UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS556)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

January 26, 2021

Mr. Chairperson, Members of the Panel:

1. The United States once again thanks you, and the Secretariat staff assisting you, for your ongoing work in this dispute. In this statement we provide closing remarks as well as comments on the complainant's responses to the Panel's questions during the first day of this meeting.

A. Complainant's Approach to Defining Safeguard Measures Under Article XIX Would Lead to Absurd Results

2. You have heard the parties' arguments at length. Now let us put into perspective the matter before the Panel. The border measures at issue are not new or mysterious; they are customs duties – tariffs – and quotas. Under WTO and GATT rules duties must be applied on an MFN basis (under Article I:1) and maintained within bound levels (under Article II:1). Quotas are generally prohibited (under Article XI:1).

3. If a Member, like the United States here, wishes to deviate from these basic obligations, it must have a valid basis to do so. Many such bases exist in the WTO Agreements.

4. Let's take duties. A Member may deviate from the obligations of Articles I and II by imposing non-MFN duties in excess of its bound commitment levels if those duties are applied consistent with Article VI and the attendant obligations in the AD Agreement or the SCM Agreement; or consistent with Article XIX and the Agreement on Safeguards. All three rights allow a Member to impose duties to protect its domestic industry from the effects of imports.

5. And, of course, a Member may justify what might otherwise constitute WTO-inconsistent behavior if it satisfies the requirements of any general exceptions (under Article XX) or security exceptions (under Article XXI). This is the case here, for example, where the United States has taken its action pursuant to Article XXI for the protection of its essential security interests. But because each of these bases exists for a Member to justify a deviation from its obligations, any such deviation would not be supported by *all* of them. They each have their own respective requirements. Rather, only one basis is needed, and it is for the acting Member to choose, based on its own policy preferences and objectives, which basis to pursue.

6. Complainant has argued that the United States has not availed itself of its Article XXI rights, but instead has imposed a safeguard duty under Article XIX. Accordingly, complainant asks the Panel to review the measures' consistency with that article and with the Agreement on Safeguards, and to find that the United States has failed to comply with its requirements. As far as the United States is aware, never before in WTO dispute settlement – nor perhaps any other proceeding – has a complainant attempted to impose on a respondent its defense. For while complainant argues that the Agreement on Safeguards is not a defense but a set of obligations, there is no question that Article XIX and the Agreement on Safeguards set out obligations that must be met *in the event a Member wishes to deviate from its tariff obligations*. Were it permissible to impose any duty a Member wished, none of us would be here as no rights or obligations would be at stake.

7. So, the United States has imposed duties on certain steel and aluminum products on a non-MFN basis and in excess of the levels set out in its WTO Goods Schedule. It has done so to counter the effects of imports of these products on its own domestic industry. Complainants suggest these facts are sufficient for the Panel to find that, notwithstanding the intention,

statements or actions of the United States, the duties constitute a safeguard, but a safeguard not complying with the requirements of Article XIX or the Agreement on Safeguards because, among other things, the affected products were not being imported into the United States in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

8. The United States does not contend that its measures were applied consistent with the Agreement on Safeguards. As we have stated, the measures were applied pursuant to Article XXI and not Article XIX. Nor does the United States contend that the duties were applied consistently with the AD Agreement or the SCM Agreement. The United States does not contend for that matter that they were taken for the conservation of natural resources or for the protection of human health. But complainant does not suggest that the Panel make findings of inconsistency under these other articles. And to be sure, no WTO panel faced with Article I or Article II claims has first examined whether an action is in fact a safeguard measure or whether some other defense not invoked or submitted by the responding Member might apply.

9. Complainant does not argue, for example, that the steel and aluminum duties are antidumping duties that fail to meet the requirements of Article VI. Nor does the complainant argue that the duties are countervailing duties. As complainant charges, the United States has breached Article XIX and the Agreement on Safeguards, just as presumably it would agree that the United States breached the AD or SCM Agreements in imposing the duties at issue.

