

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

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

October 29, 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 sound and sober 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 that 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 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 to the United States.

5. Today we will first highlight a few key aspects underlying this interpretation, and explain why the text does not subject to panel review a Member's exercise of its inherent right to protect its essential security interests.

6. Second, the United States will recall the numerous statements in the negotiating history of Article XXI that confirm the article is self-judging, and that the appropriate means of redress for Members affected by essential security actions would be a non-violation, nullification or impairment claim. This 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. We can only note with regret that Members that previously shared this view have, for purposes of these disputes, taken a different view.

7. Finally, 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 Article 11.1(c) that its disciplines are not applicable.

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)”).

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.

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

8. 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 to 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.

9. 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.

10. 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).

11. 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.”

12. 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.” The subparagraphs 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. In this way, the subparagraphs guide a Member’s exercise of its rights under this provision.

13. But 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. The text of Article XXI(b) uses a single uninterrupted clause modifying “any action” such that “it considers” applies to the whole provision. The argument that “it considers” only qualifies certain words in the phrase and therefore certain aspects of the Member’s determination—for instance, the necessity of the action, or whether the action is for protection, or the Member’s essential security interests, but not the circumstances described in the subparagraphs—ignores the ordinary meaning of the terms and the grammatical structure of the provision. The provision only contemplates that a Member regards or looks upon any action as necessary for the protection of its essential security interests in the context of each subparagraph.

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

14. 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).

15. 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 that a Member’s invocation of Article XXI(b) was not intended to be reviewable against some legal standard.

16. 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.

17. 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.

18. Finally, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member “considers” appropriate or necessary, such as Article 18.7 of the Agreement on Agriculture and Article III(5) of the General Agreement on Trade in Services. As in Article XXI(b), the language signals that a particular judgment resides with that Member. In other provisions of the GATT 1994 and other WTO agreements, by contrast, the word “consider” is used to indicate that certain judgments are left for determination by a panel, the Appellate Body, or a WTO committee. For example, in at least two WTO provisions—DSU Articles 26.1 and 26.2—the judgment of a Member is expressly subject to review through dispute settlement.

This additional context also makes clear that the phrase “it considers necessary” in GATT 1994 Article XXI(b) refers to the judgment of the WTO Member taking action to protect its essential security interests, not the judgment of a WTO panel or the Appellate Body.

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

19. 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.

20. In *United States Export Restrictions*, a dispute between the United States and Czechoslovakia under GATT 1947, 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.

21. In the GATT Council meeting discussing Czechoslovakia’s request, various parties expressed the view that Article XXI is self-judging. For instance, the United Kingdom delegate commented that “since the question clearly concerned Article XXI, the United States action

would seem to be justified.”³ The United Kingdom delegate explained further that “every country must have the last resort on questions relating to its own security.”⁴

22. The delegate from Cuba supported dismissal of Czechoslovakia’s request, and explained that “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.”⁵ The representative of Pakistan similarly opined that, because the situation involved Article XXI, “the case called for examination only under the provisions of that Article.”⁶

23. 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

³ 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).

⁴ 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).

⁵ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 5 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

⁶ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 6 & 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).

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

24. 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 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.

25. 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.

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.”).

¹⁰ 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).

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

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

27. 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

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.”).

¹² U.S. First Written Submission, *United States – Certain Measures on Steel and Aluminum Products* (DS544), 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”).

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

28. 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

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).

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).

terms of this Charter,” which had “the effect of nullifying or impairing any object” of the ITO charter.¹⁷

29. 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 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

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).

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).

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.

30. 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 to the delegate’s concerns, 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 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 of 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).

31. 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.²⁴ That is, the

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 19 (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).

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 21 (US-41).

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.

32. 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 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.”²⁵ 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.”²⁶

33. 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

²⁵ 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).

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).

pursuant to Article 94 of the Charter [then the essential security exception].”²⁷ 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.²⁸

34. 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.

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 (emphasis added) (US-42).

