UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS552)

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 95. Should you wish to provide any additional response in writing to the advance questions sent by the Panel before the second substantive meeting, any follow-up questions posed by the Panel during the meeting, or the parties' written comments following the meeting, please do so by indicating the specific question or comment to which you would like to provide any additional response in writing.

2. In its response to the Panel's Question 95, Norway repeats its argument that the Panel should reject the U.S. invocation of Article XXI(b) because of what Norway perceives as a "defect" in the DOC reports—namely, that the Secretary of Commerce did not focus enough on certain segments of the U.S. aluminum and steel industries in his national security assessment.[1] In addition, Norway reframes its argument as relating to a "good faith" requirement, stating that "it is contrary to this [good faith] principle for a Member to seek to justify a violation by ignoring critical facts that contradict the proffered justification."[2]

3. Further, Norway denies that it is asking the Panel to supplant the Secretary's findings and the President's determinations with its own, and argues it is asking the Panel to "objectively view the world as it is, rather than as the United States might like it to be, and conclude that the United States has failed to establish its defence because it has ignored facts critical to its proffered justification (i.e., the production capacity of the majority and thriving segments of the US aluminum and steel industries)."[3] This means, Norway argues, "the Panel need not take a position on whether the entirety of the US production capacity of aluminum and steel…is sufficient".[4]

4. Norway's argument is baseless. If the Panel were to reject the U.S. invocation of Article XXI for the reasons advanced by Norway, the Panel would be concluding that the United States

[1] Norway's Response to the Panel's Question 95, para. 3 ("In particular, the United States focuses on the minority, ailing, segments of its aluminum and steel industries, while ignoring the majority, and thriving, segments of those industries.").

[2] Norway's Response to the Panel's Question 95, para. 6.

[3] Norway's Response to the Panel's Question 95, paras. 8-9.

[4] *See* Norway's Response to the Panel's Question 95, para. 9. In its response, Norway appears to mischaracterize the emergency at issue. *See* Norway's Response to the Panel's Question 95, para. 2. As the United States explained in its prior submission, "[t]he emergency that the United States assessed was that, as a result of the circumstances resulting from the global steel and aluminum excess capacity crises, it was at risk of not being able to produce sufficient steel and aluminum to meet demands during national emergency. To the United States, that risk in itself was an emergency that needed to be addressed urgently and immediately." *See* U.S. Comments on Norway's Comments on U.S. Statements at the Panel's Videoconference with the Parties, para. 4.

could not have "consider[ed] [the action] necessary for the protection of its essential security interests" because, in the Panel's view, the United States has failed to give enough weight to certain factual evidence in assessing the necessity of the challenged measures. Despite Norway's claim that the Panel would not be supplanting the Secretary's assessment in the report with its own under this approach, there is no other way to view Norway's proffered outcome – the Panel would be supplanting the Secretary's assessment of the facts, including the weight given by the Secretary to certain factual evidence in the assessment of U.S. national security. Such a searching review is inconsistent with the text of the Article XXI, which reserves to the Member the judgment of what it considers necessary to protect its essential security interests under Article XXI(b).

5. In fact, while the United States and Norway disagree about whether the phrase "which it considers" qualifies all or some of the terms of Article XXI(b), the parties agree that the phrase qualifies the text of the chapeau and that the invoking Member must be accorded deference with respect to its determination as to whether the challenged measure is necessary for the protection of its essential security interests.[5] This means not only according deference to the invoking Member's overall national security determination but also according deference to the determinations it made to arrive at that conclusion, including its assessment and weighing of factual evidence. Norway's argument thus fails to accord with even its own interpretation of Article XXI(b)(iii).

6. Norway cannot have it both ways. If Norway considers that Members should be accorded some level of deference in exercising their right to take measures necessary to protect their essential security interests, it cannot negate that deference by then inviting the Panel to engage in a searching review and reassessment of the facts underlying the Member's national security determination. Such an invitation would ignore the text of Article XXI completely, and allow a panel to review any aspect of a Member's determination with respect to essential security simply by labeling it "good faith".

