

UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS
(DS554)

**OPENING STATEMENT OF
THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

November 8, 2019

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. Your sober and sound judgment of the issues before you is critical to maintaining the legitimacy of the WTO and its dispute settlement system by recognizing the exchange of commitments WTO Members have agreed to and the sovereign rights they have retained.

2. 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.

3. To the contrary, this right is reflected in Article XXI(b) of the GATT 1994.¹ As the United States explained in its first written submission, 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.

4. We have explained in our written submission that this understanding of Article XXI(b) is based in the text and context of the provision itself. Because it is the text of Article XXI(b) itself that is self-judging, it is entirely consistent with the Panel's terms of reference to make such a finding. The DSB has established this panel to examine the matter and to "make such findings as will assist" the DSB in making a recommendation to bring a measure into conformity with the

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

covered agreements.² Because Article XXI(b) is self-judging, an invocation cannot be found to be WTO-inconsistent, and thus there is no recommendation the DSB could make in this dispute.

5. In two other disputes over the past two years, Russia has commented on the authority reserved to Members under Article XXI(b). As Russia stated, “the wording of Article XXI of the GATT, leav[es] the necessity, the form, design and structure of such measures within the sole discretion of the Member. Moreover, nothing in the GATT, including any rules applicable to these proceedings, may directly or indirectly require the Russian Federation to furnish any information the disclosure of which it considers to be contrary to its essential security interests.”³

6. In addition, Russia has commented on the timing of Members’ actions under Article XXI. As Russia stated, “pursuant to GATT Article XXI(b)(iii) it is up for the Member taking the actions (in this case Russia) to decide when and whether to modify (in particular by reducing or expanding) such actions the way it considers necessary for the purpose of protection of its essential security interests as long as the emergency that according to that Member required such actions to be taken maintains.”⁴

7. We agree with these prior statements by Russia in other disputes in which it was the responding party. We see no principled basis for Russia to take a different position in this

² DSU Art. 7.1 (setting forth the standard terms of reference as “[t]o examine, in the light of the relevant provisions in [the relevant covered agreement(s)], the matter referred to the DSB by [the complaining Member] . . . 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)”).

³ Oral Opening Statement by the Russian Federation, *Russia – Traffic in Transit* (DS512), January 23, 2018, para. 43.

⁴ Second Written Submission of the Russian Federation, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union – Recourse to Article 21.5 of the DSU by the European Union* (DS475), June 3, 2019, para. 127.

dispute where it is the complaining party. Russia should explain to the Panel what its justification is for advancing diametrically opposed interpretations of Article XXI to different panels in different disputes.

8. Today we will first highlight key aspects underlying the U.S. interpretation of Article XXI(b), and explain why the text of that provision does not subject to panel review a Member's exercise of its inherent right to protect its essential security interests.

9. Second, the United States will recall numerous statements in the negotiating history of Article XXI that confirm that Article XXI is self-judging. The negotiators not only discussed that a claim of breach of Article XXI could not be made, but also discussed that the appropriate means of redress for Members affected by essential security actions would be a non-violation, nullification or impairment claim. The self-judging nature of Article XXI has been the view espoused by the United States for more than 70 years, and it is a key element of our participation in the WTO.

10. Next, we will address the complainants' claims in relation to safeguards rules. In the first instance, the measures at issue are not safeguards and therefore the Agreement on Safeguards does not apply. Once a Member invokes Article XXI(b) of the GATT 1994, the Agreement on Safeguards makes clear in its Article 11.1(c) that the safeguard disciplines are not applicable. And in any event, Article XXI(b) would be a defense not only to claims raised under the GATT 1994, but also to claims under the Agreement on Safeguards.

11. And finally, we will explain how it is entirely consistent with the Panel's terms of reference, as established by the Dispute Settlement Body, to make a finding that the United States has invoked Article XXI. Given the text of Article XXI, this is the sole finding consistent

with Panel’s terms of reference as there are no further findings the Panel may make that would assist the DSB in making a recommendation to the United States.

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

12. The text of Article XXI(b) establishes that Article XXI(b) is self-judging. The chapeau of Article XXI(b) provides 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.” “[C]onsider[.]” means “[r]egards in a certain light or aspect; look upon as.” Here, the relevant “light” or “aspect” in which a Member should regard the action is whether that action is necessary for protection of the acting Member’s essential security interests. Whether the Member “regards” the actions in this light is a subjective question.

13. The text also specifies that it is “*its* essential security interests”—the Member’s in question—that the action is taken for the protection of. In identifying such security interests, therefore, it is the judgment of the Member that is relevant. Only a Member can determine for itself what comprises its essential security interests, including “relating to fissionable materials” under Article XXI(b)(i) or “relating to the traffic in arms, ammunition and implements of war” under Article XXI(b)(ii).

14. 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 should “consider” 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. 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. For instance, under Article XXI(b)(i), what is relevant is the Member’s appreciation of its essential security interests relating to fissionable materials or the materials from which they are derived, and what is necessary for the protection of those interests. If individual elements of that clause were subject to review, it would no longer authorize the action that the *Member* considers necessary – it would be the action that some other evaluator (here, the Panel) considers necessary.

