UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS
(DS544)

First Substantive Meeting of the Panel with the Parties

Closing Statement of the United States

October 30, 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. As we heard yesterday, China concedes that Article XXI(b) touches on very sensitive matters. China encourages you not even to consider the circumstances in which this provision might be implicated. China's national security law defines "national security" as "a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally and the capability to maintain a sustained security status."[1] This language provides some hint as to what China might regard as its essential security interests falling under Article XXI(b).

[1] National Security Law of the People's Republic of China (2015), Article 2.

4. However, China suggests that whether the circumstances described in the romanettes (i) to (iii) of Article XXI(b) are present is objectively knowable. Referring again to our exchanges, that is not correct in all circumstances. It is easy to imagine a variety of circumstances in which two Members could disagree as to whether one Member's actions – for example, in the South China Sea – give rise to an emergency in international relations.

5. The Panel does not have authority to reach these issues, and under the text of Article XXII(b)(iii) there is no need to reach these views – although that is a conclusion that lawyers are reluctant to reach. The text of Art XXI(b)(iii) reflects a wiser judgment that in these circumstances, these are not issues to be committed to the judgment of lawyers. These are national security and foreign policy issues for each Member to determine for itself.

6. The United States has presented to the Panel a comprehensive understanding of this WTO provision, including the long history of the U.S. understanding and the conclusion that should result. When Article XXI is invoked, the United States has 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 to bring a non-violation, nullification or impairment claim. The traditional U.S. understanding is wholly supportive of the reciprocal and mutually advantageous commitments that Member exchange.

7. Without an understanding that Members can judge for themselves when the circumstances described in Article XXI(b) would arise, what would happen? Unfortunately, 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 dispute settlement in the WTO 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 incredibly sensitive issues of national security and foreign policy. The dispute settlement actions 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 lead you in the right direction towards the findings that are appropriate and necessary in this dispute.