UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS556)

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 closing statement, Switzerland notes that "its exports of steel and aluminum into the United States mostly consist of highly specialized, niche products, that do not contribute to the global problem of overcapacity and that only account for a minor fraction of the total U.S. imports of such products."[1] Switzerland concludes, "It is therefore extremely difficult to conceive how Swiss imports of steel and aluminum products could threaten to impair the national security of the United States."[2] Switzerland's statements are misdirected, however.

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. And by invoking Article XXI(b), the United States has indicated that it considers the challenged action to be "necessary for the protection of its essential security actions" in the circumstances set out in Article XXI(b).

5. Switzerland appears to disagree with the U.S. consideration that the challenged action is necessary for the protection of its essential security interests, and implies that the Panel should review the necessity of the measures at issue. However, Switzerland thus far has agreed with the United States that the phrase "which it considers" qualifies "necessary" and has stated that "a certain degree of discretion" should be granted to the invoking Member's "necessity" determination.[4]

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[1] Switzerland's Closing Statement, para. 7.

[2] Switzerland's Closing Statement, para. 7.

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

[4] Switzerland's Response to the Panel's Question 35, para. 230.

6. As reflected in the record, pursuant to a U.S. national security statute, the U.S. Department of Commerce conducted investigations into the effects of steel and aluminum imports on U.S. national security.[5] The Secretary of Commerce found that these articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security.[6] President Trump concurred with the Secretary's findings and took actions that would eliminate the identified national security threat, a determination that the statute left to the President's judgment.[7] Specifically, President Trump imposed Section 232 duties on steel and aluminum imports from all countries, except those countries with which the United States has agreed on alternative ways to address the threat.[8]

7. Switzerland is in effect asking the Panel to substitute its own judgment for that of a responding Member on matters of essential security. Specifically, Switzerland is urging the Panel to disagree with the Secretary's national security findings, and the President's determination as to how to address the national security threat. Switzerland also suggests that the Panel may, for example, determine that Swiss steel and aluminum imports do not threaten the U.S. national security, while Chinese or Turkish steel and aluminum imports do. The type of review that Switzerland urges this Panel to undertake has no basis in the text of Article XXI, the DSU, or the WTO dispute settlement system, and risks serious consequences to the WTO.

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

8. In its opening statement, Switzerland asserts that there is no difference between the Spanish version of Article XXI(b), on the one hand, and English and French versions of Article XXI(b), on the other hand.[9] Furthermore, Switzerland rejects the U.S. interpretation that best reconciles the three texts under Article 33 of the VCLT, arguing that the U.S. interpretation "requires reading the words 'which it considers' at the end of the chapeau."[10] Switzerland's arguments are baseless.

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[5] *See* U.S. First Written Submission, Section II.

[6] *See* U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, pp. 55-57 (US-7); U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at pp. 5, 104-106 (US-8); Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US-10).

[7] *See* Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US-10); *see also* 19 U.S.C. 1862 (US-1).

[8] *See* Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US10); Presidential Proclamation 9711 of March 22, 2018 (US-11); Presidential Proclamation 9710 of March 22, 2018 (US-12).

[9] Switzerland's Opening Statement, para. 34.

[10] Switzerland's Opening Statement, para. 35.

9. As the United States has previously explained, 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.[11] 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. This means that, under Article 33 of the Vienna Convention on the Law of Treaties (VCLT), the meaning that best reconciles the three authentic texts, having regard to the object and purpose of the treaty, must be adopted.

10. 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). Under 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.

11. The U.S. efforts to present an interpretation that best reconciles the three texts under Article 33 of the VCLT reflect 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). In contrast, Switzerland simply superimposed its desired reading of Article XXI(b) onto the Spanish text of Article XXI(b)(iii). Switzerland's failure to see the difference in meaning that emerges from comparing the three authentic texts of Article XXI(b) reflects its failure to read the text of Article XXI(b) as written.

12. Furthermore, Switzerland's unsupported argument that the U.S. alternative interpretation "requires reading the words 'which it considers' at the end of the chapeau" is unavailing. In Switzerland's view, in order for "it considers" to qualify other elements of the provision, that phrase must be repeated over and over: "Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for [what it considers] the protection of [what it considers] essential security interests [and which it considers] taken in time of war or other emergency in international relations." Switzerland's view is neither consistent with English usage nor consistent with English grammar, and Switzerland fails to provide any compelling explanation for such an argument.

