UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS544)

INTEGRATED EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA

June 25, 2021

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

1. At issue in this dispute is the sovereign right of a state to take action to protect its essential security in the manner it considers necessary. WTO Members did not relinquish this inherent right in joining the WTO. To the contrary, this right is reflected in Article XXI(b) of the GATT 1994, and WTO Members have not agreed to subject the exercise of this right to legal review.

2. Section 232 of the Trade Expansion Act of 1962 (Section 232) allows the United States to adjust imports of an article based on a finding that such imports threaten to impair U.S. national security. On April 19 and 26, 2017, the United States initiated investigations under Section 232 into imports of steel and aluminum, respectively. In connection with these investigations, United States solicited written comments from interested parties and held public hearings. The United States summarized its findings from these investigations in written reports, and released these reports to the public. On March 8, 2018, the United States acted pursuant to Section 232 and imposed tariffs on certain steel and aluminum imports, effective beginning on March 23, 2018. The United States also established a process to permit product-specific exclusions from the Section 232 tariffs, based on, among other factors, the national security implications of those imports.

A. The Text Of GATT 1994 Article XXI(b) In Its Context, And In The Light Of The Agreement's Object And Purpose, Establishes That The Exception Is Self-Judging

3. The text of GATT 1994 Article XXI(b), in its context and in the light of the agreement's object and purpose, establishes that the exception is self-judging. As this text provides "[n]othing" in the GATT 1994 shall be construed to prevent a WTO Member from taking "any action" which "it considers necessary" for the protection of its essential security interests. This text establishes that (1) "nothing" in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest, and (2) the action necessary for the protection of its essential security interests is that which the Member "considers necessary" for such protection.

4. The self-judging nature of GATT 1994 Article XXI(b) is demonstrated by that provision's reference to actions that the Member "considers necessary" for the protection of its essential security interests. The ordinary meaning of "considers" is "[r]egard in a certain light or aspect; look upon as" or "think or take to be." Under Article XXI(b), the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for the protection of the acting Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("consider[]") the action as having the aspect of being necessary for the protection of that Member's essential security interests. The French and Spanish texts of Article XXI(b) confirm the self-judging nature of this provision. Specifically, use of the subjunctive in Spanish ("estime") and the future with an implied subjunctive mood in French ("estimera") support the view that the action taken reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate.

5. The ordinary meaning of the terms in the phrase "its essential security interests," also supports the self-judging nature of Article XXI. The word "interest" is defined as "[t]he relation of being involved or concerned as regards potential detriment or (esp.) advantage." The term "security" refers to "[t]he condition of being protected from or not exposed to danger." The definitions of "essential" include "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important."

6. And it is "its" essential security interests – the Member's in question – that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves "its interests," that is, potential detriments or advantages from the perspective of that Member. Each WTO Member likewise must determine whether a situation implicates its "security" interests (not being exposed to danger), and whether the interests at stake are "essential," that is, significant or important, in the absolute or highest sense. By their very nature, these questions are political and can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those circumstances. No WTO Member or WTO panel can substitute its views for those of a Member on such matters.

7. The text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. The first element of this text that is notable is the lack of any conjunction to separate the three subparagraphs. The subparagraphs are not separated by the coordinating conjunction "or", to demonstrate alternatives, or the conjunction "and", to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b). Subparagraphs (i) and (ii) of Article XXI(b) both begin with the phrase "relating to" and directly follow the phrase "essential security interests" in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraphs (i) and (ii) modify the phrase "essential security interests" and thus illustrate the types of "essential security interests" that Members considered could lead to action under Article XXI(b).

8. Subparagraphs (i) and (ii) do not limit a Member's essential security interests exclusively to those interests. First, the chapeau of Article XXI(b) (as noted) reserves to the Member the judgment of what "its interests" are, including whether they are relating to one of the enumerated interests. Second, subparagraph (iii) reflects no explication (and therefore cannot be understood to reflect a limitation) on a Member's essential security interests. Rather, as with subparagraphs (i) and (ii), the essential security interests are those determined by the Member taking the action.

9. Subparagraph (iii) begins with temporal language: "*taken in time of* war or other emergency in international relations." The phrase "taken in time of" echoes the reference to "taking any action" in the chapeau of Article XXI (b), and it is actions that are "taken", not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word "action," rather than the phrase "essential security interests." Accordingly, Article XXI(b)(iii) reflects a Member's right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations. Nor does the text of Article XXI(b)(iii) require that the emergency in international relations or war directly involve the acting Member, reflecting again that the action taken for the protection of its essential security interests is that which the Member judges necessary.

10. Subparagraphs (i) to (iii) of Article XXI(b) thus reflect that Members wished to set out certain types of "essential security interests" and a temporal circumstance that Members considered could lead to action under Article XXI(b). A Member taking action pursuant to Article XXI(b) would consider its action to be necessary for the protection of the interests identified in subparagraphs (i) and (ii) or to be taken in time of war or other emergency in international relations. In this way, the subparagraphs guide a Member's exercise of its rights under this provision while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

11. The context of Article XXI(b) also supports this understanding. First, the phrase "which it considers necessary" is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase "which it considers" in Article XXI(b), and not reduce these words to inutility. Second, the context provided by Article XX supports the understanding that Article XXI(b) is self-judging. Specifically, Article XX sets out "general exceptions," and a number of subparagraphs of Article XX relate to whether an action is "necessary" for some listed objective. For example, Article XX(a), (b), and (d), respectively, provide exceptions for certain measures "*necessary* to protect public morals," "*necessary* to protect human, animal or plant life or health," and "*necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" (emphases added). Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "necessary." Furthermore, Article XX includes a chapeau which subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member's action, is absent from Article XXI.

12. Third, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member "considers" appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. For example, under Article 18.7 of the Agreement on Agriculture, "[a]ny Member" may bring to the attention of the Committee on Agriculture "any measure which it considers ought to have been notified by another Member." Similarly, Article III(5) of the General Agreement on Trade in Services (GATS) permits "[a]ny Member" to notify the Council for Trade in Services of any measure taken by another Member which "it considers affects" the operation of GATS. In other provisions of the GATT 1994 or other WTO agreements, however, certain judgments are left for determination by a panel, the Appellate Body, or a WTO committee. Under DSU Art. 12.9, for example, "[w]hen the panel considers" that it cannot issue its report within a certain period of time, the panel must provide certain information to the DSB. Under Article 4(1) of the Agreement on Rules of Origin, the Committee on Rules of Origin may request work from the Technical Committee on Rules of Origin "as it considers appropriate" for the furtherance of the objectives of that agreement.

13. Fourth, by way of contrast, and further context, in at least two WTO provisions the judgment of a Member is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the

complaining party. As DSU Article 26.1 states, a non-violation complaint may be instituted, "[w]here and to the extent that such party considers *and* a panel or the Appellate Body determines" that a particular measure does not conflict with a WTO agreement, among other requirements. Thus, in this provision, Members explicitly agreed that it is not sufficient that "[a] party considers" a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that "a panel or the Appellate Body determines that" a non-violation situation is present. A similar limitation—that a "party considers and a panel determines that"—was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c).