7. As the United States explained in its response to Questions 31 and 32, a claim in WTO dispute settlement must be based in the provisions of the covered agreements, interpreted in accordance with the customary rules of interpretation.[6] DSU Article 3.2 provides that the terms of the covered agreements must be interpreted in accordance with customary rules of interpretation—that is, they must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[7] Nothing in the DSU otherwise provides for the application by a panel of a principle of good faith.

[5] Norway's Response to the Panel's Question 35, para. 308.

[6] *See* U.S. Response to the Panel's Questions 31 & 32, paras. 110-113.

[7] *See* U.S. Response to the Panel's Questions 31 & 32, paras. 110-113.

8. Here, the United States has invoked the security exception under Article XXI(b). As the United States has explained, Article XXI(b), when interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose, reserves to the Member the judgment of what it considers necessary to protect its essential security interests under Article XXI(b). The principle of good faith cannot operate to alter the text of Article XXI(b).[8] For these reasons, Norway's arguments should be rejected.

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).

9. Norway errs – and contradicts specific statements by the Nordic countries during the negotiation of the Agreement on Safeguards – when it suggests that "[t]he United States' interpretation erroneously introduces two categories of safeguard measures: one governed by the *Safeguards Agreement* and another exempt from that *Agreement*."[9] Norway also attempts to confuse the Panel by making much of the unremarkable proposition that the provisions that became Article 11.1(a) and Article 11.1(c) set forth mutually exclusive disciplines.[10] The Panel should reject Norway's assertions.

10. As the United States has explained, while there may be some overlap in the scope of *measures* potentially covered by both the Agreement on Safeguards, Article XXI, or other provisions, the Agreement on Safeguards makes clear that the authority pursuant to which a Member acts – and any *disciplines* that apply – are mutually exclusive in the context presented in this dispute.[11] In particular, Article 11.1(c) states that the Agreement on Safeguards "does not apply to measures sought, taken or maintained by a Member pursuant to provision of GATT 1994 other than Article XIX." Under this provision, the Agreement on Safeguards and Article XXI are mutually exclusive in terms of their application in a particular case.

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[8] While Norway refers to the Appellate Body's discussion of good faith in *US – Shrimp*, that discussion took place in the context of assessing the U.S. invocation of Article XX(g) of the GATT 1994, specifically whether the conditions set forth in the chapeau had been met. *See US – Shrimp (AB)*, paras. 158-160. As the United States explained in its opening statement, the chapeau of Article XX sets out additional requirements for a measure falling within a general exception set out in the subparagraphs – that a measure shall not be applied in a manner which constitutes a means of "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade," both of which concepts aim to address applying a measure inconsistently with good faith. Norway is effectively asking the Panel to read into Article XXI text that is not there; doing so is inconsistent with the customary rules of interpretation and Norway's approach should be rejected. *See* U.S. Opening Statement, para. 12.

[9] Norway's Response to the Panel's Question 96, para. 11.

[10] *See* Norway's Response to the Panel's Question 96, paras. 12-15.

[11] *See* U.S. Response to the Panel's Question 74, paras. 322-325.

11. Consistent with Article 11.1(c), Article 11.1(a) provides that when a Member takes or seeks emergency action on imports "as set forth in Article XIX", it must comply with Article XIX and the Agreement on Safeguards. Also consistent with Article 11.1(c), Article 1 provides that the Agreement on Safeguards "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." These provisions make clear that the terms of Article XIX define what constitutes safeguard measures under the Agreement on Safeguards and under Article XIX, and that – even though a number of different measures might involve features of a safeguard measure – the Agreement on Safeguards "does not apply" to measures sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX.

