UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS548)

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, the EU argues that the "analysis, and the factors considered by the panel [in *United States – Tariff Measures (China)*] in reaching its conclusion, can be easily transposed to this dispute" and that this Panel "should come to the same conclusion" as that panel.[1] The EU concludes that "Proclamation 9980 is an amendment that does not change the essence of the dispute, and it is covered by the EU's panel request."[2] The EU 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.[3] 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 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."[4] 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

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[1] EU's Response to the Panel's Question 96, paras. 4-15.

[2] EU's Response to the Panel's Question 96, para. 15.

[3] U.S. Response to the Panel's Question 87, paras. 14-21.

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

must be measures that are in existence at the time of the establishment of the panel."[5] 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".[6] Rather, the DSU requires that a complaining party identify in its panel request "the specific measures at issue"[7] – 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,[8] which includes only those "specific measures at issue." 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.

5. Proclamation 9980[9] 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 the EU's panel request. Thus, consistent with the terms of the DSU, they cannot be within the Panel's terms of reference.

6. Further, the EU's reliance on the *United States – Tariff Measures (China)* panel's terms of reference analysis is misplaced. 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. Further, the EU

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

[6] *See* U.S. Comments on the EU's Response to the Panel's Question 87, paras. 13-22.

[7] DSU Art. 6.2.

[8] DSU Art. 7.1.

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

acknowledges that "Proclamation 9980 does not apply to the same products as the previous proclamations" but conveniently concludes that "the products are closely related."[10] This Panel should reject the EU's invitation to depart from conducting its proper function of determining its terms of reference based on the particular panel request at issue and the specific measures identified in that request.

Question 97. In response to Panel question No. 86, the European Union cites certain legal instruments as "element[s]" of the steel and/or aluminium measures.

> **a. Please fill out the table below by indicating the legal provision(s) that the European Union considers are being infringed by each of these elements.**
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> **b. In its response to Panel question No. 1, the European Union claims that the United States has restored additional duties on all steel and aluminium imports from Argentina and Brazil (Exhibit EU-71). However, in its response to the Panel's additional questions, the European Union does not identify this as an amendment, modification or replacement of the measures at issue. Please clarify whether the European Union is challenging these additional duties in light of the European Union's aforesaid responses to the Panel's questions.**

7. The United States comments on the EU's response to the Panel's Question 97(a) and (b) together. As the United States explained in its comments on the EU's response to Question 87, 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. Thus, the Panel lacks the authority to make findings on those measures.

8. The five proclamations[11] identified by the EU as "[a]mended, modified or replaced measures" did not exist at the time of the panel request and could not have been identified in the EU's panel request. Thus, neither the proclamations nor the related adjustments could have fallen within the Panel's terms of reference. The United States has already explained in detail why these specific proclamations fall outside of the Panel's terms of reference, and the United States refers the Panel back to those comments.[12]

9. This conclusion is not altered by the EU's characterization of the proclamations as "elements" of the measures at issue. Article 6.2 requires the complainant to identify the specific measures at issue – that is, a panel request must identify the identity of the precise or exact

[10] EU's Response to the Panel's Question 96, para. 11.

[11] Proclamation 9772 of August 10, 2018 (US-229); Proclamation 9980 of January 24, 2020 (US-225); Proclamation 9888 of May 17, 2019 (US-231); Proclamation 9893 of May 19, 2019 (US-232); and Proclamation 9894 of May 19 2019 (US-233).

[12] *See* U.S. comments on the EU's Response to the Panel's Question 87, paras. 13-22.

measures which it alleges affect the operation of any covered agreement. If the measure a complainant seeks to challenge is not set out in a single legal instrument but consists of multiple elements or components, then identifying the precise scope and content of the measure may require a description of the measure and the various elements or components which the complainant considers to comprise the measure it challenges.

Question 98. 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).

