UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS548)

COMMENTS OF THE UNITED STATES OF AMERICA ON THE COMPLAINANT'S COMMENTS ON U.S. STATEMENTS AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

March 11, 2021

1. The United States comments below on the complainant's comments on U.S. statements at the Panel's videoconference with the parties. The absence of a comment on any particular answer or argument by the complainant should not be construed as agreement with the complainant's arguments.

I. CONTRARY TO COMPLAINANT'S COMMENTS, CHALLENGED MEASURES ARE ESSENTIAL SECURITY MEASURES UNDER ARTICLE XXI(B), AND THE PANEL SHOULD FIND THAT THE UNITED STATES HAS INVOKED ARTICLE XXI(B) OF THE GATT 1994

A. Complainant's Comments Fail to Undermine the U.S. Interpretation of Article XXI(b), including Article XXI(b)(iii), as Self-Judging

2. The EU contests the U.S. argument that the invoking Member would consider the challenged action to be "taken in time of war or other emergency in international relations," arguing that "[e]ach of the subparagraphs (i) to (iii) contain objective elements" and emphasizing the panel reports in *Russia – Traffic in Transit* and *Saudi Arabia – Protection of IPRs*.[1] The EU's incorrect and misleading argument should be rejected.

3. As the United States has explained, the U.S. understanding that the Member invoking Article XXI(b)(iii) would *consider* the essential security action to be "taken in time of war or other emergency in international relations" is consistent with the ordinary meaning of the English text of Article XXI(b), as well as the alternative interpretation that best reconciles the three authentic texts of Article XXI(b).[2] Under the ordinary meaning of the English text of Article XXI(b), the phrase "which it considers" qualifies all of the terms in the single relative clause that follows the word "action", including the terms in the main text and the subparagraph endings. Thus, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances, including the circumstance set forth in Article XXI(b)(iii), is committed to the judgment of that Member alone.

4. In addition, under the interpretation that best reconciles the three authentic texts of Article XXI(b), the subparagraph endings modify the terms "any action which it considers" in the main text of Article XXI(b).[3] Thus, under Article XXI(b)(iii), the invoking Member would take action "which it considers necessary for protection of its essential security interests" and "which it considers…taken in time of war or other emergency in international relations." Under this reading, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances remains committed to the judgment of that Member alone. The United States has provided detailed explanations for this interpretation, including by reference to grammar sources, dictionary definitions, and the rules

[1] EU's Comments after the Second Substantive Meeting, para. 61 (emphasis added).

[2] U.S. Opening Statement, paras. 4-9.

[3] *See* U.S. Second Written Submission, Section II.D; U.S. Responses to the Panel's Questions 41-43, paras. 165-166.

set out in the VCLT.[4] This reading of Article XXI(b) has been proven correct by the arguments and analyses developed in the course of this dispute.[5]

5. This reading is also supported by the ordinary meaning of "emergency." As the United States explained, the ordinary meaning of the term "emergency" can be defined as "a serious, unexpected, and often dangerous situation requiring action."[6] 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.[7] The ordinary meaning of "emergency" supports the U.S. interpretation.

6. Second, while the EU emphasizes the panel reports in *Russia – Traffic in Transit* and *Saudi Arabia – Protection of IPRs*, which it refers to as "established jurisprudence", the EU's comments are misguided. The term, or the concept of, "established jurisprudence," does not appear in the DSU. By "established jurisprudence," the EU appears to mean a body of law that creates a precedent.[8] And the EU's suggestion this Panel must follow a prior interpretation in another panel report is directly contrary to the DSU, including the function of a panel.

7. The role of a WTO dispute settlement panel established by the DSB[9] is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it", including an objective assessment of "the applicability of and conformity with the covered agreements".[10] That assessment is one of conformity with the covered agreements – not prior reports adopted by the DSB. The DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".[11]

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[4] *See* U.S. Second Written Submission, Section II.B & II.D; U.S. Responses to the Panel's Questions 41-43, paras. 158-199.

[5] *See* U.S. First Written Submission, Section III.B; U.S. Second Written Submission, Section II.B & II.D; U.S. Responses to the Panel's Questions 41-43, paras. 158-199.

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

[7] *See* U.S. Second Written Submission, Section II.B.3, para. 33.

[8] *See, e.g.*, Oxford English Dictionary, "jurisprudence": "A system or body of law; a legal system" https://www.oed.com/view/Entry/102159?redirectedFrom=jurisprudence#eid (US-256); Oxford English Dictionary, "establish": "To set up or bring about permanently (a state of things); to 'create' (a precedent); to introduce and secure permanent acceptance for (a custom, a belief)." https://www.oed.com/view/Entry/102159?redirectedFrom=jurisprudence#eid (US-257).

[9] DSU, Art. 7.1.

[10] DSU, Art. 11 (second sentence).

[11] DSU, Art. 3.2 (second sentence). *See also* AD Agreement, Art. 17.6(ii).

8. Under the DSU, the DSB has no authority to adopt an authoritative interpretation of the covered agreements that is binding on WTO Members – and, therefore, neither the Appellate Body nor any panel can issue such an authoritative interpretation that amounts to "established jurisprudence," as stated by the EU. In fact, Article 3.9 of the DSU explicitly states that "the provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement." Per Article IX:2 of the WTO Agreement, that "exclusive authority" is reserved to the Ministerial Conference or the General Council acting under a special procedure.[12] Accordingly, a WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to apply an interpretation in a report adopted by the DSB in a prior dispute.

9. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law" to understand the text of the covered agreements. Those customary rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties, does not assign any interpretive role to dispute settlement reports. Article 31 of the Vienna Convention rather provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[13]

10. Furthermore, to date, *Russia – Traffic in Transit* panel remains the only panel (out of four recent disputes) to have interpreted essential security exceptions. However, as the United States has explained in Section III.B. of its First Written Submission, the panel in *Russia – Traffic in Transit* made numerous errors in its analysis of Article XXI, including failing to interpret the provision in accordance with the customary rules of interpretation by ignoring the ordinary meaning of Article XXI.

11. While the panel in *Saudi Arabia – Protection of IPRs* addressed a Member's invocation of the security exception in the TRIPS agreement, that panel merely "transposed" the *Russia – Traffic in Transit* panel's analysis.[14] Simply transposing the approach of a prior panel, however, is not consistent with the function of panels as set out in the DSU. That report therefore does not provide any additional relevant insight for the Panel in this dispute with respect to the interpretation of Article XXI.

12. The EU also fails to mention that in two other recent disputes in which Article XXI was invoked, WTO panels have suspended their work at the request of the complainant, including the

[12] WTO Agreement, Art. IX:2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.").

[13] EU's Comments after the Second Substantive Meeting, para. 61.

[14] *See* U.S. Response to the Panel's Question 93, paras. 50-56.

EU in *Russia – Pigs (21.5)*.[15] In the underlying *Russia – Pigs* dispute, the EU had challenged Russia's import restrictions on pigs, pork and certain pig products as inconsistent with the SPS Agreement and the GATT 1994. The panel found that the measures at issue are inconsistent with the SPS Agreement.[16] The Appellate Body subsequently recommended that the DSB request Russia to bring its measures into compliance.[17]

13. In 2018, the EU requested the establishment of a compliance panel.[18] In the compliance proceeding, for the first time, Russia invoked Article XXI of the GATT 1994 with respect to measures that the EU alleged to have the same effect as the SPS measures at issue in the original proceedings.[19] In 2019, the panel informed the DSB that the panel expected to issue its final report in the first quarter of 2020.[20] In January 2020, the EU requested the panel to suspend its work, and the request was granted.[21] We cannot know the reason for the EU's request, but it seems unlikely the EU would have made the request if they had prevailed or if publication of the report would have supported their position in this dispute.

14. Similarly, in the *UAE – Goods, Services, and IP rights* dispute, the UAE invoked the essential security exceptions in the GATT 1994, GATS and TRIPS in response to Qatar's claims of inconsistency with those agreements.[22] That panel informed the DSB that it expected to issue

[15] *See* Communication from the Panel, *UAE – Goods, Services, and IP rights*, WT/DS526/6 (Jan. 19, 2021); Communication from the Panel, *Russia – Pigs (EU) (Article 21.5) (Panel)*, WT/DS475/24 (Jan. 31, 2020).

[16] *Russia – Pigs (EU)*, para. 8.1.

[17] *Russia – Pigs (EU)(AB)*, paras. 6.1-6.9.

[18] *See* Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products From the European Union, Recourse to Article 21.5 of the DSU by the European Union, Request for the Establishment of a Panel, WT/DS475/21 (Oct. 19, 2018).

[19] Third Party Submission of the United States in *Russia – Pigs (EU) (Article 21.5)*, https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Sub.fin.%28public%29_1.pdf ("In its First Written Submission, the Russian Federation invoked Article XXI(b) of GATT 1994 as a defense to the claims of the European Union with respect to Resolution 1292.") (US-251); Third Party Comments of the United States on Russia's Request for a Preliminary Ruling in *Russia – Pigs (EU) (Article 21.5)*, https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Cmts.Rus.PRR.fin.%28public%29.pdf ("In its second written submission, the EU takes the position that Decree 1292 is within the terms of reference because Decree 1292 has the same effect as the SPS measures at issue in the original proceedings, and because the timing of Decree 1292's promulgation demonstrates Decree 1292 to be a replacement for the legal instruments at issue in the original proceedings") (US-252).

[20] Communication from the Panel, *Russia – Pigs (EU) (Article 21.5) (Panel)*, WT/DS475/23 (Mar. 25, 2019).

[21] Communication from the Panel, *Russia – Pigs (EU) (Article 21.5) (Panel)*, WT/DS475/24 (Jan. 31, 2020).

[22] Third Party Executive Summary of the United States of America in *UAE – Goods, Services, and IP rights*, *https://ustr.gov/sites/default/files/enforcement/WTO/US.3d.Pty.Exec.Summary.fin.%28public%29.pdf* (US-253).

its final report in the first quarter of 2021[23]. In January 2021, that panel suspended its work in response to Qatar's request.[24]

15. Thus, in most recent WTO disputes in which the respondent has raised the security exception, the panels suspended their work late in the proceedings in response to the complainants' requests. In only one dispute – *Russia – Traffic in Transit* – did a panel even attempt its own interpretation of Article XXI. Therefore, the EU's assertion that there is "established jurisprudence" is both legally and factually baseless.

