UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS544)

**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. In response to the U.S. statement that a 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," China argues that "the United States has presented no interpretative basis" for its reading.[1] China repeats its claim that the term "considers" does not qualify subparagraph ending (iii) and that the panel's analysis under Article XXI(b)(iii) is "no different in kind, for example, than a determination under Article XX of the GATT 1994 of whether a particular measure is one 'relating to the conservation of exhaustible natural resources.'"[2] China is wrong.

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 plain 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).[3] 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).[4] 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."

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[1] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 40.

[2] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, paras. 40-41.

[3] U.S. Opening Statement, paras. 4-9; U.S. Closing Statement, para. 48.

[4] *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.

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 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.[5] This reading of Article XXI(b) has been proven correct by the arguments and analyses developed in the course of this dispute.[6]

5. This reading is also supported by the ordinary meaning of "emergency." As the United States explained, the ordinary meaning of the term "emergency" can be defined as "a serious, unexpected, and often dangerous situation requiring action."[7] 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.[8] The ordinary meaning of "emergency" supports the U.S. interpretation.

6. Lastly, contrary to China's argument that the panel's inquiry under Article XXI(b)(iii) is "no different in kind, for example, than a determination under Article XX of the GATT 1994 of whether a particular measure is one 'relating to the conservation of exhaustible natural resources'," there are important textual differences between Article XXI and Article XX of the GATT 1994. It would not be appropriate for the Panel to approach Article XXI as it would approach analyzing a defense under Article XX, and China's suggestion to do so confirms that it seeks to impose a desired structure and interpretation onto Article XXI, rather than interpreting its terms in their context.[9]

7. As the United States explained in its Second Written Submission, while there may be surface-level similarities between Article XX and Article XXI, there are numerous important textual differences between the provisions.[10] In Article XX, for example, the subparagraphs themselves – not the chapeau – contain the operative language regarding the relation between the measure taken and the Member's objective; namely, the measure must be, for example, "necessary to," "relating to," or "essential to" the relevant objective. It is, therefore, the subparagraph that indicates on what basis a Member may avail itself of the exception. In addition, the chapeau of Article XX also includes additional non-discrimination and good faith requirements.

8. By contrast, in Article XXI(b), the operative language regarding the relationship between the measure and the objective is in the chapeau – "any action which it considers necessary for the

[5] *See* U.S. Second Written Submission, Section II.B & II.D; U.S. Responses to the Panel's Questions 41-43, paras. 157-198.

[6] *See* U.S. First Written Submission, Section III; U.S. Second Written Submission, Section II.B & II.D; U.S. Responses to the Panel's Questions 41-43, paras. 157-198.

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

[8] *See* U.S. Response to the Panel's Question 92(b), paras. 47-48; U.S. Second Written Submission, Section II.B.3.

[9] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, paras. 40-41.

[10] *See* U.S. Second Written Submission, Section II.B.4(b), paras. 35-40.

protection of its essential security interests." As the United States has explained, the requirement for applicability of the exception is that the Member taking the action must *consider* that action necessary for the protection of its essential security interests in the circumstances set forth in Article XXI(b). This key difference explains why, although a panel examining an Article XX defense might test the relationship between the measures and the objectives set out in the subparagraphs of Article XX, the text would not require a panel examining an Article XXI defense to test the applicability of the subparagraph endings in Article XXI(b), including subparagraph ending (iii).

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)

9. 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]

1. China's Comments about "Emergency in International Relations" are Flawed

10. In response to the U.S. closing statement, China misconstrues the U.S. statements and argues that the United States has recognized that "a purely economic phenomenon, such as the existence of excess capacity in a particular industry, cannot by itself constitute an 'emergency in international relations' within the meaning of Article XXI(b)(iii)."[13] The United States has done no such thing. China fails to comprehend the difference between a legal interpretation of a treaty term and the discussion of the facts specific to the present dispute.

11. As the United States has explained, 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.[14] The ordinary meaning of the text does not support China's narrow construction of an "emergency in international relations" as being limited to a situation

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[11] *See* U.S. Closing Statement, paras. 47-61.

[12] *See* U.S. Closing Statement, paras. 47-61.

[13] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 54.

