UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS564)

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

February 25, 2021

1. The United States comments below on the complainant's opening and closing 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 Arguments, the Ordinary Meaning of Article XXI(b) Establishes That Article XXI(b) Is Self-Judging

2. The complainant attempts to undermine the U.S. interpretation of Article XXI(b). However, the complainant's arguments only highlight the flaws in its own interpretation of Article XXI(b). The United States responds to some of the complainant's assertions below.

A. Complainant Fails to Undermine the U.S. Interpretation of Article XXI(b) as Self-Judging

3. In its opening statement, Turkey attempts to undermine the U.S. interpretation of Article XXI as self-judging by pointing to the security exception language in the U.S.-Morocco Free Trade Agreement.[1] Turkey argues that the FTA text "links the word 'relating to' to 'measures'" and "makes clear that the 'considers necessary' clause is separate and distinct from the 'relating to' clause."[2] Turkey's argument attempts to distract from the actual text at issue, that of Article XXI.

4. As the United States explained in its prior submissions, Article XXI(b), as interpreted according to the customary rules of interpretation, is self-judging, meaning that each Member has the right to determine, for itself, what it considers necessary to protect its own essential security interests, and to take action accordingly.[3] This is because the phrase "which it considers" qualifies all of the terms in the single relative clause that follows the word "action", including the terms in the main text and the subparagraph endings. This reading of Article XXI(b) has been proven correct by the arguments and analyses developed in the course of this dispute.[4]

5. Under the DSU, the Panel's role is to interpret the text of Article XXI in accordance with customary rules of interpretation – based on the ordinary meaning of the treaty terms, in their context– and does not entail adopting a meaning reflected in different texts of another agreement between different parties. There is nothing in the customary rules of interpretation referred to in DSU Article 3.1 that would make the U.S.-Morocco FTA text relevant here, and even aside from this, while there are certain similarities, the text of Article 21.2 of the U.S.-Morocco FTA is in

[1] Turkey's Opening Statement, para. 20.

[2] Turkey's Opening Statement, paras. 20-22.

[3] *See* U.S. First Written Submission, Section III; U.S. Second Written Submission, II.B; and U.S. Responses to the Panel's Questions 35-37, paras. 122-137.

[4] *See* U.S. Responses to the Panel's Questions 35-40, paras. 122-155; U.S. Response to the Panel's Question 90, paras. 25-28; and U.S. Second Written Submission, Section II.B.

any event different from the text of Article XXI of the GATT. The security exception language in the FTA, therefore, provides no guidance to the Panel in interpreting Article XXI of the GATT 1994.

B. Complainant Fails to Rebut the U.S. Interpretation That Best Reconciles the English, Spanish and French Versions of Article XXI(b)

6. In its opening statement, Turkey asserts that there is no conflict between the different language versions of Article XXI(b).[5] Turkey also suggests that the United States has somehow treated the Spanish text as less than equal to the English and French texts.[6] Further, Turkey criticizes the United States for not including grammatical or interpretative bases for the U.S. alternative interpretation.[7] Turkey's claims are baseless.

7. As the United States has previously explained in response to the Panel's Question 43 and in its Second Written Submission, under Article 33 of the VCLT, "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language" and the "terms of the treaty are presumed to have the same meaning in each authentic text."[8] Article 33(4), however, recognizes that a difference in meaning may emerge from comparing two or more authentic texts and that application of the rules of treaty interpretation in Articles 31 and 32 may not remove such a difference. In such instance, Article 33(4) provides that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

8. With respect to Article XXI(b), the interpretation that emerges based on the ordinary meaning of the text of the subparagraph endings in the English and French language versions is not fully supported by the Spanish text of the subparagraph endings. Specifically, the Spanish text of the three subparagraphs indicates that they must be read to modify the term "actions" in the chapeau of Article XXI(b); whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term "interests" in the chapeau.[9] This means that, under Article 33 of the VCLT, the meaning that best reconciles the three authentic texts, having regard to the object and purpose of the treaty, must be adopted.

