UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS
(DS548)

First Substantive Meeting of the Panel with the Parties

Closing Statement of the United States

November 5, 2019

1. We thank the Panel for its time in this dispute, and we appreciate the interesting exchanges we have had regarding the issues presented. We think these exchanges have reinforced the correctness of the United States' interpretation of Article XXI(b). That interpretation is, as we have presented to you, that Article XXI(b) is self-judging.

2. Use of the phrase "which it considers" indicates that the matters set forth in Article XXI(b) are left to each Member's judgment, as each Member must be able to judge whether any action taken is necessary to protect its interests. Each of the elements present in Article XXI(b) necessarily implicate a Member's judgment with respect to its essential security interests.

3. We have expressed agreement with the views expressed by the EU regarding Article XXI. Specifically, the United States agrees with those views of the EU that were expressed at the GATT Council meetings in 1982 and 1986. For example, after invoking XXI, the EU said that "the exercise of these rights constituted a general exception, and required *nether notification, justification, nor approval*, a procedure confirmed by thirty-five years of implementation of the General Agreement."[1]

4. The text of XXI has not changed since the EU made those statements. The U.S. understanding of Article XXI remains the same. Only *the EU's understanding* has changed. The mystery is *when* the EU's view changed and *why*. The EU's reading of Article XXI(b) would

[1] GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-59) (italics added).

substitute for the judgment of a Member instead the judgment of an adjudicator regarding what action the adjudicator considers necessary for the protection of the Member's essential security interests.

5. EU member states appear to accept constraints on their actions to protect essential security actions for purposes of EU law. This is evident when comparing Article XXI of the GATT 1994 with Articles 346 to 348 of the Treaty on the Functioning of the European Union (TFEU). Under the TFEU, EU member states have accepted that their essential security actions are *explicitly* subject to consultations and judicial review. But what *the EU* has accepted for purposes of its internal EU law is *not* what *WTO Members* have accepted for purposes of WTO law.

6. The United States has presented to the Panel a comprehensive understanding of Article XXI, including the long history of the U.S. understanding and the conclusion that should result. When Article XXI is invoked, the United States has always recognized there may be consequences. One is that other WTO Members have the capacity to take reciprocal actions; another is that WTO Members may seek other actions under the DSU, including whether to bring to bring a non-violation, nullification or impairment claim. The traditional U.S. understanding of Article XXI is wholly supportive of the reciprocal and mutually advantageous commitments that Members have exchanged in the WTO.

7. Without an understanding that Members can judge for themselves when the circumstances described in Article XXI(b) arise, what would happen? Unfortunately, it is the situation in which the WTO finds itself today: the types of actions that have always been taken –

but which have not previously been subject to disputes – are now being brought into WTO dispute settlement.

8. 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. The dispute settlement actions that you are presented with are not necessary, and they risk serious consequences to the WTO.

9. The United States thanks the Panel very much for your questions. We hope our answers will help to lead you in the right direction towards the findings that are appropriate and necessary in this dispute.