10. Why the Agreement on Safeguards – but not the AD or SCM Agreement, or Article XX? For one, complainant argues that Article XXI does not apply to the Agreement on Safeguards. That argument fails for reasons the United States has explained.[1] But given the logic of complainant's argument, the question remains why complainant raises its challenge under the Agreement on Safeguards only and not, for example, the AD and SCM Agreements as well. Therefore, the answer appears to be "rebalancing." While this complainant hasn't chosen to impose retaliatory duties of its own, almost all of its co-complainants have done so. Perhaps Switzerland merely seeks to support the actions of these co-complainants, or perhaps it is unsure whether such a novel approach is defensible and seeks cover from this Panel before taking such an action in the future.

11. Complainant has suggested that the United States is trying to act with impunity through its arguments in this dispute. Such arguments misstate the underlying events, however, and only disguise the complainant's own self-serving motives in bringing this dispute.

12. 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 Appellate Body's incomplete "constituent features." To recall, the features discussed by the Appellate Body are (1) that the measure "must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession," and (2) "the suspension, withdrawal, or modification in question must be designed

[1] *See* U.S. First Written Submission, Section III.C. *See also* U.S. Opening Statement at the First Substantive Meeting of the Panel, Section G.

to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product."[2]

13. The Appellate Body's findings mimic the language of Article XIX and the Agreement on Safeguards, which makes sense, as they were addressing a situation in which a Member *had* claimed to take a safeguard measure. But according to complainant's arguments, the test can be satisfied by showing that respondent's measure: (1) breaches one of its GATT concessions, and (2) is designed to prevent or remedy injury to the Member's domestic industry. Complainant is not arguing that the U.S. measure is a safeguard because the injury to the domestic industry is in fact serious, or that it is in fact caused or threatened by increased imports. Rather, it is the complainant itself that is attributing this "design" to the U.S. measure.

14. Complainant's approach leads to absurd results because it would permit almost any border measure – including as countermeasures under Article 22.2 of the DSU – to be deemed safeguard measures by other Members or by a panel, and allow other Members to assert a right to rebalance on that basis.[3]

15. Switzerland suggests countermeasures could be distinguished from safeguard measures under Article XIX because "countermeasures are aimed to induce compliance with DSB's recommendations and rulings rather than to prevent or remedy a serious injury to the domestic industry caused or threatened by increased imports."[4] This argument ignores, however, that the same action may be regarded differently by different Members, or by a WTO panel. In Switzerland's words, one Member may regard its measures as aimed to induce compliance with DSB recommendations, while another Member (or a panel) regards those measures to be aimed at preventing or remedying injury to a domestic industry – as Switzerland does here. It also ignores the probability that countermeasures would in fact be imposed for both such purposes, as a complaining Member may – and likely would – seek compliance with WTO findings in order to prevent or remedy injury to a domestic industry.

16. The absurdity of this result highlights the importance of the acting Member's identification or invocation of the legal basis for the deviation from its obligations. If no basis is proffered, then the Member simply breaches its obligations. In the case of countermeasures, the basis is a grant – upon request – of legal authority to suspend concessions from the DSB. And in the case of Article XIX, that basis is the invocation of Article XIX through providing notice to Members and the meeting of certain conditions. As explained, Article XIX makes clear that invocation through notice is a fundamental, condition precedent for a Member's exercise of its right to take action under Article XIX and the application of safeguards rules to that action.[5] This interpretation is clear from the ordinary meaning of the text of Article XIX, in its context, and is confirmed by the negotiating history of both Article XIX and the Agreement on Safeguards.[6]

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[2] *Indonesia – Iron or Steel Products (AB)*, para. 5.60.

[3] *See* U.S. Response to the Panel's Question 5(e)-(f), paras. 22-24.

[4] Switzerland's Responses to the Panel's Question 5, para. 83.

[5] *See* U.S. Second Written Submission, Section IV.

[6] *See* U.S. Second Written Submission, Section IV.

