

**IN THE WORLD TRADE ORGANIZATION**

**European Union – Additional Duties on Certain Products from the United States**

**WT/DS559**

**Third Party Submission  
by  
Norway**

Geneva

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Table of cases cited in this submission

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:1, p.3
<i>Dominican Republic – Safeguard Measures</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243.
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
<i>Indonesia – Iron or Steel Products</i>	Appellate Body Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018
<i>Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)</i>	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> , WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:III, p. 1291

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<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571

## I. INTRODUCTION

1. Norway welcomes the opportunity to present its views as a third party in this case concerning a disagreement between the European Union (“the EU”) and the United States (“the US”), regarding the conformity with the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) of additional duties imposed by the EU with respect to certain products originating in the US. The US claims that the measures at issue are inconsistent with Articles I:1, II:1(a) and II:1(b) of the GATT 1994.

2. In response to the US claims, the EU argues that its measures are “rebalancing measures”<sup>1</sup> consistent with Article XIX:3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards (“Safeguards Agreement”), taken as a response to the US imposition of additional tariffs on imported aluminium and steel products, including on products from the EU, pursuant to “Presidential Proclamation 9704” and “Presidential Proclamation 9705” of 8 March 2018 (“US steel and aluminium tariffs”). The EU takes these rebalancing measures on the premise that the US steel and aluminium tariffs constitute safeguard measures within the meaning of Article XIX of the GATT 1994, and Article 1 of the Safeguards Agreement.

3. In its submission, the US argues that it is only after an importing WTO Member invokes Article XIX of the GATT 1994 that another Member may take actions, such as rebalancing measures, under the Safeguards Agreement. The US also argues that, for the Safeguards Agreement to apply to an importing Member’s measures in the first place, the importing Member must invoke the Safeguards Agreement. In the US’ view, Article XIX serves as a justification for suspending GATT 1994 obligations, or withdrawing or modifying tariff concessions.

4. Since the US has not invoked the Safeguards Agreement, then, according to the US, the Agreement simply does not apply to the steel and aluminium tariffs. In the US’ view, the “right to apply a safeguard measure through invocation of Article XIX falls exclusively within the judgement of the Member imposing the measure and it is not subject to re-characterisation by another Member for the purpose of unilateral retaliation”.<sup>2</sup>

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<sup>1</sup> The EU’s first written submission, para. 156. *See also* paras. 258 and 260.

<sup>2</sup> The US’ first written submission, para. 77.

5. This dispute raises issues of systemic importance with regard to the interpretation and applicability of the Safeguards Agreement. There are also certain overlapping issues between this dispute and the case Norway has brought against the US measures described above, i.e. dispute DS552 *United States — Certain Measures on Steel and Aluminium Products*. Norway’s third party submission is confined to the following points: *first*, domestic law characterisations of a measure do not determine which WTO obligations apply to that measure (Section II); *second*, the legal standard governing the applicability of the Safeguards Agreement to a measure (Section III); and, *third*, Article XIX of the GATT 1994, and the Safeguards Agreement, do not operate as an affirmative defense, but contain a specific set of obligations that, when particular substantive and procedural conditions are met, displace GATT obligations which would otherwise be applicable (Section IV).

## II. LEGAL STANDARD GOVERNING THE APPLICABILITY OF WTO OBLIGATIONS

6. It is well-established that municipal law classifications are not determinative of legal questions raised in WTO dispute settlement proceedings, in particular how a measure is characterised under WTO law, including which WTO obligations apply to a measure. As the Appellate Body has explained, “the manner in which the municipal law of a WTO Member classifies an item cannot, in itself, be determinative of the interpretation of provisions of the WTO covered agreements”.<sup>3</sup> Instead, the characterisation of a measure under WTO law must be based on the measure’s “content and substance”, and “not merely on its form or nomenclature”.<sup>4</sup>

7. It is not uncommon for a respondent to assert, based on domestic law classifications, that a measure is not subject to particular WTO obligations. In that event, as the panel in *Dominican Republic – Safeguard Measures* has explained, “the determination on applicability [of the provisions of the covered agreements to the challenged measures] must be a prior step to the analysis of whether the impugned measures are consistent with the obligations contained in the cited provision[s]”.<sup>5</sup>

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<sup>3</sup> Appellate Body Reports, *US – Softwood Lumber IV*, para. 65 and *China – Auto Parts*, footnote 244.

<sup>4</sup> Appellate Body Report, *US – Continued Zeroing*, footnote 87.

