UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS544)

COMMENTS OF THE UNITED STATES OF AMERICA ON THE COMPLAINANT'S STATEMENTS AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

February 25, 2021

1. The United States comments below on the complainant's opening and closing statements at the Panel's videoconference with the Parties. The absence of a comment on any particular answer or argument by the complainant should not be construed as agreement with the complainant's arguments.

I. Contrary to Complainant's Arguments, the Ordinary Meaning of Article XXI(b) Establishes That Article XXI(b) Is Self-Judging

2. The complainant attempts to undermine the U.S. interpretation of Article XXI(b). However, the complainant's arguments only highlight the flaws in its own interpretation of Article XXI(b). The United States responds to some of the complainant's assertions below.

A. Complainant Fails to Undermine the U.S. Interpretation of Article XXI(b) as Self-Judging

3. In its closing statement, China again invokes the principle of effective treaty interpretation.[1] China characterizes the subparagraph endings as "limitations" and argues that "[f]or these limitations to have any meaning and effect, they must be objectively reviewable by a panel convened under the DSU."[2] China echoes its prior argument that under U.S. interpretation "the interpretation and effect of Article XXI(b) would be no different than if the subparagraphs did not exist."[3] In this way, China again advances its flawed argument that for the treaty text to have "meaning and effect," the text must be reviewable by the Panel.[4]

4. As the United States explained in its prior submissions, Article XXI(b), as interpreted according to the customary rules of interpretation, is self-judging, meaning that each Member has the right to determine, for itself, what it considers necessary to protect its own essential security interests, and to take action accordingly.[5] This is because the phrase "which it considers" qualifies all of the terms in the single relative clause that follows the word "action", including the terms in the main text and the subparagraph endings. This interpretation of Article XXI as self-judging is fully consistent with the principle of treaty interpretation, which is expressed in the maxim *ut res magis valeat quam pereat*, meaning "parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless," and embodied in the general rule of interpretation in Article 31 of the VCLT.[6]

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[1] China's Closing Statement, para. 7.

[2] China's Closing Statement, para. 7.

[3] China's Second Written Submission, para. 85.

[4] *See also* China's Second Written Statement, para. 9 (claiming that the U.S. interpretation "fail[s] to give meaning and effect to the subparagraphs of that provision")

[5] *See* U.S. First Written Submission, Section III; U.S. Second Written Submission, II.B; U.S. Responses to the Panel's Questions 35-37, paras. 123-138.

[6] U.S. Response to the Panel's Question 47, paras. 204-205.

5. As the United States has previously explained, the subparagraph endings form an integral part of Article XXI(b) in that they complete the sentence begun in the main text, establishing three circumstances in which a Member may act.[7] In this way, the subparagraph endings, along with the main text, help guide a Member's exercise of its rights under Article XXI(b) by identifying the circumstances in which it is appropriate for a Member to invoke those rights. This understanding of the function of the subparagraph endings is fully consistent with the principle of treaty interpretation, and in no way deprives the subparagraph endings of any effect or meaning. It is also not true that, under the U.S. interpretation, Article XXI(b) has the same effect as though the subparagraph endings did not exist. For instance, if subparagraph ending (iii) were not part of the relative clause that begins in the main text, the Member would need only to consider that the action is necessary for the protection of its essential security interest. Because of the text of the subparagraph ending (iii), the Member also needs to consider that the essential security action is "taken in time of war or other emergency in international relations."

6. China's argument – that without panel review of their "applicability" the subparagraph endings are without effect or meaning – is untrue and misconstrues the principle. As the United States explained in its response to the Panel's Question 47, the VCLT provides for rules governing the conclusion and adoption of treaties between states.[8] The VCLT does not, however, suggest that whether a party enters into binding treaty obligations is dependent on that party agreeing to formal dispute settlement. In fact, many – if not most – international obligations are undertaken without being subject to review by an arbitral body.[9] The question of whether a state consents to undertake a particular obligation in international law is simply separate from whether a state consents to dispute settlement in respect of that obligation. The

[7] U.S. Response to the Panel's Question 47, para. 203.