17. Apart from this misconstruction of Article XIX, complainant's approach also risks serious consequences to the WTO. In arguing that a Member has authority to impose rebalancing duties in response to any duty a complainant deems designed to prevent or remedy injury, complainant does not pursue this dispute to obtain the right to suspend concessions under DSU Article 22. Complainant contends that it already has that right under the guise of "rebalancing." Therefore, complainant's only objective in bringing this dispute can be to have the Panel pronounce on the validity of the U.S. security measures.

18. To take a step back, the measures challenged are on steel and aluminum (key sources for military vehicles, weapons, and systems for critical national infrastructure) that the United States has taken for national security purposes. The complainant urges the Panel to review these security measures and conclude that the United States could not have considered them necessary for the protection of its essential security interests and taken in time of "war or other emergency in international relations." The complainant urges the Panel to conclude that security measures cannot have the goal or the effect of protecting an industry, even an industry that is vital to our national security and whose decline threatens to impair our national security. Although complainant purports to appeal to your common sense, complainant's approach is not only inconsistent with the text of Articles XIX and XXI, but also defies common sense.

19. Adopting complainant's approach would lead to the proliferation of disputes, such as this one, which ask WTO panels to adjudicate the types of security actions that have always been taken, but which have not previously been subject to WTO disputes. The WTO was created with a focus on economic and trade issues, and not to seek to resolve sensitive issues of national security and foreign policy which are fundamental to a sovereign State's rights and responsibilities. Such dispute settlement actions are not necessary, not productive, and only diminish the WTO's credibility.

20. The United States is well aware of its WTO obligations, including its right to impose a safeguard duty and how to provide the requisite notice and opportunity for consultation, as evidenced by its recent invocation of Article XIX with respect to solar products, large residential washers, and blueberries. Similarly, the United States has imposed numerous antidumping and countervailing duties – including on some of the same products at issue in these disputes – all pursuant to the rights provided under Article VI and the AD and SCM Agreements. As the United States has made clear, however, the measures at issue are not safeguard measures (or AD or CVD measures), but are security measures taken pursuant to Article XXI.

21. The United States has acknowledged the consequences of invoking Article XXI, including that other Members may take reciprocal actions or seek other actions under the DSU, including a non-violation claim. These consequences provide recourse to affected Members, but without adjudicating essential security issues in dispute settlement. This approach properly respects the balance of rights and obligations agreed to by the Members, and reflects the text of Article XIX and Article XXI(b) as interpreted in accordance with the customary rules.

22. Consistent with the text of Article XXI and the Panel's terms of reference under DSU Article 7.1, and past GATT practice, the Panel should decline complainant's invitation to make findings where none would assist the parties in the settlement of their dispute.

B. Invocation through Notice is a Condition Precedent for a Member's Exercise of its Right to Take Action under Article XIX and for the Application of Safeguards Disciplines

1. Complainant Misconstrues the U.S. Arguments Regarding Other WTO Agreement Provisions Requiring Invocation

23. As the Panel's Question 4 recognized, the United States has described numerous other WTO provisions that – like Article XIX – contemplate a Member exercising a right through invocation and that contain structural features that are similar to Article XIX.[7]

24. In response, Switzerland attempted to diminish the interpretive value of the provisions cited by the United States by suggesting that only WTO agreement provisions that relate to the same subject matters as Article XIX could provide "context" relevant to an interpretation of Article XIX, and referred to the TBT Agreement as providing relevant context. Switzerland's argument comes to nothing, however, because the customary rules of interpretation do not limit what context is relevant as Switzerland suggests. In addition, Switzerland contradicted its own argument by suggesting TBT measures were more similar to suspension, withdrawal or modification under Article XIX than modification of schedules under Article XXVIII.

25. By discussing these provisions, the United States does not argue that notification requirements are prerequisites in every instance. Rather, the United States observed the numerous provisions of the covered agreements that, like Article XIX, grant Members the right to take particular action when certain conditions are met – should the acting Member invoke its right to do so. Such provisions are relevant context demonstrating that granting Members the right to take particular action when certain conditions are met – should the acting Member invoke its right to do so – is an ordinary part of the WTO Agreement.

