before it. In this regard, the Panel recalls that the parties submitted detailed executive summaries of their arguments, annexed to this Report<sup>43</sup>, which provide a comprehensive account of their respective positions. The Panel further understands that it has substantial discretion to focus and elaborate on those aspects of the parties' submissions that it considers most pertinent for the resolution of the dispute, in fulfilment of its duty to make such findings as will assist the DSB in making the recommendations or rulings provided for in the covered agreements.<sup>44</sup>

6.4. Accordingly, unless otherwise specified in this section, the Panel considers that the parties' arguments were adequately summarized in the Interim Report and that it need not modify or expand the relevant paragraphs in the Final Report.

6.5. The Panel has made typographical and other editorial modifications in the Report, including in response to the parties' requests for review.<sup>45</sup>

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<sup>40</sup> United States' first written submission, para. 89; second written submission, para. 156.

<sup>41</sup> China's first written submission, para. 158; second written submission, para. 169.

<sup>42</sup> The paragraph and footnote numbers in the Final Report may have changed due to the revisions made at the interim review stage. The paragraph and footnote numbers indicated in this section pertain to those in the Final Report, unless otherwise specified.

<sup>43</sup> See Annexes B-1 and B-2.

<sup>44</sup> See Article 7.1 of the DSU.

<sup>45</sup> Editorial changes in response to the parties' requests for review have been made at paras. 1.1, 1.15, 2.9, 7.3, 7.7, 7.38-7.39, 7.57, and 7.132.

## **6.1 Compliance of the United States' panel request with Article 6.2 of the DSU**

### **6.1.1 Paragraphs 7.17-7.30**

6.6. China requests that the Panel modify paragraphs 7.17, 7.26, 7.29, and 7.30 of the Interim Report to "correctly summarize and reflect China's arguments" concerning the issue of the Panel's terms of reference.<sup>46</sup> The United States objects to the request, arguing that the Panel has accurately presented China's position on Article 6.2 of the DSU. The United States further contends that China offers no precise comments as to how the Panel should modify its statements.<sup>47</sup>

6.7. The Panel's understanding of China's position, as expressed in the paragraphs identified by China as well as in other relevant parts of the Report, is based on a close reading of all of China's submissions. The Panel does not consider that it misstates or otherwise misrepresents China's position. Nevertheless, for greater clarity, the Panel has modified paragraphs 7.17, 7.26, 7.28, and 7.29 of the Final Report, including by adding or modifying footnotes 104, 113, and 114, to further explain both its own understanding of China's position and the basis of that understanding in China's various submissions. In the light of these changes, the Panel no longer considered paragraph 7.30 of the Interim Report to be necessary and has accordingly deleted that paragraph.

## **6.2 Applicability of the relevant covered agreements**

### **6.2.1 Paragraph 7.36 and footnote 131**

6.8. The United States requests that the Panel make certain modifications to more accurately reflect the United States' position that "invocation through notice is the condition precedent for taking action under Article XIX and the application of the safeguards disciplines".<sup>48</sup> China does not comment on the request.

6.9. Taking into account that the modifications requested in the summary of the United States' arguments do not impact the Panel's reasoning, and in the absence of any objection from China, the Panel agrees to modify paragraph 7.36 and footnote 131 of the Report.

### **6.2.2 Paragraph 7.77**

6.10. In relation to China's argument that the absence of an underlying safeguard measure concerns the consistency with, and not the applicability of, Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, China requests that the Panel modify the summary of China's arguments and reconsider its analysis or findings.<sup>49</sup> Specifically, China requests that the Panel revise or remove a statement in paragraph 7.77 reflecting the Panel's understanding of the consequences of China's arguments.<sup>50</sup> The United States does not object to the deletion of this sentence, but does not consider that the Panel should reconsider its analysis or findings.<sup>51</sup>

6.11. The Panel takes note that the United States does not object to the removal of the sentence identified by China. As the sentence concerns an observation relating to certain arguments raised by China, but is not a direct summary of those arguments, the Panel agrees to remove the final sentence of paragraph 7.77 and has replaced it with a statement reflecting China's argument as contained in its second written submission. The Panel does not consider it necessary to revise its reasoning or findings set out in subsequent paragraphs, which address China's arguments as reflected in the remainder of paragraph 7.77.

### **6.2.3 Paragraphs 7.90-7.94**

6.12. The United States requests that the Panel add a paragraph in the Report to support its interpretation of the terms "pursuant to" in Article 11.1(c) of the Agreement on Safeguards. Specifically, the United States requests the Panel to indicate that the ordinary meaning of "sought,

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<sup>46</sup> China's interim review comments, paras. 3-14.

<sup>47</sup> United States' comments on China's interim review comments, paras. 3-6.

<sup>48</sup> United States' interim review comments, para. 5.

<sup>49</sup> China's interim review comments, paras. 15-17.

<sup>50</sup> China's interim review comments, para. 16.

<sup>51</sup> United States' comments on China's interim review comments, para. 7.



taken or maintained" in Article 11.1(c) supports the Panel's understanding that "in the case of measures sought, taken, or maintained by virtue of or under 'provisions of the GATT other than Article XIX', the Agreement on Safeguards does not apply, irrespective of whether the measures are consistent with such other provisions".<sup>52</sup> China does not comment on the request.

6.13. The Panel does not find it necessary to supplement its reasoning with additional considerations. In the Panel's view, its interpretation of the text of Article 11.1(c) of the Agreement on Safeguards is adequately supported by considerations pertaining to the context of the provision and the object and purpose of the Agreement. In this light, the Panel does not consider that addressing the additional elements raised by the United States is strictly necessary to resolve the dispute or to make such findings as will assist the DSB in making the recommendations or rulings provided for in the covered agreements. Accordingly, the Panel declines the request.

## 7 FINDINGS

### 7.1 Compliance of the United States' panel request with Article 6.2 of the DSU

7.1. China contends that the United States' panel request does not comply with the requirements of Article 6.2 of the DSU because it fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>53</sup> Specifically, China argues that, by failing to raise a claim in its panel request that the additional duties measure is not justified under Article XIX of the GATT 1994 and the Agreement on Safeguards, and only claiming inconsistency with Articles I and II of the GATT 1994 in its panel request, the United States has not provided a brief summary of the legal basis of its complaint sufficient to present the problem clearly, and thus failed to notify China of the nature of its case.<sup>54</sup> China submits that, as a result, the United States' claims under Articles I and II of the GATT 1994, as well as any arguments concerning the additional duties measure's consistency with Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards, fall outside the Panel's terms of reference.<sup>55</sup> China requested that the Panel rule on this issue "on preliminary basis or otherwise".<sup>56</sup>

7.2. On 12 March 2020, the Panel informed the parties in writing that it did not intend to issue a preliminary ruling in respect of China's request under Article 6.2 because it "touches upon issues that are closely related to the substantive questions raised by the parties in this dispute".<sup>57</sup> The Panel indicated that it would instead address China's objections in its Report.<sup>58</sup> Given that these objections concern the Panel's terms of reference, the Panel will address them first before turning to the substance of the dispute.

#### 7.1.1 Main arguments of the parties

##### 7.1.1.1 China

7.3. China submits that the United States was "well aware" that China's measure at issue was plainly taken pursuant to Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards.<sup>59</sup> China observes that the United States nevertheless chose not to invoke Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards in its panel request. Instead, in the panel request, the United States only claimed that China's measure was inconsistent with Articles I and II of the GATT 1994.<sup>60</sup> According to China, Article XIX of the GATT 1994 and the Agreement on Safeguards establish "positive obligations" for Members, and it is therefore the obligation of a complainant to raise a claim of violation under these provisions in its panel request for measures "plainly taken" pursuant to them.<sup>61</sup> In China's view, the United States'

<sup>52</sup> See para. 7.91 below.

<sup>53</sup> China's response to Panel question No. 1, para. 2.

<sup>54</sup> China's first written submission, para. 58.

<sup>55</sup> China's first written submission, paras. 17 and 60.

<sup>56</sup> China's first written submission, para. 62.

<sup>57</sup> Communication by the Panel on China's request for a ruling under Article 6.2 of the DSU (Annex D-2).

<sup>58</sup> Communication by the Panel on China's request for a ruling under Article 6.2 of the DSU (Annex D-2).

<sup>59</sup> China's first written submission, para. 13.

<sup>60</sup> China's first written submission, para. 14.

<sup>61</sup> China's first written submission, para. 15. Relatedly, China elaborates on why it considers that Article XIX of the GATT 1994 and the Agreement on Safeguards cannot be considered "affirmative defences" in

omission of these provisions from its panel request precludes the Panel from assessing either the United States' claims under Articles I and II of the GATT 1994, or from examining and making findings on whether China's measure is consistent with Article XIX of the GATT 1994 and the Agreement on Safeguards.<sup>62</sup>

7.4. China further argues that, when the measure at issue in a dispute is "plainly taken" pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards, then "the relevant concessions and obligations under other GATT 1994 provisions, such as those under Article I and II of GATT 1994, are necessarily suspended, withdrawn or modified".<sup>63</sup> In China's view, it follows in such circumstances that a complainant cannot make a claim solely under Articles I and II of the GATT 1994 in its panel request without also claiming that the measure cannot be justified under Article XIX of the GATT 1994 and the Agreement on Safeguards.<sup>64</sup>

7.5. China argues that to sustain a claim of violation of Articles I and II of the GATT 1994 by a measure taken pursuant to the WTO safeguard provisions, the non-application of or inconsistency with the WTO safeguard provisions "would be an inextricable link, and therefore an integral part" of the legal basis for such a claim.<sup>65</sup> Thus, China considers that, in failing to identify Article XIX of the GATT 1994 and the Agreement on Safeguards in its panel request, the United States has turned a "blind eye"<sup>66</sup> to "the explicit legal basis within the WTO framework of China's measure[]" and so failed to present a proper claim before the Panel.<sup>67</sup> In particular, China maintains that, because the "crucial and inextricable link in between China's [measure] at issue and claim of violation of Article I and II of the GATT 1994 is missing", the panel request does not sufficiently connect the challenged measure with the United States' claims under Articles I and II of the GATT 1994.<sup>68</sup>

7.6. China draws support for its position from the Appellate Body's report in *EC – Tariff Preferences*.<sup>69</sup> According to China, in that case the Appellate Body found that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the legal basis of the complaint sufficient to present the problem clearly.<sup>70</sup> China notes that the Appellate Body found that a complainant in such a case must cite the Enabling Clause in making its claim of inconsistency with Article I:1 of the GATT 1994, and must moreover identify in its panel request the provision(s) of the Enabling Clause that it considers to have been violated by the measures at issue.<sup>71</sup> In China's view, the same principles underlying the Appellate Body's report in *EC – Tariff Preferences* would have required the United States in this dispute to identify in its panel request the specific requirement(s) in Article XIX of the GATT 1994 and the Agreement on Safeguards with which it considered China had failed to comply to properly "convey the legal basis of the complaint sufficient to present the problem clearly".<sup>72</sup> In China's view, although the United States was "entitled to disagree and challenge that China's [measure] could be justified under its explicit legal basis,

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paragraphs 18-30 of its first written submission and paragraphs 15-19 of its second written submission. The Panel will discuss these arguments as relevant in its analysis below.

<sup>62</sup> China's first written submission, para. 17.

<sup>63</sup> China's first written submission, para. 16; opening statement at the first meeting of the Panel, para. 22. China provides further arguments on why measures taken pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards suspend, withdraw, or modify obligations under the GATT 1994 in paragraphs 31-42 of its first written submission. The Panel will discuss these arguments as relevant in its analysis below.

<sup>64</sup> China's first written submission, para. 16.

<sup>65</sup> China's second written submission, para. 47.

<sup>66</sup> China's second written submission, para. 46.

<sup>67</sup> China's first written submission, para. 43.

<sup>68</sup> China's second written submission, para. 48. (emphasis omitted)

<sup>69</sup> China's first written submission, paras. 44-55; second written submission, para. 50; and response to Panel question No. 5.

<sup>70</sup> China's first written submission, para. 47 (referring to Appellate Body Report, *EC – Tariff Preferences*, para. 110).

<sup>71</sup> China's first written submission, para. 45 (referring to Appellate Body Report, *EC – Tariff Preferences*, paras. 113 and 125).

<sup>72</sup> China's first written submission, paras. 48 and 52 (internal citation omitted). China draws further parallels between this dispute and *EC – Tariff Preferences* in paragraphs 49-55 of its first written submission, which, in China's view, supports the position described above.

Article XIX:3 of GATT 1994 and Article 8.2 of the Safeguard Agreement", it should nevertheless have raised a claim of inconsistency with these provisions in its panel request.<sup>73</sup>

7.7. China concludes that the United States' decision not to identify Article XIX of the GATT 1994 and the Agreement on Safeguards in its panel request is a "fundamental defect"<sup>74</sup> that results in the panel request failing either to convey the legal basis of the complaint sufficiently to present the problem clearly, or to notify China of the nature of the United States' case.<sup>75</sup> According to China, the panel request thus fails to meet the requirements of Article 6.2 of the DSU<sup>76</sup>, with the consequence that the Panel does not have jurisdiction to assess either the United States' claims under Articles I and II of the GATT 1994 or to examine and make findings on whether China's measure is consistent with Article XIX of the GATT 1994 and the Agreement on Safeguards.<sup>77</sup>

#### 7.1.1.2 United States

7.8. The United States contends that China's arguments on the sufficiency of the United States' panel request are "groundless"<sup>78</sup>, and asks the Panel to reject China's request for a ruling under Article 6.2 of the DSU.

7.9. The United States submits that its panel request fully satisfies the requirements of Article 6.2 of the DSU. According to the United States, the panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. It does so by identifying the legal instrument through which China imposes the additional duties and explaining why the United States considers that China's additional duties are inconsistent with China's obligations under Articles I and II of the GATT 1994.<sup>79</sup> By doing so, the United States is of the view that the panel request properly "connects China's additional duties measure with provisions of the GATT 1994".<sup>80</sup> The United States further submits that, because its panel request satisfies the requirements of Article 6.2 of the DSU, "China cannot credibly claim that it did not receive proper notice on the nature of the dispute".<sup>81</sup>

7.10. The United States further argues that China's reference to the Appellate Body Report in *EC – Tariff Preferences* is unavailing. In the United States' view, the approach adopted by the Appellate Body in *EC – Tariff Preferences* was based on "particular circumstances ... dictating a special approach, given the fundamental role of the Enabling Clause" in "promoting trade as a means of stimulating economic growth and development".<sup>82</sup> According to the United States, such considerations are not relevant in the present dispute.<sup>83</sup>

7.11. Moreover, the United States observes that in *EC – Tariff Preferences*, the complaining party considered the Enabling Clause to be relevant to the dispute and requested consultations under that provision.<sup>84</sup> In contrast, in this dispute, the United States does not consider Article XIX of the GATT 1994 or the Agreement on Safeguards to be relevant, and has not asserted that China has acted inconsistently with those provisions. There was therefore, in the United States' view, no reason for the United States to refer to Article XIX of the GATT 1994 or the Agreement on Safeguards in its panel request.<sup>85</sup> The United States notes that China has asserted that certain "permissive provisions" of the Agreement on Safeguards and Article XIX of the GATT 1994 are relevant. In the United States'

<sup>73</sup> China's first written submission, para. 57.

<sup>74</sup> China's first written submission, paras. 17 and 60-62.

<sup>75</sup> China's first written submission, para. 58.

<sup>76</sup> Ibid.

<sup>77</sup> China's first written submission, paras. 17 and 60.

<sup>78</sup> United States' response to China's request for a preliminary ruling, para. 4.

<sup>79</sup> United States' response to China's request for a preliminary ruling, para. 8; second written submission, para. 150.

<sup>80</sup> United States' response to China's request for a preliminary ruling, para. 8.

<sup>81</sup> United States' response to China's request for a preliminary ruling, para. 9.

<sup>82</sup> United States' opening statement at the first meeting of the Panel, para. 51 (referring to Appellate Body Report, *EC – Tariff Preferences*, paras. 106-107).

<sup>83</sup> United States' response to China's request for a preliminary ruling, para. 11.

<sup>84</sup> United States' response to China's request for a preliminary ruling, para. 11; opening statement at the first meeting of the Panel, para. 46.