[8] U.S. Response to the Panel's Question 47, paras. 207-210. Several articles in the VCLT address treaty formation: Article 9 (Adoption of the text); Article 11 (Means of expressing consent to be bound by a treaty); Article 12 (Consent to be bound by a treaty expressed by signature); Article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty); Article 14 (Consent to be bound by a treaty expressed by ratification, acceptance or approval); Article 15 (Consent to be bound by a treaty expressed by accession); Article 16 (Exchange or deposit of instruments of ratification, acceptance or accession); Article 17 (Consent to be bound by part of a treaty and choice of differing provisions); and Article 24 (Entry into force) (US-108).

[9] *See e.g.*, U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (US-109); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (US-110); U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (US-111); U.N. Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3 (US-112); Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37 (US-113); U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163 (US-114); U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 (US-115); Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 1023 U.N.T.S. 15 (US-116); U.N. Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229 (US-117); Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, 1511 U.N.T.S. 3 (US-118); International Sugar Agreement, Mar. 20, 1992, 1703 U.N.T.S. 203 (US-119); U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (US-120); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 (US-121).

principle of effective treaty interpretation therefore does not address the reviewability of a treaty provision.[10]

7. This point is reflected in a leading treatise on public international law, which states that "[t]he judicial settlement of international disputes is only one facet of the enormous problem of the maintenance of international peace and security."[11] Formal dispute settlement in international law – such as WTO panel procedures as established in the DSU – are consensual in character, and "there is no obligation in general international law to *settle* disputes."[12] Furthermore, even when dispute settlement mechanisms are created, the underlying treaty terms still determine whether such mechanisms have authority over particular disputes.[13]

8. Nothing in the VCLT would suggest that parties cannot adopt a treaty provision that is self-judging and therefore not subject to review by an arbiter. To the contrary, the VCLT contains general rules for interpreting a treaty obligation according to the ordinary meaning of its terms. Where the ordinary meaning makes plain the self-judging nature of an obligation, the VCLT requires that that meaning be respected by an interpreter.[14]

9. Therefore, the fact that the terms of a particular provision are drafted to be self-judging, such that a panel may not second-guess or determine for itself whether the circumstances identified have occurred, does not somehow render that provision moot or no longer binding. If a State consents to a provision, it must abide by that provision. But it does not follow that each provision imposes an obligation, or conditions for the exercise of a right, that is reviewable under a dispute settlement mechanism. China's argument is based on its flawed understanding of the principle and should be rejected.

[10] *See* U.S. Response to the Panel's Question 47, paras. 203-211.

[11] James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 718 (8th ed. 2012) (US-122).

[12] James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW at 718 (8th ed. 2012) (US-122). Original emphasis.

[13] In addition to Article XXI of the GATT 1994, Annex A(5) of the SPS Agreement is another example of an obligation that is not subject to Panel review in a sense that the Panel can test the Member's determination: the provision defines "appropriate level of sanitary or phytosanitary protection" as "[t]he level of protection *deemed appropriate by the Member* establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory."

[14] *See* Draft Articles on the Law of Treaties with Commentaries (1966), YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 229 (Mar. 30)) (US-23).

B. Complainant Fails to Rebut the U.S. Interpretation That Best Reconciles the English, Spanish and French Versions of Article XXI(b)

10. In its opening statement, China attempts to undermine the U.S. interpretation that best reconciles the three authentic texts of Article XXI(b), claiming that "the United States has effectively asked the Panel to declare that [Spanish] text invalid."[15] China's claim is baseless.

11. As the United States has explained, the analyses of the Spanish and French texts of Article XXI(b) confirm the U.S. interpretation of Article XXI(b).[16] The interpretation that emerges based on the ordinary meaning of the text of the subparagraph endings in the English and French language versions is not fully supported by the Spanish text of the subparagraph endings. Specifically, the Spanish text of the three subparagraphs indicates that they must be read to modify the term "actions" in the chapeau of Article XXI(b); whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term "interests" in the chapeau. This means that, under Article 33 of the VCLT, the meaning that best reconciles the three authentic texts, having regard to the object and purpose of the treaty, must be adopted.

