UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS548)

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 Measures At Issue Are Not Safeguards

2. 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

3. In its closing statement, the EU challenged the U.S. interpretation of Article 11.1(c) and Article XIX and asserted generally that Members were "fed up of grey area measures" when they drafted the Agreement on Safeguards, and "want[ed] to make sure [they] swe[pt] everything under the Agreement on Safeguards."[1] The EU pointed to Article 11.1(b) and the recitals of the Agreement on Safeguards to support its assertions, and asked – without examining the text of Article 11.1(b), Article XIX, or any other provision – "how could it possibly be that the applicability of [the Agreement on Safeguards] depended upon the defendants' agreement, invocation?"[2] The EU then incorrectly asserted that if the Panel were to adopt the U.S. arguments in this dispute, the Agreement on Safeguards and particularly its provisions on grey area measures would be rendered "meaningless."[3] The EU's arguments come to nothing.

4. 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.[4] 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.[5] Accordingly, the measures at issue are not safeguards measures, and the

[1] EU's Closing Statement, para. 14.

[2] EU's Closing Statement, paras. 14-15.

[3] EU's Closing Statement, para 15.

[4] *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.

[5] *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 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."

5. The EU is not correct when it suggests that the Agreement on Safeguards would be "meaningless" if the right to take a safeguards measure depends on a Member's invocation. Article 11.1(c) provides that the Agreement on Safeguards – including Article 11.1(b) – does not apply to a measure sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX. By contrast, a measure that was *not* sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX *could* breach Article 11.1(b). In the words of the Agreement on Safeguards, if a measure is not "sought, taken or maintained pursuant to provisions of GATT 1994 other than Article XIX", then Article 11.1(b) "does []apply" and provides, among other things, that "[f]urthermore a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side."

6. This interpretation of Article 11.1(b) and Article 11.1(c) is supported by the ordinary meaning of these provisions, as well as their negotiating history.[6] This interpretation is also consistent with a 1987 Background Note by the GATT Secretariat that 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."[7] In light of this statement by the GATT Secretariat, Article 11.1(b) appears 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."

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)).

[6] *See* U.S. Response to the Panel's Question 94, paras. 57-70 & Annex 1.

[7] 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).

B. Complainant Ignores the Potential Overlap Between Measures Potentially Covered by the Agreement on Safeguards and Article XXI

7. In its closing statement, the EU claimed that the United States is "redefin[ing] essential security as meaning economic security."[8] The EU is wrong, both in its characterization of the U.S. arguments, and in its suggestion that essential security does not include economic security.

8. As the United States has explained, the term "security" refers to "[t]he condition of being protected from or not exposed to danger."[9] As this definition indicates, the term "security" is broad and could encompass what one might describe as "economic security." Furthermore, nothing in Article XXI(b) would prevent a Member from considering interests of this type to be "essential" – defined as "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important."[10] And where a Member does so consider, those interests would be "essential security interests" under Article XXI(b). Thus, the United States is not redefining essential security; it is simply interpreting the treaty terms based on their ordinary meaning.

9. Consistent with this understanding of what may constitute "essential security interests" under Article XXI(b), a number of WTO Members – including *Certain Measures on Steel and Aluminum Products* complainants China, Norway, Russia, and Turkey, and EU member states such as Austria, Germany, The Netherlands, and Spain – appear to include economic considerations in their own assessment of their security interests for purposes of domestic law and policy, and do not strictly separate what might be regarded as "economic security" from other "types" of security.[11]

10. Therefore, the EU also errs in arguing that, in order to prevail, the "US would have to persuade you that these measures are exclusively, purely security measures."[12] To the extent that the EU is arguing that, if a measure can be construed both as an essential security measure and a measure that falls under another discipline, that measure cannot qualify as an Article XXI measure, its argument is directly contrary to the Article XXI language "Nothing in this Agreement shall be construed to prevent...".

11. To the extent the EU is arguing that the measures at issue must comply with *both* Article XXI *and* the safeguards disciplines, this argument also fails. It is nonsensical to suggest that an essential security action taken under Article XXI could – despite the text of that provision ("Nothing in this Agreement shall be construed to prevent…") – be subject to all the procedural and substantive requirements set forth in Article XIX and the Agreement on Safeguards. As the

[8] EU's Closing Statement, para. 28.

