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**UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM  
PRODUCTS**

REPORT OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Report of the Panel to be found in documents WT/DS564/R.

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**ANNEX A**

## WORKING PROCEDURES OF THE PANEL

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## **ANNEX A-1**

### **WORKING PROCEDURES OF THE PANEL**

#### **Adopted on 5 April 2019**

#### **General**

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.  
  
(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

#### **Confidentiality**

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.  
  
(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.  
  
(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.  
  
(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

#### **Submissions**

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.  
  
(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.  
  
(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.  
  
(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

#### **Preliminary rulings**

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
  - a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the

Panel. Turkey shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

- b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
- c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
- d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

#### **Evidence**

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.  
  
(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.  
  
(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Turkey should be numbered TUR-1, TUR-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered [XXX]-5, the first exhibit in connection with the next submission thus would be numbered [XXX]-6.  
  
(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.  
  
(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

### **Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

### **Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
  - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

### **Substantive meetings**

10. The Panel shall meet in closed session.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite Turkey to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.
  - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days prior to the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.
  - c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
  - d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Turkey presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

- i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
- ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
- iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
- iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The Panel will communicate in advance concerning the conduct of the second substantive meeting, after having consulted with the parties.

### **Third party session**

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third party session of the meeting with the Panel.

21. The Panel will communicate in advance concerning the conduct of the third-party session, after having consulted with the parties.

### **Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve

as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. The integrated executive summary shall be limited to no more than 30 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

### **Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

### **Interim and Final Report**

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

- a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).
- b. Each party and third party shall submit 2 paper copies of its submissions and 2 paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.
- c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.



- d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.
- e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.
- f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

**Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

## **ANNEX A-2**

### **WORKING PROCEDURES OF THE PANEL**

**Revised on 19 July 2019 and 20 February 2020**

#### **General**

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.  
  
(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

#### **Confidentiality**

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(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.  
  
(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.  
  
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#### **Submissions**

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.  
  
(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.  
  
(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.  
  
(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

#### **Preliminary rulings**

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
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Panel. Turkey shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

- b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
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- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
  - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

### **Substantive meetings**

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  - d. The Panel may subsequently pose questions to the parties.

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f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

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20. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third party session of the meeting with the Panel.

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### **Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve

as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

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### **Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

### **Interim and Final Report**

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

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- c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.

- d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.
- e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall serve directly on the third parties any submissions up to and including the responses to the questions posed by the Panel following the first substantive meeting of the Panel with the parties, as well as the final versions of the oral statements made during this meeting. In addition, each party shall serve directly on the third parties second written submissions, final versions of oral statements made during the second substantive meeting, responses to the Panel's questions after the second substantive meeting, and comments on those responses. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.
- f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

**Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

### **ANNEX A-3**

#### **ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING MEETINGS WITH REMOTE PARTICIPATION**

*Adopted on 1 December 2020*

#### **General**

1. These Additional Working Procedures set out terms for holding meetings with the Panel where all of the participants shall attend by remote means.
2. These Additional Working Procedures are meant to develop and complement paragraph 16 of the Working Procedures of the Panel.

#### **Definitions**

3. For the purposes of these Additional Working Procedures:

**"Remote participant"** means any registered person attending the meeting with the Panel by remote means.

**"Platform"** means Cisco Webex software through which remote participants attend the meeting with the Panel.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the platform.

#### **Equipment and technical requirements**

4. Each party shall ensure that all remote participants of its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.
5. All technical questions, including the minimum equipment and technical requirements for the usage of the Platform, will be addressed in the advance testing sessions in paragraph 8 below between the Host and the parties.

#### **Technical support**

6. (1) Each party is responsible for providing technical support to the remote participants of its delegation.  
  
(2) The host will assist remote participants in accessing and using the platform in preparation of, and during, the meeting with the Panel.

#### **Pre-meeting**

##### Registration

7. Each party shall provide to the Panel the list of the members of its delegation, on a dedicated form to be provided by the WTO Secretariat, no later than 5:00 p.m. (Geneva time) one week before the first day of the meeting with the Panel.



#### Advance testing

8. Before the meeting with the Panel, the WTO Secretariat will hold two testing sessions with all remote participants of each party: (i) a separate one for each party's remote participants, and (ii) a joint session with all participants in the meeting, including all remote participants of the parties and the Panel joining remotely. Such sessions will seek to reflect, as far as possible, the conditions of the meeting.

#### **Confidentiality and security**

9. The Panel shall meet in closed session. The content and conduct of the meeting are confidential and no recording by the parties of any part of the meeting is allowed.
10. The Panel will record the meeting and keep an official copy of it for the Panel's record.

#### **Conduct of the meeting**

##### Access to the virtual meeting room

11. (1) The host will invite remote participants via email to join the virtual meeting room on the platform.  
  
(2) For security reasons, access to the virtual meeting room will be password-protected and limited to registered participants. Remote participants shall not forward or share the meeting link or password.  
  
(3) Each party shall ensure that only registered participants from its delegation join the virtual meeting room.

##### Advance log-on

12. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.  
  
(2) All remote participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

##### Document sharing

13. (1) Each party shall provide the Panel and other participants with a provisional written version of its opening statement and, if available, of its closing statement, before delivery at the meeting. The parties are invited to make their opening statements available to the Panel the day before the commencement of the meeting.  
  
(2) Any participant wishing to share a document with the Panel and other participants during the meeting shall do so before first referring to such document at the meeting.

##### Technical matters

14. (1) Each party shall designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The host can be contacted via the platform, by sending an email to [leslie.stephenson@wto.org](mailto:leslie.stephenson@wto.org), or by calling +41 022 739 6148.  
  
(2) Should any technical interruptions occur, the host will directly coordinate with the affected participants to resolve the issue. After consulting the parties, the Panel may pause the session until the technical issue is resolved or may continue the proceedings with those participants that continue to be connected.
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**ANNEX B**

ARGUMENTS OF THE PARTIES

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**ANNEX B-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TÜRKIYE****1 INTRODUCTION**

1.1. This integrated executive summary contains the arguments presented by the Republic of Turkey (Turkey) in its written submissions, oral statements, responses to questions, and comments thereto in the present proceedings.

1.2. In this dispute, together with six other co-complainants, Turkey challenges unilateral and WTO-inconsistent safeguard measures on steel and aluminium articles imposed by the United States on 23 March 2018.<sup>1</sup> These measures are intended to provide broad-based protection to the politically influential US steel and aluminium industries to free them from competitive pressures from imports, and to improve their economic performance.

1.3. For the most part, the measures take the form of additional tariffs of 25 per cent (for steel) and 10 per cent (for aluminium). These tariff levels are well above the United States' tariff bindings in the United States' GATT Schedule of Concessions. Certain WTO Members are subject to quantitative restrictions, either on steel or aluminium or both, instead of these duties. Finally, Turkey is aware of certain other measures taken by the United States in the form of voluntary export restraints and potentially other forms. However, these other measures have not been published.

1.4. All of these measures have been imposed and modified over time by the President of the United States (President) through a series of Presidential Proclamations, issued between March 2018 and January 2020. All of these Presidential Proclamations are based on two investigations conducted by the United States Department of Commerce (the USDOC) on the basis of Section 232 of the 1962 Trade Expansion Act (Section 232).

1.5. Since 23 March 2018, the measures have been continuously evolving by means of various subsequent amendments. For instance, for reasons unknown, Turkey was initially singled out and subject to duties on steel twice as high as those imposed on any other WTO Member, 50 per cent instead of 25 per cent. This "extra-high" duty subsequently lapsed, and Turkey became subject to the "ordinary" rate of duty of 25 per cent.<sup>2</sup> As another example, on 24 January 2020, the United States issued a Presidential Proclamation stating that imports of steel and aluminium derivatives would be subject to safeguard measures in the form of a tariff increase.<sup>3</sup>

1.6. In Turkey's view, the above measures fall within the scope of Article XIX of the GATT 1994 and the Agreement on Safeguards. Moreover, these measures violate a number of core WTO legal provisions, in particular Articles I, II:1(a) and II:1(b), X:3(a), XI, XIX of the GATT 1994, as well as a long list of provisions of the Agreement on Safeguards.

1.7. The United States' defense is premised on a series of incorrect interpretations of WTO law. Most prominently, the United States incorrectly reads Article XXI of the GATT 1994 as providing "*carte blanche*" for a Member to impose any measures at any time, at its full discretion, without any consequences and without remedy for any affected Member. This should give serious concern to any Member interested in the continued existence of an effective multilateral trade law regime.

1.8. As part of its "*carte blanche*" approach to WTO law, the United States also argues for unprecedented discretion for a responding Member in a dispute to decide which legal disciplines apply to its measures. In particular, the United States argues that the WTO disciplines applicable to safeguard measures do not apply to a safeguard measure if the regulating Member does not wish them to apply. Under this interpretation, WTO safeguard rules become entirely optional at the unlimited discretion of a regulating Member. All that it takes for a government to escape the WTO

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<sup>1</sup> Section 4.3 of Turkey's First Written Submission.

<sup>2</sup> Turkey's response to Panel question 86.

<sup>3</sup> See Presidential Proclamation 9980 of 24 January 2020 Adjusting Imports of Derivative Aluminium Articles and Derivative Steel Articles into the United States. Exhibit TUR-48.

safeguard regime is simply not to notify the measure to the WTO as a safeguard measure. This cannot be correct.

1.9. The United States also fails to engage with, or downplays without any explanation, many of Turkey's textual, contextual, and systemic arguments under Article XXI of the GATT 1994. The United States also misinterprets the findings of the panel in *Russia – Traffic in Transit*.

1.10. Turkey's integrated executive summary is structured as follows: In Section 2, Turkey summarises the key facts in this dispute. In Section 3, Turkey summarises its legal arguments. In Section 4, Turkey summarises its conclusions and requests for findings.

## 2 FACTUAL BACKGROUND

2.1 The measures at issue in this dispute – imposed through the above-mentioned Presidential Proclamations – are based on two investigations conducted by the USDOC, covering steel and aluminium products respectively. The nominal purpose of these investigations was to determine whether imports of steel and aluminium were entering the United States under conditions that impaired national security. In reality, the investigations essentially determined whether increased steel and aluminium imports were injuring, or threatening to injure, the profitability of the US steel and aluminium industries. Thus, in essence, the investigations were safeguard investigations in all but name.

2.2. These investigations were nominally based on Section 232 and Section 705 of the United States Code of Federal Regulations, which is the implementing regulation for Section 232. Under these provisions, the US President is authorized to impose import restrictions if the USDOC conducts an investigation and makes an affirmative determination that a product "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security".<sup>4</sup>

2.3. The two investigations were initiated approximately at the same time, on 19 April 2017 in the case of steel and on 26 April 2017 in the case of aluminium. Both investigations were initiated by a decision of the United States' Secretary of Commerce Wilbur Ross (self-initiation).<sup>5</sup> In addition, for both investigations, the President issued a Presidential Memorandum, in which he directed the Secretary of Commerce to "proceed expeditiously in conducting his investigation and submit a report on his findings to the President".<sup>6</sup>

2.4. The results of these investigations were set out in two separate reports: The "USDOC Section 232 Steel Report" was issued on 11 January 2018 and the "USDOC Section 232 Aluminium Report" was issued on 17 January 2018.

2.5. The broad thrust of the USDOC Section 232 Steel Report is as follows:

- The Report finds that the US steel industry has been injured, over an extended period of time, by competing steel imports.<sup>7</sup>
- These increasing imports have put pressure on prices<sup>8</sup>, resulted in steel mill closures<sup>9</sup>, caused a declining employment trend<sup>10</sup>, are blamed for the loss by the domestic industry

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<sup>4</sup> Section 232, 19 USC. §1862, Exhibit TUR-1, para. (b)(3)(A).

<sup>5</sup> USDOC Section 232 Steel Report, p. 18. Exhibit TUR-3. USDOC Section 232 Aluminium Report, p. 18. Exhibit TUR-4.

<sup>6</sup> Administration of Donald J. Trump, Memorandum on Steel Imports and Threats to National Security, 20 April 2017, Section 3. Exhibit TUR-20. Administration of Donald J. Trump, Memorandum on Aluminium Imports and Threats to National Security, 27 April 2017, Section 3. Exhibit TUR-21. See also, USDOC Section 232 Steel Report, p. 18. Exhibit TUR-3. USDOC Section 232 Aluminium Report, p. 18. Exhibit TUR-4.

<sup>7</sup> USDOC Section 232 Steel Report, pp. 25, 37, 55-57. Exhibit TUR-3.

<sup>8</sup> USDOC Section 232 Steel Report, Section V.B.4. Exhibit TUR-3.

<sup>9</sup> USDOC Section 232 Steel Report, Section V.B.5. Exhibit TUR-3.

<sup>10</sup> USDOC Section 232 Steel Report, Section V.B.6. Exhibit TUR-3.

of commercial opportunities to bidders using imported steel<sup>11</sup>, contributed to the domestic steel industry's financial distress<sup>12</sup>, and limited its capital expenditures<sup>13</sup>.

- According to the USDOC, the industry needs to operate at a certain level of capacity utilization in order to be economically viable. Without much analysis, the report concludes that capacity utilization of 80 per cent or above "is typically necessary for sustained profitability"<sup>14</sup> and that "[o]ver 80 per cent is a healthy capacity utilization rate and a rate at which most companies would be profitable".<sup>15</sup> The Section 232 Steel Report (as well as the Section 232 Aluminium Report) rely on this level of capacity utilization as the official target to be achieved by the proposed trade-restrictive measures.
- This targeted level of capacity utilization is alleged to be necessary for the domestic industry to supply an unspecified and large level of steel for US defense and so-called "critical infrastructure" requirements, in the event of a hypothetical and largely undescribed emergency scenario.<sup>16</sup> Put differently, the entire investigation is premised on the idea that the US steel industry must be able to supply not only steel required for defense or military purposes, but also for a broad range of non-military, commercial sectors that have no connection to the defense or military sectors.
- In fact, the USDOC Section 232 Steel Report admits explicitly that the military steel requirements of the Department of Defense constitute only approximately three per cent of total steel production.<sup>17</sup>

2.6. The Section 232 Aluminium Report is somewhat longer than the Steel Report. Nevertheless, it is similar to the Steel Report in structure and content:

- According to the Report, the aluminium-producing industry can be divided into an upstream segment that produces unwrought aluminium and a downstream segment that produces semi-finished aluminium products.<sup>18</sup>
- The Report postulates that aluminium is "essential" to US national security.<sup>19</sup> As in the case of the Section 232 Steel Report, the aluminium demand that must be supplied by the US aluminium industry is not only that of the defense sector, which "use[s] a small percentage of US aluminium production". Rather, the relevant level of production that allegedly must be guaranteed reflects also the demands of the so-called "critical infrastructure sectors", which are the same 16 sectors analysed in the Steel Report.<sup>20</sup>
- According to the USDOC's analysis, the primary aluminium production is declining.<sup>21</sup> Nevertheless, secondary aluminium production – which was excluded from the USDOC's report – has increased, as has production in the downstream sector.<sup>22</sup>
- According to the USDOC Report, because domestic production is currently well below demand, the United States is allegedly dependent on imports for a large proportion of its aluminium needs.<sup>23</sup> The USDOC determined that there had been an "increase in imports ... in both primary aluminium and downstream products."<sup>24</sup>

<sup>11</sup> USDOC Section 232 Steel Report, Section V.B.8. Exhibit TUR-3.

<sup>12</sup> USDOC Section 232 Steel Report, Section V.B.9. Exhibit TUR-3.

<sup>13</sup> USDOC Section 232 Steel Report, Section V.B.10. Exhibit TUR-3.

<sup>14</sup> USDOC Section 232 Steel Report, p. 47. Exhibit TUR-3.

<sup>15</sup> USDOC Section 232 Steel Report, p. 48. Exhibit TUR-3.

<sup>16</sup> USDOC Section 232 Steel Report, pp. 13, 27, Appendix I. Exhibit TUR-3.

<sup>17</sup> USDOC Section 232 Steel Report, p. 23. Exhibit TUR-3. See also Memorandum from Secretary of Defense for Secretary of Commerce, undated, Exhibit TUR-19.

<sup>18</sup> USDOC Section 232 Aluminium Report, pp. 21-22, 52. Exhibit TUR-4.

<sup>19</sup> USDOC Section 232 Aluminium Report, p. 23. Exhibit TUR-4.

<sup>20</sup> USDOC Section 232 Aluminium Report, pp. 25, 38. Exhibit TUR-4.

<sup>21</sup> USDOC Section 232 Aluminium Report, pp. 40 – 58. Exhibit TUR-4.

<sup>22</sup> USDOC Section 232 Aluminium Report, pp. 22, 50. Exhibit TUR-4.

<sup>23</sup> USDOC Section 232 Aluminium Report, pp. 59 - 63. Exhibit TUR-4.

<sup>24</sup> USDOC Section 232 Aluminium Report, p. 63-75. Exhibit TUR-4.

- These imports have an adverse impact on the welfare of the US aluminium industry. For example, the primary sector has seen "dramatic job losses".<sup>25</sup>
- The examination of the downstream sector, in contrast, yields an overwhelmingly positive picture.<sup>26</sup> These positive developments notwithstanding, according to the USDOC, the downstream industry is in a difficult situation. This is because "it is not clear that this can be maintained given the rise of imported aluminium products, which are steadily eroding the customer base for domestic production".<sup>27</sup>
- Thus, despite a number of favourable developments, the USDOC concludes that the US aluminium industry is "at a risk of becoming unable to satisfy existing national security needs or respond to a national security emergency that requires a large increase in domestic production".<sup>28</sup>
- As in the case of steel, the level of production required to alleviate the above risks is set at 80 per cent of installed capacity, and the various tariff and quota options presented to the President are designed to achieve that capacity utilization level.<sup>29</sup>

2.7. Both Reports recommended to the President multiple options for trade restrictive actions, in the form of either a global quota, global tariffs, or tariffs on a subset of countries. The Reports assessed each option based on its ability to enable the two US industries to achieve a desired rate of capacity utilization. Both Reports also discussed the possibility of exempting particular countries or excluding particular affected parties from the import restrictions. The President ultimately chose the global tariff option (with a few exceptions), but at a tariff level higher than that recommended by the USDOC.<sup>30</sup>

2.8. Notwithstanding the assertions by the United States that the measures at issue concern "national security", the clear purpose of these measures is economic and trade-related. The purpose is to prevent or remedy economic injury of the domestic industries allegedly caused, or threatened, by increased imports. Thus, these measures are classical industry-protective measures for which WTO law envisages a range of responses, such as trade remedy provisions (under the Anti-Dumping, SCM, and Safeguard Agreements). Alternatively, when a Member wishes to increase its tariffs beyond its bound levels without using the trade remedy disciplines, it can resort to tariff renegotiations under Article XXVIII of the GATT 1994.

2.9. The economic and trade-related nature of the measures arises from the following facts:

- The source of the problem is defined as increased imports, in general terms and in particular imports purportedly triggered by an excess global capacity.
- The extent of the problem is gauged by the harm inflicted to the domestic industry by imports, by its idling capacity, and by its reduced production or production shortfall to supply an increasing demand on the US market.
- The primary goal and purpose of the remedial action is to improve the health of the US industry, its economic fundamentals, in particular its production capacity, capacity utilization, and overall production.
- Numerous statements reveal that the Section 232 determinations and Presidential Proclamations are a surrogate for and a replacement of AD, CVD, and safeguard action.

2.10. All of these points are discernible from the legal acts and documents that embody or contain the measures at issue, as well as from statements from senior officials of the US Government.<sup>31</sup>

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<sup>25</sup> USDOC Section 232 Aluminium Report, p. 89 -103. Exhibit TUR-4.

<sup>26</sup> See, *inter alia*, USDOC Section 232 Aluminium Report, pp. 90, 93, 94, 97-98. Exhibit TUR-4.

<sup>27</sup> USDOC Section 232 Aluminium Report, p. 94. Exhibit TUR-4.

<sup>28</sup> USDOC Section 232 Aluminium Report, p. 5. Exhibit TUR-4.

<sup>29</sup> USDOC Section 232 Aluminium Report, p. 6. Exhibit TUR-4.

<sup>30</sup> Turkey's First Written Submission, Section 3.2.

<sup>31</sup> See Turkey's First Written Submission, Section 3.4.

2.11. Turkey is concerned that the United States has, therefore, chosen to rely on the notion of "national security" in order to circumvent the responses to import competition that have been negotiated under WTO agreements. By relabelling these trade protective measures as based on "national security", the United States seeks to shield these trade measures from the agreed disciplines and proper scrutiny under WTO law, and unilaterally to release itself from its multilateral obligations.

### 3 TURKEY'S LEGAL ARGUMENTS

#### 3.1 The measures at issue and the Panel's terms of reference

3.1. Throughout these proceedings, the Panel has posed to the parties a number of questions relating to its terms of reference.

3.2. Turkey has consistently explained that, in its Panel Request, it adequately identified the measures at issue before the Panel. Turkey did so both by means of a narrative description of the measures at issue and by listing the legal instruments by which those measures were imposed. These are relatively straightforward types of measures, namely, additional duties, quotas (quantitative limitations), and voluntary quantitative restrictions on exports, applied to steel and aluminium.<sup>32</sup>

3.3. For the Panel's ease of reference, in its submissions, Turkey further elaborated on the measures at issue by characterising them as follows:

- The additional duty of 25 per cent *ad valorem* that applies to steel products originating in all countries, except Argentina, Australia, Brazil, and South Korea ("measure a");<sup>33</sup>
- The additional duty of 50 per cent *ad valorem* that applies to steel products originating in Turkey ("measure b");<sup>34</sup>
- Country-specific quantitative limitations on steel goods that apply to Argentina, Brazil, and South Korea ("measure c");<sup>35</sup>
- The additional duty of 10 per cent *ad valorem* that applies to aluminium articles originating in all countries, except Argentina and Australia ("measure d");<sup>36</sup>
- Country-specific quantitative limitations on imports of aluminium goods that apply to Argentina ("measure e");<sup>37</sup> and
- Various unpublished voluntary export restraints, orderly marketing arrangements, and similar measures, such as export moderation and export price monitoring, agreed upon between the United States and certain other WTO Members, such as Australia, Argentina, Brazil, Canada, Mexico, and South Korea ("measure f").<sup>38</sup>

<sup>32</sup> Turkey's response to Panel question 82.

<sup>33</sup> Presidential Proclamation 9705, para. 8, clause (2), Annex, Exhibit TUR-6, as amended by subsequent Presidential Proclamations, such as Presidential Proclamation 9711, clause (1). Exhibit TUR-8; and Presidential Proclamation 9740, clause (1). Exhibit TUR-10.

<sup>34</sup> Presidential Proclamation 9772. Exhibit TUR-14. This measure existed at the time of the establishment of the Panel. However, on 16 May 2019, the United States announced that it was reducing the steel duty safeguard applicable to Turkey from 50 per cent to 25 per cent. Effectively, this meant that the United States returned the safeguard duties back to the level they had been prior to August 2018. Presidential Proclamation 9886 of 16 May 2019. Exhibit TUR-42.

<sup>35</sup> Presidential Proclamation 9740 clause (1), Annex (Part B). Exhibit TUR-10; Presidential Proclamation 9759, paras. 4-5, clauses (1), (2), Annex. Exhibit TUR-12.

<sup>36</sup> Presidential Proclamation 9704, para. 7, clause (2), Annex, Exhibit TUR-7, as amended by subsequent presidential proclamations, such as Presidential Proclamation 9710 clause (1). Exhibit TUR-9; Presidential Proclamation 9739 clause (1). Exhibit TUR-11; and Presidential Proclamation 9758, clause (1). Exhibit TUR-13.

<sup>37</sup> Presidential Proclamation 9758, clause (2), Annex (Part B). Exhibit TUR-13.

<sup>38</sup> Presidential Proclamation 9740 para. 4. Exhibit TUR-10; Presidential Proclamation 9759, paras. 4-5. Exhibit TUR-12; Presidential Proclamation 9758, para. 5. Exhibit TUR-13; Presidential Proclamation 9893 of 19 May 2019, paras. 4-6. Exhibit TUR-43; Presidential Proclamation 9894 of 19 May 2019, paras. 5-7. Exhibit

3.4. Turkey challenges the above measures under various provisions of the GATT 1994 and the Agreement on Safeguards, as well as the WTO-inconsistent administration of the same measures under Article X:3(a) of the GATT 1994.<sup>39</sup>

3.5. As far as Turkey is aware, in its submissions to the Panel, the United States never raised any issues relating to Article 6.2 of the DSU. This, in Turkey's view, demonstrates that the United States sees no problem with Turkey's Panel Request or the way that Turkey has articulated its claims in the light of Article 6.2 of the DSU. This, in turn, indicates that, in the Panel proceedings, the United States did not feel that it suffered any prejudice as such, for example, that its ability to respond to Turkey's claims was impeded.<sup>40</sup>

3.6. On the contrary, the United States confirmed that it had understood clearly the measures before this Panel, when it stated as follows: "The border measures at issue are not new or mysterious; they are customs duties – tariffs – and quotas".<sup>41</sup>

3.7. The United States' position further demonstrates that Turkey's Panel Request is fully consistent with Article 6.2 of the DSU.

### **3.2 Applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue**

#### **3.2.1 The import measures at issue meet the definition of "safeguard" under Article XIX of the GATT 1994**

3.8. Turkey submits that the the United States' import measures at issue fall under the WTO safeguard rules, as set out under Article XIX of the GATT 1994 and under the Agreement on Safeguards. Furthermore, the United States' measures are inconsistent with these rules.