<sup>85</sup> United States' response to China's request for a preliminary ruling, para. 12.

view, because China would have the provisions considered as justification for the additional duties measure, it is for China to demonstrate their applicability.<sup>86</sup>

7.12. The United States concludes that China's arguments concerning Article 6.2 of the DSU merely point "to *additional claims*" that, in its opinion, the United States could or should have presented.<sup>87</sup> In the United States' view, however, the fact that additional claims could have been made "is not an issue under DSU Article 6.2 that the legal basis of the claims the United States *has* presented are not clear".<sup>88</sup>

### 7.1.1.3 Main arguments of the third parties

#### 7.1.1.3.1 European Union

7.13. The European Union submits that the United States is incorrect to refer to Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards as "affirmative defences".<sup>89</sup> In the European Union's view, these provisions are in fact "the controlling provisions in this dispute"<sup>90</sup>, because the measure at issue is "based on" them.<sup>91</sup> According to the European Union, it is "disingenuous" of the United States to claim that those provisions have no legal connection to the claims raised in this dispute.<sup>92</sup> The European Union concludes that the Panel must dismiss the United States' case because neither the consultations request nor the panel request make reference to Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards.<sup>93</sup>

#### 7.1.1.3.2 Russian Federation

7.14. The Russian Federation submits that "China took the [measure] at issue to exercise its essential right under Article 8.2 of the [Agreement on Safeguards] to counter the disruptive effects of the United States' safeguards measures on their bilateral trade".<sup>94</sup> In the Russian Federation's view, the United States' evident disagreement with this proposition "does not relieve [it] from its obligation to present the problem clearly in accordance with Article 6.2 of the DSU, i.e. to present the 'full picture'", including by identifying Article XIX of the GATT 1994 and the Agreement on Safeguards in its panel request.<sup>95</sup> According to the Russian Federation, the United States' omission of Article XIX of the GATT 1994 and the Agreement on Safeguards from its panel request results in a failure to "present the problem clearly"<sup>96</sup>, as required by Article 6.2 of the DSU, because the United States' claims under Articles I and II of the GATT 1994 "are legally and factually linked to the safeguards disciplines under which China adopted the challenged measure[]".<sup>97</sup>

#### 7.1.1.3.3 Türkiye

7.15. Türkiye submits that it "shares China's concern that, in its consultations and panel request, as well as its first written submission, the United States has not articulated the correct legal basis for challenging China's measure[]".<sup>98</sup> In Türkiye's view, in circumstances in which a measure falls under WTO safeguard rules, claims under Articles I and II "as free-standing claims" should be rejected, because they would amount to "circumventing the complaining Member's burden to make out a *prima facie* case under Article XIX and the Agreement on Safeguards".<sup>99</sup> According to Türkiye, if the Panel agrees with China that the additional duties measure falls within the scope of the

<sup>86</sup> United States' opening statement at the first meeting of the Panel, para. 45.

<sup>87</sup> United States' response to China's request for a preliminary ruling, para. 13; opening statement at the first meeting of the Panel, para. 50; second written submission, para. 147. (emphasis original)

<sup>88</sup> United States' response to China's request for a preliminary ruling, para. 13. (emphasis original)

<sup>89</sup> European Union's comments on China's request for a preliminary ruling, para. 4.

<sup>90</sup> European Union's third-party written submission, para. 11; comments on China's request for a preliminary ruling, para. 4.

<sup>91</sup> European Union's comments on China's request for a preliminary ruling, para. 6.

<sup>92</sup> Ibid.

<sup>93</sup> European Union's comments on China's request for a preliminary ruling, para. 8.

<sup>94</sup> Russian Federation's comments on China's request for a preliminary ruling, para. 5.

<sup>95</sup> Russian Federation's comments on China's request for a preliminary ruling, para. 7.

<sup>96</sup> Russian Federation's third-party submission, para. 53.

<sup>97</sup> Russian Federation's comments on China's request for a preliminary ruling, para. 10.

<sup>98</sup> Türkiye's comments on China's request for a preliminary ruling.

<sup>99</sup> Türkiye's comments on China's request for a preliminary ruling. (emphasis original)

Article XIX and the Agreement on Safeguards, the Panel "should reject the United States' claims under Articles I and II of the GATT 1994 as improper".<sup>100</sup>

#### 7.1.1.3.4 Ukraine

7.16. Ukraine cautions against a "loop-hole" that would allow a complainant to "escape from its obligation" to present the problem clearly by intentionally failing to raise claims under the applicable covered agreements.<sup>101</sup> However, Ukraine also notes that if a claim is properly governed by a particular covered agreement, then a complainant would be "completely right" in raising only that covered agreement in a panel request.<sup>102</sup> Ukraine concludes that, in undertaking its analysis, the Panel should "look into the nature of the measure at issue to find whether it is in its terms of reference".<sup>103</sup>

### 7.1.2 Analysis by the Panel

#### 7.1.2.1 Introduction

7.17. The Panel's task is to determine whether the United States' panel request is inconsistent with Article 6.2 of the DSU because, as argued by China, by failing to claim that the additional duties measure is inconsistent with Article XIX of the GATT 1994 and Article 8.2 of the Agreement on Safeguards, it does not provide a brief summary of the legal basis of the United States' complaint sufficient to present the problem clearly.<sup>104</sup>

7.18. The Panel begins its analysis by examining the legal standard under Article 6.2 of the DSU.

#### 7.1.2.2 Applicable legal standard

7.19. Article 6.2 of the DSU provides as follows:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

7.20. As indicated, China's concerns relate to the requirement that a panel request must provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Both parties agree that, to comply with this requirement, a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".<sup>105</sup> The parties disagree on the application of this requirement in the present case.

<sup>100</sup> Türkiye's third-party submission, para. 3.19.

<sup>101</sup> Ukraine's third-party submission, para. 11.

<sup>102</sup> Ibid.

<sup>103</sup> Ukraine's third-party written submission, para. 13.

<sup>104</sup> China's first written submission, paras. 3, 15, and 57- 58. The Panel observes that certain arguments advanced by the parties and third parties in response to China's request under Article 6.2 touch upon issues such as the characterization of the WTO safeguards regime as an "exception" or a "right", the burden of proof, and the order of analysis that the Panel should adopt in these proceedings. However, these issues are legally and conceptually separate from the question whether the panel request satisfies the specific requirements of Article 6.2. The Panel will address these issues as necessary in the relevant parts of its Report.

Additionally, the Panel notes China's argument that, having failed to raise claims under Article XIX of the GATT 1994 or Article 8.2 of the Agreement on Safeguards, the United States cannot be allowed to claim that the additional duties measure is inconsistent with those provisions. In this respect, the Panel notes that the United States has confirmed that it is not seeking findings on the consistency of the additional duties measure with those provisions. (United States' response to China's request for a preliminary ruling, para. 12). Accordingly, the Panel does not consider it necessary to address this aspect of China's request for a ruling under Article 6.2 of the DSU.

<sup>105</sup> China's second written submission, para. 48; and United States' response to China's request for a preliminary ruling, para. 7 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*,

7.21. The Panel agrees with the parties that Article 6.2 of the DSU requires a panel request to plainly connect the challenged measures with the provisions of the covered agreements claimed to be violated. This requirement has been linked to the important role that the panel request plays in ensuring due process, since only through such connection between the measure(s) and the relevant provision(s) can a respondent "know what case it has to answer, and ... begin preparing its defence".<sup>106</sup>

7.22. At the same time, a panel request need not elaborate the arguments why the complainant believes the measure at issue to be WTO-inconsistent.<sup>107</sup> The term "arguments" in this context refers to "the reasons put forth by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".<sup>108</sup> Arguments of this nature are instead to be "set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties".<sup>109</sup>

7.23. Given that arguments need not be set out in the panel request, it follows that the requirement "to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" is not a requirement to set out in detail the reasons underlying a complainant's case. Rather, the Panel considers that Article 6.2 requires only that the legal basis of the complaint be set out with sufficient clarity to enable the respondent to know what case it has to answer, and what violations have been alleged, so that it can begin preparing its defence.<sup>110</sup>

7.24. The Panel notes that Article 6.2 does not require the panel request to explain or otherwise justify the applicability of the particular provisions identified as the legal basis of a claim. Nor does it require a panel request to expressly indicate the provisions governing the characterization of a measure for the purposes of the applicability of a given covered agreement. Rather, where particular provisions of the covered agreements are cited in the panel request, it can be logically presupposed that the complainant considers such provisions to be applicable and relevant to the case at hand.<sup>111</sup>

7.25. With these principles in mind, the Panel now turns to examine whether, as argued by China, the United States' panel request contains "fundamental defects"<sup>112</sup> that result in the United States' claims under Articles I and II of the GATT 1994 being outside the Panel's terms of reference.

### **7.1.2.3 Whether the United States' claims under Articles I and II of the GATT 1994 fall outside the Panel's terms of reference**

7.26. The Panel understands China's request to be based on the proposition that the United States' panel request is defective because Article 6.2 of the DSU required the United States to include claims under Article XIX of the GATT 1994 and the Agreement on Safeguards in its panel request in order to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. For China, the United States' failure to do so results in those claims that it did include, under Articles I and II of the GATT 1994, falling outside the Panel's terms of reference. China's central argument is thus that the United States' panel request is defective because it fails to provide a brief

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para. 162). The parties further agree that a panel request must explain "how or why" the measure at issue is considered by the complaining party to violate the WTO obligation in question. (See China's second written submission, para. 48 and United States' response to China's request for a preliminary ruling, para. 7 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 130)). In this regard, the Panel recalls the Appellate Body's statement in *Korea – Pneumatic Valves (Japan)* that "the use of the phrase 'how or why' [in previous panel and Appellate Body reports] does not imply a new and different legal standard for complying with the requirements of Article 6.2 of the DSU". (Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.7).

<sup>106</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162. (internal citations omitted) See also Appellate Body Report, *Thailand – H-Beams*, para. 88.

<sup>107</sup> Appellate Body Report, *EC – Bananas III*, paras. 141-143.

<sup>108</sup> Award of the Arbitrators, *Colombia – Frozen Fries (Article 25)*, para. 4.58 (quoting Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14; and *Korea – Dairy*, para. 139).

<sup>109</sup> Appellate Body Report, *EC – Bananas III*, para. 141.

<sup>110</sup> Appellate Body Report, *Thailand – H-Beams*, para. 88.

<sup>111</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.30.

<sup>112</sup> China's first written submission, paras. 5, 17, and 60-62.

summary of what China considers to be the "full"<sup>113</sup> or "correct"<sup>114</sup> legal basis of the United States' complaint.

7.27. The Panel observes that Article 6.2 of the DSU does not qualify the concept of the "legal basis of the complaint" in terms of correctness. Article 6.2 requires only that the brief summary of the legal basis of the complaint be "sufficient to present the problem clearly"; it does not require that such a summary be "correct". The wording of Article 6.2 of the DSU, and the requirement that the summary of the legal basis present the "problem" clearly, thus entrust to each complainant the discretion to articulate the "problem" about which it is concerned in any given dispute.<sup>115</sup> This includes identifying the measures it wishes to challenge and deciding which of the covered agreements to bring claims under. Provided that the complainant clearly identifies the provisions under which it seeks to bring claims and properly links those provisions to the measures at issue in a manner sufficient to present its "problem" clearly, a panel request satisfies the requirements of Article 6.2 of the DSU.

7.28. In the Panel's view, whether the panel request has identified the correct legal basis is a matter that goes to the merits of the complainant's case<sup>116</sup>, and not to the sufficiency of its panel request.<sup>117</sup> The Panel notes that a central part of every panel's duty to make an "objective assessment of the matter" pursuant to Article 11 of the DSU is the obligation to assess "the applicability of the relevant covered agreements".<sup>118</sup> If a complainant identifies in its panel request provisions that a panel later finds to be inapplicable to the measure at issue, its case cannot succeed, and it cannot raise additional claims later in the proceedings.<sup>119</sup> However, a panel request that identifies what either the respondent considers, or the panel ultimately finds, to be the incorrect legal basis for a claim is not thereby retrospectively rendered defective in terms of Article 6.2 of the DSU.

7.29. In these proceedings, the United States has challenged the additional duties measure as being inconsistent with Articles I and II of the GATT 1994. China has not argued that the panel request fails to identify those specific provisions with sufficient clarity. Instead, China argues that the additional duties measure is subject to the WTO safeguards regime, and not to Articles I and II of the GATT 1994. This is a disagreement that the Panel will need to resolve in fulfilling its mandate under Article 11 of the DSU, as detailed in the following section. In the Panel's view, however, the question whether the United States' panel request identified the correct legal basis is not relevant to an examination of the compliance of that request with the requirements of Article 6.2 of the DSU.

7.30. China refers to the Appellate Body Report in *EC – Tariff Preferences* in support of its request. In that case, the Appellate Body found that, in order to present the problem clearly under Article 6.2 of the DSU, the complaining party was required to identify in its panel request not just the provisions of the GATT 1994 with which it considered the relevant tariff preferences to be inconsistent, but also

<sup>113</sup> China's second written submission, para. 51.

<sup>114</sup> China's opening statement at the first meeting of the Panel, para. 7.

<sup>115</sup> The Panel notes that China generally agrees with this proposition: "It is up to the United States, as the complaining party, to assess and determine which covered agreement or provision are considered violated and therefore should be challenged. China, as the respondent, has no role in that decision". (China's opening statement at the first meeting of the Panel, para. 13).

<sup>116</sup> The Panel notes that in *Australia – Apples*, the Appellate Body confirmed the distinction between issues going to a panel's jurisdiction, on the one hand, and issues going to the merits of a dispute, on the other hand. The Appellate Body stated that "[f]or a matter to be within a panel's terms of reference—in the sense of Articles 6.2 and 7.1 of the DSU—a complainant must identify 'the specific measures at issue' and the 'legal basis of the complaint sufficient to present the problem clearly' ... By contrast, the question of whether the measures identified in the panel request can violate, or cause the violation of, [a WTO obligation] is a substantive issue to be addressed and resolved on the merits". (Appellate Body Report, *Australia – Apples*, paras. 423 and 425. See also Panel Report, *EU – PET (Pakistan)*, para. 7.24).

<sup>117</sup> In this connection, the Panel considers relevant the findings of the panel in *Thailand – Cigarettes (Philippines)* (*Article 21.5 – Philippines*). In that case, the panel stated that "a panel must take care to ensure that it does not make findings on disputed questions of fact or law encroaching on the merits of a claim for the purpose of determining whether it has jurisdiction over that same claim ... disputed questions of fact or law raised at the jurisdictional phase will encroach upon the merits of a claim insofar as they would require a panel to make findings relating to one or more legal elements that must be established to uphold the claim at issue". (Panel Report, *Thailand – Cigarettes (Philippines)* (*Article 21.5 – Philippines*), paras. 7.528-7.529).

<sup>118</sup> Article 11 of the DSU.

<sup>119</sup> The Panel notes that the United States agrees with this conclusion. See United States' second written submission, para. 147. See also Appellate Body Reports, *India – Patents (US)*, para. 89; and *Indonesia – Iron or Steel Products*, para. 5.31.

the Enabling Clause<sup>120</sup>, which, if properly invoked and applied by the responding party, would have shielded those preferences from WTO-inconsistency.<sup>121</sup>

7.31. The Panel is not persuaded that the approach to the Enabling Clause taken in *EC – Tariff Preferences* is helpful in the present dispute. Indeed, the Appellate Body in *EC – Tariff Preferences* recognized that its treatment of the Enabling Clause was "special" and justified by "the particular circumstances" of that case.<sup>122</sup> The Appellate Body thus placed particular emphasis on the Enabling Clause's "special status in the covered agreements"<sup>123</sup>, which engendered "particular implications for WTO dispute settlement".<sup>124</sup>

7.32. The Panel sees no basis in either the Appellate Body's statements or the text of the DSU for treating what was a decision based on the particular status and function of a "special" WTO provision as a general rule about the requirements of Article 6.2 of the DSU.

### 7.1.3 Conclusion

7.33. For the reasons outlined above, the Panel finds that Article 6.2 of the DSU did not require the United States to include claims of violation under Article XIX of the GATT 1994 or the Agreement on Safeguards in its panel request in order to provide a brief summary of the legal basis of its complaint sufficient to present the problem clearly. Accordingly, the Panel rejects China's request to find that the United States' panel request does not comply with the requirements of Article 6.2 of the DSU.

## 7.2 Applicability of the relevant covered agreements

### 7.2.1 Main arguments of the parties

#### 7.2.1.1 United States

7.34. The United States argues that the Panel's analysis should begin by evaluating its claims under Articles I and II of the GATT 1994, before addressing China's arguments under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994.<sup>125</sup>

7.35. The United States maintains that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 do not apply to China's additional duties measure. In the United States' view, Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards explicitly link a Member's right to suspend concessions or other obligations to the application or extension of a safeguard measure by another Member.<sup>126</sup> According to the United States, Article 8.2 of the Agreement on Safeguards allows an exporting Member affected by a safeguard measure to suspend concessions or other obligations under the GATT 1994 if no agreement concerning compensation has been reached among the Members concerned pursuant to Article 8 of the Agreement on Safeguards. For the United States, the first analytical step to

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<sup>120</sup> The Enabling Clause, originating in a 1979 decision of the GATT contracting parties, allows derogations from the Most-Favoured-Nation Treatment obligation laid down in Article I of the GATT 1994 in favour of developing countries. For more information on the Enabling Clause, see the relevant page on the WTO website: [https://www.wto.org/English/docs\\_e/legal\\_e/enabling1979\\_e.htm](https://www.wto.org/English/docs_e/legal_e/enabling1979_e.htm) (last accessed 17 May 2023).

<sup>121</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 110. The Appellate Body reasoned as follows: "[A] complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the 'legal basis of the complaint sufficient to present the problem clearly'. ... [I]t is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause".

<sup>122</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 106 and 110.

<sup>123</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 107.

<sup>124</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 110. The Appellate Body confirmed the exceptional nature of this approach in *Brazil – Taxation*. See Appellate Body Reports, *Brazil – Taxation*, paras. 5.361-5.362.

<sup>125</sup> United States' responses to Panel question No. 18, para. 30.

