UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS544)

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

January 25, 2021

Mr. Chairperson, Members of the Panel:

1. The United States once again thanks you, and the Secretariat staff assisting you, for your ongoing work in this dispute.

2. You have heard the arguments of all parties at this point – filling many hours and many more pages in submissions. At this point, let us step back and put into perspective the matter before the Panel. The border measures at issue in this dispute are not new or mysterious; the measures at issue are customs duties – tariffs – and quotas. 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). Quotas are generally prohibited (under Article XI:1).

3. 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.

4. 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. That is, if a Member can demonstrate that imports from another Member are entering its territory at less than fair market value and are causing injury to a domestic industry, the Member may impose an anti-dumping duty to counter the effects of those imports. If the Member can demonstrate that imports are subsidized and causing injury to a domestic industry, the Member may impose a countervailing duty to counter the effects of those imports. And, if the Member can demonstrate that imports are significantly increasing and causing injury to a domestic industry, it may impose a safeguard duty to counter the effects of those imports. All three of these rights allow a Member to impose duties to protect its domestic industry from the effects of imports.

5. And, of course, a Member may justify what might otherwise constitute WTO-inconsistent behavior if it satisfies the requirements of any general exceptions (under Article XX) or security exceptions (under Article XXI) 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, and it is for the acting Member to choose, based on its own policy preferences and objectives, which basis to pursue.

6. Complainant has argued that the United States has not availed itself of 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; and we might venture to guess that it's never happened in any 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.

7. So, the United States has imposed duties on certain steel and aluminum products on a non-MFN basis and in excess of the levels set out in its WTO Goods Schedule. It has done so to counter the effects of imports of these products on its own domestic industry. 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.

8. The United States does not contend that its measures were applied consistent with the Agreement on Safeguards. As we have stated innumerable times, the measures were applied pursuant to Article XXI and not Article XIX. Nor does the United States contend that the duties were applied consistently with the AD Agreement or the SCM Agreement. The United States does not contend for that matter that they were taken for the conservation of natural resources or for the protection of human health. But complainant does not attempt to argue that the Panel should make findings of inconsistency under any of these other articles. And to be sure, no WTO panel, when faced with a simple claim under Article I or Article II of the GATT 1994, has first examined whether an action is in fact a safeguard measure or whether some defense other than that invoked or submitted by the responding Member.

9. Complainant does not argue, for example, that the steel and aluminum duties are antidumping duties but that they fail to meet the requirements of Article VI because no finding of dumping was made. Nor does the complainant argue that the duties are countervailing duties but that they fail because the United States did not properly calculate the level of subsidization. As complainant charges, the United States did not act consistently with Article XIX and the Agreement on Safeguards, just as presumably it would agree that the United States did not act consistently with the AD or SCM Agreements in imposing the duties at issue.

10. 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.

11. Complainant has suggested, sometimes overtly and sometimes by implication, that the United States is trying to act with impunity – or get away with something – through the arguments it presents in this dispute. China has suggested that the U.S. arguments in this dispute would allow Members "to pick and choose which WTO disciplines (if any) apply to their own measures" so that "[t]hrough the simple expedient of how they classify a measure under municipal law, Members could evade their WTO obligations and deprive other Members of their

right to challenge WTO-inconsistent measures in dispute settlement."[1] These arguments misstate the events underlying this dispute and serve only to disguise the complainant's own self-serving motives in bringing this dispute.

12. 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." To recall, the features discussed by the Appellate Body are (1) that the measure "must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession," and (2) "the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product."[2]

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

14. Therefore, 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.

15. The Panel should not allow itself to be used in this manner and should recognize complainant's self-serving arguments regarding Article XIX and Article XXI for what they are – simply serving complainant's current policy preferences.

16. 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.

17. 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

[1] China's Second Written Submission, para. 23.

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

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.

18. Adopting the complainant's approach would lead to the proliferation of disputes such as the one before you today – and the other disputes before you every day this week. 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. As this Panel is well aware, these disputes raise extremely sensitive issues which are fundamental to a sovereign State's rights and responsibilities. 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.

19. The United States is well aware of its WTO obligations. As evidenced by its recent invocation of Article XIX with respect to solar products, large residential washers, and blueberries, 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. U.S. law provides for such actions, and those laws have been applied numerous times, including in these recent cases. 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. In fact, the United States maintains numerous antidumping and countervailing duties on steel and aluminum products, including on some of the same products at issue in these disputes. 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 for that matter), but are security measures taken pursuant to Article XXI of the GATT 1994.

