UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS548)

INTEGRATED EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA

June 25, 2021

EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION

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

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

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

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

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

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

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

7. The text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. The first element of this text that is notable is the lack of any conjunction to separate the three subparagraphs. The subparagraphs are not separated by the coordinating conjunction "or", to demonstrate alternatives, or the conjunction "and", to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

8. Subparagraphs (i) and (ii) of Article XXI(b) both begin with the phrase "relating to" and directly follow the phrase "essential security interests" in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraphs (i) and (ii) modify the phrase "essential security interests" and thus illustrate the types of "essential security interests" that Members considered could lead to action under Article XXI(b). Subparagraphs (i) and (ii) do not limit a Member's essential security interests exclusively to those interests. First, the chapeau of Article XXI(b) (as noted) reserves to the Member the judgment of what "its interests" are, including whether they are relating to one of the enumerated interests. Second, subparagraph (iii) reflects no explication (and therefore cannot be understood to reflect a limitation) on a Member's essential security interests. Rather, as with subparagraphs (i) and (ii), the essential security interests are those determined by the Member taking the action.

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

war directly involve the acting Member, reflecting again that the action taken for the protection of its essential security interests is that which the Member judges necessary.

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

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

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

13. Fourth, by way of contrast, and further context, in at least two WTO provisions the judgment of a Member is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party. As DSU Article 26.1 states, a non-violation complaint may be instituted, "[w]here and to the extent that such party considers *and* a panel or the Appellate Body determines" that a particular measure does not conflict with a WTO agreement, among other requirements. Thus, in this provision, Members explicitly agreed that it is not sufficient that "[a] party considers" a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that "a panel or the Appellate Body determines that" a non-violation situation is present. A similar limitation—that a "party considers and a panel determines that"—was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c).

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

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

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

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

Article 32 (General Exceptions to Chapter IV):

> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures
> . . . .

> (e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.

Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):

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

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

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

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

> Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which *it considers contrary* to its essential security

> interests, or to prevent any Member from taking any action which *it may consider to be necessary* to such interests:
>
> a) Relating to fissionable materials or their source materials;
>
> b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
>
> c) In time of war or other emergency in international relations, relating to the protection of its essential security interests . . . .

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

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

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

23. At that time, Article 35(2) provided for the possibility of consultations concerning the application of any measure, "whether or not it conflicts with the terms of this Charter," which had "the effect of nullifying or impairing any object" of the ITO charter. If the parties were

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

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

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

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

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

27. The self-judging nature of Article XXI(b) is also supported by views repeatedly expressed by GATT contracting parties (now Members) in connection with prior invocations of their essential security interests.

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

28. The panel in *Russia – Traffic in Transit* erred when it decided that it had authority to review multiple aspects of a responding party's invocation of Article XXI. That panel's interpretation of Article XXI is not consistent with the customary rules of interpretation set forth in the Vienna Convention. In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. In fact, the panel appears to have reached its conclusion regarding the reviewability of Article XXI a mere four paragraphs after beginning its analysis – based not on "the mere meaning of the words and the grammatical construction of the provision," but on what it termed the "logical structure of the provision."

29. Furthermore, in its examination of the negotiating history of the treaty, the *Russia – Traffic in Transit* panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history. These errors reveal the panel's analysis as deeply flawed and suggest a results-driven approach not in line with the responsibility bestowed on the panelists by WTO Members through the DSU.

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

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

30. The text of Article XXI(b) establishes that Article XXI(b) is self-judging. The chapeau of Article XXI(b) provides that "[n]othing in this Agreement shall be construed to prevent any

contracting party from taking any action which it considers necessary for the protection of its essential security interests." "[C]onsider[]" means "[r]egards in a certain light or aspect; look upon as." Here, the relevant "light" or "aspect" in which a Member should regard the action is whether that action is necessary for protection of the acting Member's essential security interests. Whether the Member "regards" the actions in this light is a subjective question.

31. The text also specifies that it is "*its* essential security interests"—the Member's in question—that the action is taken for the protection of. In identifying such security interests, therefore, it is the judgment of the Member that is relevant. Only a Member can determine for itself what comprises its essential security interests, including "relating to fissionable materials" under Article XXI(b)(i) or "relating to the traffic in arms, ammunition and implements of war" under Article XXI(b)(ii).

32. Fundamentally, Article XXI(b) is about a Member taking an action "which it considers necessary". The relative clause that follows the word "action" describes the circumstances which the Member should "consider" to be present when it takes such an "action". The clause begins with "which it considers necessary" and ends at the end of each subparagraph. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, and they are left to the determination of the Member. For instance, under Article XXI(b)(i), what is relevant is the Member's appreciation of its essential security interests relating to fissionable materials or the materials from which they are derived, and what is necessary for the protection of those interests. If individual elements of that clause were subject to review, it would no longer authorize the action that the ***Member*** considers necessary – it would be the action that some other evaluator (here, the Panel) considers necessary.

33. The text and grammatical structure of subparagraphs (i) to (iii) of Article XXI(b) also support the self-judging nature of this provision. These subparagraphs lack any conjunction—an "and" or an "or"—to specify their relationship to each other. This indicates that each subparagraph must be considered for its relation to the chapeau of Article XXI(b). The first two subparagraphs each relate to the kinds of interests for which the Member may consider its action necessary to protect. Those subparagraphs provide that a Member may take any action it considers necessary for the protection of its essential security interests "relating to fissionable materials or the materials from which they are derived," and its essential security interests "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying for military establishment." The final subparagraph does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. That subparagraph provides that a Member may take any action which it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations."

34. The subparagraphs thus form an integral part of the provision in that they complete the sentence begun in the chapeau, establishing three circumstances in which a Member may act. An invocation of Article XXI(b) indicates that a Member considers that any or all of the three circumstances described in the subparagraphs are present. In this way, the subparagraphs guide a Member's exercise of its rights under this provision, and as we shall see, may even lead a Member to determine not to invoke Article XXI(b).

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

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

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

37. The U.S. interpretation is further supported by the context provided in Article XX. Specifically, Article XX sets out "general exceptions," and a number of subparagraphs of Article XX relate to whether an action is "necessary" for some listed objective. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "necessary." Therefore, WTO Members, as well as panels and the Appellate Body, have consistently understood the text to impose a "necessity test" for measures with respect to which a general exception of this kind is invoked. The textual distinction between Article XX and Article XXI is a fundamental one, and confirms that the drafters considered many interests to be important enough that deviations from a Member's WTO obligations may be appropriate. Only in the case of essential security interests, however, was the authority to deviate drafted to permit any action a Member considers necessary for the protection of the interests at stake.

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

38. The complainant has challenged the U.S. security measures under Article XIX and under several provisions of the Agreement on Safeguards. The measures at issue are not safeguards and therefore the Agreement on Safeguards does not apply. Pursuant to Article 11.1(c), once a Member invokes Article XXI(b), the Agreement on Safeguards is not applicable. In any event, Article XXI makes clear that the security exceptions, including the essential security exception,

apply to the entire agreement. Specifically, Article XXI begins with the clause "Nothing in this Agreement shall be construed." The provision does not contain any qualification to this threshold clause; nor does Article XIX of the GATT 1994 indicate that the security exceptions do not apply to rights and obligations in that article. Furthermore, the Agreement on Safeguards contains 14 references to the GATT 1994. Such language establishes an express, textual link between the GATT 1994 and obligations under the Agreement on Safeguards. This language also confirms that, in any event, Article XXI(b) would be a defense not only to claims raised under the GATT 1994 but also to claims under the Agreement on Safeguards.

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

39. In light of the self-judging nature of Article XXI, the sole finding that the panel may make – consistent with its terms of reference and the DSU – is to note the U.S. invocation of Article XXI. This is the only finding the panel can make consistent with the DSU. Under DSU Article 7.1, the Panel's terms of reference call on the Panel to examine the matter referred to the DSB and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements]." The Panel has two functions: (1) to "examine" the matter – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests" ; and (2) to "make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for" in the covered agreement.

40. This dual function of panels is confirmed in DSU Article 11, which states that the "function of panels" is to make "an objective assessment of the matter before it" and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." As DSU Article 19.1 provides, these "recommendations" are issued "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement" and are recommendations "that the Member concerned bring the measure into conformity with the agreement." DSU Article 19.2 clarifies that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement."

41. To clarify, the United States does not argue that the Panel should not make an objective assessment of the matter. The Panel should absolutely make an objective assessment of the matter – to examine the matter and to assess the self-judging nature of Article XXI. However, the Panel's ability to make an objective assessment does not convert every element of the Article XXI(b) text into a legal standard against which a measure is to be judged by a panel. The plain text of Article XXI(b) does not call for testing of the Member's measure against a legal standard. Instead, the text of GATT 1994 Article XXI(b) establishes that it is for a responding Member to determine whether the actions it has taken are necessary for the protection of its own essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member's determination.

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

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

42. The self-judging nature of Article XXI(b) of GATT 1994 is established by the text of that provision, in its context, and in the light of the treaty's object and purpose. The ordinary meaning of the terms of Article XXI(b) establishes that the word "considers" qualifies all the terms in the chapeau and the subparagraph endings of Article XXI(b).

43. The EU continues to argue in error that the term "considers" only qualifies the "necessity" of the Member's action under Article XXI(b). Under this interpretation, while the "necessity" of the action is left to the Member's judgment, the Panel must test whether the action is "for the protection of" and whether the interests being protected are in fact "security" interests that are "essential" to the Member. The EU further argues that the subparagraph endings modify "action" in the English text of Article XXI(b).

44. The EU's argument artificially separates the terms in the single relative clause, which begins with the phrase "which it considers necessary" and ends at the end of each subparagraph. The clause follows the word "action" and describes the situation which the Member "considers" to be present when it takes such an "action". Because the relative clause describing the action begins with "which it considers", the other elements of this clause are committed to the judgment of the Member taking the action.

45. The EU's argument that the phrase "which it considers" only qualifies the "necessity" of the Member's action under Article XXI(b) is also inconsistent with the ordinary meaning of the text of the provision. In Article XXI(b), the phrase "which it considers necessary" is followed by the word "for". The relevant inquiry is not simply whether a Member considers any action "necessary". Instead, it is whether a Member considers the action "necessary *for*" a purpose – namely, the protection of its essential security interests relating to subject matters in subparagraph endings (i) and (ii), or for the protection of its essential security interests in the temporal circumstance provided for in subparagraph ending (iii). Artificially separating the words "which it considers necessary" from the language that immediately follows and continues the clause – for the protection of – would erroneously interpret certain terms of Article XXI(b) in isolation.

46. In addition, the EU's argument that the word "considers" does not qualify the terms in the subparagraph endings is also not consistent with the overall grammatical structure of the provision. This argument appears to rely in part on the EU's erroneous view that all three subparagraph endings modify the term "action". Under the ordinary meaning of the English text of Article XXI(b), the subparagraph endings (i) and (ii) modify the phrase "essential security interests"; each relate to the kinds of interests for which the Member may consider its action necessary to protect. In this way, the subparagraph endings (i) and (ii) indicate the types of essential security interests to be implicated by the action taken. This is because, under English grammar rules, a participial phrase, which functions as an adjective, normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.

47. The final subparagraph ending provides that a Member may take any action which it considers necessary for the protection of its essential security interests "taken in time of war or other emergency in international relations." It does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. The drafters departed from typical English usage in placing the modifier next to "its essential security interests" as opposed to "action." However, this departure does not mean that subparagraphs (i) and (ii) should be read in a manner that is inconsistent with English grammar rules.

48. The EU suggests, in error, that the U.S. did not properly invoke Article XXI(b) because "the invocation of Article XXI(b) cannot cover all three subparagraphs." However, Article XXI(b) does not require a responding Member to invoke a specific subparagraph of the provision to invoke that Member's right to take any action which it considers necessary for the protection of its essential security interests.

49. Neither is there any text in Article XXI(b) that imposes a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked. This understanding is supported by the text of Article XXI(a), which confirms that Members are not required "to furnish any information the disclosure of which it considers contrary to its essential security interests." It may be that a Member invoking Article XXI(b) nonetheless chooses to make information available to other Members. Indeed, the United States did make plentiful information available in relation to its challenged measures. While such publicly available information could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii), the text of Article XXI does not require a responding Member to provide details relating to its invocation of Article XXI, including by identifying a specific subparagraph.

50. The EU argues, citing the panel report in *Russia – Traffic in Transit*, that "[t]he terms 'war' and 'other emergency in international relations' refer to objective factual situations, the existence of which is independent from the assessment made by the invoking Member in each case and can be fully reviewed by panels." The EU acknowledges that it "could imagine that there may be situations other than a threat of war that may amount to 'other emergencies in international relations'" such as "a massive cyber-attack from abroad, paralysing a whole country and its vital structures." The EU stops short, however, of allowing that an "other emergency in international relations" could extend to an "'emergency' in commercial or trade relations".

51. Like the panel in *Russia – Traffic in Transit*, the EU is wrong that "[t]he terms 'war' and 'other emergency in international relations'" can be characterized as "objective factual situations," and that the applicability of Article XXI(b)(iii) "can be fully reviewed by panels." To the contrary, the text of subparagraph ending (iii) supports the interpretation that the applicability of Article XXI(b)(iii), like all of Article XXI(b), is self-judging.

52. The term "emergency" can be defined as "a serious, unexpected, and often dangerous situation requiring action." In addition to being modified by the phrase "which it considers," whether a certain situation is "serious, unexpected, and . . . dangerous" is, also by nature, a subjective determination that involves consideration of numerous factors that will vary from Member to Member. Similarly, Members may vary – based on their own unique circumstances – in their determinations of whether they consider that a particular situation "requires action." Just as a panel cannot determine – without substituting its judgment for that of the Member –

which are the essential security interests of a Member, a panel cannot determine - without substituting its own judgment for that of the Member – whether a Member considers its action to be taking place "in time of war or other emergency in international relations."

53. The United States agrees with the EU there may be situations other than a threat of war that may amount to an "other emergencies in international relations" within the meaning of Article XXI(b)(iii). So much is obvious. Therefore, it cannot follow, as the EU claims, that an emergency in commercial or trade relations is somehow excluded from the scope of the phrase "other emergency in international relations." The EU cites nothing in the terms of Article XXI(b)(iii) to support this argument, which appears to be contradicted by the EU's own assertions in the G20 Global Forum on Steel Excess Capacity – including the EU's assertion 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". This statement by the EU supports that, contrary to the EU's arguments in this dispute, a Member may consider commercial or trade matters to be a matter of *existential* importance – certainly something then that could constitute an emergency in international relations.

54. Nor is the EU's position consistent with views of its member States. Numerous WTO Members, including several EU member States, appear to include economic or commercial considerations in their own assessments of their security interests for purposes of domestic law and policy. These Members – including Austria, Germany, The Netherlands, and Spain – do not distinguish between commercial and trade relations and other types of security.

55. The terms "security" and "emergency" in Article XXI(b)(iii) are broad and could encompass matters of political or economic relations. Accordingly, the narrow construction of Article XXI(b)(iii) asserted by the EU is not only inconsistent with the ordinary meaning of the terms of the provision, it is contradicted by the views of its own member States.

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

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

57. The drafting history of Article XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). Numerous statements by the drafters of the text that became Article XXI(b) confirm that negotiators intended for this provision to be self-judging by the acting Member, and that the appropriate remedy for such measures is a non-violation, nullification or impairment claim. The EU challenges the relevance of these statements in the negotiating history of Article XXI(b). The complainant's arguments

fail because the interpretive value of the negotiating history of Article XXI is not diminished merely because negotiations took place in 1947. On the contrary, the text of Article XXI was retained – unchanged and in its entirety – when incorporated into the GATT 1994; moreover, statements by the original negotiators of Article XXI were publicly available for *decades* before the Uruguay Round negotiators made the specific decision to retain Article XXI in the GATT 1994.

58. Furthermore, with knowledge of the statements by the original negotiators of the terms of Article XXI, Uruguay Round negotiators also decided to incorporate security exceptions with the same self-judging terms in GATS and TRIPS. That is, in addition to retaining this language in the GATT 1994, all of which remained unchanged, Uruguay Round negotiators also chose to retain the original GATT 1947 language in new covered agreements, the language of which was drafted at that time. Had Uruguay Round negotiators disagreed with their predecessors regarding the proper interpretation of this language, it seems surprising that they would have repeated that language verbatim in two other agreements concluded during that round. In addition, Uruguay Round negotiators of the DSU also discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable.

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

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

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

61. Reconciling the texts leads to the interpretation that all of the subparagraphs modify the terms "any action which it considers" in the chapeau, because this reading is consistent with the Spanish text, and also – while less in line with rules of grammar and conventions – permitted by the English and French texts. This reading of the text of the subparagraphs does not alter the

plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase "which it considers" still modifies the entirety of the chapeau and the subparagraph endings. Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances to the judgment of that Member alone.

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

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

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

64. That invocation is a precondition for a Member's exercise of its right to take action under Article XIX and to the consequent application of safeguards rules to that action is also confirmed by the Working Party's report in *US – Fur Felt Hats*. As the Working Party explained, the notification requirement of Article XIX is one of the "conditions" that qualifies the exercise "of the right to suspend an obligation or to withdraw or modify a concession" under Article XIX. Supplementary means of interpretation, including the drafting history of Article XIX of the GATT 1994, confirm that notice under Article XIX:2 is a fundamental, condition precedent to a Member's exercise of its right to take action under Article XIX and the application of safeguards disciplines. The predecessor to Article XIX included an invocation requirement as originally drafted. Although removal of this requirement was discussed as the ITO and GATT 1947 negotiations proceeded, the drafters ultimately decided to retain it.

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

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

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

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

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

69. It is not correct to argue that the Panel must first determine whether the measures challenged breach the GATT 1994 or the Agreement on Safeguards before assessing the U.S. invocation of Article XXI. This is because Article XXI is a defense to claims under both the Agreement on Safeguards and the GATT 1994, and the United States has invoked Article XXI as

to *all* aspects of *all* the measures challenged. Thus, if the Panel determines that Article XXI(b) is self-judging, consistent with the text, or that Article XXI in any event applies under another interpretation, there would be no need to review any of the complainant's claims.

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

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

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

71. The ordinary meaning of the phrase "other emergency in international relations" in Article XXI(b)(iii) is broad. An "other emergency in international relations" can be understood as referring to a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.

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

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

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

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

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

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

75. And, of course, a Member may justify what might otherwise constitute WTO-inconsistent behavior if it satisfies the requirements of any general exceptions (under Article XX) or security exceptions (under Article XXI). This is the case here, for example, where the United States has taken its action pursuant to Article XXI for the protection of its essential security interests. But because each of these bases exist for a Member to justify a deviation from its obligations, any such deviation would not be supported by *all* of them. Rather, only one basis is needed.

76. Complainant has argued that the United States has not availed itself of its Article XXI rights, but instead has imposed a safeguard duty under Article XIX. As far as the United States is aware, never before in WTO dispute settlement has a complainant attempted to impose on a respondent its defense. For while complainant argues that the Agreement on Safeguards is not a defense but a set of obligations, there is no question that Article XIX and the Agreement on Safeguards set out obligations that must be met *in the event a Member wishes to deviate from its tariff obligations*. Were it permissible to impose any duty a Member wished, none of us would be here as no rights or obligations would be at stake.

77. So, the United States has imposed duties on certain steel and aluminum products on a non-MFN basis and in excess of the levels set out in its WTO Goods Schedule. It has done so to counter the effects of imports of these products on its own domestic industry. Complainants suggest these facts are sufficient for the Panel to find that, notwithstanding the intention, statements or actions of the United States, the duties constitute a safeguard, but a safeguard not complying with the requirements of Article XIX or the Agreement on Safeguards because, among other things, the affected products were not being imported into the United States in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

78. The United States does not contend that its measures were applied consistent with the Agreement on Safeguards. The measures were applied pursuant to Article XXI and not Article XIX. Nor does the United States contend that the duties were applied consistently with the AD Agreement or the SCM Agreement. But complainant does not suggest that the Panel make findings of inconsistency under these other articles. Why the Agreement on Safeguards – but not

the AD or SCM Agreement, or Article XX? We know the answer: "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.

79. Complainant has suggested that the United States is trying to act with impunity through its arguments in this dispute. Such arguments misstate the underlying events, however, and only disguise the complainant's own self-serving motives in bringing this dispute. If the Panel were to adopt complainant's approach, any Member could effectively declare – unilaterally – that another Member's border measures were safeguard measures pursuant to Article XIX, simply by arguing that the duties comply with the Appellate Body's incomplete "constituent features." 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.

80. Complainant's approach leads to absurd results because it would permit almost any border measure – including as countermeasures under Article 22.2 of the DSU – to be deemed safeguard measures by other Members or a panel, and allow other Members to assert a right to rebalance. The absurdity of this result highlights the importance of the acting Member's identification or invocation of the legal basis for the deviation from its obligations. If no basis is proffered, then the Member simply breaches its obligations. In the case of countermeasures, the basis is a grant – upon request – of legal authority to suspend concessions from the DSB. And in the case of Article XIX, that basis is the invocation of Article XIX through providing notice to Members and the meeting of certain conditions. As explained, Article XIX makes clear that invocation through notice is a fundamental, condition precedent for a Member's exercise of its right to take action under Article XIX and the application of safeguards rules to that action. 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.

81. Apart from this misconstruction of Article XIX, complainant's approach also risks serious consequences to the WTO. Having already imposed retaliatory duties in response to the U.S. measures, complainant does not pursue this dispute to attain additional rights to resolve the dispute – namely, the right to suspend concessions under DSU Article 22. Complainant has already suspended concessions to the United States under the guise of "rebalancing," and its only objective in this dispute is to have the Panel pronounce on the validity of the U.S. security measures. To take a step back, the measures challenged are on steel and aluminum (key sources for military vehicles, weapons, and systems for critical national infrastructure) that the United States has taken for national security purposes. The complainant urges the Panel to review these security measures and conclude that the United States could not have considered them necessary for the protection of its essential security interests and taken in time of "war or other emergency

in international relations." The complainant urges the Panel to conclude that security measures cannot have the goal or the effect of protecting an industry, even an industry that is vital to our national security and whose decline threatens to impair our national security. Although complainant purports to appeal to your common sense, complainant's approach is not only inconsistent with the text of Articles XIX and XXI, but also defies common sense. Adopting complainant's approach would lead to the proliferation of disputes, such as this one, which ask WTO panels to adjudicate the types of security actions that have always been taken, but which have not previously been subject to WTO disputes. The WTO was created with a focus on economic and trade issues, and not to seek to resolve sensitive issues of national security and foreign policy which are fundamental to a sovereign State's rights and responsibilities. Such dispute settlement actions are not necessary, not productive, and only diminish the WTO's credibility.

82. The United States is well aware of its WTO obligations, including its right to impose a safeguard duty and how to provide the requisite notice and opportunity for consultation. Similarly, the United States has imposed numerous antidumping and countervailing duties all pursuant to the rights provided under Article VI and the AD and SCM Agreements. As the United States has made clear, however, the measures at issue are not safeguard measures (or AD or CVD measures), but are security measures taken pursuant to Article XXI. The United States has acknowledged the consequences of invoking Article XXI, including that other Members may take reciprocal actions or seek other actions under the DSU, including a non-violation claim. These consequences provide recourse to affected Members, but without adjudicating essential security issues in dispute settlement. This approach properly respects the balance of rights and obligations agreed to by the Members, and reflects the text of Article XIX and Article XXI(b) as interpreted in accordance with the customary rules. Consistent with the text of Article XXI and the Panel's terms of reference under DSU Article 7.1, and past GATT practice, the Panel should decline complainant's invitation to make findings where none would assist the parties in the settlement of their dispute.

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

83. The United States has described numerous other WTO provisions that – like Article XIX – contemplate a Member exercising a right through invocation and that contain structural features that are similar to Article XIX. In response, the EU attempted to diminish the interpretive value of these provisions by suggesting that antidumping- and subsidy-related provisions actually provide a better or closer analogy to Article XIX and the Agreement on Safeguards, than do the WTO agreement provisions listed by the United States. The EU's argument fails, however, because all of these provisions (antidumping, subsidies, modification of schedules, governmental assistance to economic development, etc.) relate to tariffs; these provisions are all bases on which a member can rely to deviate from its obligations and impose tariffs above its bindings or not on an MFN basis. That antidumping- and subsidy-related provisions may operate in a different manner than safeguards provisions does not mean safeguards provisions (or provisions on modification of schedules, special safeguards, or other provisions) cannot operate as they do, according to the ordinary meaning of the terms that govern each provision.

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

84. Under Article 11.1(c), the Agreement on Safeguards "does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX." Here, the United States has attempted to take – and succeeded in taking – the measures at issue in accordance with Article XXI; accordingly the Agreement on Safeguards "does not apply." This result is consistent with Article 11.1(a). The United States is not seeking or taking action "as set forth in Article XIX"; therefore, the action need not conform with the provisions of Article XIX applied in accordance with the Agreement on Safeguards.

85. According to the EU, "there is no provision of the GATT 1994 'pursuant to' which the measures at issue have been taken 'other than' Article XIX." The EU's argument ignores the potential overlap in the scope of measures covered by both the Agreement on Safeguards and Article XXI, and that a Member could take any number of actions in response to what it might consider economic emergencies. Whether the Agreement on Safeguards, Article XXI, or another provision applies will depend on the legal basis pursuant to which the Member takes the action. The EU attempts to mislead the Panel by suggesting that "[u]nder the US' definition, the circumstances enabling the imposition of a safeguard would always amount to an 'emergency in international relations'". A Member may invoke Article XXI with respect to an economic emergency for which it considers an action necessary for the protection of its essential security interests. But many Members have imposed safeguard measures in circumstances they do not consider to implicate their essential security interests. 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 called "emergency action" under a number of provisions, including Article XXI. Article 11.1(a) does not limit a Member's choice of action. As provided in Article 11.1(c), when a Member has "sought, taken or maintained" actions pursuant to provisions of the GATT 1994 or the WTO Agreement other than Article XIX, the Agreement on Safeguards – including Article 11.1(a) – "does not apply".

86. The EU also misconstrues the measures at issue when it suggests that "measures taken *pursuant to both* Article XIX and some other provision are within the scope of the Agreement on Safeguards, because they are not taken pursuant to provisions "other than" Article XIX." The measures at issue were taken pursuant to Article XXI, and not pursuant to Article XIX. Moreover, the Panel may wonder whether the EU's incorrect assertion amounts to a concession by the EU that the two constituent features set out by the Appellate Body are not sufficient to establish the existence of a safeguard measure. In addition, the EU changes its view of the phrase "sought, taken, or maintained pursuant to" depending on its arguments. The EU argues that the measures at issue cannot be "sought, taken or maintained" pursuant to Article XXI because they are not consistent with Article XXI (a proposition the United States disputes). At the same time, the EU argues the measures at issue *are* "sought, taken or maintained pursuant to Article XIX" even though the EU also argues that the measures are *not* "consistent with" Article XIX. The EU cannot have it both ways. The ordinary meaning of the terms in Article 11.1(c) can be understood as measures that a Member has tried or attempted to do, succeeded in doing, or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX. The French and Spanish texts of the Agreement on Safeguards support this understanding.

87. A number of different measures might involve features of a safeguard measure, or be said to have what some might call a safeguard objective. If the Member has not chosen to act under Article XIX, any safeguard objective the measure might be thought to have does not have independent relevance to the rights and obligations implicated by that measure. The negotiators of the Agreement on Safeguards shared this understanding.

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

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

89. In its response, the EU acknowledged that suspension, withdrawal, and modification under Article XIX should be separate from whether a product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers. The EU effectively collapsed these issues, however, when it asserted that suspension, modification, and withdrawal should be read in the context of whether a measure is designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports. This reading would effectively remove the words suspend, modify, and withdraw from Article XIX and negate what the EU itself argues is one of the two "constituent features" of a safeguard measure.]

90. A measure does not itself suspend an obligation or withdraw or modify a concession; instead, a Member must claim an obligation is suspended (or a concession is withdrawn or modified) to justify taking particular action. If the Member does not make such a claim, the Member would simply breach another commitment (e.g., Article II), unless it has another basis to take the action. In relation to the measures at issue, the United States has explicitly and repeatedly invoked GATT 1994 Article XXI. 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.

E. The Complainant's Arguments Regarding Article 11.1(b) Are Unavailing

91. The complainant has criticized the U.S. response related to Article 11.1(b). To be clear – if the United States did *not* have a justification under Article XXI for the measures at issue, the measures at issue – for example quotas imposed in connection with country exemptions – would breach certain WTO obligations, including Article XI:1. The United States acknowledges that, as a factual matter, the measures at issue include quotas imposed by mutual agreement. The United States does not contend, however, that the measures at issue include "[a]n import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and [the Agreement on Safeguards]." Because the United States has not taken the measures pursuant to the Agreement on Safeguards, per Article 11.1(c), Article 11.1(b) simply doesn't apply to the

measures at issue because the United States has taken those measures pursuant to another GATT 1994 provision.

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

92. The EU argues that Article 6.2 of the DSU only obligates the complainant to identify the specific measures at issue and that it does not obligate a complainant to identify all elements or components of its measure in its panel request. Article 6.2 obligates a complaining Member to establish the identity of the precise or exact measures which it alleges affect the operation of any covered agreement. If the measure a complainant seeks to challenge is not set out in a single legal instrument but consists of multiple elements or components, then identifying the precise scope and content of the measure requires a description of the measure and the various elements or components which the complainant considers to comprise the measure it challenges. In this way, the composite measure the EU seeks to challenge is similar to an unwritten measure.

93. The EU also argues that the Panel can address only "fundamental" issues concerning its terms of reference on its own. The EU's argument is a fabrication based on a misrepresentation of a single word used in an Appellate Body report. Nothing in the text of Article 6.2 supports the proposition that a panel may grant itself authority to hear claims not identified in a panel request so long as the defects of the panel request are only non-fundamental. The EU also makes much of the fact that it perceives no prejudice to the respondent. However, prejudice to the respondent, or the complainant's perception of the lack thereof, has no bearing on whether the complainant has satisfied the requirements of Article 6.2, and what "matter" is before the Panel under Article 7.1. Lastly, the EU's argument that it had specifically identified the product exclusion process in its panel request by including the term "certain" before steel and aluminum products is unavailing. The EU's references to "certain" steel and aluminum products merely reflect the language used in the proclamations, and the fact the Section 232 duties were imposed on a subgroup of steel and aluminum products. And even if the EU's references to "certain" steel and aluminum products were intended to refer to the product exclusion process, such general references would not be sufficient to satisfy the requirements of Article 6.2.

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

94. 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. The United States also specifically pointed to the circumstances described in Article XXI(b)(iii) in its opening statement for the first substantive meeting of the panel with the parties. Any suggestion that there was a delay in invoking Article XXI(b)(iii) and providing relevant evidence is without merit.

95. 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 set out in Article XXI(b)(iii); and the Panel should find that this extensive information certainly meets any requirement of "good faith".

96. The EU continues to urge this Panel to take the same approach as the panel in *Russia – Traffic in Transit*. The EU also urges the Panel to find that the United States has failed to satisfy its "burden of proof" . And so, the EU tries to have it both ways – both advocating for the Panel *to follow* the *Russia – Traffic in Transit* panel's approach to interpretation, and advocating for the Panel *not to follow* the *Russia – Traffic in Transit* panel's approach to evaluating Russia's invocation. The United States recalls that Russia invoked Article XXI but did not affirmatively set out the evidentiary basis for its invocation of Article XXI(b)(iii). Nonetheless, the panel examined the evidence and found a sufficient basis to substantiate the essential security exception. If the Panel were to follow the *Russia – Traffic in Transit* panel's approach, it *would review any evidence* on the record and relevant to the U.S. invocation. But, in fact, the United States has put forward *far more* evidence and argumentation than did Russia in support of its own invocation. Under the EU's view that an invocation of Article XXI is reviewable, the Panel would need to examine that evidence to fulfill its function under DSU Article 11.

97. The EU argues that the United States could not have taken the challenged measures for the protection of its essential security interests, pointing to the two-page memorandum from the U.S. Secretary of Defense to the U.S. Secretary of Commerce. However, the communication of the U.S. Department of Defense represents just one piece of information that the U.S. Secretary of Commerce and the President considered. Furthermore, the Secretary of Defense's statement regarding the "national defense requirements" did not address other national security needs. Finally, the Secretary of Defense concurred with the Secretary of Commerce's conclusion that "imports of foreign steel and aluminum…impair the national security."

98. The record clearly supports that the United States considered the measures in question necessary for the protection of its essential security interests, and considered that there existed at that time an emergency in international relations. First, in 2017, it emerged that global efforts to address the crises would be insufficient. Second, in 2017, steel imports in the United States rapidly increased while global excess capacity continued to increase. Therefore, what the DOC steel report conveys is that the United States was at a crucial point—that without immediate action, the steel industry could suffer damages that may be difficult to reverse and reach a point where it cannot maintain or increase production to address national emergencies. This conclusion is also supported by statements at the G20 Global Steel Forum on Steel Excess Capacity.

99. The EU itself 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." Then-EU Trade Commissioner Cecilia Malmström made similar observations in her 2016 speech at the OECD High-Level Symposium on Steel. 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."

100. 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.

101. Equally baseless is the EU's claim that the "standard of proof" in the WTO is a balance of probability and, therefore, the panel must determine based on the evidence submitted whether it is more plausible that the challenged measures are safeguard measures or security measures. The DSU also does not alter the text of Article XXI or XIX, as the EU has done in its response. Under Article XIX, the question is whether the acting Member has invoked the right to take a safeguard action through notification to Members, and whether it has satisfied the conditions for taking such action. Under Article XXI, the question is whether the invoking Member (not the complainant or the panel) "considers" the action necessary for the protection of its essential security interests in the circumstances set forth.

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

A. Complainant's Arguments Would Effectively Remove Article 11.1(c) from the Agreement on Safeguards

102. The EU challenged the U.S. interpretation of Article 11.1(c) and Article XIX and asserted generally that Members were "fed up of grey area measures" when they drafted the Agreement on Safeguards, and "want[ed] to make sure [they] swe[pt] everything under the Agreement on Safeguards." The EU pointed to Article 11.1(b) and the recitals of the Agreement on Safeguards to support its assertions, and asked "how could it possibly be that the applicability of [the Agreement on Safeguards] depended upon the defendants' agreement, invocation?" The EU's arguments come to nothing. Article XIX establishes a Member's right (but not obligation) under certain conditions to deviate from its WTO obligations and apply a safeguard measure. A key condition precedent to the exercise of that right is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult. Without satisfying that condition precedent, the Member may not rely on Article XIX as a release from the "control" of its WTO obligations. The United States has *not* invoked Article XIX as the legal basis for the measures at issue; instead, the United States has invoked Article XXI. Accordingly, the measures at issue are not safeguards measures, and the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply. This result is confirmed by Article 11.1(c).

103. The EU is not correct when it suggests that the Agreement on Safeguards would be "meaningless" if the right to take a safeguards measure depends on a Member's invocation. Article 11.1(c) provides that the Agreement on Safeguards – including Article 11.1(b) – does not apply to a measure sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX. By contrast, a measure that was *not* sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX *could* breach Article 11.1(b). This interpretation of Article 11.1(b) and Article 11.1(c) is supported by the ordinary meaning of these provisions, as well as their negotiating history. This interpretation is also consistent with a 1987 Background Note by the GATT Secretariat.

B. Complainant Ignores the Potential Overlap Between Measures Potentially Covered by the Agreement on Safeguards and Article XXI

104. The EU claimed that the United States is "redefin[ing] essential security as meaning economic security." The EU is wrong. The term "security" is broad and could encompass what one might describe as "economic security." Nothing in Article XXI(b) would prevent a Member from considering interests of this type to be "essential". And where a Member does so consider, those interests would be "essential security interests" under Article XXI(b). Consistent with this understanding of what may constitute "essential security interests" under Article XXI(b), a number of WTO Members appear to include economic considerations in their own assessment of their security interests for purposes of domestic law and policy, and do not strictly separate what might be regarded as "economic security" from other "types" of security.

105. Therefore, the EU also errs in arguing that, in order to prevail, the "US would have to persuade you that these measures are exclusively, purely security measures." To the extent that the EU is arguing that, if a measure can be construed both as an essential security measure and a measure that falls under another discipline, that measure cannot qualify as an Article XXI measure, its argument is directly contrary to the Article XXI language "Nothing in this Agreement shall be construed to prevent...". To the extent the EU is arguing that the measures at issue must comply with *both* Article XXI *and* the safeguards disciplines, this argument also fails. It is nonsensical to suggest that an essential security action taken under Article XXI could – despite the text of that provision – be subject to all the procedural and substantive requirements set forth in Article XIX and the Agreement on Safeguards. As the EU itself has proposed this the logical conclusion to its "exclusively, purely security" understanding of Article XXI, it provides another basis for the Panel to reject the EU's erroneous interpretation. The circumstances in which a Member might invoke Article XXI could overlap with those described in Article XIX and the Agreement on Safeguards. A Member may invoke Article XXI with respect to an economic emergency for which it considers an action necessary for the protection of its essential security interests. But many Members, the United States and the EU included, have imposed safeguard measures in circumstances of economic emergencies they do not consider to implicate their essential security interests. In such cases, the obligations of Article XIX and the Agreement on Safeguards would remain.

106. The EU's argument is also inconsistent with Article 11.1(c). There is potential overlap in the scope of measures covered by both the Agreement on Safeguards and Article XXI, and a Member could take any number of actions in response to what it might consider economic emergencies, such as raising its ordinary customs duty. Though there may be overlap in the scope of *measures,* there is not an overlap in *disciplines* in the context presented in this dispute, however, because the ordinary meaning of Article 11.1(c) precludes the cumulative application of the Agreement on Safeguards and Article XXI where the measure at issue has been sought, taken, or maintained under the latter provision. Contrary to the EU's additional arguments, such an "exclusively, purely" test is not required for the general exceptions under Article XX. In no panel or Appellate Body report has an adjudicator first assessed the applicability of some other exception or justification not invoked by the responding Member. Nor has a panel or the Appellate Body assessed with respect to a particular subparagraph of Article XX whether some other objective for the measure also exists in determining whether a measure has the objective identified in the relevant subparagraph.

C. Complainant's Arguments Regarding Other WTO Provisions Are Unavailing

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

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

108. 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. The role of a WTO dispute settlement panel 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. 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". That assessment is one of conformity with the covered agreements – not prior reports adopted by the DSB. 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". 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 do not assign any interpretive role to dispute settlement reports.

109. Furthermore, to date, *Russia – Traffic in Transit* panel remains the only panel (out of four recent disputes) to have interpreted essential security exceptions. However, the panel in *Russia – Traffic in Transit* made numerous errors in its analysis of Article XXI. 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. That report does not provide any additional relevant insight with respect to the interpretation of Article XXI. 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 EU in *Russia – Pigs (21.5)*. 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.

A. 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)

110. The EU 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. However, the United States has from the outset of this dispute supplied equivalent information in relation to the measures relating to aluminum – including the assessments and findings in the DOC aluminum report that support the U.S. consideration of the existence of an "emergency in international relations" when the challenged measures were taken. The DOC aluminum report conveys that, as with steel, the United States was at a crucial point—without immediate action, the aluminum industry could continue to suffer irreversible damages and not be able to maintain or increase production to address national emergencies.

B. 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

111. 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," but this assertion is refuted by explicit statements of the negotiators. A distinction between breach claims and non-violation claims was introduced by Australia in June 1947. 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*." Australia's proposal was revised and incorporated into a draft of the GATT 1947 on July 24, 1947. 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 Member considers necessary for the protection of its essential security interests. Australia's statements in proposing the distinction between breach claims and non-violation claims are consistent with these other statements.

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

112. The EU misperceives both the U.S. arguments and the proper role of a WTO panel when it contends that "the qualification of a measure as a safeguard [is] entirely objective". When considering alleged breaches of affirmative obligations, a panel may determine whether a measure falls within the scope of measures that are subject to the obligations claimed to have been breached. When a Member wishes to *deviate* from its WTO obligations, 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.

113. The EU suggests – incorrectly – that "[t]he United States attempts to cast aspersions on the European Union's right to rebalance." 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. 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." 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.

114. 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. 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 – the Member would simply be in breach of its underlying obligations if the duties imposed were above the Member's bound rates. The EU's arguments regarding Article 6 of the Agreement on Textiles and Clothing also fail. The EU criticizes the United States for suggesting that each WTO provision should be interpreted based on its terms. The EU then appears to suggest that the Panel should interpret Article XIX based on the AD and SCM Agreements. 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. 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."

115. The EU 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'". "Furthermore" in Article 11.1(b) indicates that this provision simply continues the disciplines in Article 11.1(a). These provisions seek to ensure that safeguard measures adopt certain forms (and not others), are taken pursuant to specified procedures, and satisfy certain conditions. 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. 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.