[14] *See* U.S. Response to the Panel's Question 92(b), paras. 47-48.

that gives rise to "defence and military interests, as well as maintenance of law and public order interests."[15]

12. The U.S. discussion of the DOC reports concerned the "emergency in international relations" *at issue* in this dispute, and was made in the context of explaining that – even under complainant's erroneous approach – the requirements of Article XXI have been satisfied. The discussion did not – as China well knows – intend to delineate the scope of the situations that *could* constitute an "emergency in international relations." The fact that the emergency at issue involved concerns about the United States' ability to produce sufficient steel and aluminum to address national emergencies does not mean those concerns must be present in other situations in which the security exception is invoked.

13. China also suggests that the challenged measures were not taken in time of an "emergency in international relations," stating that "the emergency situation must first materialize and the action in question must be taken during that emergency" and "[a]ctions taken in contemplation of a theoretical or speculative risk are not actions taken 'in time of' an 'emergency' in international relations, of whatever type."[16] China allows that "this does not require a particular risk to have come to pass (e.g. that the Member is *already* incapable of meeting defence or public order requirements)" but notes that "the risk must be imminent."[17] China's suggestion that a Member must wait until a security crisis is "imminent" has no basis in the text of Article XXI(b)(iii), or in reality.

14. As the United States has explained, the United States considered the challenged measures necessary for the protection of its essential security interests, and to be taken in time of – "*during*" as China puts it – an emergency in international relations.[18] Again, the DOC report clearly explains the U.S. assessment that, as a result of circumstances resulting from the steel and aluminum global excess capacity crises, a situation of danger existed in which the nation was at risk of not being able to produce sufficient steel and aluminum to address national emergencies. To the United States, this emergency situation had materialized; the risk of becoming unable to address national emergencies is an emergency in itself. That a Member must, for example, allow vital industries to come to imminent collapse before acting is nonsensical, and would in fact prevent a Member from being able to take measures *it considers* necessary for the protection of its essential security interests – a result directly contrary to the text of Article XXI, which provides that *Nothing in the Agreement shall prevent* a Member from taking such action.

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[15] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 57.

[16] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 58 (emphasis in the original).

[17] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 58.

[18] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 58.

2. China's Comments about *Russia –Traffic in Transit* are Unavailing

15. In response to the United States pointing to China's contradictory approach – both advocating for the Panel *to follow* the *Russia – Traffic in Transit* panel's approach to interpretation and advocating for the Panel *not to follow* that panel's approach to evaluating Russia's invocation – China suggests that the United States has a greater "burden" to demonstrate the existence of an "emergency in international relations" than Russia did in *Russia – Traffic in Transit* because the "'war or other emergency in international relations' at issue in *Russia – Traffic in Transit* was one acknowledged by the international community as an actual armed conflict."[19] China's flawed arguments should be rejected.

16. China's suggestion that the United States has a greater "evidentiary burden" with respect to the existence of an emergency than Russia had in *Russia-Traffic in Transit* is neither supported by the text of Article XXI(b) nor the discussion China cites in the *Russia – Traffic in Transit* panel report.[20] As the United States has explained, what is required of the Member invoking Article XXI(b) is set forth in the provision, which leaves to the acting Member the determination of whether such action is necessary and taken in time of an emergency in international relations. Even under China's approach, however, nothing in the text of Article XXI suggests that the invoking Member's "burden" changes based on the nature of the emergency.

17. China misconstrues the discussion in *Russia –Traffic in Transit* when it states, "As the same panel observed, the further removed a particular situation is from one of armed conflict or a breakdown in law and public order, the greater the evidentiary burden a Member must face in seeking to *demonstrate that the situation constitutes an 'emergency in international relations'*."[21] The paragraph that China cites is under the heading "Whether the conditions of the *chapeau* of Article XXI(b) of the GATT 1994 are satisfied" and concerns not the demonstration of an emergency in international relations, but the invoking Member's articulation of its essential security interests. That panel engaged in such discussions because it considered that Russia had not articulated its essential security interests with sufficient clarity, as is apparent when the paragraph that China (para. 7.135) cites is read in its context.[22]

18. The United States has put forth *far more* evidence and argumentation than did Russia in support of its own invocation in *Russia – Traffic in Transit*. From the beginning of these proceedings, the United States has made clear that the challenged measures are national security measures and has submitted into evidence the DOC reports and the proclamations that clearly

[19] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 46.