3.9. In particular, the additional duties and quotas at issue (measures (a) – (e)) are safeguard measures *stricto sensu*. They reflect the two definitional features of a safeguard measure, as clarified by the Appellate Body in *Indonesia – Iron or Steel Products*: (1) the suspension of concessions or other obligations; and (2) the purpose of remedying serious injury to the domestic industry.<sup>42</sup>

3.10. Reflecting these two features, these measures, first, suspend, or withdraw relevant GATT concessions or obligations of the United States, in particular the obligations under Articles II:1(a) and XI:1 of the GATT 1994. Second, the purpose of the US measures is to prevent or remedy serious injury to the domestic industry, through the suspension of GATT obligations. This purpose can be discerned from multiple elements:

- The content of the USDOC Section 232 Steel and Aluminium Reports, in particular: (i) the USDOC's reasoning and conclusions that reveal the design and intended operation of the import measures; and (ii) the analytical elements that the USDOC examined in the process, including unforeseen developments, increase in imports, and an injury analysis based on the same or similar set of factors as those analysed in safeguard determinations;
- The Presidential Proclamations; and
- Official statements of the United States' high-ranking government officials.<sup>43</sup>

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TUR-44; Joint Statement by the United States and Canada on Section 232 Duties on Steel and Aluminium. Exhibit TUR-45; and Joint Statement by the United States and Mexico on Section 232 Duties on Steel and Aluminium. Exhibit TUR-46.

<sup>39</sup> Turkey's responses to Panel question 99 and question 2 in Appendix 1 to Turkey's responses to the Panel questions after the Second Hearing.

<sup>40</sup> Turkey's response to Panel question 1 in Appendix 1 to Turkey's responses to the Panel questions after the Second Hearing.

<sup>41</sup> The United States' Closing Statement at the Second Panel Hearing, para. 2.

<sup>42</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. See also Turkey's response to Panel question 3.

<sup>43</sup> Turkey's First Written Submission, Section 4.4.2.2.2.



3.11. These documents reveal that the measures at issue were designed to pursue the "specific objective" of improving the economic health of the domestic steel and aluminium industries, and to prevent or remedy the injury allegedly suffered by those industries due to increased imports of steel and aluminium products. This objective is not different in any material respect from the objective commonly pursued by any safeguard measure. As is well known, the objective of safeguard measures is to protect the economic health of the domestic industry that has been seriously injured or is threatened to be seriously injured by increased imports, or enable it to recover and to facilitate its adjustment.<sup>44</sup>

3.12. Furthermore, the voluntary export restraints, orderly marketing arrangements, and similar measures that the United States negotiated with certain other Members (measure (f)) automatically fall under Article 11.1(b) of the Agreement on Safeguards. It is not necessary to separately demonstrate the two criteria listed by the Appellate Body, because a measure in this category is not a safeguard measure *stricto sensu*.<sup>45</sup>

### 3.2.2 The United States' "self-invocation" theory has no basis in the covered agreements

3.13. The United States' legal position in this dispute is based on a "self-invocation"/ "self-judging" theory. This theory states, in a nutshell, that the regulating Member alone determines whether its measure is subject to WTO safeguard rules, or whether it falls instead under another permissive provision of the GATT 1994, such as Article XXI. According to the United States, to avail itself of the rights under Article XIX, a Member must, *inter alia*, notify its measure as a "safeguard", and afford the Members "an opportunity to consult with it in respect to the proposed action". If the requisite notice was not submitted, or an opportunity to consult was not given, the measure is not a safeguard measure.<sup>46</sup>

3.14. The United States' "self-invocation" theory is incorrect. It has no basis either in Article XIX, the Agreement on Safeguards, or in prior panel and the Appellate Body's decisions. Turkey sees the following considerations that undermine the United States' argument:

- Nothing in WTO safeguard rules suggests that the applicability of these rules depends on a Member's intent. For instance, the phrase "shall be free" – to which the United States points repeatedly – simply denotes the existence of a conditional right of a Member to apply a safeguard measure. A Member has the choice to avail itself of that right. But the existence of that choice says nothing about whether the measure is a safeguard. Whether a measure is a safeguard must be determined objectively, based on the design, structure, and intended operation of the measure at issue, at the time of its creation.<sup>47</sup>
- It is furthermore unclear why the United States attaches so much importance to the absence of an express definition of a "safeguard measure" in Article XIX or the Agreement on Safeguards. Even when there is no explicit and comprehensive definition under WTO law of a particular category of measures, a WTO adjudicator must determine the applicability of particular WTO rules. That is a routine task that many previous panels and the Appellate Body have been required to perform under Article 11 of the DSU.<sup>48</sup>
- Moreover, Article 1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 are not completely silent on the meaning of the notion of "safeguard measures". As the United States itself acknowledged, in *Indonesia — Iron or Steel Products*, the Appellate Body indeed relied on those provisions to derive the two "constituent features" of the term "safeguard measure": (i) the measure must be of a particular type; and (ii)

<sup>44</sup> Turkey's First Written Submission, paras. 4.29-4.30.

<sup>45</sup> Turkey's First Written Submission, paras. 4.56-4.61; Turkey's response to Panel question 3.

<sup>46</sup> See United States' responses to Panel questions 4 (para. 6), 5 (para. 13), (para. 41), and 14.

<sup>47</sup> Turkey's Opening Statement at the Second Hearing, para. 6.

<sup>48</sup> Turkey's Second Written Submission, para. 3.14.

it must be designed to address a particular objective.<sup>49</sup> This means that the term "safeguard measure" can be defined objectively and on the basis of the treaty text.<sup>50</sup>

- In *Indonesia – Iron or Steel Products*, the Appellate Body sought to provide very specific and precise guidance on how to determine whether a measure constitutes a safeguard measure. The Appellate Body clarified, *inter alia*, that in analysing whether a measure has the aforementioned two constituent features, panels may assess and assign probative value to, various factors, none of which is in itself dispositive. These factors may include "any relevant WTO notifications".<sup>51</sup> Thus, the Appellate Body explicitly treated WTO notifications as *one of many factors to be considered*, and clearly *not as a definitional feature* of a safeguard measure.<sup>52</sup>
- The United States appears to misunderstand the important difference between, on the one hand, the "constituent features" of a safeguard, and, on the other hand, the various procedural and substantive "conditions" or requirements that a WTO-consistent safeguard measure must fulfil.<sup>53</sup> The United States, for instance, did not explain why some of the procedural requirements (those concerning notifications and consultations) should be elevated to "constituent features" of a safeguard measure, but many other procedural requirements should not. For example, if the Panel were to find that a measure is not a safeguard measure just because it was not properly notified to the WTO, the Panel should arguably reach the same conclusion if that measure was not properly published. Turkey sees no structural difference between those procedural obligations to justify this radically different treatment.<sup>54</sup>
- Indeed, there can be many reasons why a Member chooses not to notify a measure as a safeguard measure. For instance, the Member may have failed to notify for strategic reasons, e.g. precisely because it anticipated a subsequent challenge in a dispute. Perhaps, for that very reason, the Uruguay Round 1993 Decision on Notification Procedures states that "notification itself [is] *without prejudice* to views on the consistency of measures with or their relevance to rights and obligations under the Multilateral Trade Agreements".<sup>55</sup>
- The United States relies on the word "sought" in Article 11.1(c) of the Agreement on Safeguards to argue that an importing Member can decide unilaterally whether a measure falls within the WTO safeguard rules.<sup>56</sup> However, the word "sought" in this provision does not attach legal significance to the subjective intent of the regulating Member, nor to that Member's *ex post* explanations of its alleged regulatory intent. Instead, the phrase "measures sought, taken or maintained by a Member" in Article 11.1(c) merely reflects the broad range of scenarios that can arise under the Agreement on Safeguards. At any given point in time, a Member may have already taken safeguard measures and may be maintaining previously imposed safeguard measures, or it may also be *in the process of preparing to implement ("seek")* safeguard measures. In the latter scenario, a Member could act inconsistently with, *inter alia*, Articles 12.1(b) and 12.3 of the Agreement on Safeguards at the time when it is still "seeking" to apply a

<sup>49</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

<sup>50</sup> Turkey's Second Written Submission, para. 3.15.

<sup>51</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

<sup>52</sup> Turkey's response to Panel question 9.

<sup>53</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57.

<sup>54</sup> Turkey's Second Written Submission, paras. 3.18-3.19. The element of "consultations" was no longer emphasized in the United States' Second Written Submission. The United States appears to have realized, that, under Article XIX:2 of the GATT 1994, in exceptional circumstances, a safeguard measure may be applied *before consultations take place*. This, of course, undermines the argument that holding consultations under Article XIX:2 is a prerequisite for Article XIX to apply. Obviously, it makes no sense that a procedural step that can post-date the application of a safeguard measure should determine whether the WTO safeguard rules apply to this measure in the first place. Turkey's Opening Statement at the Second Hearing, para. 8.

<sup>55</sup> Turkey's response to Panel question 9. Emphasis added.

<sup>56</sup> Article 11.1 distinguishes between: (i) emergency action[s] on imports ... as set forth in Article XIX of GATT 1994" (Article 11.1(a)); and (2) "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX" (Article 11.1(c)).

safeguard measure, even though it has not yet "taken", or is not yet "maintaining" a safeguard measure.<sup>57</sup>

- The United States also relies on various examples of provisions in the covered agreements allegedly requiring invocation through notification before action is taken, as the relevant context for WTO safeguard disciplines.<sup>58</sup> Turkey, however, fails to understand how entirely different types of notifications, phrased in different treaty language, under entirely different, unrelated provisions with a different underlying structure and logic can shed any meaningful light on the issue before the Panel. Moreover, the provisions listed by the United States appear to be a randomly selected, heterogenous group of provisions that have essentially nothing in common, except that they envisage that, at some point, a WTO Member will make some form of announcement or notification to the WTO. This makes no sense as a basis for comparison. In any event, even looking at the listed provisions in greater detail, nothing in those provisions supports the United States' argument.<sup>59</sup>
- The negotiating history of the Agreement on Safeguards further confirms Turkey's position that the drafters of this agreement had a clear idea of what the term "safeguard measure" meant. Some negotiating texts circulated during the Uruguay Round contained a definition of this term, which was not different from the Appellate Body's definition of the term "safeguard".<sup>60</sup>
- Finally, the United States' arguments in this dispute are contradicted by its own submissions to the Negotiating Group on Safeguards during the Uruguay Round. Back then, the United States itself defined the concept of a "safeguard measure" in the same way as the Appellate Body, emphasizing the design and purpose of the measure "to prevent or remedy serious injury to domestic producers caused by increased imports and to facilitate adjustment". The United States also characterized notification not as a definitional feature, but rather as one of multiple procedural requirements triggered after the decision to apply a safeguard measure was taken.<sup>61</sup>
- The United States' negotiating proposal was even more revealing on what should happen if an importing Member took a safeguard measure, but did not notify it as a safeguard measure. In those circumstances, the United States proposed, another Member could counter-notify the importing Member's action as a "safeguard" and could request consultations under safeguard disciplines. Any ensuing dispute regarding the legal nature of that measure as a "safeguard" would be resolved by either a recommendation of the Safeguards Committee or by initiating the dispute settlement procedures.<sup>62</sup> This proposal is logically premised on the notion that a measure can be a safeguard measure independently of whether it has been notified as such by the imposing Member.

3.15. In sum, the United States' "self-invocation" theory is legally unfounded and should be rejected. The United States' Section 232 import measures on steel and aluminium are safeguard measures in all but name, as they clearly possess the constituent features of a safeguard measure, as clarified and explained by the Appellate Body in *Indonesia — Iron or Steel Products*.

### **3.3 The measures at issue are inconsistent with numerous provisions of the WTO safeguard disciplines and the GATT 1994**

<sup>57</sup> Turkey's Second Written Submission, paras. 3.23-3.25.

<sup>58</sup> United States' second written submission, Section IV.A.2 (citing, *inter alia*, Article 5 of the Agreement on Agriculture, Article 6 of the (now defunct) Agreement on Textiles and Clothing, Article XXI of the GATS, as well as Articles II:5, XVIII, XXIV, XXVII and XXVIII of the GATT 1994).

<sup>59</sup> Turkey's response to Panel question 4 in Appendix 1 to Turkey's responses to the Panel questions after the Second Hearing.

<sup>60</sup> Turkey's Second Written Submission, paras. 3.16-3.17 (citing, *inter alia*, Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25, 27 June 1989, para. 2. Exhibit TUR-34).

<sup>61</sup> Turkey's Opening Statement at the Second Hearing, citing Negotiating Group on Safeguards, 'Submission by the United States', MTN.GNG/NG9/W/23, 13 June 1989, p. 2. Exhibit TUR-70.

<sup>62</sup> Turkey's Opening Statement at the Second Hearing, citing Negotiating Group on Safeguards, 'Submission by the United States', MTN.GNG/NG9/W/23, 13 June 1989, pp. 7-8. Exhibit TUR-70.

3.16. In its First Written Submission, Turkey demonstrated that the United States' measures at issue violate Article XIX of the GATT 1994 and the Agreement on Safeguards on multiple grounds. Turkey's safeguard-related claims may be summarised as follows:

- The import measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994, as in the Section 232 Steel and Aluminium Reports, the United States failed to identify the United States' GATT obligations that, in its view, resulted in the increase in imports that allegedly caused serious injury to the US domestic industry. Furthermore, the United States failed to explain the logical connection between these obligations, as well as the purported unforeseen development, on the one hand, and allegedly increased imports, on the other hand.<sup>63</sup>
- The import measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards, as the USDOC failed to demonstrate that the alleged increases in imports were "recent enough, sudden enough, sharp enough, and significant enough ... to cause or threaten to cause 'serious injury'".<sup>64</sup>
- The import measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards, as the United States failed to properly determine serious injury or threat of serious injury to its domestic industries. In particular, the USDOC improperly determined that the downstream segment of the US aluminium industry is threatened with serious injury, because it failed to evaluate the threat of serious injury that is "clearly imminent". Due to this flaw, the USDOC's determination concerning the aluminium industry as a whole (both the upstream primary and downstream segments) is vitiated as well. Finally, the USDOC failed to observe the requirement of parallelism in its investigations on steel and aluminium (i.e., correspondence between the scope of its investigations, including the analysis of serious injury or its threat, and the scope of the final measures at issue), which vitiates its serious injury findings in these investigations.<sup>65</sup>
- Furthermore, the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 4.2(b) of the Agreement on Safeguards because it failed to conduct the non-attribution analysis required for the application of a safeguard measure. In particular, the USDOC failed to observe the requirement of "parallelism". In addition, in its Section 232 Steel and Aluminium Reports, the USDOC referred to several other factors that had allegedly caused injury to the domestic steel and aluminium industries, such as the fact that the United States is a relatively high-cost producer of aluminium. However, it did not conduct a proper non-attribution analysis of these additional factors.<sup>66</sup>
- The safeguard measures at issue (in particular, additional tariffs and quotas) are also inconsistent with Article 2.2 of the Agreement on Safeguards, which requires that safeguard measures be applied "to a product being imported irrespective of its source". Despite this requirement, the United States has exempted Australia entirely from all import measures, whether on steel or aluminium. Moreover, the United States permits steel imports from Argentina, Brazil and South Korea to enter the United States without the additional duty up until the quantitative limits set out in the relevant Presidential Proclamations. Finally, the United States permits aluminium imports from Argentina to enter the United States without the additional duty up to the quantitative limits set out in the relevant Presidential Proclamation.<sup>67</sup>

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<sup>63</sup> Turkey's First Written Submission, Section 4.4.4.

<sup>64</sup> Turkey's First Written Submission, Section 4.4.5.

<sup>65</sup> The United States granted various country exemptions from the additional duties to certain top exporters of steel and aluminium articles. However, the scope of the investigation included imports from these sources. In these circumstances, there is no proper determination that the imports subject to the final measure satisfy, by themselves, the standards of serious injury and threat of serious injury in Article 4.2(a). Turkey's First Written Submission, Section 4.4.6.

<sup>66</sup> Turkey's First Written Submission, Section 4.4.7.

<sup>67</sup> Turkey's First Written Submission, Section 4.4.8.

- The additional duty of 50 per cent *ad valorem* on steel articles originating from Turkey is inconsistent with Article 5.1, first sentence, of the Agreement on Safeguards, as this duty is not proportionate to the alleged extent of "serious injury" explained in the Section 232 Steel Report, is not based on reason or logic, and does not comply with the aforementioned "parallelism" requirement.<sup>68</sup>
- The United States also appears to have sought and negotiated voluntary export restraints, orderly marketing arrangements or similar measures with other countries. These are prohibited under Article 11(1)(b) of the Agreement on Safeguards ("grey area" measures).<sup>69</sup>
- The United States also failed to meet various procedural and transparency requirements in Article XIX and the Agreement on Safeguards. In particular, contrary to Articles 12.1(a), 12.1(b) and 12.1(c), the United States did not notify the Committee on Safeguards upon initiating the steel and aluminium investigations at issue, making findings of serious injury or threat thereof, and taking the decision to apply the import measures at issue. Consequently, contrary to Article 12.2, the United States failed to provide the Committee on Safeguards with all pertinent information in the above-mentioned notifications. In addition, the United States failed to provide Turkey with an adequate opportunity for prior consultations, contrary to Article 12.3 and Article XIX:2 of the GATT 1994.<sup>70</sup>
- As the above US safeguard actions are inconsistent with Article XIX of the GATT 1994 and numerous provisions of the Agreement on Safeguards, these measures are, therefore, also inconsistent with Article 11(1)(a) of the Agreement on Safeguards. Article 11(1)(a) of the Agreement on Safeguards provides that "[a] Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement".

3.17. Turkey also challenges the United States' safeguard measures at issue under various provisions of the GATT 1994. All of these claims of violation stand independently of whether the Panel agrees with Turkey that the measures at issue are safeguard measures within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards. Turkey's GATT-related claims may be summarised as follows:

- With respect to the additional duties, the United States violated Articles II:1(a) and II:1(b) of the GATT 1994, as these duties are applied in excess of the rates prescribed in the United States' GATT Schedule.<sup>71</sup>
- Furthermore, by subjecting imports of the products at issue from Argentina, Brazil and South Korea to numerical quotas, the United States is plainly applying measures that are inconsistent with Article XI:1 of the GATT 1994.<sup>72</sup>
- The United States has also chosen to treat very differently some of the WTO Members from which it imports the steel and aluminium products at issue. In particular, while most countries are subject to a 25 per cent additional duty on steel and a 10 per cent additional duty on aluminium, Turkey was initially subject to a 50 per cent additional duty on steel. Similarly, several countries are subject to quotas instead of duties, Australia is entirely exempt from any border restrictions, and some countries appear to be subject to certain treatment operationalized through the so-called "additional unpublished measures" (voluntary export restraints). This differential treatment is clearly in violation of Article I:1 of the GATT 1994.<sup>73</sup>

<sup>68</sup> Turkey's First Written Submission, Section 4.4.9.

<sup>69</sup> Turkey's First Written Submission, Section 4.4.10.

<sup>70</sup> Turkey's First Written Submission, Section 4.4.11.

<sup>71</sup> Turkey's First Written Submission, Section 4.5.2.

<sup>72</sup> Turkey's First Written Submission, Section 4.5.3.

<sup>73</sup> Turkey's First Written Submission, Section 4.5.4.

- Finally, the United States violates Article X:3(a) of the GATT 1994, because it fails to administer the import measures at issue in a "reasonable" and "impartial" manner. Specifically, the United States' import-restrictive measures envisage a process by which individual countries can obtain exemptions from the applicable import duties of 25 and 10 per cent. Moreover, the United States introduced the so-called "product exclusion system" under which individuals or companies can petition the USDOC to grant product exclusions from the applicable measures in case the products are not produced in the United States in a sufficient and reasonably available amount, in a satisfactory quality, or otherwise based on a national security consideration. Both of these mechanisms reflect administration that is neither reasonable nor impartial.<sup>74</sup>

3.18. The United States has not rebutted any of these claims, as its position in this dispute was based entirely on the aforementioned "self-invocation"/ "self-judging" theory.<sup>75</sup> Thus, if the Panel were to reject the United States' theory as unfounded, it should uphold Turkey's claims.

### **3.4 The United States fails to justify its measures under Article XXI of the GATT 1994**

#### **3.4.1 Introduction and the standard of review under Article XXI**

3.19. Both parties appear to agree that the standard of review to be applied to Article XXI depends, in essence, on how the text of that provision should be interpreted.<sup>76</sup> The parties, however, disagree on whether Article XXI in its entirety requires deference to a regulating Member's judgment, or whether instead that deference applies only to particular aspects of Article XXI.

3.20. The United States argues that the subparagraphs of Article XXI(b) grant total discretion to the regulating Member, because the preceding *chapeau* authorizes a Member to take measures that it "considers" necessary. This implies a deferential standard of review for all of the three subparagraphs.<sup>77</sup>

3.21. In Turkey's view, however, Article XXI is an affirmative defense, just like Article XX of the GATT 1994 or Article XIV of the GATS. It must be invoked by the defending Member, which thus bears the burden of proof. It must properly specify the subparagraphs of Article XXI(b) it wishes to invoke, and it must supply argument and evidence to substantiate that defense. In prior disputes, the Appellate Body has rejected affirmative defenses under general exceptions when those were found to be "patently underdeveloped".<sup>78</sup>

3.22. Article XXI(b) consists of a *chapeau* and of three subparagraphs. The *chapeau* contains the phrase "any action which it considers necessary". Turkey accepts that this phrase confers a margin of discretion on the invoking Member, in the choice of measures that protect essential security interests. For instance, the invoking Member is not subject to the usual "necessity" test applied under Article XX. There is also certain inherent flexibility and discretion in the articulation of a Member's "essential security interests", in the light of the nature of the concept of security interests.<sup>79</sup>

3.23. Nevertheless, the discretion that informs the *chapeau* of Article XXI(b), even if wide, cannot be boundless. First, the term "considers" cannot mean that a Member is entirely free to adopt any measures, including measures that are manifestly unrelated to any conceivable security interests or that are manifestly unable to serve any security purpose. For instance, the term "objective assessment" under Article 11 of the DSU requires that a panel engage in some level of scrutiny of a Member's actions, against some objective legal benchmark. In this respect, even very permissive provisions, such as Article 3.7 of the DSU, which states that a Member is free to "exercise its

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<sup>74</sup> Turkey's First Written Submission, Section 4.5.6.

<sup>75</sup> United States' Closing Statement at the Second Hearing, paras. 2, 7, 8.

<sup>76</sup> The United States clarified that its use of the term "justiciable" is essentially co-extensive and synonymous with the "standard of review". United States' response to Panel question 61, para. 280. The United States' view that Article XXI is "self-judging", or "non-justiciable", did not relate to the question of the Panel's jurisdiction, or the DSU. United States' First Written Submission, para. 185.

<sup>77</sup> Turkey's Second Written Submission, para. 4.8.

<sup>78</sup> Turkey's Opening Statement at the First Hearing, para. 14 (citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 178-179).

<sup>79</sup> Turkey's Opening Statement at the First Hearing, para. 15.

judgment" whether engaging in WTO dispute settlement would be "fruitful", have been interpreted to include at least some residual objective standard.<sup>80</sup>

3.24. Second, by including the term "essential" before "security interests", the drafters clearly intended to limit the discretion emanating from the phrase "it considers" to situations of particularly serious matters of national security. This deliberate textual qualification of the term "security interests" would be reduced to a nullity if, as the United States posits, Members were not subject to any objective panel review at all, simply because they deem themselves to act in the name of national security.<sup>81</sup>

3.25. Third, other than the *chapeau*, Article XXI(b) contains three subparagraphs, under three romanettes (i) to (iii), that qualify the *chapeau*. These subparagraphs describe or qualify the measures (action) that can be taken pursuant to the *chapeau*. This qualification consists in either setting out a particular subject matter to which those measures must be related (i.e. fissionable materials or derivatives, or arms, ammunitions and implements of war) or in describing the time period in which those measures must be taken (time of war or other emergency in international relations). Turkey thus argues that the normally applicable, objective, and non-deferential standard of review applies to the subparagraphs of Article XXI(b). This non-deferential, objective and independent standard of review applies also to the question of whether the temporal context in which the United States took its measures amounts to a "war or other emergency in international relations".<sup>82</sup>

3.26. Turkey considers that the panels' reasoning in *Russia – Traffic in Transit* and *Saudi Arabia – Protection of IPRs* – i.e. the only panel reports that have interpreted the WTO national security exceptions – fully support its interpretation of Article XXI(b) of the GATT 1994 in this dispute. Both of these reports rejected the United States' "self-judging" theory, which is the centrepiece of the United States' defense in this dispute.<sup>83</sup>

3.27. The United States' erroneous reading of Article XXI as completely self-judging, without the need for any explanation, has come at great expense to Turkey's due process rights in this dispute and the efficiency of these proceedings. Because of the United States' erroneous approach, until very late in these proceedings, the United States failed even to clarify on which part of Article XXI and on which evidence it was relying. This late defence is also contrary to the 1982 Decision concerning Article XXI, which is the integral part of the GATT 1994. According to that Decision "[s]ubject to the exception in Article XXI(a), contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI". As explained further, the United States did not invoke these exceptional circumstances under Article XXI(a).<sup>84</sup>

3.28. In what follows, Turkey demonstrates that the United States' "self-judging" theory, which is, in essence, the United States' only defense in this dispute, is legally unfounded. The United States has thus failed to justify its measures on the basis of Article XXI.