<sup>126</sup> United States' response to Panel question No. 35, para. 69; second written submission, paras. 141-143.



determine whether Article 8.2 of the Agreement on Safeguards applies to a certain measure is thus to examine whether another Member has previously applied a safeguard measure.<sup>127</sup>

7.36. The United States argues that it has not adopted any relevant safeguard measure for the purposes of the present dispute.<sup>128</sup> According to the United States, a measure is only a safeguard measure when the right to apply a safeguard is invoked with notice under Article XIX:2 of the GATT 1994, which the United States deems a necessary "condition precedent" for a measure to qualify as a safeguard measure. Without this invocation, the United States argues, a Member is not seeking legal authority under Article XIX of the GATT 1994 to suspend its obligations or withdraw or modify its concessions.<sup>129</sup> The United States acknowledges that the applicability of the Agreement on Safeguards and Article XIX of the GATT 1994 is an "objective question",<sup>130</sup> and contends that whether a Member has or has not invoked these disciplines by giving notice can be objectively ascertained by a panel.<sup>131</sup> The United States notes that, in the present case, it has not invoked Article XIX, but rather Article XXI of the GATT 1994.<sup>132</sup>

7.37. The United States argues that the key issue in this dispute regarding the applicability of the Agreement on Safeguards is directly addressed in Article 11.1(c) of that Agreement.<sup>133</sup> In this respect, the United States recalls that under Article 11.1(c), the Agreement on Safeguards does not apply to measures "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX". The United States understands the terms of Article 11.1(c) to mean that the Agreement on Safeguards is inapplicable when a Member acts "under" a provision of the GATT 1994 other than Article XIX.<sup>134</sup> In support of this understanding, the United States refers to early draft texts of the Agreement on Safeguards, which in its view clarify that "the availability of Article XIX as a release from obligations does not constrain a Member's ability to take action pursuant to other provisions of the GATT 1994". The United States also notes that references in these early draft texts to measures "consistent with" or "taken in conformity with" other GATT provisions were changed in the final draft of Article 11.1(c), which instead refers to measures sought, taken, or maintained "pursuant to" other GATT provisions.<sup>135</sup>

7.38. According to the United States, the Section 232 measures were taken pursuant to Article XXI of the GATT 1994. In this respect and in the context of Article 11.1(c), the United States refers to the domestic legal basis and procedures for the Section 232 measures as well as relevant statements made in WTO committees.<sup>136</sup> On this basis, the United States argues that the Agreement on Safeguards does not apply to the Section 232 measures by virtue of Article 11.1(c) of that Agreement. For the United States, this also means that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 are inapplicable to China's additional duties measure.<sup>137</sup> The United States disagrees with China's argument that the carve-out in Article 11.1(c) does not apply in circumstances where a measure "objectively" presents the features of a safeguard measure, maintaining that "if Article 11.1(c) only applied in certain circumstances, the text would say so".<sup>138</sup>

7.39. In its comments on the findings of the panel in *US – Steel and Aluminium Products (China)* on the applicability of the Agreement on Safeguards and Article XIX of the GATT 1994 to the Section 232 measures, the United States argues that those findings may be taken into account to

<sup>127</sup> United States' response to Panel question No. 24, para. 37.

<sup>128</sup> United States' opening statement at the first meeting of the Panel, para. 4.

<sup>129</sup> United States' opening statement at the first meeting of the Panel, paras. 5 and 25. See also United States' response to Panel question No. 52, para. 99 (noting that in using the term "invocation", the United States refers to the exercise of an available right); response to Panel question No. 26, para. 50 (arguing that the "invocation" of the right to take a safeguard measure occurs through notification of the measure and providing an opportunity for consultation).

<sup>130</sup> United States' opening statement at the first meeting of the Panel, para. 27 (also noting that "the first step in the analysis is the 'objective question' of whether a Member has sought to invoke its right under Article XIX to suspend its obligations or to withdraw concessions ... If so, the 'objective question' will turn to whether the measure at issue meets additional elements required for meeting the definition of a safeguard.").

<sup>131</sup> United States' response to Panel question No. 92, para. 79.

<sup>132</sup> United States' response to Panel question No. 33, para. 67; second written submission, para. 11.

<sup>133</sup> United States' comments on China's response to Panel question No. 73, para. 16.

<sup>134</sup> United States' second written submission, paras. 92 and 109.

<sup>135</sup> United States' response to Panel question No. 73, paras. 25 and 27.

<sup>136</sup> United States' second written submission, paras. 12-16 and 109; comments on China's responses to Panel question Nos. 73 and 85.

<sup>137</sup> United States' second written submission, paras. 91-92; response to Panel question No. 72.

<sup>138</sup> United States' response to Panel question No. 92, para. 80.

the extent that they are persuasive. The United States considers that the findings in that panel report on the meaning of the expression "pursuant to" in Article 11.1(c) were arrived at through a careful assessment of the expression's ordinary meaning in its context. The United States also regards as compelling that panel's assessment of the Section 232 measures in the context of Article 11.1(c). The United States nevertheless emphasizes that this Panel must conduct an objective assessment of the matter before it pursuant to Article 11 of the DSU.<sup>139</sup>

### 7.2.1.2 China

7.40. China argues that the Panel should first examine China's additional duties measure in relation to Article 8.2 of the Agreement on Safeguards, and examine the United States' claims under Articles I and II of the GATT 1994 only if the Panel were to find that Article 8.2 of the Agreement on Safeguards does not apply.<sup>140</sup> According to China, this approach is based on the correct understanding of the legal relationship between the Agreement on Safeguards and Article XIX of the GATT 1994, on the one hand, and Articles I and II of the GATT 1994, on the other hand.<sup>141</sup> China submits that a measure taken pursuant to and consistent with Article 8.2 of the Agreement on Safeguards suspends the application of other obligations under the GATT 1994, and it would thus be incorrect for the Panel to assess claims of inconsistency under the GATT 1994 prior to determining the law applicable to the measure at issue.<sup>142</sup>

7.41. China maintains that a measure falls under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 when it exhibits the following constituent features: (i) it suspends concessions or obligations; and (ii) it pursues the objective of maintaining a substantially equivalent level of concessions and other obligations compared to that existing under the GATT 1994 between the Member imposing a safeguard measure and the Member affected by it.<sup>143</sup> In addition, China submits that other substantive conditions and procedural requirements may also be considered, including: (i) the Member imposing a safeguard and the Member affected by it failed to reach an agreement on trade compensation; (ii) the suspension of concessions or other obligations takes place within 90 days after the application of the safeguard measure; (iii) 30 days have elapsed from the day on which written notice of the suspension of concessions is received by the Council on Trade in Goods; and (iv) the suspension of concessions or other obligations was not disapproved by the Council on Trade in Goods.<sup>144</sup> According to China, its additional duties measure exhibits all of these features.<sup>145</sup> China argues that it has thus acted "with the explicit authorization of" Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards.<sup>146</sup> China further notes that the United States has not made any claims under Article XIX:3(a) of the GATT 1994 or Article 8.2 of the Agreement on Safeguards.<sup>147</sup>

7.42. China argues that determining whether the United States' Section 232 measures are safeguard measures is not a threshold issue for determining whether Article 8.2 of the Agreement on Safeguards applies to the additional duties measure. In China's view, the existence of an underlying safeguard measure is a condition for the consistency of a measure with Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, but does not control the applicability of those provisions.<sup>148</sup> In support of this position, China argues that the rigid time-frames provided in Article 8 of the Agreement on Safeguards do not permit a Member that considers itself to be affected by a safeguard measure to ascertain *ex ante* whether the underlying measure is in fact a safeguard measure.<sup>149</sup> Therefore, in China's view, the existence of an underlying safeguard measure cannot be a condition precedent to the applicability of Article 8.2 of the Agreement on Safeguards. Relatedly, China argues that the applicability of Article XIX of the

<sup>139</sup> United States' communications (20 January and 10 February 2023).

<sup>140</sup> China's response to Panel question No. 18, para. 37.

<sup>141</sup> China's response to Panel question No. 18, para. 38.

<sup>142</sup> China's response to Panel question No. 18, paras. 38 and 40.

<sup>143</sup> China's response to Panel question No. 24, paras. 51-53.

<sup>144</sup> China's response to Panel question No. 24, para. 54.

<sup>145</sup> China's second written submission, paras. 115-118.

<sup>146</sup> China's opening statement at the second meeting of the Panel, para. 38.

<sup>147</sup> China's first written submission, para. 14.

<sup>148</sup> China's response to Panel question No. 24, para. 62; second written submission, para. 92.

<sup>149</sup> China's response to Panel question No. 24, para. 59.

GATT 1994 and the Agreement on Safeguards in the present dispute should be assessed solely based on the additional duties measure and not the United States' Section 232 measures.<sup>150</sup>

7.43. Nevertheless, China maintains that the Section 232 measures are safeguard measures as they present the two "constituent features" of safeguard measures identified by the Appellate Body in *Indonesia – Iron or Steel Products*.<sup>151</sup> First, China contends that these measures impose duties on aluminium and steel imports that exceed the bound rates set forth in the United States' tariff schedule; thus, according to China, they "suspend a GATT obligation or withdraw or modify a GATT concession".<sup>152</sup> Second, referring *inter alia* to the statutory basis for the Section 232 measures, the investigations and reports that led to the adoption of these measures, and the relevant proclamations of the United States, China argues that "the Section 232 measures have a demonstrable link to the objective of remedying serious injury to domestic industries caused by increased imports".<sup>153</sup> China considers that whether the Section 232 measures are safeguard measures must be determined through an objective assessment of their design, structure, and expected operation, and by giving due consideration to "all relevant factors" to recognize the aspects most central to these measures.<sup>154</sup>

7.44. China also contends that the Section 232 measures include "quota agreements" between the United States and certain countries, which are subject to Article 11.1(b) of the Agreement on Safeguards.<sup>155</sup> For China, the applicability of Article 11.1(b) of the Agreement on Safeguards to these quotas further demonstrates that the Section 232 measures are safeguard measures.<sup>156</sup> China considers that for measures subject to Article 11.1(b) of the Agreement on Safeguards, such as the Section 232 measures, it has the right to suspend concessions or other obligations under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994.<sup>157</sup>

7.45. China acknowledges that the disciplines of the Agreement on Safeguards, including Article 8.2, do not apply to a measure falling under Article 11.1(c) of that Agreement.<sup>158</sup> China argues, however, that the carve-out in Article 11.1(c) of the Agreement on Safeguards does not apply to a measure that is "objectively" a safeguard measure.<sup>159</sup> China relies on the references to Article XIX of the GATT 1994 in Articles 1 and 11.1(a) of the Agreement on Safeguards to contend that Article XIX of the GATT 1994 is the only benchmark for determining whether a particular measure is a safeguard measure to which the rules in the Agreement on Safeguards should apply.<sup>160</sup>

7.46. China further argues that the expression "pursuant to" in Article 11.1(c) of the Agreement on Safeguards "requires that the measure is consistent with the relevant legal basis" and that there is "a genuine connection between the measure and the provision of the GATT 1994 other than Article XIX".<sup>161</sup> In China's view, a genuine connection between the measure and a provision of the GATT 1994 other than Article XIX cannot be established by the invocation of the provision by a Member, but must be determined by objectively analysing the design, structure, and operation of the measure.<sup>162</sup> For China, the domestic legal basis of the Section 232 measures, the procedure under which they were adopted, and the non-notification of the measures to the WTO Committee on Safeguards are not dispositive in determining the applicable rules.<sup>163</sup> China contends that the

<sup>150</sup> China's first written submission, paras. 80-81; response to Panel question No. 73, para. 21.

<sup>151</sup> China's first written submission, paras. 103-148 (referring to Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.57-5.62).

<sup>152</sup> China's first written submission, para. 103; response to Panel question No. 27, para. 71.

<sup>153</sup> China's first written submission, para. 148. See also first written submission, paras. 113-135 (where China argues that the domestic legal basis for the Section 232 measures, the reports underlying these measures, as well as the proclamations constituting them mirror the factors under Articles 2 and 4 of the Agreement on Safeguards).

<sup>154</sup> China's response to Panel question No. 30, paras. 79-81; first written submission, paras. 89-90; opening statement at the first meeting of the Panel, paras. 41 and 43.

<sup>155</sup> China's first written submission, para. 149.

<sup>156</sup> China's first written submission, para. 152.

<sup>157</sup> China's response to Panel question No. 72.

<sup>158</sup> China's response to Panel question No. 72, para. 16 (where China also states that Members affected by measures falling under Article 11.1(c) of the Agreement on Safeguards would not have the right to suspend concessions or other obligations under Article XIX:3 of the GATT 1994).

<sup>159</sup> China's opening statement at the second meeting of the Panel, para. 46.

<sup>160</sup> China's response to Panel question No. 73, para. 30.

<sup>161</sup> China's response to Panel question No. 73, para. 26. (emphasis omitted)

<sup>162</sup> China's response to Panel question No. 73, para. 27.

<sup>163</sup> China's response to Panel question No. 85.

examination of those measures based on their objective legal characteristics would give meaning to both Articles 11.1(a) and 11.1(c) of the Agreement on Safeguards, such that the latter is not interpreted in a way that diminishes the application of the former.<sup>164</sup>

7.47. In its comments on the findings by the panel in *US – Steel and Aluminium Products (China)* concerning the applicability of the WTO safeguards regime to the Section 232 measures, China argues that the measures at issue before this Panel are different (namely, China's additional duties measure and not the United States' measures). China also contends that this Panel must conduct its own objective assessment of the matter before it. Finally, China disagrees with the findings in that panel report, arguing that they were based on an inappropriate interpretation of Article 11.1(c) of the Agreement on Safeguards and overly emphasize the United States characterization of the Section 232 measures.<sup>165</sup>

## 7.2.2 Analysis by the Panel

### 7.2.2.1 Introduction

7.48. The parties hold diverging views on which covered agreement applies to the measure at issue in this dispute. On the one hand, China argues that its additional duties measure is subject to Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, and therefore that the application of Articles I and II of the GATT 1994 to the measure is suspended.<sup>166</sup> On the other hand, the United States maintains that the challenged measure is subject to Articles I and II of the GATT 1994, and that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 are not applicable.<sup>167</sup>

7.49. The Panel will begin by setting out its understanding of the provisions in the DSU concerning the assessment of the applicability of the relevant covered agreements in a dispute. The Panel will then decide the order in which it will conduct its analysis. Specifically, the Panel will decide whether it will begin with a review of the United States' claims under Articles I and II of the GATT 1994 before examining China's argument that the application of the obligations and concessions under those two provisions is suspended within the meaning of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 or vice versa.

### 7.2.2.2 The Panel's duty to assess the applicability of the relevant covered agreements

7.50. Article 11 of the DSU requires a panel to make "an objective assessment of the matter before it, including an objective assessment of the applicability of and conformity with the relevant covered agreements". This requirement applies in all disputes, including those where the parties agree on which relevant covered agreements apply to the measures at issue.<sup>168</sup> In the specific circumstances of this case, the requirement to make an objective assessment of the applicability of the relevant covered agreements is of particular significance given the parties' disagreement.

7.51. Under Article 7.2 of the DSU, a panel is required to address "the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". In this dispute, while the United States has raised claims under Articles I and II of the GATT 1994 in its panel request, China has identified Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 as the provisions applicable to the additional duties measure. Both parties have made extensive arguments regarding the applicability (or non-applicability) of these provisions to the measure at issue. The Panel therefore considers that all of these provisions are "relevant" within the meaning of Article 7.2 of the DSU and must be addressed in the Panel's analysis.

7.52. Reading Articles 7.2 and 11 of the DSU together, the Panel is of the view that, in making an objective assessment of the matter before it, it must determine which provisions of the covered agreements apply to China's additional duties measure. To examine the United States' claims under Articles I and II of the GATT 1994 without determining their relationship with other provisions raised

<sup>164</sup> China's response to Panel question No. 73, para. 31.

<sup>165</sup> China's communications (20 January and 10 February 2023).

<sup>166</sup> China's first written submission, paras. 1-4.

<sup>167</sup> United States' first written submission, paras. 50 and 67; second written submission, paras. 21 and 92.

<sup>168</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.

by China (specifically, Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994) would overlook a disputed issue between the parties and not assist the DSB "in making the recommendations or in giving the rulings provided for in the covered agreements", as prescribed in Article 11 of the DSU. The Panel further considers that this would be at odds with the aim of the dispute settlement mechanism, as set out in Article 3.7 of the DSU, of securing a positive solution to a dispute.

7.53. The Panel is mindful of the limits of its authority when assessing the applicability of the relevant covered agreements to the measure at issue in this dispute. Specifically, examining the applicability of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 to China's additional duties measure does not imply that the Panel may make findings on the consistency of the additional duties measure with those two provisions. While Articles 11 and 7.2 of the DSU require the Panel to determine the provisions applicable to the additional duties measure, the Panel can only make findings on the claims raised and provisions listed in the United States' panel request<sup>169</sup>, which does not include Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994. Accordingly, the Panel will only consider Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 to the extent necessary to determine the applicability of these provisions to the measure at issue.

### 7.2.2.3 Order of analysis

7.54. The Panel now turns to consider the order in which to conduct its analysis. One possibility would be to begin by examining the United States' claims under Articles I and II of the GATT 1994, and then proceeding to assess the applicability of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 to China's additional duties measure. The United States and Egypt favour this approach.<sup>170</sup> Alternatively, the Panel could begin by examining the applicability of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994. Under this approach, the Panel would only examine the United States' claims under Articles I and II of the GATT 1994 if it were to conclude that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 do not apply to the additional duties measure. China and several third parties are in favour of this option.<sup>171</sup>

7.55. Neither the DSU nor the relevant provisions of the GATT 1994 or the Agreement on Safeguards prescribe a mandatory order of analysis that must be followed in addressing the issues raised in this dispute. The Panel thus has discretion to structure its order of analysis in the way it considers most appropriate, provided that its choice is in line with its mandate and functions as laid down in the DSU.<sup>172</sup>

7.56. In the specific circumstances of this case, the Panel considers that beginning with the question of whether Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 apply to China's additional duties measure is the most appropriate course of action, for the reasons that follow.