[20] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 48.

[21] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 48 (emphases added).

[22] *Russia – Traffic in Transit*, paras. 7.134-7.137.

articulate the U.S. security interests and support the U.S. consideration that these challenged measures are necessary for the protection of those interests.[23]

3. DOC Aluminum Report Supports the U.S. Consideration that the Challenged Measures Were Taken In Time of an Emergency in International Relations

19. In response to the U.S. closing statement, China makes much of the fact that the United States identified relevant facts related to steel excess capacity, as an example, but not aluminum.[24] However, the United States has from the outset of this dispute supplied equivalent information in relation to the measures relating to aluminum – including the assessments and findings in the DOC aluminum report that support the U.S. consideration of the existence of an "emergency in international relations" when the challenged measures were taken.

20. First, the DOC aluminum report details the precipitous decline in U.S. production of primary aluminum, as well as the increase in imports of primary aluminum.[25] The report notes that "U.S. primary aluminum production in 2016 was about half of what it was in 2015, and output further declined in 2017."[26] The report makes clear that the decline in U.S. primary aluminum production and capacity utilization was sudden: "The decline in U.S. production and capacity utilization has been *particularly dramatic in just the past two years*, during which aluminum prices were at near record lows. The erosion of primary aluminum production capacity in the United States due to falling aluminum prices and subsequent closure of smelters has been *precipitous*."[27] The report further notes that the United States "currently has five smelters remaining, only two smelters that are operating at full capacity" and that "[o]nly one of these five smelters produces high-purity aluminum required for critical infrastructure and

[23] *See* U.S. First Written Submission, Section III and Table of Exhibits.

[24] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 47.

[25] 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 p. 43 (Figure 2) (US-8).

[26] The report further noted, "U.S smelters are now producing at 43 percent of capacity and at annual rate of 785,000 metric tons. As recently as 2013, U.S. production was approximately 2 million metric tons per year." 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 p. 3 (US-8).

[27] 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 p. 44 (US-8) (emphases added).

defense aerospace applications."[28] It also noted that "the downstream aluminum sector also is threatened by overcapacity and surging imports."[29]

21. The report also details the increase in aluminum imports: "U.S. imports in the aluminum categories subject to this investigation totaled 5.9 million metric tons in 2016, up 34 percent from 4.4 million metric tons in 2013. In the first 10 months of 2017, aluminum imports rose 18 percent above 2016 levels on a tonnage basis."[30] In the certain downstream aluminum sectors, "imports rose 33 percent from 1.2 million metric tons in 2013 to 1.6 million metric tons in 2016."[31]

22. Second, the report makes clear that aluminum excess capacity is a major cause of the recent decline of the U.S. aluminum industry and notes the recognition that emerged in 2017 that the ongoing engagement with China would be insufficient to address the crises. The report notes that "[a] major cause of the recent decline in the U.S. aluminum industry is the rapid increase in production in China. Chinese overproduction suppressed global aluminum prices and flooded into world markets."[32] The report also states, "Despite promises by the Chinese Government to curtail capacity, there has been little voluntary shutdown of production. In fact, some plants that had closed in 2015 had been restarted. Primary output by Chinese smelters for the first 5 months of 2017 was up nearly 9 percent from 2016 levels."[33] This unforeseen development contributed to the urgency of addressing this "emergency in international relations."

23. The report's conclusion was clear: "The U.S. is also at risk of becoming completely reliant on foreign producers of high-purity aluminum that is essential for key military and commercial systems. The domestic aluminum industry is at risk of becoming unable to satisfy existing national security needs or respond to a national security emergency that requires a large increase in domestic production."[34] The report further explained, "If no action is taken, the

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[28] 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 p. 3 (US-8).

[29] 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 p. 3 (US-8).

[30] 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 p. 4 (US-8).

[31] 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 p. 4 (US-8).

[32] 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 p. 4 (US-8).

[33] 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, Appendix E, p. 5 (US-8).

[34] 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 p. 5 (US-8).