#### **3.4.2 The United States' grammatical analysis of Article XXI(b) makes neither grammatical nor logical sense**

3.29. One of the core elements in the United States' interpretative approach to Article XXI is that Article XXI(b) forms a "single relative clause" or "single integral clause" with each of the three subparagraphs.

3.30. The logic of this "single relative clause" theory is that, because the *chapeau* of Article XXI(b) and each subparagraph can allegedly be combined and written out as a single sentence, all the words in each *chapeau*-subparagraph combination must relate to and inform each other. In the United States' view, this means that the phrase "which it considers necessary" in the *chapeau* must be read as reaching far beyond its actual position in the sentence and extending into the three

<sup>80</sup> Turkey's Opening Statement at the First Hearing, paras. 17-21.

<sup>81</sup> Turkey's Opening Statement at the First Hearing, para. 22.

<sup>82</sup> Turkey's Opening Statement at the First Hearing, paras. 23-26; Turkey's Second Written Submission, para. 4.9.

<sup>83</sup> Turkey's response to Panel question 93; Turkey's comment on the United States' response to Panel question 93.

<sup>84</sup> Turkey's Opening Statement at the Second Hearing, paras. 33-34.

subparagraphs to vest the invoking Member with the discretion to determine compliance with these three subparagraphs. According to the United States, this means that Article XXI is self-judging.<sup>85</sup>

3.31. But this "single integral clause" theory is not based on any accepted grammatical analysis and is moreover contrary to common sense.<sup>86</sup> In reality, the phrase "which it considers" relates only to the words "necessary for the protection of its essential security interests" in the Article XXI(b) *chapeau* and does not reach into the three subparagraphs. The three subparagraphs instead each form a separate relative clause that is grammatically linked to the word "action".

3.32. Effectively, therefore, the *chapeau* of Article XXI(b) and each of the three subparagraphs form a sentence with relative clauses. All these relative clauses relate to the word "action" (rather than the words "essential security interests"). As a result, the content of one of these relative clauses cannot inform the other clause. Turkey has presented numerous examples with hypothetical sentences to illustrate this proposition. The United States has not rebutted any of these examples.

3.33. For Article XXI(b)(iii), the link between the word "action" and the subparagraph is obvious from a common-sense perspective alone, given that only an "action" – rather than a "security interest" – can be "taken in times of war or other emergency". In contrast, for subparagraphs (i) and (ii), the word "relating" could theoretically relate to either "action" or "essential security interests". However, there are several reasons why the word "relating" must be linked to "action", rather than "security interest".

3.34. First, it would be entirely unprecedented anywhere in the WTO covered agreements, and highly unlikely as a matter of drafting, that in a provision with subparagraphs such as Article XX or XXI, different paragraphs would relate to different parts of a *chapeau* clause. Put differently, it is highly unlikely that the drafters would draft subparagraphs (i) and (ii) as linked to the words "essential security interests" and then, without any indication, switch and link subparagraph (iii) to the word "action". The United States quotes no precedent anywhere in the WTO covered agreements for this proposition.

3.35. Second, in any event, any debate about the English language version is resolved by the Spanish version. Given that each of the three subparagraphs in the Spanish version begins with the words "relativas", that paragraph must relate to a word in the feminine plural, which is "medidas", the Spanish equivalent to the English term "action". The three different language versions must be read harmoniously. This means that the word "relating" in paragraphs (i) and (ii) in the English version must be read as relating to the same word as in the Spanish version, which is "action".

3.36. The United States understands this and realizes that the Spanish language version refutes its "single integrated clause" theory. The United States, therefore, puts forward multiple arguments to relegate the Spanish language version to a secondary role. The United States refers to the Spanish version as "idiosyncratic"<sup>87</sup>; as a mere "translation"<sup>88</sup>; and as "structurally different" from the English and French language versions.<sup>89</sup> That, of course, is incorrect and is incompatible with the most basic principles of treaty interpretation. All three language versions of the covered agreements have identical interpretative value and, as stated explicitly in Article 33(3) of the Vienna Convention, are presumed to have the same meaning in each authentic text.

3.37. The United States argues that the three language versions are somehow "different" from each other and that, therefore, these versions have to be "reconciled", within the meaning of Article 33(4) of the Vienna Convention, in a manner convenient to the United States.<sup>90</sup> But this argument is incorrect. All three language versions have to be read in the light of each other, because they provide context to each other. In the Spanish version, all three subparagraphs can, logically and grammatically, only refer to "action" ("medidas") and cannot refer to "essential security interests". This fact must also inform the reading of the English and French versions. In this way, the Spanish

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<sup>85</sup> United States' response to Panel question 40, para. 148. Emphasis added.

<sup>86</sup> Turkey's response to Panel questions 36 and 40(c).

<sup>87</sup> United States' response to Panel question 40, para. 155.

<sup>88</sup> General Comment of the United States on Panel questions 41 to 43, para. 156.

<sup>89</sup> General Comment of the United States on Panel questions 41 to 43, para. 163.

<sup>90</sup> United States' comments on Turkey's statements at the Second Panel Hearing, para. 7.



version provides context for understanding the meaning of the English and French versions of the corresponding term.

3.38. Indeed, this is how a treaty with multiple language versions is properly read. Article 33(3) of the Vienna Convention provides that the terms of the treaty are presumed to have the same meaning in each authentic text. The United States effectively ignores and skips Article 33(3). It denies the Spanish version its proper interpretative value for understanding the English and French versions, and instead jumps to Article 33(4). This is incorrect.

### **3.4.3 The United States' contextual analysis of Article XXI(b) is incorrect**

3.39. In these proceedings, Turkey has pointed out repeatedly that, if Members were free to invoke Article XXI to shield any economic measure from a panel's scrutiny, many other exceptions and permissive provisions of the GATT 1994 would lose any practical meaning. This would remove from meaningful WTO disciplines even measures that are very remote from the foreign policy concerns addressed in this provision, including measures of an economic nature, such as those under Article XIX.<sup>91</sup>

3.40. Indeed, one of the key weaknesses of the United States' "self-judging" theory is precisely that it fails to acknowledge that each of the GATT exceptions and permissive provisions is based on a fundamentally different policy consideration. These provisions constitute alternative paths to justify a GATT-inconsistent measure. This also explains why Article XXI cannot serve as an exception to measures found to be inconsistent with the Agreement on Safeguards.<sup>92</sup>

3.41. The United States also argues that objective review under Article XXI(b) conflicts with Article XXI(a) of the GATT 1994 as relevant context. But Turkey's interpretation has not deprived the United States of its right to withhold any sensitive information concerning its real essential security interests, as envisaged under Article XXI(a). Nor were other Members that successfully invoked Article XXI(b)(iii) in other disputes deprived of their right to withhold confidential information.<sup>93</sup> The reason for this is simple: Information that a panel requires in order to determine whether the defendant's reliance on Article XXI is legally sustainable will very often be available in the public domain, and can be placed on the panel record without concerns about confidentiality.<sup>94</sup>

3.42. This dispute is a case in point. The United States has itself acknowledged that it has made "plentiful information available" to the Panel. This includes the USDOC Reports on Steel and Aluminium, various Presidential Proclamations, as well as a G-20 Report on Steel Excess Capacity.<sup>95</sup> Turkey sees no confidentiality concerns whatsoever.<sup>96</sup>

3.43. Finally, it bears emphasising that the United States has not invoked the exceptional circumstances in Article XXI(a) as a basis for withholding any confidential information, let alone explained any such circumstances to the Panel and Turkey.<sup>97</sup>

### **3.4.4 The United States' interpretation of Article XXI(b) is contrary to the principle of effective treaty interpretation**

3.44. The United States' interpretation of Article XXI goes against the principle of effective treaty interpretation. The United States' approach renders the carefully drafted language of the three subparagraphs in Article XXI(b) inutile, because everything is left to the discretion of the invoking Member. This cannot be correct. If the existence of the conditions in the subparagraphs were left entirely to the assessment of the invoking Member, the drafters would not have gone through the effort of negotiating the three subparagraphs, with very precise and objectively verifiable scenarios in which a national security exception could be invoked. Nor would there have been a reason for the

<sup>91</sup> Turkey's Opening Statement at the Second Hearing, para. 29.

<sup>92</sup> Turkey's Opening Statement at the Second Hearing, para. 30.

<sup>93</sup> See, *inter alia*, Panel Report, *Russia – Traffic in Transit*, paras. 7.77, 7.139-7.149; and Panel Report, *Saudi Arabia – Protection of IP Rights*, paras. 7.229-7.294.

<sup>94</sup> Turkey's Opening Statement at the Second Hearing, para. 31.

<sup>95</sup> United States' Opening Statement at the First Hearing, paras. 53-58; United States' response to Panel question 92.

<sup>96</sup> Turkey's Opening Statement at the Second Hearing, para. 32.

<sup>97</sup> Turkey's Opening Statement at the Second Hearing, para. 34.

drafters to make this list exhaustive. The United States has not offered any credible response to these arguments.<sup>98</sup>

### **3.4.5 The United States relies erroneously on the 1982 Decision concerning Article XXI and the 1949 Decision in *US – Export Restrictions***

3.45. The United States also relies erroneously on two GATT 1947-era Decisions to argue that they support the "self-judging" nature of Article XXI:1(b). These two decisions are the 1982 Decision concerning Article XXI and the 1949 Decision in *US – Export Restrictions*.<sup>99</sup>

3.46. However, neither Decision provides a basis – textual or otherwise – for the United States' "self-judging" theory. On the contrary, the 1982 Decision states that, "when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement". A Member's "full rights" under the GATT 1947 included the "rights" to seek dispute settlement under Articles XXII and XXIII with respect to measures allegedly subject to Article XXI. Those "full rights" would be meaningless if the invocation of Article XXI was ultimately not reviewable. It is, therefore, highly unlikely that the drafters of this Decision would explicitly reserve these "full rights", if they considered Article XXI to be completely self-judging. The Decision thus undermines, rather than supports, the United States' argument.<sup>100</sup>

3.47. Similarly, the 1949 Decision in *US – Export Restrictions* does not support the United States' "self-judging" theory either, as it concerned a specific dispute between the United States and Czechoslovakia, and did not provide a general interpretation of Article XXI.<sup>101</sup>

3.48. Finally, the United States is incorrect in arguing that these Decisions are either "decisions" under paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement or, alternatively, a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention. The legal status of a "decision" under paragraph 1(b)(iv) of the GATT 1994 indeed applies to the 1982 Decision, but does not apply to the 1949 Decision.<sup>102</sup>

### **3.4.6 The negotiating history of Article XXI and the Agreement on Safeguards confirm Turkey's interpretation of Article XXI**

3.49. To the extent that the Panel were to consult the negotiating history of Article XXI to confirm its textual and contextual interpretation of this provision, the negotiating history further undermines the United States' "self-judging" theory.

3.50. An objective reading of the negotiating history reveals a consistent theme running through all the relevant documents. That consistent theme is the recognition by all intervening delegations, including that of the United States, that some balance had to be found between, on the one hand, some reasonable discretion to be afforded to the regulating Member, and, on the other hand, objective, reviewable elements to limit that discretion and prevent it from destroying the entire legal framework. The debate during the negotiations concerned the question of *how to strike this balance properly*.

3.51. For instance, at the time when the GATT 1947 was negotiated, even the United States itself did not view Article XXI as a provision that "would permit anything under the sun".<sup>103</sup> The rejection of the "self-judging" theory is evident even from the internal position of the United States' delegation to these negotiations, whose overwhelming majority feared and, therefore, rejected a wording of the national security exception that would "negate" the ITO Charter and turn it into an "illusory document".<sup>104</sup> Thus, nothing in the negotiating history suggests that the drafters thought that the

<sup>98</sup> Turkey's Second Written Submission, Section 4.4.

<sup>99</sup> United States' response to Panel question 25, paras. 94, 96.

<sup>100</sup> Turkey's Second Written Submission, paras. 4.143-4.147; Turkey's Opening Statement at the First Hearing, Section 3.5.

<sup>101</sup> Turkey's Second Written Submission, paras. 4.148-4.159.

<sup>102</sup> Turkey's Second Written Submission, Section 4.5.2.

<sup>103</sup> 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), pp. 20-21. Exhibit USA-41.

<sup>104</sup> Turkey's Opening Statement at the First Hearing, Section 3.8; Turkey's Second Written Submission, Section 4.7; Kenneth J. Vandavelde, *The First Bilateral Investment Treaties: U.S. Post-war Friendship*,

forementioned balance would be best achieved by making Article XXI a completely "self-judging", non-reviewable provision.<sup>105</sup>

3.52. The negotiating history of Article XXI also indicates that this provision was not intended to cover "*economic emergencies*", such as measures contemplated under Article XIX of the GATT 1994. For example, during the GATT 1947 negotiations, the United States' representative stated that "other emergency" would include a scenario in which certain Members were in a state of war, but the regulating Member was not (yet), but nevertheless wished to take measures to protect its essential security interests.<sup>106</sup> Some other statements of the United States' delegate at the same meeting suggest that the United States' delegation desired to ensure that Members would not rely on the national security exception to shield from scrutiny measures that really had a "commercial purpose", and properly belonged under the safeguards provision.<sup>107</sup> Furthermore, during the Uruguay Round of negotiations, the drafters of the Agreement on Safeguards emphasised that various GATT permissive provisions reflected "fundamentally different considerations". The drafters clearly intended to distinguish between the "the scope of the issue to be negotiated in the Negotiating Group on Safeguards", and the scope of the issues covered by, *inter alia*, Articles VI, XVIII, XX or XXI.<sup>108</sup>

3.53. Turkey is furthermore puzzled by the United States' arguments about non-violation complaints under Article XXIII:1(b) of the GATT 1994. The United States alleges that, at the time when the GATT 1947 was negotiated, the drafters considered the non-violation complaint to be the only remedy available to Members affected by national security measures.<sup>109</sup> However, in reality, the United States alleged remedy is entirely theoretical and, in any event, ineffective. Instead of interpreting the terms of Article XXI, the United States invites the Panel to engage in a highly speculative analysis of what would have happened had Turkey, as well as the other co-complainants, based their respective cases on Article XXIII:1(b).<sup>110</sup>

3.54. The Panel should disregard the United States' arguments based on Article XXIII:1(b) in their entirety. This provision is not at issue in this dispute, and, in the absence of relevant facts, the Panel would unlikely be in a position to assess properly the legal prospects of a Member's non-violation case against the alleged national security measure.

3.55. For example, under a non-violation complaint, a complainant has to demonstrate that it could not reasonably anticipate, at the time that market access commitments were negotiated, that a WTO-consistent measure based on Article XXI would be taken at a later point in time. Obviously, it can never be known, *ex ante*, with certainty whether a dispute of this kind would be successful. Moreover, it is unclear which evidence a complainant would be required to adduce to demonstrate the absence of reasonable anticipation. Demonstrating this would be particularly difficult, if all Article XXI measures were deemed WTO-consistent, based on a subjective will of a regulating Member, as the United States insists. Put simply, it would be very difficult for a complainant to succeed in a non-violation complaint by arguing that national security measures could not be reasonably anticipated, especially during the period immediately following the end of WWII, when the GATT 1947 was negotiated.<sup>111</sup>

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Commerce, and Navigation Treaties, (Oxford University Press 2017), pp. 145-154. Exhibit TUR-41; and U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, pp. 2 and 3. Exhibit USA-49.

<sup>105</sup> Turkey's Second Written Submission, Section 4.6; Turkey's Opening statement at the first panel hearing, paras. 66-84; Turkey's responses to Panel questions 57, 62.

<sup>106</sup> 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), p. 20. Exhibit USA-41.

<sup>107</sup> See Turkey's response to Panel question 81; and 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), pp. 20-21 and 29. Exhibit USA-41.

<sup>108</sup> Turkey's Second Written Submission, para. 4.172 (citing, *inter alia*, Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10, 5 October 1987, para. 2. Exhibit USA-167).

<sup>109</sup> See United States' first written submission, paras. 68-71; United States' responses to Panel questions 59 (para. 275), and 60.

<sup>110</sup> Turkey's Second Written Submission, para. 4.178.

<sup>111</sup> Turkey's Second Written Submission, para. 4.179.

3.56. It is also unclear why a Member affected by these measures would take upon itself the task of starting a WTO dispute based on Article XXIII:1(b). Recall that according to the United States, a Member affected by another Member's national security measures could simply take "reciprocal actions ... under a similar understanding of [its] inherent right" to invoke Article XXI.<sup>112</sup>

3.57. This argument demonstrates the fatal flaw in the United States' arguments based on Article XXIII:1(b). As the United States itself acknowledges, raising a non-violation complaint against a national security measure is in fact a useless exercise. To recall, the only outcome of this complaint – if it were to succeed in overcoming the above-mentioned legal hurdles – would be the permission to retaliate. The respondent would be under no obligation to withdraw the measure. However, as the United States argues, the same result could be achieved, in a much faster and more procedurally convenient way, through a "self-judging", unilateral and reciprocal action under Article XXI by the affected Member (assuming the necessary political will and economic power of the affected Member to take that action).<sup>113</sup>

3.58. In any event, the GATT 1947 negotiating history also disproves the United States' theory. Nothing in that negotiating history suggests that non-violation complaints were considered as the only available remedy for Members affected by (alleged) national security measures. The non-violation remedy was discussed as a mere solution for the Members affected by *legitimate national security measures*, taken in a manner consistent with the GATT 1947 (or the ITO Charter). Throughout the negotiations, no delegate ever suggested that national security measures would be self-judging, or non-reviewable in their entirety.<sup>114</sup>

3.59. Finally, the United States also points to certain Uruguay Round drafting proposals to clarify Article XXI. It argues that, because these proposals were ultimately not taken up and the text of Article XXI was left unchanged, the negotiators made "the deliberate choice" to preserve the "self-judging" nature of Article XXI.<sup>115</sup>

3.60. But this does not support the United States' position. First, the discussions during the Uruguay Round obviously say nothing about how Article XXI was understood 50 years earlier, during the GATT 1947 negotiations. As Turkey has demonstrated, at the time of its creation, Article XXI was not intended to be self-judging. Second, the United States appears to imply that, between 1947 and 1995, GATT Contracting Parties developed a different, "self-judging", interpretation of Article XXI, presumably through a common "agreement" or "practice" within the meaning of Articles 31(3)(a) or 31(3)(b) of the Vienna Convention. The implication would be that the above-mentioned drafting proposals intended unsuccessfully to modify that alleged agreement or practice. But the United States provides no evidence for this alleged common agreement or practice.<sup>116</sup> On the contrary, the United States' own submissions to this Panel quote many GATT Contracting Parties that over the course of many years repeatedly characterized Article XXI as objectively reviewable and thus not self-judging.<sup>117</sup>

3.61. In sum, the negotiating history of Article XXI confirms that the United States' "self-judging" theory is unfounded. The United States' interpretation of Article XXI(b) in this dispute is in stark contrast with how the United States, and the other drafters, understood this provision in 1947. Far from being completely "self-judging", it was instead intended to establish a delicate balance between the inherent right of Members to protect their essential security interests and the need to prevent abuse of this right for protectionist purposes.

### **3.5 In any event, Article XXI does not apply to safeguard measures as Article XXI and the WTO safeguard rules are "mutually exclusive"**

3.62. Turkey now turns to the relationship between Article XXI and WTO safeguard rules. Turkey and the United States agree that Article XIX and Article XXI of the GATT 1994 "are mutually exclusive

<sup>112</sup> United States' response to Panel question 34, para. 118.

<sup>113</sup> Turkey's Second Written Submission, paras. 4.180-4.182.

<sup>114</sup> Turkey's Second Written Submission, Section 4.6.3.

<sup>115</sup> United States' Second Written Submission, paras. 52, 55, 80.

<sup>116</sup> In *Russia — Traffic in Transit*, the panel found that no common position of GATT and WTO Members on this issue existed. Panel Report, *Russia — Traffic in Transit*, para. 7.80, Appendix.

<sup>117</sup> Turkey's Opening Statement at the Second Hearing, paras. 37-41.

in terms of their application in a particular case".<sup>118</sup> This means that a single measure cannot fall under both provisions. It is either a "safeguard measure" within the meaning of Article XIX, or it is an Article XXI national security measure.

3.63. Both parties also agree, to a large extent, that the legal basis for this mutually exclusive relationship is found in Articles 1, 11.1(a) and 11.1(c) of the Agreement on Safeguards.<sup>119</sup> For instance, Article 1 states that the Agreement on Safeguards "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994". Thus, a measure that satisfies the definition of a "safeguard" within the meaning of Article XIX is subject to the WTO safeguard regime. According to Article 11.1(a) of the Agreement on Safeguards, this measure must "conform[] with the provisions of [Article XIX] applied in accordance with this Agreement".

3.64. Article 11.1 of the Agreement on Safeguards further draws a distinction between:

- "emergency action[s] on imports ... as set forth in Article XIX of GATT 1994", under Article 11.1(a) (i.e. safeguard measures); and
- measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX", under Article 11.1(c) (for example, Article XXI measures, or anti-dumping measures under Article VI of the GATT 1994).

3.65. Given this clear demarcation between Articles 11.1(a) and 11.1(c), a single measure cannot fall under both of these two sets of disciplines. Had the drafters intended that a measure could simultaneously fall under both of these sets of disciplines, why would they distinguish between these two categories of measures, subject to the different sets of disciplines? This interpretation would be against the principle of effective treaty interpretation.<sup>120</sup>

3.66. This mutual exclusivity is further confirmed by the overall GATT context, in particular the category of what Turkey refers to as "permissive" provisions. These permissive provisions include exception clauses (e.g., Articles XX or XXI) and escape clauses (e.g., Articles VI or XIX). These provisions enable WTO Members to depart from their GATT obligations. Each of these permissive provisions has a separate and independent function and is based on a distinct legitimate policy rationale. In other words, these permissive provisions provide mutually exclusive and alternative pathways for WTO Members to depart from their GATT obligations. Under normal circumstances, a single measure, depending on its rationale, could fall under one of these permissive provisions, but not all of them. If all of these provisions merely duplicated each other, at least some of these provisions would be redundant.<sup>121</sup>

3.67. In reality, Article XXI is not the appropriate provision for safeguard measures, precisely because the subject matters of GATT exceptions and escape clauses are clearly delineated and mutually exclusive. In *Russia – Traffic in Transit*, the panel made clear that Article XXI does not justify measure pursuing a commercial purpose. It stated that "economic differences between Members" or "protectionism under the guise of a security issue" would not rise to the "emergency" standard in Article XXI(b)(iii).<sup>122</sup>

3.68. Furthermore, pursuant to a well-developed line of WTO jurisprudence, exceptions provisions in the GATT 1994 cannot be casually imported into non-GATT goods agreements and used to justify

<sup>118</sup> United States' response to Panel question 74, para. 320. See also Turkey's responses to Panel questions 20, 49, 74, 76, 77, 78, 79, and 80.

<sup>119</sup> See United States' responses to Panel questions 20 (para. 74), 74 (paras. 320-321). See also Turkey's response to, *inter alia*, Panel question 20.

<sup>120</sup> Turkey's Second Written Submission, paras. 5.4-5.7.

<sup>121</sup> Turkey's Second Written Submission, para. 5.8.

<sup>122</sup> See Panel Report, *Russia – Traffic in Transit*, paras. 7.75, 7.81, 7.133. The analysis of the USDOC in its two reports on steel and aluminium suggests that the existence of a "national security" concern, as a matter of US law under Section 232, can arise as a result of the volume of imports of a particular product or products, and of other circumstances involving those imports, including their impact on the state of a domestic industry that produces a competing product. It is thus clear that the term "national security" in Section 232, on its face and as applied in the investigations at issue, covers a much broader range of circumstances and scenarios than Article XXI(b) of the GATT 1994, as clarified by the panels in *Russia – Traffic in Transit* and *Saudi Arabia – IP Rights*. Turkey's response to Panel question 92.

violations of those agreements. Rather, "a clearly discernible, objective link" is required between the text of the covered agreement and the exception at issue (e.g. Articles XX and XXI).<sup>123</sup> Only this "objective link" is evidence that the drafters intended to put, for instance, Article XX, at the Members' disposal to justify violations of non-GATT agreements. But no such link to Article XXI exists in the Agreement on Safeguards.<sup>124</sup>

3.69. In sum, WTO safeguard rules and Article XXI establish mutually exclusive legal regimes, which are the alternative pathways for a Member to depart from its GATT obligations. This means that both of these regimes cannot apply to a single measure. Whether a measure is a "safeguard measure" or falls under another permissive provision under the GATT 1994, such as Article XXI, must be determined objectively, in line with the requirements of Article 11 of the DSU. The mutually exclusive relationship between Article XXI and WTO safeguard rules also means that, contrary to the United States' position, Article XXI cannot serve as an exception for the measures at issue, which fall properly under Article XIX and the Agreement on Safeguards.<sup>125</sup>

#### 4 CONCLUSION AND REQUEST FOR FINDINGS

4.1. By way of conclusion, it is worth recalling that the core of the United States' defence in this dispute is that Article XXI(b) of the GATT 1994 is "self-judging" in its entirety. Translated into practical terms, this would mean that, no matter which violation is alleged by a complaining Member, as soon as a defending Member signals its wish to rely on Article XXI(b), the dispute is terminated and the invoking Member wins. All that a WTO panel can and should do is to take note of that invocation of Article XXI, briefly mention that in its report, and lay down its pen.

