UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS544)

COMMENTS OF THE UNITED STATES OF AMERICA ON COMPLAINANT'S RESPONSES TO THE PANEL'S QUESTIONS AFTER THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

April 21, 2021

1. The United States comments below on complainant's responses to 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)*?**
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> **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. In its response to the Panel's Question 96, China argues that "the findings of the panel in *United States –Tariff Measures (China)* ('DS543') squarely support China's position", but that "the Panel need look no further than China's panel request to confirm that the duties on derivative steel and aluminum articles and country-specific exemptions therefrom are within its terms of reference."[1] In China's view, the phrase "'any modification, replacement or amendment' in China's panel request" is sufficient to capture the new duties on derivative steel and aluminum products.[2] China urges this Panel to "reach the same conclusion as the panel in DS543 [because] the language of China's panel request authorizes the Panel to consider amendments enacted post-panel establishment and the expansion of the import duties on steel and aluminium articles to derivative articles is an amendment that does not change the essence of the initial import duties identified in China's panel request."[3] China is wrong.

3. As the United States explained in its response to the Panel's Question 87, under the DSU, subsequent 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.[4] A panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Specifically, when the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise

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[1] China's Response to the Panel's Question 96, para. 2.

[2] China's Response to the Panel's Question 96, para. 3.

[3] China's Response to the Panel's Question 96, para. 7.

[4] *See* U.S. Response to the Panel's Question 87, paras. 15-22.

decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint."[5] As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[6] A claim alleges an inconsistency of a measure with a WTO provision at a particular point in time. The DSB tasks the panel with examining that legal situation – that is, the measure and the claim as of the point in time the DSB is requested to and does establish the panel. Thus, the Panel lacks the authority to make findings on subsequent measures that post-date the establishment of the panel.

4. There is nothing in the text of the DSU that supports the assertions in certain reports that panels can make findings concerning legal instruments that came into effect after the panel was established when those instruments "did not change the essence of the regime".[7] Rather, the DSU requires that a complaining party identify in its panel request "the specific measures at issue"[8] – not *non-specific* or hypothetical measures *not yet* at issue – and the DSB establishes a panel's terms of reference "to examine … the matter" in the panel request,[9] which includes only those "specific measures at issue." Similarly, there is nothing in the text of the DSU that supports China's claim that the phase "any modification, replacement or amendment in China's panel request" is sufficient to render any subsequent measures to fall within the Panel's terms of reference.[10] Instead, China's claim is contrary to the DSU's requirement for a complaining party to identify in its panel request "the specific measures at issue".

5. In addition to the lack of foundation in the DSU, making findings on such subsequent measures is not necessary to resolve the dispute. A recommendation to bring a measure that existed as of panel establishment into compliance with WTO rules would apply to a closely related measure in place at the end of a compliance period, where such measure bears on whether the responding Member has implemented the DSB's recommendations, whether or not the panel had specifically made findings upon it. Therefore, where a later-in-time measure in fact does not change the essence of (or is closely connected to) a measure properly within the panel's terms of reference, it is not necessary for a panel to make additional findings with respect to that measure.

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[5] *See US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

[6] *EC – Chicken Cuts (AB)*, para. 156.

[7] *See* U.S. Comments on China's Response to the Panel's Question 87, paras. 11-16.

[8] DSU Art. 6.2.

[9] DSU Art. 7.1.

[10] China's Response to the Panel's Question 96, para. 3.

6. Proclamation 9980[11] imposing duties on derivative products 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. The new duties on derivative products therefore were not in place at the time of the panel's establishment and were not (and could not have been) identified in China's panel request. Thus, consistent with the terms of the DSU, they cannot be within the Panel's terms of reference.

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).

7. Perhaps recognizing that the negotiating history does not support its arguments, China acknowledges that it "has not commented extensively" on U.S. arguments on negotiating history, and says that it "does not perceive any basis for the Panel to have recourse to supplementary means of interpretation under Article 32 of the Vienna Convention."[12] Rather than responding to the Panel's question – on the negotiating history of Article 11.1(c) – China then proceeds to expound on its views of Article 11.1(a) and the negotiating history of Article XIX, suggesting that "even if the Panel were to consider supplementary means of interpretation" it would not support the U.S. position in this dispute.[13] Even in those arguments, however, China resorts to misconstruing the text of these provisions and mischaracterizing U.S. arguments in this dispute.

