UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS556)

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. Complainant's Comments Fail to Undermine the U.S. Interpretation of Article XXI(b), including Article XXI(b)(iii), as Self-Judging

2. Switzerland argues that the United States is "invit[ing] the Panel to apply a wrong standard of review," claiming that the "[t]he question before this Panel is not whether the United States considered that there existed an emergency in international relations and that its essential security interests were implicated" but rather "the Panel must make an objective assessment whether an emergency in international relations and security interests as identified by the United States meet the requirements of Article XXI(b)(iii)."[1] Switzerland's effort to undermine the U.S. interpretation is unavailing.

3. As the United States has explained, the U.S. understanding that the Member invoking Article XXI(b)(iii) would *consider* the essential security action to be "taken in time of war or other emergency in international relations" is consistent with the ordinary meaning of the English text of Article XXI(b), as well as the alternative interpretation that best reconciles the three authentic texts of Article XXI(b).[2] Under the ordinary meaning of the English text of Article XXI(b), 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. Thus, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances, including the circumstance set forth in Article XXI(b)(iii), is committed to the judgment of that Member alone.

4. In addition, under the interpretation that best reconciles the three authentic texts of Article XXI(b), the subparagraph endings modify the terms "any action which it considers" in the main text of Article XXI(b).[3] Thus, under Article XXI(b)(iii), the invoking Member would take action "which it considers necessary for protection of its essential security interests" and "which it considers…taken in time of war or other emergency in international relations." Under this reading, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances remains committed to the

[1] Switzerland's Comments on the U.S. Closing Statement, para. 47.

[2] U.S. Opening Statement, paras. 5-9; U.S. Second Written Submission, Section II.B & II.D.

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

judgment of that Member alone. The United States has provided detailed explanations for this interpretation, including by reference to grammar sources, dictionary definitions, and the rules set out in the VCLT.[4] This reading of Article XXI(b) has been proven correct by the arguments and analyses developed in the course of this dispute.[5]

5. This reading is also supported by the ordinary meaning of "emergency." As the United States explained, the ordinary meaning of the text, term "emergency" can be defined as "a serious, unexpected, and often dangerous situation requiring action."[6] Whether a certain situation is "serious, unexpected, and . . . dangerous" is, also by nature, a subjective determination that involves consideration of numerous factors that will vary from Member to Member.[7] The ordinary meaning of "emergency" supports the U.S. interpretation.

6. In its statement that "the Panel must make an objective assessment whether an emergency in international relations and security interests as identified by the United States meet the requirements of Article XXI(b)(iii)," Switzerland attempts to link its argument to DSU Article 11 but advances a flawed understanding of the Panel's role under that provision.[8] As the United States has explained in prior submissions, the Panel's objective assessment of the matter before it leads to the conclusion that Article XXI is self-judging.[9] Under DSU Article 11, to make the "objective assessment" that may lead a panel to make findings to assist the DSB to make recommendations, the Panel is to make "an objective assessment of the facts of the case" and "of the applicability of and conformity with the relevant covered agreements."[10]

7. In the context of this dispute, such an assessment begins with interpreting Article XXI(b) in accordance with the customary rules of interpretation and leads to the understanding set out by the United States – that the sole finding that the Panel may make is to recognize the Member's invocation of Article XXI(b).

[4] *See* U.S. Second Written Submission, Section II.B & II.D; U.S. Responses to the Panel's Questions 41-43, paras. 156-197.

[5] *See* U.S. First Written Submission, Section III.B; U.S. Second Written Submission, Section II.B & II.D; U.S. Responses to the Panel's Questions 41-43, paras. 156-197.

[6] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806 (US-86).

[7] *See* U.S. Second Written Submission, Section II.B.3, para. 31.

[8] Switzerland's Comments on the U.S. Closing Statement, para. 47.

[9] *See* U.S. First Written Statement, Section III.D; U.S. Second Written Submission, Section III.A.

[10] DSU, Article 11 ("Accordingly, a panel should make an objective assessment of the matter before it…and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.").

B. 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)

8. 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.[11] 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."[12]

9. In response to the U.S. closing statement, Switzerland argues that the United States has not met its "burden of proof under Article XXI(b)," because "the United States has not properly invoked subparagraph (iii) and has not submitted any specific facts, evidence or arguments to establish that the measures at issue have been 'taken in time of war or other emergency in international relations' and 'for the protection of its essential security interests.'"[13] Switzerland further states that "Switzerland does not consider that the cited paragraphs of the United States' opening statement meet the requirement of articulating the defence 'promptly and clearly'."[14] Switzerland's argument is misleading and wrong.

10. As the United States has explained, what is required of the Member invoking Article XXI(b) is set forth in the text of Article XXI(b). From the beginning of the proceedings, the United States invoked Article XXI(b), indicating that the United States considers that any or all of the three circumstances described in the subparagraphs are present.[15] Contrary to Switzerland'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, the United States specifically pointed to the circumstance present in Article XXI(b)(iii) during the first substantive meeting.[16] While Switzerland suggests that there is a specific formula to "properly" invoke Article XXI(b), there is no such formula

[11] *See* U.S. Closing Statement, paras. 43-54.