4.2. It is hardly an exaggeration to say that this approach would be the end of the global rules-based system for international trade relations. One need not go as far as invoking the extreme example, discussed during the publicly accessible hearing in DS548, that the invoking Member would be even free to decide, for itself, that pigs or cows are fissionable materials for purposes of Article XXI(b)(i).

4.3. In the context of this dispute, the United States has designated the economic health of its steel and aluminium industry and its concerns about competing imports – something that clearly falls under Article XIX – as a national security concern. Moreover, according to the United States, the entirety of the production of the United States steel and aluminium industry is a matter of national security. On this view, even though the US military authorities themselves believe that only 3 per cent of that production has any connection to military matters, the United States' President has decided that every little piece of steel and aluminium leaving a US steel or aluminium plant, down to literally the last "kitchen cabinet", "metal frame" and "valve",<sup>126</sup> involves the United States' national security and must therefore be protected from foreign competition.

4.4. If the United States' approach were to stand, there would be literally no limits to what each and every WTO Member could "consider" to be in the interest of its alleged national security. Any Member could adopt analogous measures to protect any of its own industries: chemical production; agriculture; textile; raw materials; cars; footwear; paper; building materials; electronics; or any other industry one can think about. There would also be no limit to the types of measures that could be shielded from scrutiny to protect a Member's industry of choice.

4.5. Ultimately, national security could even be decoupled from concerns about any specific industry. For instance, a tariff increase to any level on any product at any point in time may be "considered" justified, on the reasoning that national security demands sufficient monetary revenue for the government.

4.6. It is not rhetorical hyperbole to state that accepting this would mean ending the rule of law in the multilateral trade order. The WTO covered agreements would become nothing but a purely

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<sup>123</sup> See, for instance, Turkey's response to Panel question 79. See also Appellate Body Report, *China – Publications and Audiovisual Products*, para. 230; Appellate Body Report, *China – Rare Earths*, paras. 5.52-5.74; and Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.750 (under appeal).

<sup>124</sup> Turkey's Second Written Submission, paras. 5.27-5.32.

<sup>125</sup> Turkey's Second Written Submission, Section 5.2.

<sup>126</sup> USDOC Section 232 Steel Report, Appendix I. Exhibit TUR-3.

voluntary code of conduct, precisely the "illusory document" that the US delegation in 1947 and 1948 feared, if the "total discretion" approach were to prevail.<sup>127</sup> Any Member would be free to invoke Article XXI at any time for any product without any multilateral review. There would be no security or predictability for other Members or traders, no security or predictability for supply chains, no security and predictability for international investment plans. Everything would revert to a state of affairs where the only reliable rule would be that nations will seek to unilaterally impose their will on other nations, without the rule of law.

4.7. This is a world that Turkey believes, thanks to the GATT 1947 and the WTO, has been relegated to the introductory historical chapters of trade law textbooks. Turkey trusts that the Panel will render a decision that would not allow the rolling back of the international trade order to its pre-GATT 1947 state.<sup>128</sup>

4.8. For the reasons explained in this submission, Turkey requests the Panel to find that:

- Measures a-f are safeguard measures that fall within the scope of Article XIX of the GATT 1994 and the Agreement on Safeguards;
- The United States has acted inconsistently with Article XIX:1(a) of the GATT 1994 as it failed to identify GATT obligations that resulted in the increase in imports within the meaning of this provision;
- The United States has acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards as it failed to properly determine the increase in imports of the subject products;
- The United States has acted inconsistently with Article XIX:1(a) of the GATT 1994 and Articles 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards as it failed to properly determine serious injury or threat of serious injury to its domestic industries;
- The United States has acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 4.2(b) of the Agreement on Safeguards because it failed to conduct a non-attribution analysis;
- The United States has acted inconsistently with Article 2.2 of the Agreement on Safeguards because the import measures at issue (i.e. measures a-f) have not been applied to the imported subject products, including steel and aluminium articles originating from Turkey, in a non-discriminatory manner, i.e. irrespective of the source of these products;
- The United States has acted inconsistently with Article 5.1, first sentence, of the Agreement on Safeguards, as it failed to ensure that the import measures at issue (in particular the additional duty of 50 per cent on steel articles originating from Turkey, or measure b) apply only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment;
- The United States has acted inconsistently with Article 11.1(b) of the Agreement on Safeguards as it appears to have sought and negotiated voluntary export restraint agreements with certain WTO Members, in particular Australia, Argentina, Brazil, Canada, Mexico, and South Korea;
- The United States has acted inconsistently with Articles 12.1(a), 12.1(b) and 12.1(c) of the Agreement on Safeguards, as it did not notify the Committee on Safeguards upon

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<sup>127</sup> See statement of Mr. Rubin in U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo. Exhibit US-49.

<sup>128</sup> Turkey's Opening Statement at the First Hearing, Section 6.

initiating the steel and aluminium investigations at issue, making findings of serious injury or threat thereof, and taking the decision to apply the import measures at issue;

- The United States has acted inconsistently with Article 12.2 of the Agreement on Safeguards, as it failed to provide the Committee on Safeguards with all pertinent information in the above-mentioned Article 12.1 notifications;
- The United States has acted inconsistently with Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994, as it failed to provide Turkey with an adequate opportunity for prior consultations; and
- The United States has acted inconsistently with Article 11(1)(a) of the Agreement on Safeguards, given that the import measures at issue are inconsistent with Article XIX of the GATT 1994 and multiple provisions of the Agreement on Safeguards.

4.9. In addition to violating multiple obligations under Article XIX and the Agreement on Safeguards, in applying its import measures, the United States has also acted inconsistently with the following provisions under the GATT 1994:

- The United States has acted inconsistently with Articles II:1(a) and II:1(b), first and second sentences, of the GATT 1994, as the United States' additional duties (measures a-b and d) are applied in excess of the rates prescribed in the United States' GATT Schedule;
- The United States has acted inconsistently with Article XI:1 of the GATT 1994 by imposing quantitative limitations on imports from Argentina, Brazil and South Korea (measures c and e);
- The United States has acted inconsistently with Article I:1 of the GATT 1994 by providing an advantage to steel and aluminium articles originating from some Members, which is not extended immediately and unconditionally to like products originating in other Members, including Turkey; and
- The United States has acted inconsistently with Article X:3(a) of the GATT 1994, because it fails to administer the import measures at issue in a "reasonable" and "impartial" manner.

4.10. Turkey also respectfully requests the Panel to reject the United States' defence under Article XXI of the GATT 1994.



**ANNEX B-2****INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA**

1.1. 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. WTO Members did not relinquish this inherent right in joining the WTO. To the contrary, this right is reflected in Article XXI(b) of the GATT 1994, and WTO Members have not agreed to subject the exercise of this right to legal review.

1.2. Section 232 of the Trade Expansion Act of 1962 (Section 232) allows the United States to adjust imports of an article based on a finding that such imports threaten to impair U.S. national security. On April 19 and 26, 2017, the United States initiated investigations under Section 232 into imports of steel and aluminum, respectively. In connection with these investigations, United States solicited written comments from interested parties and held public hearings. The United States summarized its findings from these investigations in written reports, and released these reports to the public. On March 8, 2018, the United States acted pursuant to Section 232 and imposed tariffs on certain steel and aluminum imports, effective beginning on March 23, 2018. The United States also established a process to permit product-specific exclusions from the Section 232 tariffs, based on, among other factors, the national security implications of those imports.

**A THE TEXT OF GATT 1994 ARTICLE XXI(B) IN ITS CONTEXT, AND IN THE LIGHT OF THE AGREEMENT'S OBJECT AND PURPOSE, ESTABLISHES THAT THE EXCEPTION IS SELF-JUDGING**

1.3. The text of GATT 1994 Article XXI(b), in its context and in the light of the agreement's object and purpose, establishes that the exception is self-judging. As this text provides "[n]othing" in the GATT 1994 shall be construed to prevent a WTO Member from taking "any action" which "it considers necessary" for the protection of its essential security interests. This text establishes that (1) "nothing" in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest, and (2) the action necessary for the protection of its essential security interests is that which the Member "considers necessary" for such protection.

1.4. The self-judging nature of GATT 1994 Article XXI(b) is demonstrated by that provision's reference to actions that the Member "considers necessary" for the protection of its essential security interests. The ordinary meaning of "considers" is "[r]egard in a certain light or aspect; look upon as" or "think or take to be." Under Article XXI(b), the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for the protection of the acting Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("consider[]") the action as having the aspect of being necessary for the protection of that Member's essential security interests. The French and Spanish texts of Article XXI(b) confirm the self-judging nature of this provision. Specifically, use of the subjunctive in Spanish ("estime") and the future with an implied subjunctive mood in French ("estimera") support the view that the action taken reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate.

1.5. The ordinary meaning of the terms in the phrase "its essential security interests," also supports the self-judging nature of Article XXI. The word "interest" is defined as "[t]he relation of being involved or concerned as regards potential detriment or (esp.) advantage." The term "security" refers to "[t]he condition of being protected from or not exposed to danger." The definitions of "essential" include "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important."

1.6. And it is "its" essential security interests – the Member's in question – that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves "its interests," that is, potential detriments or advantages from the perspective of that Member. Each WTO Member likewise must determine whether a situation implicates its "security" interests (not being exposed to danger), and whether the interests at stake are "essential," that is, significant or important, in the absolute or highest sense. By their very nature, these questions are political and can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those

circumstances. No WTO Member or WTO panel can substitute its views for those of a Member on such matters.

1.7. The text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. The first element of this text that is notable is the lack of any conjunction to separate the three subparagraphs. The subparagraphs are not separated by the coordinating conjunction "or", to demonstrate alternatives, or the conjunction "and", to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b). Subparagraphs (i) and (ii) of Article XXI(b) both begin with the phrase "relating to" and directly follow the phrase "essential security interests" in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraphs (i) and (ii) modify the phrase "essential security interests" and thus illustrate the types of "essential security interests" that Members considered could lead to action under Article XXI(b).

1.8. Subparagraphs (i) and (ii) do not limit a Member's essential security interests exclusively to those interests. First, the chapeau of Article XXI(b) (as noted) reserves to the Member the judgment of what "its interests" are, including whether they are relating to one of the enumerated interests. Second, subparagraph (iii) reflects no explication (and therefore cannot be understood to reflect a limitation) on a Member's essential security interests. Rather, as with subparagraphs (i) and (ii), the essential security interests are those determined by the Member taking the action.

1.9. Subparagraph (iii) begins with temporal language: "taken in time of war or other emergency in international relations." The phrase "taken in time of" echoes the reference to "taking any action" in the chapeau of Article XXI (b), and it is actions that are "taken", not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word "action," rather than the phrase "essential security interests." Accordingly, Article XXI(b)(iii) reflects a Member's right to take action it considers necessary for the protection of its essential security interests when that action is taken in time of war or other emergency in international relations. Nor does the text of Article XXI(b)(iii) require that the emergency in international relations or war directly involve the acting Member, reflecting again that the action taken for the protection of its essential security interests is that which the Member judges necessary.

1.10. Subparagraphs (i) to (iii) of Article XXI(b) thus reflect that Members wished to set out certain types of "essential security interests" and a temporal circumstance that Members considered could lead to action under Article XXI(b). A Member taking action pursuant to Article XXI(b) would consider its action to be necessary for the protection of the interests identified in subparagraphs (i) and (ii) or to be taken in time of war or other emergency in international relations. In this way, the subparagraphs guide a Member's exercise of its rights under this provision while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

1.11. The context of Article XXI(b) also supports this understanding. First, the phrase "which it considers necessary" is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase "which it considers" in Article XXI(b), and not reduce these words to inutility. Second, the context provided by Article XX supports the understanding that Article XXI(b) is self-judging. 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. For example, Article XX(a), (b), and (d), respectively, provide exceptions for certain measures "necessary to protect public morals," "necessary to protect human, animal or plant life or health," and "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" (emphases added).

1.12. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "necessary." Furthermore, Article XX includes a chapeau which subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member's action, is absent from Article XXI.

1.13. Third, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member "considers" appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. For example, under Article 18.7 of the Agreement on Agriculture, "[a]ny Member" may bring to the attention of the Committee on Agriculture "any measure which it considers ought to have been notified by another Member." Similarly, Article III(5) of the General Agreement on Trade in Services (GATS) permits "[a]ny Member" to notify the Council for Trade in Services of any measure taken by another Member which "it considers affects" the operation of GATS. In other provisions of the GATT 1994 or other WTO agreements, however, certain judgments are left for determination by a panel, the Appellate Body, or a WTO committee. Under DSU Art. 12.9, for example, "[w]hen the panel considers" that it cannot issue its report within a certain period of time, the panel must provide certain information to the DSB. Under Article 4(1) of the Agreement on Rules of Origin, the Committee on Rules of Origin may request work from the Technical Committee on Rules of Origin "as it considers appropriate" for the furtherance of the objectives of that agreement.

1.14. Fourth, by way of contrast, and further context, in at least two WTO provisions the judgment of a Member is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party. As DSU Article 26.1 states, a non-violation complaint may be instituted, "[w]here and to the extent that such party considers *and* a panel or the Appellate Body determines" that a particular measure does not conflict with a WTO agreement, among other requirements. Thus, in this provision, Members explicitly agreed that it is not sufficient that "[a] party considers" a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that "a panel or the Appellate Body determines that" a non-violation situation is present. A similar limitation—that a "party considers and a panel determines that"—was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c).

1.15. The context provided by DSU Articles 26.1 and 26.2 is highly instructive. No such review of a Member's judgment is set out in Article XXI(b), which permits a Member to take action "which it [a Member] considers necessary for the protection of its essential security interests." Accordingly, the context of Article XXI(b) demonstrates that Members did not agree to subject a Member's essential security judgments to review by a WTO panel.

1.16. The object and purpose of the GATT 1994 also establishes that Article XXI(b) is self-judging. The object and purpose of the GATT 1994 is set out in the agreement's Preamble. That Preamble provides, among other things, that the GATT 1994 set forth "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." Particularly with these references to arrangements that are "mutually advantageous" and tariff reductions that are "substantial" (rather than complete), the contracting parties (now Members) acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions at Article XXI.

1.17. The self-judging nature of Article XXI is further established by a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia.

**B SUPPLEMENTARY MEANS OF INTERPRETATION, INCLUDING NEGOTIATING HISTORY, CONFIRM THE SELF-JUDGING NATURE OF GATT 1994 ARTICLE XXI(B)**

1.18. While not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirms that GATT 1994 Article XXI(b) is self-judging. The drafting history of GATT 1994 XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). In 1946, the United States proposed a draft charter for the ITO, which included the following two exceptions provisions:

Article 32 (General Exceptions to Chapter IV):

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures

. . . .

(e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.

Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):

None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.

1.19. The United States asserted at the time that Article 32(e) "afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests" in a time of war or a national emergency. As originally drafted, however, neither exceptions provision was explicitly self-judging. These provisions lacked the key phrase that appears in the current text of GATT 1994 Article XXI(b) regarding action by a Member that "it considers necessary for" the protection of its essential security interests. In addition, the essential security exception set out in Article 32 of the ITO draft charter was one of twelve exceptions, several of which later formed the basis for the general exceptions at GATT 1994 Article XX.

1.20. In March 1947, the same exceptions text was proposed as both GATT Article XX and Article 37 the ITO draft charter, in Chapter V, which related to "[g]eneral commercial policy." The chapeau of this proposed text and a number of the subparagraphs are identical to what would become GATT 1994 Article XX. With its proviso, the chapeau contemplated panel review so that the exceptions would not be applied to discriminate unfairly. The subparagraphs corresponding to essential security were included in this proposed text, together with other exceptions, and thus were subject to the proviso in the chapeau, like these other exceptions. This structure suggests that, at that time, not all drafters may have viewed the essential security exception in subparagraph (e) as self-judging.

1.21. In May 1947, the United States proposed removing, *inter alia*, subparagraph (e) from the ITO draft charter exceptions provision quoted above. In the U.S. proposal, item (e) would be included in a new article, to be inserted at an "appropriate" place at the end of the ITO draft charter, so that these exceptions would apply to the whole charter. The United States also proposed that the new article would begin by stating "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures," including those relating to the protection of essential security interests.

1.22. Thereafter, the United States proposed the addition of a new chapter, entitled "Miscellaneous" at the end of the ITO draft charter, and that the proposed exceptions to the charter as a whole be included in this new chapter. The United States also suggested additional text to this exceptions provision, to make the self-judging nature of these exceptions explicit. Under this U.S. proposal, the draft exceptions provision stated:

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which *it considers contrary* to its essential security interests, or to prevent any Member from taking any action which *it may consider to be necessary* to such interests:

- a) Relating to fissionable materials or their source materials;
- b) Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- c) In time of war or other emergency in international relations, relating to the protection of its essential security interests . . . .

1.23. The text now referenced what a Member considered to be necessary, explicitly indicating that this provision could be invoked based on a Member's own judgment. Moreover, this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interests. The drafting history thus shows that a deliberate textual distinction was drawn between the self-judging nature of exceptions pertaining to essential security and exceptions related to other interests that, unlike the security-based exceptions referenced above, were retained as part of the "[g]eneral commercial policy" chapter of the ITO draft charter.

1.24. Regarding the exception's scope, at a July 1947 meeting of the ITO negotiating committee, the delegate from The Netherlands requested clarification on the meaning of a Member's "essential security interests," and suggested that this reference could represent "a very big loophole" in the ITO charter. The U.S. delegate responded that the exception would not "permit anything under the sun," but suggested that there must be some latitude for security measures. The U.S. delegate further observed that in situations such as times of war, "no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are."

1.25. 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. That is, the parties would serve to police each other's use of the essential security through a culture of self-restraint. During the same July 1947 meeting, the Chairman asked whether the drafters agreed that actions taken pursuant to the essential security exception "should not provide for any possibility of redress." In response, the U.S. delegate observed that such actions "could not be challenged in the sense that it could not be claimed that the Member was violating the Charter." The United States acknowledged, however, that a member affected by such actions "would have the right to seek redress of some kind" under Article 35(2) of the ITO charter.

1.26. 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. If the parties were unable to resolve the matter, it could be referred to the ITO, which in turn could make recommendations, including the suspension of obligations or concessions.

1.27. In response to the explanation from the U.S. delegate, including the right to seek redress for non-violation under Article 35(2), the Australian delegate lifted a reservation on the essential security exception at this July 1947 meeting. The delegate from Australia stated that, as the exception was "so wide in its coverage"—particularly the "which it may consider to be necessary" language—Australia's agreement was done with the assurance that "a Member's rights under Article 35(2) will not be impinged upon."

1.28. This exchange demonstrates that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, an ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired, as set forth at Article 35(2) of the ITO Charter draft current in July 1947. As applied to the WTO context, this discussion indicates essential security measures cannot be found by a panel to breach the GATT 1994 or other WTO agreements, although Members may request that a panel review whether its benefits have been nullified or impaired by the essential security measure and, if so, to assess the level of that nullification or impairment.

1.29. This understanding of the relationship between essential security measures and nullification or impairment procedures is further confirmed by discussions of the ITO Charter that occurred in early 1948. For example, after "extensive discussions," a Working Party of representatives from Australia, India, Mexico, and the United States decided to retain the draft charter's non-violation nullification or impairment provision. The Working Party noted that the provision "would apply to the situation of action taken by a Member" to protect its essential security interests. The explanation of the Working Party is worth reading 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.

1.30. Members of a sub-committee on the ITO Charter's dispute settlement chapter expressed similar views. Thereafter, the essential security exception in the ITO draft charter was revised based on suggestions from the United Kingdom. The UK representative opined that with these revisions, the Charter "would neither permit, nor condemn, nor pass any judgment whatever on, unilateral economic sanctions." After the UK's revisions were accepted, a representative of India—when discussing nullification or impairment claims as a remedy for essential security measures—"expressed some doubt" about whether "the bona fides of an action allegedly coming within [the essential security exception] could be questioned." In early 1948, negotiators also declined to adopt a UK proposal that would have amended the essential security provision to state that nullification or impairment procedures were the appropriate recourse for members affected by essential security measures by other members. As the United States noted at the time, such a reference to nullification or impairment in the essential security provision was "unnecessary" in light of the existing text.

1.31. In its analysis of the negotiating history of Article XXI(b), the Russia – Traffic in Transit panel referred at length to internal documents of the U.S. delegation to the GATT negotiations. Specifically, in addition to considering published documents associated with the negotiating history of Article XXI(b), that panel considered a study that discusses internal documents of the U.S. delegation. In particular, the panel report recounts at some length this study's discussion of an internal U.S. delegation meeting of July 4, 1947. The panel used these documents as negotiating history to confirm the panel's interpretation that it had the authority to review a Member's invocation of its essential security interests. The Panel in Russia – Traffic in Transit erred in relying on such material because it is not "negotiating history" within the meaning of the Vienna Convention. It is concerning that the panel would commit such an elementary error in interpretive approach. Even putting aside this interpretative error, the panel also misunderstood and mischaracterized the U.S. discussions to which it referred. These internal U.S. deliberations—when considered as a whole and in context—further confirm that Article XXI(b) is self-judging.

1.32. The self-judging nature of Article XXI(b) is also supported by views repeatedly expressed by GATT contracting parties (now Members) in connection with prior invocations of their essential security interests.

C THE RUSSIA – TRAFFIC IN TRANSIT PANEL ERRED IN DECIDING IT HAD AUTHORITY TO REVIEW A RESPONDING PARTY'S INVOCATION OF ARTICLE XXI.

1.33. The panel in Russia – Traffic in Transit erred when it decided that it had authority to review multiple aspects of a responding party's invocation of Article XXI. That panel's interpretation of Article XXI is not consistent with the customary rules of interpretation set forth in the Vienna Convention. In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. In fact, the panel appears to have reached its conclusion regarding the reviewability of Article XXI a mere four paragraphs after beginning its analysis – based not on "the mere meaning of the words and the grammatical construction of the provision," but on what it termed the "logical structure of the provision."

1.34. Furthermore, in its examination of the negotiating history of the treaty, the Russia – Traffic in Transit panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history. These errors reveal the panel's analysis as deeply flawed and suggest a results-driven approach not in line with the responsibility bestowed on the panelists by WTO Members through the DSU.

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**ANNEX C****ARGUMENTS OF THE THIRD PARTIES**

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**ANNEX C-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA**

1. This executive summary integrates the Oral Statement and Responses to the Panel's Questions by China in these disputes.

**I. LEGAL CHARACTERIZATION OF MEASURES AS SAFEGUARD MEASURE**

2. China believes the Appellate Body in *Indonesia – Iron or Steel Products* has provided useful analysis as to what measure constitutes Safeguard measure.
3. The Appellate Body identified two constituent elements of a safeguard measure, i.e. (1) the suspension, in whole or in part, of a GATT obligation or the withdrawal or modification of a GATT concession; and (2) that the suspension, withdrawal, or modification in question is designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.
4. In China's view, the purpose of a safeguard measure is to prevent or remedy serious injury to a domestic industry caused or threatened by increased imports, through the mechanism of suspending, withdrawing, or modifying a GATT obligation or concession. That is what a safeguard measure "is", and a measure which meets the two constituent elements would be a safeguard measure. The remaining elements provided under Article XIX(1)(a) are legal requirements for the imposition of a safeguard measure rather than constituent elements of such a measure.
5. Furthermore, China believes that the characterization of a measure as safeguard measure is not a question of subjective intent, but independent and objective assessment of the features of the measure. In making this "independent and objective assessment", a panel must "identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject." The assessment of whether a measure is a safeguard measure is therefore an objective assessment based on the relevant characteristics of the measure, not the importing Member's subjective intent.
6. This conclusion is unaffected by the statement in Article XIX:1(a) that a Member "shall be free" to suspend an obligation in whole or in part or to modify or withdraw a concession, provided that the conditions for the imposition of a safeguard measure are satisfied. The phrase "shall be free" does nothing more than confer the right to impose a safeguard measure when the conditions for the imposition of such a measure are satisfied.

**II. ISSUES CONCERNING INTERPRETATION OF ARTICLE XXI(b)****i. Standard of Review**

7. China holds the view that, nothing in the DSU or elsewhere in the covered agreements allows a panel to perform its role any differently in disputes in which the responding Member invokes Article XXI(b) of the GATT 1994.
8. Article XXI(b) is an affirmative defense which, like other affirmative defenses, must be interpreted and applied to the facts of the case to determine whether it provides justification for any identified inconsistency. There are no special or additional rules or procedures that apply to a dispute in which the responding Member has invoked Article XXI(b), and the panel's function to undertake "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" is the same as in any other dispute.



9. Furthermore, the subparagraphs of Article XXI(b) represent an enumerated and exhaustive list of the circumstances under which a Member may seek to justify a particular type of action that is otherwise inconsistent with the GATT 1994. For the subparagraphs to be exhaustive and have effective meaning, they must be objectively reviewable. Otherwise, Article XXI(b) would have the same meaning and effect as if the subparagraphs did not exist, and the circumstances described in the three subparagraphs would no longer constrain the circumstances in which a Member could invoke Article XXI(b).