15. The text and grammatical structure of subparagraphs (i) to (iii) of Article XXI(b) also support the self-judging nature of this provision. These subparagraphs lack any conjunction—an “and” or an “or”—to specify their relationship to each other. This indicates that each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

16. The first two subparagraphs each relate to the kinds of interests for which the Member may consider its action necessary to protect. Those subparagraphs provide that a Member may take any action it considers necessary for the protection of its essential security interests “relating to fissionable materials or the materials from which they are derived,” and its essential security interests “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying for military establishment.” The final subparagraph does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. That subparagraph provides that a Member may take 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.”

17. The subparagraphs thus form an integral part of the provision in that they complete the sentence begun in the chapeau, establishing three circumstances in which a Member may

act. An invocation of Article XXI(b) indicates that a Member considers that any or all of the three circumstances described in the subparagraphs are present. In this way, the subparagraphs guide a Member's exercise of its rights under this provision, and as we shall see, may even lead a Member to determine not to invoke Article XXI(b).

18. The fact that these circumstances are exhaustive, however, does not mean that the Member's invocation of Article XXI(b) is subject to review. For while the circumstances guide the Member's invocation and assist the Member in exercising its rights under Article XXI(b), the text of the chapeau clearly reserves to the Member the judgment of whether a particular action is necessary to protect its essential security interests in any of the three circumstances identified.

B. The Context of Article XXI(b) Supports an Understanding of that Provision as Self-Judging

19. The self-judging nature of Article XXI(b) is also supported by the context of its terms. Article XXI(a) and Article XXI(c) provide the immediate context in which to view the ordinary meaning of the text of Article XXI(b).

20. Article XXI(a) states that “[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.” With this language, Article XXI(a) specifically provides that a Member need not provide any information—to a WTO panel or to other WTO Members—regarding essential security measures or the Member's underlying security interests. This provision both recognizes the highly sensitive nature of a Member's essential security interests and reveals the deference the drafters intended to give to Members when exercising their rights under Article XXI. That a Member may not be required to disclose information it considers

contrary to its interests supports the interpretation a Member’s invocation of Article XXI(b) was not intended to be reviewable against some legal standard.

21. Furthermore, the phrase “which it considers” is present in Articles XXI(a) and XXI(b), but not in Article XXI(c), which provides that Members may not be prevented from “taking any action in pursuance of” its UN obligations for the maintenance of international peace and security. Thus, the self-judging clause “which it considers” was omitted from Article XXI(c), which relates to action in pursuance of certain UN obligations, which may or may not implicate its essential security interests. That is, when a Member assesses that its essential security interests are at issue, as in Articles XXI(a) and XXI(b) of the GATT 1994, the text provides that it is the judgment of the acting Member that controls.

22. The U.S. interpretation is further supported by the context provided in Article XX of the GATT 1994. Specifically, Article XX sets out “general exceptions,” and a number of subparagraphs of Article XX relate to whether an action is “necessary” for some listed objective. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase “which it considers” to introduce the word “necessary.” Therefore, WTO Members, as well as panels and the Appellate Body, have consistently understood the text to impose a “necessity test” for measures with respect to which a general exception of this kind is invoked. The textual distinction between Article XX and Article XXI is a fundamental one, and confirms that the drafters considered many interests to be important enough that deviations from a Member’s WTO obligations may be appropriate. Only in the case of essential security interests, however, was the authority to deviate drafted to permit any action a Member considers necessary for the protection of the interests at stake.

C. A Subsequent Agreement Regarding The Application of the Treaty Confirms That Article XXI(b) Is Self-Judging

23. Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT) provides that, together with context, a “subsequent agreement between the parties regarding the interpretation of the treaty” “shall be taken into account.” Accordingly, the Panel should take into account the subsequent agreement reflected in the *United States Export Restrictions* decision regarding the self-judging nature of Article XXI(b), which is entirely consistent with the ordinary meaning set out above.

24. In *United States Export Restrictions*, Czechoslovakia requested that the GATT Council decide under Article XXIII whether the United States had failed to carry out its GATT obligations through its administration of export licenses. In explaining its request, Czechoslovakia claimed that the United States had engaged in discrimination in violation of Article I by withholding certain export licenses. In response, the United States invoked Article XXI and proposed that Czechoslovakia’s request be dismissed. After providing an explanation for the measure at issue, the United States’ representative added that he felt he “ha[d] gone a good deal further than was required.”⁵

25. In the GATT Council meeting discussing Czechoslovakia’s request, various parties expressed the view that Article XXI is self-judging. Among them was the United Kingdom delegate, who stated that “since the question clearly concerned Article XXI, the United States action would seem to be justified” and that “every country must be the judge in the last resort on

⁵ Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949), at 14 (US-26).