[12] *See* U.S. Closing Statement, paras. 43-54.

[13] Switzerland's Comments on the U.S. Closing Statement, paras. 43-45.

[14] Switzerland's Comments on the U.S. Closing Statement, para. 44 (citing Switzerland's second written submission and its reference to Appellate Body Report, *US – Gambling*, para. 272).

[15] See U.S. First Written Submission, Sections I & III; U.S. Opening Statement at the First Substantive Meeting of the Panel, paras. 51- 58.

[16] U.S. Opening Statement at the First Substantive Meeting of the Panel, 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.").

either in the text of Article XXI(b) or in the DSU. Therefore, Switzerland's suggestion that the United States failed to "properly" invoke Article XXI(b)(iii) is baseless.

11. Nor does the Appellate Body report in *US – Gambling* support Switzerland's position. The Appellate Body's discussion about the invocation of the general exception in *US – Gambling* (under Article XIV of GATS, the counterpart to Article XX of GATT 1994) is not relevant to this Panel's task of addressing the U.S. invocation of the security exception under Article XXI. In any case, the Appellate Body report in *US – Gambling* does not support Switzerland's argument. In *US – Gambling*, the Appellate Body was addressing whether the panel erred in addressing the U.S. defense under Article XIV because the United States did not mention Article XIV of the GATS *until its second written submission*.[17] That is not the case here.

12. Equally wrong is Switzerland's suggestion that the United States has not submitted evidence supporting its view that the measures were necessary for the protection of its essential security interests and taken in time of international emergency. To the contrary, the United States has submitted extensive evidence into the 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.[18] 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.[19] And the United States has engaged in detailed discussions about the DOC reports in response to Switzerland's arguments.[20]

13. Switzerland's arguments thus amount to formulaic attempts to undermine the U.S. invocation and must fail.

[17] *US – Gambling (AB)*, paras. 268-276.

[18] U.S. First Written Submission, Table of Exhibits.

[19] 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).

[20] *See* U.S. Closing Statement, paras 43-54.

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

14. Switzerland misperceives both the U.S. arguments in this dispute and the proper role of a WTO panel when it states that "while a Member may decide to take for instance an SPS measure, or a safeguard measure, the legal characterisation of that measure under WTO law is not determined by that Member's intention and must be objectively assessed based on the features of that measure."[21] Switzerland makes a similarly misguided argument in its discussion of Article XIX and Article XXI, stating that "[w]hether a measure falls within the scope of Article XIX or Article XXI of the GATT 1994 must be objectively assessed based on the features of that measure and bearing in mind the different nature of Article XIX, which provides conditional right to impose safeguard measures, and Article XXI, which constitutes an affirmative defence and thus may be invoked to justify measures inconsistent with other provisions of the GATT."[22] Switzerland's assertions are not supported by the ordinary meaning of Article XIX or Article XXI, and reveal Switzerland's misunderstanding of the U.S. arguments in this dispute and the role of a panel as set out in the DSU.

15. As an initial matter, the term "affirmative defense" is not a legal term reflected in the DSU or any other covered agreement. Whether Switzerland, another Member, or an adjudicator would characterize the Article XIX or Article XXI (or neither provision, or both provisions) as affirmative defenses does not affect the interpretation of these provisions. The DSU calls on the Panel to interpret each provision cited in the dispute in accordance with customary rules of interpretation of public international law.[23] Switzerland's argument also ignores that both Article XXI and Article XIX (and other provisions) provide bases on which a Member may be permitted to deviate from its WTO obligations and impose tariffs, for example.

16. 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 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.

[21] Switzerland's Comments on the U.S. Closing Statement, para. 4 (footnote omitted).

[22] Switzerland's Comments on the U.S. Closing Statement, para. 23 (footnote omitted).

[23] DSU Art. 3.2.

17. 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 Switzerland's words – attempt to assess "[w]hether a measure falls within the scope of Article XIX or Article XXI" – to determine whether there might be a separate basis on which a Member may be permitted to deviate from its WTO obligations.

18. 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.[24] 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. Switzerland's attempt to link its argument to DSU Article 11 does not change this result,[25] 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.

19. In fact, the text of Article XXI refutes Switzerland's suggestion that the Panel must assess "[w]hether a measure falls within the scope of Article XIX or Article XXI". 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 Switzerland'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.

[24] U.S. Closing Statement, para. 35; U.S. Response to the Panel's Question 76, paras. 347-348.

[25] Switzerland's Comments on the U.S. Closing Statement, para. 10 ("While indeed 'the same action may be regarded differently by different Members, or by a WTO panel', the correct legal characterisation of a measure under WTO law, in case of a dispute, is to be objectively assessed by a panel. Indeed, it is not uncommon for WTO Members to disagree as to the legal characterisation of the challenged measures.").