14. The context provided by DSU Articles 26.1 and 26.2 is highly instructive. No such review of a Member's judgment is set out in Article XXI(b), which permits a Member to take action "which it [a Member] considers necessary for the protection of its essential security interests." Accordingly, the context of Article XXI(b) demonstrates that Members did not agree to subject a Member's essential security judgments to review by a WTO panel.

15. The object and purpose of the GATT 1994 also establishes that Article XXI(b) is self-judging. The object and purpose of the GATT 1994 is set out in the agreement's Preamble. That Preamble provides, among other things, that the GATT 1994 set forth "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." Particularly with these references to arrangements that are "mutually advantageous" and tariff reductions that are "substantial" (rather than complete), the contracting parties (now Members) acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions at Article XXI. The self-judging nature of Article XXI is further established by a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia.

B. Supplementary Means of Interpretation, Including Negotiating History, Confirm The Self-Judging Nature of GATT 1994 Article XXI(b)

16. While not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirms that GATT 1994 Article XXI(b) is self-judging. The drafting history of GATT 1994 XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). In 1946, the United States proposed a draft charter for the ITO, which included the following two exceptions provisions:

> Article 32 (General Exceptions to Chapter IV):
>
> > Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures
> > . . . .
> > (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.

> Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):
>
> > None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.

17. The United States asserted at the time that Article 32(e) "afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests" in a time of war or a national emergency. As originally drafted, however, neither exceptions provision was explicitly self-judging. These provisions lacked the key phrase that appears in the current text of GATT 1994 Article XXI(b) regarding action by a Member that "it considers necessary for" the protection of its essential security interests. In addition, the essential security exception set out in Article 32 of the ITO draft charter was one of twelve exceptions, several of which later formed the basis for the general exceptions at GATT 1994 Article XX.

18. In March 1947, the same exceptions text was proposed as both GATT Article XX and Article 37 the ITO draft charter, in Chapter V, which related to "[g]eneral commercial policy." The chapeau of this proposed text and a number of the subparagraphs are identical to what would become GATT 1994 Article XX. With its proviso, the chapeau contemplated panel review so that the exceptions would not be applied to discriminate unfairly. The subparagraphs corresponding to essential security were included in this proposed text, together with other exceptions, and thus were subject to the proviso in the chapeau, like these other exceptions. This structure suggests that, at that time, not all drafters may have viewed the essential security exception in subparagraph (e) as self-judging.

19. In May 1947, the United States proposed removing, *inter alia*, subparagraph (e) from the ITO draft charter exceptions provision quoted above. In the U.S. proposal, item (e) would be included in a new article, to be inserted at an "appropriate" place at the end of the ITO draft charter, so that these exceptions would apply to the whole charter. The United States also proposed that the new article would begin by stating "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures," including those relating to the protection of essential security interests. Thereafter, the United States proposed the addition of a new chapter, entitled "Miscellaneous" at the end of the ITO draft charter, and that the proposed exceptions to the charter as a whole be included in this new chapter. The United States also suggested additional text to this exceptions provision, to make the self-judging nature of these exceptions explicit. Under this U.S. proposal, the draft exceptions provision stated:

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which *it considers contrary* to its essential security interests, or to prevent any Member from taking any action which *it may consider to be necessary* to such interests:

> a) Relating to fissionable materials or their source materials;
>
> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests . . . .

20. The text now referenced what a Member considered to be necessary, explicitly indicating that this provision could be invoked based on a Member's own judgment. Moreover, this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interests. The drafting history thus shows that a deliberate textual distinction was drawn between the self-judging nature of exceptions pertaining to essential security and exceptions related to other interests that, unlike the security-based exceptions referenced above, were retained as part of the "[g]eneral commercial policy" chapter of the ITO draft charter.

21. Regarding the exception's scope, at a July 1947 meeting of the ITO negotiating committee, the delegate from The Netherlands requested clarification on the meaning of a Member's "essential security interests," and suggested that this reference could represent "a very big loophole" in the ITO charter. The U.S. delegate responded that the exception would not "permit anything under the sun," but suggested that there must be some latitude for security measures. The U.S. delegate further observed that in situations such as times of war, "no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are."

22. In those discussions the Chairman made a statement "in defence of the text," and recalled the context of the essential security exception as part of the ITO charter. As the Chairman observed, when the ITO was in operation "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind" raised by The Netherlands delegate. That is, the parties would serve to police each other's use of the essential security through a culture of self-restraint. During the same July 1947 meeting, the Chairman asked whether the drafters agreed that actions taken pursuant to the essential security exception "should not provide for any possibility of redress." In response, the U.S. delegate observed that such actions "could not be challenged in the sense that it could not be claimed that the Member was violating the Charter." The United States acknowledged, however, that a member affected by such actions "would have the right to seek redress of some kind" under Article 35(2) of the ITO charter.

23. At that time, Article 35(2) provided for the possibility of consultations concerning the application of any measure, "whether or not it conflicts with the terms of this Charter," which had "the effect of nullifying or impairing any object" of the ITO charter. If the parties were unable to resolve the matter, it could be referred to the ITO, which in turn could make recommendations, including the suspension of obligations or concessions. In response to the explanation from the U.S. delegate, including the right to seek redress for non-violation under

Article 35(2), the Australian delegate lifted a reservation on the essential security exception at this July 1947 meeting. The delegate from Australia stated that, as the exception was "so wide in its coverage"—particularly the "which it may consider to be necessary" language—Australia's agreement was done with the assurance that "a Member's rights under Article 35(2) will not be impinged upon." This exchange demonstrates that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, an ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired, as set forth at Article 35(2) of the ITO Charter draft current in July 1947. As applied to the WTO context, this discussion indicates essential security measures cannot be found by a panel to breach the GATT 1994 or other WTO agreements, although Members may request that a panel review whether its benefits have been nullified or impaired by the essential security measure and, if so, to assess the level of that nullification or impairment.

24. This understanding of the relationship between essential security measures and nullification or impairment procedures is further confirmed by discussions of the ITO Charter that occurred in early 1948. For example, after "extensive discussions," a Working Party of representatives from Australia, India, Mexico, and the United States decided to retain the draft charter's non-violation nullification or impairment provision. The Working Party noted that the provision "would apply to the situation of action taken by a Member" to protect its essential security interests. The explanation of the Working Party is worth reading in full:

> Such action, for example, in the interest of national security in time of war or other international emergency *would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent* with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.

25. Members of a sub-committee on the ITO Charter's dispute settlement chapter expressed similar views. Thereafter, the essential security exception in the ITO draft charter was revised based on suggestions from the United Kingdom. The UK representative opined that with these revisions, the Charter "would neither permit, nor condemn, nor pass any judgment whatever on, unilateral economic sanctions." After the UK's revisions were accepted, a representative of India—when discussing nullification or impairment claims as a remedy for essential security measures—"expressed some doubt" about whether "the bona fides of an action allegedly coming within [the essential security exception] could be questioned." In early 1948, negotiators also declined to adopt a UK proposal that would have amended the essential security provision to state that nullification or impairment procedures were the appropriate recourse for members affected by essential security measures by other members. As the United States noted at the time, such a reference to nullification or impairment in the essential security provision was "unnecessary" in light of the existing text.