[9] *See* U.S. Response to the Panel's Question 74(d)-(f), paras. 332-333; *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22).

[10] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852, 2754 (US-22).

[11] *See* U.S. Response to the Panel's Question 74(d)-(f), paras. 333-345.

[12] EU's Closing Statement, para. 32.

EU itself has proposed this the logical conclusion to its "exclusively, purely security" understanding of Article XXI, it provides another basis for the Panel to reject the EU's erroneous interpretation.

12. As noted, the circumstances in which a Member might invoke Article XXI could overlap with those described in Article XIX and the Agreement on Safeguards. A Member may invoke Article XXI with respect to an economic emergency for which it considers an action necessary for the protection of its essential security interests. But many Members, the United States and the EU included, have imposed safeguard measures in circumstances of economic emergencies they do not consider to implicate their essential security interests. In such cases, the obligations of Article XIX and the Agreement on Safeguards would remain.

13. The EU's argument is also inconsistent with Article 11.1(c) of the Agreement on Safeguards. As the United States has explained, there is potential overlap in the scope of measures covered by both the Agreement on Safeguards and Article XXI, and a Member could take any number of actions in response to what it might consider economic emergencies, such as raising its ordinary customs duty.[13] Though there may be overlap in the scope of *measures*, there is not an overlap in *disciplines* in the context presented in this dispute, however, because the ordinary meaning of Article 11.1(c) precludes the cumulative application of the Agreement on Safeguards and Article XXI of the GATT 1994 where the measure at issue has been sought, taken, or maintained under the latter provision.[14] Put differently, the authority under which a Member acts (Article XXI, as opposed to Article XIX) – and any disciplines that apply – are mutually exclusive in the context presented in this dispute.

14. Furthermore, contrary to the EU's additional arguments, such an "exclusively, purely" test is not required for the general exceptions under Article XX.[15] As the United States has already pointed out, in no panel or Appellate Body report has an adjudicator first assessed the applicability of some other exception or justification not invoked by the responding Member.[16] Nor has a panel or the Appellate Body assessed with respect to a particular subparagraph of Article XX whether some other objective for the measure also exists in determining whether a measure has the objective identified in the relevant subparagraph. To the contrary, panels may assess in a single dispute multiple justifications under multiple subparagraphs. Were the EU correct that only a single objective may exist for a measure to satisfy one of the subparagraphs of Article XX, the mere invocation of multiple subparagraphs would itself constitute evidence against the applicability of any of the exceptions – a result unsupported by the text of the WTO

[13] *See* U.S. Response to the Panel's Question 74.

[14] U.S. Response to the Panel's Question 74, paras. 325-328.

[15] EU's Closing Statement, para. 32 (suggesting that under Article XX "if you want to benefit from one [of the general exceptions] you must *exclusively* comply in full with all of the conditions and qualifications associated with them…") (emphasis added).

[16] *See* U.S. Opening Statement, para. 6 ("As far as the United States is aware, never before in WTO dispute settlement – nor perhaps any other proceeding – has a complainant attempted to impose on a respondent its defense.").

Agreements and not reflected in the submissions of WTO Members or the analyses of panels applying the Article XX exceptions.

15. Therefore, the EU is incorrect that a measure related to an economic security objective cannot be taken pursuant to Article XXI, or that, having an economic security objective in addition to some other non-economic security purpose, a measure must be treated as a safeguard only. The text of both Article XXI and of Article 11.1(c) of the Safeguards Agreement provide expressly to the contrary.

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

16. The EU misperceives the U.S. arguments when it asserts that the "United States is taking the position that the question of which agreements and which provisions control a particular measure in WTO law, is a matter that depends upon the Member adopting that measure", and that it is the U.S. position that "unilaterally . . . the Member adopting the measure would determine what the applicable law would be in a narrow sense, what a controlling agreement for provisions would be."[17] Contrary to the EU's assertions, however, the U.S. argument in this dispute is simply that each 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.

17. 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.[18] 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.

II. Conclusion

18. 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 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.

[17] EU's Closing Statement, para. 9.

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