UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS564)

COMMENTS OF THE UNITED STATES OF AMERICA ON THE COMPLAINANT'S COMMENTS ON U.S. STATEMENTS AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

March 11, 2021

1. The United States comments below on the complainant's comments on U.S. statements at the Panel's videoconference with the parties. The absence of a comment on any particular answer or argument by the complainant should not be construed as agreement with the complainant's arguments.

I. CONTRARY TO COMPLAINANT'S COMMENTS, CHALLENGED MEASURES ARE ESSENTIAL SECURITY MEASURES UNDER ARTICLE XXI(B), AND THE PANEL SHOULD FIND THAT THE UNITED STATES HAS INVOKED ARTICLE XXI(B) OF THE GATT 1994

A. Complaint's Comments Fail to Undermine the U.S. Argument That, Even Under the Complainant's Approach, the United States Has Substantiated its Defense under Article XXI(b)(iii)

2. In its closing statement, the United States explained that, even on the complainant's understanding of Article XXI(b) as *not* self-judging, the United States as the Member invoking Article XXI(b) has chosen to make information available to other Members that would satisfy the complaining party's approach.[1] The United States then pointed to information in the record, including the DOC steel report and the G20 Global Steel Forum report, that clearly supports the U.S. consideration that the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations."[2]

3. In response to the U.S. explanation, Turkey argues that the United States has not made a "proper *prima facie* case" under Article XXI(b)(iii).[3] Turkey also claims that "since Article XXI is an *affirmative* defence, it is not sufficient for the respondent to merely allude to its possible defense" and "it is also not enough to place voluminous factual materials on the record, without connection them to legal arguments."[4] Turkey's arguments are unavailing.

4. First, as the United States has explained, the term "affirmative defense" is not a legal term reflected in the DSU or any other covered agreement, and whether Article XXI "is characterized" as an affirmative defense does not itself have implications as to what is required of a party invoking that defense.[5] The DSU calls on the Panel to interpret Article XXI in accordance with customary rules of interpretation, and, as the United States has explained, what is required of the Member invoking Article XXI(b) is set forth in that provision. Turkey's reliance on the term "affirmative defense" is therefore misguided.

5. Turkey's claim that the United States "merely alluded to its possible defence" under Article XXI(b)(iii) is without merit. From the beginning of the proceedings, the United States

[1] *See* U.S. Closing Statement, paras. 39-55.

[2] *See* U.S. Closing Statement, paras. 39-55.

[3] Turkey's Comments on U.S. Closing Statement at the Second Hearing, paras. 27-30 (emphasis in the original).

[4] Turkey's Comments on U.S. Closing Statement at the Second Hearing, paras. 27-28 (emphasis in the original).

[5] *See* U.S. Response to the Panel's Question 33, paras. 114-116.

invoked Article XXI(b), indicating that the United States considers that any or all of the three circumstances described in the subparagraphs are present.[6] Contrary to Turkey's suggestion, the text of Article XXI(b) does not require the Member exercising its right under Article XXI(b) to identify a specific subparagraph ending. Though not required under Article XXI(b), however, during the first substantive meeting, the United States specifically pointed to the circumstance present in Article XXI(b)(iii).[7] While Turkey suggests that there is a specific formula to properly invoking Article XXI(b), there is no such formula either in the text of Article XXI(b) or in the DSU.

6. Furthermore, the United States has submitted extensive evidence into record that supports the U.S. invocation of Article XXI(b)(iii). The United States has submitted as exhibits the U.S. Department of Commerce reports, in which the U.S. Secretary of Commerce found that steel and aluminum articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.[8] The United States has also submitted as an exhibit the U.S. National Security Strategy, which further describes the U.S. evaluation of its national security interests and situation.[9] The United States has engaged in detailed discussions about the DOC steel and aluminum reports in response to Turkey's arguments.[10] Turkey's claim that the United States has failed to substantiate its defense is baseless.