20. 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.

21. 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.

22. We will now move on to address the specific comments made by the complainant in response to the Panel's questions on Day 1 of the panel's meeting with the parties.

A. The Measures At Issue Are Not Safeguards Measures

23. In previous U.S. submissions and again in our session two weeks ago, the United States has demonstrated that the measures at issue are not safeguards and therefore the Agreement on Safeguards does not apply. Complainant seeks to avoid this result by continuing to make a variety of untenable arguments, which the United States has already rebutted.

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

24. 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*.[3]

25. As an initial matter, even the Appellate Body's report in *Indonesia – Iron or Steel* does not support the complainant's reading of these findings. That report describes these two "features" only as those "absent which" a measure could not be considered a safeguard measure, and states that "whether a particular measure constitutes a safeguard measure for purpose of WTO law can be determined only on a case-by-case basis" – language that alludes to other conditions that might need to be met.[4] This reasoning by the Appellate Body makes sense, as reliance on these two features, by themselves, to establish that a measure is a safeguard measure would lead to absurd results.

26. As already noted, 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.[5] This approach would allow the actions of one Member to be unilaterally recharacterized by other Members – and permit other Members to effectively "assign" the acting Member a release for its potential breach of obligations – so that those other Members could take advantage of a unique right provided for in the Agreement on Safeguards, the right to retaliate within the WTO system but without pursuing dispute settlement. Such a result would be nonsensical and is contrary to the ordinary meaning of the text of Article XIX and the Agreement on Safeguards.

27. China suggests that countermeasures could be distinguished from safeguard measures under Article XIX because "unlike a safeguard measure, this suspension or modification [authorized by the DSB under DSU Article 22] is not authorized for the purpose of preventing or remedying injury to domestic producers caused or threatened by increased imports. Rather, the suspension of concessions or other obligations under Article 22 of the DSU is a temporary action

[3] *See* China's Opening Statement, para. 4.

[4] *Indonesia – Iron or Steel Products (AB)*, paras. 5.57, 5.60.

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

to offset the level of nullification or impairment for so long as the responding Member remains out of compliance with the recommendations and rulings of the DSB."[6] China's argument ignores, however, that the same action may be regarded differently by different Members, or by a WTO panel. Specifically – using China's words – one Member may regard certain actions as offsetting the level of nullification or impairment for another Member's non-compliance with DSB recommendations and rulings, while another Member (or a panel) could regard that same action as having the purpose of preventing or remedying injury to domestic producers – as China does here. Under China's approach, a Member could unilaterally characterize such measures as having the purpose of preventing or remedying injury to domestic producers, and assert the right to rebalance on that basis.

28. 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.[7]

29. China cites Article 12.8 of the Agreement on Safeguards to support its assertion that "notification is a *legal obligation* in respect of measures that are objectively safeguard measures, rather than an element of what *makes* a measure a safeguard measure."[8] This argument misperceives the relationship between Article 12 and invocation through notification under Article XIX. The Agreement on Safeguards has elaborated procedural requirements to expand the scope of information a Member provides to other Members regarding that invocation and proposed action.[9] A Member that does not provide information consistent with the elaborated notification requirements of the Agreement on Safeguards in relation to a safeguard measure under its domestic safeguards authority would breach those procedural obligations. This does not mean, however, that the notification obligations in Article 12 subsume the requirement to give notice in writing under Article XIX:2 of proposed action.

30. In addition, China's argument is not supported by the text of Article 12.8. Article 12.8 states "[a]ny Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions *dealt with in this Agreement* that have not been notified by other Members that are required by this Agreement to make such

[6] China's Response to the Panel's Question 5, para. 31.

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

[8] China's Opening Statement para. 6 (emphases in original).

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

notifications."[10] As the words "dealt with in this Agreement" make clear, this provision relates only to notifications that Members are required to make by the Agreement on Safeguards. By its terms, this provision would not permit a Member to notify the Committee on Safeguards of another Member's invocation pursuant to Article XIX:2, which pre-dates the adoption of the Agreement on Safeguards.