26. In its analysis of the negotiating history of Article XXI(b), the *Russia – Traffic in Transit* panel referred at length to internal documents of the U.S. delegation to the GATT negotiations.

Specifically, in addition to considering published documents associated with the negotiating history of Article XXI(b), that panel considered a study that discusses internal documents of the U.S. delegation. In particular, the panel report recounts at some length this study's discussion of an internal U.S. delegation meeting of July 4, 1947. The panel used these documents as negotiating history to confirmed the panel's interpretation that it had the authority to review a Member's invocation of its essential security interests. The Panel in *Russia – Traffic in Transit* erred in relying on such material because it is not "negotiating history" within the meaning of the Vienna Convention. It is concerning that the panel would commit such an elementary error in interpretive approach. Even putting aside this interpretative error, the panel also misunderstood and mischaracterized the U.S. discussions to which it referred. These internal U.S. deliberations—when considered as a whole and in context—further confirm that Article XXI(b) is self-judging. The self-judging nature of Article XXI(b) is also supported by views repeatedly expressed by GATT contracting parties (now Members) in connection with prior invocations of their essential security interests.

C. The *Russia – Traffic In Transit* Panel Erred In Deciding It Had Authority To Review A Responding Party's Invocation Of Article XXI.

27. The panel in *Russia – Traffic in Transit* erred when it decided that it had authority to review multiple aspects of a responding party's invocation of Article XXI. That panel's interpretation of Article XXI is not consistent with the customary rules of interpretation set forth in the Vienna Convention. In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. In fact, the panel appears to have reached its conclusion regarding the reviewability of Article XXI a mere four paragraphs after beginning its analysis – based not on "the mere meaning of the words and the grammatical construction of the provision," but on what it termed the "logical structure of the provision." Furthermore, in its examination of the negotiating history of the treaty, the *Russia – Traffic in Transit* panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history. These errors reveal the panel's analysis as deeply flawed and suggest a results-driven approach not in line with the responsibility bestowed on the panelists by WTO Members through the DSU.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

A. The Plain Meaning of the Text of GATT 1994 Article XXI(b) Establishes That The Exception Is Self-Judging

28. The text of Article XXI(b) establishes that Article XXI(b) is self-judging. The chapeau of Article XXI(b) provides that "[n]othing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests." "[C]onsider[]" means "[r]egards in a certain light or aspect; look upon as." Here, the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for protection of the acting Member's essential security interests. Whether the Member "regards" the actions in this light is a subjective question.

29. The text also specifies that it is "*its* essential security interests"—the Member's in question—that the action is taken for the protection of. In identifying such security interests, therefore, it is the judgment of the Member that is relevant. Only a Member can determine for itself what comprises its essential security interests.

30. The text and grammatical structure of subparagraphs (i) to (iii) of Article XXI(b) also support the self-judging nature of this provision. These subparagraphs lack any conjunction—an "and" or an "or"—to specify their relationship to each other. This indicates that each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

31. The first two subparagraphs each relate to the kinds of interests for which the Member may consider its action necessary to protect. Those subparagraphs provide that a Member may take any action it considers necessary for the protection of its essential security interests relating to "fissionable materials or the materials from which they are derived" and its essential security interests relating to "the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying for military establishment."

32. The final subparagraph does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. That subparagraph provides that a Member may take any action which it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations." The subparagraphs form an integral part of the provision in that they complete the sentence begun in the chapeau, establishing three circumstances in which a Member may act. In this way, the subparagraphs guide a Member's exercise of its rights under this provision.

33. But the text of the chapeau clearly reserves to the Member the judgment of whether a particular action is necessary to protect its essential security interests in any of the three circumstances identified. The text of Article XXI(b) uses a single uninterrupted clause modifying "any action" such that "it considers" applies to the whole provision. The argument that "it considers" only qualifies certain words in the phrase and therefore certain aspects of the Member's determination—for instance, the necessity of the action, or whether the action is for protection, or the Member's essential security interests, but not the circumstances described in the subparagraphs— ignores the ordinary meaning of the terms and the grammatical structure of the provision.

B. The Context of Article XXI(b) Supports an Understanding of that Provision as Self-Judging

34. The self-judging nature of Article XXI(b) is also supported by the context of its terms. Article XXI(a) and Article XXI(c) provide the immediate context in which to view the ordinary meaning of the text of Article XXI(b). Article XXI(a) states that "[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests." With this language, Article XXI(a) specifically provides that a Member need not provide any information—to a WTO panel or to other WTO Members—regarding essential security measures or the Member's underlying security interests. This provision both recognizes the highly sensitive nature of a Member's essential security interests and reveals the deference the drafters intended to give to Members

when exercising their rights under Article XXI. That a Member may not be required to disclose information it considers contrary to its interests supports the interpretation that a Member's invocation of Article XXI(b) was not intended to be reviewable against some legal standard.

35. Furthermore, the phrase "which it considers" is present in Articles XXI(a) and XXI(b), but not in Article XXI(c), which provides that Members may not be prevented from "taking any action in pursuance of" its UN obligations for the maintenance of international peace and security. Thus, the self-judging clause "which it considers" was omitted from Article XXI(c), which relates to action in pursuance of certain UN obligations, which may or may not implicate its essential security interests. That is, when a Member assesses that its essential security interests are at issue, as in Articles XXI(a) and XXI(b), the text provides that it is the judgment of the acting Member that controls.

36. The U.S. interpretation is further supported by the context provided in Article XX. Specifically, Article XX sets out "general exceptions," and a number of subparagraphs of Article XX relate to whether an action is "necessary" for some listed objective. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "necessary." Therefore, WTO Members, as well as panels and the Appellate Body, have consistently understood the text to impose a "necessity test" for measures with respect to which a general exception of this kind is invoked. The textual distinction between Article XX and Article XXI is a fundamental one, and confirms that the drafters considered many interests to be important enough that deviations from a Member's WTO obligations may be appropriate. Only in the case of essential security interests, however, was the authority to deviate drafted to permit any action a Member considers necessary for the protection of the interests at stake. Finally, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member "considers" appropriate or necessary. As in Article XXI(b), the language signals that a particular judgment resides with that Member. In other provisions of the GATT 1994 and other WTO agreements, by contrast, the word "consider" is used to indicate that certain judgments are left for determination by a panel, the Appellate Body, or a WTO committee.

C. Because Article XXI Applies, The Rules On Safeguards Are Not Relevant, And In Any Event Article XXI Could Serve As A Defense To Alleged Breaches Of The Agreement On Safeguards

37. The complainant has challenged the U.S. security measures under Article XIX and under several provisions of the Agreement on Safeguards. The measures at issue are not safeguards and therefore the Agreement on Safeguards does not apply. Pursuant to Article 11.1(c), once a Member invokes Article XXI(b), the Agreement on Safeguards is not applicable. In any event, Article XXI of the GATT 1994 makes clear that the security exceptions, including the essential security exception, apply to the entire agreement. Specifically, Article XXI begins with the clause "Nothing in this Agreement shall be construed." The provision does not contain any qualification to this threshold clause; nor does Article XIX of the GATT 1994 indicate that the security exceptions do not apply to rights and obligations in that article. Furthermore, the Agreement on Safeguards contains 14 references to the GATT 1994. Such language establishes an express, textual link between the GATT 1994 and obligations under the Agreement on Safeguards, and confirms that, in any event, Article XXI(b) would be a defense not only to claims raised under the GATT 1994 but also to claims under the Agreement on Safeguards.