<sup>5</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.58, referring to Appellate Body Reports, *China – Auto Parts*, para. 139; *Canada – Autos*, para. 151; and *US – Shrimp*, para. 119.

8. This “prior step” of determining the applicability of the relevant covered agreements is one frequently faced by panels and the Appellate Body:

- In *US – 1916 Act*, the US argued that the measure was not subject to the obligations in the Anti-Dumping Agreement, because it did not constitute “specific action against dumping”. The Appellate Body disagreed on the basis that, notwithstanding its domestic legal characterisation, the “constituent elements of dumping” were present in the measure;<sup>6</sup>
- In *Australia – Apples*, the Appellate Body found that whether a measure constitutes an SPS measure within the meaning of Annex 1(a) of the SPS Agreement “must be ascertained not only from the objectives of the measure as expressed by the responding party, but also from the text and structure of the relevant measure, its surrounding regulatory context, and the way in which it is designed and applied”;<sup>7</sup>
- In *EC – Seal Products*, the Appellate Body “emphasized that a determination of whether a measure constitutes a technical regulation ‘must be made in the light of the characteristics of the measure at issue and the circumstances of the case’”. The Appellate Body found that “[i]n determining whether a measure is a technical regulation, a panel must therefore carefully examine the design and operation of the measure while seeking to identify its ‘integral and essential’ aspects”;<sup>8</sup> and
- In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Thailand argued that criminal charges alleging underpayment of customs duties was not subject to the obligations in the Customs Valuation Agreement, because the measure was criminal in nature. The panel disagreed, finding that notwithstanding its domestic legal characterisation, the measure contained the constituent elements of “customs valuation”.<sup>9</sup> The panel made its assessment based on the text of the measure and its surrounding domestic legal framework.<sup>10</sup>

9. In each instance, a Member’s characterisation of the measure at issue was not determinative of the applicable WTO obligations. Instead, the assessment was based on the content and substance of the measure, clarified according to: the text and structure of the measure; the surrounding regulatory context; the domestic legal framework in which the measure is adopted; and the design and application of the measure.

10. In sum, if a measure is, in “content and substance”, a “safeguard measure”, a Member cannot exclude the application of the Safeguards Agreement by characterising the measure as something other than a “safeguard measure” under its own domestic law. Otherwise, the Member’s own characterisation of the measure would be determinative of the WTO obligations

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<sup>6</sup> Appellate Body Report, *US – 1916 Act*, para. 130.

<sup>7</sup> Appellate Body Report, *Australia – Apples*, para. 173.

<sup>8</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.19, citing Appellate Body Report, *EC – Asbestos*, para. 72. (emphasis added)

<sup>9</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Philippines – Article 21.5)*, paras. 7.673-7.683.

<sup>10</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Philippines – Article 21.5)*, paras. 7.619-7.683.

applicable to the measure. In short, a Member would be able to decide for itself which WTO obligations apply to its measures.

Instead, a panel must decide whether a covered agreement – here the Safeguards Agreement – applies to a measure using the substantive criteria in WTO law. *First*, a panel must ascertain the legal standard in the agreement governing the applicability of the agreement. *Second*, a panel must assess the facts, in particular the nature and character of the measures at issue, and apply the legal standard to the relevant facts. Below, Norway explains these principles as they apply to the Safeguards Agreement.

### III. LEGAL STANDARD GOVERNING THE APPLICABILITY OF THE SAFEGUARDS AGREEMENT

11. Article 1 of the Safeguards Agreement provides that “this Agreement establishes rules for the application of the safeguard measures which shall be understood to mean those provided for in Article XIX of the GATT 1994”.

12. Norway, therefore, turns first to Article XIX to establish the scope of application of the Safeguards Agreement. Article XIX provides:

If, as a result of unforeseen developments and the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

13. As the Appellate Body observed in *Indonesia – Iron or Steel Products*, Article XIX is not styled as a definitional provision: “Article XIX:1(a) does not expressly define the scope of measures that fall under the WTO safeguard disciplines”.<sup>11</sup> Instead, Article XIX serves to impose obligations on the adoption of safeguard measures. These obligations are considerably developed in the Safeguards Agreement.

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<sup>11</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57. Article XIX of the GATT 1994 may be contrasted with truly definitional treaty provisions, such as Article 1.1 of the SCM Agreement or paragraph 1 of Annex A of the SPS Agreement, whose function is limited exclusively to setting forth the required features of a particular type of measure, without imposing any obligations on the measure in question.

