UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS552)

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

January 14, 2021

1. Mr. Chairman, and members of the Panel, on behalf of the U.S. delegation, I thank the Panel, and the Secretariat staff assisting you, for your work in this dispute.

2. These are difficult times, and ensuring both the safety of participants and the fairness of these proceedings is of paramount importance. As the United States has explained in previous communications, virtual meetings with the Panel present significant difficulties for the Parties in terms of effectively coordinating and presenting views, while ongoing health concerns related to the global pandemic prevent members of delegations from gathering in a single location. Therefore, the United States is disappointed that the Panel has determined to move forward with holding a virtual meeting in this dispute. We are particularly concerned that virtual sessions in this and four other of the *Certain Steel and Aluminum Products* disputes will occur this month, while proceedings in the remaining two disputes will remain postponed indefinitely. Per the complainant's request – the timetables in the *Certain Steel and Aluminum Products* disputes in which same three persons are serving as panelists were harmonized, and thus far the Panel's questions to the parties have been nearly identical. As a result, not only may this virtual session be of limited utility to the Panel because of the technical difficulties its format presents, but its occurrence could introduce an advantage to complainants in other proceedings. Given the Panel's decision to proceed in this manner, we urge the Panel to continue to be mindful of these issues as these virtual proceedings move forward so that any prejudice that may arise can be mitigated to the greatest extent possible.

3. At issue in this dispute is the sovereign right of a state to take action to protect its essential security in the manner it considers necessary. This right is fundamental and goes to the heart of the basic responsibilities of a government. WTO Members, including the United States,

did not relinquish this inherent right in joining the WTO. To the contrary, this right is reflected in Article XXI(b) of the GATT 1994.[1]

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

4. As the United States explained throughout these proceedings, Article XXI(b) is by its terms self-judging. Each WTO Member has the right to determine, for itself, what action it considers necessary to protect its own essential security interests. The self-judging nature of Article XXI(b) of GATT 1994 is established by the text of that provision, in its context, and in the light of the treaty's object and purpose.

5. Fundamentally, Article XXI(b) is about a Member taking an action "which it considers necessary". The relative clause that follows the word "action" describes the circumstances which the Member "considers" to be present when it takes such an "action". The clause begins with "which it considers necessary" and ends at the end of each subparagraph ending. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, and they are left to the determination of the Member. This reading of Article XXI(b) has been proven correct by the arguments and analyses developed in the course of this dispute.[2] It is the only grammatically correct reading of the English text of Article XXI(b).

6. In contrast, the flaws in Norway's interpretation of Article XXI(b) have become more clear throughout the proceedings. Norway's argument that "the phrase 'which it considers'

[1] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

[2] *See* U.S. Responses to the Panel's Questions 35-40, paras. 122-155; U.S. Response to the Panel's Question 90, paras. 23-28; and U.S. Second Written Submission, Section II.B.

qualifies the chapeau of Article XXI(b), but does not qualify the subparagraphs" is unsupported by the text and grammatical structure of Article XXI(b).[3] Norway's argument artificially separates the terms in the single relative clause, which begins with the phrase "which it considers necessary" and ends at the end of each subparagraph ending.[4] The result of Norway's piece-meal approach is a failure to interpret the entire text of Article XXI(b), including the grammatical construction of the full provision.

7. By ignoring the ordinary meaning of the text of Article XXI(b), the complainant attempts to alter the balance struck in the GATT 1947 and retained in GATT 1994 – to substantially reduce tariffs and other barriers to trade and to apply agreed rules while retaining fundamental sovereign rights, including the ability to take action which a Member considers necessary for the protection of its essential security interests. This effort should be rejected.

8. Analyses of the Spanish and French texts of Article XXI(b) confirm the U.S. interpretation of Article XXI(b).[5] The interpretation that emerges based on the ordinary meaning of the text of the subparagraph endings in the English and French language versions is not fully supported by the Spanish text of the subparagraph endings. This means that, under Article 33 of the Vienna Convention on the Law of Treaties (VCLT), the meaning that best reconciles the three authentic texts, having regard to the object and purpose of the treaty, must be adopted.

[3] Norway's Response to the Panel's Question 35, para. 308.

[4] *See* U.S. Comments on Norway's Response to the Panel's Question 90, paras. 22-23; U.S. Second Written Submission, Section II.B.2.

[5] *See* U.S. Responses to the Panel's Questions 41-43, paras. 156-197; U.S. Second Written Submission, Section II.D.

9. The interpretation that best reconciles the three texts is that the subparagraph endings modify the terms "any action which it considers" in the main text of Article XXI(b). Under this reading, the terms of the provision still form a single relative clause that begins in the main text and ends with each subparagraph ending, and therefore the phrase "which it considers" still modifies the entirety of the main text and the subparagraph endings. Thus, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances is committed to the judgment of that Member alone.

