

UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS552)

**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. 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).

2. 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.

3. 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",¹ 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.² 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.³

¹ 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).

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

³ 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).

4. 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 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.*⁴

5. 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).

6. 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.⁵

7. 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.

⁴ 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).

⁵ 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).

8. 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 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.⁶ 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.”

⁶ 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).