14. Given the nature of Article XIX, the Appellate Body cautioned against conflating the factors that properly define a safeguard measure (and, hence, the applicability of the Safeguards Agreement), with those that govern the WTO-consistency of such measures:

[I]t is important to distinguish between the features that determine whether a measure can be properly characterised as a safeguard measure from the conditions that must be met in order for the measure to be consistent with the Agreement on Safeguards and the GATT 1994. Put differently, it would be improper to conflate factors pertaining to the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines with the substantive conditions and procedural requirements that determine the *WTO-consistency* of a safeguard measure.<sup>12</sup>

15. The Appellate Body’s distinction is “important” indeed: a measure may be properly regarded as a safeguard, even though it does not meet the WTO obligations governing safeguard measures. If this were not the case, a measure could, by definition, be subject to WTO safeguard obligations solely if it complied with those obligations and, correspondingly, there could, by definition, never be a WTO-inconsistent safeguard measure. The Appellate Body rightly rejected this approach.

16. Although the provisions of Article XIX are not definitional, the Appellate Body found that they shed light on the character of a safeguard measure. The Appellate Body found that the types of measures “provided for” in Article XIX are those “designed to secure a specific *objective*, namely preventing or remedying serious injury to the Member’s domestic industry”.<sup>13</sup> To be a safeguard measure, therefore, a challenged measure must have “a demonstrable link to the objective of preventing or remedying injury”.<sup>14</sup>

17. Connected to this objective, the Appellate Body also identified two “constituent features” of a “safeguard measure”: (1) it must suspend or withdraw a GATT 1994 obligation or tariff concession; and (2) it must be designed to prevent or remedy serious injury to a domestic industry caused or threatened by increased imports.<sup>15</sup>

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<sup>12</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57. (emphasis original).

<sup>13</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.

<sup>14</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.56.

<sup>15</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. In this regard, the Appellate Body’s reasoning is similar to the Appellate Body’s and panel’s reasoning in *US – 1916 Act* and *Thailand – Cigarettes (Philippines)* (*Philippines – Article 21.5*), respectively. In both disputes, the Appellate Body and panel found that the measures at issue contained the “constituent elements” of conducted regulated by WTO obligations (dumping and customs valuation respectively). This meant that the relevant WTO obligations applied, notwithstanding that the measures contained another element that is not regulated by WTO obligations (in both cases, the criminal element of “intent”).

18. The Appellate Body found that its view that the application of the Safeguards Agreement turns on the “objective” of the measure was “buttressed” by the preamble to the Agreement, which stresses “the importance of structural adjustment”, and reiterates “the need to enhance rather than limit competition in international markets”.<sup>16</sup>

19. Article 12.1 of the Safeguards Agreement further confirms the Appellate Body’s interpretation. This provision identifies certain acts, by an importing Member, that trigger the application of notification obligations in the Safeguards Agreement. These include the following acts: (1) “initiating an investigatory process relating to serious injury or threat thereof” to a domestic industry, “and the reasons for it”; and (2) “making a finding of serious injury of threat thereof caused by increased imports”. These notification obligations underscore the critical role in safeguards actions of a finding of serious injury to a domestic industry, caused by imports.

20. The US argues that the Safeguards Agreement applies to a measure only if the importing Member formally invokes Article XIX of the GATT 1994.

21. In setting out its incorrect interpretation of the term "safeguard measure" under Article 1, the US essentially misunderstands the difference between three distinct questions:

- (a) Whether a measure is a WTO safeguard (i.e., the question of the WTO law characterisation of the measure or the applicability of WTO safeguard rules to that measure);
- (b) Whether the importing Member has the right to apply a safeguard measure (i.e., is the measure consistent with the substantive and procedural conditions in Article XIX of the GATT 1994 and the Safeguards Agreement); and
- (c) Whether the measures are applied in a manner consistent with the Safeguards Agreement (for example, Articles 2.2, 5.1, and 9.1, governing the application of safeguard measures).

22. Driven by its misunderstanding of the fundamental distinction between these three questions, the US refers to inapplicable jurisprudence in support of its arguments. The US notes, for example, the Appellate Body’s statement that: “[n]otification under Article XIX ... is ‘a necessary prerequisite to establishing a right to apply a safeguard measure’”.<sup>17</sup> The US relies on the Appellate Body’s statement to conclude erroneously that “[w]ithout an invocation of that

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<sup>16</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, footnote 189.