7.57. Article XIX:3(a) of the GATT 1994 allows Members to "suspend ... the application ... of ... substantially equivalent concessions or other obligations under this Agreement" to the trade of another Member taking action under Article XIX:1 of the GATT 1994. Article 8.2 of the Agreement on Safeguards, which clarifies the disciplines of Article XIX:3(a) of the GATT 1994<sup>173</sup>, similarly allows Members, under certain conditions, to "suspend ... the application of substantially equivalent concessions or other obligations under GATT 1994" to the trade of another Member applying a

<sup>169</sup> A panel making findings on provisions that are not listed in the panel request would be acting *ultra petita*, and thus inconsistently with Article 11 of the DSU. Appellate Body Report, *Chile – Price Band System*, para. 173.

<sup>170</sup> United States' response to Panel question No. 18; Egypt's response to Panel question No. 2(a).

<sup>171</sup> China's response to Panel question No. 18; Canada's response to Panel question No. 2(a); European Union's response to Panel question No. 2(a); Japan's response to Panel question No. 2(a); Norway's response to Panel question No. 2; Russian Federation's response to Panel question No. 2; Switzerland's response to Panel question No. 2; Türkiye's response to Panel question No. 2; Ukraine's third-party submission, para. 15.

<sup>172</sup> See Appellate Body Report, *Colombia – Textiles*, para. 5.20.

<sup>173</sup> Agreement on Safeguards, preamble, second recital: "Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (*Emergency Action on Imports of Particular Products*) ...".

safeguard measure. Measures falling within the scope of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 thus "suspend" the application of concessions or other obligations under the GATT 1994. In the context of these two provisions, the Panel understands the notion of a suspension of concessions or other obligations to mean that, provided certain conditions are met, Members affected by the application of a safeguard measure may temporarily lift the application of tariff concessions or other GATT obligations *vis-à-vis* the Member applying the safeguard measure. In such cases, measures falling within the scope of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 would not simultaneously be subject to GATT rules governing tariff concessions or other obligations that have been suspended.

7.58. The Panel therefore considers it most logical to begin its analysis by first determining whether Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 apply to China's additional duties measure, suspending concessions and obligations under Articles I and II of the GATT 1994. If that were the case, the Panel would have to conclude its analysis with a finding that Articles I and II of the GATT 1994 do not apply to China's additional duties measure. If, however, the Panel were to find that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 do not apply to the measure at issue, this would mean that the application of Articles I and II of the GATT 1994 has not been suspended. Consequently, the Panel would need to review the consistency of China's additional duties measure with the latter set of provisions, as per the claims raised by the United States.

7.59. Beginning with an assessment of the applicability of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 has the benefit of allowing the Panel to examine the United States' claims under Articles I and II of the GATT 1994 only to the extent necessary, that is, only if the Panel determines that those provisions actually apply to China's additional duties measure. Otherwise, the Panel would need to make interim findings under Articles I and II of the GATT 1994, which would become moot if the Panel subsequently were to find that the application of those provisions to the additional duties measure is suspended under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994.

7.60. Accordingly, the Panel will proceed to examine whether Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 apply to the additional duties measure. The Panel commences by interpreting these provisions in accordance with the customary rules of interpretation of public international law.<sup>174</sup>

#### **7.2.2.4 Interpretation of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994**

7.61. Article 8.2 of the Agreement on Safeguards (*Level of Concessions or Other Obligations*) reads:

If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, 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, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

7.62. Article XIX:3(a) of the GATT 1994 (*Emergency Action on Imports of Particular Products*) reads:

If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such

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<sup>174</sup> Article 3.2 of the DSU.

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action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

7.63. Article 8.2 of the Agreement on Safeguards sets out the right of a Member "to suspend ... concessions or other obligations under GATT 1994 [...] to the trade of" another Member, provided that certain conditions are met. The exercise of this right is part of a process laid down in Article 8 of the Agreement on Safeguards designed to preserve the level of concessions and other obligations existing under the GATT 1994.

7.64. In this respect, Article 8.1 of the Agreement on Safeguards requires Members proposing to apply a safeguard measure (or seeking to extend its application) to endeavour to maintain, *vis-à-vis* other Members affected by that safeguard measure, a level of concessions or other obligations substantially equivalent to that existing under the GATT 1994. To this effect, Article 8.1 of the Agreement on Safeguards establishes that the Members concerned may agree on adequate means of trade compensation for the adverse effects of the safeguard measure on their trade. Article 8.2 of the Agreement on Safeguards then stipulates that, if the Member applying the safeguard measure and the affected exporting Members fail to reach an agreement on adequate means of trade compensation, the affected Members shall have the right, subject to certain conditions, to suspend the application of substantially equivalent concessions or other obligations under the GATT 1994 to the trade of the Member applying the safeguard measure. Next, Article 8.3 of the Agreement on Safeguards sets out certain temporal and substantive limitations on the exercise of the right to suspend concessions or other obligations under the GATT 1994 *vis-à-vis* the Member applying a safeguard measure.

7.65. The Panel considers that the ordinary meaning of the terms of Article 8.2 of the Agreement on Safeguards plainly links the right to suspend concessions or other obligations under the GATT 1994 to the application of a safeguard measure by another Member. Indeed, the provision stipulates that affected exporting Members "shall be free ... to suspend ... the application of substantially equivalent concessions or other obligations ... to the trade of the Member applying *the safeguard measure*".<sup>175</sup> In the Panel's view, this language indicates that the right under Article 8.2 of the Agreement on Safeguards becomes available only to rebalance the adverse effects of a safeguard measure. The French and Spanish versions of Article 8.2 of the Agreement on Safeguards equally reserve the right provided in that provision only to Members affected by a "*mesure de sauvegarde*" or a "*medida de salvaguardia*".<sup>176</sup>

7.66. An examination of the text of Article 8.2 of the Agreement on Safeguards shows that the right to suspend concessions or other obligations under the GATT 1994 established in this provision is subject to several requirements, including that: (a) no agreement on adequate means of trade compensation maintaining a level of concessions or other obligations substantially equivalent to those existing under the GATT 1994 is reached between the Member proposing to apply or extend a safeguard measure and other Members having a substantial interest as exporters of the product concerned, within 30 days from the application of the safeguard measure; (b) not more than 90 days have passed from the application of the safeguard measure; and (c) a Member affected by a safeguard measure suspends the application of "substantially equivalent" concessions or other obligations to the trade of the Member applying the safeguard measure. The Panel observes that all of these requirements are contingent upon a safeguard measure being applied or extended by another Member.<sup>177</sup>

7.67. The immediate context of Article 8.2 of the Agreement on Safeguards supports the Panel's understanding. Article 8 of the Agreement on Safeguards refers to "safeguard measure" five times, and to "such a measure" twice. Only in one case does Article 8 refer to "the measure", without further qualification, at the end of the final sentence of paragraph 1. There, the provision stipulates that the Members concerned may agree on adequate means of trade compensation for the adverse effects of "the measure" on their trade. For the Panel, this can only be read as referring to the

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<sup>175</sup> Emphasis added.

<sup>176</sup> Under Article 33(1) of the Vienna Convention, "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail".

<sup>177</sup> A fourth requirement in Article 8.2 of the Agreement on Safeguards envisages that the right to suspend concessions or other obligations be exercised upon expiration of 30 days from the day on which written notice of the proposed suspension of concessions or other obligations is received by the Council for Trade in Goods, provided that the latter does not disapprove it.

"safeguard measure" mentioned at the beginning of the paragraph, which is the basis for the negotiations and eventual agreement foreseen in this final sentence. This understanding is consistent with the logic and the structure of Article 8 of the Agreement on Safeguards as a whole, which, as noted above, envisages a process that is premised on the adoption or extension of a safeguard measure. All other steps outlined in Article 8 of the Agreement on Safeguards flow from, and depend on, this premise. The immediate context of Article 8.2 of the Agreement on Safeguards thus underscores that a safeguard measure is a necessary precondition and the basis for the rights and procedures laid out therein.

7.68. The Panel's understanding of Article 8.2 of the Agreement on Safeguards is also consistent with the broader context of the Agreement on Safeguards. In this connection, the Panel considers Article 11.1 of the Agreement on Safeguards (*Prohibition and Elimination of Certain Measures*) to be particularly relevant. This provision establishes certain rights and obligations for Members depending on the characterization of a measure under the Agreement on Safeguards. First, Article 11.1(a) stipulates that Members "shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement". This provision must be read in conjunction with Article 1 of the Agreement on Safeguards, according to which the Agreement "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994". Thus, Article 11.1(a) of the Agreement on Safeguards establishes that Members can take or seek safeguard measures, which must conform with Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards.

7.69. Under Article 11.1(b), Members shall not "seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side". To the extent that any such measures were in effect on the date of entry into force of the WTO Agreement, they should have either been phased out within a short time-frame after the entry into force of the Agreement on Safeguards or brought into conformity with the provisions thereof.

7.70. Finally, Article 11.1(c) provides that the Agreement on Safeguards does not apply to "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994".

7.71. Article 11.1 of the Agreement on Safeguards conditions the disciplines applicable to measures upon their characterization under the three subparagraphs of that provision. If a Member is seeking or taking a safeguard measure, that Member is subject to several obligations under the Agreement on Safeguards. This includes endeavouring "to maintain a substantially equivalent level of concessions or other obligations to that existing under the GATT 1994 between it and exporting Members" affected by the safeguard measure as provided in Article 8.1. Relatedly, Members affected by a safeguard measure have a right to suspend concessions or other obligations in response to that measure under the terms of Article 8.2 of the Agreement on Safeguards. This right is, however, not available if the underlying measure has a different characterization under the subparagraphs of Article 11.1 of the Agreement on Safeguards, and is correspondingly subject to different legal disciplines.

7.72. Reading the multiple references to a "safeguard measure" in Article 8 of the Agreement on Safeguards in this broader context, the Panel considers that the characterization of an underlying measure as a safeguard measure or otherwise is a necessary analytical step in determining the applicability or inapplicability of Article 8.2 of the Agreement on Safeguards.

7.73. The Panel further considers this understanding to be consistent with the object and purpose of the Agreement on Safeguards. The second recital of the Agreement's preamble recognizes "the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (*Emergency Action on Imports of Particular Products*), to re-establish multilateral control over safeguards and eliminate measures that escape such control". The preamble thus confirms the distinct treatment of measures depending on their characterization under the Agreement on Safeguards. In the Panel's view, such distinction is therefore central to the structure and logic of the entire Agreement on Safeguards and should inform the reading of its provisions. In particular, this suggests to the Panel that Article 8.2 of the Agreement on Safeguards can only be interpreted as



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concerning rights and obligations related to or flowing from safeguard measures, which are the measures over which the Agreement on Safeguards establishes multilateral control.

7.74. Based on the foregoing, the Panel considers that the ordinary meaning of the terms of Article 8.2 of the Agreement on Safeguards, in their context and in the light of the object and purpose of the Agreement on Safeguards, conditions the right to suspend concessions or other obligations under the GATT 1994 upon a "safeguard measure" being applied by another Member.

7.75. Article XIX:3(a) of the GATT 1994 is the other relevant provision for the purposes of the Panel's assessment. According to Article XIX:3(a), a Member affected by "the action" taken or continued by another Member under paragraph 1 of the same provision shall be free, subject to certain conditions, to suspend the application of GATT concessions or obligations to the trade of the Member taking such action. Article XIX:3(a) of the GATT 1994 also provides that the GATT concessions or obligations so suspended must be "substantially equivalent to" the "action" envisaged under Article XIX:1 of the GATT 1994.

7.76. Under Article XIX:3(a) of the GATT 1994, for a Member to have a right to suspend concessions or other obligations under the GATT 1994, another Member must have taken or continued an "action" under Article XIX:1 of the GATT 1994. According to Article 1 of the Agreement on Safeguards, measures provided for in Article XIX of the GATT 1994 shall be understood to be safeguard measures. It follows that, like Article 8.2 of the Agreement on Safeguards, Article XIX:3(a) of the GATT 1994 establishes a conditional right to suspend concessions or other obligations under the GATT 1994 in response to a safeguard measure. Thus, in the Panel's view, the application of a safeguard measure is a necessary precondition under both Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 for this right to become available to affected Members.

7.77. The Panel notes the parties' agreement that, in the absence of a safeguard measure applied by a Member, another Member would not have the right, under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, to suspend concessions or other obligations under the GATT 1994.<sup>178</sup> China, however, considers that a measure may be subject to or covered by Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 regardless of whether an underlying safeguard measure exists, but that in the absence of an underlying safeguard, the measure taken in response would be inconsistent with those provisions.<sup>179</sup> For China, a Member would not "have the 'right' to implement a rebalancing measure" in the absence of an underlying safeguard measure because that "would make the rebalancing measure inconsistent with Article 8.2". However, such a circumstance would not "make Article 8.2 inapplicable in the first place."<sup>180</sup>

7.78. On the basis of its interpretation of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, the Panel is not persuaded by China's position. As the Panel has explained, both provisions plainly link the right to suspend concessions or other obligations to the application of a safeguard measure by a Member. It is this safeguard measure that triggers the availability of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994. In the Panel's view, in the absence of an underlying safeguard measure, concessions and other obligations under the GATT 1994 may not be suspended within the meaning of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, as both these provisions would simply not apply. Any question regarding the consistency of measures taken with Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 would therefore not arise.

7.79. China further argues that if an underlying safeguard measure were a requirement for the applicability of Article 8.2 of the Agreement on Safeguards, that provision would be rendered without effect. This is because, in its view, whether a Member has applied such a safeguard measure would have to be confirmed by a WTO panel before an exporting Member could suspend concessions or other obligations in response, but the dispute settlement process exceeds the timeline for the exercise of the rights foreseen in Article 8 of the Agreement on Safeguards. Hence, China argues that if an underlying safeguard were a condition precedent to the application of Article 8.2 of the

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<sup>178</sup> United States' second written submission, paras. 140-143; China's second written submission, para. 91.

<sup>179</sup> China's second written submission, paras. 92-95.

<sup>180</sup> China's second written submission, para. 95. (emphasis omitted)

Agreement on Safeguards, it would in practice be impossible for a Member to ever avail itself of the right provided for under Article 8.2 of the Agreement on Safeguards within the specified time-frame.<sup>181</sup>

7.80. The Panel does not share China's view. The Panel does not interpret Article 8 of the Agreement on Safeguards to require in all cases confirmation by a WTO panel regarding the application of a safeguard measure by a Member before another Member can suspend concessions or other obligations under the GATT 1994. Whether a Member has applied a safeguard measure may not be a point of contention, and the Members concerned may resort to the provisions of Article 8 of the Agreement on Safeguards without having recourse to dispute settlement. In the present case, however, the Panel notes that (i) the application of an underlying safeguard measure by the United States is a point of contention; (ii) dispute settlement proceedings have been initiated; and (iii) the parties' disagreement touches upon the determination of the relevant provisions of the covered agreements applicable to the measure at issue. In these circumstances, the Panel is required to examine the issue as part of its objective assessment.

7.81. Accordingly, based on its understanding of the text, the logic, and the structure of the relevant provisions of the Agreement on Safeguards and the GATT 1994, the Panel considers that whether Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 apply to China's additional duties measure depends on the characterization under the Agreement on Safeguards of the underlying measure adopted by the United States.

#### **7.2.2.5 Whether Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 apply to China's additional duties measure**

7.82. The relevant measures of the United States, in response to which China has imposed the additional duties measure, are the measures "Adjusting Imports of Aluminum" and "Adjusting Imports of Steel" into the United States (the Section 232 measures).<sup>182</sup>

7.83. As a preliminary matter, the Panel notes China's argument that the Section 232 measures are not the measures at issue in this dispute and that the Panel should assess the applicability of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 to its additional duties measure without considering the Section 232 measures.<sup>183</sup> The United States does not object to the consideration of the Section 232 measures by this Panel.<sup>184</sup> Both parties have submitted arguments and evidence concerning the background, legal basis, and application of the Section 232 measures.<sup>185</sup>

7.84. In the light of its earlier conclusion that the applicability of Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 to the additional duties measure depends on whether a Member has applied a safeguard measure, the Panel does not consider that it can make an objective assessment of the applicability of the relevant provisions of the covered agreements to the measure at issue in this dispute without reviewing the characterization of the Section 232 measures under the Agreement on Safeguards. In the Panel's view, the examination of the arguments and evidence submitted by the parties in this connection is essential to secure a positive solution to the present dispute. The Panel will accordingly proceed to examine the characterization of the Section 232 measures under the Agreement on Safeguards.

7.85. The Panel recalls that Article 11.1 of the Agreement on Safeguards stipulates the disciplines that apply to a measure depending upon its characterization under that provision.<sup>186</sup> China argues

<sup>181</sup> China's response to Panel question No. 35, paras. 94-95; No. 24, para. 59.

<sup>182</sup> China's first written submission, para. 1; opening statement at the first meeting of the Panel, para. 3. The Panel notes that the applicability of the Agreement on Safeguards and Article XIX of the GATT 1994 to the United States' Section 232 measures was also examined by the panel in *US – Steel and Aluminium Products (China)*. Recalling its duty under Article 11 of the DSU, this Panel will make its own objective assessment of the characterization of the Section 232 measures and will refer to the reasoning of that panel to the extent that it finds the same relevant and persuasive.