7. In response to the United States pointing to Turkey's contradictory approach – both advocating for the Panel *to follow* the *Russia – Traffic in Transit* panel's approach to interpretation and advocating for the Panel *not to follow* that panel's approach to evaluating Russia's invocation – Turkey now argues that *Russia – Traffic in Transit* and the dispute at issue are "very different."[11] The facts of these disputes do not bear this out, however.

8. In *Russia – Traffic in Transit*, Russia invoked Article XXI(b)(iii) and the panel found there to be an emergency in international relations, noting that the situation was "recognized by

---

[6] U.S. First Written Submission, Sections I & III; U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 20.

[7] U.S. Opening Statement at the First Substantive Meeting, para. 53 ("It may be that a Member invoking Article XXI nonetheless chooses to make information available to other Members. Indeed, the United States did make plentiful information available in relation to its actions under Section 232. While such publicly available information could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii), it is not necessary under Article XXI, as explained, for any Member to provide details relating to its invocation of Article XXI.").

[8] *See* U.S. First Written Submission, Table of Exhibits.

[9] National Security Strategy of the United States of America (Dec. 2017) (" China and Russia challenge American power, influence and interests, attempting to erode American security and prosperity. They are determined to make economies less free and less fair, to grow their militaries, and to control information and data to repress their societies and expand their influence.") (US-142).

[10] *See* U.S. Closing Statement, paras. 39-55; U.S. Opening Statement at the First Substantive Meeting, paras. 54-58; U.S Response to the Panel's Question 92(a)-(b), paras. 34-50.

[11] Turkey's Comments on U.S. Closing Statement at the Second Hearing, para. 32.

the UN General Assembly as involving armed conflict."[12] Here, the United States has invoked Article XXI(b)(iii) after having taken action in response to an emergency resulting from an international crisis that also was (and is) very much a matter of public knowledge.[13] The panel in *Russia – Traffic in Transit* found that Russia failed to articulate its defense with much clarity; and Turkey alleges here, however wrongly, that the United States has made a similar failure.[14]

9. With respect to burden, then, a main difference between the disputes appears to be that the United States included in its first written submission extensive evidence regarding the factual basis for this emergency and the U.S. consideration that the actions it was taking were necessary for the protection of its essential security interests – the 232 Reports and Presidential Proclamations pursuant to which the United States took the challenged actions. Russia submitted no such evidence, yet the panel in that dispute found Russia's showing to be sufficient under Article XXI(b)(iii).

10. Turkey cannot have it both ways. Instead, as the United States has argued throughout these proceedings, the Panel should base its interpretation in this dispute, not on the faulty logic and assessment of a previous panel, but on the text of Article XXI.

II. COMPLAINANT'S COMMENTS ON THE U.S. STATEMENTS DO NOT ESTABLISH THAT THE MEASURES AT ISSUE ARE SAFEGUARD MEASURES UNDER ARTICLE XIX

A. Complainant's Arguments Misperceive the Role of a WTO Panel under the DSU

11. Turkey acknowledges that certain Members may regard the same measure differently, but misconstrues the U.S. argument when it states that this "does not mean that the legal nature of that measure cannot be determined *objectively* by a WTO panel, according to the panel's clear mandate under Article 11 of the DSU."[15] Turkey's assertions are not supported by the ordinary meaning of Article XIX or Article XXI, and reveal Turkey's misunderstanding of the U.S. arguments in this dispute and the role of a panel as set out in the DSU.

12. When considering alleged breaches of affirmative obligations in the WTO agreements, a panel may determine whether a particular measure falls within the scope of measures that are subject to the obligations claimed to have been breached. For example, when considering a

[12] *Russia – Traffic in Transit*, para. 7.122.

[13] *See e.g.*, G20 Global Steel Forum Report (Nov. 30, 2017), at 4 ("The imbalance between supply and demand is a global challenge that has led to a collapse in the fortunes of steel industries in all regions of the world. Excess capacity has driven down prices, employment, capacity utilisation rates and profitability for steelmakers, putting at risk the viability of an industry that produces a material which is vital for the functioning of economies and societies.") (US-239).