B. Complainant Fails to Rebut the U.S. Interpretation of "Emergency" under Article XXI(b)(iii)

16. In response to the U.S. argument that the panel in *Russia – Traffic in Transit* read into the text of Article XXI(b)(iii) the terms of the security exceptions of other treaties, the EU counters that the language "serious international tension" is in the text of the Spanish and French versions of Article XXI(b).[25] The EU's argument comes to nothing.

17. In its U.S. opening statement, the United States explained the following:

> 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 (TFEU) and Agreement on the European Economic Area (EEA) but *not* in the GATT 1994. For example, without textual analysis, the panel stated that "essential security interests" generally refers to "the protection of its territory and its population *from external threats*, and the *maintenance of law and public order* internally." The panel further suggested that a situation would not constitute an "emergency in international relations" unless it "give[s] rise to *defence and military interests*, or *maintenance of law and public order* interests." Such language, however, is not part of the text of Article XXI(b)(iii), and such a narrow construction of Article XXI(b)(iii) is not consistent with the ordinary meaning of the terms of that provision. The

[23] Communication from the Panel, *UAE – Goods, Services, and IP rights*, WT/DS526/5 (Dec. 21, 2020).

[24] Communication from the Panel, *UAE – Goods, Services, and IP rights*, WT/DS526/6 (Jan. 19, 2021).

[25] EU's Comments after the Second Substantive Meeting, paras. 63-66.

> complainant urges this Panel to replicate these same errors—an effort that should be rejected.[26]

18. As evident from the paragraph above, the United States did not take issue with the language "serious international tension" in these other treaties. Rather, the United States raised concerns with the panel's adoption of terms – absent from text of Article XXI(b) – that limit the broad language of "serious international tension" and "serious internal disturbances," namely, "constituting a threat of war" and "affecting the maintenance of law and order."[27] The EU's claim fails to address the U.S. point and fails to rebut the U.S. argument.

C. Complaint's Comments Fail to Undermine the U.S. Argument That, Even Under the Complainant's Approach, the United States Has Substantiated its Defense under Article XXI(b)(iii)

19. In its closing statement, the United States explained that, even on the complainant's understanding of Article XXI(b) as *not* self-judging, the United States as the Member invoking Article XXI(b) has chosen to make information available to other Members that would satisfy the complaining party's approach.[28] The United States then pointed to information in the record, including the DOC steel report and the G20 Global Steel Forum report, that clearly supports the U.S. consideration that the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations."[29]

20. In response, the EU again argues that the United States "as a party invoking an affirmative defence" must "mention": (1) "the 'action' that it considers necessary to protect its essential security interests"; (2) "the 'essential security interests' that it claims to be at issue"; (3) "the nature of the alleged 'emergency in international relations'"; and (4) "any plausible connection between the 'action' and the 'essential security interests."[30] Then, it concludes that "[t]he United States did none of this."[31] Furthermore, the EU states that "the United States forgets to explain which emergency exists with regard to aluminium."[32] But the EU's rhetorical approach simply fails to confront the core fact underlying the U.S. argument – namely, that the evidence in the record satisfies even the EU's approach.

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[26] U.S. Opening Statement, para. 11 (footnotes omitted).

[27] For additional clarity, the problematic limiting language is italicized: ""war or serious international tension *constituting a threat of war*" and "the event of serious internal disturbances *affecting the maintenance of law and order*".

[28] *See* U.S. Closing Statement, paras. 51-65.

[29] *See* U.S. Closing Statement, paras. 51-65.

[30] EU's Comments after the Second Substantive Meeting, para. 73.

[31] EU's Comments after the Second Substantive Meeting, para. 73.

[32] EU's Comments after the Second Substantive Meeting, para. 78.

21. As the United States has explained, the term "affirmative defense" is not a legal term reflected in the DSU or any other covered agreement, and whether Article XXI "is characterized" as an affirmative defense does not itself have implications as to what is required of a party invoking that defense.[33] The DSU calls on the Panel to interpret Article XXI in accordance with customary rules of interpretation, and, as the United States has explained, what is required of the Member invoking Article XXI(b) is set forth in that provision.

22. Further, from the beginning of the proceedings, the United States has maintained that the ordinary meaning of Article XXI(b) establishes that the provision is self-judging and there is nothing in Article XXI(b) that requires invoking Member to provide an explanation or produce evidence. However, the United States has also stated that, even on the complainant's understanding of Article XXI(b) as *not* self-judging, the evidence on the record would satisfy the complaining party's approach. The United States then pointed to extensive information in the record, including the DOC steel report, that clearly supports the U.S. consideration that the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations."[34] The U.S arguments to date and the evidence in the record clearly meet even the requirements of the EU's erroneous approach.

23. The EU also appears to take issue with the fact that the United States identified relevant facts related to steel excess capacity, as an example, but not aluminum.[35] 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.

24. First, the DOC aluminum report details the precipitous decline in U.S. production of primary aluminum, as well as the increase in imports of primary aluminum.[36] The report notes that "U.S. primary aluminum production in 2016 was about half of what it was in 2015, and output further declined in 2017."[37] The report makes clear that the decline in U.S. primary aluminum production and capacity utilization was sudden: "The decline in U.S. production and capacity utilization has been *particularly dramatic in just the past two years*, during which aluminum prices were at near record lows. The erosion of primary aluminum production capacity in the United States due to falling aluminum prices and subsequent closure of smelters

[33] *See* U.S. Response to the Panel's Question 33, paras. 114-115.