31. That invocation through notification is a prerequisite to application of the safeguards disciplines is also clear from the very nature of the right provided for in Article XIX and the Agreement on Safeguards. Like any duty applied on a non-MFN basis or in excess of a Member's tariff bindings, a safeguard is a deviation from obligations a Member must otherwise comply with. As the reports in *Indonesia – Iron or Steel* highlighted, a safeguard may be imposed where an action is otherwise prohibited under the GATT – that is, where a Member chooses to suspend, withdraw or modify a GATT concession after meeting certain conditions. Indonesia's duties in that case did not require suspension, withdrawal or modification, because it had made no GATT concession that prevented its action. But that does not mean that every WTO-inconsistent customs duty is a potential safeguard. A Member may have no proffered legal justification for a duty applied inconsistently with its obligations, in which case, were that duty challenged in dispute settlement, the Member would be found to have breached its obligations. It would be nonsensical for a panel also to evaluate whether the duties should be characterized as a safeguard because they have some protective effect on the responding Member's domestic industry. The Member simply hasn't chosen to avail itself of the rights contained in the WTO Agreements to deviate from its obligations in a WTO-consistent manner.

32. In this case, as we have explained at length, the United States has taken action pursuant to Article XXI of the GATT 1994, which provides that "Nothing in this Agreement" shall prevent the United States from taking measures it considers necessary for the protection of its essential security interests. Having such a consideration, the requirement of Article XI is met and the United States avails itself of the right to take action that would otherwise be inconsistent with its obligations under the GATT. The United States needs no other legal basis to do so, and none can be imposed upon it so that complainant might bestow upon itself a right to deviate from its own obligations that does not exist.

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

33. As the Panel's Question 4 recognized, Section IV.A.2 of 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.

34. With its discussion of these provisions at Section IV.A.2 of its Second Written Submission, 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

[10] Emphasis added.

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.

35. Of course, there are other provisions of the covered agreements for which invocation is *not* required – but the existence of these provisions does not change the requirements of Article XIX or the other provisions that *do* require invocation. There are also provisions of the covered agreements in which notification may serve as a procedural requirement – but the existence of such provisions does not change that notification under Article 12 of the Agreement on Safeguards relates to *both* the applicability of safeguard disciplines and the consistency of those measures with the safeguards disciplines. Each provision should be interpreted based on the ordinary meaning of its own terms, in accordance with the customary rules of interpretation of public international law.

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

36. 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."

37. 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."

38. 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)".[11]

39. 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.

[11] China's Opening Statement, para. 8 (emphases in original).

40. 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)."[12]

41. As the United States has explained in its response to the Panel's Question 74, a Member could take any number of actions in response to what it might consider economic emergencies, such as raising its ordinary customs duty.[13] Whether the Agreement on Safeguards, Article XXI, or another provision applies, 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".

42. As explained earlier, 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. For example, in the face of increased imports causing injury, a Member might increase its ordinary customs duty consistent with Article II of the GATT 1994; a Member might impose an antidumping or countervailing duty if dumping or subsidization is also present; or a Member might impose an SPS measure if the measure is also necessary to protect human, animal, or plant life or health. But if the Member has not chosen to act under Article XIX, any safeguard objective the measure might be thought to have does not have independent relevance to the rights and obligations implicated by that measure. The negotiators of the Agreement on Safeguards shared this understanding, as they distinguished the work of the Committee on Safeguards from the "several articles and provisions of a safeguard nature," including Article XXI in the GATT 1947 (now the GATT 1994).[14]

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

43. In Question 3, the Panel asked the Parties to consider the meaning of the words "suspend," "modify," and "withdraw" in Article XIX, and the relationship of these words to other parts of Article XIX. As the United States explained, these terms describe what a Member

[12] China's Response to the Panel's Question 74, para. 205.

[13] *See* U.S. Response to the Panel's Question 74, paras. 321-341.

[14] *See* U.S. Response to the Panel's Question 81, paras. 360-364; Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987), at 1 (US-167); Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168).

is permitted to do in relation to its WTO commitments if it meets the conditions of Article XIX and the Agreement on Safeguards. Under Article XIX, WTO Members have the right – but not an obligation – to apply a safeguard, subject to certain requirements.

44. Whether an obligation is suspended, withdrawn, or modified is an incidental legal characterization that attaches if a Member is seeking to take action pursuant to Article XIX and has complied with the conditions set forth in Article XIX and the Agreement on Safeguards. Put differently, these words describe the implicit or automatic operation of law that occurs when a Member is relieved from complying with its obligations because of Article XIX of the GATT 1994 and the Agreement on Safeguards.

