

UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS544)

**RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S QUESTIONS AFTER
THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES**

April 7, 2021

1. The United States comments below on the Panel’s questions after the videoconference with the Parties. The absence of a comment on any particular argument by the complainant should not be construed as agreement with the complainant’s arguments.

Question 96. With respect to the panel's findings on terms of reference in *United States – Tariff Measures (China)* (DS543):

a. To what extent are the legal and factual circumstances of the present case, specifically those in respect of the imposition of duties on derivative steel and aluminium products, similar to and/or distinct from the circumstances in *United States – Tariff Measures (China)*?

b. In view of these similarities and/or differences, please comment on whether and to what extent the factors considered by the panel in *United States – Tariff Measures (China)* are relevant for the Panel's analysis of whether the duties on derivative steel and aluminium products are within its terms of reference.

2. The United States responds to the Panel’s Questions 96(a) and (b) together.

3. The terms of reference for a dispute must be determined based on the particular panel request at issue and the specific measures identified in that request. Therefore, the terms of reference analysis relating to a panel request identifying a measure in a different dispute provides limited relevant insight for this Panel in analyzing its terms of reference under a different panel request identifying a different measure.

4. The panel’s terms of reference analysis in *United States – Tariff Measures (China)* addressed a different question from the one faced by this Panel. Specifically, that panel addressed a situation in which a panel request specified one level of tariffs on certain products, and, subsequent to the panel’s establishment, there was an increase in the level of tariffs applied to the *same* products.¹ In this dispute, in contrast, the later duties on derivative steel and aluminum products concern an entirely separate set of products with different HTS headings than those subject to the duties in existence at the time of the panel request and establishment.²

¹ See *US – Tariff Measures (Panel)*, paras. 7.23-7.29 & 7.37-7.62 (“In this case, the increase of the rate of additional duties covers the same products (List 2 products) as the second measure identified in China’s panel request. The Annex of the Notice of 9 May 2019 amends the Harmonized Tariff Schedule of the United States ‘to provide that the rate of additional duties for the September 2018 action will increase to 25 percent on May 10, 2019’....”) (citation omitted)(emphasis omitted).

² Proclamation 9704 and subsequent amendments concern “aluminum articles” defined in HTS as: (a) unwrought aluminum (HTS 7601); (b) aluminum bars, rods, and profiles (HTS 7604); (c) aluminum wire (HTS 7605); (d) aluminum plate, sheet, strip, and foil (flat rolled products) (HTS 7606 and 7607); (e) aluminum tubes and pipes and tube and pipe fitting (HTS 7608 and 7609); and (f) aluminum castings and forgings (HTS 7616.99.51.60 and 7616.99.51.70). See Presidential Proclamation 9704 of March 8, 2018 (US-10). In contrast, Proclamation 9980

5. Moreover, as the United States explained in its response to Question 87, under the DSU, subsequent measures, such as “amended” or “new” measures, that did not exist at the time of the panel request could not have been identified in the panel request and are not within the Panel’s terms of reference.³ The new duties on derivative steel and aluminum products did not exist at the time of the panel’s establishment and could not have been identified in the complainant’s panel request, much less subject to consultations.⁴ Thus, the new duties on derivative steel and aluminum products fall outside the Panel’s terms of reference.

imposed additional duties on the following “derivative aluminum products”: (a) stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and with steel core, not electrically insulated; the foregoing fitted with fittings or made up into articles (described in subheading 7614.10.50); (b) stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing comprising electrical conductors, not fitted with fittings or made up into articles (described in subheading 7614.90.20); (c) stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing not comprising electrical conductors, not fitted with fittings or made up into articles (described in subheading 7614.90.40); (d) stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing fitted with fittings or made up into articles (described in subheading 7614.90.50); (e) bumper stampings of aluminum, the foregoing comprising parts and accessories of the motor vehicles of headings 8701 to 8705 (described in subheading 8708.10.30); and (f) body stampings of aluminum, for tractors suitable for agricultural use (described in subheading 8708.29.21). *See* Presidential Proclamation 9980 of January 24, 2020 (US-225).

Proclamation 9705 and subsequent amendments concern “steel articles” consisting of: (i) flat-rolled products provided for in headings 7208, 7209, 7210, 7211, 7212, 7225 or 7226; (ii) bars and rods provided for in headings 7213, 7214, 7215, 7227, or 7228, angles, shapes and sections of 7216 (except subheadings 7216.61.00, 7216.69.00 or 7216.91.00); wire provided for in headings 7217 or 7229; sheet piling provided for in subheading 7301.10.00; rails provided for in subheading 7302.10; fish plates and sole plates provided for in subheading 7302.40.00; and other products of iron or steel provided for in subheading 7302.90.00; (iii) tubes, pipes and hollow profiles provided for in heading 7304, or 7306; tubes and pipes provided for in heading 7305; (iv) ingots, other primary forms and semi-finished products provided for in heading 7206, 7207 or 7224; and (v) products of stainless steel provided for in heading 7218, 7219, 7220, 7221, 7222 or 7223. *See* Presidential Proclamation 9705 of March 8, 2018 (US-9). In contrast, Proclamation 9980 imposed additional duties on the following “derivative iron or steel products”: (a) nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar articles, of iron or steel, whether or not with heads of other material (excluding such articles with heads of copper), suitable for use in powder-actuated handtools, threaded (described in subheading 7317.00.30); (b) nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar articles, of iron or steel, whether or not with heads of other material (excluding such articles with heads of copper), of one piece construction, whether or not made of round wire; the foregoing described in statistical reporting numbers 7317.00.5503, 7317.00.5505, 7317.00.5507, 7317.00.5560, 7317.00.5580 or 7317.00.6560 only and not in other statistical reporting numbers of subheadings 7317.00.55 and 73,17. 00. 65; (c) bumper stampings of steel, the foregoing comprising parts and accessories of the motor vehicles of headings 8701 to 8705 (described in subheading 8708.10.30); and (d) body stampings of steel, for tractors suitable for agricultural use (described in subheading 8708.29.21). *See* Presidential Proclamation 9980 of January 24, 2020 (US-225).