**ii. Interpretation of Article XXI(b)**

10. Within Article XXI (b), the phrase "which it considers" qualifies the phrase "necessary for the protection of its essential security interests". Thus, what a Member is permitted to determine, in its own judgment, is whether a particular action of a type set forth in subparagraphs (i) through (iii) is "necessary for the protection of its essential security interests". For an action in question to be justified under Article XXI(b), it must objectively fall within one of the three enumerated subparagraphs. Provided that the action in question is objectively within the scope of one (or more) of the enumerated subparagraphs, it is up to the invoking Member to determine whether the action in question is necessary for the protection of its essential security interests. The United States stands alone in asserting that the entirety of Article XXI(b), including its subparagraphs, is self-judging. This is clearly different from what was perceived from other parties and third parties.
11. The subjective element of the *chapeau* encompasses both the "necessity" of the action and the determination of the invoking Member's "essential security interests". The *chapeau* refers not to "necessity" in the abstract, but to the necessity of a particular action "for the protection of *its* essential security interests". The elements of this determination are not divisible – a Member's determination of whether a particular action is "necessary" includes the determination of whether that action is "for the protection of" what the Member considers to be "its essential security interests".
12. The phrase "any action which it considers necessary for the protection of its essential security interests" has two operative halves. The phrase "any action" is qualified by the three subparagraphs. Thus, any action for which justification is sought under Article XXI(b) must be one "*relating to fissionable materials*", "*relating to the traffic in arms ...*", or one "*taken in time of war or other emergency in international relations*". Provided that the action in question is of one or more of those types, the Member may determine, in its own judgment, whether that action is "necessary for the protection of its essential security interests".
13. China does not consider that the present disputes present a circumstance in which there is a potential conflict among the Spanish, French and English texts following the application of Articles 31 and 32 of the Vienna Convention. Rather, the minor differences in terminology, structure, and punctuation discussed in response to the preceding questions all point to the same conclusion: that the individual subparagraphs of Article XXI(b) are objectively reviewable in dispute settlement and do not form part of the self-judging element of that provision.
14. The individual subparagraphs of Article XXI(b) describe, exhaustively, the specific circumstances in which a Member may seek to justify an inconsistent measure under this provision. They serve the same function as the subparagraphs of Article XX, i.e. to delimit the scope of application of the exception.
15. The exhaustive nature of the three subparagraphs means there are no other circumstances in which a Member may invoke Article XXI(b) to justify a GATT-inconsistent measure. If those subparagraphs were considered "self-judging", there would be *no* constraint upon the circumstances in which a Member could justify a GATT-inconsistent action. Such an interpretation would defeat and run contrary to the exhaustive nature of the three subparagraphs.
16. In addition, if the self-judging element of Article XXI(b) were interpreted to encompass the three subparagraphs of this provision, those subparagraphs would be rendered inutile in

violation of the principle of effective interpretation. Had this been the intention of the drafters, the three subparagraphs could have been omitted entirely and Article XXI(b) would have the same meaning and effect.

17. It is well established that an object and purpose of the GATT 1994 is to "promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade". An interpretation of Article XXI(b) under which the applicability of its subparagraphs is to be determined by the invoking Member in its own judgment would be incompatible with the object and purpose of the GATT 1994, because a Member could, at any time and for any reason, excuse itself from compliance with its WTO obligations merely by invoking Article XXI(b). A consideration of the object and purpose of the GATT 1994 plainly supports the conclusion that the subparagraphs of Article XXI(b) are objectively reviewable by a panel. Otherwise, the security and predictability of the multilateral trading system would be obviously undermined.
18. Whatever the scope of the self-judging element in Article XXI(b), a Member's invocation of Article XXI(b) is, in all events, subject to the requirement of Article 26 of the Vienna Convention that a treaty must be performed in good faith.
19. The principle of good faith applies to the performance of any treaty obligation, including elements of a treaty that are committed to a party's discretion. It does not deprive a Member invoking Article XXI(b) of its right to determine its essential security interests in its own judgement and take measures it considers necessary for the protection of those interests. However, as a general matter, the pervasive nature of the obligation to act in good faith requires that even in relation to those elements of Article XXI(b) that are committed to a Member's discretion by virtue of the phrase "which it considers", the invoking Member must nevertheless invoke Article XXI(b) in good faith. This may require some explanation by the invoking Member of why it considered a particular element of Article XXI(b) to apply.

### **III. RELATIONSHIP BETWEEN ARTICLES XXI AND XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS**

20. In China's view, the absence of an explicit cross-reference in the Agreement on Safeguards to Article XXI of the GATT 1994 is not determinative of whether Article XXI is available to justify measures that are inconsistent with the Agreement on Safeguards. It is, however, a pertinent interpretive consideration, and one that weighs against the conclusion that Article XXI is available in this circumstance.
21. The Appellate Body has stated that the relationship between provisions contained in two different agreements, including the applicability of a GATT exception to another agreement, "must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments". Within the framework articulated by the Appellate Body, the presence or absence of an express textual cross-reference is not dispositive. The only circumstance in which a GATT exception was found to be available notwithstanding the absence of an explicit textual cross-reference is where the provision at issue strongly implied the availability of the GATT exceptions.
22. The fact that the Agreement on Safeguards is an elaboration upon Article XIX of the GATT 1994 does not mean that Article XXI applies to the Agreement on Safeguards. This is true in respect of both those provisions of the Agreement on Safeguards that could be said to replicate provisions of Article XIX and those provisions of the Agreement on Safeguards that have no counterpart in Article XIX.
23. With has been said, China believes that nothing in the Agreement on Safeguards provides any indication that the exceptions provisions of the GATT 1994, including Article XXI, are available as potential justifications for measures that are inconsistent with that agreement.

**ANNEX C-2****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****1. INTRODUCTION**

1. In this dispute, the complainants have argued that the steel and aluminium measures are safeguards, inconsistent with the Agreement on Safeguards; that they are also inconsistent with the GATT 1994; and that they are not justified by Article XXI of the GATT 1994, even if the US chose to make out an Article XXI defence, and even if that provision applied.
2. In response, the US has said one thing only: Article XXI is "self-judging". In other words, as soon as the US "invokes" any part of Article XXI or Article XXI as a whole, the Panel is allowed to do no more than record that the "invocation" took place.
3. That assertion is baseless as a matter of law. It is also unacceptable from a systemic point of view. It cannot be that Members are able to escape their WTO obligations through mere unilateral "invocations". Going down that road would undermine everything that the dispute settlement system has achieved and reduce WTO law to inutility.
4. It is important to note the following: the US has not taken issue with a single fact or piece of evidence put forward by the complainants. It has not even tried to rebut the claim that the steel and aluminium measures are safeguards; any of the claims under the Agreement on Safeguards or the GATT 1994. Strikingly, for all its reliance on Article XXI, the US has not even raised an Article XXI defence. It has not said which "action" supposedly falls within Article XXI(b), whether or why it "considers it necessary", what it is "for", which "security interest" is at issue, whether and why it is "essential" , which of the three subparagraphs (if any) is at issue or why.
5. For these reasons and others, the EU considers that it should not be difficult for the Panel to find that the measures at issue are WTO-inconsistent.

**2. THE MEASURES AT ISSUE FALL WITHIN THE SCOPE OF THE AGREEMENT ON SAFEGUARDS, AND ARE INCONSISTENT WITH CERTAIN PROVISIONS OF THAT AGREEMENT****2.1 WHETHER THE AGREEMENT ON SAFEGUARDS APPLIES TO A MEASURE IS AN OBJECTIVE QUESTION TO BE DECIDED BY THE PANEL**

6. The EU recalls that, according to settled case-law, and as recently confirmed by the Appellate Body in the specific context of the Agreement on Safeguards, whether or not a measure is subject to the disciplines of the Agreement on Safeguards is an objective question. Contrary to what the US asserts in the Additional Duties cases, it is not a question to be decided unilaterally by the Member imposing the safeguard measure.
7. A reason why the characterisation of a measure as a safeguard must be an objective question is that Article XIX and the rules of the Agreement on Safeguards include important and fundamental rights of other WTO Members, notably the right to suspend equivalent GATT obligations. It cannot be that a WTO Member can deprive other WTO Members of these rights simply by choosing not to notify its measure as a safeguard measure or by not "invoking" Article XIX. The fulfilment of the requirements in Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards is a question of consistency, not of the applicability of the Agreement on Safeguards.
8. In making that objective assessment of whether a measure is a safeguard, the Panel must engage in a case-specific assessment, having regard to all of the relevant facts. In this respect, and again contrary to what the US asserts in the Additional Duties case, the domestic procedures pursuant to which a measure has been adopted are not determinative, and neither are the WTO procedures that have been followed, or not followed, by the adopting Member.
9. Indeed, the Appellate Body has previously held that the characterisation of a measure under a Member's municipal law is not dispositive of the question of whether or not that measure is governed by the provisions of a particular agreement.

10. What are, then, the true "constituent features" of a safeguard?
11. In the context of Article 1 of the Agreement on Safeguards, in order to be a safeguard measure, a measure must have two constituent features. First, it must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the relevant products. The constituent features of a safeguard measure are distinct from and not to be conflated with the conditions that must be met in order for the right to adopt, apply and maintain a safeguard measure to be exercised.
12. If the measures have "a specific objective" of preventing or remedying serious injury to the Member's domestic industry, they are subject to the disciplines of the Agreement on Safeguards.
13. In conducting its assessment, the Panel must have regard to the measure "as a whole". The US measures, with respect to steel and aluminium products, should be seen as the tariff and non-tariff treatment provided for, without qualification (that is, with respect to all WTO Members, as a whole).

## 2.2 THE AGREEMENT ON SAFEGUARDS APPLIES TO THE MEASURES AT ISSUE

14. The only reasonable outcome of an objective assessment is to conclude that the US measures are safeguards.
15. The facts speak for themselves: even on their face, the central objective, and at the very least "a specific objective" of the measures is protecting domestic steel and aluminium industry writ large from competition with imports, regardless of any alleged national security implications.
16. Applying the legal standard formulated by the Appellate Body, it is first of all clear that the US measures suspend at least one GATT obligation, in whole or in part, or withdraw or modify at least one GATT concession.
17. Indeed, prior to the Section 232 measures the US customs duties on the steel and aluminium products at issue were bound, as well as applied at the level of 0%. However, the US measures provide for a customs duty rate of 25% ad valorem for the relevant steel products and 10% ad valorem for the relevant aluminium products.
18. Thus, the US measures suspend at least one GATT obligation or withdraw or modify at least one GATT concession, per tariff line in question, in a manner that is inconsistent with Article II:1(b) of the GATT 1994.
19. According to the Presidential Proclamations, the US measures are designed to prevent or remedy a decline in the respective domestic industries caused by imports, and to provide a "relief" to those industries from competition with imports.
20. Indeed, the Steel Report, the Aluminium Report and the Proclamations point to several elements relevant to an injury analysis. The steel and aluminium import adjustments explicitly purport to assess a number of injury factors that are typically associated with a serious injury finding under Article 4.2(a) of the Agreement on Safeguards (the rate and amount of the increase in imports, the share of the domestic market taken by increased imports (import penetration), changes in the level of domestic sales, production and productivity, capacity utilization, profits and losses, and employment).
21. Thus, consistent with the legal standard identified by the Appellate Body in Indonesia – Iron or Steel Products, the US measures have a specific objective of preventing or remedying serious injury to the US domestic steel and aluminium industries caused or threatened by increased imports of the relevant products.
22. An analysis of the "design, structure, and expected operation" of the steel and aluminium measures supports the conclusion that they are safeguard measures. The measures are designed, and expected to operate, such as to achieve a certain domestic capacity utilisation for all domestic producers of steel and aluminium, whether their products are linked to security needs or not. The structure of the measures also shows that their overwhelming concern is simply whether imports harm or threaten to harm "US producers writ large", with regard essentially to their "industrial and commercial sales". Any discussion of defence-

related needs is brief, marginal, and would actually argue against the imposition of the measures.

23. Furthermore, there are several characteristics of the US measures that confirm that they are safeguards measures. While these aspects provide further support for the conclusion that the US measures are safeguards, it is not legally necessary to go beyond the two required "constituent features".

2.3 THE MEASURES AT ISSUE ARE INCONSISTENT WITH SEVERAL PROVISIONS OF THE AGREEMENT ON SAFEGUARDS

24. The EU agrees that the steel and aluminium measures at issue are inconsistent with several provisions of the Agreement on Safeguards. In particular:

- Article 2.1 (notably, because the US acted inconsistently with the provisions of Articles 4.1 and 4.2);
- Article 2.2 (because the US did not apply the safeguard measures to the products at issue irrespective of their source);
- Articles 4.1 and 4.2 (because the USDOC failed to properly demonstrate (i) an increase in imports of the steel and aluminium products at issue, (ii) the existence of serious injury (or threat thereof) to the US domestic steel and aluminium industries and (iii) a causal link between increased imports and serious injury (or threat thereof) with respect to the steel and the aluminium industries);
- Article 5.1 (because the US has failed to apply its safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment);
- Article 7.1 (because the safeguard measures make no provision for their application only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment, and without limitation to four years or any other period of time);
- Article 7.4 (because the safeguard measures fail to make provision for the progressive liberalisation at regular intervals during the period of their application, the expected duration of which is over one year);
- Article 11.1(a) (because the safeguard measures do not conform with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards);
- Article 12.1 (because the US failed to make the notifications listed in Article 12.1 of the Agreement on Safeguards);
- Article 12.2 (because the US failed to provide the Committee on Safeguards with all pertinent information);
- Article 12.3 (because the US failed to provide adequate opportunity for prior consultations with Members having a substantial interest as exporters of the product concerned when proposing to apply or extend the safeguard measures).

2.4 ARTICLE XXI IS NOT A DEFENCE FOR CLAIMS UNDER THE AGREEMENT ON SAFEGUARDS

25. When another covered agreement specifically cross-references Article XXI of GATT 1994 and incorporates these security exceptions by reference, then the Article XXI exceptions will also apply to that other agreement. The Agreement on Safeguards does not contain a similar provision, which would lead to the incorporation by reference of the security exceptions of the GATT 1994. Thus, the GATT 1994 security exceptions are not available to justify breaches of the Agreement on Safeguards.
26. To confirm such a conclusion it is useful to follow a standard "analytical approach" developed by the Appellate Body, which entails an agreement-by-agreement analysis that starts with the text of the covered agreement in question, while keeping in mind that the lack of an express textual reference to a particular enumerated provision is not dispositive in and of itself. Cases such as China – Publications, China - Raw Materials, China- Rare Earths and Thailand – Cigarettes (Philippines) provide useful guidance in this respect.

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27. It is up to the US whether or not it wishes to invoke Article XXI of the GATT 1994 at all and, should it wish to do so, to develop arguments taking into account the guidance provided by the Appellate Body in previous cases.
28. Indeed, the burden under Article XXI lies on the party raising the defence, which would in this case be the US. The same is true of the burden of showing why Article XXI applies in the context of the Agreement on Safeguards. The general point that there are textual links between the two agreements does nothing to specifically establish that Article XXI is available as a defence for inconsistencies with the Agreement on Safeguards.

**3. THE MEASURES AT ISSUE ARE INCONSISTENT WITH CERTAIN PROVISIONS OF THE GATT 1994**

29. The EU also agrees that the steel and aluminium measures at issue are inconsistent with several provisions of the GATT 1994.
30. First, they are inconsistent with Articles II:1(b) and II:1(a), because they impose duties in excess of bound rates. The bound duties provided in the US' Schedule for the steel and aluminium products at issue are 0%, while the duties imposed through the Presidential Proclamations are 25% ad valorem for steel products and 10% ad valorem for aluminium products.
31. Second, the import adjustments at issue are inconsistent with Article I:1 of the GATT 1994. The imposition of additional customs duties of 25% on steel products and 10% on aluminium products creates more favourable competitive opportunities on the US market for like products of certain origins, namely for products from countries that were exempted from the additional duties on steel and aluminium and have chosen instead a quota regime (exemptions have been agreed with Argentina, Australia, Brazil, and Korea).
32. Third, the administration of the product exclusions and the country exemptions by the US was not uniform, impartial or reasonable. Thus, it can be established that the US acted inconsistently with Article X:3(a) of the GATT 1994.

**4. ARTICLE XXI IS NOT "SELF-JUDGING"**

33. The US' view that that Article XXI is "self-judging" has been convincingly rejected by the Panel Report in Russia — Traffic in Transit. It is wrong in light of the text, context, object and purpose, and indeed useful effect of the GATT 1994. It is not supported by any of the materials referred to in Articles 31 and 32 of the VCLT, including supplementary means of interpretation.
34. In addition, while certain GATT Contracting Parties have expressed the view that Article XXI(b) is "self-judging", several others have repeatedly expressed diametrically opposed positions. Thus, the enquiry into the GATT 1947 palaeontology does not support the US position.
35. The EU recalls, first, that Article XXI of the GATT 1994 is an affirmative defence. But it does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of GATT 1994. The DSU creates compulsory jurisdiction, and it contains no security exception.
36. Second, interpreting Article XXI as a "non-justiciable" provision in this dispute would be inconsistent with the terms of reference of the Panel, which follow Article 7.1 of the DSU. It would also be inconsistent with Article 7.2 of the DSU, which specifies that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".
37. Thus, the present disputes differs from the case under the GATT 1947 opposing the US and Nicaragua, where the terms of reference explicitly precluded that panel from examining or judging the validity or motivation for the invocation of Article XXI(b) by the US.
38. Third, interpreting Article XXI as a "non-justiciable" provision would make it impossible for the Panel to "make an objective assessment of the matter before it", as required by Article 11 of the DSU, as the "matter" before the Panel must also include any defence under Article XXI raised by the US.

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39. Fourth, interpreting Article XXI as a "non-justiciable" provision would undermine one of the fundamental objectives of the DSU, as expressed in Article 3.2 of the DSU: security and predictability.
  40. Fifth, Article 23 of the DSU prohibits Members from making a determination to the effect that a violation has occurred, except through recourse to dispute settlement in accordance with the DSU. If Article XXI was "non-justiciable", a WTO Member, rather than the WTO adjudicating bodies, would be deciding unilaterally the outcome of a dispute.
  41. Finally, by way of illustration, the EU would like to point out that there are fundamental differences in the way that security exceptions are drafted in the GATT, on the one hand, and in other international agreements, on the other hand. For instance, an express text that comes very close to the idea of "non-justiciability" can be found in the KORUS FTA. There is no such text agreed by the WTO Membership in any of the covered agreements.
  42. Thus, the invocation of Article XXI by a defending party does not have the effect of excluding the jurisdiction of a panel.
  43. The EU fails to understand how Article XXI(a) can exempt the US from meeting its burden of proof under Article XXI(b). Like Article XXI(b), Article XXI(a) is also a justiciable provision. Any discretion accorded under it is not unlimited.
  44. The EU acknowledges that information relating to essential security interests is of a highly sensitive nature, but the respondent is expected at a minimum to explain in sufficient detail why such information cannot be shared with the Panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article XXI. At any rate, even if the US was justified in not providing certain information pursuant to Article XXI(a), that would not discharge the US from its burden of proof in relation to Article XXI(b).
  45. Regarding the interpretation of Article XXI, in the EU's view, the phrase "which it considers" refers only to the necessity test and not to any other provisions. Furthermore, the subparagraphs to Article XXI(b) are exhaustive of the types of circumstances covered by the provision, and cannot be considered cumulative in nature. All those distinct circumstances are objective, and susceptible to a panel's assessment. Moreover, the terms "other emergency in international relations" do not extend to an "emergency" in commercial or trade relations.
  46. Concerning the negotiating history raised by the US, even under the Havana Charter, the correct position would have been that the predecessor to Article XXI is "justiciable", and not self-judging. Even under the Havana Charter, all issues arising out of the Charter were intended to be subject to the dispute settlement procedures provided therein, whether involving the ITO itself (Articles 93-95 of the Havana Charter), or the ICJ (Article 96 of the Havana Charter). The evolution towards the WTO covered agreements, and notably the provisions of the DSU, further confirms that position.
  47. Furthermore, the 1949 GATT Council decision cited by the US cannot be considered as a subsequent agreement on the interpretation even of the GATT 1947, or in any way binding to all the contracting parties to the GATT 1947. Still less could it be considered as binding under the GATT 1994. In any event, it also supports the complainants' position rather than that of the US.

## **5. CONCLUSIONS**

48. What the US is advocating is, in fact, the end of a rules—based multilateral trading system. While the EU acknowledges the margin of discretion that WTO Members enjoy under the security exceptions, that discretion is not unfettered, but subject to certain objective elements, which can and should be subject to review by a panel
49. The EU hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the Agreement on Safeguards and of the GATT 1994.

**ANNEX C-3****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF HONG KONG, CHINA****I. INTRODUCTION**

1. In DS544, DS547, DS548, DS552, DS554, DS556, and DS564 ("the parallel disputes"), the complainants challenge the consistency of the measures imposed by the United States ("U.S.") on steel and aluminium products. Specifically, the complainants have challenged the U.S. measures under several of the core provisions of the GATT 1994, including Articles II:1 and I:1. The United States has sought to defend its measures pursuant to Article XXI(b) of the GATT 1994.

2. Hong Kong, China ("HKC") has participated in the parallel disputes because of its systemic interest in the correct interpretation and application of the provisions of the WTO-covered agreements at issue in these disputes and its substantial interest in the outcome of the parallel disputes.<sup>1</sup>

3. For the reasons set out in Hong Kong, China's written submission, oral statement, and responses to questions from the Panel to the third parties, Hong Kong, China respectfully submits that in its view, the complaints have established a *prima facie* case that the U.S. measures are inconsistent with the relevant provisions of the Agreement on Safeguards and the GATT 1994. Hong Kong, China further respectfully submits that the United States has failed to demonstrate that the U.S. measures are justified under Article XXI(b) of the GATT 1994.

4. Throughout these proceedings, Hong Kong, China has focused on the correct legal interpretation of Article XXI(b) of the GATT 1994 in light of the critical systemic implications of the U.S. proposed interpretation of this provision as entirely self-judging.

**II. THE COMPLAINANTS' CLAIMS UNDER THE AGREEMENT ON SAFEGUARDS AND THE GATT 1994**

5. As detailed in Hong Kong, China's written submission, Hong Kong, China considers that the complainants have each demonstrated that when evaluated objectively and in a manner consistent with the Appellate Body's statements in *Indonesia – Iron or Steel Products*, the U.S. measures are safeguard measures because (1) the measures suspend at least one GATT obligation, in whole or in part, or withdraw or modify a GATT concession, and (2) it is evident on the face of the measures and in their design, structure, and operation that the specific objective of such measures is to prevent or remedy serious injury to the U.S. steel and aluminium industries.<sup>2</sup> In Hong Kong, China's view, each of the complainants has also demonstrated that the U.S. measures are inconsistent with numerous provisions of the Agreement on Safeguards.<sup>3</sup>

**III. THE APPLICABILITY OF ARTICLE XXI OF THE GATT 1994 TO THE AGREEMENT ON SAFEGUARDS**

6. In its answers to questions from the Panel to the third parties, Hong Kong, China explained its view that Article XXI of the GATT 1994 is inapplicable to the Agreement on Safeguards.<sup>4</sup> Hong Kong, China considers the lack of an explicit reference to Article XXI or any other GATT exception in the Agreement on Safeguards, in particular, to be critical evidence that Article XXI is not available to justify violations of the Agreement on Safeguards. In Hong Kong, China's view, the general references in the Agreement on Safeguards to the GATT 1994 do not provide a sufficient legal basis to apply Article XXI to the Agreement on Safeguards. The Agreement on Safeguards strikes a balance between preserving the right of Members to take emergency action on imports and disciplining the use of safeguard measures. Consequently, allowing recourse to Article XXI of the GATT 1994 is both legally unjustifiable and potentially disruptive of this inherent balance.

<sup>1</sup> See Hong Kong, China's third-party submission, para. 1; third-party statement, paras. 2 and 3.

<sup>2</sup> See Hong Kong, China's third-party submission, paras. 5-8.

<sup>3</sup> See Hong Kong, China's third-party submission, para. 9.

<sup>4</sup> See Hong Kong, China's response to Panel questions Nos. 38(a), 38(c), 38(d), and 39. See also Hong Kong, China's third-party statement, paras. 10-12.



#### IV. ARTICLE XXI(B) OF THE GATT 1994

7. The United States has invoked Article XXI(b) of the GATT 1994 in respect of all of the complainants' claims. Therefore, for the reasons detailed in Hong Kong, China's answers to questions from the Panel to the third parties, the Panel has jurisdiction to examine and interpret Article XXI(b).<sup>5</sup> In particular, pursuant to Articles 7.2 and 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the Panel is required to address Article XXI(b) and conduct an objective assessment of whether Article XXI(b) applies to the U.S. measures.