questions relating to its own security.”⁶ In discussing the decision to be made in that meeting, the Chairman opined that the question of whether U.S. measures conformed to GATT Article I “was not appropriately put” because the United States had defended its actions under Article XXI, which “embodied exceptions” to Article I.⁷ Instead, the Chairman stated, the question should be whether the United States “had failed to carry out its obligations” under the GATT 1947. The Chairman’s statement indicates that the relevant question is a broader one—whether the United States has any obligations under the GATT 1947 given its invocation of Article XXI. After discussing the matter, 17 contracting parties held—with only Czechoslovakia dissenting—that the United States had not failed to carry out its obligations under the GATT.⁸

26. The rules of procedure existing at that time provided that “decisions shall be taken by a majority of the representatives present and voting.”⁹ The rules neither restricted the contracting parties’ ability to interpret the provisions of GATT 1947 nor provided special procedures for adopting an interpretation of the provisions. It is in this context that the CONTRACTING

⁶ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 7 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

⁷ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

⁸ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).

⁹ General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedures GATT/CP.2/3 Rev.1 (Aug. 18, 1948) (Rule 27 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”); General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949) (Rule 28 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”).

PARTIES came to their decision regarding the United States’ invocation of Article XXI, and under Article 31(3)(a) of the Vienna Convention the Panel should take this decision into account.

27. After the vote, the representative of Czechoslovakia inquired “whether the decision could not be communicated to all members of the Interim Commission of the International Trade Organization, so that they would be informed of the *interpretation* given by the CONTRACTING PARTIES of the provisions of the Havana Charter”.¹⁰ No Contracting Party disagreed with that statement. This supports the United States’ long-standing view that, in the very earliest days of the GATT and pursuant to then-applicable rules, the CONTRACTING PARTIES had reached agreement on the interpretation of Article XXI that actions pursuant to that provision are not subject to review for consistency in GATT or WTO dispute settlement.

D. Supplementary Means of Interpretation, Including Negotiating History, Confirm The Self-Judging Nature of GATT 1994 Article XXI(b)

28. While not necessary in this dispute, the Panel may have recourse to supplementary means of interpretation, including the negotiating history of GATT 1994 Article XXI(b).¹¹ As the United States described in its first written submission in this dispute, the negotiating history of GATT 1994 Article XXI(b) confirms that (1) essential security matters are within the judgment of the acting government, and (2) a non-violation, nullification or impairment claim – as opposed

¹⁰Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27) (emphasis added).

¹¹ See Vienna Convention on the Law of Treaties, Article 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.”).

to a claimed breach of underlying obligations – is the appropriate form of redress for a Member affected by an essential security action.¹²

29. The drafting history of the essential security provision dates back to negotiations to establish the International Trade Organization of the United Nations (“ITO”), which proceeded alongside the GATT 1947 negotiations. As this negotiating history demonstrates, the United States asserted in 1946 that the then-existing version of the essential security exception “afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests in time of war or a national emergency.”¹³ As the negotiations went on, the self-judging nature of this provision was strengthened and made more explicit, particularly with the insertion of the pivotal “it considers” language.¹⁴ Following these changes, the drafters stated in a November 1947 informal summary of the negotiations that the essential security exception would permit Members to do “whatever they think necessary” to protect their essential security interests relating to the circumstances presented in that provision.¹⁵

¹² U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products* (DS554), Section III.A.3.

¹³ Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946), at 11 & Annexure 11 (US-31) (discussing the 1946 draft charter proposed by the United States, which included exceptions provisions that related to, among other things, measures taken “in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member”).

¹⁴ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236, at Annex A (July 4, 1947) (US-35) (referring to action which a Member “may consider to be necessary”); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947), at 25–26 (US-36) (referring to actions that a Member “may consider to be necessary”); Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (referring to actions that a Member “considers necessary” for the protection of its essential security interests) (US-37).

¹⁵ United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947), at 35 (US-39).

30. As the United States has observed in its written submission, negotiators also discussed that essential security actions would *not* be reviewable for consistency with the underlying agreement, and that the appropriate redress for a country affected by such actions would be a non-violation, nullification or impairment claim. For example, at a meeting on July 24, 1947, Australia withdrew an objection to the essential security provision after receiving assurance that a Member affected by essential security actions would have redress pursuant to then-Article 35(2) of the draft ITO Charter.¹⁶ At that time, Article 35(2) provided for the possibility of consultations concerning the application of any measure, “whether or not it conflicts with the terms of this Charter,” which had “the effect of nullifying or impairing any object” of the ITO charter.¹⁷

31. In that meeting, the Chairman asked whether the drafters agreed that actions taken pursuant to the then-existing essential security exception “should not provide for any possibility of redress.”¹⁸ In response, the U.S. delegate stated that actions that a Member considered necessary to protect its essential security interests “*could not be challenged* in the sense *that it could not be claimed* that the Member was *violating the Charter*”¹⁹— indicating the view that essential security actions could not be found to *breach* the Charter. The U.S. delegate also

¹⁶ 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 26-30 (US-41).

¹⁷ Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-33).

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 26 (US-41).