10. To arrive at a different understanding of Article XXI(b), the panel in *Russia – Traffic in Transit* ignored the ordinary meaning of Article XXI(b) and read into Article XXI(b)(iii) the terms of the security exceptions of other treaties.[6] Although it acknowledged that the text of Article XXI(b) could be read so that "'which it considers' qualifies the determinations in the three enumerated subparagraphs," the *Russia – Traffic in Transit* panel gave this plain meaning no interpretive weight.[7] Instead, based on what it termed (without explanation) the "logical structure of the provision," the panel concluded that subparagraph endings (i) to (iii) qualify and limit Members' discretion to take essential security measures, and that, "for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision."[8]

11. Further, rather than relying on the ordinary meaning of "its essential security interests" and "in time of war or other emergency in international relations" in Article XXI(b)(iii), the

[6] *See* U.S. First Written Submission, Section III.B; U.S. Second Written Submission, Section II.B.4.

[7] *Russia – Traffic in Transit*, para. 7.65.

[8] *Russia – Traffic in Transit*, paras. 7.65 and 7.82.

panel effectively read into that text references to "the event of serious internal disturbances affecting the maintenance of law and order" and "war or serious international tension constituting a threat of war" – language that appears in the Treaty on the Functioning of the European Union (TFEU)[9] and Agreement on the European Economic Area (EEA)[10] but *not* in the GATT 1994. For example, without textual analysis, the panel stated that "essential security interests" generally refers to "the protection of its territory and its population *from external threats*, and the *maintenance of law and public order* internally."[11] The panel further suggested that a situation would not constitute an "emergency in international relations" unless it "give[s] rise to *defence and military interests*, or *maintenance of law and public order* interests."[12] Such language, however, is not part of the text of Article XXI(b)(iii), and such a narrow construction of Article XXI(b)(iii) is not consistent with the ordinary meaning of the terms of that provision.[13]

[9] Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in *the event of serious internal disturbances affecting the maintenance of law and order*, in the event of *war, serious international tension constituting a threat of war*, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security. Treaty on the Functioning of the European Union, Art. 347 (emphases added) (US-182).

[10] Nothing in this Agreement shall prevent a Contracting Party from taking any measures . . . which it considers essential to its own security in *the event of serious internal disturbances affecting the maintenance of law and order*, in time of *war or serious international tension constituting threat of war* or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security. Agreement on the European Economic Area, Art. 123 (emphases added) (US-221).

[11] *Russia – Traffic in Transit*, para. 7.130 (emphases added).

[12] *Russia – Traffic in Transit*, para. 7.75 (emphases added).

[13] *See* U.S. Second Written Submission, Section II.B.3.

The complainant urges this Panel to replicate these same errors—an effort that should be rejected.[14]

12. The complainant's suggestion that the principle of "good faith" requires a Panel to review whether a Member has acted in good faith in invoking Article XXI is also misguided and is inconsistent with the ordinary meaning of Article XXI.[15] Such a reading would rewrite Article XXI(b) to insert the text, and impose the requirements, of the chapeau of Article XX. The chapeau of Article XX sets out additional requirements for a measure falling within a general exception set out in the subparagraphs – that a measure shall not be applied in a manner which constitutes a means of "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade," both of which concepts aim to address applying a measure inconsistently with good faith. The complainant is effectively asking the Panel to read into Article XXI text that is not there; doing so is inconsistent with the customary rules of interpretation and the complainant's approach should be rejected.

13. As illustrated, the complainant's arguments only serve to confirm the correctness of the U.S. interpretation – the only interpretation that is based on the ordinary meaning of the text of Article XXI(b) and thus in accordance with the customary rules of interpretation of public international law.

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

[14] Norway's Response to the Panel's Question 51(a), paras. 440-447; Norway's Response to the Panel's Question 92(a), para. 35; Norway's Response to the Panel's Question 92(b), para. 51.

[15] Norway's Response to the Panel's Questions 31 and 32, paras. 295-300.

14. This interpretation of Article XXI is confirmed by supplementary means of interpretation, including Uruguay Round negotiating history.[16] Although not necessary in this dispute, recourse to these materials may be had to confirm the meaning of Article XXI(b) that results from the application of Article 31 of the VCLT, that the provision is self-judging.