[34] *See* U.S. Closing Statement, paras. 51-65.

[35] EU's Comments after the Second Substantive Meeting, para. 78.

[36] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 43 (Figure 2) (US-8).

[37] The report further noted, "U.S smelters are now producing at 43 percent of capacity and at annual rate of 785,000 metric tons. As recently as 2013, U.S. production was approximately 2 million metric tons per year." U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 3 (US-8).

has been *precipitous*."[38] The report further notes that the United States "currently has five smelters remaining, only two smelters that are operating at full capacity" and that "[o]nly one of these five smelters produces high-purity aluminum required for critical infrastructure and defense aerospace applications."[39] It also noted that "the downstream aluminum sector also is threatened by overcapacity and surging imports."[40]

25. The report also details the increase in aluminum imports: "U.S. imports in the aluminum categories subject to this investigation totaled 5.9 million metric tons in 2016, up 34 percent from 4.4 million metric tons in 2013. In the first 10 months of 2017, aluminum imports rose 18 percent above 2016 levels on a tonnage basis."[41] In the certain downstream aluminum sectors, "imports rose 33 percent from 1.2 million metric tons in 2013 to 1.6 million metric tons in 2016."[42]

26. Second, the report makes clear that aluminum excess capacity is a major cause of the recent decline of the U.S. aluminum industry and notes the recognition that emerged in 2017 that the ongoing engagement with China would be insufficient to address the crises. The report notes that "[a] major cause of the recent decline in the U.S. aluminum industry is the rapid increase in production in China. Chinese overproduction suppressed global aluminum prices and flooded into world markets."[43] The report also states, "Despite promises by the Chinese Government to curtail capacity, there has been little voluntary shutdown of production. In fact, some plants that had closed in 2015 had been restarted. Primary output by Chinese smelters for the first 5 months of 2017 was up nearly 9 percent from 2016 levels."[44] This unforeseen development contributed to the urgency of addressing this "emergency in international relations."

27. The report's conclusion was clear: "The U.S. is also at risk of becoming completely reliant on foreign producers of high-purity aluminum that is essential for key military and commercial systems. The domestic aluminum industry is at risk of becoming unable to satisfy

[38] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 44 (US-8) (emphases added).

[39] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 3 (US-8).

[40] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 3 (US-8).

[41] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 4 (US-8).

[42] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 4 (US-8).

[43] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 4 (US-8).

[44] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, Appendix E, p. 5 (US-8).

existing national security needs or respond to a national security emergency that requires a large increase in domestic production."[45] The report further explained, "If no action is taken, the United States is in danger of losing the capability to smelt primary aluminum altogether."[46] The Secretary concluded that aluminum articles are being imported in such quantities and under such circumstances as to threaten to impair the national security.[47]

28. Therefore, the DOC aluminum report conveys that, as with steel, the United States was at a crucial point—without immediate action, the aluminum industry could continue to suffer irreversible damages[48] and not be able to maintain or increase production to address national emergencies.

29. This conclusion is also supported by statements made by the French Chair at the 2018 OECD Ministerial Council Meeting that the OECD Members "share the view that severe excess capacity in key sectors such as steel and aluminum are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy" and "stress the urgent need to avoid excess capacity in … sectors such as aluminium and high technology."[49] The Charlevoix G7 Summit Communiqué also "stressed the urgent need to avoid excess capacity" in the aluminum sector.[50] Thus, even under the EU'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.

[45] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 5 (US-8).

[46] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 5 (US-8).

[47] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at pp. 5, 104-106 (US-8).

[48] In its conclusion, the report also noted that "[a]lthough global aluminum prices have regained lost ground in recent months, the damage to U.S. aluminum production capability was significant and irreversible." U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 105 (US-8).

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

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

D. The Drafting History of Article XXI Refutes the EU's Suggestion that Both Breach Claims and NVNI Claims Were Intended As Remedies for Members Affected by Essential Security Actions

30. The EU suggests that the drafters of Article XXI "referred to non-violation claims as an *additional*, and not the exclusive recourse against measures alleged to be justified by security grounds,"[51] but this assertion is refuted by explicit statements of the negotiators.[52] As the United States has explained, a distinction between what are now known as breach claims and non-violation claims was introduced into the negotiations by Australia in June 1947.[53] Australia set out several "main purposes" for its proposal, including "to provide for the fact that in some cases a complaining Member's difficulties might not be due to any act or failure of another Member *to whom complaint could appropriately be made*."[54] Australia's proposal was revised and incorporated into a draft of the GATT 1947 on July 24, 1947.[55] This text was adopted into the draft ITO Charter on August 22, 1947.[56]

31. Numerous statements by negotiators – including statements after the distinction was made between breach claims and non-violation claims – indicate that non-violation claims, not breach claims, are the appropriate recourse for a Member affected by actions that another

[51] EU's Comments after the Second Substantive Meeting, para. 85.

[52] *See* U.S. Response to the Panel's Question 59, paras. 271-279.

[53] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 1—2 (US-144) (permitting redress for (a) "the failure of another Member to carry out its obligations under this Charter", (b) "the application by another Member of any measure, whether or not it conflicts with the provisions of this Charter", or (c) "the existence of any other situation."

