UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS552)

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

January 28, 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? For one, complainant argues that Article XXI does not apply to the Agreement on Safeguards. That argument fails for the reasons the United States has explained.[1] But given the logic of complainant's argument, the question remains why complainant raises its challenge under the Agreement on Safeguards only and not, for example, the AD and SCM Agreements as well. Therefore, the answer appears to be "rebalancing." While this complainant hasn't chosen to impose retaliatory duties of its own, almost all of its co-complainants have done so. Perhaps Norway merely seeks to support the actions of these co-complainants, or perhaps it is unsure whether such a novel approach is defensible and seeks cover from this Panel before taking such an action in the future.

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

[1] *See* U.S. Opening Statement at the First Substantive Meeting of the Panel, Section G.

to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product."[2]

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

14. 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.[3]

15. Norway 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 (or, indeed, from unfairly dumped or subsidised imports);" instead countermeasures "are designed to implement DSB-authorisation, with the objective of inducing compliance with DSB recommendations and rulings."[4] Norway's argument ignores, however, that the same action may be regarded differently by different Members, or by a WTO panel. In Norway's words, one Member may regard certain action as having the objective of protecting the domestic industry from an increase in fairly traded imports, while another Member (or a panel) regards that action as being designed to implement DSB-authorization with the objective of inducing compliance with DSB recommendations and rulings. 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.

16. The disingenuousness of Norway's 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).

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

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

[4] Norway's Response to the Panel's Question 5, para. 92.

right to take action under Article XIX and the application of safeguards rules to that action.[5] 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.[6]

18. Apart from this misconstruction of Article XIX, complainant's approach also risks serious consequences to the WTO. In arguing that a Member has authority to impose rebalancing duties in response to any duty a complainant deems designed to prevent or remedy injury, complainant does not pursue this dispute to obtain the right to suspend concessions under DSU Article 22. Norway contends that it already has that right under the guise of "rebalancing." Therefore, complainant's only objective in bringing this dispute can be to have the Panel pronounce on the validity of the U.S. security measures.

19. 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.

20. 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.

21. 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.

22. 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

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

[6] *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.

23. 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

24. As the Panel's Question 3 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.[7]

25. In response, Norway attempted to diminish the interpretive value of these provisions by manufacturing an artificial distinction between what Norway described as WTO provisions that relate to domestic-level actions and WTO provisions that relate to WTO-level actions. Without citing any basis in the text of the relevant provisions, Norway proceeded to suggest that notification under WTO provisions that relate to domestic-level actions serves only to ensure that other Members are aware of the domestic-level action, and cannot be a condition precedent to taking action under such provisions. Not surprisingly – since it fits Norway's self-serving argument in this dispute – Norway suggested that Article XIX is a WTO provision that relates only to domestic-level action, and for which notice can serve only to inform other Members that certain domestic-level action has been taken.

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

27. Article XXVIII also provides for both WTO-level and domestic-level actions. The structures of Article XXVIII and Article XIX are similar in that they both allow a Member to exercise a right – take a domestic action – after invoking the provision to propose to other Members that it might take such action.[8] Also like Article XIX, the proposed modification or

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

[8] *See* Article XXVIII:3(a) (authorizing a Member proposing to "modify or withdraw" a tariff concession to implement the proposed modification even if no agreement is reached between the importing Member and the affected Member); Article XIX:3(a) (allowing an importing Member proposing to take a safeguard measure to implement the proposed measure even if no agreement is reached between the importing Member and the affected Members).

withdrawal under Article XXVIII triggers a WTO process involving discussions between the invoking Member and certain other Members.[9]

28. The modification of a WTO legal right does not necessarily affect the treatment of imports at the domestic level, however, as the note Ad Article XXVIII reflects. Ad Article XXVIII provides, among other things, that Members "shall be informed immediately of all changes in national tariffs resulting from recourse to this Article" – distinguishing between "national tariffs" and a modification of schedules under Article XXVIII. Ad Article XXVIII also states that modifying or withdrawing a concession under Article XXVIII "means that . . . the legal obligation of such Member under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day."[10] In other words, a Member may modify or withdraw a concession under Article XXVIII, but the domestic-level change to the Member's customs tariff might be effective on a different date. In this way Article XXVIII, like other WTO provisions, relates to action at both the WTO-level and the domestic-level.