United States is in danger of losing the capability to smelt primary aluminum altogether."[35] The Secretary concluded that aluminum articles are being imported in such quantities and under such circumstances as to threaten to impair the national security.[36]

24. Therefore, the DOC aluminum report conveys that, as with steel, the United States was at a crucial point—without immediate action, the aluminum industry could continue to suffer irreversible damages[37] and not be able to maintain or increase production to address national emergencies.

25. This conclusion is also supported by statements made by the French Chair at the 2018 OECD Ministerial Council Meeting that the OECD Members "share the view that severe excess capacity in key sectors such as steel and aluminum are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy" and "stress the urgent need to avoid excess capacity in … sectors such as aluminium and high technology."[38] The Charlevoix G7 Summit Communiqué also "stressed the urgent need to avoid excess capacity" in the aluminum sector.[39] Thus, even under China'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."

C. China's Suggestion that this Panel Should Avoid Interpreting and Applying Article XXI is Ill-Founded

26. China points to the "sensitivity surrounding the interpretation and application of Article XXI" and suggests that "a report by the Panel finding that the Section 232 measures are safeguard measures that are inconsistent with the identified provisions of the Agreement on Safeguards would be sufficient to achieve a satisfactory resolution of this matter in accordance with the objectives of the DSU"[40] China's self-serving suggestion is ill-founded. Given that

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[35] 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 p. 5 (US-8).

[36] 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).

[37] In its conclusion, the report also noted that "[a]lthough global aluminum prices have regained lost ground in recent months, the damage to U.S. aluminum production capability was significant and irreversible." 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 p. 105 (US-8).

[38] Statement of the Chair of the OECD Ministerial Council Meeting 2018, at p. 5, https://www.oecd.org/mcm-2018/documents/Statement-French-Chair-OECD-MCM-2018.pdf (US-254).

[39] The Charlevoix G7 Summit Communiqué (June 9, 2018), para. 5, http://www.g7.utoronto.ca/summit/2018charlevoix/communique.html (US-255).

[40] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 35.

China has been unwilling to adhere to Members' traditional understanding of Article XXI, the Panel should interpret and apply Article XXI(b) to find that, based on the U.S. invocation in this proceeding, there are no further findings the Panel may make that would assist the DSB in making a recommendation in this dispute. That is, contrary to China's position, it is precisely by properly "interpret[ing] and apply[ing]" Article XXI that the Panel would make only the appropriate findings "[g]iven the sensitivity surrounding Article XXI".

27. The United States recalls that it is China who chose to raise these issues of U.S. essential security before this WTO Panel. China chose to do so despite repeated statements by the United States invoking its essential security interests with respect to these measures, and indicating that Article XXI of the GATT 1994 applies. If China considers the issues it has raised in these proceedings to be too sensitive for the Panel to address, it should end this dispute. China has, in any event, already chosen to impose countermeasures against the United States in response to the challenged measures. China itself does not appear to consider, therefore, that it is necessary for it to succeed in this dispute to secure the right to retaliate against the United States. Under these circumstances, maintaining this dispute would require this Panel to pronounce itself on sensitive issues of essential security and Article XXI(b) of the GATT 1994 – the very issues China now asks the Panel to avoid "[g]iven the sensitivities surrounding Article XXI". China cannot have it both ways. If China wishes to continue this dispute, it must accept the consequences of that decision.

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

28. In challenging the U.S. interpretation of Article XIX, China repeatedly refers to the concept of WTO panels "classifying" measures "in relation to the disciplines of the covered agreements."[41] China argues, for example, that "United States' understanding of how panels are to classify measures in relation to the disciplines of the covered agreements is profoundly mistaken" and refers to potential cases "in which the classification of a measure as a safeguard measure is beyond any possible dispute."[42] China's comments reveal its misunderstanding of both the U.S. arguments in this dispute and the role of a panel in WTO dispute settlement.

29. 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

[41] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, paras. 4, 6, and 19.

[42] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, paras. 4 and 19.

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.

30. 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 China's words – attempt to "classify" measures "in relation to the disciplines of the covered agreements" – to determine whether there might be a different basis on which a Member may be permitted to deviate from its WTO obligations, other than the basis that the acting Member has claimed.