¹⁹ 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 26—27 (emphases added) (US-41).

stated, however, that “redress *of some kind* under Article 35” would be available.²⁰ Neither the Chairman nor any representative disagreed with the U.S. delegate’s statement. In fact, immediately after the U.S. delegate’s explanation, the Australian delegate expressed appreciation for the United States’ assurance that “Member’s rights under Article 35(2) are not in any way impinged upon.”²¹ The exchange demonstrates that the U.S. and other delegates were referring to a non-violation claim – as opposed to an alleged violation of the Charter – when referring to the redress available under Article 35(2) to Members affected by essential security actions.

32. Also in that meeting, The Netherlands delegate expressed concern that the then-existing essential security exception might constitute “a very big loophole in the whole Charter.”²² In response, the U.S. representative observed that the United States had sought to “draft provisions which would take care of real essential security interests and, at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.”²³ Regarding the then-existing provision for action taken in time of war, the U.S. delegate expressed his view that “no one would question the need of a Member, or the right of a Member, to take action relating to its security interests in time of war

²⁰ 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 27 (emphasis added) (US-41).

²¹ 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 27 (US-41).

²² 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 19 (US-41).

²³ 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 20 (US-41) & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947).

and *to determine for itself* – which I think we cannot deny – what its security interests are.”²⁴

This is consistent with the U.S. view expressed in this dispute, namely that the reference in Article XXI(b)(iii) to “a time of war or other emergency in international relations,” and the text that became subparagraphs (i) and (ii) of Article XXI(b), do not alter the operative chapeau text – which reserves to the Member the judgment whether particular action is necessary to protect its essential security interests – but nonetheless serve to guide a Member’s exercise of its rights under Article XXI(b).

33. In those discussions the Chairman made a statement “in defence of the text,” and recalled the context of the essential security exception as part of the ITO charter. As the Chairman observed, when the ITO was in operation “*the atmosphere inside the ITO* will be the only efficient guarantee against abuses of the kind” raised by The Netherlands delegate.²⁵ That is, the parties would not have the ability to challenge a security action as breaching the charter; rather, they would serve to police each other’s use of the essential security exception through the culture of the organization.

34. Documents from early 1948 further confirm the drafters’ understanding that non-violation, nullification or impairment claims – and not breach claims – would be the appropriate recourse for countries affected by essential security actions. As stated in their report of January 9, 1948, a Working Party of representatives from Australia, India, Mexico, and the United States

²⁴ 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 20 (US-41) & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (emphasis added).

²⁵ 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) (emphasis added).

had “extensive discussions” of the provision on “Consultation between Members,” particularly subparagraph (b) of that provision, for claims based on the application of a measure “whether or not it conflicts with the provisions of the Charter.”²⁶ At this time, the “Consultation between Members” provision explicitly distinguished between what are now understood as breach claims and non-violation claims. Non-violation claims were set out in subparagraph (b), while subparagraph (a) related to breach claims; that is, claims based on “the failure of a Member to carry out its obligations under the Charter.”²⁷

35. This Working Party “considered that [subparagraph (b) of the “Consultation between Members” provision] would apply to the situation of action taken by a Member such as action pursuant to Article 94 of the Charter [then the essential security exception].”²⁸ The explanation of the Working Party is worth considering in full:

Such action, for example, 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. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent with the Charter*, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.²⁹

²⁶ 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 (US-42).

²⁷ 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 (US-42).

²⁸ 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 (US-42).

²⁹ 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).

36. As noted, the draft ITO Charter text before the Working Party at this time explicitly distinguished between breach and non-violation claims, but the Working Party’s report provides no indication that breach claims – in addition to non-violation claims – could be an appropriate recourse for Members affected by essential security actions. Rather, the Working Party’s conclusion that non-violation claims are the appropriate recourse for Members affected by essential security actions is consistent with the understanding reached between the U.S. and Australia in July 1947. This language from the Working Party’s report is consistent with and tracks closely the intervention by the United States delegate in July 1947, lending further support to the conclusion that the United States delegate was referring to non-violation, nullification or impairment claims in that discussion.

37. A similar discussion occurred a few days later, at a meeting of the Sub-Committee on Chapter VIII (entitled “Settlement of Differences – Interpretation”). At that meeting, “[f]ive representatives agreed with the Chairman that actions of the type mentioned in Article 94 [then the essential security exception] could not be *challenged* by recourse to the procedures of Chapter VIII”³⁰ – indicating that these Members did not believe that essential security actions could be found to breach the Charter. However, the record of their meeting suggests that “any Member which considered that any *benefit* accruing to it being nullified or impaired as specified in Article 89 might invoke the procedures of Chapter VIII in order that compensatory measures

³⁰ United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (emphasis added) (US-43).

might be permitted.”³¹ The representative of the United Kingdom stated that his delegation “intended to move an amendment to Article 94 which would make clear this relationship.”³² Two other representatives at this meeting “expressed some doubts as to the opinion given by the Chairman” and the committee left “the question of [the] relationship between Article 94 and Chapter VIII for further consideration later, if necessary after final texts of Article 94 and 43 [on general exceptions] had been prepared.”³³

38. The report of that meeting does not elaborate on these “doubts,” and one may speculate whether perhaps these two doubting representatives believed that *no* recourse – not even a non-violation claim – was available to Members affected by essential security measures. Regardless of the content of these “doubts,” however, subsequent discussions indicate that they were resolved and negotiators reached a common understanding that non-violation claims, rather than breach claims, were the appropriate redress for Members affected by essential security actions.