29. Similarly, "tak[ing] action" under Article XIX:2 occurs at both the WTO level and the domestic level. At the WTO level, there is suspension of an obligation, or withdrawal or modification of a concession, as explicitly referred to in Article XIX:1. At the domestic level, there is a tariff or quota. Put differently, in Article XIX, the word "action" refers to affecting a WTO legal right (explicitly, through references to suspending obligations, or modifying or withdrawing concession), but it also relates to the domestic action. This is suggested by Article XIX:1's reference to applying safeguard measures "to the extent and for such time as may be necessary to prevent or remedy such injury" – because it is the domestic-level tariff or quota, rather than any WTO-level action, that would prevent or remedy the injury from imported products. This conclusion is confirmed by Article 1 of the Agreement on Safeguards, which refers to "*measures provided for* in Article XIX"[11] – indicating that Article XIX refers to domestic measures in addition to suspension, withdrawal, or modification at the WTO level. As these references establish, Article XIX relates to both domestic-level action as well as WTO-level action.

30. With the discussion at Section IV.A.2 of its Second Written Submission, 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

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

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

[11] Emphasis added.

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.

31. 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

32. 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."

33. 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.

34. During the first day of this session, Norway made a number of incorrect statements regarding Article 11.1 of the Agreement on Safeguards. We will address only some of them today. For example, Norway misconstrued Article 11.1(a) and its relationship to Article 11.1(c) when it suggested that Article 11.1(c) "does not provide an exception for safeguard measures subject to [Article 11.1(a)]" because "[b]y definition, these measures are not taken pursuant to a group of GATT 'provisions … *other than* Article XIX.'"[12] Norway'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, such as raising its ordinary customs duty.[13] 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.

35. 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."

[12] Norway's Opening Statement, para. 22.

[13] *See* U.S. Response to the Panel's Question 74, paras. 322-342.

36. Norway also misconstrues the measures at issue when it suggests – incorrectly – that "their legal basis *includes* Article XIX and is, therefore, not drawn from the universe of GATT 'provisions' 'other than' Article XIX."[14] Contrary to this assertion, the measures at issue were taken pursuant to Article XXI, and not pursuant to Article XIX, as the United States has repeatedly made clear.[15]

37. Moreover, the Panel may wonder whether Norway's incorrect assertion that the "legal basis [for the measures at issue] *includes* Article XIX"[16] amounts to a concession by Norway 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 Norway – then Norway should conclude that the measures at issue are sought, taken, or maintained pursuant to Article XIX *only*.

38. In addition, Norway changes its view of the phrase "sought, taken, or maintained pursuant to" depending on its arguments. Norway 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, Norway argues the measures at issue *are* "sought, taken or maintained pursuant to Article XIX" even though Norway also argues that the measures are *not* "consistent with" Article XIX. Norway cannot have it both ways.

39. 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.[17] The French and Spanish texts of the Agreement on Safeguards support this understanding, particularly 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."[18] In response to the Panel's Question 4 at this virtual session, Norway suggested that the word "sought" in Article 11.1(c) cannot mean "try" – but Norway fails to explain how such an understanding is supported by the English, French, or Spanish texts. In fact, Norway has previously acknowledged that "[b]ased on the ordinary meaning of the terms,

[14] Norway's Opening Statement, para. 27.

[15] 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)).

[16] Norway's Opening Statement, para. 27.

[17] *See* U.S. Response to the Panel's Question 20, paras. 65-74.

[18] *See* U.S. Response to the Panel's Question 20, paras. 65-74.

therefore, a Member 'seeks' a measure, if it 'tries', or 'attempts', to adopt the measure."[19] Norway has not explained why it subsequently takes a different view.

40. Norway has also suggested that "for purposes of applying Article 11.1(c) in this dispute, Norway considers that the appropriate verbs are 'taken' and 'maintained'" because "[t]hese measures were not merely 'sought' to be taken by the United States," but rather actually taken and maintained.[20] But the text of Article 11.1(c) does not operate in the manner Norway suggests – if a measure is "sought, taken *or* maintained pursuant to" Article XXI, then the Agreement on Safeguards "does not apply."[21]

41. Furthermore, it is illogical to suggest, as Norway 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 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.