26. Of course, invocation is *not* required for other provisions of the covered agreements – but these provisions' existence does not change the requirements of Article XIX or of other provisions that *do* require invocation. In some provisions notification may serve as a procedural requirement, but the existence of such provisions does not change that notification under Article 12 relates to *both* the applicability of safeguard disciplines and the consistency of those measures with the safeguards disciplines. Each provision should be interpreted based on its own terms.

27. Switzerland is mistaken when it suggests that Article 12.8 of the Agreement on Safeguards supports its view that invocation is not a condition precedent to the right to apply a safeguard measure.[8] This argument misperceives the relationship between Article 12 and invocation through notification under Article XIX. The Agreement on Safeguards has elaborated procedural requirements to expand the scope of information a Member provides to other Members regarding that invocation and proposed action.[9] A Member that does not provide information consistent with the elaborated notification requirements would breach these procedural obligations, but this does not mean that the notification obligations in Article 12 subsume the requirement to give notice in writing under Article XIX:2 of proposed action.

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[7] *See* U.S. Second Written Submission, Section IV.A.2.

[8] According to Switzerland, "[t]he United States' interpretation would make this provision [Article 12.8] redundant because, according to the United States, the failure to notify the measure would prevent it from being a "safeguard measure" and make counter-notifications pointless." Switzerland's Opening Statement, para. 20.

[9] *See* U.S. Response to the Panel's Question 8, paras. 29-32.

28. In addition, Switzerland's argument is not supported by the text of Article 12.8, which refers to counternotifications regarding "any measures or actions *dealt with in this Agreement*."[10] As these words make clear, this provision relates only to notifications that Members are required to make by the Agreement on Safeguards and would not permit a Member to notify the Committee on Safeguards of another Member's invocation pursuant to Article XIX:2.

2. Article 11.1(c) Establishes that the Agreement on Safeguards Does Not Apply to the Measures At Issue

29. Under Article 11.1(c), 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 attempted to take – and succeeded in taking – the measures at issue in accordance with Article XXI; accordingly the Agreement on Safeguards "does not apply."

30. This result is consistent with Article 11.1(a), which provides "[a] Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement." The United States is not seeking or taking action "as set forth in Article XIX"; therefore, the action need not conform with the provisions of Article XIX applied in accordance with the Agreement on Safeguards.

31. Citing Article 11.1(a) – but diverging from its text – Switzerland suggests that "all safeguard measures are subject to the safeguard disciplines and, if non-compliant, are prohibited."[11] Switzerland has previously suggested – incorrectly – that measures that "present[] the two constituent features of a safeguard measure" "cannot become excluded from the scope of application of the Agreement on safeguards by virtue of Article 11.1(c)" because such measures are not measures "sought, taken or maintained pursuant to provisions of GATT 1994 *other than* Article XIX."[12]

32. Article 11.1(a) does not support Switzerland's argument, and Article 11.1(c) contradicts it. Article 11.1(c)'s reference to "this Agreement" establishes that nothing in the Agreement on Safeguards, including Article 11.1(a), applies to measures that are sought, taken, or maintained by a Member pursuant to provisions of the GATT 1994 other than Article XIX.

33. Switzerland's argument also ignores the potential overlap in the scope of measures covered by both 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.[13] Whether the Agreement on Safeguards, Article XXI, or another provision applies will depend on the legal basis pursuant to which the Member takes the action.

34. 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.

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[10] Emphasis added.

[11] Switzerland's Opening Statement, para. 26.

[12] Switzerland's Second Written Submission, para. 88 (emphasis in original).

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

However, a Member may take what might be called "emergency action" under a number of provisions, including Article XXI. Article 11.1(a) of the Agreement on Safeguards does not limit a Member's choice of action. As provided in Article 11.1(c), when a Member has "sought, taken or maintained" actions pursuant to provisions of the GATT 1994 or the WTO Agreement other than Article XIX, the Agreement on Safeguards – including Article 11.1(a) – "does not apply".