39. As foreshadowed, the United Kingdom soon thereafter proposed amendments to the essential security exception. These proposed amendments included the suggested addition of an explicit statement in Article 94 that if an action a Member considered necessary for the protection of its essential security interests “nullifie[d] or impair[ed] any benefit accruing to another Member directly or indirectly the procedure set forth in Chapter VIII of this Charter shall apply and the Organization may authorize such other Member to suspend the application to the

³¹ United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (*italics added*) (US-43).

³² United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (US-43).

³³ United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), E/CONF.2/C.6/W.41 (Jan. 13, 1948), at 1 (US-43).

Member taking the action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate.”³⁴

40. The United States stated at the time that this additional text was “unnecessary” because it was “in effect a *repetition of paragraph (b)* of Article 89.”³⁵ At that time, Article 89(b) provided for consultations when a Member considered that any benefit accruing to it under the Charter was being nullified or impaired as a result of another Member’s measure, “whether or not it conflicts with the provisions of this Charter.”³⁶ The UK representative responded to the United States that “he would be agreeable to having the applicability of Articles 89 and 90 written into the record rather than incorporated in the actual text of Article 94.”³⁷ Notably, neither the UK nor any other representative disagreed with the U.S. statement regarding Article 89(b), and after further discussion, although other aspects of the UK proposal were adopted, ITO charter negotiators declined to incorporate into the essential security exception the UK’s proposed text regarding the suspension of obligations or concessions.

41. Together, this drafting history of Article XXI(b)—which was incorporated without revision to GATT 1994—confirms that a Member’s invocation of its essential security interests is self-judging and not subject to review by a dispute settlement panel. The drafting history also

³⁴ United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948), at 1-2 (US-44).

³⁵ United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 (Jan. 20, 1948), at 3 (emphasis added) (US-47).

³⁶ Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947), article 89 (US-55).

³⁷ United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 (Jan. 20, 1948), at 3 (US-47).

makes clear that non-violation claims, rather than breach claims, are the appropriate means of recourse for parties negatively affected by essential security measures.

E. The United States Has Consistently Expressed That Article XXI(b) Is Self-Judging

42. For over 70 years the United States has consistently held the position that actions taken pursuant to Article XXI are not subject to review for consistency in GATT or WTO dispute settlement. After the United States invoked Article XXI(b) in its 1949 dispute with Czechoslovakia, the United States sought – and secured – dismissal of Czechoslovakia’s claims without the establishment of a Working Party or a panel.

43. The United States took a similar approach in its response to the dispute that arose in 1951 concerning U.S. dairy measures. At issue was Section 104 of the Defense Production Act of 1950, which banned certain dairy imports to the United States. This provision apparently sought to maintain that ban consistently with U.S. trade obligations by expressly stating that the measure was necessary for the protection of U.S. essential security interests.³⁸ Importantly, despite the inclusion of such language in the domestic legislation, U.S. representatives to the GATT did *not* invoke Article XXI(b) with respect to this measure in discussions with other GATT contracting parties. On the contrary, U.S. representatives to the GATT acknowledged that Section 104 breached U.S. trade obligations, explained the domestic division of powers within the U.S. government, and emphasized that “vigorous efforts” had been made to seek repeal of the measure through U.S. domestic processes.³⁹

³⁸ See Item 30 – Restrictions on Imports of Dairy Products Into the United States – Addendum, Memorandum by the United States, GATT/CP.6/28/Add.1 (Sep. 24, 1951).

³⁹ Item 30 – Restrictions on Imports of Dairy Products into the United States, Addendum, Memorandum by the United States Delegation, GATT/ CP.6/28/Add.1 (Sep. 24, 1951); Summary Record of the Tenth Meeting, GATT/CP.6/SR.10 (Sep. 26, 1951), at 7-8; Summary Record of the Tenth Meeting, SR.7/10 (Oct. 31, 1952).

44. In testimony before the U.S. Congress – which was also put before the GATT – the U.S. Executive Branch stated that, if the United States were to attempt to use the security exception in this instance, that would “give other countries a good excuse for using the same exception to justify any protective barriers by which they may wish to limit their imports of our farm products.”⁴⁰ That is, the United States recognized that other Contracting Parties could also invoke Article XXI on the same basis, and the United States chose instead to preserve a culture by not making the invocation. Consistent with the position of the U.S. Executive Branch, the U.S. Congress allowed Section 104 to expire on June 30, 1953.⁴¹