D. In Light Of The Self-Judging Nature Of GATT 1994 Article XXI, The Sole Finding The Panel May Make Consistent With Its Terms Of Reference Under DSU Article 7.1 Is To Note The Invocation Of Article XXI

38. In light of the self-judging nature of Article XXI, the sole finding that the panel may make – consistent with its terms of reference and the DSU – is to note the U.S. invocation of Article XXI. This outcome may be understood based on the difference between "jurisdiction" and "justiciability." In this context, "jurisdiction" can be defined as the extent of power of the Panel under the DSU to exercise its judicial authority or decide a particular case. By contrast, the word "justiciability" relates to whether a matter is appropriate or suitable for adjudication by a court, or in this context, whether an issue is subject to findings by the Panel under the DSU. Here, the Panel has "jurisdiction" over the dispute because the DSB has established the Panel to examine the matter set out in the panel request. The matter before the Panel may be considered "non-justiciable," however, because – as the ordinary meaning of the terms of Article XXI(b) establish – the Panel cannot make findings or provide a recommendation on that matter. In these circumstances, the sole finding the Panel may make is to recognize that the United States has invoked its essential security interests under GATT 1994 Article XXI(b). This result is consistent with the DSU, contrary to arguments the Panel has heard from the complainant.

39. Under DSU Article 7.1, the Panel's terms of reference call on the Panel to examine the matter referred to the DSB by the Member and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements]." As this text establishes, the Panel has two functions: (1) to "examine" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests"; and (2) to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreement. This dual function of panels is confirmed in DSU Article 11, which states that the "function of panels" is to make "an objective assessment of the matter before it" and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

40. As DSU Article 19.1 provides, these "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement."

41. The text of GATT 1994 Article XXI(b), however, establishes that it is for a responding Member to determine whether the actions it has taken are necessary for the protection of its own essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member's determination. Accordingly, when a respondent has invoked its essential security interests under Article XXI(b) as to a challenged measure, a panel may make no legal findings that will assist the DSB in making recommendations or giving rulings as to a complaining Member's claims, within the meaning of DSU Articles 7.1, 11, and 19.

42. Under these circumstances, the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security interests under GATT 1994 Article XXI(b). In other words, the Panel has jurisdiction over this dispute but the dispute

presents an issue that is not justiciable—a challenge to a Member's essential security measure. This means that the Panel cannot, consistent with its terms of reference, make findings of inconsistency or provide a recommendation on that issue. This result is also consistent with DSU Article 19.2 because finding an essential security measure to breach a covered agreement would diminish the "right" of a Member to take action it considers necessary for the protection of its essential security interests.

43. Such an understanding also respects the decision of the WTO Members. WTO Members agreed to remove invocation of the essential security exception from multilateral judgment when they agreed to self-judging text included in Article XXI. This decision by Members recognized that issues of essential security are inherently political in nature, and there are no legal criteria by which a Member's consideration of its essential security interests can be objectively determined. Importantly, the decision recognized that the Members did not relinquish the sovereign right of a state to take action to protect its essential right. Therefore, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of this provision, the sole finding that the Panel may make is to note the U.S. invocation. Such a finding is consistent with the Panel's terms of reference and the DSU.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

Excerpt from U.S. Response to the Panel Question 20

44. The ordinary meaning of the terms in Article 11.1(c) can be understood as "measures [that a Member has] tried to do, succeeded in doing or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX." The ordinary meaning of these terms establishes that Article 11.1(c) is triggered – and the Agreement on Safeguards "does not apply" – when a Member acts (by seeking, taking or maintaining a measure) pursuant to a provision of the GATT 1994 other than Article XIX. Here, the United States has expressly invoked a provision of GATT 1994 other than Article XIX – namely, Article XXI. Accordingly, Article 11.1(c) establishes that the Agreement on Safeguards "does not apply." The French and Spanish texts of the Agreement on Safeguards support this interpretation of Article 11.1(c).

Excerpt from U.S. Response to the Panel Question 47

45. The principle of effective treaty interpretation is expressed in the maxim *ut res magis valeat quam pereat*, meaning "parties are assumed to intend the provisions of a treaty to have a certain effect, and not to be meaningless." The Appellate Body has previously articulated the principle as "treaty interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." This principle is embodied in the general rule of interpretation in Article 31 of the VCLT. In preparing Article 31, the ILC recognized that in certain circumstances recourse to this principle may be appropriate. However, the ILC cautioned against applying it in a manner that would result in adopting an interpretation that diverges from to the ordinary meaning of the treaty text. Nothing in the VCLT would suggest that parties cannot adopt a treaty provision that is self-judging. To the contrary, the VCLT contains general rules for interpreting a treaty obligation based on the ordinary meaning of its terms. Where the

ordinary meaning makes plain the self-judging nature of an obligation, the VCLT requires that that meaning by respected by an interpreter.

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

A. Ordinary Meaning of Article XXI(b) Establishes that Article XXI(b) is Self-Judging

46. China's argument that the phrase "which it considers" does not qualify the subparagraphs is unsupported by the text and grammatical structure of Article XXI(b). China now makes clear that it agrees with the United States that the phrase "which it considers" qualifies the phrase "necessary for the protection of its essential security interests" in the chapeau. According to China, however, the subjective element of the chapeau does not extend to the subparagraph endings because the subparagraph endings modify "action." In a new argument, China argues the "third subparagraph can only modify the term 'action'" and "[g]iven that each of the three subparagraphs serves the same function in relation to the chapeau, the logical conclusion is that each of the subparagraphs modifies the term 'action'". China's argument artificially separates the terms in the single relative clause, which begins with the phrase "which it considers necessary" and ends at the end of each subparagraph. The clause follows the word "action" and describes the situation which the Member "considers" to be present when it takes such an "action". Because the relative clause describing the action begins with "which it considers", the other elements of this clause are committed to the judgment of the Member taking the action.

47. China is also incorrect that each of the subparagraph endings must modify the same terms in the chapeau of Article XXI(b). China itself fails to provide any explanation or point to any linguistic sources to support its argument. English grammar certainly permits the subparagraphs of Article XXI(b) to modify different terms in the chapeau, particularly as these subparagraphs are *not* connected by a conjunction, such as "and" or "or". Under the ordinary meaning of the English text of Article XXI(b), the subparagraph endings (i) and (ii) modify the phrase "essential security interests"; each relate to the kinds of interests for which the Member may consider its action necessary to protect. In this way, the subparagraph endings (i) and (ii) indicate the types of essential security interests to be implicated by the action taken. This is because, under English grammar rules, a participial phrase, which functions as an adjective, normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.