35. As explained above, a number of different measures might involve features of a safeguard measure, or be said to have what some might call a safeguard objective. 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. The negotiators of the Agreement on Safeguards shared this understanding, as they distinguished the work of the Committee on Safeguards from the "several articles and provisions of a safeguard nature," including Article XXI in the GATT 1947 (now the GATT 1994).[14]

3. Complainant Misconstrues the Words "Suspend," "Modify," and "Withdraw" in Article XIX of the GATT 1994

36. In Question 3, the Panel asked the Parties to consider the words "suspend," "modify," and "withdraw" and their relationship to other parts of Article XIX. As the United States explained, these terms describe what a Member is permitted to do in relation to its WTO commitments if it meets the conditions of Article XIX and the Agreement on Safeguards. Under Article XIX, Members have the right – but not an obligation – to apply a safeguard, subject to certain requirements

37. In its response to this question, Switzerland incorrectly suggested that suspension, withdrawal, or modification are legal actions *taken by a Member*. Whether an obligation is suspended, withdrawn, or modified is an incidental legal characterization that attaches if a Member is seeking to take action pursuant to Article XIX and has complied with the conditions set forth in Article XIX and the Agreement on Safeguards. A measure does not itself suspend an obligation or withdraw or modify a concession; instead, a Member must claim an obligation is suspended (or a concession is withdrawn or modified) to justify taking particular action. If the Member does not make such a claim, the Member would simply breach another commitment (e.g., Article II), unless it has another basis to take the action.

38. As the United States has explained, in relation to the measures at issue, the United States has explicitly and repeatedly invoked Article XXI. No obligation or concession may supersede the right to take action under that provision, as the text of Article XXI confirms that "[n]othing in this Agreement shall be construed … to prevent" a Member "from taking any action which it considers necessary for the protection of its essential security interests." Accordingly, in taking

[14] *See* U.S. Response to the Panel's Question 81, paras. 362-366; Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987), at 1 (US-167); Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168).

action under Section 232, the United States has acted consistently with its existing rights under the covered agreements, and has not "suspended in whole or in part a GATT obligation or withdrawn or modified a GATT concession" within the meaning of Article XIX.

C. Complainant Failed to Meet the Requirements Under Article 6.2 of the DSU

39. In response to the Panel's Questions 1 and 2, Switzerland argues that the Panel may examine issues concerning its terms of reference on its own initiative, but also suggests that, in determining whether Switzerland has satisfied Article 6.2, the Panel should give weight to whether the United States has been prejudiced by potential failings of its panel request. However, prejudice to respondent (or a perceived lack thereof by the complainant) has no bearing on whether the complainant has satisfied the requirements of Article 6.2, and what "matter" is before the Panel under Article 7.1. In any event, Switzerland fails to support its claim that the United States was not prejudiced, stating only that it "clearly" has not been.

40. In arguing that it has fulfilled the requirements of Article 6.2 with respect to the seeking and/or conclusion of country exemption agreements, Switzerland argues that DSU Article 6.2 only obligates the complainant to identify the specific measures at issue and that it does not obligate a complainant to identify specific aspects of the challenged measures in its panel request.[15] In this way, Switzerland draws an artificial distinction between the "measures at issue" and "specific aspects" of those measures, and suggests that the seeking and/or conclusion of exemption agreements is merely an "aspect" of the measures at issue. This artificial distinction does not change the requirements of Article 6.2.

41. If the measure a complainant seeks to challenge is not set out in a single legal instrument but consists of multiple elements or components – or "aspects" to use Switzerland's word – then identifying the precise scope and content of the measure may require a description of the measure and the various elements or components (or aspects) which the complainant considers to comprise the measure it challenges. In this way, the composite measure Switzerland seeks to challenge is similar to an unwritten measure. Switzerland has chosen to challenge as a single measure aspects of multiple U.S. actions reflected in multiple legal instruments. Having done so, the burden is on Switzerland to identify which actions and instruments form part of the "measure" it has identified and chosen to challenge.