45. Similarly, U.S. comments in the 1975 Sweden *Footwear* matter are consistent with the current U.S. position and longstanding U.S. practice. That matter arose in connection with Sweden’s imposition of a global import quota system for certain footwear.⁴² A third party in this dispute has pointed to notes – allegedly taken by Sweden – which report that a U.S. representative stated that the United States did not consider the Swedish measures sufficiently motivated, and called for a date on which the measures were to be repealed.⁴³ In that instance, however, Sweden had not invoked Article XXI(b). Instead, Sweden asserted that its actions were taken “in conformity with the spirit of Article XXI.”⁴⁴ Comments by the U.S. representative on Sweden’s actions therefore were not made in the context of a formal invocation of Article XXI, and cannot be interpreted as suggesting that a responding Member’s invocation

⁴⁰ Item 30 – Restrictions on Imports of Dairy Products into the United States, Addendum, Memorandum by the United States Delegation, GATT/ CP.6/28/Add.1 (Sep. 24, 1951), at 6.

⁴¹ See United States’ Restrictions on Dairy Products, L/119 (Sep. 9, 1953), at 2-3.

⁴² Sweden – Import Restrictions on Certain Footwear, L/4250 (Nov. 17, 1975), at 1.

⁴³ Third Party Written Submission by the European Union, *United States – Certain Measures on Steel and Aluminum Products* (DS554), para. 2 & note 4.

⁴⁴ Minutes of Meeting, C/M/109, at 9 (Nov. 10, 1975).

of Article XXI(b) is subject to review for conformity with WTO obligations. Rather, the U.S. comments are consistent with seeking to preserve a culture surrounding invocation of essential security interests.

46. The consistent U.S. position with respect to Article XXI continued in 1982, when the European Communities (EC) and its member states, Canada, and Australia invoked Article XXI to justify their application of certain measures against Argentina in light of Argentina's actions relating to the Falkland Islands.⁴⁵ In discussions of these measures, the United States opined that "the GATT had never been the forum for resolution of any disputes whose essence was security and not trade, and that for good reasons, such disputes had seldom been discussed in the GATT, which had no power to resolve political or security disputes."⁴⁶ The United States further stated in these discussions that the "GATT, by its own terms, left it to each contracting party to judge what was necessary to protect its essential security interests in time of international crisis."⁴⁷

47. The United States also expressed similar views in 1985, after Nicaragua asked the GATT Council to condemn a U.S. embargo and to request that the United States revoke these measures immediately.⁴⁸ At a GATT Council Meeting considering the matter, the United States responded that "[i]t was not for GATT to approve or disapprove the judgement made by the United States as to what was necessary to protect its national security interests; GATT was a trade

⁴⁵ GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982) (US-59); Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) (US-60).

⁴⁶ GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 8 (US-59).

⁴⁷ GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982), at 10 (US-59).

⁴⁸ Minutes of Meeting of May 29, 1985, C/M/188, at 2 (June 28, 1985) (US-63).

organization, and had no competence to judge such matters.”⁴⁹ The United States noted that it had taken the same view in the past, when other countries had invoked Article XXI, and that “GATT had traditionally not become involved in political disputes because it was not the appropriate place to resolve them.”⁵⁰

48. In its written submissions before the GATT panel, the United States continued to express this view, and stated that “[b]ecause the U.S. embargo was taken under the Article XXI exception, the U.S. actions cannot be considered a violation of GATT obligations.”⁵¹ The United States also noted, however, that non-violation claims could be available to countries affected by measures that another Member considered necessary for the protection of its essential security interests. As the United States explained, “[i]t could be argued, *as is evident in the negotiating history of Article XXI*, that a measure excepted from GATT obligations by Article XXI may nevertheless be found to cause nullification or impairment in the sense of Article XXIII:1(b) or (c).”⁵²

49. That panel concluded that it could not decide whether the United States was complying with its GATT obligations, and declined to make a recommendation on Nicaragua’s non-violation, nullification or impairment claim.⁵³ The United States recommended adoption of the report and observed that “GATT was not a forum for examining or judging national security

⁴⁹ Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985) (US-63).

⁵⁰ Minutes of Meeting of May 29, 1985, C/M/188, at 4-5 (June 28, 1985) (US-63).

⁵¹ Letter to the Chairman of the Panel on U.S. Trade Measures Affecting Nicaragua from the Office of the United States Trade Representative (June 4, 1986), at 2 (excerpt) (US-70).

⁵² Letter to the Chairman of the Panel on U.S. Trade Measures Affecting Nicaragua from the Office of the United States Trade Representative (June 4, 1986), at 2 (excerpt) (US-70) (italics added).

⁵³ GATT Panel Report, *United States – Trade Measures Affecting Nicaragua* (US-65).

disputes. When a party judged trade sanctions to be essential to its security interests, it should be self-evident that such sanctions would be modified or lifted in accordance with those security considerations.”⁵⁴

50. As these and other statements show, the United States has consistently expressed, for over 70 years, that invocations of Article XXI are self-judging. The United States has also acknowledged, consistent with its argument today, that non-violation, nullification or impairment claims are available and may provide redress for Members affected by essential security actions.