8. Furthermore, since Article XXI(b) is an affirmative defence, the Panel should first evaluate whether each complainant has established a *prima facie* case that the U.S. measures violate certain provisions of the Agreement on Safeguards and the GATT 1994 and whether the United States has rebutted those claims, before turning to the interpretation and application of Article XXI(b) of the GATT 1994.<sup>6</sup>

9. In regard to the correct legal interpretation of Article XXI(b), it is Hong Kong, China's view that when analysed in accordance with Article 3.2 of the DSU and the general customary rules of interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), it is clear that this provision preserves the right of Members to take actions necessary for the protection of their essential security interests, but it is not entirely self-judging.<sup>7</sup>

10. Pursuant to Article 31 of the Vienna Convention, the terms of Article XXI(b) must be interpreted in good faith, in accordance with their ordinary meaning in their context, and in the light of the object and purpose of the GATT 1994. The language "which it considers" makes clear that Article XXI(b) contemplates a certain level of unilateral determination by the invoking Member. The placement of the language of "which it considers" in the *chapeau* indicates that it is up to the invoking Member to determine, in good faith, whether a measure is necessary for the protection of its essential security interests.<sup>8</sup>

11. Pursuant to the principle of effective treaty interpretation, a treaty interpreter may not "adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".<sup>9</sup> A proper interpretation of Article XXI(b) must therefore give meaning to all of the enumerated subparagraphs. If the language "which it considers" is interpreted to qualify the subparagraphs, the subparagraphs would be rendered inutile. In order to give meaning to all parts of Article XXI(b), the enumerated subparagraphs must be interpreted as subject to objective review by a WTO panel. Correctly interpreted, Article XXI(b) is therefore not entirely self-judging. This conclusion is supported by the fact that the *chapeau* does not include any terms to suggest that the enumerated subparagraphs do not exhaustively list the types of actions covered by Article XXI(b), such as "including" or "*inter alia*".<sup>10</sup>

12. This conclusion is further supported by the context provided by Article XX of the GATT 1994, which requires a "two-tiered" analysis, the first tier of which consists of objectively determining whether the measure at issue falls within the scope of one or more of the enumerated subparagraphs.<sup>11</sup>

<sup>5</sup> See Hong Kong, China's answers to Panel questions Nos. 8-11. See also Hong Kong, China's third-party submission, para. 56.

<sup>6</sup> See Hong Kong, China's answer to Panel question No. 15; third-party submission, para. 4.

<sup>7</sup> See Hong Kong, China's third-party submission, paras. 20-32; third-party statement, paras. 13-21.

<sup>8</sup> See Hong Kong, China's third-party submission, para. 23. See also Hong Kong, China's response to Panel questions Nos. 13 and 14.

<sup>9</sup> See Hong Kong, China's third-party submission, para. 25, quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, quoting Appellate Body Report, *US – Gasoline*, p. 23; third-party statement, para. 19.

<sup>10</sup> See Hong Kong, China's third-party submission, para. 26; third-party statement, para. 18.

<sup>11</sup> See Hong Kong, China's third-party submission, paras. 27-29, quoting Appellate Body Report, *US – Shrimp*, paras. 118 and 119, quoting Appellate Body Report, *US – Gasoline*, p. 22 (explaining that the analysis under Article XX is "two-tiered: first, provisional justification by reason of characterization of the measure [under one of the subparagraphs]... ; second, further appraisal of the same measure under the introductory clauses of Article XX (emphasis added)" and explaining that this analysis reflects "the fundamental structure and logic of Article XX.").

13. The terms of Article XXI(b) must also be interpreted in light of their object and purpose, which as Hong Kong, China has explained, requires "avoid[ing] interpretations that would enable Members to 'circumvent' or 'evade' their obligations," including those under Article XIX of the GATT 1994.<sup>12</sup> In this regard, Hong Kong, China has highlighted the statement by the panel in *Russia – Traffic in Transit* that a "general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade", and therefore "[i]t would be entirely contrary to the security and predictability of the multilateral trading system ... to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member."<sup>13</sup> Hong Kong, China concurs with the panel's statement.

14. In support of its interpretation of Article XXI(b) as entirely self-judging, the United States has advanced certain arguments relating to the *United States v. Czechoslovakia* dispute and the views previously expressed by WTO Members on Article XXI. Hong Kong, China respectfully submits that the United States has failed to demonstrate that the Panel should take into account these arguments as a matter of law, nor has the United States demonstrated that these arguments factually support the U.S. proposed interpretation of Article XXI(b).<sup>14</sup>

15. Finally, throughout these proceedings, Hong Kong, China has expressed strong disagreement with the U.S. view that the negotiating history detailed in the U.S. first written submission confirms that Article XXI(b) is self-judging.<sup>15</sup> Hong Kong, China has carefully examined the records of the discussions surrounding the evolution of the language "which it considers" and disagrees that they confirm that the drafters intended for this language to qualify the adjectival clauses that ultimately became the subparagraphs of Article XXI(b). As Hong Kong, China has highlighted in its submissions to the Panel, in contrast to the interpretation proposed by the United States in the present parallel disputes, in these early discussions the United States itself did not consider Article XXI(b) to be entirely self-judging or that Members' rights of redress in respect of the exception would be limited.<sup>16</sup>

## V. CONCLUSION

16. The text of Article XXI(b) of the GATT 1994, interpreted in its context and in light of the object and purpose of that agreement, establishes that for a measure to be justified under that provision, the action taken must objectively fall within the scope of Article XXI(b). As the party invoking Article XXI(b), the United States bears the burden of demonstrating that its measures fall within the scope of that provision.<sup>17</sup> Additionally, consistent with the general international law principle of *pacta sunt servanda* underlying all of the WTO-covered agreements, the Member invoking Article XXI(b) must do so in good faith. For the reasons explained in Hong Kong, China's submissions in the parallel disputes, Hong Kong, China respectfully submits that in its view, the complainants have met their burden of proof and established a *prima facie* case that the U.S. measures violate the relevant provisions of the GATT 1994 and the Agreement on Safeguards. Given that the proposed interpretation by the United States of Article XXI(b) is flawed and the United States has failed to meet its burden of proof under Article XXI(b),<sup>18</sup> Hong Kong, China also respectfully submits that the Panel should find that the U.S. measures are not justified under that provision.

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<sup>12</sup> See Hong Kong, China's third-party submission, para. 30, quoting Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.642.

<sup>13</sup> See Hong Kong, China's third-party submission, para. 31, quoting Panel Report, *Russia – Traffic in Transit*, para. 7.79 (internal citations omitted).

<sup>14</sup> See Hong Kong, China's third-party submission, paras. 33-36; 45-51, 54.

<sup>15</sup> See Hong Kong, China's third-party submission, paras. 42-44; third-party statement, paras. 22-24.

<sup>16</sup> See Hong Kong, China's third-party submission, paras. 42-44; third-party statement, paras. 22-24.

<sup>17</sup> See Hong Kong, China's third-party submission, para. 57, citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16 (noting that the burden of establishing an affirmative defense "should rest on the party asserting it.").

<sup>18</sup> See Hong Kong, China's response to Panel questions Nos. 16-19, 21, 25, and 26.

**ANNEX C-4****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA****I. Introduction**

1. India notes that the United States does not contest any of the evidence presented and claims raised, by the complainants in any of the 6 disputes in which India is a third party. In other words, there is no longer any dispute that the measures at issue violate multiple provisions of GATT 1994 and Agreement on Safeguards.

2. The entirety of United States First Written Submissions is devoted to Article XXI(b) of GATT 1994. Essentially, the United States argues that mere invocation of Article XXI(b) shields the measures at issue from scrutiny by the Panel. India disagrees for the reasons outlined below. India also notes that the United States also fails to offer any explanation as to how Article XXI could be a defence against claims raised under Article XIX of GATT 1994 and Agreement on Safeguards (which are themselves an exception to the obligations contained in Articles I, II, X and XI of GATT 1994). Finally, the United States offers a generic defence under Article XXI without specifying the precise sub-clause it invokes and without presenting any facts to support the invocation of Article XXI. India submits that the burden of proof is on the United States<sup>1</sup> to establish that Article XXI applies in the facts and circumstances of the present dispute since Article XXI(b) of the GATT 1994 is an affirmative defence, just like Article XX.

**II. Justiciability of Article XXI(b) of the GATT 1994**

3. The United States argues that Article XXI(b) is "self-judging" and this "has been the consistently expressed view of the United States for more than 70 years".<sup>2</sup> Nothing could be farther from the truth<sup>3</sup>. Such assertion contradicts the comments made by the representatives of the United States when Article XXI (and its predecessor) were being drafted<sup>4</sup>.

4. India considers that the terms "justiciable/non-justiciable" can neither be found in the DSU nor in any other WTO covered agreements. These terms have not been addressed in past disputes except in *Russia – Traffic in Transit* in which the United States, intervened as a third-party<sup>5</sup>. Accordingly, India considers that these terms do not provide any guidance in relation to the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings.

5. India submits that the invocation of Article XXI of GATT 1994 is subject to review by the Panel. India notes that the Panel in *Russia – Traffic in Transit* supports India's position. The Panel held "[i]t would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member."<sup>6</sup>

6. India also recalls that the panel explicitly rejected the United States' position that Article XXI(b)(iii) is non-justiciable<sup>7</sup> and correctly found that Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia in those proceedings. Although the United

<sup>1</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16

<sup>2</sup> US' first written submission, para. 2.

<sup>3</sup> Panel Report, *Russia- Traffic in Transit*, Appendix – subsequent conduct concerning Article XXI of the GATT 1947, paras. 1.11 – 1.14 with regard to the views expressed by several US agencies in 1951 in *United States – Imports of Dairy Products* (1951).

<sup>4</sup> Exhibit USA-41, pp. 20-21.

<sup>5</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.52 and 7.103.

<sup>6</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.79.

<sup>7</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.103 and fn 183.

States has not specifically asserted that it is invoking Article XXI(b)(iii), it is unimaginable that any other sub-clause of XXI(b) could apply in the facts and circumstances of the present dispute.

7. Further in the 1982 Decision Concerning Article XXI of the General Agreement (1982 Decision)<sup>8</sup> the contracting parties decided that a 'formal interpretation of Article XXI' was yet to be taken and, in the meanwhile, 'all contracting parties...retain[ed] their full rights under the General Agreement' and the GATT Council would give 'further consideration to this matter in due course'. Since this was a later and more specific agreement, which expressly resolved to keep the interpretation of Article XXI open-ended and subject to further consideration, any purported agreement which predated the 1982 Decision limiting the rights of parties to the GATT to this extent would be modified or set aside by the 1982 Decision. Accordingly, Article 31(3)(c) of the VCLT gives precedence to the 1982 Decision on the interpretation of Article XXI of GATT 1994.<sup>9</sup>

### III. Interpretation of Article XXI(b) of the GATT 1994

8. India considers that the phrase "which it considers" appearing in Article XXI(b) does not qualify the three subparagraphs of Article XXI(b). The subparagraphs only relate to the word "action" in the *chapeau*. In other words, the three subparagraphs identify circumstances (the first two identifying the types of goods and the third being a temporal circumstance) which must objectively be met in order for a Member to take action under the *chapeau*. India considers that the phrase "which it considers" relates only to the "necessity" of the action. *Per contra*, India is of the view that the phrase "for the protection of [that Member's] essential security interests" is not qualified by the terms "which it considers".

9. India acknowledges that the words "which it considers" imply that a certain degree of discretion is granted to the Member taking action. Accordingly, the standard of review would be somewhere between "total deference" and "*de novo*" review, both of which are excluded<sup>10</sup>. It implies that the United States must provide a rationale and plausible explanation regarding how or why it considers that its measures are "necessary" for the protection of its essential security interests. It is not India's position that the panel make a judgment on what the panel itself "considers" is "necessary" in the circumstances.

10. India also considers that the three subparagraphs to Article XXI(b) are exhaustive of the circumstances covered by that provision. Article XXI(b) does not include any language to suggest that the three paragraphs are merely illustrative. In that regard, it may be observed that Article XX of the GATT 1994 containing "General Exceptions" similarly includes ten subparagraphs numbered (a) to (j) without conjunction between the ten subparagraphs. The ten categories are exhaustive, implying that in order to be justified under Article XX, a measure must necessarily fall "under at least one of the ten exceptions listed under Article XX".<sup>11</sup>

11. India further considers that the words "relating to" in subparagraphs (i) and (ii) and "taken in time of" in subparagraph (iii) are words linking each subparagraph to the word "action" in the *chapeau*. Accordingly, there must be a substantive nexus between particular subparagraph, the challenged measure and the security interests in question.

12. Finally, India considers that each of the three subparagraphs of Article XXI(b) is a relevant context for the interpretation of the other two subparagraphs. The *chapeau* is also relevant context for interpreting the subparagraphs. In particular, the three subparagraphs suggest that purely economic interests would not fall within the scope of Article XXI(b)<sup>12</sup>. India submits that the phrase "other emergency in international relations" in Article XXI(b)(iii) must be interpreted on the basis of its ordinary meaning in light of its context.<sup>13</sup> The panel in *Russia – Traffic in Transit*, explained that

<sup>8</sup> Decision Concerning Article XXI of the General Agreement dated 30 November 1982, L/5426 at recital 3 and para 3 (2 December 1982).

<sup>9</sup> International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006' UN Doc. A/73/10, p. 180, paras 17; VCLT, Articles 30, 41.

<sup>10</sup> Appellate Body Report, *EC – Hormones*, para. 115.

<sup>11</sup> Appellate Body Report, *Brazil – Tyres*, para. 139. See also, Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.96; Appellate Body Report, *China – Raw Materials*, para. 354; Appellate Body Report, *EC – Seal Products*, para. 5.169; Appellate Body Report, *US – Gasoline*, para. 57.

<sup>12</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.75 and 7.133.

<sup>13</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.71-7.76.

*political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii) .... unless they give rise to defence and military interests, or maintenance of law and public order interests.*<sup>14</sup> Accordingly, for emergency in commercial or trade relations to be covered by Article XXI(b), it must pose a threat to the functioning and/or stability of the respondent state, including the maintenance of law and public order. Further, the use of the word "other" clearly "indicate[s] that war is one example of the larger category of 'emergency in international relations'".<sup>15</sup> Thus, the phrase "or other" makes clear that the situation of "emergency in international relations" is of the same category as that arising in the context of "war".

13. Finally, India submits that three subparagraphs are not cumulative in nature. The subparagraphs describe three distinct circumstances in which a Member may invoke Article XXI(b). The intent of the drafters is reflected in the structure of that provision, which contains three separate subparagraphs, that are separated by a semicolon and deal with substantially different subject matters<sup>16</sup>. This interpretation has been confirmed by the panel in *Russia – Traffic in Transit*<sup>17</sup>. The United States is therefore required to identify a specific subparagraph of Article XXI(b) on which it relies as part of its defence. The respondent may, if it wishes, rely on more than one subparagraph. However, it must demonstrate that the conditions in each of the subparagraphs is satisfied.

#### **IV. Exception to an Exception under the GATT 1994**

14. India submits that the text and context of GATT 1994 do not support the proposition that the agreement provides an exception to an exception, i.e. specifically put, it is India's view that Article XXI(b) cannot be an exception to Article XIX. In this regard, India supports the interpretation proposed by Switzerland<sup>18</sup>. During the course of the substantive meeting India had argued that Article XIX and XXI are separate mechanisms which allow Members to derogate from their general obligations under GATT to address exceptional situations - economic emergency under XIX and security interests under Article XXI. The general obligations could be, for instance, obligations under Article I or Article II.

15. India further submits that assuming without conceding that the proposition advanced by the United States that Article XXI(b) is an exception to Article XIX, is tenable, the result would be merely a "release" for the United States from certain substantive and procedural obligations contained in Article XIX and the Agreement on Safeguards. This is because when a respondent seeks to apply Article XXI(b) as an exception to Article XIX, it makes two implicit admissions – (a) that the measure is indeed a safeguard measure; and (b) that by applying Article XXI(b), it is not required to follow the disciplines contained in Article XIX and the Agreement on Safeguards. As a result, the Complainants would then be free to apply rebalancing measures pursuant to Article 8.3 because the respondent has already admitted that the measure at issue does not conform to the provisions of Agreement on Safeguards.

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<sup>14</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.75. See also, paras. 7.71-7.76.

<sup>15</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.72.

<sup>16</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.68.

<sup>17</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.68.

<sup>18</sup> Opening Statement of Switzerland at the First Substantive Meeting of the Panel, *US – Steel and Aluminium Products (DS556)*, paras. 111 – 119.

**ANNEX C-5****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. INTRODUCTION**

1. Japan does not take a position on the merits of the claims and defenses that are before the Panel. However, Japan has a systemic interest in the scope of application of the Agreement on Safeguards and the availability of non-violation remedies when measures are justified under the security exception in Article XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

**II. SCOPE OF APPLICATION OF THE AGREEMENT ON SAFEGUARDS**

2. A "safeguard measure" is not a defined term or notion. Thus it seems to have limited value to try to draw a line of what is a safeguard measure and what is not. Japan therefore disagrees with the view that a measure is a safeguard measure when it contains certain elements, because such a view is based on the premise that there is a definition for "a safeguard measure". In order to determine whether a measure can be characterized as a safeguard measure for purposes of Article XIX of the GATT 1994 and the Agreement on Safeguards, various factors should be considered on a case by case basis taking into consideration all relevant factors.

3. Notifications submitted by WTO Members are an example of a factor that may be relevant in certain cases. Although notifications are not a prerequisite for the applicability of the safeguard disciplines to a measure, notifications indicate that the relevant measure is taken to remedy "serious injury or threat thereof." This provides some indication that the measure was designed to prevent or remedy serious injury and thus should be considered as one of the relevant factors when determining the applicability of the safeguard disciplines.

4. While notifications are an example of a relevant factor that may be considered to determine the applicability of safeguard disciplines, a WTO Member's formal "invocation" or its intention to exercise the rights under Article XIX of the GATT 1994 is not a necessary factor for the safeguard disciplines to apply. In fact, WTO panels and the Appellate Body have generally avoided relying on a WTO Member's subjective intent.<sup>1</sup> However, the Panel may consider the objectives pursued as reflected in the measure itself or in statements made by the Member taking the measure.

5. Ultimately, a panel must look at all of the evidence available to ensure that a WTO Member is not seeking to avoid the disciplines of Article XIX and the Agreement on Safeguards, or to frustrate other WTO Members' right to rebalancing measures. It is likewise important to consider all of the evidence, because otherwise, potentially, the Agreement on Safeguards could be applied to any measure raising the tariff above the Article II tariff bindings, including anti-dumping measures. This is particularly so given that a tariff by its nature only applies to imports, and thus even in the case of anti-dumping measures, the allegation could be made that they are a remedy for injury suffered by the domestic industry.

6. The terms "to suspend the obligation in whole or in part or to withdraw or modify the concession" under Article XIX of the GATT 1994 are not necessarily synonymous with violations of the GATT 1994. That is, it may be possible to determine that a Member withdrew or modified a concession without assessing whether there is a violation. Having said that, Japan recognizes that the determination of violation could turn out to be merely a consequential step that does not require much in terms of additional analysis. If the measure does not comply with the safeguard disciplines under Article XIX of the GATT 1994 and the Agreement on Safeguards, then consequently, it will be found simply to violate a GATT 1994 obligation.

7. A measure may have multiple objectives. For example, a measure may be taken for national security purpose as well as to prevent or remedy serious injury to domestic industries. In such cases, the application of Article XXI of the GATT 1994 as well as the Agreement on Safeguards may need to be considered, respectively. If a measure can be justified pursuant to Article XXI of the

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<sup>1</sup> See, for example, Appellate Body Report, *US – COOL*, para. 420.

GATT 1994, there is no need to justify the measure pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards. Article 11.1 (c) clarifies that measures that are in conformity with Article XXI of the GATT 1994, should not be prohibited by Article 11.1(b) of the Agreement on Safeguards and that such a measure need not be in accordance with the Agreement on Safeguards. In this regard, Article 11.1(c) is one of the articles in the WTO Agreement that seek to avoid situations where a measure that is WTO-consistent under one of the covered agreements becomes WTO inconsistent under another agreement.

8. On the other hand, when the measure at issue is not justified under Article XXI of the GATT 1994, the situation is more complex and a case-by-case analysis would be required. If the measure can be characterised as a safeguards measure, considering all relevant factors, the safeguard disciplines should be considered. If the measure falls under Article 11.1(b) of the Agreement on Safeguards, the measure should be withdrawn as such a measure is prohibited. Japan notes that in some cases, it may be unclear whether the measure at issue can be justified as a safeguard measure or whether it falls under the measures that are prohibited under Article 11.1(b) of the Agreement on Safeguards. In such a case, it would be necessary to engage in a case-by-case analysis, considering various factors to determine whether the measure is one of those that is prohibited or whether the measure can be characterised as a safeguard measure.

### **III. NON-VIOLATION CLAIMS AGAINST SECURITY MEASURES JUSTIFIED UNDER ARTICLE XXI(B) OF THE GATT 1994**

9. While Japan does not take a view on whether the measures at issue are justified under Article XXI(b) of the GATT 1994, Japan does not consider that the potential availability of a non-violation remedy, in and of itself, provides a basis for concluding that Article XXI(b) is self-judging, as suggested by the United States.

10. Japan considers that, if a measure that otherwise would be inconsistent with the GATT 1994 satisfies the security exception in Article XXI, then the appropriate conclusion to draw is that the measure does not conflict with the GATT 1994. This does not mean, however, that a non-violation finding under Article XXIII:1(b) can always be made against such measures. Indeed, there are several textual and contextual elements that appear to suggest that measures that satisfy Article XXI are very unlikely to be subject to a non-violation remedy or, at the very least, that a complaining party would have to overcome a high burden before succeeding in a non-violation claim in such circumstances.

11. First, Article XXI(b) permits a WTO Member to take measures that would otherwise be deemed inconsistent with the GATT 1994 in order to address essential national security risks. The purpose of the security exception under Article XXI(b) of the GATT 1994 would be frustrated if it were the case that security measures justified under Article XXI(b) were unvaryingly found to nullify or impair benefits accruing to other Members, or to impede the attainment of the objectives of the GATT 1994.

12. The exceptional nature of the non-violation remedy also weighs against applying a presumption that security measures justified under Article XXI(b) nullify or impair benefits or impede the attainment of objectives under the GATT 1994. In Japan's view, the very existence of a specific exception under Article XXI(b) might indicate that WTO Members did not necessarily expect that they would be challenged for actions that are properly justified under that exception.

13. Article XXIII:1 requires a panel examining a non-violation claim under Article XXIII:1(b) to assess whether there was a reasonable expectation, at the time that market access commitments were negotiated, that the WTO-consistent measure at issue would not be taken.<sup>2</sup> Given that WTO Members agreed that security measures taken under Article XXI(b) are permissible, they clearly contemplated the possibility that the security exception would be invoked and thus should be deemed to have reasonably expected that Members would have recourse to such an exception. Japan is of the view that WTO Members cannot reasonably expect that other Members will never rely on Article XXI(b) to justify measures otherwise inconsistent with GATT obligations.

14. It is by no coincidence that during the GATT-era, non-violation claims were mostly used to address subsidy measures, since at that time, explicit subsidy rules were not in place except for

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<sup>2</sup> See Panel Report, *Japan – Film*, paras. 10.76-10.77.

export subsidies. This situation arose not because the Contracting Parties agreed not to discipline subsidy measures, but because the Contracting Parties could not agree on the rules. Thus, "non-violation claims" were used to address issues that lacked explicit rules. Unlike such circumstances where there was lack of explicit rules, Article XXI contains explicit rules for security exceptions. If a measure fully satisfies the explicit rules in Article XXI, it would not be reasonable to expect that such measures could not be taken, and thus such a measure would not result in being subject to non-violation remedy.



**ANNEX C-6****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND****I. INTRODUCTION**

1. New Zealand's participation in this dispute reflects its systemic interest in the proper interpretation of Article XXI(b) of the General Agreement on Tariffs and Trade 1994 (**GATT**). Article XXI(b) is being called upon by Members in a way that it has not been in the past. In this changing climate, it is imperative that Article XXI(b) is interpreted in a principled and robust manner that both preserves its utility and also guards against its abuse.

2. Article XXI(b) performs an important function. It permits Members to take measures that would otherwise conflict with trade obligations in order to protect certain essential security interests, and grants Members a degree of latitude to determine where this is necessary. This is not without limit, however. Article XXI(b) contains elements that are subject to objective review by a panel. Further, like all treaty provisions, Article XXI(b) must be applied in good faith. Whether this good faith obligation has been fulfilled is also a matter that is open to panel review. These limiting features maintain the utility of the national security exception for Members, while still preserving the security and predictability of the international trading system and protecting Article XXI(b) against misuse.

**II. SCOPE OF PANEL REVIEW UNDER ARTICLE XXI(b) GATT**

3. Article XXI(b) GATT provides that:

Nothing in this Agreement shall be construed

...

(b) to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests:

(i) relating to fissionable materials or the materials from which they are derived;

(ii) 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 a military establishment;

(iii) taken in time of war or other emergency in international relations;

4. A key issue in this dispute is the extent to which Article XXI(b) retains Members' discretion to determine the matters contained in that provision, and the extent to which action taken in reliance on it can be reviewed by a panel. As a preliminary point, it can be noted that this is not a question of justiciability. The fact that a provision fully or partially defers to the judgment of a Member will not, in itself, render conduct taken under that provision non-justiciable. As discussed further below, all treaties must be applied and performed in good faith.<sup>1</sup> Whether this obligation of good faith has been met is a justiciable matter susceptible to panel review. The degree of discretion retained by Members under Article XXI(b) will, however, impact upon the nature of a panel's assessment of that conduct. An examination of the scope of this discretion is therefore an appropriate place to start our interpretation.