31. 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.[43] 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.

32. In fact, the text of Article XXI refutes China's suggestion that the Panel should attempt to "classify" the measures at issue to determine whether the measures at issue are safeguards measures. 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 China'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.

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

33. China suggests – without support – that the drafters of Article XIX and the Agreement on Safeguards "intended the rights and obligations of Article XIX and the Agreement on Safeguards, including the right to rebalance, to apply to all measures that are objectively

[43] U.S. Closing Statement, para. 42; U.S. Response to the Panel's Question 76, paras. 345-346.

safeguard measures" and that the Agreement on Safeguards was adopted to "'re-establish multilateral control' over certain types of safeguard-like measures that Members had adopted in order to 'escape such control.'"[44] China does not explain, however, what it regards as "safeguard-like measures" or how the text of the Agreement on Safeguards supports its assertions. China also emphasizes the importance of distinguishing between Article XXI vs. Article XIX and the Agreement on Safeguards because, according to China, "the balancing of rights and obligations that makes the safeguards system possible would be thrown off-kilter if a Member could readily impose safeguard or safeguard-like measures under the guise of an asserted 'emergency in international relations', thereby forcing other Members to seek vindication of their rights through the more laborious and time-consuming mechanism of dispute settlement."[45] China's arguments come to nothing.

34. As an initial matter, China's criticism of WTO dispute settlement is surprising considering its course of action. China has not been forced to vindicate its rights through "laborious and time-consuming" litigation. China chose to challenge the U.S. measures at the WTO after already having taken retaliatory action against those measures. The only outcome China can hope to achieve is that this Panel opine on the legitimacy of the U.S. security measures. Given the "sensitivity surrounding the interpretation and application of Article XXI", China's chosen course of action is therefore not only "laborious and time-consuming", but inappropriate and irresponsible.

35. With respect to China's retaliatory actions, China offers no support in the text of Article XIX or the Agreement on Safeguards for its suggestion that a right to rebalance would attach when a WTO Member has taken what China calls (without explanation) "safeguard-like measures." The text does not support such an argument, and in fact, China's suggestion is directly contradicted by statements by the drafters of the Agreement on Safeguards.[46]

36. Specifically, in a 1987 communication to the Negotiating Group on Safeguards, Switzerland opined that "[t]he General Agreement distinguishes between several categories of safeguards," and – although Switzerland included Article XXI and other provisions among these "categories of safeguards" – it indicated that these other provisions "do not directly concern the object of our work in the present context."[47] Similarly, a 1988 communication by the Nordic countries distinguished between the "several articles and provisions of a safeguard nature,"

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[44] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 20.

[45] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 62. China also complains that interpreting Article XIX to require invocation would "force affected Members to challenge the measure in dispute settlement before obtaining any right to rebalance – a process that would ordinarily take years (as the present dispute evinces) rather than the 120 days contemplated by Article 8.2 of the Agreement on Safeguards." China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 19.

[46] *See* U.S. Response to the Panel's Question 81, paras. 360-364.

[47] Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987), at 1 (US-167) ("The provisions relating to health, security etc. in Articles XX and XXI protect interests situated at other levels than purely economic and trade interests. The specific reasons for their existence do not directly concern the object of our work in the present context.").

including Article XXI, and opined that "the scope of the issue to be negotiated in the Negotiating Group on Safeguards . . . . should be confined to the rules and disciplines applicable for the withdrawal of GATT concessions in an emergency situation as stipulated by the current Article XIX."[48] As these statements demonstrate, the drafters of the Agreement on Safeguards were aware that other GATT 1947 (now GATT 1994) provisions included other measures that could be described as safeguards, and they understood their work as confined to measures sought, taken, or maintained pursuant to Article XIX.

37. The United States does not dispute that a Member affected by another Member's action pursuant to Article XIX shall be free to suspend substantially equivalent concessions or other obligations as set out in Article XIX:3 and Article 8. What a Member cannot do under the WTO system, however, is to adopt unilateral retaliation measures – disguised as purported "rebalancing measures" – simply because it is concerned with certain measures imposed by another Member.