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

20. Switzerland continues to argue that the counter-notification provision at Article 12.8 of the Agreement on Safeguards undermines the U.S. interpretation of Article XIX as requiring invocation because – according to Switzerland – the phrase "'any measures or actions dealt with in this Agreement' within the meaning of Article 12.8 are safeguard measures, i.e. 'measures provided for in Article XIX of GATT 1994', as per Article 1 of the Agreement on Safeguards."[26] Switzerland ignores, however that the reference in Article 1 to "measures provided for in Article XIX of the GATT 1994" includes a reference to Article XIX:2 and its requirement that a Member "shall give notice in writing" of action pursuant to Article XIX:1 "[b]efore" taking that action so that Members may engage in consultation.[27] In fact, the drafters of the Agreement on Safeguards made a specific decision to refer to Article XIX in its entirety at Article 1 of the Agreement on Safeguards, rather than referring to certain characteristics of safeguard measures.[28]

C. Switzerland's Comparison of GATT 1994 Article XIX:2 and TBT Agreement Article 2.9.2 is Inapt

21. Switzerland asserts that the notification requirement at Article 2.9.2 of the TBT Agreement "constitutes more relevant context for interpreting Article XIX of the GATT 1994 than the provisions cited by the United States because, like Article XIX, it relates to domestic measures that may be taken by a WTO Member."[29] Switzerland does not explain why it believes Article XIX and the TBT Agreement "relate[] to domestic measures," but – according to Switzerland – the provisions discussed by the United States in its Second Written Submission at Section IV.A.2 do not. Regardless, the WTO Agreement does not support Switzerland's proffered distinction, and in fact numerous WTO provisions – including Article XIX – relate to action on both the domestic-level and the WTO-level.

22. For example, "tak[ing] action" under Article XIX:2 occurs at both the WTO level and the domestic level. At the WTO level, there is suspension of an obligation, or withdrawal or modification of a concession, as explicitly referred to in Article XIX:1. At the domestic level, there is a tariff or quota. Put differently, in Article XIX, the word "action" refers to affecting a

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[26] Switzerland's Comments on the U.S. Closing Statement, para. 19.

[27] *See* U.S. Second Written Submission, Section IV.A.1.a.

[28] See U.S. Second Written Submission, Section IV.B.4.a (discussing drafters' decision to refer to Article XIX of the GATT 1994 in Article 1 of the Agreement on Safeguards and their abandonment of early draft text that provided, among other things, that "[t]his agreement covers all safeguard measures designed to give protection to domestic industries in the circumstances specified below" and "[s]afeguards consist of import relief measures that entail the suspension, in whole or in part, of obligations, including concessions under the GATT, and are designed to prevent or remedy certain emergency situations and to facilitate structural adjustment of domestic industries or the reallocation of resources").

[29] Switzerland's Comments on the U.S. Closing Statement, para. 16.

WTO legal right (explicitly, through references to suspending obligations, or modifying or withdrawing concession), but it also relates to the domestic action. This is suggested by the reference in Article XIX:1 to applying safeguard measures "to the extent and for such time as may be necessary to prevent or remedy such injury" – because it is the domestic-level tariff or quota, rather than any WTO-level action, that would prevent or remedy the injury from imported products. This conclusion is confirmed by Article 1 of the Agreement on Safeguards, which refers to "*measures provided for* in Article XIX"[30] – indicating that Article XIX refers to domestic measures in addition to suspension, withdrawal, or modification at the WTO level. As these references establish, Switzerland is not correct to suggest that Article XIX relates only to domestic measures, and in fact Article XIX relates to both domestic-level action as well as WTO-level action.

23. Switzerland's assertions about the relevance of the TBT Agreement also fail to acknowledge that the TBT Agreement defines the types of measures that are subject to its obligations, and that these definitions do *not* contain terms similar to Article XIX:2, which requires that a Member "shall give notice in writing" of action pursuant to Article XIX:1 "[b]efore" taking that action so that Members may engage in consultation.[31] The Agreement on Safeguards, by contrast, specifically does not purport to define "safeguard measures,"[32] and instead refers to "measures provided for in Article XIX" (Article 1) and "emergency action on imports of particular products as set forth in Article XIX" (Article 11.1(a)). Thus, these references confirm that it is the text of Article XIX – including its requirement of invocation through notice and an opportunity to consult – that determines what constitutes a "safeguard measure" within the meaning of Article XIX and the Agreement on Safeguards. Accordingly, any context provided by Article 2.9.2 of the TBT Agreement is consistent with the U.S. arguments in this dispute.

III. CONCLUSION

24. 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

[30] Emphasis added.

[31] Annex 1 of the TBT Agreement provides that "[f]or the purpose of this Agreement . . . the following definitions shall apply" and then defines terms including "[t]echnical regulation," "[s]tandard," and "[c]onformity assessment procedure."

[32] See U.S. Second Written Submission, Section IV.B.4.a (discussing drafters' decision to refer to Article XIX of the GATT 1994 in Article 1 of the Agreement on Safeguards and their abandonment of early draft text that provided, among other things, that "[t]his agreement covers all safeguard measures designed to give protection to domestic industries in the circumstances specified below" and "[s]afeguards consist of import relief measures that entail the suspension, in whole or in part, of obligations, including concessions under the GATT, and are designed to prevent or remedy certain emergency situations and to facilitate structural adjustment of domestic industries or the reallocation of resources").

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.