9. The interpretation that best reconciles the three texts is that the subparagraph endings modify the terms "any action which it considers" in the main text of Article XXI(b).[10] Under

[5] Turkey's Opening Statement, para. 24.

[6] Turkey's Opening Statement, para. 25.

[7] Turkey's Opening Statement, para. 27.

[8] *See* U.S. Responses to the Panel's Questions 43, paras. 189-197; U.S. Second Written Submission, Section II.D.

[9] *See* U.S. Second Written Submission, Section, Section II.D, paras. 90-111; U.S. Responses to the Panel's Questions 41-43, paras. 162-164.

[10] *See* U.S. Second Written Submission, Section, Section II.D, paras. 102-111; U.S. Responses to the Panel's Questions 41-43, paras. 165-166.

this reading, the terms of the provision still form a single relative clause that begins in the main text and ends with each subparagraph ending, and therefore the phrase "which it considers" still modifies the entirety of the main text and the subparagraph endings. Thus, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances is committed to the judgment of that Member alone.

10. Contrary to Turkey's claim, the U.S. approach is more respectful of the Spanish text than Turkey's approach. The United States is the only party that has sought to understand the Spanish text of Article XXI as written, including grappling with the inclusion of "relativas" in the main text and the inclusion of "a las aplicadas" in Article XXI(b)(iii).[11] The U.S. efforts to present an interpretation that best reconciles the three texts under Article 33 of the VCLT reflects the seriousness with which the United States views this interpretive exercise and the thoughtfulness with which it has analyzed the three authentic texts of Article XXI(b). Turkey has, instead, simply superimposed its desired reading of Article XXI(b) onto the Spanish text of Article XXI(b)(iii).

11. Furthermore, contrary to Turkey's claim, the United States has cited to numerous English, Spanish and French linguistic sources in its analyses under Article 33.[12] In addition, Turkey appears to miss the point of the alternative interpretation. The alternative interpretation does not represent the most natural and grammatically sound interpretation in either the English, Spanish or French version; instead, it is an interpretation that best reconciles the three authentic texts. Turkey's criticism thus does not take the three authentic language texts seriously, and is accordingly unpersuasive.

II. Contrary to Complainant's Arguments, the Measures At Issue Are Not Safeguards

12. In its opening and closing statements at the Panel's videoconference with the Parties, the complainant argued – incorrectly – that the measures at issue are safeguards measures and sought to bolster that argument with a number of incorrect propositions. The United States responds to some of complainant's assertions below.

13. Turkey has continued to press its misguided argument that the two "constituent features" of safeguard measures described by the Appellate Body in *Indonesia – Iron or Steel Products* are sufficient to establish that a particular measure is a safeguard measure, and suggests that the interpretation put forward by the United States in this dispute has been rejected in what it calls "WTO case law."[13] Turkey fails to explain, however, how its proffered approach to Article XIX is supported by the text of that provision as interpreted according to the customary rules of

[11] *See* U.S. Second Written Submission, Section II.D., paras. 90-101; U.S. Response to the Panel's Questions 41-43, paras. 156-197.

[12] *See* U.S. Second Written Submission, Section II.D, paras. 90-111; U.S. Response to the Panel's Questions 41-43, paras. 156-197.

[13] Turkey's Opening Statement, para. 6.

interpretation. Turkey also criticizes the United States for not distinguishing between what it calls "definitional features," of a safeguard measure, as opposed to "the various substantive and procedural requirements that a safeguard measure must fulfill,"[14] but Turkey fails to explain the basis for such a distinction in either Article XIX or the Agreement on Safeguards.

14. Contrary to Turkey's assertions, the term, or the concept of, "case law" does not appear in the DSU. By "case law", Turkey appears to mean law as determined by prior adjudicatory decisions, or precedent.[15] Turkey's suggestion that this Panel must follow a prior interpretation in another panel report is directly contrary to the DSU, including the function of a panel.