35. 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 action of the type mentioned in Article 94 [then the essential security provision] could not be *challenged* by recourse to the procedures of Chapter VIII”²⁹ – 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 might be permitted.”³⁰ The representative of the United Kingdom stated that his delegation “intended to move an amendment to Article 94 which would make clear this relationship.”³¹ 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.”³²

36. 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-

²⁹ 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).

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 (italics added) (US-43).

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 (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).

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.

37. 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 under 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 Member taking the action of such obligations or concessions under or pursuant to this Charter as the Conference deems appropriate.”³³

38. 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.”³⁴ 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.”³⁵ The UK representative responded to the

³³ 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).

³⁴ 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).

³⁵ 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).

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.”³⁶ 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.

39. 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 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. 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

40. 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

³⁶ 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).

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.

41. 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.

42. Furthermore, the Agreement on Safeguards contains 14 references to the GATT 1994. In addition to Article 1, which 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,” 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, and 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.

F. 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

43. 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.³⁷

44. This outcome may be understood based on the difference between “jurisdiction” and “justiciability.” In this context, “jurisdiction” can be defined as the extent of power of the Panel under the DSU to exercise its judicial authority or decide a particular case.³⁸ By contrast, the word “justiciability” relates to whether a matter is appropriate or suitable for adjudication by a court, or in this context, whether an issue is subject to findings by the Panel under the DSU.³⁹ Here, the Panel has “jurisdiction” over the dispute because the DSB has established the Panel to examine the matter set out in the panel request. The matter before the Panel may be considered “non-justiciable,” however, because – as the ordinary meaning of the terms of Article XXI(b) establish – the Panel cannot make findings or provide a recommendation on that matter.

³⁷ First Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products* (DS544), Part. III. C.

³⁸ See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1465 (US-68) (defining “jurisdiction” as “[1] Exercise of judicial authority, or of the functions of a judge or legal tribunal; power of administering law or justice. Also, power or authority in general; administration, control.; and [2] The extent or range of judicial or administrative power; the territory over which such power extends”); *Black’s Law Dictionary*, ed. Bryan A. Garner, Eighth edition, 2004, at 867 (defining “jurisdiction” as “[a] government’s general power to exercise authority over all persons and things within its territory” or “[a] court’s power to decide a case or issue a decree”) (US-69).

³⁹ See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1466 (US 68) (defining “justiciable” as “[I]iable to be tried in a court of justice; subject to jurisdiction); *Black’s Law Dictionary*, ed. Bryan A. Garner, Eighth edition, 2004, at 882 (defining “justiciability” as “[t]he quality or state of being appropriate or suitable for adjudication by a court.”) (US-69).

45. In these circumstances, the sole finding the Panel may make is to recognize that the United States has invoked its essential security interests under GATT 1994 Article XXI(b). This result is consistent with the DSU, contrary to arguments the Panel has heard from the complainant.

46. 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].”⁴⁰ 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 tests”⁴¹ ; 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.

47. 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.”

48. 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

⁴⁰ United States – Certain Measures on Steel And Aluminum Products, Constitution of the Panel Established at the Request Of China, Note By The Secretariat, WT/DS544/9 (Jan. 28, 2019).

⁴¹ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870.

and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement.”

49. The text of GATT 1994 Article XXI(b), however, establishes that it is for a responding Member to determine whether the actions it has taken are necessary for the protection of its own essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member’s determination. 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 that issue.

50. This result is also consistent with DSU Article 19.2 because finding an essential security measure to breach a covered agreement would diminish the “right” of a Member to take action it considers necessary for the protection of its essential security interests.

51. Such an understanding also respects the decision of the WTO Members. WTO Members agreed to remove invocation of the essential security exception from multilateral judgment when they agreed to self-judging text included in Article XXI. This decision by Members recognized

that issues of essential security are inherently political in nature, and there are no legal criteria by which a Member's consideration of its essential security interests can be objectively determined. Importantly, the decision recognized that the Members did not relinquish the sovereign right of a state to take action to protect its essential right.

52. Therefore, 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.

G. Conclusion

53. For the foregoing reasons, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB. The United States thanks the Panel for its attention and looks forward to answering its questions.