42. Norway has also suggested – without support – that its interpretation of Article 11.1 is "consistent with the principle of the cumulative application of WTO obligations" because "[i]n principle, a measure may be subject to the requirements of more than one provision of the GATT 1994 and, indeed, of the other covered agreements."[22] Norway's interpretation of Article 11.1 is not consistent with the text of that provision, however, and as the United States has explained, the ordinary meaning of Article 11.1(c) precludes the cumulative application of the Agreement on Safeguards and Article XXI of the GATT 1994 where the measure at issue has been sought, taken, or maintained under the latter provision.[23]

43. Norway's proffered interpretation of Article 11 is also inconsistent with Article XXI and its statement that "Nothing in this Agreement shall be construed to prevent…". The reference to "Nothing in this Agreement" includes Article XIX, and – as Article 11.1(c) confirms – Members did not restrict their rights to take action under other provisions of the GATT 1994 when they concluded the Agreement on Safeguards. And 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 the Agreement on Safeguards. Complainant's own interpretation of Article XXI doesn't come close to suggesting such a reading.

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[19] Norway's Response to the Panel's Question 20(a), paras. 194-195.

[20] Norway's Response to the Panel's Question 20(a), para. 198.

[21] Emphasis added.

[22] Norway's Response to the Panel's Question 20, para. 213.

[23] U.S. Response to the Panel's Question 74, paras. 322-325.

44. This is not to say that the circumstances in which a Member might invoke Article XXI could not 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 Norway 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.

45. 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).[24]

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

46. In Question 2, 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.

47. Norway reads too much into the terms "suspend" "modify" and "withdraw" in Article XIX:1(a) when it argues that these terms relate to both (1) whether a measure is "apt" to suspend, modify, or withdraw – a question Norway says goes to the applicability of the safeguards disciplines, and (2) whether a measure actually suspends, modifies, or withdraws – a question that Norway says goes to a measure's conformity with the safeguards disciplines. The text of XIX doesn't support Norway's arguments. A variety of tariff measures could be "apt" to suspend, modify, or withdraw within the meaning of Norway's manufactured approach – for example, any duty that exceeds the bound commitment levels of the acting Member.

48. 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

[24] *See* U.S. Response to the Panel's Question 81, paras. 361-365; 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).

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.

49. 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. Norway's assertions to the contrary are not correct.[25]

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

50. Norway has criticized the U.S. response to the Panel's Question 6, 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, those measures – 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]."[26] 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 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 4(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.[27] 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

[25] Norway is not correct when it asserts that the United States "does not contest that its measures possess" the two "constituent features" set out by the Appellate Body in *Indonesia – Iron or Steel Products*. Norway's Opening Statement, para. 7.

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

[27] *See* U.S. Second Written Submission, Section II.B; U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 48.

a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked.[28]

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.[29] 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.[30] 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 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, Norway states that "[a] Member invoking Article XXI(b) carries the burden to prove the elements of the defence in both the chapeau and, at least, one subparagraph. The only two panels to have adjudicated the security exception share Norway's view."[31] In support of that statement, Norway cites to the portion of the *Russia – Traffic in Transit* panel report that discusses the panel's conclusion that Article XXI(b) is subject to panel

[28] *See* U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 49; U.S. Response to the Panel's Question 38, paras. 142-145.

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

[30] U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 50.

[31] Norway's Opening Statement, para. 29.

review.[32] In addition, Norway cites to the portion of the *Saudi Arabia –Protection of IPRs* panel report in which that panel transposed the *Russia – Traffic in Transit* panel's analysis of Article XXI of the GATT to Article 73(b)(iii) of the TRIPS without further analysis.[33]

56. In its response to the Panel's Question 4(a), however, Norway also urges the Panel to conclude that the United States has not substantiated its defense, alleging that the United States has not established the applicability of Article XXI(b)(iii) and has not alleged its "essential security interests" with specificity. And so, Norway 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.

57. 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).[34] Nonetheless, the panel examined the evidence and found a sufficient basis to substantiate the essential security exception.[35] 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 Norway'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.

58. In its opening statement, Norway argues that, under Article XXI, "economic and political problems are not an 'emergency,' unless they give rise to 'defence and military interests, or maintenance of law and public order interests'".[36] In its response to the Panel's Question 4(a), Norway argues that the DOC reports only outlined an "economic problem," pointing to the two-page memorandum from the U.S. Secretary of Defense to the U.S. Secretary of Commerce. Norway's argument comes to nothing.

59. As the United States has previously explained, the communication of the U.S. Secretary of Defense represents just one piece of information that the Secretary of Commerce considered in finding that the steel and aluminum imports threaten to impair the national security of the

[32] Norway's Opening Statement, para. 29, n. 34 (citing *Russia – Traffic in Transit*, paras. 7.102-7.104).