45. A measure does not itself suspend an obligation or withdraw or modify a concession; instead, a Member must claim an obligation is suspended (or a concession is withdrawn or modified) to justify taking particular action. If the Member does not make such a claim, the Member would simply breach another commitment (*e.g.*, Article II), unless it has another legal basis to take the action. Once a Member has the right to suspend an obligation or withdraw or modify a concession under Article XIX (including by invoking Article XIX through notice of a proposed measure to other Members), that Member no longer has to perform those obligations.

46. As the United States has explained – in response to the Panel's Questions 7 and 89 – in relation to the measures at issue, the United States has explicitly and repeatedly invoked GATT 1994 Article XXI. No obligation or concession may supersede the right to take action under that provision, as the text of Article XXI confirms that "[n]othing in this Agreement shall be construed … to prevent" a Member "from taking any action which it considers necessary for the protection of its essential security interests." Accordingly, in taking action under Section 232, the United States has acted consistently with its existing rights under the covered agreements, and has not "suspended in whole or in part a GATT obligation or withdrawn or modified a GATT concession" within the meaning of Article XIX. Complainant's assertions to the contrary are not correct.[15]

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

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

[15] China is not correct when it asserts that "the United States does not contest that the Section 232 measures have the two constituent elements of a safeguard measure identified by the Appellate Body in *Indonesia – Iron or Steel Products."* China's Opening Statement, para. 4.

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

imposes a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked.[17]

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

49. However, even on the complainant's understanding of Article XXI(b) as *not* self-judging, the United States as the Member invoking Article XXI(b) has chosen to make information available to other Members that would satisfy the complaining party's approach. From the beginning of the proceedings, the United States has submitted as exhibits the U.S. Department of Commerce reports, in which the U.S. Secretary of Commerce found that steel and aluminum articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.[18] The record before the Panel demonstrates that the United States considers the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations."

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

51. In its opening and in response to the Panel's Question 5(a), 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.[19] 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

[17] *See* U.S. Response to the Panel's Question 38, paras. 143-146.

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

[19] *See* China's Opening Statement, para. 15.

support of its own invocation, and under China's view of Article XXI the Panel in this dispute may review that evidence.

52. 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."[20] 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.[21] China's argument comes to nothing.

53. As the United States has previously explained, the communication of the U.S. Department of Defense represents just one piece of information that the U.S. Secretary of Commerce considered in finding that the steel and aluminum imports threaten to impair the national security of the United States,[22] and just one piece of information that the President considered in deciding to take action based on the Secretary's findings. Furthermore, the Secretary of Defense's statement regarding the "national defense requirements" did not address other national security needs, such as the needs of the U.S. critical infrastructure sectors, that the lengthy reports also addressed.[23] Finally, the Secretary of Defense concurred with the Secretary's conclusion that "imports of foreign steel and aluminum…impair the national security."[24]

54. In addition, China's narrow construction of an "emergency in international relations" – based on the flawed interpretation of the *Russia – Traffic in Transit* panel – is not consistent with the ordinary meaning of the terms of that provision.[25] As the United States has explained, based on the ordinary meaning of the text, "emergency in international relations" can be understood as

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[20] *See* China's Opening Statement, para. 20.

[21] *See* China's Opening Statement, para. 24.

[22] Section 232 statute provides that, "[i]n the course of any investigation conducted under this subsection, the Secretary shall—(i) consult with the Secretary of Defense regarding the methodological and policy questions raised in any investigation initiated under paragraph (1), (ii) seek information and advice from, and consult with, appropriate officers of the United States, and (iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." Section 232 statute, 19 U.S.C. 1862(b)(2)(A) (US-1). The statute also sets forth a list of relevant factors that the Secretary of Commerce and the President must consider. The list includes "the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment decrease in revenues of government loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports." Section 232 statute, 19 U.S.C. 1862(d) (US-1).

[23] U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, pp. 23-24 & 55-57 (US-7); U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at 23-24, 36-39 & 104-106 (US-8).

[24] Secretary of Defense, Memorandum for Secretary of Commerce, https://www.commerce.gov/sites/default/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf (Exhibit CHN-19).