8. For example, China misconstrues the text of Article 11.1(a) when it suggests that this provision "makes clear that Members must take '*any* emergency action on imports of particular products' of the type described in Article XIX of the GATT 1994 *exclusively* in accordance with Article XIX and the Agreement on Safeguards."[14] China mischaracterizes the U.S. position when it suggests the U.S. view is that "a Member may unilaterally determine the law (if any) to which a particular measure is subject, including a unilateral determination as to whether a particular measure is or is not a safeguard measure."[15] China also suggests – incorrectly – that the negotiating history of Article XIX "reveals nothing more than that some parties felt that notice should be provided *before* the safeguard measure is imposed while other parties felt that notice could be provided *simultaneously with* the imposition of the measure or, in some cases, within a reasonable period of time thereafter."[16]

[11] Proclamation 9980 of January 24, 2020 (US-225).

[12] China's Response to the Panel's Question 97, paras. 8 and 12.

[13] China's Response to the Panel's Question 97, para. 13.

[14] China's Response to the Panel's Question 97, para. 9 (emphases in original).

[15] China's Response to the Panel's Question 97, para. 13.

[16] China's Response to the Panel's Question 97, para. 15 (emphases in original).

9. As an initial matter, China errs when it suggests there is no basis for the Panel to have recourse to supplementary means of interpretation. Under Article 32 of the VCLT, although the ordinary meaning of Article 11.1(c) is clear from the text, the Panel may have recourse to supplementary means of interpretation – including negotiating history – to confirm this meaning.

10. In its arguments regarding Article 11.1(a), China fails to acknowledge that a Member may take what might be called "emergency action" under a number of provisions, including Article XIX or Article XXI. For example, a Member might increase its ordinary customs duty consistent with Article II of the GATT 1994; a Member might impose an antidumping or countervailing duty if dumping or subsidization is also present; or a Member might impose an SPS measure if the measure is also necessary to protect human, animal, or plant life or health. Article 11.1(a) does not limit a Member's choice of action, and China's arguments to the contrary conveniently ignore the words "as set forth in Article XIX" in Article 11.1(a). As Article 11.1(a) provides, "[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."[17]

11. Consistent with the text of Article 11.1(a), Article 11.1(c) establishes that the Agreement on Safeguards – including Article 11.1(a) – "does not apply" to measures that are sought, taken, or maintained by a Member pursuant to provisions of the GATT 1994 other than Article XIX. The meaning of Article 11.1(c) does not change – and the Agreement on Safeguards "does not apply" – whether or not a measure that has been sought, taken, or maintained pursuant to Article XXI *could have been* (but was not) sought, taken, or maintained pursuant to Article XIX.

12. Contrary to China's assertion, the United States does not argue in this dispute that "a Member may unilaterally determine the law (if any) to which a particular measure is subject, including a unilateral determination as to whether a particular measure is or is not a safeguard measure."[18] As the United States has explained, the text of Article XIX establishes three necessary conditions for a safeguard measure to exist,[19] meaning that even when a Member has

[17] Emphasis added.

[18] China's Response to the Panel's Question 97, para. 13.

[19] U.S. Comments on China's Comments on U.S. Statements at the Panel's Videoconference with the Parties, para. 49; U.S. Response to the Panel's Question 5(b)-(d), para. 13. Those necessary conditions are: (1) the acting Member invokes Article XIX as the legal basis for a safeguard measure by providing notice in writing and affording affected Members an opportunity to consult; (2) the measure must suspend an obligation in whole or in part or withdraw or modify a concession, and (3) this suspension, withdrawal, or modification is necessary to prevent or remedy serious injury to the Member's domestic producers caused or threatened by increased imports of the subject product because the domestic safeguard measure would otherwise be contrary to the obligation or concession. U.S. Comments on China's Comments on the U.S. Closing Statement, para. 49; U.S. Response to the Panel's Question 5(b)-(d), para. 13.

invoked Article XIX – as Indonesia did with respect to measures at issue in *Indonesia – Iron or Steel Products* – the measures at issue still may not be safeguard measures.[20]

13. China's arguments regarding the negotiating history of Article XIX ignore that, though negotiators discussed *when* a Member would be required to provide notice of action under that article and allow other Members an opportunity to consult, those discussions were based on the assumption that a Member *seeking* to act pursuant to that provision would provide such notice and opportunity to consult – in other words, the negotiators agreed that the acting Member would invoke the provision.[21] For example, in a 1946 intervention, the UK opined that "it may fairly often be necessary for the notification to be simultaneous with, and not prior, to the taking of action under this Article."[22] India similarly suggested in 1946 that it might be better to re-write the provision "so as to require the member concerned to inform the Organization and to start this process of consultation after taking the action which is needed."[23] Such statements assume that the acting Member will provide notice and an opportunity to consult if it seeks to act pursuant to Article XIX – *i.e.*, that the acting Member will invoke the provision. China points to nothing in the negotiating history to support its contrary assertions, and the Panel should reject its arguments.

