***UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS***

**(DS564)**

# 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)*?**
>
> **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, Turkey notes certain factual similarities and differences between the present dispute and the *United States – Tariff Measures (China)*.[1] After pointing out certain similarities, however, Turkey ignores the differences and simply concludes that "the panel report in *United States – Tariff Measures (China)* further confirms that the amendment to cover steel and aluminum derivative products falls within the Panel's terms of reference."[2] Turkey also refers to what it perceives as "the well-settled principle that an amendment or replacement measure enacted subsequent to the establishment of a panel may fall within the panel's terms of reference."[3] Turkey's arguments are misguided.

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.[4] 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

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[1] Turkey's Response to the Panel's Question 96, paras. 1.5-1.6.

[2] Turkey's Response to the Panel's Question 96, para. 1.7.

[3] Turkey's Response to the Panel's Question 96, para. 1.4.

[4] *See* U.S. Response to the Panel's Question 87, paras. 13-21.

specific measures at issue" and "brief summary of the legal basis of the complaint."[5] 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 must be measures that are in existence at the time of the establishment of the panel."[6] 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".[7] Rather, the DSU requires that a complaining party identify in its panel request "the specific measures at issue"[8] – 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,[9] 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[10] 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 Turkey's panel request. Thus, consistent with the terms of the DSU, they cannot be within the Panel's terms of reference.

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

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

[7] *See* U.S. Comments on Turkey's Response to the Panel's Question 87, paras. 9-14; *see also* U.S. Response to the Panel's Question 87, paras. 13-21.

[8] DSU Art. 6.2.

[9] DSU Art. 7.1.

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

6. Further, Turkey'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, Turkey conveniently ignores the factual differences between the present dispute and in *United States – Tariff Measures (China).* This Panel should reject Turkey'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 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).**

7. 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 – Turkey's response focuses on prior U.S. arguments relating to Article 1 of the Agreement on Safeguards, and even in those arguments, Turkey resorts to misconstruing the U.S. position. According to Turkey, the U.S. position is that – by declining to include a definition of the term "safeguard" in Article 1, and instead referring to Article XIX – "the drafters intended to convey that no objective definition of a safeguard measure existed and that they intended to leave it entirely to individual WTO Members whether a measure was to be legally characterized as a safeguard measure."[11] Turkey is mistaken.

8. As the United States has explained, in preparing the text that became Article 1 (and Article 11.1), the drafters abandoned early attempts to include a definition for what would constitute safeguard measures, and instead included only a reference to Article XIX.[12] 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.[13] This conclusion does not mean, however – as Turkey wrongly suggests – that whether a measure is legally characterized as a safeguard measure is left entirely to individual WTO Members. The text of Article XIX establishes three necessary conditions for a safeguard measure to exist,[14]

[11] Turkey's Response to the Panel's Question 98, para. 1.8.

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

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

[14] U.S. Comments on Turkey's Comments on U.S. Statements at the Panel's Videoconference with the Parties, para. 27; U.S. Response to the Panel's Question 5(b)-(d), para. 13. Those necessary conditions are: (1) the acting Member invokes Article XIX as the legal basis for a safeguard measure by providing notice in writing and affording affected Members an opportunity to consult; (2) the measure must suspend an obligation in whole or in part or withdraw or modify a concession, and (3) this suspension, withdrawal, or modification is necessary to prevent or remedy serious

meaning that even when a Member has invoked Article XIX – as Indonesia did with respect to measures at issue in *Indonesia – Iron or Steel Products* – the measures at issue still may not be safeguard measures.[15] The Panel should ignore Turkey's misconstruction of the U.S. arguments in this dispute.

**Question 99. In response to Panel question No. 2.d, Turkey argues that "Turkey's claim under Article X:3(a) of the GATT 1994 concerns the administration (i.e. application) of the United States' safeguard measures (a) to (f)". However, in Annex I of its responses to the Panel's questions following the first substantive meeting, Turkey only identifies the product exclusions, country exemptions, and a possible administrative practice relating to the product exclusions as relevant for its claim under Article X:3(a) of the GATT 1994. Please clarify whether Turkey is challenging each of measures (a) to (f) as described in its first written submission under Article X:3(a) of the GATT 1994.**

9. The United States recalls that Article X:3(a) relates to the administration of particular laws or other measures, and not to the content of substantive laws themselves. General statements not identifying a measure relating to administration of a law are thus not sufficient to specifically identify a measure at issue that may be challenged under Article X:3(a). Therefore, each of the measures (a) to (f), as identified by Turkey in its response as being challenged under Article X:3(a), must have been specifically identified in its panel request. To the extent that Turkey's panel request contains only general statements regarding what it now calls "the alleged partial, non-uniform, and unreasonable administration of the measures at issue"[16], Turkey's claims with respect to those measures fall outside the Panel's terms of reference.

injury to the Member's domestic producers caused or threatened by increased imports of the subject product because the domestic safeguard measure would otherwise be contrary to the obligation or concession. U.S. Comments on Turkey's Comments on U.S. Statements at the Panel's Videoconference with the Parties, para. 27; U.S. Response to the Panel's Question 5(b)-(d), para. 13.

[15] U.S. Comments on Turkey's Comments on U.S. Statements at the Panel's Videoconference with the Parties, para. 28.

[16] Turkey's Response to the Panel's Question 99, para. 1.13.