42. Switzerland also attempts to bolster its argument that the seeking and/or conclusion of additional country exemption agreements falls within the Panel's terms of reference by noting that its panel request lists Proclamation 9705 among the relevant "instruments" and quoting certain language from that proclamation. Where a legal instrument sets out numerous different actions by a Member, however, merely naming the instrument in a panel request, without more (for example, without specifying the potential action of concern), may not be sufficient to identify the "specific measure at issue." Switzerland did not point to the language in question of Proclamation 9705 in its panel request, and it cannot now cure that defect.

[15] As Switzerland stated in its Comments on the U.S. Response to the Panel's Question 82 – citing *EC – Trademarks and Geographical Indications (Australia) (Panel)*, para. 7.2 (para. 26), "Switzerland recalls that, while a panel request must identify the 'specific measures at issue', it does not have to identify the 'specific aspects' of those measures." Switzerland's Comments on the U.S. Response to the Panel's Question 82, para. 2.

D. The United States Has Properly Invoked Article XXI(b), Including Article XXI(b)(iii), And Has Substantiated This Defense Even Under Complainant's Interpretation.

43. As the United States has explained in response to the Panel's Question 5(a) and in its prior submissions, the text of Article XXI(b) does not require the Member exercising its right under Article XXI(b) to identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant.[16] The text only requires that a Member consider a measure necessary for the protection of its essential security interests – and does not require notification in writing as in Article XIX. Neither is there any text in Article XXI(b) that imposes a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked.[17]

44. What is required of the party exercising its right under Article XXI is set forth in the terms of Article XXI itself—that the Member consider one or more of the circumstances set forth in Article XXI(b) to be present. Thus, a Member invoking Article XXI(b)(iii) would consider the measures "necessary for the protection of its essential security interests" and consider the measures "taken in time of war or other emergency in international relations." From the beginning of the proceedings, the United States has invoked Article XXI(b), indicating that it considers the challenged actions necessary for the protection of its essential security interests and indicating that it considers that any or all of the three circumstances described in the subparagraphs are present.

45. However, 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. From the beginning of the proceedings, 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 also specifically pointed to the circumstances described in Article XXI(b)(iii) in its opening statement for the first substantive meeting of the panel.[19] Any suggestion that there was a delay in invoking Article XXI(b)(iii) and providing relevant evidence is without merit. The record before the Panel demonstrates that the United States considers 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."

46. Therefore, even were the Panel to analyze the U.S. measures under the complaining party's approach, the Panel should find that the United States has invoked Article XXI; the Panel should find the United States has provided information that it considers the measure necessary for the protection of its essential security interests; the Panel should find that the United States

[16] U.S. Second Written Submission, Section II.B.

[17] *See* U.S. Response to the Panel's Question 38, paras. 142-145.

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

[19] *See* U.S. Opening Statement at the First Substantive Meeting of the Panel, paras. 53-58.

has provided information that it considers the measure taken "in time of war or other emergency in international relations", the circumstance in Article XXI(b)(iii); and the Panel should find that this extensive information certainly meets any requirement of "good faith".

47. In its opening statement, Switzerland claims that the U.S. interpretation of "its essential security interests" and an "emergency in international relations" is "excessively broad" and "unsubstantiated".[20] Without further explanation, Switzerland refers back to its response to Panel Question 92, in which Switzerland advanced the flawed interpretation of an "emergency in international relations" adopted by the panel in *Russia - Traffic in Transit*.[21] As the United States explained in its opening statement, that panel's narrow construction of Article XXI(b)(iii) is not consistent with the ordinary meaning of the terms of that provision.[22] Based on the ordinary meaning of the text, "emergency in international relations" can be understood as a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.[23]

48. The record clearly supports that the United States considered the measures in question necessary for the protection of its essential security interests, and considered that there existed at that time an emergency in international relations. For example, with respect to whether an emergency related to steel excess capacity exists, the record reflects the following:

49. First, in 2017, it emerged that global efforts to address the crises would be insufficient. While the DOC steel report noted that the excess capacity crisis is a global problem and that steel-producing nations have committed to "work together on possible solutions," the report observed the limits of the global efforts, including the work of the Global Forum on Steel Excess Capacity.[24] For instance, the report noted that the Global Forum report "provides helpful policy prescriptions, but it does not highlight the lack of true market reforms in the steel sector."[25] The DOC steel report also suggested that the adjustments proposed in the Global Forum report would not address the overcapacity crisis, and observed: "The setting of capacity reduction targets is not a long-term response to the crisis. Meaningful progress can only be achieved by removing subsidies and other forms of government support so that markets can function properly."[26]

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[20] Switzerland's Opening Statement, para. 40.