³ *See* U.S. Response to the Panel’s Question 87, paras. 15-22.

⁴ *See* U.S. Response to the Panel’s Question 87, para. 22 (“Proclamation 9980 was issued on January 24, 2020, more than a year after the establishment of the panel and after the completion of the first panel meeting.”).

Question 97. Please comment on the negotiating history of Article 11.1(c) of the Agreement on Safeguards, including on those documents cited by the United States, especially in relation to the term "pursuant to" in Article 11.1(c).

6. As the United States explained in response to the Panel's Question 20, the ordinary meaning of the terms in Article 11.1(c) can be understood as "measures [that a Member has] tried to do, succeeded in doing or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX." The ordinary meaning of these terms establishes that Article 11.1(c) is triggered – and the Agreement on Safeguards "does not apply" – when a Member acts (by seeking, taking or maintaining a measure) pursuant to a provision of the GATT 1994 other than Article XIX. This result is confirmed by the negotiating history of the Agreement on Safeguards, as described in Section IV.B.4.b of the U.S. Second Written Submission.

7. In particular, although early draft text of the Agreement on Safeguards would have permitted Members to take safeguard measures under Article XIX "only in a situation in which other GATT provisions do not provide remedies",⁵ this approach was abandoned by July 1990, when the draft text was changed to provide that the agreement "do[es] not prejudice" a Member's ability to take action pursuant to provisions of the GATT 1994 other than Article XIX.⁶ As the July 1990 draft Agreement on Safeguards provided in relevant part:

The provisions of paragraph 1 [defining a safeguard measure] above *do not prejudice* the rights and obligations of contracting parties regarding trade-restrictive measures taken in conformity with specific provisions of the General Agreement other than Article XIX, protocols, and agreements and arrangements negotiated under the auspices of GATT.⁷

8. Although the phrasing and placement of this provision changed as the negotiations went along, subsequent drafts of the Agreement on Safeguards continued to reflect negotiators' underlying intent to prevent the terms of the Agreement on Safeguards from prejudicing

⁵ See Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), para. 4 (providing that "[a] contracting party [or a customs union] may apply safeguard measures to a product being imported into its territory, *only in a situation* in which other GATT provisions do not provide specific remedies (e.g. Articles VI, XVI or XXVIII)" and on certain conditions) (emphasis added) (US-215); Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1 (January 15, 1990), para. 4 ("A contracting party [or a customs union] may apply a safeguard measure to a product being imported into its territory *only in a situation* in which other provisions of the General Agreement do not provide specific remedies, and on the conditions that...") (emphasis added) (US-216).

⁶ Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990), para. 2 (US-217).

⁷ Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990), para. 2 (emphasis added) (US-217).

Members' rights under other GATT provisions. As the October 1990 draft text stated in relevant part:

*No trade-restrictive measure shall be sought or taken by a contracting party unless it conforms with the provisions of Article XIX as interpreted by the provisions of this agreement, or is consistent with other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement.*⁸

9. With this text, the October 1990 draft continues to make clear – like the July 1990 draft – 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. So much is clear based on the use of the word “or” in the draft text quoted above, which confirms that that Members could seek or take trade-restrictive measures that were either in conformity with Article XIX or consistent with other provisions of the General Agreement (including Article XXI).

10. The same meaning is clear in the December 1991 draft Agreement on Safeguards, in which the text that became Article 11.1(c) was moved, rephrased, and divided into parts, to read in relevant part:

(c) Measures sought, taken or maintained by a contracting party pursuant to other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement are not included in the scope of this agreement.⁹

11. Subparagraph (c) of the December 1991 draft is similar to Article 11.1(c), particularly its reference to measures “sought, taken or maintained . . . pursuant to” other provisions of the General Agreement. By referring to measures sought, taken, or maintained “pursuant to” other provisions of the General Agreement – a change from the October 1990 draft's reference to measures “consistent with” other provisions of the General Agreement, and the July 1990 draft's reference to measures “taken in conformity with” specific provisions of the General Agreement – the December 1991 draft Agreement on Safeguards underscores that the Agreement on Safeguards does not apply to measures that a Member has tried to do, succeeded in doing or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX.

12. In the final text of the Agreement on Safeguards, this text was again rephrased to emphasize this point. Specifically, the December 1991 draft language stating that measures sought, taken, or maintained pursuant to other provisions of the GATT 1994 “are not included in

⁸ Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (Oct. 31, 1990), at para. 24 (emphases added) (US-220).

⁹ Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 1991), at M.6 -M.7, para. 22 (US-190).

the scope of” the Agreement on Safeguards was replaced with a more definite statement that the Agreement on Safeguards “does not apply” to such measures.¹⁰ By stating that the Agreement “does not apply” to such measures, this final text makes even clearer that a Member’s ability to seek, take, or maintain safeguard measures does not constrain a Member’s ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI. And that where a Member has sought, taken or maintained action pursuant to an “other provision /of the GATT 1994,” as the United States has explained, the Agreement on Safeguards “does not apply.”

¹⁰ As the final text of Article 11.1(c) provides in relevant part, “This Agreement does not apply to measure sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX.” Agreement on Safeguards, art. 11.1(c).