[14] *Russia – Traffic in Transit,* paras. 7.136-7.137 (stating that "Russia has not explicitly articulated the essential security interests that it considers the measures at issue are necessary to protect" and that "[d]espite its allusiveness, Russia's articulation of its essential security interests is minimally satisfactory in these circumstances.").

[15] Turkey's Comments on U.S. Closing Statement at the Second Hearing, para. 9.

claim under Article I:1 of the GATT 1994, a WTO panel may determine whether the measures at issue constitute "customs duties and charges of any kind imposed on or in connection with importation or exportation", "rules and formalities in connection with importation and exportation", or another measure that falls within the scope of Article I:1. A panel can likewise determine whether a particular charge should be treated as an "internal charge" within the scope of Article III:2 or an "import charge" within the scope of Article II.

13. When a Member wishes to *deviate* from its WTO obligations, however – such as by seeking to take measures pursuant to Articles VI, Article XIX, Article XX, or Article XXI – it is for that Member to determine the basis on which it will seek to deviate. If a measure is sought, taken, or maintained pursuant to the exercise of a right under one such basis for deviation from WTO obligations (as the United States has done here, pursuant to Article XXI), there is no reason for a Member to *also* seek, take, or maintain that measure pursuant to a right provided by another provision (such as pursuant to Article XIX, the release that the complainant attempts to assign to the United States in this dispute). If a Member has failed to comply with the requirements of the provision pursuant to which it is seeking to deviate from its WTO obligations, the Member simply breaches its underlying obligation. A panel does not – to use Turkey's words –attempt to "determine[] *objectively*" whether there might be a separate basis on which a Member may be permitted to deviate from its WTO obligations.

14. As the United States has explained, a number of different measures might involve features of a safeguard measure, or be said to have what some might call a safeguard objective.[16] For example, in the face of increased imports causing injury, a Member might increase its ordinary customs duty consistent with Article II of the GATT 1994; a Member might impose an antidumping or countervailing duty if dumping or subsidization is also present; or a Member might impose an SPS measure if the measure is also necessary to protect human, animal, or plant life or health. But if the 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. Turkey's attempt to link its argument to DSU Article 11 does not change this result, as the Panel's function of making "an objective assessment of the matter before it" does not call on the Panel to assign to a responding Member a basis for a deviation from its obligations that the Member is not attempting to employ.

15. In fact, the text of Article XXI refutes Turkey's suggestion that the Panel should attempt to "determine[] *objectively*" whether a measure is a safeguard measure under Article XIX. Specifically, the words "Nothing in this Agreement shall be construed to prevent…" in Article XXI includes Article XIX, and – as Article 11.1(c) confirms – Members did not restrict their rights to take action under other provisions of the GATT 1994 when they concluded the Agreement on Safeguards. The Panel should ignore Turkey's attempts to muddle the issues in this dispute and instead interpret these provisions of the covered agreements in accordance with customary rules of interpretation of public international law.

[16] U.S. Closing Statement, para. 34; U.S. Response to the Panel's Question 76, paras. 344-345.

B. Complainant's Arguments Regarding its Purported "Rebalancing" Measures Turn WTO Obligations on their Head

16. Turkey mischaracterizes the U.S. arguments in this dispute when it asserts that the United States "appears to imply that the existence of possibility of rebalancing measures somehow precludes WTO dispute settlement action".[17] Contrary to Turkey's assertions, the United States does not dispute that a Member affected by another Member's action pursuant to Article XIX shall be free to suspend substantially equivalent concessions or other obligations as set out in Article XIX:3 and Article 8. What a Member cannot do under the WTO system, however, is to adopt unilateral retaliation measures – disguised as purported "rebalancing measures" – simply because it is concerned with certain measures imposed by another Member.

17. Put differently, a measure cannot constitute a safeguard under the WTO Agreement unless a Member that departs from its GATT 1994 obligations invokes the right to implement a safeguard measure and provides the required notice to other exporting Members of such action. If the Member departing from its GATT 1994 obligations does not invoke Article XIX, then it is not entitled to claim the Agreement on Safeguards provides a legal basis for its measure, and that measure is not a safeguard. In these circumstances, another WTO Member affected by the breach could raise the matter bilaterally or in WTO dispute settlement. What the affected Member may not do is to reach a unilateral determination to the effect that a WTO violation has occurred and, on that basis, decide to adopt retaliatory measures on the theory that they are "rebalancing measures." Having taken this latter course, however, the complainant now asks this Panel to provide it an ex-post justification for its purported "rebalancing" measures. The Panel should decline to do so.