48. The final subparagraph ending provides that a Member may take any action which it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations." It does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. The drafters departed from typical English usage in placing the modifier next to "its essential security interests" as opposed to "action." However, this departure does not mean that subparagraphs (i) and (ii) should be read in a manner that is inconsistent with English grammar rules. The subparagraphs of Article XXI(b) are *not* connected by a conjunction, such as "and" or "or", that would suggest they modify the same term in the chapeau. Rather, the chosen text of this provision suggests that the drafters saw each subparagraph ending as having a different meaning, and structured them accordingly.

B. Responding Member Need Not Identify a Specific Subparagraph of Article XXI(b) to Invoke Its Right to Take Measures for the Protection of Its Essential Security Interests

49. China suggests that the U.S. invocation of Article XXI(b) fails because United States has "not identified a specific subparagraph of Article XXI(b) that it considers applicable." However, Article XXI(b) does not require a responding Member to invoke a specific subparagraph of the provision to invoke that Member's right to take any action which it considers necessary for the protection of its essential security interests. Furthermore, nothing in the text of Article XXI(b) suggests that the subparagraphs are mutually exclusive. By invoking Article XXI(b), the Member is indicating that one or more of the subparagraphs is applicable.

50. 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. This understanding is supported by the text of Article XXI(a), which confirms that Members are not required "to furnish any information the disclosure of which it considers contrary to its essential security interests." It may be that a Member invoking Article XXI(b) nonetheless chooses to make information available to other Members. Indeed, the United States did make plentiful information available in relation to its challenged measures. While such publicly available information could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii), the text of Article XXI does not require a responding Member to provide details relating to its invocation of Article XXI, including by identifying a specific subparagraph.

C. Contrary to Complainant's Arguments, The Terms Of Article XXI(b)(iii) Support a Finding That Article XXI(b) Is Self-Judging

51. China submits that the existence of an "other emergency in international relations" within the meaning of Article XXI(b)(iii) "is an objective question to be determined by a panel, based on all the evidence and legal argument presented." China also asserts that "'emergency in international relations' must be understood as eliciting the same type of interests as those arising from the other matters addressed in the enumerated subparagraphs of Article XXI(b), i.e. 'defence and military interests, as well as maintenance of law and public order interests'".

52. Like the panel in *Russia – Traffic in Transit*, China is wrong that "the applicability of Article XXI(b)(iii) to a particular set of facts is an objective matter to be evaluated by a panel." To the contrary, the text of subparagraph ending (iii) supports the interpretation that the applicability of Article XXI(b)(iii), like all of Article XXI(b), is self-judging.

53. The term "emergency" can be defined as "a serious, unexpected, and often dangerous situation requiring action." In addition to being modified by the phrase "which it considers," 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. Similarly, Members may vary – based on their own unique circumstances – in their determinations of whether they consider that a particular situation "requires action." Just as a panel cannot determine – without substituting its judgment for that of the Member – which are the essential security interests of a Member, a panel cannot determine – without substituting its own judgment for that of the Member – whether a Member considers its action to be taking place "in time of war or other emergency in international relations."

54. Furthermore, China misconstrues the role of context in the interpretative exercise when it attempts to read into subparagraph (iii) the terms of the other two subparagraphs. Particularly in light of the absence of any conjunction between the subparagraphs of Article XXI(b), China's reliance on subparagraphs (i) and (ii) to construe subparagraph (iii) makes little sense. Indeed, a Member may consider a variety of "security interests" to be "essential" even if they are not strictly "'defence and military interests'" or "'maintenance of law and public order interests'". A prominent example is cybersecurity.

55. Finally, the term "security" is broad, such that a number of WTO Members appear to include a variety of considerations – including economic considerations – in their understanding of what constitutes "security." For example, the definition of "national security" in China's National Security Law of 2015 states "'[n]ational security' means a state in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally, and there is the ability to ensure that a state of security is maintained."

D. Supplementary Means of Interpretation – Including Uruguay Round Negotiating History – Confirm that Actions Under Article XXI are not Subject to Review

56. Although not necessary in this dispute, supplementary means of interpretation – including negotiating history of the Uruguay Round – confirms that Article XXI(b) is self-judging. First, Uruguay Round drafters retained the text of Article XXI(b) – unchanged and in its entirety – when that provision was incorporated into the GATT 1994. Uruguay Round drafters also incorporated security exceptions with the same self-judging terms into GATS and TRIPS. In addition, Uruguay Round negotiators of the DSU discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable. These decisions by Uruguay Round negotiators are notable, particularly in light of the alternative approaches to security exceptions that had been incorporated into other treaties between 1947 and 1994.

57. The drafting history of Article XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). Numerous statements by the drafters of the text that became Article XXI(b) confirm that negotiators intended for this provision to be self-judging by the acting Member, and that the appropriate remedy for such measures is a non-violation, nullification or impairment claim. Furthermore, numerous decisions by Uruguay Round negotiators confirm that they were well aware of – and did not intend to alter – the longstanding interpretation of Article XXI. Specifically, Uruguay Round negotiators decided to maintain Article XXI in the GATT 1994 – unchanged and in its entirety – even when presented with proposals to alter that text. Uruguay Round negotiators also decided to incorporate security exceptions with the same self-judging terms in GATS and TRIPS. In addition, Uruguay Round negotiators of the DSU also discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable.

58. These decisions by the Uruguay Round negotiators are striking, particularly considering that some trade agreements negotiated between 1947 and the Uruguay Round, including

agreements negotiated by GATT contracting parties, had in fact developed security exceptions that differed in important ways from the GATT 1947. That Uruguay Round negotiators also decided not to follow the approach of these intervening trade agreements, however – neither in the GATT 1994, nor in GATS or TRIPS, nor in the DSU – reflects that the Uruguay Round negotiators, by retaining the unchanged text of Article XXI, did not intend to depart from their predecessors regarding the interpretation of Article XXI. These intentions of the drafters – including the Uruguay Round drafters – must be given effect in this dispute.

E. Article 33 of the VCLT Supports Adopting an Interpretation that Best Reconciles the English, Spanish and French versions of Article XXI(b)

59. The ordinary meaning of the English text of Article XXI(b) establishes that the provision is self-judging. The interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions, however, is not fully supported by the Spanish text of the subparagraphs. Specifically, the Spanish text of the three subparagraphs indicates that they must be read to modify the term "actions" in the chapeau of Article XXI(b); whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term "interests" in the chapeau. Thus, the meaning that best reconciles the texts, having regarding to the object and purpose of the treaty, must be adopted under Article 33 of the VCLT.

60. Reconciling the texts leads to the interpretation that all of the subparagraphs modify the terms "any action which it considers" in the chapeau, because this reading is consistent with the Spanish text, and also – while less in line with rules of grammar and conventions – permitted by the English and French texts. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase "which it considers" still modifies the entirety of the chapeau and the subparagraph endings. Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances to the judgment of that Member alone.

F. The Measures at Issue are Not Safeguards Measures and the Agreement on Safeguards Does Not Apply

61. Article XIX of GATT 1994 establishes a right for a Member to deviate from its WTO obligations under certain conditions. In order to exercise that right to apply a safeguard measure, a Member must comply with those conditions precedent set out in Article XIX. One of those key conditions precedent is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult. The measures at issue in this dispute are not safeguard measures because the United States has not invoked Article XIX as the legal basis for this measure; instead, the United States has (explicitly and repeatedly) invoked Article XXI. Accordingly, the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply.