10. Perhaps recognizing that its arguments are not supported by the negotiating history of Article 11.1(c) – the subject of the Panel's Question 98 – the EU instead focuses on Article 11.1(b) in its response. Even in those arguments, however, the EU resorts to mischaracterizing the negotiating history and suggesting an interpretation of Article 11.1 that is contrary to its ordinary meaning.

11. The EU makes much of references to "grey-area" measures in a 1987 Secretariat Note, [13] and suggests that it is "of significance" that the July 1990 draft Agreement on Safeguards "included a paragraph in the General section, which was later moved to the paragraphs becoming Article 11.1, addressing the prohibition and elimination of certain measures."[14] According to the EU, the "logical progression" of Article 11.1, and the drafters' decision to place Article 11.1(b) before Article 11.1(c) in the final text "means that [Article 11.1(b)] was given more importance."[15] Under the EU's interpretation of Article 11.1, "[o]ne should first look whether the measure at issue is a safeguard measure - Article 11.1(a)." "If the measure at issue is not a safeguard measure," the EU continues, "then Article 11.1(b) first addresses 'grey area' measures by prohibiting them."[16] Article 11.1(c), according to the EU, "only confirms that Members may take measures that are neither safeguard measures, nor grey area measures."[17]

12. As an initial matter, the EU's reliance on the "logical progression" of Article 11.1, and its assertion that subparagraphs listed first in an article are "given more importance" than those listed later – is based on interpretive rules of the EU's own invention and not customary rules of interpretation of public international law. Such an approach would lead to absurd results, for example, that measures relating to the importations or exportations of gold or silver under Article XX(c) would be more important than measures relating to the products of prison labor under

[13] EU's Response to the Panel's Question 98, paras. 19, 28, 29.

[14] EU's Response to the Panel's Question 98, para. 28.

[15] *See* EU's Response to the Panel's Question 98, paras. 33-35.

[16] EU's Response to the Panel's Question 98, para. 35.

[17] EU's Response to the Panel's Question 98, para. 35.

Article XX(e) or certain measures relating to the conservation of exhaustible natural resources under Article XX(g). The EU's approach also leads to an interpretation of the Agreement on Safeguards that is contrary to the ordinary meaning of the text, and should be rejected by the Panel.

13. The EU also misconstrues the negotiating history of Article 11.1(b) by attempting to assign outsized significance to references to grey area measures in a 1987 Secretariat Note and suggesting that negotiators' decision to place Article 11.1(c) after Article 11.1(b) "means that [Article 11.1(b)] was given more importance."[18] As discussed in Annex I of that Note, the "main points raised in past negotiations and discussions" related to a variety of topics, many of which do not refer to "grey-area" measures.[19] And in fact, the negotiating history of the Agreement on Safeguards refutes the EU's suggestion that Article 11.1(b) "was given more importance."[20] As the United States has explained, after the text that became Article 11.1(c) was first introduced into the draft Agreement on Safeguards, in July 1990, the text was reordered and revised to make explicit that Article 11.1(c) applied to *all* the provisions of the Agreement on Safeguards, including Article 11.1(b).[21]

14. Specifically, the October 1990 draft of Article 11.1 – in which the text that became Article 11.1(c) came *before* the text that became Article 11.1(b) – could have been understood to require measures then referred to as "consistent with other provisions of the General Agreement [other than Article XIX]" (text that became Article 11.1(c)) to be among the "[a]ny such measure[s]" which must be "either brought into conformity with the provisions of Article XIX and this agreement or phased out" (text that became Article 11.1(b)).[22] In subsequent drafts,

[18] EU's Response to the Panel's Question 98, paras. 28, 34.

[19] *See* Work Already Undertaken in the GATT on Safeguards, MTN.GNG/NG9/W/1, (Apr. 7, 1987), Annex I (US-213).

[20] EU's Response to the Panel's Question 98, para. 34.

[21] *See* U.S. Response to the Panel's Question 94, paras. 61-70.