18. If the Panel were to adopt complainant's approach, any Member could effectively declare – unilaterally – that another Member's border measures were safeguard measures pursuant to Article XIX, simply by arguing that the duties comply with the incomplete statement of "constituent features" set out by the Appellate Body in *Indonesia – Iron or Steel Products*. Complainant's approach is not supported by the text of Article XIX or the Agreement on Safeguards, and leads to the absurd result that almost any border measure could be deemed a safeguard measure by other Members or a panel, allowing other Members to assert a right to rebalance.

19. The complainant's approach would also radically undermine the WTO dispute settlement mechanism and the WTO as a whole. DSU Article 23.2(a) provides that Members shall "not make a determination to the effect that a violation" of the covered agreements has occurred "except through recourse to dispute settlement in accordance with the rules and procedures" of the DSU. Accordingly, if a Member believes that another Member's measure is inconsistent with a WTO obligation, DSU Article 23 makes clear that the method to address such a concern is through recourse to the procedures of the DSU. Under the complainant's approach, however – contrary to DSU Article 23 – a Member can deem another Member's measure as inconsistent with a GATT obligation and, on that basis, adopt retaliatory measures.

[17] Turkey's Comments on U.S. Closing Statement at the Second Hearing, para. 10 (footnote omitted).

C. Contrary to Complainant's Arguments, Article 12.8 Does Not Support Complainant's Position

20. Turkey argues – incorrectly – that Article 12.8 of the Agreement on Safeguards undermines the U.S. interpretation of Article XIX as requiring invocation because Article 12.8 "assumes that safeguard disciplines may apply to a Member's action even if that Member failed to notify that action to the Committee on Safeguards."[18] Turkey also misperceives the U.S. arguments in this dispute when it suggests the United States believes Article 12.8 "is only relevant when a Member has notified its safeguard measures, but then failed to include in its notification all of the items required under Article 12."[19] Contrary to Turkey's assertions, the United States believes that Article 12.8 should apply based on its own terms.

21. Article 12.8 provides that "[a]ny Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications."

22. As the United States has explained, the reference in Article 12.8 to "any measures or actions *dealt with in this Agreement*"[20] makes clear that this provision relates only to notifications that Members are required to make by the Agreement on Safeguards. This text does not permit a Member to invoke – on behalf of another Member – the right to take a safeguard measure pursuant to Article XIX if the acting Member itself has not itself invoked that right by providing notice and an opportunity to consult as set forth in Article XIX:2. For example, if a Member has invoked its right to take action pursuant to Article XIX and provided notice and an opportunity to consult as set forth in Article XIX:2 – but the acting Member did not notify the Committee upon making a finding of serious injury or threat thereof caused by increased imports as called for by Article 12.1(b) – another Member may counter-notify under Article 12.8 that the acting Member has made a finding of serious injury or threat thereof caused by increased imports. If the Member taking action has *not* invoked its right to take a safeguard measure pursuant to Article XIX, however, Article 12.8 does not permit another Member to counter-invoke that right for the acting Member.

23. Turkey also continues to suggest, incorrectly, that the U.S. interpretation of Article XIX in this dispute is inconsistent with the views it expressed in a 1989 submission to the Negotiating Group on Safeguards. Based on this 1989 U.S. submission, Turkey argues that "in 1989 the United States fully accepted that whether a measure is a safeguard measure could be determined objectively, independent of whether a Member 'invoked' the safeguard disciplines' [sic] and that the relevant decision should be placed in the hands of an independent decision-maker to resolve

[18] Turkey's Comments on U.S. Closing Statement at the Second Hearing, para. 19.

[19] Turkey's Comments on U.S. Closing Statement at the Second Hearing, para. 21.