62. Interpreting Article XIX according to the customary rules of interpretation makes clear that invocation is a fundamental, condition precedent for a Member's exercise of its right to take action under that provision and for the application of safeguards rules to that action. The text of Article XIX, including the title of that provision and each paragraph, leads to the conclusion that notice is a condition precedent to taking action under Article XIX. The context of Article XIX also supports this interpretation, and reveals that numerous other WTO provisions contemplate a Member exercising a right through invocation and contain structural similarities to Article XIX. The object and purpose of the GATT 1994, as discussed in Section IV.A.3, also supports that invocation is a condition precedent for a Member's exercise of its right to take action under Article XIX.

63. That invocation is a precondition for a Member's exercise of its right to take action under Article XIX and to the consequent application of safeguards rules to that action is also confirmed by the Working Party's report in *US – Fur Felt Hats*, a 1950 dispute between the United States and Czechoslovakia. As the Working Party explained, the notification requirement of Article XIX is one of the "conditions" that qualifies the exercise "of the right to suspend an obligation or to withdraw or modify a concession" under Article XIX.

64. Supplementary means of interpretation, including the drafting history of Article XIX of the GATT 1994, confirm that notice under Article XIX:2 is a fundamental, condition precedent to a Member's exercise of its right to take action under Article XIX and the application of safeguards disciplines. The predecessor to Article XIX included an invocation requirement as originally drafted. Although removal of this requirement was discussed as the ITO and GATT 1947 negotiations proceeded, the drafters ultimately decided to retain it.

65. The Agreement on Safeguards, which provides context for Article XIX of the GATT 1994, also supports that invocation of Article XIX through written notice is a condition precedent to a Member's exercise of its right to take action under Article XIX. Article 11.1(c) supports this conclusion because a Member cannot seek, take, or maintain a measure "pursuant to" Article XIX without invoking that provision as set forth in Article XIX:2. In addition, contrary to the complainant's assertions, Article 11.1(c), establishes that a Member may decide to seek, take, or maintain a measure pursuant to other provisions of the GATT 1994, such as Article XXI, and in such a case, the Agreement on Safeguards does not apply.

66. The requirement of invocation as a condition precedent to taking action under Article XIX is also supported by other provisions of the Agreement on Safeguards. These conclusions are supported by the object and purpose of the Agreement on Safeguards, as set forth in its Preamble, to clarify and reinforce the obligations of Article XIX of the GATT 1994, including its notice requirement. Although not necessary in this dispute, the Panel may have recourse to supplementary means of interpretation, including the drafting history of Articles 1 and 11. The drafting history of these provisions confirms that the invocation is a condition precedent to a Member's exercise of its right to take action under Article XIX, and a Member's ability to seek, take, or maintain safeguards measures does not constrain its ability to take such action pursuant to Article XXI.

67. In particular, in preparing the text that became Article 1 and Article 11.1, Uruguay Round drafters abandoned their early attempts to include a definition for what would constitute safeguard measures, and instead included only a reference to the provisions of Article XIX. This decision by the Uruguay Round drafters confirms that it is the terms of Article XIX – including its invocation requirement – that define what constitutes safeguard measures under the Agreement on Safeguards and under Article XIX. Furthermore, Uruguay Round drafters also abandoned their early proposals that could have been seen as limiting Members' ability to take action pursuant to provisions of the GATT 1994 other than Article XIX. This decision by drafters confirms that nothing in the Agreement on Safeguards constrains a Member's ability to take action pursuant to Article XXI.

G. The Panel Should Begin Its Analysis By Addressing the United States' Invocation of Article XXI

68. The DSU does not specify the order of analysis that a panel must adopt, and instead leaves this matter up to the Panel's determination. Whatever the Panel's *internal* ordering of its analysis, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole *finding* that the Panel may make in its report – consistent with its terms of reference and the DSU – is to note its understanding of Article XXI and that the United States has invoked Article XXI. Accordingly, the Panel should begin by addressing the United States' invocation of GATT 1994 Article XXI(b).

69. It is not correct to argue that the Panel must first determine whether the measures challenged breach the GATT 1994 or the Agreement on Safeguards before assessing the U.S. invocation of Article XXI. This is because Article XXI is a defense to claims under both the Agreement on Safeguards and the GATT 1994, and the United States has invoked Article XXI as to *all* aspects of *all* the measures challenged. Thus, if the Panel determines that Article XXI(b) is self-judging, consistent with the text, or that Article XXI in any event applies under another interpretation, there would be no need to review any of the complainant's claims.

70. Nor does characterizing Article XXI as an "affirmative defense" or an "exception" require the Panel to begin its analysis with the complainant's claims. The DSU does not use these terms, and instead calls on the Panel to interpret Article XXI in accordance with customary rules of interpretation. Even where it is claimed that Article XXI is not a defense to claims under the Agreement on Safeguards – which the United States disagrees with – addressing Article XXI first also leads to the conclusion under Article 11.1(c) of the Agreement on Safeguards that the Agreement on Safeguards is not applicable to the challenged measures. This is because Article 11.1(c) makes clear that that agreement "does not apply" to a measure sought, taken, or maintained pursuant to Article XXI, such as the measures at issue in this dispute.

EXECUTIVE SUMMARY OF THE U.S. RESPONSES TO THE PANEL'S ADDITIONAL QUESTIONS

Excerpt from U.S. Response to the Panel Question 92(b)

71. The ordinary meaning of the phrase "other emergency in international relations" in Article XXI(b)(iii) is broad. Definitions of "emergency" include "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention." A broad understanding of the term "emergency" in Article XXI(b)(iii) is supported by the context provided by other provisions of the GATT 1994 and other covered agreements. The phrase "international relations" can be understood as referring to a broad range of matters. The term "relations" can be defined as "[t]he various ways by which a country, State, etc., maintains political or economic contact with another," while the term "international" can be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations." With these definitions in mind, an "other emergency in international relations" can be understood as referring to a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.

EXECUTIVE SUMMARY OF THE U.S. OPENING STATEMENT AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

A. The Plain Meaning of the Text of GATT 1994 Article XXI(b) Establishes That The Exception Is Self-Judging

72. Fundamentally, Article XXI(b) is about a Member taking an action "which it considers necessary". The relative clause that follows the word "action" describes the circumstances which the Member "considers" to be present when it takes such an "action". The clause begins with "which it considers necessary" and ends at the end of each subparagraph ending. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, and they are left to the determination of the Member.

73. To arrive at a different understanding of Article XXI(b), the panel in *Russia – Traffic in Transit* ignored the ordinary meaning of Article XXI(b) and read into Article XXI(b)(iii) the terms of the security exceptions of other treaties. Further, rather than relying on the ordinary meaning of "its essential security interests" and "in time of war or other emergency in international relations" in Article XXI(b)(iii), the panel effectively read into that text references to "the event of serious internal disturbances affecting the maintenance of law and order" and "war or serious international tension constituting a threat of war" – language that appears in the Treaty on the Functioning of the European Union and Agreement on the European Economic Area but not in the GATT 1994.