[54] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 2 (emphasis added) (US-144); *see also* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/12 (June 12, 1947), at 22 (quoting the Australian representative as stating that the reference to "the application by another Member of any measure, whether or not it conflicts with the provisions of Charter" was "taken over automatically from a standard clause in the old type of Trade Agreement and was designed, I presume, to deal primarily with possible attempts to evade obligations accepted in an exchange of tariff concessions") (US-172).

[55] *See* Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135 (July 24, 1947), at 2 & 55 (including the revised text at Article XXI (the on "Nullification or Impairment") and noting that the draft text appears in its "latest form" sometimes based on "texts prepared by sub-committees and Commissions of this Conference") (US-147).

[56] *See* Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 166 (with "breach" language at Article 89 and NVNI language transposed from former Article 35) (US-37); Verbatim Report, Second Session of the Preparatory Committee of the United Nations Conference on Trade & Development, Twenty-Second Meeting In Executive Session, E/PC/T/EC/PV.2/2 (Aug. 22, 1947), at 47-48 (examining and approving Article 89 as reflected in report of August 19, 1947) (US-148).

Member considers necessary for the protection of its essential security interests. For example, in a meeting of ITO Charter drafters on July 24, 1947 – after Australia had proposed distinguishing between breach claims and non-violation claims, but before that proposal was adopted into the ITO Charter – the Chairman asked whether the drafters agreed that actions taken pursuant to the then-existing essential security exception "should not provide for any possibility of redress."[57] The U.S. delegate responded that actions that a Member considered necessary to protect its essential security interests "*could not be challenged* in the sense *that it could not be claimed* that the Member was *violating the Charter*"[58] – indicating the view that essential security actions could not be found to *breach* the Charter. The U.S. delegate also stated, however, that "redress *of some kind* under Article 35" would be available.[59] The record reveals no disagreement with the U.S. delegate, and in fact the Australian delegate expressed appreciation for this assurance.[60] The exchange demonstrates that the delegates were referring to a non-violation claim – not an alleged violation of the Charter – when discussing the redress available to Members affected by essential security actions.

32. In early 1948 – after the distinction between breach claims and non-violation claims had been adopted into the ITO Charter (as well as the GATT 1947) – drafters again confirmed that non-violation claims, and not breach claims, were the appropriate redress for Members affected by essential security actions. For example, as stated in their report of January 9, 1948, a Working Party of representatives from Australia, India, Mexico, and the United States had "extensive discussions" of the provision on "Consultation between Members," particularly subparagraph (b) of that provision, for claims based on the application of a measure "whether or not it conflicts with the provisions of the Charter."[61] At this time, the "Consultation between Members" provision set out non-violation claims in subparagraph (b), while subparagraph (a) related to breach claims.[62]

33. This Working Party "considered that [subparagraph (b) of the "Consultation between Members" provision] would apply to the situation of action taken by a Member such as action

[57] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26 (US-41).

[58] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 (emphases added) (US-41).

[59] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 27 (emphasis added) (US-41).

[60] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 27 (US-41).

[61] United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

[62] United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

pursuant to Article 94 of the Charter [then the essential security exception]."[63] Specifically, the Working Party stated that essential security actions "*would be entirely consistent with the Charter*," although if such actions affected other Members, such other Members should "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."[64] This conclusion by the Working Party confirms that – after the distinction between non-violation claims and breach claims was adopted – the drafters continued to believe that non-violation claims, and not breach claims, are the appropriate recourse for Members affected by essential security actions.

34. Australia's statements in proposing the distinction between breach claims and non-violation claims – particularly its reference to cases in which "a complaining Member's difficulties might not be due to any act or failure of another Member *to whom complaint could appropriately be made*"[65] – are consistent with these other statements of negotiators. Accordingly, the drafting history of Article XXI refutes the EU suggestion that non-violation claims were intended as an additional recourse, and not the exclusive recourse, against action that another Member considers necessary for the protection of its essential security interests.

II. COMPLAINANT'S COMMENTS ON THE U.S. STATEMENTS DO NOT ESTABLISH THAT THE MEASURES AT ISSUE ARE SAFEGUARD MEASURES UNDER ARTICLE XIX

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

35. The EU misperceives both the U.S. arguments in this dispute and the proper role of a WTO panel when it contends that "the qualification of a measure as a safeguard [is] entirely objective" and that "the United States' view would enable the adopting Member to unilaterally dis-apply all of the obligations in the Agreement on Safeguards (by choosing not to 'invoke')".[66]

36. When considering alleged breaches of affirmative obligations in the WTO agreements, a panel may determine whether a particular measure falls within the scope of measures that are subject to the obligations claimed to have been breached. For example, when considering a claim under Article I:1 of the GATT 1994, a WTO panel may determine whether the measures at

[63] United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

[64] United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-42).

[65] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 2 (emphasis added) (US-144).

[66] EU's Comments after the Second Substantive Meeting, paras. 9, 18.

issue constitute "customs duties and charges of any kind imposed on or in connection with importation or exportation", "rules and formalities in connection with importation and exportation", or another measure that falls within the scope of Article I:1. A panel can likewise determine whether a particular charge should be treated as an "internal charge" within the scope of Article III:2 or an "import charge" within the scope of Article II.