[21] Switzerland's Response to the Panel's Question 92, paras. 98-99.

[22] U.S. Opening Statement, para. 11.

[23] U.S. Response to the Panel's Question 51, para. 231; U.S. Response to the Panel's Question 92(b), paras. 48-49.

[24] 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, Appendix L, p. 1 (US-7).

[25] 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, Appendix L, p. 2 (US-7).

[26] 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, Appendix L, p. 2 (US-7).

50. Second, in 2017, steel imports in the United States rapidly increased while global excess capacity continued to increase. The steel report noted that "[i]n the first ten months of 2017 steel imports have increased at a double-digit rate over 2016."[27] The report cited to the OECD Steel Committee Chair's statement from March 2017: "New data suggest that nearly 40 million metric tons of gross capacity additions are currently underway and could come on stream during the three-year period of 2017-19, while an additional 53.6 million metric tons of capacity additions are in the planning stages for possible start-up during the same time period."[28]

51. Therefore, what the DOC steel report conveys is that the United States was at a crucial point—without immediate action, the steel industry could suffer damages that may be difficult to reverse and reach a point where it cannot maintain or increase production to address national emergencies.[29]

52. This conclusion is also supported by statements at the G20 Global Steel Forum on Steel Excess Capacity. The 2017 G20 Global Steel Forum Report observed, for example, that the situation of excess steelmaking capacity "has become particularly acute since 2015" and emphasized that "the steel industry will have to adjust in response to fundamental changes in economic activity brought on by the 'next production revolution.'"[30] The report further stated that in 2016 the global surplus in steelmaking capacity was estimated to have reached "the highest level seen *in the history of the steel industry*" and that if the announced capacity

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[27] 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, p. 3 (US-7).

[28] 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, p. 53 (US-7).

[29] 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. 56-57 (US-7).

> The Department's investigation indicates that the domestic steel industry has declined to a point where further closures and consolidation of basic oxygen furnace facilities represents a "weakening of our internal economy" as defined in Section 232. The more than 50 percent reduction in the number of basic oxygen furnace facilities – either through closures or idling of facilities due to import competition – increases the chance of further closures that place the United States at serious risk of being unable to increase production to the levels needed in past national emergencies. The displacement of domestic product by excessive imports is having the serious effect of causing the domestic industry to operate at unsustainable levels, reducing employment, diminishing research and development, inhibiting capital expenditures, and causing a loss of vital skills and know-how. The present capacity operating rates for those remaining plants continue to be below those needed for financial sustainability. These conditions have been further exacerbated by the 22 percent surge in imports thus far in 2017 compared with 2016. Imports are now consistently above 30 percent of U.S. domestic demand.

[30] G20 Global Steel Forum Report (Nov. 30, 2017), at 2, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt) (US-72).

expansions until 2020 took place, this excess capacity would increase even further.[31] An industry facing "fundamental changes" brought on by a "production revolution" can certainly lead to unexpected developments, particularly when that industry is facing an "acute" situation of global excess capacity that is the highest in the industry's history.

53. Another Member affected by the crisis, the EU commented at the G20 Global Steel Forum on Steel Excess Capacity that "[g]lobal overcapacity has reached a tipping point—it is so significant that it poses an existential threat that the EU will not accept."[32] Then-EU Trade Commissioner Cecilia Malmström made similar observations in her 2016 speech at the OECD High-Level Symposium on Steel. She noted that the EU had faced "a massive surge in imports" in recent years, stating that this surge had amounted to a 25% increase in 2015 alone.[33] She also remarked on the "scale of the emergency" and stated that "it's now life or death for many companies."[34]

54. Thus, even under Switzerland's interpretation of Article XXI(b) as not self-judging, there is an abundance of information that supports the U.S. consideration that the challenged actions are "necessary for the protection of its essential security interests" and "taken in time of war or other emergency in international relations."