15. The role of a WTO dispute settlement panel established by the DSB[16] is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it", including an objective assessment of "the applicability of and conformity with the covered agreements".[17] That assessment is one of conformity with the covered agreements – not prior reports adopted by the DSB. The DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".[18]

16. Under the DSU, the DSB has no authority to adopt an authoritative interpretation of the covered agreements that is binding on WTO Members – and, therefore, neither the Appellate Body nor any panel can issue such an authoritative interpretation that amounts to "case law" as stated by Turkey. In fact, Article 3.9 of the DSU explicitly states that "the provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement." Per Article IX:2 of the WTO Agreement, that "exclusive authority" is reserved to the Ministerial Conference or the General Council acting under a special procedure.[19] Accordingly, a WTO

[14] Turkey's Opening Statement, para. 7.

[15] *See, e.g.*, Oxford English Dictionary, "case law": "the law as determined by decided cases", https://www.oed.com/ (US-248); Cambridge English Dictionary, "case law": "law based on decisions that have been made by judges in the past:" https://dictionary.cambridge.org/us/dictionary/english/case-law (US-249); University of Strathclyde, Glasgow, Case law: "Case law (or judicial precedent) is law which is made by the courts and decided by judges. Judicial precedent operates under the principle of *stare decisis* which literally means 'to stand by decisions'. This principle means that a court must follow and apply the law as set out in the decisions of higher courts in previous cases." https://guides.lib.strath.ac.uk/case_law (US-250).

[16] DSU, Art. 7.1.

[17] DSU, Art. 11 (second sentence).

[18] DSU, Art. 3.2 (second sentence). *See also* AD Agreement, Art. 17.6(ii).

[19] WTO Agreement, Art. IX:2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an

dispute settlement panel has no authority under the DSU or the WTO Agreement simply to apply an interpretation in a report adopted by the DSB in a prior dispute.

17. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law" to understand the text of the covered agreements. Those customary rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties, do not assign any interpretive role to dispute settlement reports. Article 31 of the Vienna Convention rather provides that "[a] treaty shall 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 the light of its object and purpose."

18. The United States considers it appropriate for a WTO panel to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules – that is, a prior report may be examined for its persuasive value. For that reason, were the Panel to examine the Appellate Body's report in *Indonesia – Iron or Steel* cited by Turkey, it would find that report does not support Turkey's reading that two "constituent features" are sufficient to establish that a particular measure is a safeguard measure. That report describes these two "features" only as those "absent which" a measure could not be considered a safeguard measure, and states that "whether a particular measure constitutes a safeguard measure for purpose of WTO law can be determined only on a case-by-case basis" – language that alludes to other conditions that might need to be met.[20] Accordingly, Turkey is misguided in its protestations regarding the invented distinction between the "definitional features" of a safeguard measure and "the various substantive and procedural requirements that a safeguard measure must fulfill".

19. Article XIX establishes a Member's right (but not obligation) under certain conditions to deviate from its WTO obligations and apply a safeguard measure. A key condition precedent to the exercise of that right is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult.[21] Without satisfying that condition precedent, the Member may not rely on Article XIX as a release from the "control" of its WTO obligations. The United States has *not* invoked Article XIX as the legal basis for the measures at issue; instead, the United States has invoked Article XXI.[22] Accordingly, the measures at issue are not safeguards measures, and the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply.

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interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.").

[20] *Indonesia – Iron or Steel Products (AB)*, paras. 5.57, 5.60.

[21] *See* U.S. Response to the Panel's Question 5, paras. 8-24; U.S. Second Written Submission, Section IV; U.S. Opening Statement, Section C.

[22] *See* U.S. Response to the Panel's Question 5(b)-(d), paras. 13-21 (citing and discussing U.S. statements in the WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27 (US-80), WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27 (US-81), WTO Committee on

20. This result is confirmed by the text of the Agreement on Safeguards, particularly Article 11.1(c), which provides in relevant part that the Agreement on Safeguards "does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX." Here, the United States has sought, taken, and maintained the challenged measures pursuant to Article XXI of the GATT 1994. Accordingly, under Article 11.1(c), the Agreement on Safeguards "does not apply."

III. Conclusion

21. As the United States has demonstrated in these comments, the complainant's arguments in its statements at the videoconference are without merit. 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.

Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2 (US-82), U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018), at 3 (US-83), and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (US-84)).