<sup>183</sup> China's first written submission, paras. 81 and 82; second written submission, paras. 119 and 121; response to Panel question No. 24.

<sup>184</sup> United States' response to Panel question No. 24.

<sup>185</sup> For instance, United States' second written submission, paras. 11-17 and 132-138; China's first written submission, section IV.D.

<sup>186</sup> See para. 7.71 above.

that the Section 232 measures are "safeguard measures" under the Agreement on Safeguards, which must conform to the disciplines set out in Article 11.1(a) of that Agreement (namely, Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards). China also regards the Section 232 measures as similar to voluntary export restraints and, therefore, subject to Article 11.1(b) of the Agreement on Safeguards. In the United States' view, the Section 232 measures are "measures sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX" within the meaning of Article 11.1(c) of the Agreement on Safeguards, to which that Agreement "does not apply".

7.86. The Panel observes that, in relation to the applicability of the Agreement on Safeguards, both parties agree that Article 11.1(c) excludes certain measures from the scope of application of that Agreement.<sup>187</sup> They further acknowledge that Members affected by measures to which the Agreement on Safeguards does not apply do not have the right to take action under Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994.<sup>188</sup> The point of contention between the parties, based on their differing interpretations of Article 11.1(c) of the Agreement on Safeguards<sup>189</sup>, is whether the Section 232 measures are measures of the kind described in Article 11.1(c).

7.87. The Panel will begin its analysis by setting out its understanding of Article 11.1(c) of the Agreement on Safeguards, before turning to consider the Section 232 measures in the light of its interpretation of that provision.

#### **7.2.2.5.1 Interpretation of Article 11.1(c) of the Agreement on Safeguards**

7.88. Article 11.1 of the Agreement on Safeguards (*Prohibition and Elimination of Certain Measures*) reads:

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.<sup>[3,4]</sup> These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

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

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<sup>3</sup> An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

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<sup>187</sup> United States' response to Panel question No. 73; China's comments on the United States' response to Panel question No. 73.

<sup>188</sup> United States' response to Panel question No. 72; China's response to Panel question No. 72.

<sup>189</sup> According to China, for the Section 232 measures to be "pursuant to" provisions of the GATT 1994 other than Article XIX, they must be "consistent with" such other provisions. China's response to Panel question No. 73. On the other hand, the United States does not seem to consider that the expression "pursuant to" in Article 11.1(c) means the consistency of a measure with provisions of the GATT 1994 other than Article XIX. (See United States' second written submission, para. 116 (where the United States argues that Article 11.1(c) precludes the application of the Agreement on Safeguards to any measure sought, taken, or maintained "under" a provision of the GATT 1994 other than Article XIX); response to Panel question No. 73 (where the United States notes that in using the expression "pursuant to", Article 11.1(c) departs from previous drafts of the Agreement on Safeguards, which referred to measures "consistent with" or "taken in conformity with" certain GATT provisions)).

<sup>4</sup> Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

7.89. The Panel understands the phrase "[t]his Agreement does not apply" in Article 11.1(c) to explicitly limit the scope of application of the Agreement on Safeguards by carving out "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX" from the purview of that Agreement.<sup>190</sup> This is also recognized in the French and Spanish texts of Article 11.1(c), in which the expressions "*ne s'applique pas*" and "*no es aplicable*" respectively signify that the Agreement on Safeguards is inapplicable to certain "*mesures*" or "*medidas*". Further, the Panel sees no indication in the text of the Agreement on Safeguards that the carve-out in Article 11.1(c) is subject to or qualified by other provisions in that Agreement. The Panel thus understands that all disciplines of the Agreement on Safeguards are inapplicable to measures of the kind described in Article 11.1(c) of the Agreement, including Article 8.2 of the Agreement on Safeguards, which foresees that certain rights are available only to Members affected by safeguard measures. Moreover, the Panel does not consider that Article XIX:3(a) of the GATT 1994 provides Members with a right to suspend concessions or other obligations under the GATT 1994 in response to measures that are not subject to the disciplines of the Agreement on Safeguards.<sup>191</sup>

7.90. The expression "pursuant to" in Article 11.1(c) of the Agreement on Safeguards links "measures sought, taken or maintained by a Member" to "provisions of GATT 1994 other than Article XIX". Depending on the context in which it is used, "pursuant to" may have different meanings. A measure could be "pursuant to" a provision in the sense that it is consistent or in conformity with that provision. A measure could also be "pursuant to" a provision when it is adopted by virtue of or under that provision, regardless of whether it is consistent with that provision. The Panel notes that the Agreement on Safeguards uses the expression "pursuant to" in different ways. In some instances, the expression refers to a requirement of consistency with a provision of the covered agreements; in others, it appears to denote measures taken under a provision of the covered agreements.<sup>192</sup> To determine the meaning of "pursuant to" in Article 11.1(c) of the Agreement on Safeguards, the Panel will assess the ordinary meaning of this expression in the context in which it appears in Article 11.1(c), and in the light of the object and purpose of the Agreement on Safeguards, as required by the customary rules of interpretation of public international law.<sup>193</sup>

7.91. In Article 11.1(c) of the Agreement on Safeguards, the expression "pursuant to" is part of a provision that pertains to the applicability of the Agreement on Safeguards. Specifically, as suggested by the opening phrase "[t]his Agreement does not apply", Article 11.1(c) determines whether the disciplines applicable to a measure sought, taken, or maintained by a Member are not those provided in the Agreement on Safeguards, but those contained in "provisions of GATT 1994 other than Article XIX". In the Panel's view, to condition the applicability of "provisions of GATT 1994 other than Article XIX" to a measure upon its consistency with such other provisions would conflate two distinct issues, namely, the applicability of the relevant covered agreements and conformity with those agreements. In this light, the Panel is not persuaded by China's argument that the expression "pursuant to" in Article 11.1(c) denotes consistency with provisions of the GATT 1994

<sup>190</sup> The Panel notes that, as per the terms of Article 11.1(c), the Agreement on Safeguards also does not apply to measures sought, taken, or maintained pursuant to "Multilateral Trade Agreements in Annex 1A other than this Agreement" or pursuant to "protocols and agreements or arrangements concluded within the framework of GATT 1994".

<sup>191</sup> The Panel recalls its understanding of the relationship between Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 as set out in paragraph 7.76 above.

<sup>192</sup> For example, Article 2.1 of the Agreement on Safeguards states that "[a] Member may apply a safeguard measure to a product only if that Member has determined, *pursuant to* the provisions set out below", that certain conditions exist. (emphasis added) In this instance, the expression "pursuant to" is part of a provision that has been interpreted as establishing requirements with which Members must comply. (Appellate Body Report, *US – Steel Safeguards*, para. 264). This expression is represented in the French and Spanish texts of Article 2.1 with the terms "*conformément*" and "*con arreglo a*", respectively. Another example is Article 10 of the Agreement on Safeguards, referring to "measures taken pursuant to Article XIX of GATT 1947". The French and Spanish texts of Article 10 describe these measures as "*mesures ... au titre de l'article XIX du GATT de 1947*" and "*medidas ... al amparo del artículo XIX del GATT de 1947*", respectively, and the three authentic texts of this provision do not appear to be referring to consistency of measures with the GATT 1947.

<sup>193</sup> Article 3.2 of the DSU.

other than Article XIX. The Panel's understanding of Article 11.1(c) is that, in the case of measures sought, taken, or maintained by virtue of or under "provisions of GATT other than Article XIX", the Agreement on Safeguards does not apply, irrespective of whether the measures are consistent with such other provisions.

7.92. The Panel finds support for this understanding of Article 11.1(c) in the context provided by the other paragraphs of Article 11.1 of the Agreement on Safeguards. In stipulating that a safeguard measure must be consistent with certain disciplines, Article 11.1(a) requires that the measure "conforms with" the provisions of Article XIX of the GATT 1994 applied "in accordance with" the Agreement on Safeguards. Similarly, concerning the prohibition on seeking, taking, or maintaining voluntary export restraints, orderly marketing arrangements, or any other similar measures, Article 11.1(b) directs that any such measures that are in effect on the date of the entry into force of the WTO Agreement must be brought "into conformity with" the Agreement on Safeguards, or phased out "in accordance with" Article 11.2 of that Agreement. Footnote 3 to Article 11.1(b) specifies that an exporting Member may, under certain conditions, administer an import quota applied as a safeguard measure "in conformity with the relevant provisions of GATT 1994 and [the Agreement on Safeguards]". Thus, where Article 11.1 stipulates an obligation to conform with provisions of the Agreement on Safeguards or with relevant provisions of the GATT 1994, it does so explicitly. In contrast, Article 11.1(c) of the Agreement on Safeguards does not contain any explicit references to consistency with "provisions of GATT 1994 other than Article XIX".

7.93. This is equally true for the French text of the Agreement on Safeguards. In Articles 11.1(a) and 11.1(b), the French text uses the terms "*conforme au*" (or the plural "*conformes aux*" as appropriate) and "*conformément*" to signify obligations to comply with provisions of the Agreement on Safeguards or relevant provisions of the GATT 1994. On the other hand, the French text of Article 11.1(c) conditions the inapplicability of the Agreement on Safeguards on whether the measures in question were sought, taken, or maintained "*en vertu de*" provisions of the GATT 1994 other than Article XIX. The use of different terms in the English and French texts of Article 11.1(c) when compared with the immediately preceding paragraphs of Article 11.1 indicates that "pursuant to" in Article 11.1(c) has a different meaning to consistency with provisions of the GATT 1994 other than Article XIX. Particularly noteworthy is the use of the expression "*en vertu de*" in the French text of Article 11.1(c), which suggests that Article 11.1(c) concerns measures sought, taken, or maintained by virtue of or under provisions of the GATT 1994 other than Article XIX.<sup>194</sup>

7.94. In the Spanish text of the Agreement on Safeguards, the expression corresponding to "pursuant to" in Article 11.1(c) is "*de conformidad con*". This expression has several meanings.<sup>195</sup> Depending on the context, the Spanish text of the Agreement on Safeguards uses the expression "*de conformidad con*" variably to indicate "consistency" with the Agreement, as well as other kinds of relationships between a measure and the relevant provision. For example, the Spanish expression "*de conformidad con*" in Articles 11.1(a) and 11.1(b) of the Agreement on Safeguards appears in the English and French texts as "conformity with" and "*conformément aux*", respectively. In contrast, in footnote 1 to Article 2.1 of the Agreement on Safeguards, the terms corresponding to "*de conformidad con el presente Acuerdo*" are "under this Agreement" and "*au titre du présent accord*" in English and French respectively, which do not seem to denote consistency.<sup>196</sup> Thus, the Panel does not consider

<sup>194</sup> *Dictionnaire Larousse de Français* (defining the expression "*en vertu de*" as "*en conséquence de*", "*par l'effet de*", or "*au nom de*"). The Panel notes the expression "*en vertu de*" only features in two other provisions of the Agreement on Safeguards, both of which confirm the Panel's understanding of this expression as used in Article 11.1(c) of the Agreement. Article 8.1 of the Agreement on Safeguards refers to the level of concessions and other obligations existing "*en vertu du GATT de 1994*", denoted in the English text as "under GATT 1994", and thus does not suggest that concessions or obligations must be in conformity with GATT 1994. Article 12.8 of the Agreement on Safeguards refers to notifications by Members "*qui sont tenus de le faire en vertu du présent accord*". The terms corresponding to notifications "*en vertu du présent accord*" in the English text of Article 12.8 are "by this Agreement". To denote the obligation of making such notifications, the terms "by this Agreement" or "*en vertu du présent accord*" are used together with explicit references to a requirement or, in French, the expression "*[ils] sont tenus de le faire*", respectively.

<sup>195</sup> *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), pp. 420-421 (defining "*de conformidad con*" as "*con arreglo a*", "*a tenor de*", "*en proporción o correspondencia a*", or "*de la misma suerte o manera que*").

<sup>196</sup> For other examples in the covered agreements, see Article 3.9 of the DSU (referring to "the rights of Members to seek authoritative interpretation ... through decision-making under the WTO Agreement" in English, "*droit des Membres de demander une interprétation faisant autorité ... par la prise de décisions au titre de l'Accord sur l'OMC*" in French, and "*el derecho de los Miembros de recabar una interpretación autorizada ...*

that the use of "*de conformidad con*" in Article 11.1(c) in and of itself denotes that "*medidas que un Miembro trate de adoptar, adopte o mantenga*" must be consistent with "*otras disposiciones del GATT de 1994, aparte del artículo XIX*" for the Agreement on Safeguards to be inapplicable. In the Panel's view, read in the context of a provision governing the applicability of the Agreement on Safeguards<sup>197</sup>, "*de conformidad con*" must be understood as referring to measures adopted by virtue of or under certain provisions, but not requiring consistency with such provisions. Accordingly, the three authentic language versions of Article 11.1(c) of the Agreement on Safeguards converge in this respect.

7.95. The Panel's understanding of the terms of Article 11.1(c) comports with the broader context of the Agreement on Safeguards. As clarified in Article 1 of the Agreement, the Agreement on Safeguards "establishes rules for the application of safeguard measures". This "General Provision" resonates in other provisions of the Agreement on Safeguards, which broadly relate to one of two enquiries: (i) whether there is a right to apply safeguard measures, and (ii) if so, whether that right has been exercised within the limits set out in the Agreement.<sup>198</sup> The Agreement on Safeguards thus prescribes rules and requirements for a specific kind of measure identified in that Agreement. The consistency of measures with "provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than [the Agreement on Safeguards]" is not a matter regulated by the Agreement on Safeguards, and Article 11.1(c) must be interpreted taking this important consideration into account.

7.96. In this connection, the Panel recalls its discussion above of the object and purpose of the Agreement on Safeguards, which confirms that different disciplines apply to measures depending on their characterization under the Agreement on Safeguards, as reflected in Article 11.1 of that Agreement.<sup>199</sup> In particular, the Agreement on Safeguards seeks to "re-establish multilateral control over safeguards" (expressed through the mandatory conditions in Article 11.1(a) with which safeguard measures must conform) and to "eliminate measures that escape such control" (expressed through the prohibition of the measures described in Article 11.1(b)). The object and purpose of the Agreement on Safeguards is thus to regulate, and in particular to secure the WTO consistency of, measures of the kind described in Articles 11.1(a) and 11.1(b) of the Agreement, and not those excluded from its scope under Article 11.1(c). The Panel does not consider that an interpretation of Article 11.1(c) of the Agreement of the Safeguards that brings the question of whether a measure is consistent with "provisions of GATT 1994 other than Article XIX" within the scope of the Agreement on Safeguards would be consistent with this clearly articulated aim and focus of the Agreement.

7.97. The parties have also referred to supplementary means of interpretation, such as the preparatory work of the Agreement on Safeguards, in support of their interpretative arguments. Under Article 32 of the Vienna Convention, the Panel may have recourse to this preparatory work to confirm its interpretation of Article 11.1(c) set out above. The Panel observes that early draft texts of the Agreement on Safeguards sought to preserve the rights and obligations of contracting parties regarding trade-restrictive measures "taken in conformity with" or "consistent with" other GATT provisions.<sup>200</sup> These references to conformity and consistency were removed from subsequent drafts of the provision that became Article 11.1(c) of the Agreement on Safeguards, in favour of the expression "pursuant to".<sup>201</sup> The Panel also notes that references to conformity and consistency were only removed from Article 11.1(c) of the Agreement on Safeguards, but retained in the other paragraphs of Article 11.1, which provide context for the interpretation of Article 11.1(c). This

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*mediante decisiones adoptadas de conformidad con el Acuerdo sobre la OMC*" in Spanish); Article 3.11 of the DSU (referring to "requests for consultations under the consultation provisions of the covered agreements" in English, "*demandes de consultations présentées au titre des dispositions des accords visés*" in French, and "*solicitudes de celebración de consultas que se presenten de conformidad con las disposiciones sobre consultas de los acuerdos abarcados*" in Spanish); and Article 4.11 of the DSU (providing that a Member shall be free to request "consultations under paragraph 1 of Article XXII", "*consultations au titre du paragraphe 1 de l'article XXII*", and "*consultas de conformidad con el párrafo 1 del artículo XXII*" in English, French and Spanish, respectively).

<sup>197</sup> See para. 7.91 above.

<sup>198</sup> Appellate Body Report, *US – Line Pipe*, para. 84.

<sup>199</sup> See para. 7.73 above.

<sup>200</sup> Negotiating Group on Safeguards, Chairman's Report on Status of Work in the Negotiating Group (13 July 1990), MTN.GNG/NG9/W/25/Rev.2, p. 3; Negotiating Group on Safeguards, Draft Text of an Agreement (31 October 1990), MTN.GNG/NG9/W/25/Rev.3, p. 9.

<sup>201</sup> Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations (20 December 1991), MTN.TNC/W/FA, p. M.7.

preparatory work thus confirms the Panel's understanding that Article 11.1(c) does not pertain to the consistency of measures excluded from the scope of the Agreement on Safeguards.

7.98. Based on the foregoing, the Panel considers that Article 11.1(c) excludes from the scope of the Agreement on Safeguards measures that are sought, taken, or maintained by virtue of or under provisions of the GATT 1994 other than Article XIX. In the Panel's view, Article 11.1(c) is not concerned with the consistency of such measures with the provisions of the GATT 1994 pursuant to which they are sought, taken, or maintained.