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

13. 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.

[11] U.S. Responses to the Panel's Questions 41-43, paras. 156-195; U.S. Second Written Submission, Section II.D.

A. Complainant's Arguments Would Effectively Remove Article 11.1(c) from the Agreement on Safeguards

14. In its closing statement, Switzerland incorrectly suggested that the United States is attempting to "opt out" of the safeguards disciplines "simply by omitting to 'invoke' its right to take a safeguard measure."[12] Switzerland also repeated its erroneous assertion that "Article XXI of the GATT is not available as a defence for measures that are inconsistent with Article XIX of the GATT and the Agreement on Safeguards."[13] Switzerland's arguments are not consistent with the text of Article XIX or Article XXI, and would effectively remove Article 11.1(c) from the Agreement on Safeguards.

15. As the United States has explained, Article XIX establishes a Member's right (but not obligation) under certain conditions to deviate from its WTO obligations and apply a safeguard measure.[14] 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.[15] 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.[16] Accordingly, the measures at issue are not safeguards measures, and the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply.

16. 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."

17. This result is also consistent with the text of Article XXI. Specifically, the words "Nothing in this Agreement shall be construed to prevent…" in Article XXI include Article XIX,

[12] Switzerland's Closing Statement, para. 6.

[13] Switzerland's Closing Statement, para. 6.

[14] U.S. Opening Statement, para. 22.

[15] *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.

[16] *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 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)).

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.

B. Complainant Ignores the Potential Overlap Between Measures Potentially Covered by the Agreement on Safeguards and Article XXI

18. In its closing statement, Switzerland suggested – without support – that "economic emergency" measures are covered by Article XIX, and not by Article XXI.[17] However, Switzerland ignores that there is potential overlap in the scope of measures covered by the Agreement on Safeguards and Article XXI, and that a Member could take any number of actions in response to what it might consider economic emergencies, such as raising its ordinary customs duty.[18] Whether the Agreement on Safeguards, Article XXI, or another provision applies will therefore depend on the legal basis pursuant to which the Member takes the action.

19. Switzerland's argument is also inconsistent with the ordinary meaning of the phrase "its essential security interests" under Article XXI. The ordinary meaning of "security" – defined as "[t]he condition of being protected from or not exposed to danger"[19] – is broad and could encompass what one might refer to as economic security. Nothing in Article XXI(b) would prevent a Member from considering interests of this type to be "essential," defined as "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important."[20] And where a Member does so consider, those interests would be "its essential security interests" under Article XXI(b).

20. Consistent with this understanding of what may constitute "essential security interests" under Article XXI(b), a number of WTO Members – including *Certain Measures on Steel and Aluminum Products* complainants China, Norway, Russia, and Turkey, and EU member states such as Austria, Germany, The Netherlands, and Spain – appear to include economic considerations in their own assessment of their security interests for purposes of domestic law and policy, and do not strictly separate what might be regarded as "economic security" from other "types" of security.[21] Thus, Switzerland's suggestion that "economic emergency" measures are covered only by Article XIX – and not by Article XXI – is not supported by the

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[17] Switzerland's Closing Statement, paras. 5-6 ("The terms 'other emergency in international relations' and 'essential security interests' have specific meanings. They do not cover a situation whereby a WTO Member restricts imports in order to give an economic boost to its domestic industry which is struggling to compete with imports. . . . . Measures meant to address an economic emergency fall under Article XIX of the GATT and the Agreement on Safeguards and must comply with the requirements set by the safeguard disciplines."). *See also* Switzerland's Response to the Panel's Question 74(e), para. 364 ("'[E]ssential security interests' within the meaning of Article XXI of the GATT are distinct from the 'economic interests' relevant in the context of Article XIX of the GATT").

[18] *See* U.S. Response to the Panel's Question 74, paras. 323-343.

[19] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22).

[20] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852, 2754 (US-22).

[21] *See* U.S. Response to the Panel's Question 74(d)-(f), paras. 327-343.

text of either Article XIX or Article XXI, and in fact is refuted by the text of Article XXI, Article 11.1(c) of the Agreement on Safeguards, and by the actions of numerous WTO Members.

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.