**Article XXI(b) contains both elements that defer to Members' own judgment and elements that are capable of objective review by a panel**

5. The starting point to the interpretation of Article XXI(b) is the phrase 'which it considers' contained in the chapeau. It is clear from the words directly preceding the phrase, that the term 'it'

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<sup>1</sup> Vienna Convention on the Law of Treaties, Articles 31(1) and 26; Appellate Body Report *US – Shrimp*, at para 158.

is a reference to the relevant contracting party. To 'consider' means "to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of".<sup>2</sup> This is an inherently subjective exercise. The use of 'which it considers' in the chapeau to Article XXI(b) signals that what is being referred to is a subjective assessment to be carried out in good faith by the relevant contracting party.

6. The phrase 'which it considers' qualifies both the assessment of the 'necessity' of the action taken *and* the determination of the invoking Member's 'essential security interests'. This is clear from the structure of the chapeau to Article XXI(b). The terms in the chapeau run one after the other. There is no grammatical or formatting division suggesting the phrase 'which it considers' applies only to the term 'necessary' and not to 'for the protection of its essential security interests'. This is further supported by the use of the term 'its' before 'essential security interests'. The chapeau is not referring to essential security interests in the abstract, it is referring to the essential security interests of the *particular Member* invoking Article XXI(b). It would be artificial to suggest that any entity other than a Member can determine that Member's essential security interests. It is for a Member, acting in good faith, to determine its essential security interests, and the measures necessary to protect those interests.

7. As recognised by the Panel in the recent decision *Russia – Traffic in Transit*, the phrase 'which it considers' does not qualify the three subparagraphs to Article XXI(b). Unlike the chapeau, the sub-paragraphs are framed in objective terms. As noted above, the chapeau uses 'it considers' and 'its essential security interests' to indicate that these are subjective matters left to the judgment of a Member. In stark contrast, the subparagraphs are framed in purely objective terms: whether the measures relate to fissionable materials; whether the measures relate to military materials; whether the measures were taken in a time of war or emergency in international relations. This reflects a deliberate effort to differentiate between those elements that are to be subjective and left to the judgment of a Member, and those that are objective requirements, subject to determination by a panel.

8. This interpretation is supported by the context of Article XXI(b), in particular, Article XXI(a), which provides that contracting parties shall not be required to furnish information the disclosure of which it considers contrary to its essential security interests. An objective assessment of a Member's asserted security interests and the necessity of action taken for their protection could require a panel to be provided with information contrary to Article XXI(a).

9. This interpretation is also supported by the object and purpose of the GATT. The general object and purpose of the GATT, as well as the Marrakesh Agreement Establishing the World Trade Organization, is to 'promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade'.<sup>3</sup> A number of provisions, including Article XXI(b), permit Members to take measure that would otherwise conflict with trade obligations in order to protect other interests. While these provisions grant Members a degree of flexibility, they contain in-built limits to preserve the security and predictability of the trading system and protect against abuse. The three subparagraphs to Article XXI(b) perform this important limiting function by delineating the factual circumstances in which Article XXI(b) can be invoked. As noted by the Panel in *Russia – Traffic in Transit*, it would be "entirely contrary" to the security and predictability of the multilateral trading system established by the above agreements to interpret Article XXI(b) as "an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member".<sup>4</sup>

10. Accordingly, whether the factual circumstances set out in one of the sub-paragraphs to Article XXI(b) exist is a matter subject to objective panel review. In carrying out this review, a panel should take into account the particular factual circumstances relevant to the invoking Member. It would be unhelpful to attempt to prescribe the scope of each of the factual circumstances contained in the sub-paragraphs. Whether a particular set of facts falls within the sub-paragraphs is a matter to be assessed on a case by case basis. An overly formulistic approach to the interpretation of the

<sup>2</sup> [www.oed.com](http://www.oed.com). Last accessed 04 July 2019.

<sup>3</sup> See Appellate Body Report, *EC – Computer Equipment*, at para 82; Appellate Body Report *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, at para 433; Appellate Body Report *EC – Chicken Cuts*, at para 243.

<sup>4</sup> Panel Report, *Russia – Traffic in Transit*, at para 7.79.

circumstances described in the sub-paragraphs could unduly limit the scope of Article XXI(b) and, in doing so, undermine its utility. The terms of Article XXI(b) are not static. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations.<sup>5</sup> The degree to which the existence of these factual circumstances must be substantiated by the Member relying on Article XXI(b) will also depend on the circumstances.

**Members are obliged to perform their obligations under Article XXI(b) GATT in good faith**

11. It is a principle of general international law that all treaty provisions must be interpreted and performed in good faith.<sup>6</sup> This obligation of good faith arises irrespective of whether a provision defers to the judgment of Members or is subject to objective review by a panel.

12. The obligation to perform a treaty in good faith requires Members to not use the exceptions in Article XXI(b) as a means to circumvent its obligations under GATT.<sup>7</sup> In carrying out an assessment of conduct taken in reliance on Article XXI(b), a panel may consider whether this obligation of good faith has been met. There is no test, in the abstract, for how a panel should assess whether this obligation of good faith has been met. 'Good faith' is not a threshold, or a standard of proof, it is an assessment of the integrity of a Member's performance of a particular treaty provision. This assessment will differ depending the facts and circumstances of the particular case. In the context of Article XXI(b), it will likely involve consideration of the connections between the measure in dispute, the essential security interests engaged and the factual circumstances in the relevant sub-paragraph. The question for the panel is whether, in all relevant circumstances, the Member's reliance on Article XXI(b) is a good faith performance of that provision.

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<sup>5</sup> Panel Report, *US – Shrimp*, at para 129.

<sup>6</sup> Vienna Convention on the Law of Treaties, Articles 31(1) and 26; Appellate Body Report *US – Shrimp*, at para 158.

<sup>7</sup> Panel Report, *Russia – Traffic in Transit*, at para 7.133.

## ANNEX C-7

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

#### I. THE "JUSTICIABILITY" OF ARTICLE XXI(b) OF THE GATT 1994

1. The United States accepts that the Panel has jurisdiction over this dispute, in the sense that the DSB has established the Panel to examine the matter set out in the panel request.<sup>1</sup> However, the United States asserts that the Panel cannot undertake any meaningful review of the US actions that are purportedly justified under Article XXI(b),<sup>2</sup> because, based on its terms, "whether and what circumstance action is necessary to protect its essential interests" is entirely "self-judging", by virtue of the phrase "which it considers".<sup>3</sup>
2. In sum, the United States argues that Article XXI(b) establishes a right – to take GATT-inconsistent security measures – with no scope whatsoever for a panel to review the obligations and conditions that qualify that right. Thus, the dispute is subject to the Panel's *jurisdiction*, but the Panel may not undertake an objective review, by virtue of the phrase "which it considers".
3. Norway strongly disagrees with this argument by the United States. If mere invocation of Article XXI(b) would render a claim "non-justiciable", this would allow easy circumvention of WTO obligations. If a respondent could effectively bar a panel, that the United States acknowledges enjoys jurisdiction, from undertaking objective review by mere invocation of a security exception, this would give "carte blanche" for WTO Members to unilaterally set aside the rules that the legitimacy of the rule-based system rests on. A respondent could invoke a variety of protectionist interests under the guise of national security, and thereby avoid scrutiny of its WTO-inconsistent measures altogether. Such a measure could violate any of the Member's WTO obligations, and a WTO panel would be barred from making any findings of inconsistency. An interpretation of Article XXI(b), which had this effect, would render all the obligations in the GATT 1994 effectively unenforceable.
4. Moreover, if the intentions of the negotiators were for the panel to have no authority to assess a Member's invocation of a security exception provision, one would also have expected such an important and significant matter be expressly provided for.<sup>4</sup>

#### II. ORDER OF ANALYSIS UNDER ARTICLE XXI(b) OF THE GATT 1994

5. Article XXI(b) operates to justify certain GATT-inconsistent action, using the same language as Article XX: "nothing in this Agreement shall be construed to prevent any Member from taking any action which...". Hence, Article XXI(b) is, just like Article XX, an affirmative defence to a violation of the GATT 1994. Under Article XX, panels and the Appellate Body have, without exception, addressed first whether the complainant has made out its claims of WTO-inconsistency; and second whether the respondent has made out its affirmative defence that the measures are justified. This is because an affirmative defence is only relevant where a panel has found a violation. If there is no violation, then the relevant exceptions provision has no operative role; there is nothing to justify in the first place. Logically, therefore, where a respondent invokes Article XXI(b), the panel should first confirm whether there is a violation; and second whether the violation is justified.
6. Moreover, it is well-accepted, from jurisprudence under Article XX of the GATT 1994, that it is the WTO-inconsistent aspect of the measure – and not the measure as a whole – which must be justified.<sup>5</sup> Of course, a panel cannot identify the WTO-inconsistent aspects of a measure that would require justification, until it has addressed the claims. Hence, in our view, it is clear that the same reasoning must apply with respect to the other exceptions provisions applicable under the GATT 1994. By contrast, if a panel were obliged to address Article XXI(b) before addressing the claims, it would also have to assess whether the measures are justified in a vacuum, without yet having determined which aspects of the measures are WTO-inconsistent.

<sup>1</sup> The United States' first written submission, para. 184.

<sup>2</sup> The United States' first written submission, para. 184.

<sup>3</sup> The United States' first written submission, para. 3.

<sup>4</sup> The "justiciability" of the security exceptions is also supported by the GATT Council Decision Concerning Article XXI of the General Agreement, 30 November 1982, L/5426.

<sup>5</sup> Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.

### III. BURDEN OF PROOF UNDER ARTICLE XXI (b) OF THE GATT 1994

7. Article XXI(b) of the GATT 1994 is an affirmative defence, just like Article XX. The Appellate Body has found that the burden for establishing limited exceptions in the GATT 1994 lies with the party asserting the defence.<sup>6</sup> Hence, a respondent invoking an affirmative defence must bear the burden of proving that the applicable conditions are met. If the respondent does not take on that burden, beyond invoking an exception, a panel should not proceed to consider the merits of the exception.

8. Consequently, if the complainant establishes that a measure imposed by the respondent is inconsistent with the provisions of the GATT 1994, and the respondent does not make a *prima facie* case that those measures are justified under Article XXI, the panel must, as a matter of law, rule in favour of the complainant. In our view, the panel in *Russia – Traffic in Transit* failed, in effect, to treat Article XXI(b) of the GATT 1994 as an affirmative defence. The respondent in that dispute argued only that the security exception is not "justiciable", and did not adduce evidence and argument on the merits. In those circumstances, the panel should have found that the respondent did not make its case, and found in favour of the complainant.

### IV. STANDARD OF REVIEW UNDER ARTICLE XXI (b) OF THE GATT 1994

9. The United States agrees that the Panel has jurisdiction over this matter.<sup>7</sup> However, the United States takes the radical position that, because it has invoked Article XXI(b) of the GATT 1994, the Panel cannot make any substantive findings. In other words, while the Panel has jurisdiction, its review is empty of any substantive content.

10. In any given dispute, the standard of review under Article 11 "must be understood in light of the specific obligations of the relevant agreements that are at issue in the case".<sup>8</sup> To give effect to the chosen terms of Article XXI(b), and to the obligation to make an "objective assessment", the Panel must reject the US position that the appropriate standard of review under Article XXI(b) is total deference to the respondent.

### V. INTERPRETATION OF ARTICLE XXI(b) OF THE GATT 1994

11. The US position that Article XXI(b) is self-judging rests on two incorrect interpretive premises: *first*, the phrase "which it considers" applies to the subparagraphs of Article XXI(b); and *second* the phrase renders any other terms to which it attaches "self-judging". In Norway's view, however, the subparagraphs of Article XXI (b) are not qualified by "which it considers" and the chapeau is not "self-judging" by virtue of the terms "which it considers".

#### A. The subparagraphs of Article XXI(b)

12. The US first interpretive error is to misunderstand the relationship between the *chapeau* and the subparagraphs. The United States argues that subparagraphs (i) and (ii) qualify the term "essential security interests" in the *chapeau*, and not the word "action".<sup>9</sup> On this basis, the United States (incorrectly) argues that each subparagraph must be understood as simply endings to a sentence that begins with "which it considers". The United States thereby injects the verb "consider" from the *chapeau* into the subparagraphs. As a result, for the United States, the fulfilment of the legal conditions in the subparagraphs depends entirely on a respondent's subjective "consideration". The United States is wrong.

13. Properly interpreted, each of the three subparagraphs qualifies the word "action", and not the words "essential security interests". This follows from the text, context, object and purpose, and negotiating history of Article XXI(b). In particular, the US view is irreconcilable with the Spanish version of the text, in which the term "*relativas*" (relating) can only qualify the word "*medidas*" ("action"); and, the *chapeau* / subparagraphs are broken by a comma.

<sup>6</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>7</sup> The United States' first written submission, para. 184.

<sup>8</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 92; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.

<sup>9</sup> The United States' first written submission, paras. 29-34.

14. The *chapeau* / subparagraph relationship has important implications for the Panel's approach under Article XXI(b). Specifically, as a consequence of the relationship, a Member's "action" under Article XXI(b) is subject to two sets of distinct and independent conditions:

- (1) the "action" must "relate to" the specific circumstances set forth in subparagraph (i) or (ii), or be "taken in time of war or other emergency in international relations", under subparagraph (iii); and,
- (2) it must be "action" that the Member "considers necessary" for the protection of its essential security interests.

15. As a first step, therefore, a panel must make an objective assessment of whether the Member has demonstrated that the "action" meets the circumstances / situation in at least one of the subparagraphs. Textually, the phrase "which it considers" is not part of this step. Therefore, a Member's demonstration that it fulfils the conditions in the subparagraphs is not subject to a more forgiving standard of review flowing from the verb "consider" in the *chapeau*.

16. The United States has not identified a subparagraph of Article XXI(b), let alone substantiated that its actions meet the terms of any of the subparagraphs. The United States therefore fails to make a *prima facie* case, and the Panel's analysis may stop at the first step.

#### **B. The *chapeau* of Article XXI(b)**

17. The US second interpretive error relates to the second step of the Panel's analysis: is the measure "action" which the Member "considers necessary" for the protection of its essential security interests? The United States is wrong that the legal effect of the terms "which it considers" is that, in assessing this question, a panel must afford total deference to the respondent.

18. Norway agrees that the phrase "which it considers" means a panel should afford the respondent a degree of deference. However, a standard of "total deference", with no scrutiny whatsoever of a Member's action, fails to give effect to the chosen treaty terms, and the requirement of "objectivity" under Article 11 of the DSU.

19. The verb "consider" has a specific meaning: to "look attentively"; and, in transitive form, "to contemplate mentally, fix the mind upon".<sup>10</sup> Thus, the verb "considers" in the *chapeau* of Article XXI(b) establishes an obligation for a Member to undertake an attentive examination that the legal conditions in the *chapeau* are met.

20. Indeed, the surrounding words "necessary", "for the protection of", and "essential" each have their own specific meaning, and establish legal conditions that constrain the types of action that a respondent may take. The treaty interpreter cannot interpret two words in the *chapeau* in a way that deprives the surrounding context of meaning.

21. By way of contrast, the drafters could have chosen a different verb than "considers", and different surrounding words. For example, Article XXI(b) could have permitted a Member to take any action which it "declares necessary for the protection of its essential security interests"; or, which it "considers, in its judgment, fruitful to its security interests". The more open-ended language in each example would connote a far greater degree of discretion than the language the drafters actually chose.

22. The US interpretation of the *chapeau* as "self-judging" therefore reduces the *chapeau's* disciplines to inutility, and overrides Article 11 of the DSU. If the Panel accepts that Article XXI(b) is "self-judging", a Member could justify any action under the *chapeau*, however spurious its national security justification, thereby circumventing its GATT 1994 obligations, and defeating the object and purpose of the GATT 1994.

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<sup>10</sup> Oxford English Dictionary definition of "consider", last accessed 4 November 2019, (**Exhibit NOR-27**).

**ANNEX C-8****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION****I. Introduction**

1. Russia welcomes this opportunity to present its views as a third party in these disputes.
2. Russia recalls that seven Members challenge the US' import adjustments on steel and aluminium products in parallel disputes.<sup>1</sup> The proper legal characterization of these measures is at the heart of each of them. The reasons and grounds for adopting the measures at issue are not country-specific and are applicable to all complaints, showing a significant overlap between these disputes.
3. While the Russian Federation recognizes the exclusive right of the respondent to choose its line of defense, the US ignored and, therefore, failed to rebut complainants' specific arguments regarding inconsistency of the measures at issue with the GATT 1994 and the Agreement on Safeguards merely asserting that these measures are consistent with Article XXI (b) of the GATT 1994. In this regard, Russia stands that (i) the US failed to invoke Article XXI(b) of the GATT 1994 to justify the measures at issue as necessary for protection of its essential security interests; (ii) the measures at issue are safeguards in their essence.

**II. The task of the Panel and the order of analysis**

4. The complainants in each of the seven disputes claim that the measures by the United States on certain steel and aluminium products fall within the scope of the Agreement on Safeguards and Article XIX of the GATT 1994. The United States, on the other hand, does not characterize its measures on steel and aluminium as safeguard measures: according to the United States, the measures were introduced pursuant to Section 232 of the Trade Expansion Act of 1962, aimed at protection of national security interests and fortification of steel and aluminium industries.
5. The fact that the measures at issue are not characterized by the United States under the domestic law as safeguards is, in and of itself, not dispositive of the question of whether the measures constitute safeguards within the meaning of Article 1 of the Agreement on Safeguards. Otherwise, the domestic characterization of a measure could negate Member's obligations under the WTO agreements.
6. In such a situation, the Panel's first task is to determine whether or not the measures at issue are designed: 1) solely to protect essential security interests of the United States; 2) solely to avoid injury (or threat thereof) to its national steel and aluminum industry from imports of like or directly competitive products; 3) combination of both items.
7. If the Panel positively concludes that the measures at issue fall solely under the first scenario (protection of essential security interests of the United States), it will be in a position to proceed with the analysis of the United States' defense under Article XXI(b) of the GATT 1994. If the Panel determines that the measures are designed to protect the US domestic steel and aluminum industries from the injury or threat thereof caused by imports of like or directly competitive products, the Panel may proceed with examining their consistency with Article XIX of the GATT 1994 and the Agreement on Safeguards.
8. To conclude, whether or not the measures by the United States qualify as measures provided for in Article XIX of the GATT 1994 or measures provided for in Article XXI(b) of the GATT or both is an objective question that the Panel must decide based on the objective assessment that it is required to make pursuant to Article 11 of the DSU. In making its objective assessment, the Panel

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<sup>1</sup> These parallel disputes over the legality of the United States' import adjustments on steel and aluminium products, are DS544 (China), DS547 (India), DS548 (EU), DS552 (Norway), DS554 (Russia), DS556 (Switzerland) and DS564 (Turkey).

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must engage in a case-specific analysis by examining all of the relevant facts and examine the constituent features of the measures at issue.

### III. Invocation of Article XXI(b) of the GATT 1994

9. There is no disagreement between the parties that the panels have jurisdiction to resolve the disputes, as the US confirms its existence. The Panels were established by the DSB with the standard terms of reference in accordance with Article 7.1 of the DSU, without any exemptions, exceptions or limitations thereto. Therefore, the Panel's function is to examine the matters set out in the panel requests and to make an objective assessment of the matter before it pursuant to Article 11 of the DSU, as well as the applicability of and conformity with the relevant covered agreements assisting the DSB in making its findings and recommendations. Making any provisions "non-justiciable", the way the US puts it forward, will directly prevent the Panel to meet this function.

10. Nothing in the Panel's terms of reference or in the WTO Agreements indicates that this Panel is not able to resolve the disputes and make necessary findings, or that invocation of Article XXI(b) of the GATT 1994 affects in any way or limits the ability of the Panel to make such findings and therefore to assist the DSB in making relevant findings and recommendations.

11. Specific attention should also be paid to the US attempts to introduce the concept of "justiciability" to the context of the WTO Agreement without providing any arguments based on the text of any of the WTO Agreements, including the DSU, in order to support this concept. Given that the WTO Agreements do not provide for this concept, explicitly or implicitly, Russia would like to caution the Panel from taking the path of bringing a new term to the WTO dispute settlement system and remind that the recommendations and rulings of the DSB cannot add to or diminish rights and obligations provided in the covered agreements. Introduction of a concept non-existent under the covered agreements clearly violates the provisions of Article 3.2 of the DSU.

12. Turning to the substance of Article XXI(b) of the GATT 1994, Russia would like to notice the following. It starts with a chapeau ("nothing in this agreement shall be construed") followed by the list of actions that may not be prevented by the application of the GATT 1994. In the wording of the chapeau of this Article there are no limiting conditions under which the measure applied shall fall. On the contrary, the chapeau provides that there could be no limitations in the Agreement for the specific purposes provided by that Article.

13. The wording in this part of the said Article provides that it is the Member taking the action who determines which actions are necessary to protect its essential security interests and excludes any objective examination or evaluation by adjudicative body. Therefore, the Panel is not in a position to make **an objective determination** as to whether the Member taking such an action is inconsistent with the chapeau.

14. The adjectival clause "which it considers" in the chapeau can be read to qualify the "necessity" of the action for the protection of the invoking Member's essential security interests, as well as the determination of these "essential security interests".

15. Thus, Russia considers that it is within the sole discretion of a Member to determine its essential security interests and what actions are necessary for their protection. Should a Member consider certain actions necessary to protect its essential security interests, the declaration thereof by that Member is enough to satisfy the requirements of the chapeau of Article XXI(b) of the GATT 1994. Neither WTO panels nor the WTO itself have the right to determine the essential security interests for the Member, whether the Member correctly chose the action necessary to protect those security interests and whether or not that action is indeed necessary.

16. The presence of subjective element, however, does not preclude the panels to assess the facts related to the measures at issue, applicability of the GATT to the measures at issue and conformity of the measures at issue with the relevant provisions. The possible panel's judgement that the term "which it considers" qualifies the determination of the essential security interests and necessity of the actions and, thus, leaves these elements under sole discretion of the Members, does not prevent the Panel to finish its analysis and resolve the matter before it in a WTO consistent way.



17. Meanwhile, the compliance with Article XXI(b) of the GATT 1994 is conditioned by three distinct settings (subparagraphs i-iii). These subparagraphs and the way they are formulated represent the objective elements that are susceptible to the Panel's review *au contraire* to the chapeau.

18. The required nexus between a particular subparagraph and the measures (actions taken to protect) is established through the phrases "relating to" (connection with subparagraphs (i-ii)) and "taken in time of" (connection with subparagraph (iii)).

19. As a result, the Panel shall determine whether the measures at issue meet the requirements of either subparagraph. In order to do so, the Panel shall assess the legal arguments and evidence provided in support. A conclusion that the measures meet these requirements is a necessary prerequisite in order to establish whether they could be justified under the national security exceptions.

20. However, Russia wishes to note that the US seems to have invoked only the chapeau of Article XXI(b) of the GATT 1994 without indicating which particular subparagraphs out of three applies and why. The reading of Article XXI(b) of the GATT 1994 proposed by the US makes part of this Article, i.e. subparagraphs (i)-(iii), redundant and inutile. However, the drafters of the GATT 1994 have specifically added the three subparagraphs qualifying the introductory statement, which must not be regarded as effectively absent in the text. The Panel bears the task of giving them their proper meaning.

21. Thus, Russia is of a position that when invoking Article XXI(b) of the GATT the respondent is under obligation to identify a particular subparagraph of Article XXI(b) of the GATT 1994. The complainants and the Panel should not be left to guess whether the measures in question are related to any of subparagraphs. Mere reference to Article XXI(b) without any identification of a particular subparagraph or any combination of such subparagraphs strips these paragraphs of all the meaning and reduces the text of the Article to its chapeau only.

22. Therefore, in these proceedings, the Panel was deprived of an ability to assess in which particular circumstances the measures at issue were taken and examine whether these particular circumstances really exist within the meaning of Article XXI(b)(i)-(iii). The US failed to fulfill its burden of proof and appropriately justify its defense.

23. Although the US failed to identify relevant subparagraphs and provide any arguments why they are applied in relevant situation, Russia would like to note the following.

24. None of the subparagraphs of Article XXI(b) of the GATT 1994 could be applied in the present situations since neither the relevant acts of the US, nor its submissions shed light on the close and genuine relationship between the measures in question and fissionable materials or the materials from which they are derived; or 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 a military establishment. Neither the relevant acts of the US, nor its submissions elaborate on any chronological concurrence in case of the measures at issue and any war or any other emergency in international relations that required the US to take said measures.

25. It is important to note that import adjustments on steel and aluminium (1) were implemented by the US through the same sources, same legal acts in respect of all the countries, (2) have the same reasoning and grounds for all of the adjustments in respect of all the Members affected, (3) it is not possible to isolate the cause for adoption of the measures at issue for one particular WTO Member.

26. Therefore, even if the Panel were in a position to engage into analysis of the applicability of any of the subparagraphs to any of the WTO Member in isolation, it would constitute an error since the measures at issue are not country-specific.

27. To sum up, in Russia's view the task of the Panel is (i) to conclude that the chapeau of Article XXI(b) of the GATT 1994 is a subjective element, remaining in the discretion of the sovereign state, limited by the obligation of good faith; (ii) to assess whether the defending Member acted in good faith while imposing and maintaining the measures at issue; (iii) to review whether the

defending Member met the requirements under subparagraphs. In respect of the latter, Russia is of the position that the US failed to establish a *prima facie* case under Article XXI(b) of the GATT, as it failed to 1) refer to particular subparagraph, 2) provide all relevant evidence and explanations supporting that those actions taken for protection of the essential security interests (i) relate to fissionable materials, (ii) relate to traffic in arms, ammunition and implements of war, and/or (iii) were taken in time of war or other emergency.

