Russia – Measures Concerning Traffic in Transit
(DS512)

Third-Party Oral Statement
of the United States of America

January 25, 2018

Mr. Chairman, members of the Panel:

I. Introduction

1. The United States welcomes this opportunity to present its views that, once a WTO Member has invoked the essential security exception under Article XXI(b)(iii) of the GATT 1994,[1] there is no basis for the Panel to review that invocation or to make findings on the claims raised in the dispute. The United States will explain the long-standing view of Members that the multilateral trading system is concerned with trade, and not security, relations. Just as the Contracting Parties had in approving the GATT in 1947, Members agreed in the WTO Agreement that each party would retain the ability to take actions "it considers necessary" to protect its essential security interests. Such action and the interests involved were agreed to be self-judging because they go to sensitive issues relating directly to a Member's political autonomy. The drafting history and numerous statements by Contracting Parties and Members confirm the understanding from the plain text of the provision that the authority to make determinations with respect to these issues is reserved to each Member.

II. Jurisdiction, Justiciability, and the Standard of Review in this Dispute

2. In reviewing the parties' and third parties' submissions, it appears some confusion exists as to whether the Panel has the capacity to make findings with respect to this dispute. Some have used the term "jurisdiction" and others "justiciability"; still others point to the "standard of review" as at issue. The United States wishes to offer its views to assist in clarifying the issues.

3. The confusion may spring from differing views regarding the meaning and significance of the terms "jurisdiction" and "justiciability." Neither of these are terms used in the DSU. For purposes of discussion, we might define jurisdiction in this context as the extent of power of the

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

Panel under the DSU to make legal decisions in this dispute, and justiciability as whether an issue is subject to findings by the Panel under the DSU.

4. With this understanding, the United States considers that the Panel has jurisdiction in the context of this dispute in the sense that the DSB has established it, and placed the matter raised in Ukraine's complaint within the Panel's Terms of Reference under Article 7.1 of the DSU.

5. The United States also considers that Russia's invocation of Article XXI is non-justiciable, and it follows that the Panel may not make findings on Ukraine's claims. Most importantly, Article XXI is a self-judging provision, and its invocation is not subject to review by the DSB (i.e., all WTO Members convening as that Body) or an adjudicator to which the DSB refers a matter (automatically, under the DSU). This conclusion is required based on the text and context of the Article, and confirmed by extensive supplementary sources, as explained in more detail below.

6. Russia's invocation of Article XXI did not occur in the DSB or prior to establishment of this Panel. The DSB established this Panel with standard terms of reference to examine the matter raised by Ukraine. However, the dispute is non-justiciable in the sense that the Panel cannot make findings on Russia's invocation, other than to conclude that Article XXI has been invoked.

7. This outcome is fully consistent with the Panel's terms of reference and the DSU. To recall, under Article 7.1, the Panel is charged with examining the matter raised by Ukraine "and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." Similarly, DSU Article 11 calls for the Panel to make "an objective assessment of the matter before it" and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered

agreements." But, as the United States explained in its letter of November 7, 2017, were the Panel to make findings on Ukraine's claims in this dispute, that would be contrary to its terms of reference and Article 11. This is because such findings "will [not] assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements." No recommendation under DSU Article 19.1 is possible in this dispute because no antecedent finding that a measure is inconsistent with a covered agreement is possible, given the invocation of Article XXI.

8. When taking all the provisions of the covered agreements that have been raised by the parties (including Article XXI) into account, the Panel must conclude that it cannot make findings as to the WTO-compatibility of Russia's measures. Any such findings would be purely advisory. The Panel will have fulfilled its obligation to make an "objective assessment" under the DSU by acknowledging the invocation of Article XXI, recognizing that it cannot provide any additional findings or recommendations, and so informing the DSB in its report.

9. In this way as well, the Panel will have "address[ed] the relevant provisions in any covered agreements cited by the parties to the disputes," consistently with DSU Article 7.2. It is erroneous to consider that to "address" a provision means that it is necessary for a Panel or the Appellate Body to make "findings" under that provision. Were this not so, each exercise of judicial economy by a panel or the Appellate Body would breach either DSU Article 7.2 or DSU Article 17.12.