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

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

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

[48] Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168).

through recourse to the procedures of the DSU. Under the complainant's approach, however – contrary to DSU Article 23 – a Member can deem another Member's measure as inconsistent with a GATT obligation and, on that basis, adopt retaliatory measures.

C. China's Suggestion that the Measures at Issue Must Comply With Both the Agreement on Safeguards and Article XXI Is Nonsensical and Contrary to the Text

41. China appears to acknowledge the potential overlap in the scope of measures covered by the Agreement on Safeguards and Article XXI, but suggests – contrary to the text of both – that "it is difficult to envision a circumstance in which a Member would need to act *inconsistently* with Article XIX of the GATT 1994 and the Agreement on Safeguards when it adopts a safeguard or safeguard-like measure for the purpose of preserving sufficient domestic capacity for defence or other public order requirements, such that any justification under Article XXI(b) would be required."[49] China then appears to retreat from its own assertions when it states that "Article XXI(b) would become relevant only if the obligations of Article XIX . . . *prevented* a Member from taking an 'action … in time of war or other emergency in international relations' which it 'considers necessary for the protection of its essential security interest.'"[50] China's arguments fail.

42. China's arguments are inconsistent with Article XXI and its statement that "Nothing in this Agreement shall be construed to prevent…". The reference to "Nothing in this Agreement" 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. China's suggestion that it is "difficult to envision" that another Member could not act consistently with Article XIX when taking action it considers necessary for the protection of its essential security interests under Article XXI is irrelevant and does not change the text of Article XXI. Article XXI permits a Member to take whatever action *it considers necessary* to protect the essential security interests at issue. It is simply nonsensical to suggest that an essential security action taken under Article XXI could – despite the text of that provision – be subject to all the procedural and substantive requirements set forth in the Agreement on Safeguards.

43. As the United States has noted, the circumstances in which a Member might invoke Article XXI could overlap with those described in Article XIX and the Agreement on Safeguards. A Member may invoke Article XXI with respect to an economic emergency for which it considers an action necessary for the protection of its essential security interests. But many Members, the United States and China included, have imposed safeguard measures in circumstances of economic emergencies they do not consider to implicate their essential security interests. In such cases, the obligations of Article XIX and the Agreement on Safeguards would remain.

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[49] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 61.

[50] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 61, footnote 50.

44. China's argument is also inconsistent with Article 11.1(c) of the Agreement on Safeguards. As the United States has explained, there is potential overlap in the scope of measures covered by both the Agreement on Safeguards and Article XXI, and a Member could take any number of actions in response to what it might consider economic emergencies, such as raising its ordinary customs duty. Though there may be overlap in the scope of *measures* covered by both the Agreement on Safeguards and Article XXI, there is not an overlap in *disciplines* in the context presented in this dispute because the ordinary meaning of Article 11.1(c) precludes the cumulative application of the Agreement on Safeguards and Article XXI of the GATT 1994 where the measure at issue has been sought, taken, or maintained under the latter provision.[51] Put differently, the authority under which a Member acts (Article XXI, as opposed to Article XIX) – and any disciplines that apply – are mutually exclusive in the context presented in this dispute.

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

45. China errs when it argues that the counter-notification provision at Article 12.8 of the Agreement on Safeguards "cannot be reconciled" with the U.S. arguments in this dispute.[52] China claims that "the incoherence in the U.S. interpretation of Article 12.8 is evident within the four corners of Article 12 itself" because Article 12.8 would permit a Member to counter-notify that another Member had "tak[en] a decision to apply or extend a safeguard measure" under Article 12.1(c).[53]

46. China's argument ignores, however, that the reference in Article 12.1(c) to "a safeguard measure" must be understood in the context of Article 1 of the Agreement on Safeguards, which defines "safeguard measures" based on the text of Article XIX. As Article 1 provides, "[t]his Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." As the United States has explained, the reference in Article 1 to "safeguard measures" as "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.[54]

47. 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.[55] Therefore, the reference to "safeguard measures"

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[51] U.S. Response to the Panel's Question 74, paras. 321-324.

[52] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 25.

[53] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 26.

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

[55] *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

at Article 12.1(c) – and any counter-notification under this provision pursuant to Article 12.8 – likewise refers to "measures provided for in Article XIX", including the invocation requirement at Article XIX:2.