12. The interpretation that best reconciles the three texts is that the subparagraph endings modify the terms "any action which it considers" in the main text of Article XXI(b). Under this reading, the terms of the provision still form a single relative clause that begins in the main text and ends with each subparagraph ending, and therefore the phrase "which it considers" still modifies the entirety of the main text and the subparagraph endings. Thus, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances is committed to the judgment of that Member alone.

13. Contrary to China's claim, the United States is in fact the *only* party that has sought to understand the Spanish text of Article XXI as written, including grappling with the inclusion of "relativas" in the main text and the inclusion of "a las aplicadas" in Article XXI(b)(iii).[17] The U.S. efforts to present an interpretation that best reconciles the three texts under Article 33 of the VCLT reflects the seriousness with which the United States views this interpretive exercise and the thoughtfulness with which it has analyzed the three authentic texts of Article XXI(b). China has, instead, simply superimposed its desired reading of Article XXI(b) onto the Spanish text of Article XXI(b)(iii). It is China, therefore, that truly is the party that fails to take seriously the three authentic language versions of the GATT 1994.

[15] China's Opening Statement, para. 17.

[16] *See* U.S. Responses to the Panel's Questions 41-43, paras. 158-199; U.S. Second Written Submission, Section II.D.

[17] *See* U.S. Responses to the Panel's Questions 41-43, paras. 157-198.

C. Complainant's Interpretation of Article XXI(b)(iii) is Flawed

14. In its closing statement, China reiterates that "other emergency in international relations" "relates to defence and military interests, or maintenance of law and public order interests."[18] It further argues that "[t]he U.S. interpretation of this phrase as encompassing the circumstance of 'global excess capacity' for inputs such as steel and aluminum, if accepted, would allow a Member to claim that virtually *any* economic difference among nations constitutes an 'emergency in international relations.'"[19] China's argument is baseless.

15. As the United States has explained, such a narrow interpretation of the phrase "emergency in international relations" is not consistent with the ordinary meaning of the terms of that provision.[20] Based on the ordinary meaning of the text, "emergency in international relations" can be understood as a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.[21] Under this definition, an "emergency in international relations" could certainly arise due to economic circumstances. Contrary to China's argument, however, that does not mean an invoking Member could consider "any economic difference among nations" to constitute an "emergency in international relations."

16. To the extent that China is raising concerns that one Member may consider another Member to abuse the essential security exception, the United States respectfully directs the Panel to the U.S. response to the Panel's Question 34.[22]

II. Contrary to Complainant's Arguments, the Measures At Issue Are Not Safeguards

17. In its opening and closing statements at the Panel's videoconference with the Parties, the complainant argued – incorrectly – that the measures at issue are safeguards measures and sought to bolster that argument with a number of incorrect propositions. The United States responds to some of complainant's assertions below.

A. Complainant's Arguments Would Effectively Remove Article 11.1(c) from the Agreement on Safeguards

18. In its closing statement, China continued to argue that the measures at issue have what China calls "the objective characteristics of safeguard measures," and that the measures at issue

[18] China's Closing Statement, para. 16.

[19] China's Closing Statement, para. 16 (emphasis in the statement).

[20] *See* U.S. Opening Statement, paras. 10-11.

[21] *See* U.S. Response to the Panel's Question 92(b), paras. 47-48; U.S. Response to the Panel's Question 51, para. 232.

[22] U.S. Response to the Panel's Question 34, paras. 118-122.

"are therefore subject to the disciplines of the Agreement on Safeguards."[23] Rather than explaining how this position is supported by the text of Article XIX or any of the provisions of the Agreement on Safeguards, however, China simply proceeded to offer its conclusory statement that, "[a]s such, [the measures at issue] cannot be 'sought, taken or maintained … pursuant to provisions of GATT 1994 other than Article XIX.'"[24] China also attempted to confuse the Panel by pointing to selected text of the preamble to the Agreement on Safeguards – recognizing the need "to 're-establish multilateral control over safeguards and eliminate measures that escape such control'" – and asking "[h]ow could this objective possibly be satisfied if each member were allowed to decide for itself whether a particular measure is or is not a safeguard measure."[25] China's arguments are not supported by the text of Article XIX, and would effectively remove Article 11.1(c) from the Agreement on Safeguards.