7.99. The Panel now turns to certain interpretive arguments raised by the parties. China maintains that if a measure is "objectively" a safeguard measure, that measure could not have been sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX within the meaning of Article 11.1(c) of the Agreement on Safeguards.<sup>202</sup> The Panel understands China's argument to mean that the assessment of whether a measure was sought, taken, or maintained pursuant to provisions of the GATT 1994 "other than Article XIX" must include consideration of whether the measure has certain features of safeguard measures. The Panel is not persuaded by this argument. An examination of measures under Article 11.1(c) of the Agreement on Safeguards must proceed on the basis of the specific terms of that provision, which provide for the inapplicability of the Agreement on Safeguards to measures adopted "pursuant to" another provision of the GATT 1994. In this respect, the Panel understands that, in referring to provisions of the GATT 1994 "other than Article XIX", the terms of Article 11.1(c) call for determining whether another provision of the GATT 1994 is the legal basis in the covered agreements by virtue of or under which a Member has sought, taken, or maintained a measure.

7.100. The Panel also notes China's concern that the Panel should not interpret Article 11.1(c) of the Agreement on Safeguards in a manner that will "diminish the application of Article 11.1(a)".<sup>203</sup> The Panel does not consider that its understanding of Article 11.1(c) has this effect. The Agreement on Safeguards provides for the inapplicability of the Agreement as a whole, including Article 11.1(a), to measures sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX. Exclusion of such measures from the Agreement on Safeguards is instrumental to preserve the rights of Members under "the basic principles of GATT 1994" on which the Agreement on Safeguards is based.<sup>204</sup> The Panel's interpretation therefore does not diminish the application of Article 11.1(a), but respects the distinct treatment of measures depending on their characterization under the Agreement on Safeguards.<sup>205</sup>

7.101. Finally, both parties have advanced certain interpretive arguments concerning the "constituent features" of or "condition precedent" for safeguard measures.<sup>206</sup> Noting the United States' arguments under Article 11.1(c) of the Agreement on Safeguards, and in the light of the interpretation of that provision rendered above, the Panel is of the view that it would be appropriate to first determine whether the United States' Section 232 measures are excluded from the scope of the Agreement on Safeguards by virtue of Article 11.1(c). Should the Panel find that the Section 232 measures are not so excluded, it will then consider whether they can be characterized as measures regulated by the Agreement on Safeguards and the legal standard for such characterization. Accordingly, the Panel will now turn to examine whether the Section 232 measures were "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX".

#### **7.2.2.5.2 Whether the United States' Section 232 measures are excluded from the scope of application of the Agreement on Safeguards**

7.102. The United States maintains that it adopted the Section 232 measures on aluminium and steel imports pursuant to Article XXI of the GATT 1994, which concerns "Security Exceptions", and thus, pursuant to a provision of the GATT 1994 other than Article XIX. China, however, argues that the design, structure, and expected operation of the Section 232 measures demonstrate otherwise,

<sup>202</sup> China's response to Panel question No. 73.

<sup>203</sup> Ibid.

<sup>204</sup> Agreement on Safeguards, preamble, fourth recital.

<sup>205</sup> See paras. 7.68-7.71 above.

<sup>206</sup> United States' first written submission, paras. 71-88; China's first written submission, paras. 93-102.

and relies, in support of this proposition, on the domestic legal basis for these measures, the reports in the investigations leading to their adoption, and the legal instruments providing for the measures.

7.103. Based on the Panel's interpretation of Article 11.1(c) of the Agreement on Safeguards, the Panel will examine whether the Section 232 measures were sought, taken, or maintained by virtue of or under Article XXI of the GATT 1994, such that the Agreement on Safeguards does not apply. In this respect, the Panel is guided by its duty under Article 11 of the DSU to conduct an objective assessment of the matter before it, which in the context of Article 11.1(c) of the Agreement on Safeguards pertains to the applicability of, and not consistency with, provisions of the GATT 1994 other than Article XIX. The Panel will assess the arguments and evidence advanced by the parties concerning the Section 232 measures in this light.

7.104. The domestic legal basis for the United States' measures was Section 232 of the Trade Expansion Act of 1962 titled "Safeguarding national security" (Section 232).<sup>207</sup> Under Section 232, the United States' Secretary of Commerce may investigate "the effects on the national security of imports of [an] article" into the United States.<sup>208</sup> Based on the Secretary of Commerce's findings and recommendations, the President of the United States may take action under Section 232 to adjust imports of the investigated article into the United States so that they will not threaten to impair its national security.<sup>209</sup> Section 232 also states that, in exercise of their respective authorities under that provision, the President and the Secretary of Commerce "shall ... give consideration to" a non-exhaustive list of factors, such as the domestic production needed for the United States' projected national defence requirements, the capacity of its domestic industries to meet such requirements, and the importation of goods that affects the capacity of the United States to meet such requirements.<sup>210</sup>

7.105. In April 2017, as authorized under Section 232, the Secretary of Commerce began investigations into the effects of aluminium and steel imports on the United States' national security.<sup>211</sup> These investigations concluded that excessive aluminium and steel imports were weakening the United States' internal economy and, therefore, threatened to impair its national security as defined in Section 232. In arriving at this conclusion, the Secretary of Commerce referred to rising levels of imports of foreign aluminium and steel, and the "substantial risk" that this would displace the United States' domestic capacity to produce aluminium and steel for critical infrastructure and national defence.<sup>212</sup> Specifically, the reports of these investigations note that "it is the ability to quickly shift production capacity used for commercial products to defence and critical infrastructure production that provides the United States a surge capability that is vital to national security, especially in an unexpected or extended conflict or national emergency." Thus, in the Secretary of Commerce's view, the risk to the financial viability of the United States' domestic aluminium and steel industries, and their competitiveness in commercial markets, placed at risk the United States' capability to meet its defence and critical infrastructure needs.<sup>213</sup>

7.106. Acting on these findings and the related recommendations, the President of the United States issued several proclamations adjusting imports of aluminium and steel into the United States. These proclamations constitute the Section 232 measures. They provide for (i) *ad valorem* tariffs of 10% and 25% on aluminium and steel imports, respectively, applicable in addition to any duties provided in the Harmonized Tariff Schedule of the United States<sup>214</sup>; (ii) exemptions for

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<sup>207</sup> Section 232, (Exhibits USA-20, CHN-23).

<sup>208</sup> Section 232(b), (Exhibits USA-20, CHN-23).

<sup>209</sup> Section 232(c), (Exhibits USA-20, CHN-23).

<sup>210</sup> Section 232(d), (Exhibits USA-20, CHN-23). The Panel notes that these criteria are also specified in the United States Code of Federal Regulations, Title 15, Part 705, (Exhibit USA-25), which sets forth "the procedures by which the [United States Department of Commerce] shall commence and conduct an investigation to determine the effect on the national security of the imports of any article" and based on which "the Secretary shall make a report and recommendation to the President for action or inaction regarding an adjustment of the imports of the article."

<sup>211</sup> Section 232 investigation into steel imports, (Exhibits USA-30, CHN-8); Section 232 investigation into aluminium imports, (Exhibits USA-31, CHN-9).

<sup>212</sup> Section 232 investigation into steel imports, (Exhibits USA-30, CHN-8), p. 55; Section 232 investigation into aluminium imports, (Exhibits USA-31, CHN-9), p. 104.

<sup>213</sup> Section 232 investigation into steel imports, (Exhibits USA-30, CHN-8), pp. 55-56; Section 232 investigation into aluminium imports, (Exhibits USA-31, CHN-9), p. 105.

<sup>214</sup> Proclamation 9704, (Exhibits USA-33, CHN-6), p. 11621; Proclamation 9705, (Exhibits USA-32, CHN-5), p. 11627.



select countries from these tariffs<sup>215</sup>; (iii) "quota treatment" for aluminium and steel imports from select countries<sup>216</sup>; and (iv) a mechanism authorizing the United States' Secretary of Commerce to relieve certain aluminium and steel imports from the aforementioned tariffs and quotas.<sup>217</sup>

7.107. The tariffs on aluminium and steel imports were imposed through Proclamations 9704 and 9705, respectively. These proclamations note that aluminium and steel articles are being imported into the United States "in such quantities and under such circumstances as to threaten to impair the national security of the United States", and state that the tariffs imposed are necessary to address this threat. Specifically, the tariffs were imposed under these proclamations with a view to helping domestic aluminium and steel industries, so as to reduce the United States' need to rely on foreign producers for aluminium and steel and, as a result, "ensure that domestic producers can continue to supply all the [aluminium and steel] necessary for critical industries and national defense". Proclamations 9704 and 9705 reason that, without the relief provided through these tariffs, the United States' domestic industries would continue to decline, leaving the United States at risk of becoming reliant on foreign producers to meet its national security needs concerning aluminium and steel, a situation that the proclamations describe as "fundamentally inconsistent with the safety and security of the American people".<sup>218</sup>

7.108. Proclamations 9704 and 9705, and the "national security interests" of the United States raised therein, formed the basis for further action by the United States.<sup>219</sup> In this respect, the Panel considers relevant the exemptions granted to certain countries from the tariffs on aluminium and steel imports. Following determinations that imports from those countries no longer threatened to impair its national security, the United States exempted (i) from tariffs on aluminium imports, Argentina and Australia; and (ii) from tariffs on steel imports, Argentina, Australia, Brazil, and the Republic of Korea.<sup>220</sup> These exemptions were granted on the basis of "important security relationships" between the United States and the exempted countries, and their shared concern regarding circumstances that threaten to impair national security, namely global excess capacity in aluminium and steel.<sup>221</sup> Proclamations 9710 and 9711 describe in greater detail the various facets of the United States' security relationships with the countries exempted from the aluminium and steel tariffs, including security, defence and intelligence partnerships, shared commitments towards addressing security concerns, and military alliances.<sup>222</sup>

7.109. The application of these tariffs and the related exemptions by the United States reveals the design and expected operation of the Section 232 measures. In connection with the tariffs, the Panel notes that Proclamations 9704 and 9705 provide for their modification or termination based on monitoring and review of the "status of [aluminium or steel] imports with respect to the national security" of the United States.<sup>223</sup> The United States in fact modified the duty applicable to steel imports from Türkiye following such monitoring and review.<sup>224</sup> The Panel also considers relevant that

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<sup>215</sup> Proclamation 9740, (Exhibits USA-36, CHN-11), p. 20685; Proclamation 9739, (Exhibit USA-37), pp. 20678-20679; Proclamation 9759, (Exhibits USA-38, CHN-12), p. 25858; and Proclamation 9758, (Exhibits USA-39, CHN-13), p. 25850.

<sup>216</sup> Proclamation 9740, (Exhibits USA-36, CHN-11), Annex; Proclamation 9759, (Exhibits USA-38, CHN-12), Annex; Proclamation 9758, (Exhibits USA-39, CHN-13), Annex.

<sup>217</sup> Proclamation 9704, (Exhibits USA-33, CHN-6), p. 11621; Proclamation 9705, (Exhibits USA-32, CHN-5), p. 11627; Proclamation 9776, (Exhibit USA-42), p. 45020; Proclamation 9777, (Exhibit USA-41), p. 45026.

<sup>218</sup> Proclamation 9704, (Exhibits USA-33, CHN-6), pp. 11619-11620; Proclamation 9705, (Exhibits USA-32, CHN-5), pp. 11626-11627.

<sup>219</sup> Proclamation 9711, (Exhibits USA-34, CHN-10), p. 13361; Proclamation 9710, (Exhibit USA-35), p. 13355; Proclamation 9740, (Exhibits USA-36, CHN-11), p. 20683; Proclamation 9739, (Exhibit USA-37), p. 20677; Proclamation 9759, (Exhibits USA-38, CHN-12), p. 25857; Proclamation 9758, (Exhibits USA-39, CHN-13), p. 25849; Proclamation 9772, (Exhibit USA-40), p. 40429; Proclamation 9777, (Exhibit USA-41), p. 45025; and Proclamation 9776, (Exhibit USA-42), p. 45019.

<sup>220</sup> Proclamation 9740, (Exhibits USA-36, CHN-11), p. 20685; Proclamation 9739, (Exhibit USA-37), pp. 20678-20679; Proclamation 9759, (Exhibits USA-38, CHN-12), p. 25858; and Proclamation 9758, (Exhibits USA-39, CHN-13), p. 25850.

<sup>221</sup> Proclamation 9704, (Exhibits USA-33, CHN-6), p. 11620; Proclamation 9705, (Exhibits USA-32, CHN-5), p. 11626.

<sup>222</sup> Proclamation 9711, (Exhibits USA-34, CHN-10), pp. 13361-13362; Proclamation 9710, (Exhibit USA-35), pp. 13355-13356.

<sup>223</sup> Proclamation 9704, (Exhibits USA-33, CHN-6), pp. 11621-11622; Proclamation 9705, (Exhibits USA-32, CHN-5), pp. 11627-11628.

<sup>224</sup> Proclamation 9772, (Exhibit USA-40), p. 40429.

any exemptions from the aluminium and steel tariffs were temporarily applied<sup>225</sup>, until the United States secured "an effective, long-term alternative means" to address the contribution of the exempted countries to the threatened impairment of its national security.<sup>226</sup> Such "long-term alternative means" included quotas restricting the quantities of aluminium and steel imported into the United States from the exempted country<sup>227</sup>, which were previously identified by the United States as appropriate means to ensure that the exemptions do not undermine the national security objectives of the tariffs on aluminium and steel imports.<sup>228</sup>

7.110. The product coverage of the Section 232 measures is similarly revealing of the national security objectives pursued by the United States in adopting these measures. Tariffs were imposed on aluminium and steel articles that the United States found, following the investigations by the Secretary of Commerce, to have applications for defence and critical infrastructure.<sup>229</sup> The Section 232 measures also include a mechanism under which certain aluminium and steel articles which were otherwise subjected to tariffs and quotas could be excluded from them on the basis of "specific national security considerations".<sup>230</sup> This mechanism was elaborated in the rules issued by the Bureau of Industry and Security of the United States Department of Commerce. The rules provide that, in granting exclusions based on national security considerations, the United States Department of Commerce can consider impacts on the United States' national security that may result from not approving an exclusion. They additionally require that "the demonstrated concern with [US] national security would need to be tangible and clearly explained and ultimately determined by the [US] Government".<sup>231</sup>

7.111. In the Panel's view, the abovementioned features of the Section 232 measures demonstrate that they were designed and expected to operate to address the threat to national security that the United States had determined to arise from rising levels of aluminium and steel imports. The Panel observes that the United States' national security objectives are reflected both in the application (tariffs, quotas) and non-application (exemptions, exclusions) of the Section 232 measures. The prescribed procedure for the adoption, modification, and removal of the Section 232 measures, and especially the provisions made for consultations with domestic authorities such as the United States' Secretary of Defense<sup>232</sup>, further support the Panel's view.

7.112. The United States also outlined its national security objectives relating to the Section 232 measures in its communications to WTO councils and committees, linking them to Article XXI of the GATT 1994. Before adopting the Section 232 measures, the United States informed the Council for Trade in Goods that its ongoing investigations into the effects of aluminium and steel imports on national security were to determine whether those imports were threatening its ability to meet its national security needs.<sup>233</sup> Following the adoption of the Section 232 measures, the United States referred to the findings of its completed investigations and provided information "pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, and consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".<sup>234</sup> In a communication addressed to the Committee on Safeguards, responding to China's request for consultations on the Section 232 measures under Article 12.3 of the Agreement on Safeguards, the United States noted the domestic legal basis pursuant to which it had taken action, and reiterated that it had provided information to the WTO Council for Trade in Goods

<sup>225</sup> Proclamation 9711, (Exhibits USA-34, CHN-10), p. 13362; Proclamation 9710, (Exhibit USA-35), p. 13356.

<sup>226</sup> Proclamation 9740, (Exhibits USA-36, CHN-11), pp. 20683-20684; Proclamation 9759, (Exhibits USA-38, CHN-12), pp. 25857-25858; and Proclamation 9758, (Exhibits USA-39, CHN-13), p. 25850.

<sup>227</sup> Proclamation 9740, (Exhibits USA-36, CHN-11), p. 20685; Proclamation 9759, (Exhibits USA-38, CHN-12), p. 25858; and Proclamation 9758, (Exhibits USA-39, CHN-13), p. 25850.

<sup>228</sup> Proclamation 9711, (Exhibits USA-34, CHN-10), p. 13363; Proclamation 9710, (Exhibit USA-35), p. 13357.

<sup>229</sup> See Proclamation 9704, (Exhibits USA-33, CHN-6), p. 11621; Proclamation 9705, (Exhibits USA-32, CHN-5), p. 11627; Section 232 investigation into steel imports, (Exhibits USA-30, CHN-8), pp. 21-22 and Appendices H and I; Section 232 investigation into aluminium imports, (Exhibits USA-31, CHN-9), pp. 24-38.

<sup>230</sup> Proclamation 9704, (Exhibits USA-33, CHN-6), p. 11621; Proclamation 9705, (Exhibits USA-32, CHN-5), p. 11627; Proclamation 9777, (Exhibit USA-41), p. 45026; Proclamation 9776, (Exhibit USA-42), p. 45020.

<sup>231</sup> BIS rule of 11 September 2018, (Exhibit USA-44), p. 46062.