10. Finally, the standard of review is not at issue because, properly understood, Article XXI is self-judging by the Member taking action. The United States now turns to elaborate its understanding of the plain meaning of the text of Article XXI.

III. The Text of Article XXI, in its Context, Establishes That the Exception Is Self-Judging

11. Article XXI of the GATT 1994, in relevant part, states that "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which *it considers necessary* for the protection of *its essential security interests* . . . taken in time of war or other emergency in international relations[.]"[2] On its face, the text establishes two crucial points: *first*, nothing in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest; and *second*, the action necessary for the protection of its essential security interests is that "which it considers necessary for" such protection. That is, a Member has the discretion and responsibility to make the serious determination, with attendant political ramifications, of what is required to protect the security of its nation and citizens.

12. The self-judging nature of Article XXI is established through use of the crucial phrase: "*which* ***it considers*** *necessary for* the protection of its essential security interests." The ordinary meaning of "considers" is "regard (someone or something) as having a specified quality" or "believe; think".[3] The "specified quality" for the action is that it is "necessary for" the protection of a Member's essential security. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("considers") an action as having the quality of being necessary.

13. The context of Article XXI(b)(iii) supports this understanding. First, the phrase "which it considers" is present in Article XXI(a) but not in Article XXI(c). Its use in Articles XXI(a) and XXI(b) highlights that, under these two provisions, it is the judgment of the Member that

[2] GATT 1994 Article XXI(b)(iii) (italics added).

[3] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993).

controls. The use of "which it considers" in Article XXI(b) should be given meaning and should not be reduced to inutility.[4]

14. Second, the context provided by Article XX supports this understanding. This Article sets out "general exceptions", and a number of subparagraphs relate to whether an action is "necessary" for some listed objective.[5] In none of these subparagraphs is the phrase "which it considers" used to introduce "necessary". It is also notable that the chapeau of Article XX subjects application of a measure qualifying as "necessary" under a subparagraph to a further requirement of, essentially, non-discrimination. No such qualification, which requires review of a Member's action, is present in Article XXI.

15. Third, the use of the phrase "it considers" in the GATT 1994 and other provisions of the WTO Agreement is used when the judgment resides in the named actor. Such provisions envision that a Member, a panel, the Appellate Body, or another entity takes an action where it "considers" that a situation arises.[6] In each of these provisions, the judgment of whether a situation arises is left to the discretion of the named actor.

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[4] *US — Gasoline (AB)*, WT/DS2/AB/R, at 23 ("One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."); *Canada — Renewable Energy / Canada — Feed-in Tariff Program (AB)*, WT/DS412/AB/R, WT/DS426/AB/R, para. 5.57 ("the principle of effective treaty interpretation requires us to give meaning to every term of the provision").

[5] *See* GATT 1994 Art. XX(a), (b), (d), and (i) ("[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) *necessary* to protect public morals; (b) *necessary* to protect human, animal or plant life or health; . . . (d) *necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices; . . . (i) involving restrictions on exports of domestic materials *necessary* to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination[.]") (italics added).

[6] Such provisions include GATT 1994 Art. XXIII:1 ("If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired … [in three situations] the contracting party may, with a view to the satisfactory adjustment of the matter, make written

16. The *Bananas* Arbitrator's approach to the phrase "if that party considers" in DSU Article 22.3(c) is not inconsistent with this understanding but rather reflects that this clause is self-judging absent additional text.[7] Unlike Article XXI and other provisions, the clause ("that party

representations or proposals to the other contracting party or parties which it considers to be concerned."); Agriculture Agreement Art. 18.7 ("Any Member may bring to the attention of the Committee on Agriculture any measure which it considers ought to have been notified by another Member."); TBT Agreement, chapeau (sixth recital) ("*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement"); TBT Agreement Art. 10.8.3; TBT Agreement Art. 14.4 ("The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected."); DSU Art. 3.3 ("The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."); DSU Art. 4.11 ("Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[], such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations."); DSU Art. 12.9 ("When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report."); DSU Art. 13.1 ("A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate."); DSU Art. 17.5 ("When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."); Agreement on Rules of Origin, Article 4(1) ("The Committee may also request such other work from the Technical Committee as it considers appropriate for the furtherance of the above-mentioned objectives of this Agreement."); Agreement on Rules of Origin, Article 4(2) ("The Technical Committee may also request such other work from the Committee as it considers appropriate for the furtherance of the above-mentioned objectives of the Agreement. The CCC Secretariat shall act as the secretariat of the Technical Committee."); Agreement on Trade Facilitation, Article 3(8) ("Each Member shall endeavor to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information."); General Agreement on Trade in Services Article III(5) ("Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement."); General Agreement on Trade in Services Article XIV bis(a) ("Nothing in this Agreement shall be construed: to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests;"); General Agreement on Trade in Services Article XIV bis(b) ("Nothing in this Agreement shall be construed: to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:"); General Agreement on Trade in Services Article XXIV(1) ("The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions."); Revised Agreement on Government Procurement Art. III(1) ("Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.").