[20] Emphasis added.

disputes between Members."[21] Turkey reads into the 1989 U.S. submission meaning which is not there.

24. The United States stated in 1989 that, "[a] contracting party that considers an action taken by another party to be a safeguard measure which has not been notified by that party to the Safeguards Committee, may notify this Committee of the action and request consultations with the party taking the action. The party taking the measure so notified should agree to consult, both bilaterally and in the Safeguards Committee, and the Safeguards Committee may make recommendations as appropriate."[22]

25. These references to bilateral consultations of Members, and recommendations "as appropriate" by the Safeguards Committee do not, as Turkey would have it, amount to acceptance that whether a measure is a safeguard measure could be determined objectively, independent of whether a Member invoked the safeguard disciplines, or that the relevant decision should be placed in the hands of an independent decision-maker to resolve disputes between Members. In fact, the 1989 U.S. submission recognizes the importance of invocation by noting the potential overlap between measures taken pursuant to Article XIX and other provisions of the GATT 1994. As the United States explained in the 1989 submission, in a section called "Definition":

> Safeguard measures are trade restrictions designed to prevent or remedy serious injury to domestic producers caused by increased imports and to facilitate adjustment. Measures taken for the above purpose or having such effect *not provided for under other GATT Articles*, Agreements or Arrangements shall be subject to the provisions of this Agreement.[23]

26. This text makes a point that the United States has asserted on numerous occasions in this dispute, including in Section II.A. of this submission:[24] In the face of increased imports causing injury, a Member might impose a number of different measures that might involve features of a safeguard measure. But if the Member has not chosen to act under Article XIX – as indicated by its decision not to invoke Article XIX – any safeguard objective the measure might be thought to have does not have independent relevance. In the words used by the United States in 1989, such measures are not "subject to" the Agreement on Safeguards. In the words of the final text, Agreement on Safeguards "does not apply" to such measures.[25]

---

[21] Turkey's Comments on U.S. Closing Statement at the Second Hearing, para. 17.

[22] Submission by the United States, Negotiating Group on Safeguards, MTN.GNG/NG9/W/23 (June 13, 1989), at 8 (TUR-70).

[23] Submission by the United States, Negotiating Group on Safeguards, MTN.GNG/NG9/W/23 (June 13, 1989), at 1 (emphasis added) (TUR-70).

[24] *See also* U.S. Responses to the Panel's Question 76, paras. 344-345; U.S. Closing Statement, para. 34.

[25] Agreement on Safeguards, Article 11.1(c).

D. Complainant Misunderstands the U.S. Arguments Regarding the Role of Invocation

27. Turkey misperceives the U.S. argument when it suggests "the United States believes . . . that whether the measures at issue qualify as a 'suspension' depends exclusively on whether they were notified to the WTO as such."[26] As the United States has explained, the text of Article XIX establishes three necessary conditions for a safeguard measure to exist: (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 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.[27]

28. Put differently, the United States does not dispute the relevance – in determining whether a particular measure is a safeguard measure under Article XIX – of whether a measure suspends an obligation in whole or in part or withdraws or modifies a concession, and whether this suspension, withdrawal, or modification is necessary to prevent or remedy serious 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. The United States also recognizes that, even when a Member has invoked Article XIX – as Indonesia did with respect to the measures at issue in *Indonesia – Iron or Steel Products* – the measures at issue still may not be safeguard measures if, for example – as occurred in *Indonesia – Iron or Steel Products* – the Member purporting to take a safeguard measure pursuant to Article XIX has no binding tariff obligation in its WTO Schedule of Concessions with respect to the product on which the Member had proposed to take a safeguard measure.

III. CONCLUSION

29. In its comments on the U.S. closing statement, the complainant has failed to rebut the arguments put forward by the United States. As the U.S. understanding of Article XXI – consistent across decades of Council statements and negotiating history, and consistent with several of the complainants' own previous views – stands unrebutted, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB.

[26] Turkey's Comments on U.S. Closing Statement at the Second Hearing, para. 25.

[27] U.S. Response to the Panel's Question 5(b)-(d), para. 13.