<sup>232</sup> See Section 232(b), (Exhibits USA-20, CHN-23); Proclamation 9704, (Exhibits USA-33, CHN-6), pp. 11621-11622; Proclamation 9705, (Exhibits USA-32, CHN-5), pp. 11627-11628.

<sup>233</sup> Council for Trade in Goods, Minutes of the meeting held on 10 November 2017, G/C/M/130.

<sup>234</sup> Council for Trade in Goods, Minutes of the meeting held on 23 and 26 March 2018, G/C/M/131.

"consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".<sup>235</sup> Considered together with the features of the Section 232 measures discussed above, these communications indicate that the legal basis in the covered agreements pursuant to which the United States has sought, taken, or maintained these measures is Article XXI of the GATT 1994.

7.113. China argues that the domestic legal basis, domestic procedures, and notifications to the WTO are not determinative for the characterization of a measure under the covered agreements.<sup>236</sup> The Panel agrees. At the same time, the Panel recalls that the characterization of the measures in the present case must proceed from the terms of the relevant provision itself, that is Article 11.1(c) of the Agreement on Safeguards. This provision calls for a determination of whether a Member has adopted measures acting under or by virtue of provisions of the GATT 1994 other than Article XIX. In these circumstances, the Panel considers that the domestic legal basis and procedures as well as notifications concerning the adoption of the measures are relevant evidence of the legal basis under the covered agreements pursuant to which the Section 232 measures were sought, taken, or maintained. The Panel further notes that it has not considered this evidence in isolation, but in conjunction with aspects of the Section 232 measures that demonstrate how they were designed, applied, and expected to operate.

7.114. China also argues that Section 232, the reports of the investigation into aluminium and steel imports, and the proclamations adjusting these imports into the United States, all address the effect of imports on the United States' relevant domestic industries, and thus mirror the inquiry under Articles 2 and 4 of the Agreement on Safeguards into whether a "domestic industry" is suffering from "serious injury" due to "increased quantities" of imports. China contends that the Panel should accordingly find the Agreement on Safeguards applicable to the Section 232 measures.

7.115. The Panel is not persuaded by this argument. The Panel notes that the references to the economic welfare of domestic industries in each of the instruments mentioned above are in the context of the relationship of such economic welfare to the United States' national security. Under Section 232, the relevant factors for the consideration of the Secretary of Commerce and the President include the impact of foreign competition on the economic welfare of domestic industries, substantial unemployment, decrease in revenues of government, and loss of skills or investment, among others. These provide the basis under which the weakening of the United States' internal economy can be determined by the relevant authorities of the United States to impair its national security. In the same vein, the findings of the Secretary of Commerce on the impact of rising levels of imports on domestic aluminium and steel industries, and the corresponding adjustments recommended, follow the Secretary's conclusion that (i) certain aluminium and steel products, as well as their domestic production, are essential to the United States' national security, national defence, and critical infrastructure; and (ii) falling domestic capacity in these industries due to rising import competition would place at risk the ability of the United States' domestic industries to cater to its national security needs, particularly during an unexpected or extended conflict or national emergency.

7.116. The Section 232 measures further implement the recommendations of the Secretary of Commerce, including with respect to reviving idled facilities, opening closed smelters and mills, preserving necessary skills, and maintaining or increasing production, for the specific purpose of securing aluminium and steel necessary for critical industries and national defence. The references to the economic welfare of the United States' domestic industries in the instruments considered above thus constitute one aspect of the United States' determination that there exists a threat to its national security. This aspect of the Section 232 measures cannot be divorced from its background and context, which reflect the measures' national security objectives and confirms that they were sought, taken, or maintained pursuant to Article XXI of the GATT 1994.

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<sup>235</sup> Committee on Safeguards, Communication from the United States, G/SG/168. The United States noted that the proclamations constituting the Section 232 measures were issued "pursuant to Section 232 of the Trade Expansion Act of 1962" and not "pursuant Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures". Accordingly, the United States maintained that the Section 232 measures were "not safeguard measures" and declined to engage in consultations under the Agreement on Safeguards.

<sup>236</sup> China's response to Panel question No. 85.

7.117. China refers to a memorandum issued by the United States' Secretary of Defense, which states that the findings of the investigations into aluminium and steel imports do not "impact the ability of [Department of Defense] programs to acquire the steel or aluminum necessary to meet national defense requirements".<sup>237</sup> According to China, this indicates that a central objective of the Section 232 measures is "to protect and remedy the condition of the domestic [US] industries for their own sake, and not merely insofar as these industries are necessary to meet national defence requirements".<sup>238</sup> The Panel notes that the memorandum referenced by China was issued as part of the consultation process between the Department of Commerce and Department of Defense provided for in Section 232. The memorandum refers to the risk posed to the United States' national security by imports of aluminium and steel and "concur[s] with the Department of Commerce's conclusion that imports of foreign steel and aluminum based on unfair trading practices impair the national security".<sup>239</sup> In the Panel's view, this supports the understanding set out above that the Section 232 measures pursue national security objectives. The additional considerations raised by China regarding the United States' ability to acquire aluminium and steel for its national defence needs pertain to whether the Section 232 measures meet the requirements of Article XXI of the GATT 1994, rather than whether they were sought, taken, or maintained pursuant to that provision. In this connection, the Panel recalls its earlier conclusion that Article 11.1(c) concerns whether certain measures were sought, taken, or maintained by virtue of or under provisions of the GATT 1994 other than Article XIX, and not whether they are consistent with such other provisions.

7.118. Finally, the Panel notes that the characterization of the Section 232 measures under the Agreement on Safeguards was previously examined by the panel in *United States – Steel and Aluminium Products (China)*. As noted above<sup>240</sup>, the Panel sought the parties' views on the findings in that panel report concerning the applicability of the WTO safeguards regime to the Section 232 measures and on the relevance of those findings for this Panel's analysis, in response to which both parties emphasized this Panel's duty under Article 11 of the DSU. Following its examination of the Section 232 measures, the Panel concurs with the findings of the panel in *United States – Steel and Aluminium Products (China)* that "the United States' determination of a threat to its national security under Section 232 is a central aspect of the measures with respect to their legal characterization as being sought, taken, or maintained pursuant to Article XXI of the GATT 1994".<sup>241</sup> Based on the Panel's understanding of Article 11.1(c) and the relevance of domestic legal status and WTO notifications for the characterization of measures under that provision, the Panel also concurs with that panel's treatment of the same considerations.<sup>242</sup>

7.119. In the light of its conclusion that the Section 232 measures were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX, the Panel finds that the Agreement on Safeguards does not apply to these measures, as provided for in Article 11.1(c) of that Agreement. As noted above, the rights under Article 8.2 of the Agreement on Safeguards and, relatedly, Article XIX:3(a) of the GATT 1994, are unavailable in respect of measures to which the Agreement on Safeguards does not apply. Accordingly, the Panel finds that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 do not apply to China's additional duties measure.

### 7.2.3 Conclusion

7.120. Having found that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 do not apply to China's additional duties measure, the Panel consequently finds that the application of Articles I and II of the GATT 1994 is not suspended in relation to this measure. The Panel will accordingly proceed to examine the United States' claims under Articles I and II of the GATT 1994 in turn.

<sup>237</sup> United States Secretary of Defense Memorandum, (Exhibit CHN-14), p. 1.

<sup>238</sup> China's first written submission, paras. 137-138 (also noting that according to this memorandum, "the [US] military requirements for steel and aluminum each represent about three percent of [US] production").

<sup>239</sup> United States Secretary of Defense Memorandum, (Exhibit CHN-14), p. 1.

<sup>240</sup> See section 1.3.1 above.

<sup>241</sup> Panel Report, *US – Steel and Aluminium Products (China)*, para. 7.96.

<sup>242</sup> Panel Report, *US – Steel and Aluminium Products (China)*, para. 7.83, footnote 383, and para. 7.96.

### 7.3 United States' claim under Article I:1 of the GATT 1994

#### 7.3.1 Main arguments of the parties

##### 7.3.1.1 United States

7.121. The United States argues that the additional duties measure is inconsistent with Article I:1 of the GATT 1994 because it fails to extend to certain products of the United States an advantage granted by China to like products originating in other countries.<sup>243</sup> In the United States' view, a measure is inconsistent with Article I:1 of the GATT 1994 if: (a) it is covered by Article I:1; (b) the subject imports are like products within the meaning of Article I:1; (c) the challenged measure confers an "advantage, favour, privilege, or immunity" to a product originating in (or destined for) another country; and (d) such "advantage, favour, privilege, or immunity" is not extended "immediately" and "unconditionally" to subject imports.<sup>244</sup> According to the United States, China's additional duties measure meets all four of these elements.<sup>245</sup>

7.122. With respect to the first element, the United States submits that the additional duties measure is "explicitly covered by the text" of Article I:1.<sup>246</sup> This is so because Article I:1 of the GATT applies to "customs duties and charges of any kind imposed on or in connection with importation", a term that would include the additional duties at issue in this dispute.<sup>247</sup> The United States further notes that Article I:1 applies both to duties that have been bound as part of a WTO Member's schedule under Article II of the GATT 1994 and to unbound duties, as well as to duties that are set below a bound rate.<sup>248</sup> As such, the United States considers that Article I:1 requires a WTO Member that applies a duty rate below its bound rate to imports from some WTO Members to apply that same duty rate to imports of like products from all WTO Members.<sup>249</sup>

7.123. With respect to the second element, the United States argues that "each [US] product subject to China's measure is 'like' a product from other countries not subject to the additional duties within the meaning of Article I:1".<sup>250</sup> The United States recalls that, in past disputes, WTO adjudicators have found that where the only distinction between two sets of products is the country of origin, it may be presumed that the two sets are like products.<sup>251</sup> In the United States' view, China's measure discriminates against United States products solely on the basis of origin, leaving unchanged the rate of duty applicable to the same products originating in other countries, including all other WTO Members.<sup>252</sup> Accordingly, the United States considers that the like product element of Article I:1 is satisfied.<sup>253</sup>

7.124. Turning to the third element, the United States submits that the additional duties measure confers an advantage on like products of other Members because it imposes additional duties on certain United States products, while leaving unchanged the rate of duty applicable to goods of all other countries, including all other WTO Members.<sup>254</sup> Noting that past GATT and WTO panels have interpreted the term "advantage" broadly, the United States argues that providing a lower duty rate clearly constitutes an advantage within the meaning of Article I:1.<sup>255</sup> In particular, the United States considers that, by providing a lower rate of duty to the like products of other countries as compared with United States products, the additional duties measure provides "more favourable competitive

<sup>243</sup> United States' first written submission, para. 33.

<sup>244</sup> United States' first written submission, para. 34 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.86).

<sup>245</sup> United States' first written submission, para. 34.

<sup>246</sup> United States' first written submission, para. 35.

<sup>247</sup> Ibid.

<sup>248</sup> United States' first written submission, para. 36 (referring to GATT Panel Report, *Spain – Unroasted Coffee*, adopted on 11 June 1981, BISD 35S/245).

<sup>249</sup> United States' first written submission, para. 36.

<sup>250</sup> United States' first written submission, para. 38.

<sup>251</sup> United States' first written submission, paras. 39-40 (referring to Panel Reports, *Indonesia – Autos*, para. 14.113, *China – Publications and Audiovisual Products*, para. 7.1446, and *Canada – Autos*, para. 10.74).

<sup>252</sup> United States' first written submission, paras. 38 and 41.

<sup>253</sup> United States' first written submission, para. 41.

<sup>254</sup> United States' first written submission, para. 42.

<sup>255</sup> United States' first written submission, para. 43 (referring to GATT Panel Report, *US – Non-Rubber Footwear*, adopted 19 June 1992, BISD 39S/128, para. 69, and Panel Report, *Colombia – Ports of Entry*, para. 7.340).

opportunities" to the former, or "affects the competitive relationship" between the two groups of products, thus conferring an "advantage" within the meaning of Article I:1.<sup>256</sup>

7.125. Finally, turning to the fourth element, the United States argues that the advantage provided by the additional duties measure is not "accorded immediately and unconditionally" to like products from the United States. For the United States, the additional duties measure does not accord to United States products the "advantage" of lower tariff rates conferred on non-United States products "at once", and is therefore inconsistent with this element of Article I:1.<sup>257</sup>

### 7.3.1.2 China

7.126. China does not deny that, if assessed "in isolation" against its general Most-Favoured Nation (MFN) tariff rates, the additional duties measure imposes duties that "exceed the applied MFN rates".<sup>258</sup> However, China argues that the additional duties measure is not inconsistent with Article I:1 of the GATT 1994 because it was taken "pursuant to and consistent with" Article 8.2 of the Agreement on Safeguards.<sup>259</sup> Accordingly, in China's view, the MFN obligation in Article I:1 of the GATT 1994 has been "properly suspended and not breached".<sup>260</sup>

### 7.3.2 Analysis by the Panel

7.127. The question before the Panel is whether, as the United States claims, the additional duties measure is inconsistent with Article I:1 of the GATT 1994. China has responded to the United States' claim by arguing that Article I:1 is "suspended" in respect of the additional duties measure, and therefore not breached. China does not contest that the additional duties measure imposes duties on United States products in excess of those applied on like products from other WTO Members. Nor has China addressed any of the specific arguments raised by the United States in support of its position that the additional duties measure meets the four requirements for inconsistency with Article I:1 articulated in that provision.

7.128. The Panel concluded, in the previous section of this Report, that Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards do not apply to the additional duties measure. The Panel further found that, consequently, the application of Articles I and II of the GATT 1994 is not suspended in relation to this measure. As such, China's argument that the additional duties measure is not inconsistent with Article I:1 because the application of that provision is suspended must be rejected.

7.129. In the absence of any further argumentation on China's part concerning the consistency of the additional duties measure with Article I:1 of the GATT 1994, the Panel considers that the United States' claim under Article I:1 is uncontested. Nevertheless, in accordance with its duty to make an objective assessment of the matter before it as laid down in Article 11 of the DSU, the Panel cannot simply accept the United States' arguments without further analysis. Rather, the Panel must satisfy itself as to whether the United States has established a *prima facie* case that the additional duties measure is inconsistent with Article I:1 of the GATT 1994.<sup>261</sup> To that end, the Panel commences its analysis with the text of the relevant provision.

#### 7.3.2.1 The applicable legal standard

7.130. Article I:1 of the GATT 1994 provides as follows:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of

<sup>256</sup> United States' first written submission, paras. 43 and 45.

<sup>257</sup> United States' first written submission, paras. 46 and 47.

<sup>258</sup> China's response to Panel question No. 20, para. 43.

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.*

<sup>261</sup> See e.g. Panel Reports, *US – Poultry (China)*, para. 7.445; *Saudi Arabia – IPRs*, para. 7.40; and *China – TRQs*, para. 7.21.

Article III,\* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.131. Article I:1 prohibits, with respect to measures falling within its scope of application, discrimination among like products originating in or destined for different countries. The obligation to accord MFN treatment as provided for in Article I:1 has been understood as protecting expectations of equal competitive opportunities for like imported products from any Member.<sup>262</sup>

7.132. To establish that a measure is inconsistent with Article I:1, a complainant must demonstrate that: (a) the measure at issue falls within the scope of Article I:1; (b) the imported products at issue are like products within the meaning of Article I:1; (c) the measure at issue confers an "advantage, favour, privilege or immunity" on any product originating in the territory of any country; and (d) the advantage, favour, privilege or immunity granted is not extended "immediately" and "unconditionally" to like products originating in the territory of all Members.<sup>263</sup> The Panel will examine whether the United States has demonstrated that the additional duties measure satisfies these four elements.

### **7.3.2.2 Whether the additional duties measure is inconsistent with Article I:1 of the GATT 1994**

7.133. Article I:1 of the GATT 1994 applies *inter alia* to "customs duties and charges of any kind imposed on or in connection with importation". The Panel understands "customs duties" to refer to charges on goods that accrue at the moment and by virtue of importation or exportation.<sup>264</sup>

7.134. The Implementation Notice describes the additional duties as "additional tariff rate[s]" that apply in addition to "current applied base tariff rates".<sup>265</sup> It states that the additional tariff rates apply to certain specified "imported" products.<sup>266</sup> Moreover, it was formally issued by the State Council Customs Tariff Commission. Taken together, the Panel considers that these facts are sufficient to establish that the measure imposes duties that fall within the scope of the phrase "customs duties and charges of any kind imposed on or in connection with importation". The Panel thus considers that the measure is subject to the requirements of Article I:1.

7.135. With respect to whether the products at issue are like within the meaning of Article I:1, WTO adjudicators have consistently held that when a measure makes a distinction between products based exclusively on their origin, the likeness of such products can be presumed.<sup>267</sup> The additional duties measure applies additional tariff rates exclusively on products "originating from the United States".<sup>268</sup> It thus makes a distinction between products solely on the basis of origin, i.e. whether they originate in the United States or in any other country. The Panel therefore finds that the United States' products subject to the additional duties can be presumed to be like the equivalent products from other countries that are not subject to the additional duties measure.

7.136. The additional duties measure applies "additional tariff rates" on certain products originating in the United States, but does not increase the tariffs applicable to like products originating in any other country. In effect, this means that products from other countries are subject to a lower tariff rate than like products originating in the United States. In the Panel's view, lower tariff rates constitute an "advantage" within the meaning of Article I:1 of the GATT 1994 because they create

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<sup>262</sup> Panel Report, *US – Steel and Aluminium Products (China)*, para. 7.51.

<sup>263</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.86.