[7] *EC — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU: Decision by the Arbitrators, WT/DS27/ARB/ECU (Mar. 24, 2000).*

considers") is preceded by mandatory language in the chapeau ("the complaining party shall apply the following principles and procedures") and followed by permissive language in the subsection ("it may seek to suspend concessions or other obligations"). Accordingly, while the text provides that the judgment whether to suspend concessions or other obligations resides with the party in question, the provision expressly conditions that discretion by imposing an obligation to apply certain principles and procedures. Conformity with the obligation ("shall apply the following principles and procedures") was viewed as permitting review of the decision to take action.

17. By way of contrast, and further context, we note at least two WTO provisions in which the judgment of the named actor is expressly subject to review through dispute settlement. Article 26.1 of the DSU permits non-violation complaints to be brought under the DSU, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party: "Where and to the extent that such party considers *and a panel or the Appellate Body determines* that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following …" (italics added). Thus, in this provision, Members explicitly agreed that "where … [a] party considers … that" is not enough, and they subjected the non-violation complaint to the additional check that "a panel or the Appellate Body determines that" the case is in fact a non-violation situation described in GATT 1994 Article XXIII:1(b). A similar limitation – that a

"party considers and a panel determines that"[8] – was agreed in DSU Article 26.2 for situation complaints described in GATT 1994 Article XXIII:1(c).

18. This context is highly instructive. No such review of a Member's judgment is set out in Article XXI, which only states "which it [a Member] considers necessary for the protection of its essential security interests". In agreeing to GATT 1994, Members could have subjected a Member's essential security judgment to an additional check through a similar phrase as in DSU Articles 26.1 and 26.2 – "and a panel [or the Appellate Body] determines that". But Members did *not* agree to this language in Article XXI. Accordingly, they did *not* agree to subject a Member's essential security judgment to review.

IV. Supplementary Means of Interpretation Confirm the Meaning of Article XXI as Self-Judging

19. The meaning of Article XXI is clear following application of customary rules of interpretation of public international law, as reflected in Article 31 of the Vienna Convention. While not necessary in this dispute, recourse to supplementary means of interpretation is permissible and confirms this meaning. We therefore draw the Panel's attention to consideration of Article XXI by the GATT CONTRACTING PARTIES, negotiating history of GATT 1947, as well as relevant statements by Contracting Parties (now Members) over time, as such materials may constitute historical background against which the GATT 1994 was agreed.[9]

20. Shortly after the GATT 1947 was concluded, a dispute arose between Czechoslovakia and the United States concerning export licenses that Czechoslovakia claimed the United States

[8] DSU Art. 26.2 ("Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members.").

[9] *EC — Computer Equipment (AB)*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 86 ("With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.").

was withholding with respect to certain goods in a discriminatory manner. Czechoslovakia requested a decision under Article XXIII whether the United States had failed to carry out its obligations under Article I of the GATT 1947. The United States responded by invoking Article XXI.

21. In addressing the request from Czechoslovakia, it was commented that "since the question clearly concerned Article XXI, the United States action would seem to be justified because every country must have the last resort on questions relating to its own security"[10] and that "the Chairman … was of the opinion that the question was not appropriately put because the United States Government had defended its actions under Article[] XXI which embodied exceptions to the general rule contained in Article I."[11]

22. Based on this shared view, and upon a vote with only Czechoslovakia dissenting, the CONTRACTING PARTIES held that the United States had not failed to carry out its obligations under the Agreement. This early GATT action confirms the understanding of Article XXI as a self-judging exception to the general applicability of the other articles in the GATT.