[22] *See* U.S. Response to the Panel's Question 94, paras. 61-70. The relevant text of the October 1990 draft Agreement on Safeguards provided as follows – with the text that became Article 11.1(b) in **bold** and the text that became Article 11.1(c) underlined:

> 24. 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. **These include actions taken by a single contracting party as well as actions under agreements, arrangements and understandings entered into by two or more contracting parties. Any such measure in effect at the time of entry into force of this agreement shall either be brought into conformity with the provisions of Article XIX and this agreement or phased out in accordance with paragraph 25 below.**

Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (Oct. 31, 1990) (emphases added) (US-220). The text remained the same in the December 1990 draft Agreement on Safeguards. See

however, this approach was revised so that the text that became Article 11.1(c) explicitly referred to the scope of "this Agreement," and the text that would become Article 11.1(c) was moved so that it appeared *after* the text that would become Article 11.1(b).[23] With these two changes, the December 1991 draft Agreement on Safeguards made explicit that the prohibition of certain measures at subparagraph (b) is – like the rest of the Agreement– is subject to the text a subparagraph (c) that preserves Members' ability to seek, take, or maintain measures pursuant to provisions of the GATT 1994 other than Article XIX. The final text of the Agreement on Safeguards retained both changes.

15. The text of Article 11.1(a) also belies the EU's "logical progression" argument. Article 11.1(a) provides that when a Member takes or seeks "any emergency action on imports . . . as set forth in Article XIX", it must comply with Article XIX and the Agreement on Safeguards. However, a Member may take what might be called "emergency action" under a number of provisions, including Article XXI. Article 11.1(a) does not limit a Member's choice of action. Instead, Article 11.1(a) provides that when a Member takes or seeks emergency action on imports "as set forth in Article XIX", it must comply with Article XIX and the Agreement on Safeguards.

16. Consistent with this understanding of Article 11.1(a), Article 11.1(c) establishes that the Agreement on Safeguards – including Article 11.1(a) and Article 11.1(b) – "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" – simply because 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.

17. The EU also attempts to distract the Panel by suggesting that "Articles 11.2 and 11.3 confirm that the centre of gravity of the whole Article 11, entitled Prohibition and Elimination of Certain Measures, is Article 11.1(b)."[24] Article 11.2 relates to the timetables for the phasing out of measures referred to in Article 11.1(b), and Article 11.3 provides that "[m]embers shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1." The EU does not even attempt to explain how the text of these provisions could support its argument, and indeed it does not.

18. When the EU does address the subject of the Panel's Question – Article 11.1(c) – the EU erroneously asserts that use of the words "in conformity" in the text that became Article 11.1(c)

Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) (US-189).

[23] *See* U.S. Response to the Panel's Question 94, paras. 61-70.

[24] EU's Response to the Panel's Question 98, para. 34.

in the July 1990 draft of the Agreement on Safeguards "suggest[s] that the measures should be consistent with the other provisions."[25] The EU's argument ignores, however, that the reference to taking action "in conformity" with provisions of the GATT 1994 other than Article XIX in the July 1990 draft text was ultimately changed to "pursuant to" in the final text of the Agreement on Safeguards, [26] a change that undermines the EU's assertions. The phrase "in conformity with" can be understood to mean "in compliance with,"[27] and "consistent with" can be understood to mean "compatible with,"[28] while "pursuant to" can be understood to mean "in accordance with."[29] By referring to measures sought, taken, or maintained "pursuant to" provisions of the GATT 1994 other than Article XIX – as opposed to measures "in conformity with" or "consistent with" such other provisions – the final text 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.

[25] EU's Response to the Panel's Question 98, para. 22.

[26] *See* U.S. Response to the Panel's Question 98, paras. 7-13; U.S. Response to the Panel's Question 94, Annex 1.

[27] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 477 (including among the definitions of "conformity" "[a]ction in accordance with some standard; compliance (*with*, *to*)") (US-258).

[28] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 486 (including among the definitions of "consistent" "[a]greeing in substance or form; congruous, compatible (*with*, [obsolete] *to*)") (US-258).

[29] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2422 (US-86).