12. Negotiators of the Agreement on Safeguards – including "Nordic Countries" – drafted these provisions with an understanding that a number of different *measures* might involve features of a safeguard measure, or be said to have a safeguard objective.[12] As stated in a 1988 communication by the Nordic countries, "The General Agreement contains *several articles and provisions of a safeguard nature* (Articles XII, XVIII, XX, XXI and others)."[13] The negotiators also understood, however, if a Member has not chosen to act under Article XIX, any safeguard objective the measure might be thought to have does not have independent relevance to the rights and obligations implicated by that measure. As the Nordic countries observed in 1988, despite the "several articles and provisions of a safeguard nature" including Article XXI in the GATT 1947 (now the GATT 1994), "the scope of the issue to be negotiated in the Negotiating Group on Safeguards" was "confined to the rules and disciplines applicable for the withdrawal of GATT concessions in an emergency situation as stipulated by the current Article XIX."[14]

13. Consistent with these assertions, the drafters abandoned their early attempts to include in the Agreement on Safeguards a definition for what would constitute safeguard measures, and instead included at Article 1 and Article 11.1(a) references to Article XIX.[15] This decision indicates that the drafters intended Article XIX to be determinative as to whether a particular

[12] *See* U.S. Response to the Panel's Questions 76 and 81, paras. 346-347 and 361-365.

[13] Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (emphasis added) (US-168).

[14] Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168). Similarly, in a 1987 communication to the Negotiating Group on Safeguards, Switzerland opined that "[t]he General Agreement distinguishes between several categories of safeguards, according to the type of interests at stake and/or the scope of the measures provided for." Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987), para. 2 (US-167). Although Switzerland included Article XXI among these "categories of safeguards," it indicated that it did not feel Article XXI was of concern to the work of the Committee on Safeguards. Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987), para. 2 (US-167) ("The provisions relating to health, security etc. in Articles XX and XXI protect interests situated at other levels than purely economic and trade interests. The specific reasons for their existence do not directly concern the object of our work in the present context.").

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

measure was a safeguard measure for purposes of the Agreement on Safeguards.[16] The negotiators also abandoned draft text that purported to limit Members' ability to take action pursuant to provisions of the GATT 1994 other than Article XIX.[17] Instead, the drafters made clear that the Agreement on Safeguards "does not apply" to measures "sought, taken or maintained pursuant to" provisions of the GATT 1994 other than Article XIX. The Panel should ignore Norway's attempt to circumvent the text of the Agreement on Safeguards, contrary to the explicit statements by the drafters of that text.

14. Norway also criticizes the United States for asserting that that the word "sought" in Article 11.1(c) means to attempt, and offers its own unsupported view that "a Member's measure must actually comply" and that "[t]his is particularly so when a measure has been 'taken' and is being 'maintained'."[18] Norway also misconstrues the use of the words "in conformity with" and "consistent with" in early drafts of Article 11.1(c), suggesting that "these terms unambiguously confirm that the drafters intended the term 'pursuant to' to require that a measure be 'consistent with' the relevant GATT 1994 provision."[19]

15. As an initial matter, Norway's current understanding of "sought" does not reconcile with its own prior acknowledgement that "[b]ased on the ordinary meaning of the terms [in Article 11.1(c)], therefore, a Member 'seeks' a measure, if it 'tries', or 'attempts', to adopt the measure."[20] Norway fails to explain why it takes a different position now, or how its current position can be reconciled with the French and Spanish texts of Article 11.1(c), which use – for "sought" – the words "*cherchera à prendre*" and "*trate de adoptar*", both of which translate to try or attempt to do.[21] Norway also fails to explain how the word "sought" could have a different meaning (or be "particularly so") if "a measure has been 'taken' and is being 'maintained,'" and Norway's suggestion is inconsistent with the use of the word "or" – a coordinating conjunction demonstrating alternatives – in the text of Article 11.1(c).

16. Norway's demand for "compliance" with a provision of the GATT 1994 other than Article XIX 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,[22] a change that undermines Norway's assertions. The phrase "in conformity with" can be

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

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

[18] Norway's Response to the Panel's Question 96, para. 18.

[19] Norway's Response to the Panel's Question 96, paras. 16-17.

[20] Norway's Response to the Panel's Question 20(a), paras. 194-195.

[21] *See* U.S. Response to the Panel's Question 20, paras. 65-74.

[22] *See* U.S. Response to the Panel's Question 96, paras. 2-8; U.S. Response to the Panel's Question 94, Annex 1.

understood to mean "in compliance with,"[23] and "consistent with" can be understood to mean "compatible with,"[24] while "pursuant to" can be understood to mean "in accordance with."[25] 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.

[23] *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).

[24] *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).

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