37. When a Member wishes to *deviate* from its WTO obligations, however – such as by seeking to take measures pursuant to Articles VI, Article XIX, Article XX, or Article XXI – it is for that Member to determine the basis on which it will seek to deviate. If a measure is sought, taken, or maintained pursuant to the exercise of a right under one such basis for deviation from WTO obligations (as the United States has done here, pursuant to Article XXI), there is no reason for a Member to *also* seek, take, or maintain that measure pursuant to a right provided by another provision (such as pursuant to Article XIX, the release that the complainant attempts to assign to the United States in this dispute). If a Member has failed to comply with the requirements of the provision pursuant to which it is seeking to deviate from its WTO obligations, the Member simply breaches its underlying obligation. A panel does not – to use the EU's words –attempt to "qualify" a measure as a safeguard measure – to determine whether there might be a separate basis on which a Member may be permitted to deviate from its WTO obligations.

38. As the United States has explained, a number of different measures might involve features of a safeguard measure, or be said to have what some might call a safeguard objective.[67] 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.

39. In fact, the text of Article XXI refutes the EU's suggestion that the Panel should attempt to "qualify" whether a measure is a safeguard measure under Article XIX. Specifically, the words "Nothing in this Agreement shall be construed to prevent…" in Article XXI includes Article XIX, and – as Article 11.1(c) confirms – Members did not restrict their rights to take action under other provisions of the GATT 1994 when they concluded the Agreement on Safeguards. The Panel should ignore the EU's attempts to muddle the issues in this dispute and instead interpret these provisions of the covered agreements in accordance with customary rules of interpretation of public international law.

[67] U.S. Closing Statement, para. 39; U.S. Response to the Panel's Question 76, paras. 349-350.

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

40. The EU suggests – incorrectly – that "[t]he United States attempts to cast aspersions on the European Union's right to rebalance by describing it as the European Union's desire for 'immediate retaliation.'"[68] Contrary to the EU's assertions, 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.

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

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

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

[68] EU's Comments after the Second Substantive Meeting, para. 20.

C. Complainant Fails to Distinguish WTO Provisions that, like Article XIX, Contemplate Exercise of a Right through Invocation

44. In an attempt to distinguish the numerous other WTO provisions that, like Article XIX, contemplate a Member exercising a right through invocation, the EU manufactures an artificial distinction between what it describes as WTO provisions that relate to actions taken within a Member's legal order vs. WTO provisions that relate to action taken at the level of the WTO. The EU also attempts to distinguish the Special Safeguard Provisions at Article 5 of the Agreement on Agriculture and the transitional safeguard mechanism described at Article 6 of the Agreement on Textiles and Clothing, but offers only categorical assertions and a faulty analysis to support its assertions. Finally, the EU appears to suggest – contrary to the customary rules of interpretation of public international law – that the Panel should interpret Article XIX based on the text of other WTO provisions. The Panel should reject the EU's ill-founded arguments.

1. The EU's Manufactured Distinction Between WTO-Level and Domestic-Level Action Is Unsupported by the Text of the Relevant Provisions

45. In an effort to support its invented distinction between WTO provisions related to domestic-level measures and WTO provisions related to WTO-level measures, the EU suggests that "an 'Article XXVIII measure' is taken at the level of the WTO, and may only be taken at the level of the WTO, whereas an 'Article XIX measure' (a safeguard) is necessarily taken within a Member's legal order."[69] Without reference to the relevant text, the EU characterizes Article II.5 as being "about the circumstances in which two members are required to enter into negotiations (when one of them makes a declaration)" and "purely a WTO process, triggered and conducted between WTO Members."[70]

46. The EU's arguments fail. The WTO Agreement does not support the EU's proffered distinction, and in fact numerous WTO provisions – including Article XIX – relate to action on both the domestic-level and the WTO-level. Article II:5, for example, refers to both domestic court rulings, as well as negotiations between Members. Article XVIII Section C refers to a Member's findings regarding governmental assistance and promoting industry establishment, as well as a Member's notification to other Members of its findings, consultations among Members, and release from WTO obligations if certain conditions are met.

47. Article XXVIII also provides for both WTO-level and domestic-level actions. The structures of Article XXVIII and Article XIX are similar in that they both allow a Member to exercise a right – take a domestic action – after invoking the provision to propose to other Members that it might take such action.[71] Also like Article XIX, the proposed modification or

[69] EU's Comments after the Second Substantive Meeting, para. 28.

[70] EU's Comments after the Second Substantive Meeting, para. 29.

[71] *See* Article XXVIII:3(a) (authorizing a Member proposing to "modify or withdraw" a tariff concession to implement the proposed modification even if no agreement is reached between the importing Member and the

withdrawal under Article XXVIII triggers a WTO process involving discussions between the invoking Member and certain other Members.[72]

48. The modification of a WTO legal right does not necessarily affect the treatment of imports at the domestic level, however, as the note Ad Article XXVIII reflects. Ad Article XXVIII provides, among other things, that Members "shall be informed immediately of all changes in national tariffs resulting from recourse to this Article" – distinguishing between "national tariffs" and a modification of schedules under Article XXVIII. Ad Article XXVIII also states that modifying or withdrawing a concession under Article XXVIII "means that . . . the legal obligation of such Member under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day."[73] In other words, a Member may modify or withdraw a concession under Article XXVIII, but the domestic-level change to the Member's customs tariff might be effective on a different date. In this way Article XXVIII, like other WTO provisions, relates to action at both the WTO-level and the domestic-level.

49. Similarly, "tak[ing] action" under Article XIX:2 occurs at both the WTO level and the domestic level. At the WTO level, there is suspension of an obligation, or withdrawal or modification of a concession, as explicitly referred to in Article XIX:1. At the domestic level, there is a tariff or quota. Put differently, in Article XIX, the word "action" refers to affecting a WTO legal right (explicitly, through references to suspending obligations, or modifying or withdrawing concession), but it also relates to the domestic action. This is suggested by the reference in Article XIX:1 to applying safeguard measures "to the extent and for such time as may be necessary to prevent or remedy such injury" – because it is the domestic-level tariff or quota, rather than any WTO-level action, that would prevent or remedy the injury from imported products. This conclusion is confirmed by Article 1 of the Agreement on Safeguards, which refers to "*measures provided for* in Article XIX"[74] – indicating that Article XIX refers to domestic measures in addition to suspension, withdrawal, or modification at the WTO level. As these references establish, Article XIX relates to both domestic-level action as well as WTO-level action.

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affected Member); Article XIX:3(a) (allowing an importing Member proposing to take a safeguard measure to implement the proposed measure even if no agreement is reached between the importing Member and the affected Members).

[72] *See* GATT 1994 Art. XIX:2 (providing that the invoking Member "shall afford the Member and those Members having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action"); GATT 1994 Art. XXVIII:1 (providing for "negotiation and agreement" with a defined set of Members and "consultation" with other substantially interested Members).

[73] GATT 1994, Ad. Article XXVIII, chapeau & para. 1. Paragraph 1 provides in full "The provision that on 1 January 1958, and on other days determined pursuant to paragraph 1, *a contracting party 'may ... modify or withdraw a concession' means that on such day, and on the first day after the end of each period, the legal obligation of such contracting party under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day*. If a tariff change resulting from negotiations undertaken pursuant to this Article is delayed, the entry into force of any compensatory concessions may be similarly delayed." Ad Article XXVIII (emphases added).

[74] Emphasis added.

50. Accordingly, the text of the relevant provisions do not support the EU's proffered distinction between WTO provisions relating to measures taken at the WTO-level vs. those relating to measures taken "within a Member's legal order". Instead, as the United States has argued, numerous provisions of the covered agreements, 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.

2. The EU Fails in its Attempts to Distinguish Special Safeguard Provisions and the Transitional Safeguard Mechanism

51. Apparently unable to carry further its manufactured distinction between WTO-level and domestic-level actions, the EU then takes a different approach in its attempt to distinguish the Special Safeguard Provisions at Article 5 of the Agreement on Agriculture and the transitional safeguard mechanism described at Article 6 of the Agreement on Textiles and Clothing. According to the EU, Article 5.7 of the Agreement on Agriculture undermines the U.S. arguments in this dispute because that provision permits Members to give notice of action pursuant to Article 5.1(a) within 10 days of implementing that action.[75] According to the EU, "[t]his means that conceptually, the provision applies before, and independently of the notification."[76]

52. The EU is wrong. If a Member were to impose a duty on agricultural products – and fail to "invoke[]" that provision, as referred to in Article 5.1 – Article 5 of the Agreement on Agriculture would not "conceptually" apply to that action; the Member would simply be in breach of its underlying obligations if the duties imposed were above the Member's bound rates. Put differently, the fact that a provision permits a Member to invoke its rights *after* implementing certain action does not change the requirement of invocation when a Member seeks to exercise its rights pursuant to that provision.

53. The EU's arguments regarding Article 6 of the Agreement on Textiles and Clothing also fail. The EU suggests that in this provision "[t]here is no 'notice' but only 'consultations'"[77], apparently failing to recognize that Article 6.1 calls for Members to "notify the TMB . . . as to whether or not they wish to retain the right to use the provisions of this Article," that Article 6.7 requires Members invoking the right to take action pursuant to that provision to not only request consultations with Members which would be affected by such action but also to communicate the

[75] EU's Comments after the Second Substantive Meeting, para. 31. Article 5.7 provides in relevant part that "Any Member taking action under subparagraph 1(a) above shall give notice in writing, including relevant data, to the Committee on Agriculture as far in advance as may be practicable and in any event within 10 days of the implementation of such action."

[76] EU's Comments after the Second Substantive Meeting, para. 31.

[77] EU's Comments after the Second Substantive Meeting, para. 31.

request for consultations to the Chairman of the TMB, and that Article 6.5 refers to the "initial notification as set forth in paragraph 7."[78]

54. In any event, the EU is also incorrect in its categorial assertions that "[s]eeking consultations is an obligation" and "[i]f the request for consultations was not made, and the Member implemented the measure anyway, the consequence would not be that Article 6 is inapplicable but rather that it is infringed."[79] As Article XIX and numerous other WTO provisions demonstrate, seeking consultations may be part of a Member's invocation of its right to take action pursuant to certain provisions, depending on the text of the provision itself. If a Member took action to restrain imports but did not invoke Article 6 of the Agreement on Textiles and Clothing as the basis for its action, the consequence would be that the Member could be in breach of its underlying obligations. Contrary to the EU's assertions, therefore, these Articles do not support the EU's claims regarding notification of a safeguard measure.