23. The view of the CONTRACTING PARTIES referenced above is in accord with the drafting history surrounding Article XXI. For example, the GATT Secretariat Note on Article XXI notes that "[i]n the original version of the draft Charter of the International Trade Organization, the provisions of what is now GATT Article XXI were combined with those of the present Article XX", but those provisions were subsequently split because the "clear intention of the separation into two articles was, as appears from the title, to have the provisions of Article 43

[10] GATT/CP.3/SR.22, at 4-10; *see id.* at 5 (remarks by Cuban representative: "The question asked by the Czechoslovakian representative in relation to the provisions of Article I did not require an answer since the United States representative had justified his case under Article XXI whose provisions overrode those of Article I.").

[11] GATT/CP.2/SR.22, at 7 (remarks by UK representative), 9 (remarks by Chairman) (recording the Chair as also referring to a U.S. invocation of Article XX that does not appear on the record).

(XX) related to the commercial policy chapter, while those of Article 94 (XXI) *were to be exceptions to the Charter as a whole*."[12] In the Havana Charter, the negotiators sought to make clear the difference between the exceptions applicable to Chapter IV, on Commercial Policy, and the security exceptions, applicable to the entire Charter.[13] In Article 86(3), the draft Charter stated: "The Members recognize that the Organization should not attempt to take action which would involve passing judgment in any way on essentially political matters." And in Article 99, the draft Charter utilized the key language carried forward to the GATT 1947: "Nothing in this Charter shall be construed … (b) to prevent a Member from taking, either singly or with other States, any action *which it considers necessary* for the protection of its essential security interests . . . ."[14]

24. Ukraine, in its opening statement, seeks to portray the U.S. position in this dispute as contradicting certain statements by a U.S. delegate in one meeting in 1947. While one statement, in the light of the significant material already reviewed, is not of significant interpretative value, a few points may be worth making. *First*, we would note that certain statements by the delegate have been omitted, such as: "I think no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself - which I think we cannot deny - what its security interests are."[15] *Second*, the U.S. delegate was not commenting on the current text of Article XXI, but rather Article 37 of the draft Charter. Article

[12] Secretariat Note, Article XXI, MTN.GNG/NG7/W/16.

[13] See Havana Charter, Article 45 ("General Exceptions to Chapter IV"), Article 99 (General Exceptions, containing material now placed in GATT 1994 Article XXI).

[14] Havana Charter, Article 99(1)(b) (General Exceptions, applicable generally to the Charter) (italics added). *See* GATT Secretariat, *The Havana Charter for an International Trade Organization: An Informal Summary*, Sec/41/53, at 13 ("No Member will be prevented from taking *whatever action it considers necessary* in relation to fissionable materials, traffic in arms or in time of war or other emergency in international relations or in entering into or carrying out agreements made by or for a military establishment for the purpose of meeting essential requirements of national security.") (italics added).

[15] E/PC/T/A/PV/33, at 19.

37 contained text relating to security in a provision applicable only to "commercial policy". This text did *not* contain the critical "which it considers" language. Rather, Article 37 was drafted much as GATT 1994 Article XX is today.[16] *Third*, in any event, as noted above, the position of the United States on Article XXI today is consistent with its view then. And *finally*, it is Article XXI and its particular language, as agreed by Members, that is at issue in this dispute; historical background should be relevant to that issue.

25. A final comment on the drafting of this provision. It appears that, when the general exceptions were moved from Article 37 (of the London and New York drafts), the U.S. proposal was to clarify the explicitly self-judging nature of the exception through the term "which it may consider to be necessary".[17] In the course of discussion and refining the drafting, this phrase became "which it considers necessary" in Article 99 of the Havana Charter, retaining its fundamental self-judging character. And this drafting change and understanding is consistent with numerous statements in the course of the negotiation, such as the view of one representative that "the Organization should be an economic organization and should therefore not judge any measure employed in connection with a political dispute when that political dispute was within the jurisdiction of the United Nations."[18]

[16] See E/PC/T/34 (New York draft), at 31-32 (draft Article 37 (General exceptions to chapter V): "Subject to the requirements that such measures are not applied in a not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures: … (e) In time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member").

[17] E/PC/T/A/SR/33, at 4 (US proposal for Article 94).

