UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS556)

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, Switzerland notes certain similarities between the circumstances in *United States – Tariff Measures (China)* and the present dispute, and urges this Panel to consider the same factors and reach the same conclusion.[1] Specifically, Switzerland states that "the Panel should reach the conclusion that the imposition of additional import duties on the derivatives of steel and aluminum products is a modification that did not change the essence of the import adjustment measures and that that modification falls within the Panel's terms of reference."[2] Switzerland 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

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[1] Switzerland's Response to the Panel's Questions 96(a) and (b), paras. 66-78.

[2] Switzerland's Response to the Panel's Questions 96(a) and (b), para. 78.

[3] *See* U.S. Response to the Panel's Question 87, paras.14-22.

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

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."[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. Further, 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. In urging the Panel to adopt the analysis in *United States – Tariff Measures (China)*, Switzerland ignores important differences between that dispute and the present one, including the fact that the panel's terms of reference analysis in *United States – Tariff Measures (China)* addressed a different question from the one faced by this Panel. As the United States explained in its response to this question, that panel addressed a situation in which a panel request specified one level of tariffs on certain products, and, subsequent to the panel's establishment, there was an increase in the level of tariffs applied to the *same* products.[9] In this dispute, in contrast, the later duties on derivative

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

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

[7] DSU Art. 6.2.

[8] DSU Art. 7.1.

[9] *See US – Tariff Measures (Panel)*, paras. 7.23-7.29 & 7.37-7.62 ("In this case, the increase of the rate of additional duties covers the same products (List 2 products) as the second measure identified in China's panel request. The Annex of the Notice of 9 May 2019 amends the Harmonized Tariff Schedule of the United States 'to provide that

steel and aluminum products concern an entirely separate set of products with different HTS headings than those subject to the duties in existence at the time of the panel request and establishment.

6. In sum, the new duties on derivative steel and aluminum products did not exist at the time of the panel's establishment and could not have been identified in the complainant's panel request, much less subject to consultations.[10] Thus, the new duties on derivative steel and aluminum products fall outside the Panel's terms of reference.

Question 97. In response to Panel question No. 86, Switzerland cites certain legal instruments that "[m]odif[y] the import adjustment measures" on certain steel and/or aluminium products.

> **a. Please fill out the table below by indicating the legal provision(s) that Switzerland considers are being infringed by each of these modifications.**
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> **b. In its response to Panel question No. 86, Switzerland argues that it is challenging the 10% additional duty imposed on imports of non-alloyed unwrought aluminium from Canada, imposed with effect from 16 August 2020 by Presidential Proclamation 10060. Please clarify whether this increased duty remains in effect and whether Switzerland is still requesting that the Panel make findings with respect to this possible modification.**

7. The United States comments on Switzerland's response to the Panel's Question 97(a) and (b) together. As the United States explained in its comments on the Switzerland'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 six proclamations[11] identified by Switzerland 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 Switzerland'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

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the rate of additional duties for the September 2018 action will increase to 25 percent on May 10, 2019'….") (citation omitted)(emphasis omitted).

[10] *See* U.S. Response to the Panel's Question 87, para. 22 ("Proclamation 9980 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.").

[11] Proclamation 9980 of January 24, 2020 (US-225); Presidential Proclamation 9886 of May 16, 2019 (US-230); Proclamation 9893 of May 19, 2019 (US-232); and Proclamation 9894 of May 19 2019 (US-233); Presidential Proclamation 10060 of August 6, 2020 (US-234); Presidential Proclamation 10064 of August 28, 2020 (US-235).

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 Switzerland's characterization of "the elements listed in the table prepared by the Panel" as "modify[ing] the measures at issue," or Switzerland's reference to these "elements" as "aspects" of the measures at issue.[13] 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 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 – or "aspects" to use Switzerland's word – then identifying the precise scope and content of the measure may require a description of the measure and the various elements or components (or aspects) 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. Switzerland suggests – without support – that the words "pursuant to" in Article 11.1(c) should be understood as "falls within the scope of," and that use of the phrases "in conformity with" and "consistent with" in early drafts of Article 11.1(c) "confirms that the fact that a Member 'invokes' another provision of the GATT, including Article XXI, does not mean that its measure is excluded from the Agreement on Safeguards by virtue of Article 11.1(c)."[14] Switzerland's suggested interpretation of Article 11.1(c) is not supported by its text, and is contradicted by the negotiating history of that provision.

11. Article 11.1(c) provides that the Agreement on Safeguards does not apply to measures "sought, taken *or* maintained"[15] by a Member pursuant to provisions of the GATT 1994 other than Article XIX. The ordinary meaning of these terms establishes that, if a Member has tried or attempted ("sought"[16]) to take a measure in accordance with a provision ("pursuant to"[17]) of the GATT 1994 other than Article XIX, the Agreement on Safeguards "does not apply." Where a

[12] *See* U.S. comments on Switzerland's Response to the Panel's Question 87, paras. 11-16.

[13] Switzerland's Response to the Panel's Question 97, paras. 79-80.

[14] Switzerland's Response to the Panel's Question 98, para. 94.

[15] Emphasis added.

[16] "Sought" is the past tense and past participle of the verb "seek," which can be defined as "[t]ry or attempt to do." *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2758 (US-86).

[17] Definitions of the word "pursuant" – used as an adverb in Article 11.1(c) – include "[w]ith to: in consequence of, in accordance with." *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2422 (US-86).

Member seeks, takes or maintains a measure pursuant to a provision of the GATT other than Article XIX, that Member necessarily would consider that the measure "falls within the scope of" the GATT 1994 provision pursuant to which the Member is seeking to impose its measure. However, nothing in the text of Article 11.1(c) suggests that consistency with that other GATT provision is necessary for Article 11.1(c) to apply. To the contrary, if a measure is sought pursuant to a provision of the GATT 1994 other than Article XIX, but the Member has failed to comply with the requirements of that other provision, the consequence is that the Member cannot succeed in justifying its measure based on that provision and thus breaches its underlying obligation. It is nonsensical to suggest that, having failed in one defense, a panel would move on to next find that the Member has failed to comply with the requirements of the Agreement on Safeguards – the rights of which the Member never intended to invoke.

12. Switzerland's argument also ignores that references to taking action "in conformity with" and "consistent with" GATT 1994 provisions other than Article XIX in early drafts of the provision that became Article 11.1(c) were changed to "pursuant to" in the final text of the Agreement on Safeguards,[18] a change that undermines Switzerland's assertions. The phrase "in conformity with" can be understood to mean "in compliance with,"[19] and "consistent with" can be understood to mean "compatible with,"[20] while "pursuant to" can be understood to mean "in accordance with."[21] 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.

13. Switzerland also errs when it suggests that "the negotiating history confirms that all safeguard measures (i.e. measures that present the two constituent features identified by the Appellate Body in *Indonesia – Iron or Steel Products*) must conform with the provisions of Article XIX of the GATT and the Agreement on Safeguards."[22] The drafters of the Agreement on Safeguards abandoned early attempts to include a definition for what would constitute safeguard measures, and instead included at Article 1 and Article 11.1(a) references to the

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

[19] *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).

[20] *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).

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

[22] Switzerland's Response to the Panel's Question 98, para. 95.

provisions of Article XIX.[23] This decision indicates that the drafters intended Article XIX to be determinative as to whether a particular measure was a safeguard measure for purposes of the Agreement on Safeguards.[24]

[23] U.S. Second Written Submission, Section IV.B.4.a.

[24] U.S. Second Written Submission, Section IV.B.4.a.