19. As the United States has explained, Article XIX establishes a Member's right (but not obligation) under certain conditions to deviate from its WTO obligations and apply a safeguard measure. A key condition precedent to the exercise of that right is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult.[26] Without satisfying that condition precedent, the Member may not rely on Article XIX as a release from the "control" of its WTO obligations. The United States has *not* invoked Article XIX as the legal basis for the measures at issue; instead, the United States has invoked Article XXI.[27] Accordingly, the measures at issue are not safeguards measures, and the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply. This result is confirmed by the text of the Agreement on Safeguards, particularly Article 11.1(c), which provides in relevant part 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."

20. Contrary to China's suggestion, this interpretation of Article XIX and Article 11.1(c) is consistent with the objective of re-establishing multilateral control over safeguards and eliminating measures that escape such control. A 1987 Background Note by the GATT

[23] China's Closing Statement, para. 9.

[24] China's Closing statement, para. 9.

[25] China's Closing Statement, para. 8.

[26] *See* U.S. Response to the Panel's Question 5, paras. 8-24; U.S. Second Written Submission, Section IV; U.S. Opening Statement, Section C.

[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)).

Secretariat describes Article XIX as "one of a number of safeguards provisions in the General Agreement" and states that "[i]n recent years, the relative use of Article XIX has declined as more safeguard actions are taken without reference to GATT rules and frequently in contravention of those rules."[28] In light of this statement by the GATT Secretariat, provisions of the Agreement on Safeguards appear aimed at such actions "taken without reference to GATT rules," or – to use the words of Article 11.1(c) – actions that are not "sought, taken or maintained pursuant to provisions of GATT 1994 other than Article XIX." Here, the United States has sought, taken, and maintained the challenged measures pursuant to Article XXI of the GATT 1994. Accordingly, under Article 11.1(c), the Agreement on Safeguards "does not apply."

B. Complainant's Arguments Regarding Other WTO Provisions Are Unavailing

21. China attempts to confuse the Panel when it suggests that if the U.S. position were accepted, that position "would extend far beyond the Agreement on Safeguards to encompass *any* type of measure that requires notification or any other sort of affirmative action on the part of a Member."[29] Contrary to China's assertion, however, the U.S. argument in this dispute is simply that each WTO provision should be interpreted based on its own text. Article XIX – as interpreted according to the customary rules of interpretation of public international law – requires invocation through notice as a condition precedent to a Member exercising its right to deviate from its WTO obligations to take a safeguard measure. Provisions with different text may be interpreted differently.

22. As the United States has explained, numerous WTO provisions – like Article XIX – contemplate a Member exercising a right through invocation and contain structural features similar to Article XIX.[30] Such provisions are relevant context demonstrating that granting Members the right to take particular action when certain conditions are met – should the acting Member invoke its right to do so – is an ordinary part of the WTO Agreement. In other WTO provisions, invocation is not required or notification may serve as a procedural requirement alone. Each provision should be interpreted based on its own text in accordance with the customary rules of interpretation of public international law.

III. Conclusion

23. As the United States has demonstrated in these comments, the complainant's arguments in its statements at the videoconference are without merit. As the U.S. understanding of Article XXI – consistent across decades of Council statements and negotiating history, and consistent with several of the complainants' own previous views – stands unrebutted, the United States

[28] Negotiating Group on Safeguards, Drafting History of Article XIX and Its Place in The GATT: Background Note by the Secretariat, MTN.GNG/NG9/W/7 (Sep. 16, 1987), paras. 9-11 (US-87).

[29] China's Closing Statement, para. 6.

[30] *See* U.S. Second Written Submission, Section IV.A.2.

respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB.