UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS548)

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

January 27, 2021

Mr. Chairperson, Members of the Panel:

1. The United States once again thanks you, and the Secretariat staff assisting you, for your ongoing work in this dispute. In this statement we provide closing remarks as well as comments on the complainant's responses to the Panel's questions during the first day of this meeting.

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

2. You have heard the parties' arguments at length. Now let us put into perspective the matter before the Panel. The border measures at issue are not new or mysterious; they are customs duties – tariffs – and quotas. 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).

3. 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.

4. 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.

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

6. Complainant has argued that the United States has not availed itself of its Article XXI rights, but instead has imposed a safeguard duty under Article XIX. Accordingly, complainant asks the Panel to review the measures' consistency with that article and with the Agreement on Safeguards, and to find that the United States has failed to comply with its requirements. As far as the United States is aware, never before in WTO dispute settlement – nor perhaps any other proceeding – 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.

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

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

9. Complainant does not argue, for example, that the steel and aluminum duties are antidumping duties that fail to meet the requirements of Article VI. Nor does the complainant argue that the duties are countervailing duties. As complainant charges, the United States has breached Article XIX and the Agreement on Safeguards, just as presumably it would agree that the United States breached the AD or SCM Agreements in imposing the duties at issue.

10. 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.

11. 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.

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

13. The Appellate Body's findings mimic the language of Article XIX and the Agreement on Safeguards, which makes sense, as they were addressing a situation in which a Member *had* claimed to take a safeguard measure. But according to complainant's arguments, the test can be satisfied by showing that respondent's measure: (1) breaches one of its GATT concessions, and (2) is designed to prevent or remedy injury to the Member's domestic industry. Complainant is

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

not arguing that the U.S. measure is a safeguard because the injury to the domestic industry is in fact serious, or that it is in fact caused or threatened by increased imports. Rather, it is the complainant itself that is attributing this "design" to the U.S. measure.

14. 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.[2]

15. The EU suggests that countermeasures could be distinguished from safeguard measures under Article XIX because "[t]he objective of countermeasures is not to protect the domestic industry from an increase in "fairly" traded imports, but to induce compliance with the relevant DSB recommendations and rulings."[3] Later, the EU acknowledged that "countermeasures *may* in practice be used by the imposing Member to protect a domestic industry," but then – without explanation – appears to discount this possibility with the irrelevant assertion that "[a] countermeasure would still be a countermeasure even if it is completely divorced from the protection of a domestic industry."[4]

16. The EU's argument ignores, however, that the same action may be regarded differently by different Members, or by a WTO panel. In the EU's words, one Member may regard certain action as inducing compliance with DSB recommendations and rulings, while another Member (or a panel) regards the same action as protecting the domestic industry from an increase in 'fairly' traded imports. It also ignores the probability that countermeasures would in fact be imposed for both such purposes, as a complaining Member may – and likely would – seek compliance with WTO findings in order to prevent or remedy injury to a domestic industry. Indeed, the EU itself acknowledges this possibility when it states that "countermeasures *may* in practice be used by the imposing Member to protect a domestic industry."[5]

17. The disingenuousness of the EU position becomes clear when considering its additional arguments under Article 11.1(c) that a measure can be both a safeguard and a security measure, as elaborated further below in the context of Article 11.1(c).

18. 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

---

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

[3] EU's Response to the Panel's Question 5, para. 61.

[4] EU's Second Written Submission, para. 69.

[5] EU's Second Written Submission, para. 69 ("Moreover, while countermeasures *may* in practice be used by the imposing Member to protect a domestic industry, their objective is not to protect domestic industries, but to induce compliance.").

right to take action under Article XIX and the application of safeguards rules to that action.[6] This interpretation is clear from the ordinary meaning of the text of Article XIX, in its context, and is confirmed by the negotiating history of both Article XIX and the Agreement on Safeguards.[7]

19. 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.

20. 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.

21. 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.

22. 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, as evidenced by its recent invocation of Article XIX with respect to solar products, large residential washers, and blueberries. Similarly, the United States has imposed numerous antidumping and countervailing duties – including on some of the same products at issue in these disputes – 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.

23. 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

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

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

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.

24. 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. Invocation through Notice is a Condition Precedent for a Member's Exercise of its Right to Take Action under Article XIX and for the Application of Safeguards Disciplines

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

25. As the Panel's Question 4 recognized, 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.[8]

26. 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.

27. By discussing these provisions, the United States does not argue that notification requirements are prerequisites in every instance. Rather, the United States observed the numerous provisions of the covered agreements that, like Article XIX, grant Members the right to take particular action when certain conditions are met – should the acting Member invoke its right to do so. Such provisions are relevant context demonstrating that granting Members the right to take particular action when certain conditions are met – should the acting Member invoke its right to do so – is an ordinary part of the WTO Agreement.

28. Of course, invocation is *not* required for other provisions of the covered agreements – but these provisions' existence does not change the requirements of Article XIX or of other provisions that *do* require invocation. In some provisions notification may serve as a procedural requirement, but the existence of such provisions does not change that notification under Article 12 relates to *both* the applicability of safeguard disciplines and the consistency of those measures with the safeguards disciplines. Each provision should be interpreted based on its own terms.

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

[8] *See* U.S. Second Written Submission, Section IV.A.2.

29. 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."

30. This result is consistent with Article 11.1(a), which provides "[a] Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement." The United States is not seeking or taking action "as set forth in Article XIX"; therefore, the action need not conform with the provisions of Article XIX applied in accordance with the Agreement on Safeguards.

31. The EU asserts – without support – that Article 11.1(c) is "entirely irrelevant in this dispute" because, 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."[9] The EU's argument ignores, however, 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, such as raising its ordinary customs duty.[10] 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.

32. 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'" and that, under the U.S. understanding "whenever anybody imposes a safeguard, there would be an emergency in international relations and Article XXI(b) could apply."[11] This is untrue. 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 European Union included, have imposed safeguard measures in circumstances they do not consider to implicate their essential security interests, and there is no reason to believe that the outcome of this dispute will lead to changes in such considerations.

33. 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) of the Agreement on Safeguards 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".

34. 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

[9] EU's Opening Statement, para. 38.

[10] *See* U.S. Response to the Panel's Question 74, paras. 325-345.

[11] EU's Opening Statement, para. 53.

Safeguards, because they are not taken pursuant to provisions "other than" Article XIX."[12] Contrary to the EU's assertions, the measures at issue were taken pursuant to Article XXI, and not pursuant to Article XIX, as the United States has repeatedly made clear.[13]

35. 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. If these two features *were* sufficient and the measures at issue *did* present them – two incorrect propositions by the EU – then the EU should conclude that the measures at issue are sought, taken, or maintained pursuant to Article XIX *only*.

36. 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.

37. 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 of Article 11.1(c), particularly the use of the words "*cherchera à prendre*" in French and "*trate de adopter*" in Spanish – both of which translate to try or attempt to do – for "sought."[14] The EU has suggested an understanding of this word that is limited to its temporal aspects only[15] – but the EU fails to explain how such an understanding is supported by the English, French, or Spanish texts.

38. Furthermore, it is illogical to suggest, as the EU does, that a measure is "sought, taken or maintained" pursuant to two provisions that each provides a right (but not an obligation) to deviate from WTO obligations. If a measure is sought, taken, or maintained pursuant to the exercise of a right under one provision, there is no reason for a Member to *also* seek, take, or maintain that measure pursuant to a right provided by another provision. The words "Nothing in this Agreement shall preclude" in Article XXI refers to Articles I, II, and XI of the GATT 1994 – meaning that there is no need for a Member to use Article XIX as a basis for its action under Article XXI. Conversely, if a Member has invoked Article XIX (and fulfilled the requirements

[12] *See* EU's Opening Statement, para. 40.

[13] See U.S. Response to the Panel's Question 5(b)-(d), paras. 13-21 (citing and discussing U.S. statements in the WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27 (US-80), WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27 (US-81), WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2 (US-82), U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018), at 3 (US-83), and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (US-84)).

[14] *See* U.S. Response to the Panel's Question 20, paras. 65-76.

[15] EU's Response to the Panel's Question 20, para. 137.

of Article XIX and the Agreement on Safeguards), that Member shall be free to suspend, modify, or withdraw, and there is no need for the Member to be free pursuant to Article XXI.

39. As explained above, a number of different measures might involve features of a safeguard measure, or be said to have what some might call a safeguard objective. For example, in the face of increased imports causing injury, a Member might increase its ordinary customs duty consistent with Article II of the GATT 1994; a Member might impose an antidumping or countervailing duty if dumping or subsidization is also present; or a Member might impose an SPS measure if the measure is also necessary to protect human, animal, or plant life or health. But if the Member has not chosen to act under Article XIX, any safeguard objective the measure might be thought to have does not have independent relevance to the rights and obligations implicated by that measure. The negotiators of the Agreement on Safeguards shared this understanding, as they distinguished the work of the Committee on Safeguards from the "several articles and provisions of a safeguard nature," including Article XXI in the GATT 1947 (now the GATT 1994).[16]

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

40. In Question 3, 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

41. 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.]

42. Whether an obligation is suspended, withdrawn, or modified is an incidental legal characterization that attaches if a Member is seeking to take action pursuant to Article XIX and has complied with the conditions set forth in Article XIX and the Agreement on Safeguards. 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.

[16] *See* U.S. Response to the Panel's Question 81, paras. 364-368; Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987), at 1 (US-167); Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168).

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

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

44. The complainant has criticized the U.S. response to the Panel's Question 7, 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 of the GATT 1994. 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]."[17] 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.

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

45. In response to the Panel's Questions 1 and 2, 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. In the EU's view, the fact that it had identified steel and aluminum measures is sufficient to satisfy the requirements.

46. As the United States explained, the requirement in Article 6.2 to "identify the specific measures at issue" 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. The EU has chosen to challenge as a single measure aspects of multiple U.S. actions reflected in multiple legal instruments. Having done so, the burden is on the EU to identify which actions and instruments form part of the "measure" it has identified and chosen to challenge.

[17] Agreement on Safeguards, Art. 11.1(b), footnote 3.

47. This understanding is consistent with the text of Article 6.2, particularly the inclusion of the word "specific" before "measures at issue," establishing a specificity requirement. This requirement ensures that the responding Member and potential third parties are provided clear notification of the specific measures at issue, as it is not for the responding Member, or the panel, to have to guess the scope and content of the measures at issue. The Panel cannot allow the EU to circumvent the requirements of Article 6.2 by defining its measures as including multiple components and then not specifically identifying those components.

48. The EU also argues that the Panel can address only "fundamental" issues concerning its terms of reference on its own and that a complainant's failure to identify certain components of a measure in its panel request would not constitute a "fundamental" issue. 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; or, to put it another way, that some breaches of Article 6.2 count and others do not. Nor does the Appellate Body report cited by the complainant supports the assertion that some distinction exists between fundamental and non-fundamental terms of reference issues.

49. 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. In fact, the Appellate Body report cited by the complainant supports this point in finding that "[t]he due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction. The principal task of the adjudicator is therefore to assess what the panel's terms of reference encompass, and whether a particular measure or claim falls within the panel's remit."[18] The EU cannot fail to identify a key component of the measures at issue in its panel request and now claim that such a failure is not prejudicial to the respondent's due process rights.

50. 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. In the proclamations, the President imposed Section 232 duties on steel and aluminum articles that fall under certain categories under the Harmonized Tariff Schedule of the United States.[19] 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.[20] 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.

---

[18] *EC – Large Civil Aircraft (AB)*, para. 640.

[19] Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US10).

[20] Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US10).

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

51. As the United States has explained in response to the Panel's Question 5(a) and in its prior submissions, the text of Article XXI(b) does not require the Member exercising its right under Article XXI(b) to identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant.[21] The text only requires that a Member consider a measure necessary for the protection of its essential security interests – and does not require notification in writing as in Article XIX. Neither is there any text in Article XXI(b) that imposes a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked.[22]

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

53. However, even on the complainant's understanding of Article XXI(b) as *not* self-judging, the United States as the Member invoking Article XXI(b) has chosen to make information available to other Members that would satisfy the complaining party's approach. From the beginning of the proceedings, the United States has submitted as exhibits the U.S. Department of Commerce reports, in which the U.S. Secretary of Commerce found that steel and aluminum articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.[23] 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.[24] Any suggestion that there was a delay in invoking Article XXI(b)(iii) and providing relevant evidence is without merit. The record before the Panel demonstrates that the United States considers the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations."

54. 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

[21] *See* U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 54; U.S. Second Written Submission, Section II.B.

[22] *See* U.S. Response to the Panel's Question 38, paras. 144-147.

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

[24] U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 56.

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".

55. In its opening statement, the EU continues to urge this Panel to take the same approach as the panel in *Russia – Traffic in Transit*, which found Article XXI(b) to be subject to review.[25] The EU also urges the Panel to find that the United States has failed to satisfy its "burden of proof," even alleging that the United States has "a secret wish the Panel will make the case for the United States."[26] 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).[27] Nonetheless, the panel examined the evidence and found a sufficient basis to substantiate the essential security exception.[28] 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.

56. In its response to the Panel's Question 5(a), 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. The EU's argument comes to nothing.

57. As the United States has previously explained, the communication of the U.S. Department of Defense represents just one piece of information that the U.S. Secretary of Commerce considered in finding that the steel and aluminum imports threaten to impair the national security of the United States,[29] and just one piece of information that the President considered in deciding to take action based on the Secretary's findings. Furthermore, the Secretary of Defense's statement regarding the "national defense requirements" did not address

[25] EU's Opening Statement, paras. 41 & 52.

[26] EU's Opening Statement, paras. 50-51.

[27] *Russia – Traffic in Transit*, paras. 7.112-7.119 & 7.136-7.137.

[28] *Russia – Traffic in Transit*, paras. 7.122-7.125 & 7.136-7.137 & 7.140-7.148.

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

other national security needs, such as the needs of the U.S. critical infrastructure sectors, that the lengthy reports also addressed.[30] Finally, the Secretary of Defense concurred with the Secretary of Commerce's conclusion that "imports of foreign steel and aluminum…impair the national security."[31]

58. The EU also continues to define an "emergency in international relations" as "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state," advancing the flawed interpretation of "emergency in international relations" adopted by the panel in *Russia – Traffic in Transit*.[32] As the United States has explained, however, such a narrow interpretation is not consistent with the ordinary meaning of the terms of that provision.[33] Based on the ordinary meaning of the text, "emergency in international relations" can be understood as a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.[34]

59. 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. For example, with respect to whether an emergency related to steel excess capacity exists, the record reflects the following:

60. First, in 2017, it emerged that global efforts to address the crises would be insufficient. While the DOC steel report noted that the excess capacity crisis is a global problem that steel-producing nations have committed to "work together on possible solutions," the report observed the limits of the global efforts, including the work of the Global Forum on Steel Excess Capacity.[35] For instance, the report noted that the Global Forum report "provides helpful policy prescriptions, but it does not highlight the lack of true market reforms in the steel sector."[36] The DOC steel report also suggested that the adjustments proposed in the Global Forum report would

---

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

[31] Secretary of Defense, Memorandum for Secretary of Commerce, https://www.commerce.gov/sites/default/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf (Exhibit EU-14).

[32] EU's Opening Statement, para. 52.

[33] U.S. Opening Statement, para. 11.

[34] *See* U.S. Response to the Panel's Question 51, para. 233; U.S. Response to the Panel's Question 92(b), paras. 47-48.

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

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

not address the overcapacity crisis, and observed: "The setting of capacity reduction targets is not a long-term response to the crisis. Meaningful progress can only be achieved by removing subsidies and other forms of government support so that markets can function properly."[37]

61. Second, in 2017, steel imports in the United States rapidly increased while global excess capacity continued to increase. The steel report noted that "[i]n the first ten months of 2017 steel imports have increased at a double-digit rate over 2016."[38] The report cited to the OECD Steel Committee Chair's statement from March 2017: "New data suggest that nearly 40 million metric tons of gross capacity additions are currently underway and could come on stream during the three-year period of 2017-19, while an additional 53.6 million metric tons of capacity additions are in the planning stages for possible start-up during the same time period."[39]

62. 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.[40]

63. This conclusion is also supported by statements at the G20 Global Steel Forum on Steel Excess Capacity. The 2017 G20 Global Steel Forum Report observed, for example, that the situation of excess steelmaking capacity "has become particularly acute since 2015" and emphasized that "the steel industry will have to adjust in response to fundamental changes in

---

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

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

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

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

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

economic activity brought on by the 'next production revolution.'"[41] The report further stated that in 2016 the global surplus in steelmaking capacity was estimated to have reached "the highest level seen *in the history of the steel industry*" and that if announced capacity expansions until 2020 took place, this excess capacity would increase even further.[42] An industry facing "fundamental changes" brought on by a "production revolution" can certainly lead to unexpected developments, particularly when that industry is facing an "acute" situation of global excess capacity that is the highest in the industry's history.