74. The complainant's suggestion that the principle of "good faith" requires a Panel to review whether a Member has acted in good faith in invoking Article XXI is also misguided and is inconsistent with the ordinary meaning of Article XXI. Such a reading would rewrite Article XXI(b) to insert the text, and impose the requirements, of the chapeau of Article XX. The chapeau of Article XX sets out additional requirements for a measure falling within a general exception set out in the subparagraphs – that a measure shall not be applied in a manner which constitutes a means of "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade," both of which concepts aim to address applying a measure inconsistently with good faith. The complainant is effectively asking the Panel to read into Article XXI text

that is not there; doing so is inconsistent with the customary rules of interpretation and the complainant's approach should be rejected.

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

75. The complainant challenges the measures at issue under Article XIX and under several provisions of the Agreement on Safeguards. Contrary to complainant's arguments, however, the measures at issue are not safeguards and therefore the Agreement on Safeguards does not apply. Article XIX establishes a Member's right (but not obligation) under certain conditions to deviate from its WTO obligations and apply a safeguard measure. A key condition precedent to the exercise of that right is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult. The United States has not invoked Article XIX as the legal basis for the measures at issue; instead, the United States has (explicitly and repeatedly) invoked Article XXI. Accordingly, the measures at issue are not safeguards measures, and the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply. This result is confirmed by the text of the Agreement on Safeguards. In particular, Article 11.1(c) provides in relevant part that "[t]his Agreement [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."

EXECUTIVE SUMMARY OF THE U.S. CLOSING STATEMENT AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

76. Let us step back and put into perspective the matter before the Panel. Under WTO rules – and GATT rules before them – duties must be applied on an MFN basis (under Article I:1) and maintained within bound levels (under Article II:1). If a Member, like the United States in this case, wishes to deviate from these basic obligations, it must have a valid basis to do so. Many such bases exist in the WTO Agreements. Let's take duties. A Member may deviate from the obligations of Articles I and II of the GATT 1994 by imposing non-MFN duties in excess of its bound commitment levels if those duties are applied consistent with Article VI of the GATT 1994 and the attendant obligations contained in the AD Agreement or the Agreement on Subsidies and Countervailing Duties; or consistent with Article XIX of the GATT 1994 and the attendant obligations contained in the Agreement on Safeguards. All three of these rights allow a Member to impose duties to protect its domestic industry from the effects of imports.

77. 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) to the GATT 1994 or other WTO Agreement. This is the case here, for example, where the United States has taken its action pursuant to Article XXI of the GATT 1994 for the protection of its essential security interests. But because each of these bases exist 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. Complainant has argued that the United States has not availed itself of the rights contained in Article XXI, but instead has imposed a safeguard duty under Article XIX of the GATT. 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, this has never before happened in WTO dispute settlement; that a complainant attempts 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.

78. 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. According to complainants, 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.

79. The United States does not contend that its measures were applied consistent with the Agreement on Safeguards. 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. But complainant does not attempt to argue that the Panel should make findings of inconsistency under any of these other articles. Why the Agreement on Safeguards then? Why not the AD or SCM Agreement? Why not GATT 1994 Article XX? We know the answer. The answer is "rebalancing." After the United States imposed its measures complainants wished to retaliate immediately. But having charged the United States with acting outside the WTO, complainant wished to appear to act within the rules. Normally, of course, countermeasures are imposed, if at all, at the end of a successful dispute settlement challenge. By characterizing the U.S. measures as safeguards, complainant sought to avoid that delay.

80. Complainant has suggested that the United States is trying to act with impunity. These arguments misstate the events underlying this dispute and serve only to disguise the complainant's own self-serving motives in bringing this dispute. If the Panel were to adopt complainant's approach, any WTO Member could effectively declare – unilaterally – that another Member's border measures were safeguard measures pursuant to Article XIX. All the Member would have to do is argue that the duties comply with the Appellate Body's incomplete "constituent features." 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. Under complainant's approach, a Member could make this determination unilaterally, notwithstanding that the acting Member had not invoked Article XIX as the basis for its action. In such a system,

any Member could determine, for itself, that almost any border measure was a safeguard measure under Article XIX, and adopt retaliatory measures disguised as "rebalancing" measures. This result would be stunning, and would not only be contrary to the text of the WTO Agreement, but would upend the manner in which such actions have been addressed over the past 70 years at the GATT and now the WTO.

81. Apart from this misconstruction of Article XIX, complainant's approach also risks serious consequences to the WTO. Having already imposed retaliatory duties in response to the U.S. measures, complainant does not pursue this dispute in order to attain additional rights intended for the resolution of the dispute – namely, the right to suspend concessions under Article 22 of the DSU. Under the guise of "rebalancing," complainant has already suspended concessions to the United States. 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.

82. To take a step back, the challenged measures are measures on steel and aluminum (key sources for producing military vehicles, weapons, and systems for building our nation's critical infrastructure) that the United States has put in place for national security purposes. What the complainant urges the Panel to do is to review these security measures and to come to the conclusion that the United States could not have considered these measures to be necessary for the protection of its essential security interests and taken in time of "war or other emergency in international relations." What the complainant urges the Panel to do is 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 is threatening to impair our national security. The complainant purports to appeal to your common sense. However, not only is the complainant's approach inconsistent with the text of Articles XIX and XXI, but common-sense dictates that the complainant's approach must be rejected.

83. Adopting the complainant's approach would lead to the proliferation of disputes such as the one before you today. These disputes 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. The dispute settlement actions that present these issues – such as those before you now – are not necessary, not productive, and only diminish the WTO's credibility. The United States is well aware of its WTO obligations. The United States is well aware of its right to impose a safeguard duty and how to provide the requisite notice and opportunity for consultation. Similarly, the United States has imposed numerous antidumping and countervailing duties, all pursuant to U.S. law and the relevant rights provided under Article VI and the AD and SCM Agreements. As the United States has repeatedly made clear at the WTO, however, the measures at issue in this dispute are not safeguard measures (or AD or CVD measures), but are security measures taken pursuant to Article XXI of the GATT 1994.

84. The United States has acknowledged there are a variety of consequences to a Member's invocation of Article XXI. One consequence is that other WTO Members have the capacity to take reciprocal actions; another consequence is that WTO Members may seek other actions under the DSU, including a non-violation claim. These consequences provide recourse to

affected Members, but in a manner that prevents adjudication of essential security issues in WTO dispute settlement. This approach also properly respects the balance of rights and obligations agreed to by the Members, and reflects the interpretation of Article XIX and Article XXI(b) that is in accordance with the customary rules of treaty interpretation. 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.

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

85. The complainant continues to argue – erroneously – that the measures at issue are safeguard measures, and argues that a measure must be a safeguard measure if it objectively presents the two "constituent features" of safeguard measures set out by the Appellate Body in *Indonesia – Iron or Steel*.

86. Reliance on these two features, by themselves, to establish that a measure is a safeguard measure would lead to absurd results. If these two "features" were by themselves sufficient to establish the existence of a safeguard measure within the meaning of Article XIX and the Agreement on Safeguards, a variety of measures – such as countermeasures under Article 22.2 of the DSU – could be deemed a safeguard measure by other Members or a panel, and other Members could assert a right to rebalance under Article XIX:3 and Article 8 of the Agreement on Safeguards. 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, this basis is the invocation of Article XIX through providing notice to Members and the meeting of certain conditions. As the United States explained, in Section IV of its Second Written Submission, 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. 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.