[33] Norway's Opening Statement, para. 29, n. 34 (citing *Saudi Arabia – Protection of IPRs*, paras. 7.241-7.242). As the United States explained in response to the Panel's Question 93, the *Saudi Arabia – Protection of IPRs* panel's failure to interpret the text of the provision at issue and its decision to transpose the approach of a prior panel were not consistent with the DSU, and that panel report offers no additional relevant guidance to this Panel. *See* U.S. Response to Panel's Question 93, paras. 48-54.

[34] *See Russia – Traffic in Transit*, paras. 7.112-7.119 & 7.136-7.137. *See Russia – Traffic in Transit*, para. 7.136 ("While Russia *has not explicitly articulated the essential security interests* that it considers the measures at issue are necessary to protect, it did refer to certain characteristics of the 2014 emergency that concern the security of the Ukraine-Russia border.") (emphasis added). *See Russia – Traffic in Transit*, para. 7.137 ("Despite its allusiveness, Russia's articulation of its essential security interests is minimally satisfactory in these circumstances.").

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

[36] Norway's Opening Statement, para. 59.

United States,[37] and just one piece of information the President considered in deciding to take action based on the Secretary's findings. Furthermore, the Secretary of Defense's statement regarding the "national defense requirements" did not address other national security needs, such as the needs of the U.S. critical infrastructure sectors, that the lengthy reports also addressed.[38] Finally, the Secretary of Defense concurred with the Secretary of Commerce's conclusion that "imports of foreign steel and aluminum…impair the national security."[39]

60. In addition, Norway's narrow construction of an "emergency in international relations" – based on the flawed interpretation of the *Russia – Traffic in Transit* panel – is not consistent with the ordinary meaning of the terms of that provision.[40] As the United States has explained, based on the ordinary meaning of the text, "emergency in international relations" can be understood as a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.[41]

61. Further, while Norway argues, in response to the Panel's Question 4(a), that steel and aluminum excess capacity cannot constitute an emergency under the U.S. definition because the topic has been subject to international discussions for many years, the situation at issue did arise unexpectedly and remained an "emergency in international relations" when the measures were taken.[42] The confluence of events in 2017 made the emergency even more pressing to address for the United States. For example, with respect to whether an emergency related to steel excess capacity exists, the record reflects the following:

62. 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

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[37] 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).

[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, 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).

[39] 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 NOR-24).

[40] *See* U.S. Opening Statement, para. 11.

[41] U.S. Response to the Panel's Question 51, para. 231; U.S. Response to the Panel's Question 92(b), para. 46.

[42] *See also* Norway's Opening Statement, para. 58.

the limits of the global efforts, including the work of the Global Forum on Steel Excess Capacity.[43] For instance, the DOC steel 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."[44] The DOC steel report also suggested that the adjustments proposed in the Global Forum report would not address the overcapacity crisis, and observed: "The setting of capacity reduction targets is not a long-term response to the crisis. Meaningful progress can only be achieved by removing subsidies and other forms of government support so that markets can function properly."[45]

63. 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."[46] 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."[47]

64. Therefore, what the DOC steel report conveys is that the United States was at a crucial point—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.[48]

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[43] 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).

[44] 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).

[45] 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).

[46] 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).

[47] 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).

[48] 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

65. This conclusion is also supported by statements at the G20 Global Steel Forum on Steel Excess Capacity. The 2017 G20 Global Steel Forum Report observed, for example, that the situation of excess steelmaking capacity "has become particularly acute since 2015" and emphasized that "the steel industry will have to adjust in response to fundamental changes in economic activity brought on by the 'next production revolution.'"[49] 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.[50] 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.

66. Another Member affected by the crisis, the EU commented at the G20 Global Steel Forum on Steel Excess Capacity that "[g]lobal overcapacity has reached a tipping point—it is so significant that it poses an existential threat that the EU will not accept."[51] 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.[52] She also remarked on the "scale of the emergency" and stated that "it's now life or death for many companies."[53]

67. Thus, even under Norway'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."

68. 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

> 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.

[49] 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).

[50] 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).

[51] 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).

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

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

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.[54] 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.[55] In 1983, DOC investigated the effect on the national security of imports of machine tools.[56] And in 2001, DOC investigated the effect on the national security of imports of iron ore and semi-finished steel articles.[57] As a result of one of these investigations – that involving machine tools – the Secretary of Commerce 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.[58] 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 of Commerce 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.

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 different roles in the global politics and economy. This is precisely why it is not appropriate for the complainant or 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.

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[54] 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).

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

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

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

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

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