[18] E/CONF.2/C.6/SR.37, at 3 (noting the view of another delegate that "an economic measure taken for political reasons was not properly speaking an economic measure but a political measure and as such was not within the competence of the Organization").

26. As has been noted by others, in the context of other disputes in the GATT in which a Contracting Party's essential security interest were implicated, consistently similar views have been expressed.

27. In 1961, Ghana justified its boycott of certain goods under the provisions of Article XXI, arguing that "under this Article each contracting party was the sole judge of what was necessary in its essential security interests."[19]

28. In 1970, Egypt justified its boycott of certain goods, and several members of the relevant Working Party supported this position, arguing the boycott measures were political and not commercial, therefore falling within the exception of Article XXI.[20]

29. In 1982, the European Communities and its member states, Canada, and Australia, spoke in the GATT Council to justify their application of trade restrictions for non-economic reasons against certain imports. The representative of the European Communities stated that it and its member states took these measures "on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise of these rights constituted a general exception, and required neither notification, justification nor approval, . . . [since] every contracting party was – in the last resort – the judge of its exercise of these rights."[21]

30. In the same Council discussion, the representative of Canada stated that "Canada's sovereign action was to be seen as a political response to a political issue" and therefore fell squarely within the exemption of Article XXI and outside the competency and responsibility of the GATT.[22]

[19] SR.19/12, at 196.
[20] BISD 17S/39, at para.22.
[21] C/M/157, p. 10.
[22] *Id.*

31. Expressing the same view, the representative of Australia stated that "the Australian measures were in conformity with the provisions of Article XXI(c), which did not require notification or justification."[23]

32. The European Communities and its member States, Canada, and Australia communicated the same position in writing to GATT Contracting Parties.[24] Thus, the self-judging nature of the essential security exception of Article XXI is well-known to Members, as they have resorted to it in the past as they deemed it necessary to do so.

33. In that same Council discussion, the United States stated that "[t]he General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The contracting parties had no power to question that judgment." Thus, the U.S. understanding of the security exemption in Article XXI has been consistent. And that understanding, consistent with the negotiating history, decision of the CONTRACTING PARTIES, and statements by Members, is entirely consistent with the meaning found in the plain text of Article XXI.

VI. Conclusion

34. The United States well understands the frustration and difficulties raised by the circumstances underlying this dispute – which many would say amounts to an emergency in international relations. However, we do not consider that the solution is to convert a political issue into a technical trade issue, and to embroil the WTO in passing judgment on the actions of a Member. The drafters of the *General Agreement on Tariffs and Trade 1947* recognized the

[23] C/M/157, p. 11.

[24] Communication to the Members of the GATT Council, L/5319/Rev.1 (noting "the European Community and its Member States, Australia and Canada, wish to state the following for the information of members of the Council … (b) they have taken these measures on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection").

importance of this issue for the viability of the multilateral trading system. They provided, and Members reiterated and agreed, a simple and unambiguous test for actions that a Member takes to protect an essential security concern. That test, enshrined in Article XXI, is a self-judging mechanism by which the specific Member will decide whether "it considers" the action necessary to protect an essential security interest during a time of war or other emergency in international relations.

35. This conclusion, which is of paramount importance to all Members of the WTO, is mandated by a plain reading of the text in Article XXI. Action by the CONTRACTING PARTIES, and multiple statements from various Members — even Members who have reversed their position in this proceeding — confirm that Article XXI is a self-judging provision, and the WTO is not to review a Member's assessment of its own essential security interests.[25]

36. A dispute involving essential security is political in nature and, therefore, beyond the proper authority and competency of the WTO to assess. Because WTO Members have decided through Article XXI that the authority to make such an assessment is not granted to the WTO, the Panel should fulfill its function by noting the invocation of Article XXI(b)(iii) in its report to the DSB and make no other findings.

37. We thank the Panel for its consideration of the views of the United States and look forward to answering any questions the Panel may have.

[25] *See, e.g.*, Minutes of Meeting of Council, Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons, C/M/157, pp. 10-11 (quoting the EEC as stating that it had taken certain measures "on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection," and that "[t]he exercise of these rights constituted a general exception, and required neither notification, justification nor approval, …[since] every contracting party was – in the last resort – the judge of its exercise of these rights").