F. Background On The Measures At Issue

51. 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. Furthermore, nothing in the text of Article XXI(b) suggests that the subparagraphs are mutually exclusive. By invoking Article XXI(b), the Member is indicating that one or more of the subparagraphs is applicable.

52. Neither is there any text in Article XXI that imposes a requirement to furnish reasons for or explanations of an action for which Article XXI is invoked. In the absence of language imposing a requirement to identify a subparagraph or furnish reasons, no such obligation may be imposed on a Member through dispute settlement.

53. It may be that a Member invoking Article XXI nonetheless chooses to make information available to other Members. Indeed, the United States did make plentiful information available in relation to its actions under Section 232. While such publicly available information could be

⁵⁴ Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986), at 8 (US-66).

understood to relate most naturally to the circumstance described in Article XXI(b)(iii), it is not necessary under Article XXI, as explained, for any Member to provide details relating to its invocation of Article XXI.

54. By way of background, and for the Panel’s convenience, we briefly set out some of the findings relating to the action taken by the President of the United States. The Secretary of Commerce’s report on the effect of imports of steel on the national security⁵⁵ summarized the findings of the investigation conducted pursuant to Section 232. In that report, the Secretary raised an alarm that “[g]lobal excess steel capacity is a circumstance that contributes to the ‘weakening of our internal economy’ that ‘threaten[s] to impair’ the national security.”⁵⁶ The report explained, “Free markets globally are adversely affected by substantial chronic global excess steel production led by China. While U.S. steel production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined.”⁵⁷ The report further stated, “The displacement of domestic steel by imports has the serious effect of putting the United States at risk of being unable [to] meet the national security requirements.”⁵⁸ The

⁵⁵ 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 (US-7).

⁵⁶ 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, at 55 (US-7);

⁵⁷ 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, at 55 (US-7).

⁵⁸ 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, at 57 (US-7).

Secretary found that steel 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.⁵⁹

55. The Secretary’s report on the effect of imports of aluminum on the national security made similar findings.⁶⁰ The aluminum report noted that “[a] major factor contributing to the decline in domestic aluminum production and loss of domestic production capacity has been excess production and capacity in China, which now accounts for over half of global aluminum production.”⁶¹ The report raised concerns about the ability of U.S. producers—given the circumstance—to remain “financially viable and competitive and able to invest in research and development of the latest technologies” to support defense and other applications.⁶²

56. The Secretary found that 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.⁶³ In his March 8, 2018 proclamations, the President *concurred* with the Secretary’s findings and made adjustments to the imports of steel and aluminum articles.⁶⁴

⁵⁹ 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, at 55 (US-7).

⁶⁰ 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 17, 2018 (US-8).

⁶¹ 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 17, 2018, at 104 (US-8).

⁶² 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 17, 2018, at 105 (US-8).

⁶³ 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 17, 2018, at 104 (US-8).

⁶⁴ Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US-10); Presidential Proclamation 9711 of March 22, 2018 (US-11).

57. The Section 232 reports and the President’s proclamations are not alone in describing the current situation as alarming. In the 2018 G20 Global Steel Forum Ministerial Report, Russia commented that “[g]lobal overcapacity... contributes to erosion in the international rules-based system” and that “[b]oth government market-distortive subsidies aimed at creating excess capacities and direct state regulation including active trade protectionism lead to a sprawl of global crisis and create problems on the way to restore a market-driven approach in this sector.”⁶⁵ In its description of “[t]he state of the steel industry,” the 2017 G20 Global Steel Forum Report included the following description:

The imbalance between supply and demand is a global challenge that has led to a collapse in the fortunes of steel industries in all regions of the world. Excess capacity has driven down prices, employment, capacity utilisation rates and profitability for steelmakers, putting at risk the viability of an industry that produces a material which is vital for the functioning of economies and societies.⁶⁶

58. Such statements from Russia and the G20 Global Steel Forum on Steel Excess Capacity are consistent with the findings in the Section 232 reports by the U.S. Secretary of Commerce and the statements in the President’s proclamations imposing tariffs under Section 232. What differs, in large part, is *what action* Russia thinks is *necessary* for the protection of U.S. essential security interests. Evidently, Russia considers *no action* is necessary. But that is *not* the issue under Article XXI. Under Article XXI, the United States may take any action *it considers*

⁶⁵ G20 Global Forum on Steel Excess Capacity Ministerial Meeting Ministerial Report (Sept. 20, 2018), at 67, <http://www.g20.utoronto.ca/2018/global-forum-on-steel-excess-capacity-180920.pdf> (excerpt) (US-76).

⁶⁶ G20 Global Steel Forum Report (Nov. 30, 2017), at 4, <https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf> (excerpt) (US-72).

necessary for the protection of its essential security interests relating to certain issues or at certain times, whether Russia agrees the action is necessary or not.