14. When China does address the subject of the Panel's Question – Article 11.1(c) – China erroneously suggests that "the United States' position that the Section 232 measures are not governed by the Agreement on Safeguards rests entirely on the proposition that because the United States did not 'invoke' Article XIX as the legal basis for these measures by notifying the Committee on Safeguards, the measures at issue are not safeguard measures even though they indisputably possess the two objective characteristics of a safeguard measure as identified by the Appellate Body in *Indonesia – Iron or Steel Products.*"[24] China goes on to assert that "[t]he United States' 'invocation and notification' argument is, in turn, the sole basis on which the United States claims that it imposed the Section 232 measures 'pursuant to provisions of GATT

[20] U.S. Comments on China's Comments on U.S. Statements at the Panel's Videoconference with the Parties, para. 50.

[21] U.S. Second Written Submission, Section IV.A.5.

[22] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PV/7 (Nov. 1, 1946), at 7-8 (emphasis added) (US-209).

[23] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 5 (US-210).

[24] China's Response to the Panel's Question 97, para. 10. China also argues that "the United States' position that the Section 232 measures are not governed by the Agreement on Safeguards rests entirely on the proposition that because the United States did not 'invoke' Article XIX the measures at issue are not safeguard measures." China's Response to the Panel's Question 97, para. 10.

1994 other than Article XIX' and, consequently, that the measures fall outside the scope of the Agreement on Safeguards by virtue of Article 11.1(c)." China is wrong in both statements.

15. As an initial matter, the United States has repeatedly explained that in taking action under Section 232, the United States has not "suspended in whole or in part a GATT obligation or withdrawn or modified a GATT concession" within the meaning of Article XIX,[25] and accordingly, the measures at issue do not possess the incomplete list of "constituent features" identified by the Appellate Body in *Indonesia – Iron or Steel Products*.[26] A measure does not itself suspend an obligation or withdraw or modify a concession; instead, whether an obligation is suspended, withdrawn, or modified is an incidental legal characterization that attaches if a Member is seeking to take action pursuant to Article XIX and has complied with the conditions set forth in Article XIX and the Agreement on Safeguards.

16. In relation to the measures at issue, the United States has explicitly and repeatedly invoked GATT 1994 Article XXI. No obligation or concession may supersede the right to take action under that provision, as the text of Article XXI confirms that "[n]othing in this Agreement shall be construed … to prevent" a Member "from taking any action which it considers necessary for the protection of its essential security interests." Accordingly, in taking action under Section 232, the United States has acted consistently with its existing rights under the covered agreements, and has not "suspended in whole or in part a GATT obligation or withdrawn or modified a GATT concession" within the meaning of Article XIX.

17. Even under China's erroneous understanding of what constitutes a safeguard measure, however – in which invocation is not a condition precedent to taking action pursuant to Article XIX – the text of Article 11.1(c) of the Agreement on Safeguards remains: the Agreement "does not apply" to the measures sought, taken or maintained pursuant to provisions of GATT 1994 other than Article XIX. As the United States has repeatedly made clear, the United States has sought to take – and has taken – the measures at issue pursuant to Article XXI.[27]

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[25] *See* U.S. Response to the Panel's Question 7, paras. 26-28; U.S. Comments on China's Response to the Panel's Question 89, paras. 18-23; U.S. Closing Statement, Section A.4.

[26] The incomplete "constituent features" of a safeguard measure discussed by the Appellate Body in its *Indonesia – Iron or Steel Products* report were: (1) the measure "must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession," and (2) "the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product." *Indonesia – Iron or Steel Products (AB)*, para. 5.60.

[27] See U.S. Response to the Panel's Question 5(b)-(d), paras. 13-21 (citing and discussing U.S. statements in the WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27 (US-80), WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27 (US-81), WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2 (US-82), U.S. Mission to

International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018), at 3 (US-83), and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (US-84)).