64. 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."[43] Then-EU Trade Commissioner Cecilia Malmström made similar observations in her 2016 speech at the OECD High-Level Symposium on Steel. She noted that the EU had faced "a massive surge in imports" in recent years, stating that this surge had amounted to a 25% increase in 2015 alone.[44] She also remarked on the "scale of the emergency" and stated that "it's now life or death for many companies."[45]

65. 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."

66. Any allegation that the United States has not acted in good faith in invoking Article XXI(b) is also without merit. President Trump's decision to impose the challenged measures – in response to the Secretary of Commerce's findings that steel and aluminum imports threaten to impair the national security – is consistent with the actions of his predecessors and reflects the continuation of the U.S. national security policy. By 2017, the Departments of Commerce and Treasury had completed approximately 24 Section 232 investigations, including three investigations that address imports of steel articles and related products.[46] In 1982, DOC investigated the effect on the national security of imports of nuts, bolts and large screws of iron or steel under Section 232.[47] In 1983, DOC investigated the effect on the national security of

[41] G20 Global Steel Forum Report (Nov. 30, 2017), at 2, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt) (US-72).

[42] G20 Global Steel Forum Report (Nov. 30, 2017), at 4, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt) (emphasis added) (US-72).

[43] G20 Global Steel Forum Report (Nov. 30, 2017), at 39, https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt) (US-72).

[44] Commissioner for Trade Cecilia Malmström, OECD High-Level Symposium on Steel (Apr. 18, 2016), https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154458.pdf (US-71).

[45] Commissioner for Trade Cecilia Malmström, OECD High-Level Symposium on Steel (Apr. 18, 2016), https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154458.pdf (US-71).

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

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

imports of machine tools.[48] And in 2001, DOC investigated the effect on the national security of imports of iron ore and semi-finished steel articles.[49] As a result of one of these investigations – that involving machine tools – the Secretary concluded that the imports threatened to impair the national security, and the President entered into agreements with Japan and Taiwan to address exports from those countries.[50] Since the enactment of the Trade Expansion Act of 1962, steel and other metal articles have been the subject of numerous Section 232 investigations because of their importance to our national security. That the President also acted in this case after the Secretary concluded that the steel and aluminum imports in question threaten to impair the national security thus cannot be characterized as an action taken in bad faith.

67. 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. As the EU noted in its response to the Panel's Question 5(a), the DSU does not have special rules for Article XXI. However, 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.

68. Even under the EU's "standard of proof" approach, however, the question is not whether the challenged measures are more likely to be essential security measures or safeguard measures; instead, it is whether it is more likely than not that the invoking Member *considers* the challenged measures to be necessary for the protection of its essential security interests taken in time of war or other emergency in international relations. Therefore, the EU is also wrong to claim that, under the U.S. interpretation of Article XXI(b)(iii), circumstances enabling the imposition of a safeguard would always amount to an "emergency in international relations."[51] Under Article XXI, the determination of whether an emergency in international relations exists is left to the Member in question. If a Member considers a situation to warrant the taking of a measure for the protection of its essential security interests, it may take such a measure. If the Member does not consider the situation to impact its essential security interests, it must choose another basis for deviating from its WTO obligations. As described earlier, it is not the U.S. view but rather the EU's interpretation that leads to absurd results, as virtually any tariff measure taken in excess of a Member's bindings could be deemed a safeguard measure, permitting affected Members rights to immediate retaliation.

69. That the United States and the complainant may have different views of "essential security interests" and an "emergency in international relations" is unsurprising. After all, the United States and the complainant have different history and geopolitical interests and play

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

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

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

[51] EU's Opening Statement, para. 53.

different roles in the global politics and economy. This is precisely why it is not appropriate for the complainant nor this Panel to substitute its judgment for the judgment that Article XXI(b) reserved to the Member alone. This is also precisely why the drafters reserved to the invoking Member the determination of whether an action is necessary for the protection of its essential security interests in the relevant circumstances set forth in Article XXI(b). However, this does not mean there is no recourse for Members affected by essential security actions.

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

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