G. Because Article XXI Applies, The Rules On Safeguards Are Not Relevant, And In Any Event Article XXI Could Serve As A Defense To Alleged Breaches Of The Agreement On Safeguards

59. The complainant has challenged the U.S. security measures under Article XIX of the GATT 1994 and under several provisions of the Agreement on Safeguards. The measures at issue are not safeguards and therefore the Agreement on Safeguards does not apply. Pursuant to Article 11.1(c) of the Agreement on Safeguards, once a Member invokes Article XXI(b) of the GATT 1994, the Agreement on Safeguards is not applicable. Specifically, Article 11.1(c) provides that “[t]his Agreement *does not apply* to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 *other than Article XIX.*” That is, the Agreement on Safeguards “does not apply” to measures that a Member considers necessary for the protection of its essential security interests under Article XXI(b). Therefore, the issue of whether Article XXI(b) applies to the Agreement on Safeguards simply does not arise.

60. In any event, Article XXI of the GATT 1994 makes clear that the security exceptions, including the essential security exception, apply to the entire agreement. Specifically, Article XXI begins with the clause “Nothing in this Agreement shall be construed.” The provision does not contain any qualification to this threshold clause; nor does Article XIX of the GATT 1994 indicate that the security exceptions do not apply to rights and obligations in that article.

61. Furthermore, the Agreement on Safeguards contains 14 references to the GATT 1994. For example, Article 1 provides that the agreement “establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article

XIX of GATT 1994.” In addition, the Preamble provides that the Agreement on Safeguards is “based on the basic principles of GATT 1994” and was established to “clarify and reinforce the disciplines of GATT 1994, specifically those of its Article XIX.” Such language establishes an express, textual link between the GATT 1994 and obligations under the Agreement on Safeguards. This language also confirms that, in any event, Article XXI(b) would be a defense not only to claims raised under the GATT 1994 but also to claims under the Agreement on Safeguards.

H. In Light Of The Self-Judging Nature Of GATT 1994 Article XXI, The Sole Finding The Panel May Make Consistent With Its Terms Of Reference Under DSU Article 7.1 Is To Note The Invocation Of Article XXI

62. As the United States has described in its first written submission, in light of the self-judging nature of Article XXI, the sole finding that the panel may make – consistent with its terms of reference and the DSU – is to note the U.S. invocation of Article XXI.⁶⁷ In fact, this is the only finding the panel can make consistent with the DSU.

63. Under DSU Article 7.1, the Panel’s terms of reference call on the Panel to examine the matter referred to the DSB by the Member and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements].”⁶⁸ As this text establishes, the Panel has two functions: (1) to “examine” the matter – that is, to “[i]nvestigate the nature, condition or qualities of (something) by close inspection or

⁶⁷ First Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products* (DS554), Part. III.C.

⁶⁸ United States – Certain Measures on Steel And Aluminum Products, Constitution of the Panel Established at the Request Of Russia, Note By The Secretariat, WT/DS554/18 (Jan. 28, 2019); United States – Certain Measures on Steel And Aluminum Products, Constitution of the Panel Established at the Request Of Russia, Note By The Secretariat, WT/DS554/18/Rev.1 (Aug. 19, 2019).

tests”⁶⁹; and (2) to “make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for” in the covered agreement.

64. This dual function of panels is confirmed in DSU Article 11, which states that the “function of panels” is 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.”

65. As DSU Article 19.1 provides, these “recommendations” are issued “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement” and are recommendations “that the Member concerned bring the measure into conformity with the agreement.” DSU Article 19.2 clarifies that “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement.”

66. To clarify, the United States does not argue that the Panel should not make an objective assessment of the matter. The Panel should absolutely make an objective assessment of the matter – to examine the matter and to assess the self-judging nature of Article XXI. However, the Panel’s ability to make an objective assessment does not convert every element of the Article XXI(b) text into a legal standard against which a measure is to be judged by a panel. The plain text of Article XXI(b) does not call for testing of the Member’s measure against a legal standard.

67. Instead, the text of GATT 1994 Article XXI(b) establishes that it is for a responding Member to consider whether the actions it has taken are necessary for the protection of its own

⁶⁹ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870.

essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member's consideration. Accordingly, when a respondent has invoked its essential security interests under Article XXI(b) as to a challenged measure, a panel may make no legal findings that will assist the DSB in making recommendations or giving rulings as to a complaining Member's claims, within the meaning of DSU Articles 7.1, 11, and 19. Under these circumstances, the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security interests under GATT 1994 Article XXI(b). In other words, the Panel has jurisdiction over this dispute but the dispute presents an issue that is not justiciable—a challenge to a Member's essential security measure. This means that the Panel cannot, consistent with its terms of reference, make findings of inconsistency or provide a recommendation on the consistency of the U.S. invocation of Article XXI.

I. Conclusion

68. In sum, in light of the U.S. invocation of Article XXI(b) and the self-judging nature of this provision, the sole finding that the Panel may make is to note the U.S. invocation. Such a finding is consistent with the Panel's terms of reference and the DSU. If Russia or any other complaining party is dissatisfied with the U.S. invocation of Article XXI, it may resort to other action under the DSU, but it may not drag the WTO and its dispute settlement system into judging what are inherently sensitive and political matters. The United States thanks the Panel for its attention and looks forward to answering its questions.