<sup>264</sup> Appellate Body Reports, *China – Auto Parts*, para. 158.

<sup>265</sup> Implementation Notice, (Exhibit USA-1), paras. 1, 2, and 4.

<sup>266</sup> Implementation Notice, (Exhibit USA-1).

<sup>267</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.36. See also Panel Reports, *Colombia – Ports of Entry*, para. 7.355; and *US – Poultry (China)*, paras. 7.424-7.432.

<sup>268</sup> Implementation Notice, (Exhibit USA-1), paras. 1 and 2.

more favourable import opportunities and thus affect the competitive relationship between those products benefiting from lower tariff rates and those subject to higher tariff rates.<sup>269</sup>

7.137. Finally, because the additional duties measure applies additional tariff rates only on products originating in the United States, it does not accord the advantage of lower tariff rates "immediately and unconditionally" to those products.

7.138. Accordingly, the Panel finds that the United States has demonstrated that the additional duties measure is inconsistent with Article I:1 of the GATT 1994 because, with respect to customs duties imposed on or in connection with importation, it fails to accord an advantage granted to like products originating in other countries immediately and unconditionally to products originating in the United States.

### 7.3.3 Conclusion

7.139. For the reasons outlined above, the Panel concludes that the additional duties measure is inconsistent with Article I:1 of the GATT 1994 because, with respect to customs duties imposed on or in connection with importation, it fails to accord an advantage granted to products originating outside the United States immediately and unconditionally to products originating in the United States.

## 7.4 United States' claim under Articles II:1(a) and II:1(b) of the GATT 1994

### 7.4.1 Main arguments of the parties

#### 7.4.1.1 United States

7.140. The United States claims that China's additional duties measure is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 because it imposes duties on products originating in the United States in excess of China's bound rate and provides less favourable treatment to such products.<sup>270</sup> Noting that a measure that violates Article II:1(b) is necessarily inconsistent with Article II:1(a) as well, the United States first elaborates its claim under Article II:1(b).<sup>271</sup>

7.141. In the United States' view, a measure violates Article II:1(b) of the GATT 1994 where it results in the imposition of duties that are in excess of the duties provided for in the relevant Member's schedule.<sup>272</sup> According to the United States, since Article II:1(b) covers both "ordinary customs duties" and "other duties or charges"<sup>273</sup>, it is "legally immaterial" whether the additional duties constitute "ordinary customs duties" or "other duties or charges" because, under either characterization, the duties exceed China's rates bound in its Schedule.<sup>274</sup> Nevertheless, arguing that "ordinary customs duties" typically relate to either the value or the volume of imported goods, whereas "other duties and charges" form a residual category that includes any financial responsibilities resulting from the importation of goods that do not qualify as "ordinary customs duties", the United States submits that the additional duties measure appears to impose "ordinary customs duties".<sup>275</sup>

7.142. The United States submits that, in respect of 123 of the 128 tariff lines covered by the additional duties measure<sup>276</sup>, China imposes "ordinary customs duties" in excess of the bound rate

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<sup>269</sup> The Panel notes that in *Canada – Autos*, the Appellate Body found that an import duty exemption applied to products from some Members but not others was inconsistent with Article I:1 of the GATT 1994. See Appellate Body Report, *Canada – Autos*, paras. 80 and 81. Similarly, the additional duties measure effectively exempts products originating outside the United States from the "additional tariff rates" applied to products originating in the United States.

<sup>270</sup> United States' first written submission, para. 51.

<sup>271</sup> United States' first written submission, para. 55.

<sup>272</sup> United States' first written submission, para. 54.

<sup>273</sup> United States' first written submission, paras. 58-59.

<sup>274</sup> United States' first written submission, para. 59.

<sup>275</sup> United States' first written submission, para. 60 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.79-7.85).

<sup>276</sup> In its first written submission, the United States argued that the additional duties measure resulted in the imposition of duties in excess of China's bound rates in respect of all 128 tariff lines covered by the



commitments contained in its Schedule, and therefore violates Article II:1(b).<sup>277</sup> In the alternative, the United States submits that if the Panel were to find that the additional duties measure imposes "other duties or charges", the measure is inconsistent with Article II:1(b) because the duties imposed by the additional duties measure are not reflected in China's Schedule of Concessions.<sup>278</sup>

7.143. Turning to Article II:1(a) of the GATT 1994, the United States argues that "Article II:1(b) proscribes the type of measures that are equally inconsistent with Article II:1(a)", and therefore submits that, having established the inconsistency of the additional duties measure with Article II:1(b), the United States has also demonstrated that the measure is inconsistent with Article II:1(a).<sup>279</sup> The United States' concludes that, by imposing duties in excess of its bound rates on products originating in the United States, China has correspondingly accorded less favourable to these products and breached Article II:1(a) as well.<sup>280</sup>

#### 7.4.1.2 China

7.144. China submits that the additional duties measure is not inconsistent with Article II:1(a) or II:1(b) because the measure was "taken pursuant to and consistent with" Article 8.2 of the Agreement on Safeguards, and therefore China's "concessions under Article II of the GATT 1994 [were] properly suspended and not breached".<sup>281</sup> However, China has not contested that the additional duties measure imposes duties in excess of those bound in its Schedule.<sup>282</sup> Finally, China notes that it "does not object to the general proposition that a breach of Article II:1(b) would result in breach of Article II:1(a)".<sup>283</sup>

#### 7.4.2 Analysis by the Panel

7.145. The question before the Panel is whether, as the United States claims, the additional duties measure is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994. China has responded to the United States' claim by arguing that Article II of the GATT 1994 is "suspended" in respect of the additional duties measure, and therefore not breached. China does not contest that the additional duties measure does in fact impose duties on products originating in the United States in excess of those bound in its Schedule, contrary to Article II:1(b) of the GATT 1994. Nor has China contested that a violation of Article II:1(b) necessarily results in a consequential violation of Article II:1(a).

7.146. The Panel has already concluded that Article XIX:3(a) of the GATT 1994 and Article 8.2 of the Agreement on Safeguards do not apply to the additional duties measure. The Panel further found that, consequently, the application of Articles I and II of the GATT 1994 is not suspended in relation to this measure.<sup>284</sup> As such, the Panel has already addressed and rejected China's argument that the additional duties measure is not inconsistent with Article II of the GATT 1994 because the application of that provision is suspended.

7.147. In the absence of any further argumentation on China's part concerning the consistency of the additional duties measure with Article II of the GATT 1994, the Panel considers that the United States' claim under that provision is uncontested. Nevertheless, in accordance with its duty to make an objective assessment of the matter before it as laid down in Article 11 of the DSU, the Panel cannot simply accept the United States' arguments without further analysis. Rather, as noted

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measure. However, in response to a question from the Panel, the United States clarified that the additional duties measure only results in excess duties for 123 of the 128 tariff lines. (United States' response to Panel question No. 12, paras. 22-23; and second written submission, para. 20).

<sup>277</sup> United States' first written submission, para. 61.

<sup>278</sup> United States' first written submission, para. 62.

<sup>279</sup> United States' first written submission, para. 65 (referring to Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 45 and 47).

<sup>280</sup> United States' first written submission, para. 66.

<sup>281</sup> China's response to Panel question No. 22, para. 46.

<sup>282</sup> The Panel notes that China made arguments on the inclusion by the United States of certain "other additional duties" in its calculation of the total duties applied on certain tariff lines covered by the additional duties measure. China's first written submission, paras. 155-157. In response to a question from the Panel, the United States confirmed that it was not seeking findings on these "other additional duties", and clarified that its claim under Articles II:1(a) and II:1(b) only relates to 123 of the 128 tariff lines. United States' response to Panel question No. 12, para. 21; and para. 2.11 above.

<sup>283</sup> China's response to Panel question No. 22, para. 46.

<sup>284</sup> See para. 7.120 above.

above<sup>285</sup>, the Panel must satisfy itself as to whether the United States has established a *prima facie* case that the additional duties measure is inconsistent with Article II of the GATT 1994.<sup>286</sup> To that end, the Panel commences its analysis with the text of the relevant provisions.

#### 7.4.2.1 The applicable legal standard

7.148. Articles II:1(a) and II:1(b) of the GATT 1994 provide as follows:

(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.149. Additionally, the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 provides in relevant part:

Members hereby agree as follows:

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

7.150. Article II:1(a) of the GATT 1994 thus prohibits a Member from subjecting imports to treatment less favourable than that provided for in its schedule.<sup>287</sup> The first sentence of Article II:1(b) of the GATT 1994 further prohibits the imposition of ordinary customs duties in excess of the rates set forth in a Member's schedule.<sup>288</sup> In assessing whether a measure is inconsistent with this sentence, a panel must ascertain (a) the treatment accorded to the products at issue under the schedule of the Member; (b) the treatment accorded to the products at issue under the measure at issue; and (c) whether the measure at issue results in the imposition of duties and conditions on the products at issue in excess of those provided for in the schedule.<sup>289</sup> The second sentence of Article II:1(b) also prohibits the imposition of other duties or charges of any kind on or in connection with importation in excess of those imposed on the date of entry into force of the GATT 1994 (or those directly and mandatorily required to be imposed thereafter by legislation in force on that date).<sup>290</sup> According to the Understanding on the Interpretation of Article II:1(b), the nature and level of any such "other duties or charges" must be recorded in a Member's schedule.<sup>291</sup>

7.151. Accordingly, a measure that is inconsistent with Article II:1(b) of the GATT 1994 will necessarily be inconsistent with Article II:1(a) as well. This is because the imposition by a Member

<sup>285</sup> See para. 7.129 above.

<sup>286</sup> See e.g. Panel Reports, *US – Poultry (China)*, paras. 7.445; *Saudi Arabia – IPRs*, para. 7.40; and *China – TRQs*, para. 7.21.

<sup>287</sup> See Appellate Body Reports, *Argentina – Textiles and Apparel*, para. 45; *Colombia – Textiles*, para. 5.34.

<sup>288</sup> See Appellate Body Reports, *India – Additional Import Duties*, para. 150; *Colombia – Textiles*, para. 5.35.

<sup>289</sup> Panel Reports, *EC – Chicken Cuts*, para. 7.65.

<sup>290</sup> See Appellate Body Report, *India – Additional Import Duties*, para. 151; Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.78.

<sup>291</sup> See Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.78. See also Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.84-7.90.

of duties in excess of the bound rates in its schedule constitutes "less favourable treatment" within the meaning of Article II:1(a).<sup>292</sup> The Panel will therefore begin its analysis by considering the United States' claim under Article II:1(b) of the GATT 1994.

#### **7.4.2.2 Whether China's additional duties measure is inconsistent with Article II:1(b) of the GATT 1994**

7.152. Article II:1(b) of the GATT 1994 prohibits the imposition of both "ordinary customs duties" in excess of those provided in a Member's schedule and "other duties or charges" not recorded in a Member's schedule. The first question facing the Panel is thus whether the duties imposed by China's additional duties measure fall within the scope of either of these categories.

7.153. The United States considers that the additional duties imposed by the measure at issue are "ordinary customs duties".<sup>293</sup> Although the term "ordinary customs duties" is not defined in Article II of the GATT 1994, past WTO adjudicators have stated that a duty is likely to constitute an "ordinary customs duty" where it arises or accrues "because of the importation of the product at the very moment it enters the territory of another Member"<sup>294</sup>, such that it can be characterized as a duty "on" importation.<sup>295</sup>

7.154. The Panel has already noted<sup>296</sup> that the Implementation Notice describes the additional duties as "additional tariff rate[s]" that apply "additionally" to "current applied base tariff rates"<sup>297</sup>, and states that the additional tariff rates apply to certain specified "imported" products.<sup>298</sup> The Panel has also noted that the Implementation Notice was formally issued by the State Council Customs Tariff Commission.<sup>299</sup>

7.155. The Panel considers that these features indicate that the duties imposed by the additional duties measure are "ordinary customs duties" for the purposes of Article II:1(b) of the GATT 1994.<sup>300</sup> Insofar as the additional duties are "additional to" the "current applied base tariff rates" on "imported products"<sup>301</sup>, the Panel understands that the duties arise or accrue because, and at the moment of, importation of the products identified in the Implementation Notice. In this sense, they are duties "on" the importation of those products.

7.156. Having determined that the duties imposed by the additional duties measure constitute "ordinary customs duties", the Panel now turns to assess whether those duties are "in excess" of the rates provided in China's Schedule. The United States has submitted evidence comparing, for the 128 tariff lines covered by the additional duties measure, the bound rates in China's Schedule and the tariff treatment accorded to the relevant products, resulting from the combination of China's MFN tariff rates and the additional duties.<sup>302</sup> When invited by the Panel to comment on this evidence, China did not contest the accuracy of the information provided by the United States.<sup>303</sup> Having carefully examined the uncontested evidence submitted by the United States, the Panel finds that it

<sup>292</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

<sup>293</sup> United States' first written submission, para. 60.

<sup>294</sup> Panel Reports, *China – Auto Parts*, para. 7.184.

<sup>295</sup> Appellate Body Reports, *China – Auto Parts*, para. 158.

<sup>296</sup> See para. 7.134 above.

<sup>297</sup> Implementation Notice, (Exhibit USA-1), paras. 1, 2, and 4.

<sup>298</sup> Implementation Notice, (Exhibit USA-1).

<sup>299</sup> Ibid.

<sup>300</sup> The precise relationship between the terms "customs duties" in Article I:1 of the GATT 1994 and "ordinary customs duties" in Article II:1(b) of the GATT 1994 has not been discussed by the parties, and the Panel does not consider it necessary to address this question to resolve the dispute before it.

<sup>301</sup> Implementation Notice, (Exhibit USA-1), paras. 1, 2, and 4.

<sup>302</sup> United States' Table Presenting Tariff Lines and Bound Rates Affected By the Chinese Measure (2018), (Exhibit USA-14); United States' Table Presenting Tariff Lines and Bound Rates Affected By the Chinese Measure (2019), (Exhibit USA-15); United States' Table Presenting Tariff Lines and Bound Rates Affected By the Chinese Measure (2018) Without Other Additional Duties, (Exhibit USA-17); and United States' Table Presenting Tariff Lines and Bound Rates Affected By the Chinese Measure (2019) Without Other Additional Duties, (Exhibit USA-18). The Panel notes that Exhibits USA-14 and USA-15 also identify other duties applicable to the tariff lines at issue. However, as the United States has confirmed that it is not seeking findings on these other duties, the Panel excludes them from its analysis. See United States' response to Panel question No. 12, para. 21.

<sup>303</sup> China's response to Panel question No. 23, para. 47.

establishes that China applies ordinary customs duties in excess of those set forth in its Schedule in respect of 123 of the 128 tariff lines covered by the additional duties measure.<sup>304</sup>

7.157. Accordingly, the Panel finds that the United States has demonstrated that the additional duties measure is inconsistent with Article II:1(b) of the GATT 1994 because it results in the imposition of ordinary customs duties on 123 tariff lines in excess of the bound rates set forth in China's Schedule.

#### **7.4.2.3 Whether the additional duties measure is inconsistent with Article II:1(a) of the GATT 1994**

7.158. As noted above, where a measure violates Article II:1(b) of the GATT 1994, it is necessarily inconsistent with Article II:1(a) as well. This is so because, where a Member imposes duties or charges on imports in excess of those set forth in its schedule, it *ipso facto* accords to those imports treatment less favourable than that provided for in its schedule.<sup>305</sup>

7.159. Having found that the United States has demonstrated that the additional duties measure is inconsistent with Article II:1(b) of the GATT 1994 because it imposes ordinary customs duties on 123 tariff lines in excess of the bound rates set forth in China's Schedule, the Panel also finds that the United States has demonstrated that the additional duties measure is inconsistent with Article II:1(a) of the GATT 1994 because it accords to those imports treatment less favourable than that provided for in China's Schedule.

#### **7.4.3 Conclusion**

7.160. For the reasons outlined above, the Panel finds that the additional duties measure is inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

### **8 CONCLUSIONS AND RECOMMENDATION**

8.1. For the reasons set forth in this Report, the Panel concludes:

- a. Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 do not apply to China's additional duties measure. Accordingly, the application of Articles I and II of the GATT 1994 is not suspended in relation to that measure.
- b. Regarding the United States' claim under Article I:1 of the GATT 1994:
  - i. China's additional duties measure is inconsistent with Article I:1 of the GATT 1994 because, with respect to customs duties imposed on or in connection with importation, it fails to accord an advantage granted to products originating outside the United States immediately and unconditionally to products originating in the United States.
- c. Regarding the United States' claims under Articles II:1(a) and II:1(b) of the GATT 1994:
  - i. China's additional duties measure is inconsistent with Article II:1(b) of the GATT 1994 because it results in the imposition of ordinary customs duties on 123 tariff lines in excess of the bound rates set forth in China's Schedule.
  - ii. China's additional duties measure is inconsistent with Article II:1(a) of the GATT 1994 because it imposes ordinary customs duties on United States-origin imports in excess of those set forth in China's Schedule, thus according to those imports treatment less favourable than that provided for in China's Schedule.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of

<sup>304</sup> The five tariff lines that China does not impose ordinary customs duties in excess of those set forth in its Schedule are 08028000, 08029090, 08044000, 08104000, and 08109030.

<sup>305</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

nullification or impairment. The Panel concludes that, to the extent that China's additional duties measure is inconsistent with certain provisions of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that Agreement.

8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends that China bring its WTO-inconsistent measure into conformity with its obligations under the GATT 1994.

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