<sup>17</sup> The US’ first written submission, para. 66.

right [through notification], a measure does not qualify as a safeguard under the WTO Agreement”.<sup>18</sup>

23. However, the Appellate Body’s statement simply means that a Member must notify a safeguard measure in order for the safeguard measure to be *consistent with* the Safeguards Agreement. The Appellate Body is not saying that the Member must notify a measure as a safeguard in order *for the Safeguards Agreement to apply* to that measure. Rather, as the Appellate Body explained in *Indonesia – Iron or Steel Products*, the applicability of the Agreement must be objectively determined, separately from the question whether a measure is consistent with the substantive and procedural conditions in Article XIX of the GATT 1994 and the Safeguards Agreement.<sup>19</sup>

24. The US thus draws an incorrect distinction between the question of whether the Safeguards Agreement applies, on the one hand, and the question of whether that safeguard measure has been applied consistently with various requirements, on the other hand.

#### **IV. ARTICLE XIX OF THE GATT 1994 AND THE SAFEGUARDS AGREEMENT DO NOT OPERATE AS AN “AFFIRMATIVE DEFENSE”**

25. The US seems to treat Article XIX as an “affirmative defense”, which applies to “justify” a “violation” of the GATT, in two possible respects. First, Article XIX can be invoked by a Member imposing a measure (“importing Member”), to justify a violation of the GATT 1994; and second, Article XIX can be invoked by a Member imposing retaliatory measures in response (“retaliating Member”), i.e., to justify retaliation measures that would otherwise violate the GATT 1994. However, in both instances, the US argues that, for the “affirmative defense” to be available, the importing Member must have formally invoked Article XIX, when imposing its measure in the first place. If it does not do so, then neither the importing Member, nor the retaliating Member, can rely on Article XIX to justify GATT violations.

26. Norway stresses that Article XIX does not operate as an “affirmative defense”. It should be recalled that the term “affirmative defense” is typically used to describe provisions like Article XX, i.e., measures which are invoked by a respondent in order to justify a violation of the GATT 1994. Norway points out that Article XIX and the Safeguards Agreement, by contrast, do not operate in this way. Rather, they establish distinct obligations that apply when a Member wishes to take a safeguard measure. Thus, if the importing Member imposes a

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<sup>18</sup> The US’ first written submission, para. 68.

<sup>19</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57.

safeguard consistent with those obligations, there is no violation of the GATT 1994. In this sense, Article XIX and the Safeguards Agreement operate in the same way as Article VI; they contain their own specific set of obligations that, when particular substantive and procedural conditions are met, displace GATT obligations which would otherwise be applicable.

27. The applicability of the Safeguards Agreement does not depend on the importing Member's invocation, as it would, for example, under Article XX. Rather, the applicability of the Safeguards Agreement is subject to objective determination. The question is whether the measure satisfies the "constituent features" of a safeguard measure, as set out in Article 1 of the Safeguards Agreement.

## V. CONCLUSION

28. Having regard to the above considerations, and in light of well-established jurisprudence of the WTO, Norway finds that a Member cannot determine for itself the provisions which are applicable to its measures; municipal law classifications are not determinative of how a measure is characterised under WTO law.

29. Rather, a panel is required to determine the applicability of the relevant covered agreements, on the basis of its own objective assessment. The assessment of the applicable obligations should be based on the "content and substance" of the measure, in light of the relevant legal standard; the panel must ascertain the legal standard in the agreement governing the applicability of the agreement; assess the facts, in particular the "content and substance" of the measure; and apply the legal standard to the facts.

30. Furthermore, Article 1 of the Safeguards Agreement provides that it applies to measures "provided for" in Article XIX of the GATT 1994. On this basis, the Appellate Body has identified two "constituent elements" of a "safeguard": the measure (1) must suspend or withdraw a GATT 1994 obligation or tariff concession; and (2) it must be designed to prevent or remedy serious injury to a domestic industry caused or threatened by increased imports.

31. Moreover, the US essentially misunderstands the difference between three distinct questions: (1) whether the measure at issue is a WTO safeguard, subject to the obligations in the Safeguards Agreement; (2) whether the imposing Member has the right to impose a safeguard; and (3) whether the measures are applied in a manner consistent with the Safeguards Agreement.

32. Norway respectfully requests the Panel to take account of the above considerations in interpreting the relevant provisions and their applicability.