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

87. The U.S. Second Written Submission 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. The United States did not seek to argue that notification requirements function as prerequisites in every instance. Rather, the United States explained that there are 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.

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

88. Article 11.1(c) provides in relevant part that the Agreement on Safeguards "does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX." Here, the United States has attempted to take – and succeeded in taking – the challenged measures in accordance with Article XXI of the GATT 1994. Accordingly, under Article 11.1(c) the Agreement on Safeguards "does not apply." This result is consistent with Article 11.1(a) of the Agreement on Safeguards, which provides that "[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" and therefore, the action need not conform with the provisions of Article XIX applied in accordance with the Agreement on Safeguards. Furthermore, under Article 11.1(c) – the Agreement on Safeguards, including Article 11.1(a) – "does not apply."

89. China attempts to avoid this result by asserting – without support – that "the U.S. reliance on Article 11.1(c) cannot be reconciled with the fact that if a measure is objectively a safeguard measure, Article 11.1(a) requires the Member to take that action exclusively in accordance with Article XIX and the Agreement on Safeguards. Such a measure cannot be a measure 'sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX' within the meaning of Article 11.1(c)". Article 11.1(a) does not support China's argument, and Article 11.1(c) directly contradicts this argument. In particular, 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.

90. China's argument also ignores that there may be some overlap in the scope of measures potentially covered by both the Agreement on Safeguards and Article XXI. Indeed, China has itself acknowledged in this dispute that "it is theoretically possible that a measure could, simultaneously, possess the objective characteristics of both a safeguard measure and a measure that is potentially justifiable under Article XXI(b)." A Member could take any number of actions in response to what it might consider economic emergencies, such as raising its ordinary customs duty. Whether the Agreement on Safeguards, Article XXI, or another provision applies, however, depends on the legal basis pursuant to which the Member takes the relevant action. Article 11.1(a) refers to "emergency action on imports . . . as set forth in Article XIX" – this language means a safeguard action for which a Member has invoked Article XIX. Thus, 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. However, a Member may take what might be referred to as "emergency action" under a number of different provisions, including Article XXI. Article 11.1(a) of the Agreement on Safeguards does not limit a Member's choice of actions. As provided in Article 11.1(c) of the Agreement on Safeguards, 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 "does not apply". A number of different measures might involve features of a safeguard

measure, or be said to have what some might refer to as a safeguard objective. 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.

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.

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

92. China continues to emphasize the interpretation of the panel in *Russia – Traffic in Transit*, which found Article XXI(b) to be subject to review, and urges this Panel to take the same approach. In its response, China also argues that the United States has failed to substantiate its defense under Article XXI(b)(iii), and states that the Panel cannot "peruse" the record for evidence supporting the U.S. position. China fails to note, however, that the panel in *Russia – Traffic in Transit* did just that. Russia raised arguments very similar to those the U.S. raises in this dispute, and therefore did not affirmatively set out the evidentiary basis for its invocation of Article XXI(b)(iii). Nonetheless, the panel found sufficient record evidence to substantiate the defense. China cannot have it both ways. The United States has put forward far more evidence and argumentation than did Russia in support of its own invocation, and under China's view of Article XXI the Panel in this dispute may review that evidence.

93. China argues that "'other emergency in international relations' encompasses differences of a political or economic nature only insofar as those differences give rise to defence and military interests, or maintenance of law and public order interests." China then argues that the United States has not demonstrated that the situation gave rise to military interests, pointing to the two-page memorandum from the U.S. Secretary of Defense to the U.S. Secretary of Commerce. However, the communication of the U.S. Department of Defense represents just one piece of information that the U.S. Secretary of Commerce and the President considered. Furthermore, the Secretary of Defense's statement regarding the "national defense requirements" did not address other national security needs. Finally, the Secretary of Defense concurred with the Secretary's conclusion that "imports of foreign steel and aluminum…impair the national security."

94. While China argues that excess capacity cannot constitute an emergency under the U.S. definition because the topic has been under discussion since 2008, the situation at issue did arise unexpectedly and remained an "emergency in international relations" when the measures were taken. The confluence of events in 2017 made the emergency even more pressing to address for the United States. First, in 2017, it emerged that global efforts to address these crises would be insufficient. While the DOC steel report noted that the excess capacity crisis is a global problem

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. Second, in 2017, steel imports in the United States rapidly increased while global excess capacity continued to increase. Therefore, what the DOC steel report conveys is that the United States was at a crucial point—and that 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. This conclusion is also supported by statements at the G20 Global Steel Forum on Steel Excess Capacity.

95. 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." 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.

EXECUTIVE SUMMARY OF U.S. COMMENTS ON THE COMPLAINANT'S STATEMENTS AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

96. The U.S. argument in this dispute is simply that each WTO provision should be interpreted based on its own text. Article XIX – as interpreted according to the customary rules of interpretation of public international law – requires invocation through notice as a condition precedent to a Member exercising its right to deviate from its WTO obligations to take a safeguard measure. Provisions with different text may be interpreted differently.

EXECUTIVE SUMMARY OF U.S. COMMENTS ON THE COMPLAINANT'S COMMENTS ON U.S. STATEMENTS AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

A. 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

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

97. China 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)." 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.

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

99. 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.

100. 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." China states that "this does not require a particular risk to have come to pass" but notes that "the risk must be imminent." 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.

101. 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. 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.

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

102. China makes much of the fact that the United States identified relevant facts related to steel excess capacity, as an example, but not aluminum. 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. 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 and not be able to maintain or increase production to address national emergencies.

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

103. 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." China's self-serving suggestion is ill-founded. Given that 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. 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.

C. Complainant's Comments on the U.S. Statements Do Not establish That the Measures At Issue Are Safeguard Measures Under Article XIX

1. Complainant's Arguments Misperceive the Role of a WTO Panel under the DSU

104. China refers to WTO panels "classifying" measures "in relation to the disciplines of the covered agreements." China's comments reveal its misunderstanding of both the U.S. arguments in this dispute and the role of a panel. When considering alleged breaches of affirmative obligations, a panel may determine whether a measure falls within the scope of measures that are subject to the obligations claimed to have been breached. When a Member wishes to *deviate* from its WTO obligations, however 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.

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

105. 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

safeguard measures". China does not explain, however, what it regards as "safeguard-like measures" or how the text of the Agreement on Safeguards supports its assertions. 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." 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.

106. 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. 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.

3. 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

107. 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." China then 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.'" China's arguments are inconsistent with Article XXI. "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. 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.

108. 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. China's argument is also inconsistent with Article 11.1(c). 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 where the measure at issue has been sought, taken, or maintained under the latter provision.

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

109. 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). China's argument ignores that the reference in Article 12.1(c) to "a safeguard measure" must be understood in the context of Article 1, which defines "safeguard measures" based on the text of Article XIX. 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.

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

110. China mischaracterizes U.S. arguments when it suggests that the United States believes invocation is "determinative". 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.