3. The EU's Attempt to Interpret Article XIX Based on the Text of Other WTO Provisions is Unavailing

55. The EU criticizes the United States for suggesting that each WTO provision should be interpreted based on its own terms, calling the U.S. approach a "dead end."[80] The EU then appears to suggest that, instead of interpreting Article XIX based on its own terms, the Panel should interpret Article XIX based on the AD and SCM Agreements because "[a]ll three agreements concern trade defence measures" and because "in respect of trade defence, the drafters designed an *exhaustive* instrument, the applicability of which [is] not in the hands of [the] adopting member, and does not depend on 'invocation'."[81]

56. The EU appears to forget that interpreting a WTO provision based on its text, in context, is the approach called for by the customary rules of interpretation of public international law.[82] That the EU apparently views such an approach as a "dead end" – perhaps because it does not yield the outcome the EU desires in this dispute – does not change the fact that the DSU calls on

[78] Article 6.7 provides in relevant part "The Member seeking consultations shall, at the same time, communicate to the Chairman of the TMB the request for consultations, including all the relevant factual data outlined in paragraphs 3 and 4, together with the proposed restraint level." Article 6.5 also refers to "the date of initial notification as set forth in paragraph 7."

[79] EU's Comments after the Second Substantive Meeting, para. 31.

[80] EU's Comments after the Second Substantive Meeting, para. 32. ("[A]ll that the United States can do is to point out that different provisions can operate differently, that invocation is required by some provisions but not others, that under some provisions invocation is only a procedural requirement unrelated to applicability, and that, ultimately, 'each provision should be interpreted based on its own terms.' What remains of the United States' argument is the rather anodyne statement that there are certain provisions of the covered agreements that contain rights, that can be invoked, and that contain conditions. We struggle to understand what the Panel is supposed to make of such a lengthy discussion coming to such a dead end.") (footnotes omitted).

[81] EU's Comments after the Second Substantive Meeting, paras. 32-35.

[82] VCLT, Arts. 31 and 32.

the Panel to follow this approach.[83] The Panel should therefore decline the EU's invitation to interpret Article XIX contrary to its own text.

57. In its arguments regarding the AD and SCM Agreements, the EU fails to acknowledge that, though these agreements prohibit action against dumping or subsidies except in accordance with the provisions of the GATT 1994 as interpreted by the AD Agreement or SCM Agreement, both agreements *also* state that this prohibition "is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate."[84] With this text, both agreements acknowledge the potential overlap between measures that could be covered by the AD or SCM Agreements – were a Member to avail itself of the rights contained therein – and another provision of the GATT 1994, like Article XXI. That these agreements may include affirmative obligations in addition to providing a basis for deviating from a Member's obligations also does not alter that fact. In other words, contrary to the EU's arguments, these provisions also make clear that a Member may choose the legal basis upon which it deviates from its obligations.

D. Complainant Misperceives the Role of Article 11.1(b)

58. The EU also errs when it asserts that "it is fundamentally inconsistent with the logic of Article 11.1(b) to suggest . . . that its applicability (also) depends on 'invocation'" because "[t]he very purpose of that provision, as recognised by the Preamble, is to eliminate measures that might otherwise 'escape multilateral control' (what used to be called grey area measures)" and "[i]t cannot be expected that such measures would ever be based on an 'invocation' of any particular WTO provision."[85] The EU misperceives the role of Article 11.1(b) and fails to acknowledge the overlap in the scope of measures covered by Article XI of the GATT 1994 and Article 11.1(b) of the Agreement on Safeguards.

59. Article 11.1(b) provides that "[f]urthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side." Footnote 4 to Article 11.1(b) provides that "[e]xamples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection." Footnote 3 to this provision provides "[a]n import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member."

60. As the United States has explained, use of the word "[f]urthermore" in Article 11.1(b) indicates that this provision simply continues the disciplines set forth in Article 11.1(a).[86] These provisions seek to ensure that safeguard measures adopt certain forms (and not others), are taken pursuant to specified procedures, and satisfy certain conditions. As the United States has

[83] DSU, Art. 3.2.

[84] AD Agreement, Art. 18.1, footnote 24; SCM Agreement, Art. 32.1, footnote 56.

[85] EU's Comments after the Second Substantive Meeting, para. 53 (footnote omitted).

[86] *See* U.S. Response to the Panel's Question 19, para. 60.

explained, if a Member does not seek authority to act under Article XIX and the Safeguards Agreement, then Article 11.1(b) simply does not apply.

61. The EU suggests that this interpretation would allow such measures to escape WTO disciplines, but this is incorrect. If a Member is not seeking to act under the Agreement on Safeguards, Article 11.1(b) is not needed because measures of the type identified in that provision would be subject to existing obligations, including Article XI of the GATT 1994.[87] For example, if a Member invokes Article XIX and imposes an import licensing measure as its safeguard action, the Member would be in breach of the prohibition in Article 11.1(b) on "export or import licensing schemes." By contrast, if a Member simply imposes a restrictive import licensing measure, *not* having invoked Article XIX as a basis for doing so, the Member would be in breach of the ban in Article XI on "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through . . . . import or export licenses". The fact that the Agreement on Safeguards "does not apply" to a measure does not mean that such a measure is permitted; it just means that where a Member has taken an action that is, for example, in breach of Article XI, that measure will not *also* be in breach of Article 11.1(b).

III. CONCLUSION

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

[87] As Article XI:1 provides, "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."