15. The drafting history of Article XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). Numerous statements by the drafters of that text confirm their intent that this provision be self-judging by the acting Member, and that the appropriate remedy for such measures is a non-violation claim.[17] These drafters acknowledged the potential for excess invocation of essential security exceptions, and responded by promoting a culture of restraint, noting that "the atmosphere inside the ITO will be the only efficient guarantee" against such excess invocations.[18] Drafters also retained the use of non-violation, nullification or impairment claims as a possible recourse for countries affected by essential security actions, noting that actions "in the interest of national security in time of war or other international emergency *would be entirely consistent with the Charter*, but *might nevertheless result in the nullification or impairment of benefits* accruing to other Members."[19]

[16] *See* U.S. Second Written Submission, Section II.C; U.S. Responses to the Panel's Questions 59 and 62, paras. 269-277 & 283-293; U.S. First Written Submission, Section III.A.3.

[17] *See* U.S. Responses to the Panel's Questions 59 and 62, paras. 269-277 & 283-293; U.S. Oral Opening Statement, Section D; U.S. First Written Submission, Section III.A.3.

[18] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-41).

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

16. The availability of non-violation claims keeps the GATT (and now the WTO) from reviewing a Member's invocation of its essential security interests, while allowing a Member to obtain redress if it is affected by action that another Member considers necessary for the protection of its essential security interests. In this manner, the availability of non-violation claims reinforces the culture of avoiding excess invocation of Article XXI(b).

17. Uruguay Round drafters made a number of decisions indicating that they were aware of and comfortable with the longstanding interpretation of Article XXI as self-judging, including their choice to retain Article XXI – unchanged and in its entirety – in the GATT 1994. In doing so, Uruguay Round drafters rejected proposals to alter the terms of Article XXI in a manner that would have limited Members' discretion when taking action under that provision,[20] observing that "only the individual contracting party concerned was ultimately in a position to judge what its security interests were" and that "the GATT has no competence in the determination of questions of security."[21]

18. Uruguay Round drafters also incorporated into the GATS and TRIPS security exceptions with the same self-judging terms as Article XXI, referring to actions that a Member "considers necessary"; separating security exceptions from general exceptions for public morals, health, and other matters; and explicitly subjecting general exceptions – but not security exceptions – to

[20] *See* U.S. Response to the Panel's Question 62, paras 283-293; U.S. Second Written Submission, Section II.C.1 (discussing Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-150); Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988) (US-151); Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988) (US-153)).

[21] Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2—3 (US-153).

review.[22] In incorporating this exception into the GATS, the drafters rejected proposals to diverge from the text of Article XXI with respect to these terms,[23] and instead – consistent with the separate proposals of the United States, the EC, and Japan – chose to mirror the text of Article XXI in relevant part in the GATS.[24] During the TRIPS negotiations, drafters considered explicitly incorporating GATT exceptions, but ultimately decided to mirror Article XXI in the text of TRIPS.[25]

19. In addition, Uruguay Round negotiators discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable.[26] Although a proposal to that effect was made[27] and DSU negotiators discussed "GATT Article XXI and its

[22] *See* U.S. Second Written Submission, Section II.C.2.

[23] *See* Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-102); Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-183).

[24] *See* Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187); Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990), at 11—12 (US-188).

[25] *See* Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990), at 78 ("Other provisions of the [GATT] shall apply to the extent that [TRIPS] does not provide for more specific rights, obligations and exceptions thereof") (US-191); Draft Final Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991), at 90 (mirroring Article XXI in Article 73) (US-190).

[26] U.S. Second Written Submission, Section II.C.3.

[27] Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (describing Nicaragua's "disappointing" experiences with dispute settlement under the GATT 1947, including its 1985 dispute with the United States in which the United States invoked Article XXI and proposing, among other things, that when a panel had been established to resolve a dispute, "[n]o contracting party may oppose examination of the applicability of GATT provisions and compliance with them" and that "[a]ny panel must reach a clear conclusion regarding nullification and impairment of benefits") (US-192).

review by a GATT panel" in one meeting,[28] nothing in the record of this meeting indicates that negotiators intended that the DSU would alter the manner in which Article XXI had been interpreted during the previous four decades, and numerous statements by the drafters of the DSU further confirm that the DSU does not alter the ordinary meaning of the terms of the covered agreements.[29]

20. These decisions by Uruguay Round negotiators are notable, particularly considering that some treaties concluded between 1947 and 1994 – such as the Treaty of Rome (now known as the TFEU) and the EEA – offered significantly different approaches to when security exceptions would apply and the extent to which action taken pursuant to such exceptions could be reviewable.[30] In other words, Uruguay Round negotiators were aware of the possibility that essential security actions *could* be subject to review – and they chose not to incorporate into the text of the GATT 1994, the GATS, TRIPS, or the DSU modifications or additional language providing for such review. These decisions by the drafters must be given effect in this dispute.