[25] China's Opening Statement, para. 21.

a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.[26]

55. 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.[27] The confluence of events in 2017 made the emergency even more pressing to address for the United States. For example, with respect to whether an emergency related to steel excess capacity exists, the record reflects the following:

56. 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.[28] For instance, the report noted that the Global Forum report "provides helpful policy prescriptions, but it does not highlight the lack of true market reforms in the steel sector."[29] The DOC steel report also suggested that the adjustments proposed in the Global Forum report would not address the overcapacity crisis, and observed: "The setting of capacity reduction targets is not a long-term response to the crisis. Meaningful progress can only be achieved by removing subsidies and other forms of government support so that markets can function properly."[30]

57. Second, in 2017, steel imports in the United States rapidly increased while global excess capacity continued to increase. The steel report noted that "[i]n the first ten months of 2017 steel imports have increased at a double-digit rate over 2016."[31] The report cited to the OECD Steel Committee Chair's statement from March 2017: "New data suggest that nearly 40 million metric tons of gross capacity additions are currently underway and could come on stream during the three-year period of 2017-19, while an additional 53.6 million metric tons of capacity additions are in the planning stages for possible start-up during the same time period."[32]

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[26] *See* U.S. Response to the Panel's Question 51, para. 232; U.S. Response to the Panel's Question 92(b), paras. 47-48.

[27] China's Opening Statement, para. 24.

[28] U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, Appendix L, p. 1 (US-7).

[29] U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, Appendix L, p. 2 (US-7).

[30] U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, Appendix L, p. 2 (US-7).

[31] U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, p. 3 (US-7).

[32] U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, p. 53 (US-7).

58. 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.[33]

59. This conclusion is also supported by statements at the G20 Global Steel Forum on Steel Excess Capacity. The 2017 G20 Global Steel Forum Report observed, for example, that the situation of excess steelmaking capacity "has become particularly acute since 2015" and emphasized that "the steel industry will have to adjust in response to fundamental changes in economic activity brought on by the 'next production revolution.'"[34] The report further stated that in 2016 the global surplus in steelmaking capacity was estimated to have reached "the highest level seen *in the history of the steel industry*" and that if announced capacity expansions until 2020 took place, this excess capacity would increase even further.[35] An industry facing "fundamental changes" brought on by a "production revolution" can certainly lead to unexpected developments, particularly when that industry is facing an "acute" situation of global excess capacity that is the highest in the industry's history.

60. Another Member affected by the crisis, the EU commented at the G20 Global Steel Forum on Steel Excess Capacity that "[g]lobal overcapacity has reached a tipping point—it is so significant that it poses an existential threat that the EU will not accept."[36] Then-EU Trade Commissioner Cecilia Malmström made similar observations in her 2016 speech at the OECD High-Level Symposium on Steel. She noted that the EU had faced "a massive surge in imports"

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[33] U.S. Department of Commerce, "The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, p. 56-57 (US-7).

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

[34] G20 Global Steel Forum Report (Nov. 30, 2017), at pp. 1-2, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (US-239).

[35] G20 Global Steel Forum Report (Nov. 30, 2017), at 4, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (emphasis added) (US-239).

[36] G20 Global Steel Forum Report (Nov. 30, 2017), at 39, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (US-239).

in recent years, stating that this surge had amounted to a 25% increase in 2015 alone.[37] She pointed to certain reforms that China had announced, and suggested these would be promising "if implemented in a reasonable period of time."[38] She also remarked on the "scale of the emergency" and stated that "it's now life or death for many companies."[39]

61. 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."

62. Any allegation that the United States has not acted in good faith in invoking Article XXI(b) is also without merit. President Trump's decision to impose the challenged measures – in response to the Secretary of Commerce's findings that steel and aluminum imports threaten to impair the national security – is consistent with the actions of his predecessors and reflects the continuation of the U.S. national security policy. By 2017, the Departments of Commerce and Treasury had completed approximately 24 Section 232 investigations, including three investigations that address imports of steel articles and related products.[40] In 1982, DOC investigated the effect on the national security of imports of nuts, bolts and large screws of iron or steel under Section 232.[41] In 1983, DOC investigated the effect on the national security of imports of machine tools.[42] And in 2001, DOC investigated the effect on the national security of imports of iron ore and semi-finished steel articles.[43] As a result of one of these investigations – that involving machine tools – DOC concluded that the imports threatened to impair the national security and the President entered into agreements with Japan and Taiwan to address exports from those countries.[44] Since the enactment of the Trade Expansion Act of 1962, steel and other metal articles have been the subject of numerous Section 232 investigations because of their importance to our national security. That the President also acted in this case after the DOC concluded that the steel and aluminum imports in question threaten to impair the national security thus cannot be characterized as an action taken in bad faith.

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

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

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

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

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

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

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

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

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

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

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