48. As the United States has explained, the reference in Article 12.8 to "any measures or actions *dealt with in this Agreement*"[56] makes clear that this provision relates only to notifications that Members are required to make by the Agreement on Safeguards. This text does not permit a Member to invoke – on behalf of another Member – the right to take a safeguard measure pursuant to Article XIX if the acting Member itself has not itself invoked that right by providing notice and an opportunity to consult as set forth in Article XIX:2. For example, if a Member has invoked its right to take action pursuant to Article XIX and provided notice and an opportunity to consult as set forth in Article XIX:2 – but the acting Member did not notify the Committee upon making a finding of serious injury or threat thereof caused by increased imports as called for by Article 12.1(b) – another Member may counter-notify under Article 12.8 that the acting Member has made a finding of serious injury or threat thereof caused by increased imports. If the Member taking action has *not* invoked its right to take a safeguard measure pursuant to Article XIX, however, Article 12.8 does not permit another Member to counter-invoke that right for the acting Member.

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

49. China mischaracterizes U.S. arguments in this dispute when it suggests that the United States believes invocation is "determinative" and invocation is the "sole basis" for characterizing a measure as a safeguard.[57] As the United States has explained, the text of Article XIX establishes three necessary conditions for a safeguard measure to exist: (1) the acting Member invokes Article XIX as the legal basis for a safeguard measure by providing notice in writing and affording affected Members an opportunity to consult; (2) the measure must suspend an obligation in whole or in part or withdraw or modify a concession, and (3) this suspension, withdrawal, or modification is necessary to prevent or remedy serious injury to the Member's domestic producers caused or threatened by increased imports of the subject product because the domestic safeguard measure would otherwise be contrary to the obligation or concession.[58]

50. Put differently, the United States does not dispute the relevance – in determining whether a particular measure is a safeguard measure under Article XIX – of whether a measure suspends an obligation in whole or in part or withdraws or modifies a concession, and whether this suspension, withdrawal, or modification is necessary to prevent or remedy serious injury to the

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").

[56] Emphasis added.

[57] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, paras. 6, 11 and 32.

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

Member's domestic producers caused or threatened by increased imports of the subject product because the domestic safeguard measure would otherwise be contrary to the obligation or concession. The United States also recognizes that, even when a Member has invoked Article XIX – as Indonesia did with respect to the measures at issue in *Indonesia – Iron or Steel Products* – the measures at issue still may not be safeguard measures if, for example – as occurred in *Indonesia – Iron or Steel Products* – the Member purporting to take a safeguard measure pursuant to Article XIX has no binding tariff obligation in its WTO Schedule of Concessions with respect to the product on which the Member had proposed to take a safeguard measure.

51. China's assertion that the U.S. interpretation of Article XIX makes "the decision to notify a safeguard measure . . . nothing more than a trap for the ignorant and the unwary"[59] is not a serious one. The United States has invoked Article XIX recently with respect to solar products, large residential washers, and blueberries.[60] 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. The United States takes seriously its rights and obligations under the WTO agreements, including its rights and obligations under Article XIX. The United States has *not* invoked Article XIX with respect to the measures at issue in this dispute, however, because these measures are security measures taken pursuant to Article XXI. The United States has repeatedly made this clear, and China's attempts to undermine those claims continue to fail.[61]

III. CONCLUSION

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

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[59] China's Comments on the U.S. Closing Statement at the Second Substantive Meeting, para. 18.

[60] *See* United States, Notification under Article 12.1(a) of the Agreement on Safeguards on the Initiation of an Investigation and the Reasons for It (Fresh, Chilled, or Frozen Blueberries), G/SG/N/6/USA/13 (Oct. 8, 2020) & G/SG/N/6/USA/13/Corr.1 (Oct. 21, 2020); United States, Notification under Article 12.1(a) of the Agreement on Safeguards on the Initiation of an Investigation and the Reasons for It (Large Residential Washers), G/SG/N/6/USA/12 (June 12, 2017); United States, Notification under Article 12.1(a) of the Agreement on Safeguards on the Initiation of an Investigation and the Reasons for It (Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)), G/SG/N/6/USA/11 (May 29, 2017).

[61] 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)).