C. Contrary to Complainant's Arguments, the Measures At Issue Are Not Safeguards

[28] Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987), at 3 (US-193).

[29] Negotiating Group on Dispute Settlement, Meeting of June 25, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987), at 5 (noting that negotiators opined that "the GATT dispute settlement procedures should not be used to create, by constructive interpretation, obligations which were not established in the text of the General Agreement" and that "[p]anels should merely interpret and apply existing GATT rules to the particular sets of circumstances in the disputes before them without purporting to create new obligations") (US-195); Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988) (reporting that during the group's discussions of developing countries and dispute settlement, one delegation "noted that the Group's mandate did not include the negotiation of new substantive rights for contracting parties") (US-196).

[30] U.S. Second Written Submission, Section II.C.4.

21. The complainant challenges the measures at issue under Article XIX of the GATT 1994 and under several provisions of the Agreement on Safeguards. Contrary to complainant's arguments, however, the measures at issue are not safeguards and therefore the Agreement on Safeguards does not apply.

22. Article XIX of GATT 1994 establishes a Member's right (but not obligation) under certain conditions to deviate from its WTO obligations and apply a safeguard measure. A key condition precedent to the exercise of that right is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult.[31] This invocation requirement is established by the ordinary meaning of each paragraph of Article XIX, the context provided by numerous other WTO provisions that contemplate a Member exercising a right through invocation, and the object and purpose of the GATT 1994 to provide "reciprocal and mutually advantageous" arrangements directed to the "substantial reduction" of tariffs.[32] This conclusion is also consistent with the Working Party's 1950 report in *US – Fur Felt Hats*, which includes among the "conditions" for meeting Article XIX's requirements that "[t]he contracting party taking action under Article XIX must give notice in writing to the CONTRACTING PARTIES before taking action" and "give an opportunity to contracting parties substantially interested and to the Contracting Parties to consult with it."[33]

[31] *See* U.S. Response to the Panel's Question 5, paras. 8-24.

[32] *See* U.S. Second Written Submission, Section IV.A.1 to Section IV.A.3.

[33] *US – Fur Felt Hats (GATT Panel)*, para. 4 (US-208); U.S. Second Written Submission, Section IV.A.4.

23. Supplementary means of interpretation, including the drafting history of Article XIX, also confirm that invocation through notice is a fundamental, condition precedent to Member's exercise of its right to take action under Article XIX and the application of safeguards disciplines.[34] The original draft of Article XIX – which dates back to negotiations to establish the ITO – stated that, among other things, a Member "shall give notice in writing" before taking action under that provision.[35] Although removal of this requirement was discussed as the ITO and GATT 1947 negotiations proceeded, the drafters ultimately decided to retain it after the United States observed that it had "been including clauses similar to [the text that would become Article XIX] in agreements for a long time" and that, in the United States' experience, "they have almost never been *invoked*, but they have been there in case the emergency should arise, which gives some assurance to the people concerned."[36]

24. The United States has *not* invoked Article XIX as the legal basis for the measures at issue; instead, the United States has (explicitly and repeatedly) invoked Article XXI.[37]

[34] U.S. Second Written Submission, Section IV.A.5.

[35] Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter (US-31).

[36] First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11 (Nov. 14, 1946), at 17 (emphasis added) (US-211). The Agreement on Safeguards also confirms that invocation through notice is a fundamental, condition precedent for a Member's exercise of its right to take action under Article XIX. *See* U.S. Second Written Submission, Section IV.B.

[37] *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)).

Accordingly, the measures at issue are not safeguards measures, and the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply.

25. This result is confirmed by the text of the Agreement on Safeguards. In particular, Article 11.1(c) provides in relevant part that "[t]his Agreement [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." By referring to "[t]his Agreement," Article 11.1(c) also makes clear that *nothing* in the Agreement on Safeguards applies to measures sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX.[38] The words "sought, taken or maintained" in Article 11.1(c) refer to measures a Member has tried to do, succeeded in doing or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX.[39] Here, the United States has attempted to take – and succeeded in taking – the challenged measures in accordance with Article XXI of the GATT 1994. Accordingly, under Article 11.1(c) the Agreement on Safeguards "does not apply."

D. Conclusion

26. As we have demonstrated in our prior submissions and during the first meeting of the Panel with the parties, and again today, the complainant's claims are without merit. In light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole finding that the Panel may make in its report regarding claims that satisfy the requirements of Article 6.2 – consistent with its terms of reference and the DSU – is to note the Panel's understanding of Article XXI and that the United States has invoked Article XXI. The United

[38] *See* U.S. Response to the Panel's Question 94, paras. 55-68.

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

States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB.

27. This concludes the U.S. opening statement. Thank you.