55. Any allegation that the United States has not acted in good faith in invoking Article XXI(b) is also without merit. President Trump's decision to impose the challenged measures – in response to the Secretary of Commerce's findings that steel and aluminum imports threaten to impair the national security – is consistent with the actions of his predecessors and reflects the continuation of the U.S. national security policy. By 2017, the Departments of Commerce and Treasury had completed approximately 24 Section 232 investigations, including three investigations that address imports of steel articles and related products.[35] In 1982, DOC investigated the effect on the national security of imports of nuts, bolts and large screws of iron or steel under Section 232.[36] In 1983, DOC investigated the effect on the national security of imports of machine tools.[37] And in 2001, DOC investigated the effect on the national security of

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[31] G20 Global Steel Forum Report (Nov. 30, 2017), at 4, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt) (emphasis added) (US-72).

[32] G20 Global Steel Forum Report (Nov. 30, 2017), at 39, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt) (US-72).

[33] Commissioner for Trade Cecilia Malmström, OECD High-Level Symposium on Steel (Apr. 18, 2016), https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154458.pdf (US-240).

[34] Commissioner for Trade Cecilia Malmström, OECD High-Level Symposium on Steel (Apr. 18, 2016), https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154458.pdf (US-240).

[35] Prior to 1980, the Department of Treasury conducted Section 232 investigations. *See* Congressional Research Service, "Section 232 Investigations: Overview and Issues for Congress," Appendix B, Section 232 Investigations (Aug. 24, 2020) (US-241).

[36] U.S. Department of Commerce, "The Effect of Imports of Nuts, Bolts, and Large Screws on the National Security" (Feb. 1983) (US-242).

[37] Initiation of Investigation of Imports of Metal-Cutting and Metal-Forming Machine Tools (48 FR 15174) (Apr. 7, 1983) (US-243).

imports of iron ore and semi-finished steel articles.[38] As a result of one of these investigations – that involving machine tools – the Secretary of Commerce concluded that the imports threatened to impair the national security, and the President entered into agreements with Japan and Taiwan to address exports from those countries.[39] Since the enactment of the Trade Expansion Act of 1962, steel and other metal articles have been the subject of numerous Section 232 investigations because of their importance to our national security. That the President also acted in this case after the Secretary concluded that the steel and aluminum imports in question threaten to impair the national security thus cannot be characterized as an action taken in bad faith.

56. That the United States and the complainant may have different views of "essential security interests" and an "emergency in international relations" is unsurprising. After all, the United States and the complainant have different history and geopolitical interests and play different roles in the global politics and economy. This is precisely why it is not appropriate for the complainant nor this Panel to substitute its judgment for the judgment that Article XXI(b) reserved to the Member alone. This is also precisely why the drafters reserved to the invoking Member the determination of whether an action is necessary for the protection of its essential security interests in the relevant circumstances set forth in Article XXI(b). However, this does not mean there is no recourse for Members affected by essential security actions.

57. To recall, a Member affected by action that another Member considers necessary for the protection of its essential security interests has a number of avenues of redress. The affected Member may pursue a non-violation claim against the acting Member, or the affected Member may take reciprocal actions. What an affected Member may not do, however – because the text of Article XXI(b) does not allow it – is have a WTO Panel review and potentially second-guess a Member's own determination of what action is necessary for the protection of its essential security interests.

58. This concludes the U.S. closing statement. Thank you, and we look forward to responding to any additional questions in writing.

[38] U.S. Department of Commerce, "The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security" (Oct. 2001) (US-244).

[39] Statement on the Revitalization of the Machine Tool Industry (Dec. 16, 1986) (US-245).