India – Certain Measures on Imports of Iron and Steel Products

(DS518)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

February 22, 2018

EXECUTIVE SUMMARY OF U.S. ANSWERS TO THE PANEL'S QUESTIONS TO THIRD PARTIES

I. QUESTION REGARDING ARTICLE XIX:1 OF THE GATT 1994

1. The expression "the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" in Article XIX:1 of the GATT 1994 refers not only to a tariff concession, but also to any obligation a Member assumed at the time the WTO was established or at the Member's accession. The text of Article XIX:1 refers to "obligations incurred by a contracting party" and, as an example of this, "include[es] tariff concessions" expressly. It would be contrary to the text of the provision to limit the type of obligations that may result in the increase of imports to those that are only a result of tariff concessions.

2. Besides tariff obligations, any WTO obligation affecting importation may potentially be a relevant obligation if it results in an unforeseen increase of imports that causes serious injury to a Member's domestic producers. Accordingly, each safeguard measure should be evaluated on a case-by-case basis while taking into consideration the relevant facts and context in which a Member has decided to take action to prevent or remedy an injury.

II. QUESTION REGARDING THE NATURE OF DUTIES RESULTING FROM APPLICATION OF A SAFEGUARD MEASURE

3. GATT 1994 Article II:1 provides that an imported product shall be accorded treatment no less favourable than that set out in a Member's Schedule and further contemplates that an imported product shall be subject to scheduled ordinary customs duties and (as set out in the Understanding on Article II) designated other duties or charges. A duty pursuant to a safeguard measure (or "emergency action") would not, in principle, be an ordinary customs duty – for example, set out in the customs tariff of a Member normally corresponding to the Harmonized System.

4. Duties imposed pursuant to a safeguard measure could, in principle, be considered an "other duty or charge" under the second sentence of Article II:1(b). Should those duties be applied consistent with the requirements of Article XIX (and the Agreement on Safeguards), a Member would be in conformity with its WTO obligations (including those under GATT 1994 Article II). This is explicit in the text of Article XIX:(1)(a) of the GATT 1994, which provides that a Member "shall be free" to suspend an obligation, in whole or in part, or modify a concession – "including tariff concessions." That is, Article II would not prevent the application of a WTO-consistent safeguard measure because the Member "shall be free" to apply that measure.

III. QUESTION REGARDING THE DEFINITION OF SAFEGUARD MEASURE

5. The United States agrees, in part, with the argument Chinese Taipei raises with respect to the relevance of the Appellate Body's reasoning in *US – 1916 Act*. The United States acknowledges that the Appellate Body found, for purposes of the Antidumping Agreement, that the phrase "anti-dumping measure" is not immediately clear and that, without an express definition, the phrase could apply to all measures taken to address imported products sold for less than their fair market value. From this, Chinese Taipei extrapolates that a safeguard measure,

which also does not have an express definition in the Agreement on Safeguards, is any measure taken to safeguard a domestic industry from increased imports.

6. However, Chinese Taipei does not recognize that, to qualify as a safeguard measure, the measure at issue must be to remedy or protect domestic producers from serious injury or a threat of serious injury and that the action a Member takes must be related to the suspension, withdrawal, or modification of a GATT obligation or concession.

IV. QUESTION WHETHER APPLICATION OF A MEASURE BELOW A BOUND RATE CAN BE CONSIDERED A SAFEGUARD MEASURE

7. A Member has, in effect, two bound rates in relation to the charge it may impose on an imported product. The first, under the first sentence of GATT 1994 Article II:1(b), is in relation to the rate it may impose as an "ordinary customs duty". The second, under the second sentence of that provision, is in relation to the rate it may impose as an "other duty or charge". The bound rate for an ordinary customs duty is as set out in a Member's Schedule. Under the Understanding on Article II, a Member was required to specify in its schedule the nature and level of any "other duty or charge" it could apply on an imported product. In the absence of any such scheduled "other duty or charge", a Member would not be able to apply a duty or charge on importation other than an ordinary customs duty.

8. If there is a duty or charge resulting from application of a safeguard measure, the issue is whether this duty or charge falls under the first or second sentence of GATT 1994 Article II:1(b). In principle, it would not seem that "emergency action" and application of a duty or charge while suspending, withdrawing, or modifying a concession (Article XIX:1) would normally result in an "ordinary customs duty". Therefore, that a duty or charge resulting from a safeguard measure falls within a Member's bound rate for an ordinary customs duty would not seem relevant. Instead, the proper analysis would seem to be whether the duty or charge resulting from a safeguard measure falls within a Member's bound rate for an "other duty or charge".

V. QUESTION REGARDING A PERIOD OF INVESTIGATION UNDER THREE YEARS

9. Most Members use at least three years as a baseline period of investigation. The most important aspect, however, is that the time period is unbiased and fair, and especially that it is not manipulated or otherwise selected to achieve a particular outcome during the investigation. Accordingly, the United States believes that a period of investigation under three years should not always be considered per se inadequate, although a reasonable explanation of that choice may be warranted.

VI. QUESTION REGARDING THE POSSIBILITY OF FINDING BOTH SERIOUS INJURY AND THREAT OF SERIOUS INJURY FOR THE SAME SAFEGUARD INVESTIGATION

10. Under the Agreement on Safeguards, it is possible to have findings of both serious injury and threat of serious injury for the same safeguard investigation. Under Article 2.1, a Member

may impose a measure if imports cause or threaten to cause serious injury, and the text does not exclude that both situations may arise.

11. The Appellate Body addressed this issue in the context of whether discrete findings were necessary under the Agreement on Safeguards. In *US – Line Pipe*, the Panel found that the Member imposing the measure had breached the Agreement on Safeguards because the Member had determined that increased imports were the substantial cause of serious injury or the threat of serious injury and, in the Panel's view, the Agreement on Safeguards required a discrete determination as to one or the other.

12. On appeal, the Appellate Body reviewed the Panel's analysis. As an initial matter, the Appellate Body agreed with the Panel that Article 2.1 of the Agreement on Safeguards necessitates the inclusion of "findings" or "reasoned conclusions" in a published report from the competent authorities. The Appellate Body, however, questioned the kind of findings that must appear in the published report.

13. In particular, the Appellate Body examined the meaning of the term "or" in the phrase "cause or threaten to cause" serious injury. That is, it examined whether the use of this term required discrete findings or allowed the possibility of finding one (serious injury), the other (threat of serious injury), or both. The Appellate Body focused on the context in which the term "or" is used. The Appellate Body determined that the phrase "or" did not necessarily mean "one or the other, but not both" and that the clause could mean "either one or the other, or both in combination" and, as such, it did not see that it matters, for purposes of imposing a safeguard measure, whether the competent authority finds the one (serious injury), the other (threat of serious injury), or the one or the other (serious injury or the threat of serious injury). On this basis, it found that the Member's determination had established the right to apply a safeguard.

VII. QUESTION REGARDING IMMEDIATE NOTIFICATION UNDER THE AGREEMENT ON SAFEGUARDS

14. The term "immediately" as used in Article 12.1 suggests a certain level of urgency. At the same time, the use of this term would not support a bright line test. Indeed, if the negotiators had intended to adopt a bright line test, they would have included that test in the text of the Agreement. Accordingly, each circumstance must be evaluated on a case-by-case basis. Appropriate considerations would include whether a Member subject to a safeguard received sufficient time to adequately defend its rights and support its position during and after the safeguard investigation.