28. In their turns, the complainants in these disputes have provided sufficient evidence to establish *prima facie* case of numerous violations under the Agreement on Safeguards and the GATT 1994. This evidence supports complainants' position that the measures at issue are purely safeguards in their nature, object and purpose and have nothing in common with the security exceptions. We believe that the nature of the measure could not be unilaterally determined by the Member. In order for a measure to be subject to security exception it is not enough just to label it as such under domestic procedures.

29. Russia would also like to note that if a particular measure complies with a particular provision of a particular WTO Agreement, this automatically means only one thing – that the measure complies with that provision of that particular WTO Agreement. This does not mean that the measure is automatically excluded from being subjected to provisions of another WTO Agreement. Therefore, if the measures at issue meet the requirements of Article XXI(b) of the GATT 1994, their consistency with Article XXI(b) of the GATT 1994 does not exclude the Panel's examination of the applicability of the Agreement on Safeguards.

30. There is no mutual exclusivity between the GATT 1994 and the Agreement on Safeguards. Article XIX of the GATT 1994 and the Agreement on Safeguards are silent in respect of particular reasons for a Member to seek to prevent serious injury to its producers as a result of increased imports, whether this is done for employment, protection of traditional industries, environmental, national security or any other reasons. Therefore, when a Member adopts an emergency action against such imports the Member shall comply with the requirements of Article XIX of the GATT 1994. If the prevention of injury is needed for national security purposes, the Member adopting the emergency action shall comply with the requirements of Article XXI(b) of the GATT 1994.

#### **IV. Legal characterization of measures at issue as safeguards**

31. The Russian Federation concurs with the complainants that the United States' measures at issue present the constituent features of safeguard measures within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards, and thus constitute safeguard measures on the basis of an objective analysis.

32. **First**, the United States has withdrawn or modified its tariff concessions and suspended at least one of its obligations under the GATT 1994. By introducing additional duties, the United States has exceeded the bound rate established under its Schedule of concessions on goods (Schedule), which amounts to withdrawal or modification of its tariff concessions. By withdrawing or modifying its concessions under the Schedule, the United States has suspended its obligations under Article II:1(a) and (b) of the GATT 1994.

33. **Second**, by their design, structure and expected operation, the import adjustments on certain steel and aluminium products sought to prevent or remedy the impairment to the domestic industry of the United States caused or threatened by increased imports of the subject products. This specific objective of the United States' measures is discernible from the texts of the U.S. President's respective Proclamations, as well as the investigation Reports on the effects of imports of steel and aluminium coupled with related documents, such as the U.S. President's Memoranda on imports of steel and aluminium, associated announcements, as well as numerous statements by the U.S. President.

34. **Third**, the withdrawal or modification of tariff concessions and suspension of GATT obligations have a demonstrable link to the prevention or remediation of the alleged serious injury.

35. In the range of legal instruments and official statements, the United States specifically declared that the measures are sought to stop the decline in its steel and aluminium industries caused by imports, to provide relief to those industries from competition with imports, to enable the

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respective domestic industries to increase their production capacity or capacity utilization and profitability, and to prevent the closures of production facilities.

36. Tariff concessions and obligations under the GATT 1994, in particular, those under Article II:1(a) and (b), however, impeded the ability of the United States to achieve its goals (prevention or remedying the alleged injury or threat thereof to the U.S. industry). Thus, the United States chose to suspend those tariff concessions and obligations. While suspending its tariff concessions and its obligations under Article II:1(a) and (b) of the GATT 1994, the United States has limited imports of steel and aluminium products by making steel and aluminium products originating from certain Members more expensive when marketed in the United States.

37. Hence, there is a clear link between the withdrawal or modification of tariff concessions and suspension of GATT obligations to the prevention or remediation of the alleged serious injury.

38. The US in support of its position states that notification under the relevant provisions of Article XIX of the GATT 1994 and of the Agreement on Safeguards is a prerequisite to the applicability of safeguard disciplines to the measures taken. In respect of import adjustments on certain steel and aluminium products it did not notify them as safeguard measures, on this basis, in its view, the measures could not be deemed safeguards. These allegations must fail.

39. Notifications pursuant to Article XIX:2 of the GATT 1994 or Article 12 of the Agreement on Safeguards are neither necessary condition nor a prerequisite for the applicability of safeguard disciplines. The compliance with any of obligations set forth in Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards does not affect the consistency of measures with *other* provisions under Article XIX of the GATT 1994 and the Agreement on Safeguards.

40. Absence of a notification does not and cannot change any of the constituent features of safeguards measures. Being otherwise would help Members to escape from application of the provisions of the Agreement on Safeguards and negative consequences to their measures (for example, DSB's finding on inconsistency of such measures with the Agreement on Safeguards).

41. Notification requirements are not an instrument of characterization or identification of measure's nature, but of transparency. Otherwise, if the applicability of a WTO agreement were to be established based on Member's compliance with the notification requirements:

- should that be so, the issue of the applicability of an agreement would be excluded from objective assessment by a panel, as it would be left for Member's discretion to choose a particular agreement under which to notify its measure;
- in such a logic a measure that was not properly notified under particular agreement becomes non-existent, as by not notifying that measure under any agreement at all a Member effectively declares that there are no relevant notification requirements that a measure falls under. Therefore, there's no WTO agreement that measure is covered by.

42. Furthermore, the United States claims that the Agreement on Safeguards does not apply to measures that a Member considers necessary for the protection of its essential security interests through Article 11.1 (c) of the Agreement on Safeguards, which provides that "this Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX". In this regard, Russia notes the following.

43. Hypothetically, there might be three scenarios. First, a measure is sought, taken or maintained exclusively pursuant to provisions of Article XIX of the GATT 1994. Second, a measure is sought, taken or maintained pursuant to provisions of Article XIX of the GATT and some other provisions of the GATT 1994. Third, a measure is sought, taken or maintained exclusively pursuant to provisions of the GATT 1994 other than Article XIX of the GATT 1994. Only the latter category of measures is excluded from the scope of the Agreement on Safeguards in accordance with Article 11.1(c).

44. We note that every term in this Article, as any treaty provision, has its own meaning and due attention should be paid to it. Without providing definitions of the terms "sought", "taken" or "maintained" Russia is of the view, that they represent different stages of measure's "life", i.e.

whether a Member tries to take the measure (initial stage where the measure does not exist yet), whether a Member has already taken the measure (the action is made, measure becomes alive) and "maintained" (the measure exists for some time, long lasting measure that continues to exist).

45. The second interpretation of the words "seek", "take" and "maintain" may be derived from the text of Article 11.1(b) which uses the same combination of the terms. In the context of this provision it is obvious that the word "seeks" is used in the meaning "asks/requests from someone". This provision covers measures, in particular, in respect of exports, that can only be obtained from another Member. Therefore, the text of Article 11.1(b) effectively says that a Member must not request another Member to adopt, in particular, exports restrictions. Given that the forms in which "emergency actions" may be taken under Article XIX of the GATT and the Agreement on Safeguards are not predetermined or exhaustively listed, the same meaning of the term "seek" may be applied in the context of Article 11.1(a) or 11.1(c).

## **V. Conclusion**

46. Russia has already noted that each of the seven disputes has the same subject matter and, therefore, there is a significant overlap between them. This fact has a bearing on how the panels in the respective disputes should go about the ensuring security and predictability to the multilateral trading system. The delicate issue here is that when two or more panels are tasked with the duty to resolve the same matter or closely related claims such a situation raises complex issues. The most dangerous consequence of the parallel proceedings involving the same or closely connected matters is the contradictory outcome of the disputes. This should be avoided.

47. It follows from Articles 3.2 and 3.4 of the DSU that a holistic and coherent resolution of all parallel disputes is *critical* for the overall vitality of the multilateral trading system.

48. Russia reminds that the ultimate goal of the Panel is to make such findings "as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" pursuant to Article 11 of the DSU. The achievement of this goal will be seriously prejudiced should the panels arrive at the different conclusions as for the proper legal characterization of the measures at issue in the respective disputes, given that these measures are the same.

## ANNEX C-9

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE

#### I. INTRODUCTION

1. This dispute raises novel issues concerning the interpretation of Article XXI of the GATT and whether it can be used as a defence to justify inconsistencies with the Safeguards Agreement. Singapore is not commenting on the merits of the claims and defences raised by the parties to the current disputes. Singapore's participation is strictly limited to whether Article XXI is applicable to and can be used as a defence to justify inconsistencies with the Safeguards Agreement, whether a Panel has jurisdiction over Article XXI, and the interpretation of Article XXI, in particular, the chapeau of Article XXI(b).

#### II. EXECUTIVE SUMMARY OF SINGAPORE'S THIRD PARTY ORAL STATEMENT

##### A. *Whether Article XXI is applicable to and can be used as a defence to justify inconsistencies with the Safeguards Agreement*

2. Article XXI is not applicable to and cannot be used as a defence to justify inconsistencies with the Safeguards Agreement. The Appellate Body has applied a standard "analytical approach" in determining the relationship between the provisions of different covered agreements<sup>1</sup> and the absence of an explicit cross-reference to Article XXI in the Safeguards Agreement is not *per se* dispositive of the issue.
3. Safeguard measures allow WTO Members to take action that would otherwise be incompatible with their obligations under the GATT 1994<sup>2</sup>. Article XIX of the GATT 1994 and the Safeguards Agreement operate to provide for the suspension of the application of the obligations under the GATT 1994, and may be imposed "only" where the conditions and circumstances listed in the relevant provisions are satisfied<sup>3</sup>. In other words, the Safeguards Agreement already provides a comprehensive set of provisions as to when a Member may justifiably apply safeguard measures. Allowing Article XXI to apply as an exception to the Safeguards Agreement would not be aligned with the comprehensive nature of the Safeguards Agreement and would be inconsistent with the intent to provide greater discipline when Members apply safeguard measures.
4. Further, the Safeguards Agreement is a different creature from other WTO Agreements as it essentially provides for the suspension of GATT obligations. To layer Article XXI over and above the provisions of the Safeguards Agreement would require a clear intent to be distilled from the text of those provisions read in their proper context. This is not the case here. Given the *sui generis* nature of the Safeguards Agreement, our views are confined to the Safeguards Agreement only.

##### B. *The Panel's jurisdiction in respect of Article XXI*

5. The Panel has jurisdiction over any Member's invocation of Article XXI in WTO dispute proceedings and the Panel is required to address such invocation. The phrase "shall address" in Article 7(2) of the DSU indicates that panels are "required to address the relevant

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<sup>1</sup> This requires an agreement-by-agreement analysis that starts with the text of the agreement in question, and entails a "thorough analysis of the relevant provisions", on the understanding that the lack of an express textual reference is not dispositive in and of itself (Appellate Body Report, *China – Rare Earths*, paras. 5.61 – 5.63). The relationship must be "ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments." (Appellate Body Report, *China – Rare Earths*, para. 5.55).

<sup>2</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.54.

<sup>3</sup> Article 2 of the Safeguards Agreement. The preparatory materials to the Safeguards Agreement and the preamble to the Safeguards Agreement confirm this.

provisions in any covered agreement or agreements cited by the parties to the dispute"<sup>4</sup>. This means that the Panel must address the relevant provisions to the dispute at hand, including Article XXI(b). The plain and ordinary meaning of the DSU's provisions do not speak of any exceptions to the application of Articles 7(1) (which set out the Panel's terms of reference) and 7(2).

**C. Interpretation of Article XXI(b) – the applicable test**

6. To the extent that the non-justiciability of a claim under Article XXI(b) relies on an interpretation that Article XXI(b) is totally self-judging, such an interpretation should not apply based on the explanation below. First, the word "it" in the phrase "it considers necessary" clearly refers to a "contracting party". The focus of any scrutiny therefore has to be from the standpoint of the invoking Member and whether that Member considers the action to be necessary. This phrase points to the self-judging nature of the assessment and indicates that a Member is allowed to determine the elements of the chapeau with a significant degree of subjectivity. Second, the assessment of threats to the essential security interests of a Member and the necessary measures in response involves judgment on the part of that Member and is dependent on the particular context and circumstances of that Member. There is necessarily a degree of subjectivity in this exercise, and an accompanying diversity of assessments that has to be respected. Third, there are many areas in the WTO regime where some margin of appreciation is accepted<sup>5</sup>.
7. A higher level of deference and a significant margin of appreciation should be accorded to a Member's chosen level of protection, and its assessment of risk and of the necessity of a measure taken for the protection of its essential security interests.
8. Notwithstanding the above, Article XXI(b) should not be read as giving a Member entirely unfettered discretion in invoking this exception. For this exception to be meaningful, a Member must act in accordance with the standard of good faith as set out in Article 26 of the Vienna Convention on the Law of Treaties<sup>6</sup> and with the general international law prohibition of abuse of rights. It is also well accepted that a Member seeking to rely on an affirmative exception bears the burden of proof. The Member invoking Article XXI would have to provide its reason(s) for doing so, by minimally explaining its course of action and invocation of Article XXI, bearing in mind the margin of appreciation to be accorded to Members on matters involving their essential security interests. The extent and degree of detail required is fact and context specific and will be informed by the specific circumstances surrounding the invocation, as well as the underlying security and confidentiality considerations.
9. We have carefully considered the *Russia – Traffic in Transit* panel's approach in interpreting Article XXI(b)(iii) in the context of certain prohibitions on goods traffic in transit, and generally agree with that panel's analysis of Article XXI(b)(iii).

**III. EXECUTIVE SUMMARY OF SINGAPORE'S RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES**

**A. Response to Question 8**

10. There are no provisions in the DSU that support a distinction between justiciable and non-justiciable matters in relation to the measures that are the subject of the present dispute.

<sup>4</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49.

<sup>5</sup> For example, in the context of the SPS Agreement, the Appellate Body has recognised that "[t]he determination of the appropriate level of protection... is a prerogative of the Member concerned and not of a panel or of the Appellate Body" (Appellate Body Report, *Australia – Salmon*, para. 199). The Appellate Body also noted, in relation to the necessity of a measure taken for the protection of health under the GATT 1994, that "... it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation" (Appellate Body Report, *EC – Asbestos*, para. 168.).

<sup>6</sup> Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

**B. Response to Question 10**

11. We agree with the panel's statements in *Russia – Traffic in Transit* that "[g]iven the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994... [the] invocation of [Article XXI(b)] of the GATT 1994 is within the Panel's terms of reference for the purposes of the DSU."<sup>7</sup>

**C. Response to Question 13**

12. We agree with the panel's statements in *Russia – Traffic in Transit* that "[t]he obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994" and that "[i]t is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity"<sup>8</sup>.

**D. Response to Question 14**

13. The good faith test is met when a Member demonstrates that it has in good faith, albeit subjectively, considered, based on information available, that there is a threat to its essential security interest, and that its chosen action is necessary for the protection of its security interest.

**E. Response to Question 15**

14. Article XXI is an affirmative defence and the invoking Member bears the burden of proof<sup>9</sup>.

**F. Response to Questions 16 and 17**

15. The phrase "which it considers" applies to the entire chapeau of Article XXI(b)<sup>10</sup>.

**G. Response to Question 18**

16. A panel should consider whether a Member's invocation of Article XXI is consistent with the principle of good faith, while recognising the element of self-judgment in Article XXI.

**H. Response to Question 19**

17. The Member invoking the exception bears the burden to show that it has, in good faith, considered, based on the information available, that the elements of Article XXI(b) are made out. The extent and detail required to demonstrate this is fact and context specific.

**I. Response to Question 20**

18. The subparagraphs to Article XXI(b) are exhaustive of the types of circumstances covered by the provision. Typically, phrases like "including"<sup>11</sup> denote that a list is merely illustrative. Nothing in Article XXI(b) suggests that the subparagraphs are merely an illustrative list. In interpreting the circumstances in the subparagraphs, a panel should adopt a contextual approach.

**J. Response to Question 21**

19. A nexus between a particular subparagraph and the challenged measure is required. The determination of that nexus should be done in good faith, taking into account the Member's circumstances and concerns.

<sup>7</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.54 and 7.56.

<sup>8</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.133 and 7.134.

<sup>9</sup> As noted by the panel in *Russia – Traffic in Transit*, it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity." (Panel Report, *Russia – Traffic in Transit*, para. 7.134.)

<sup>10</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.130 – 7.133 and 7.146.

<sup>11</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 4.161.

**K. Response to Question 25**

20. A panel should consider whether a Member's invocation of Article XXI is consistent with the principle of good faith, while recognising the element of self-judgment in Article XXI.

**L. Response to Question 26**

21. A panel will need to assess if a Member has acted in accordance with the standard of good faith and with the general international law prohibition on abuse of rights.

**M. Response to Question 27**

22. Factual evidence is relevant to considering the applicability of the conditions provided in the subparagraphs of Article XXI(b). The extent and degree of detail required is fact and context specific.

**N. Response to Question 28**

23. Subparagraphs (i) to (iii) inform each other as to the overall subject matter and scope of applicability of Article XXI(b)<sup>12</sup>.

**O. Response to Question 29**

24. Subparagraphs of Article XXI(b) are not cumulative in nature<sup>13</sup>.

**P. Response to Question 30**

25. It is inadvisable to put forward a label or prescriptive definition of "other emergency in international relations". We agree with the panel's statements in the *Russia – Traffic in Transit* panel report that there is a useful "sliding scale" of circumstances that might qualify as an "emergency in international relations" and could include any circumstances that fall within the description of "heightened tension or crisis", or "general instability engulfing or surrounding a state"<sup>14</sup>. We also agree that it is incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity<sup>15</sup>; and what qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue<sup>16</sup>. The Member would also need to demonstrate that its measure is applied in good faith.

**Q. Response to Question 31**

26. Both Articles XX<sup>17</sup> and XXI(b) are affirmative defences. A Member seeking to rely on either exception bears the burden of proof. With respect to measures under Article XXI, a higher level of deference and a significant margin of appreciation should be accorded to the WTO Member's chosen level of protection, its assessment of risk, and of the necessity of a measure taken for the protection of its essential security interests, as compared to those taken under Article XX. This is because Article XXI(b) contains the additional phrase "it considers necessary", which is not present in Article XX.

**R. Response to Question 32**

27. Article XXI(a) is concerned with a scenario where a Member is asked to furnish information, the disclosure of which it considers contrary to that Party's essential security interest. In contrast, Article XXI(b) deals with the situation in which a Member takes actions which it considers necessary for the protection of its essential security interest. There is an element

<sup>12</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.65, 7.67 and 7.74.

<sup>13</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.68.

<sup>14</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.76.

<sup>15</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.134.

<sup>16</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.135.

<sup>17</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16 and Appellate Body Report, *US – Shrimps*, para. 121; Appellate Body Report, *EC – Asbestos*, paras. 115 – 116.



of subjectivity in both Article XXI(a) and Article XXI(b) but the principle of good faith and the general international law prohibition of abuse of rights applies to both.

**S. Response to Question 34**

28. See paragraphs 3 and 4 above.

**T. Response to Question 36**

29. If the Panel determines that the measures are safeguard measures within the meaning of Article XIX and the Safeguards Agreement, Article XXI of the GATT 1994 does not apply.

**U. Response to Question 37**

30. The phrase "nothing in this agreement" in Article XXI(b) should be interpreted as referring to the obligations under the GATT 1994. It should not be interpreted to allow Article XXI(b) to operate as an exception to the conditions for suspension of GATT obligations under Article XIX as this would render the strict conditions of Article XIX and the Safeguards Agreement meaningless.

**V. Response to Questions 38 and 39**

31. While the references to Article XIX in the Preamble, Articles 1<sup>18</sup> and 11.1(a) of the Safeguards Agreement reflect a relationship between Article XIX of the GATT and the Safeguards Agreement, they do not establish any textual basis for applying Article XXI of the GATT 1994 to the Safeguards Agreement<sup>19</sup>.

**W. Response to Question 40**

32. The general interpretative note to Annex 1A of the WTO Agreement indicates that the GATT 1994 and the other agreements are to be considered together<sup>20</sup>. Thus, if a conflict were to exist between a Safeguards Agreement provision and a GATT 1994 provision, the Safeguards Agreement provision would prevail to the extent of the conflict. Applying the panel's definition of "conflict"<sup>21</sup>, the justification of a measure under Article XXI that would otherwise be prohibited under the Safeguards Agreement would not give rise to a "conflict" within the meaning of the General Interpretative Note, since Article XXI cannot be considered a permissive obligation. The presumption against conflict should also be borne in mind<sup>22</sup>. In any case, our position is that Article XXI cannot apply as an exception to the Safeguards Agreement.

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<sup>18</sup> Article 1 of the Safeguards Agreement provides that the term safeguard measure "shall be understood to mean those measures provided for in Article XIX of GATT 1994." The Appellate Body stated that Article 1 of the Safeguards Agreement "suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures" (Appellate Body Report, *Argentina – Footwear*, para. 83).

<sup>19</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* supports this interpretation. The question there was whether Article XX of the GATT applied to the CVA. Similar to the preamble to the Safeguards Agreement, the preamble to the CVA referred to the Members' desire to "further the objectives of the GATT 1994" and recognises "the importance of the provisions of Article VII of GATT 1994 and desir[e] to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation". The panel found that the language and the title to the CVA reflects a general link between the CVA and the GATT 1994, but it does not establish any textual link to Article XX of the GATT, and consequently does not establish any affirmative textual basis for concluding that Article XX applies to the CVA (paras. 7.748 and 7.749).

<sup>20</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 8.

<sup>21</sup> The panel made the following observation on the definition of "conflict" as set out in the General Interpretative Note, stating that "[i]n light of the wording, the context, the object and the purpose of [the General Interpretative Note], we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits" (Panel Report, *EC – Bananas III (Ecuador)*, para. 7.159).

<sup>22</sup> Panel Report, *Indonesia – Autos*, para. 5.349.

**ANNEX C-10****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SWITZERLAND****I. INTRODUCTION**

1. Switzerland intervenes because of its systemic interest in the correct and consistent interpretation and application of the provisions of the covered agreements at issue in this dispute and its substantial trade interest. Switzerland also has a particularly strong interest in the present dispute because it relates to the *same matter* as the matter raised by Switzerland in DS556 and by five other WTO Members in their own disputes against the United States.

**II. THE PANEL HAS JURISDICTION TO REVIEW THE INVOCATION OF ARTICLE XXI(B) OF THE GATT 1994**

2. The United States claims that Article XXI(b) which it invokes is "self-judging" and therefore the Panel may not make findings on Turkey's claims. Thereby, although the United States asserts that it does not dispute the Panel's jurisdiction, in essence it argues that there is nothing for the Panel to decide other than to note that the United States has invoked Article XXI(b) of the GATT 1994.

3. Switzerland notes that there are various principles and obligations included in the WTO covered agreements, in particular in the DSU, which confirm that the Panel has jurisdiction to review the invocation by the United States of Article XXI(b).

4. First, Article 1.1 of the DSU provides that the rules and procedures of the DSU apply to disputes brought pursuant to the consultation and dispute settlement provisions of, *inter alia*, the GATT 1994, without excluding Article XXI(b). Furthermore, neither Article XXI(b), nor any other provisions of the GATT 1994 contain any particular rules on dispute settlement that would exclude measures from the review by WTO adjudicating bodies because a WTO Member taking those measures invokes Article XXI(b) of the GATT 1994.

5. Second, pursuant to its terms of reference, this Panel must examine the matter referred to by Turkey in its request for the establishment of a Panel "in the light of the relevant provisions of the covered agreements cited by the parties to this dispute." Article 7.2 of the DSU further emphasises that obligation in providing that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

6. Third, that the Panel has jurisdiction to review Article XXI(b) of the GATT 1994 is further supported by the obligation for the Panel to make an objective assessment of the matter pursuant to Article 11 of the DSU, including "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". It is difficult to see how the Panel could fulfil its mandate pursuant to Article 11 of the DSU if it were to decline to exercise the validly established jurisdiction and make no finding on Turkey's claims.

7. Fourth, concluding that the Panel cannot make findings on Turkey's claims would "diminish" the rights of Turkey to seek redress within the meaning of Article 23 of the DSU and to bring a dispute pursuant to Article 3.3 of the DSU. It would also be inconsistent with Article 23.2(a) of the DSU as it would mean that, by merely invoking Article XXI(b), WTO Members would be able to unilaterally decide the outcome of a dispute, in place of WTO adjudicating bodies.

8. Fifth, concluding that the Panel may not review the invocation of Article XXI(b) would also undermine one of the fundamental objectives expressed in Article 3.2 of the DSU that the dispute settlement system is a "central element in providing security and predictability to the multilateral trading system" and "serves to preserve the rights and obligations of Members under the covered agreements".

9. Sixth, accepting that a panel cannot review the complainant's claims because a WTO Member invokes Article XXI(b) of the GATT 1994 would disregard the "affirmative defence" nature of that provision which implies that it is for the Member invoking Article XXI(b), in the present case the United States, to establish that the measures at issue comply with the requirements laid down in Article XXI(b) of the GATT 1994.

### **III. THERE IS NO OBSTACLE TO THE PANEL'S EXERCISE OF JURISDICTION DUE TO THE POLITICAL NATURE OF ESSENTIAL SECURITY INTERESTS**

10. The United States' argument that the invocation of Article XXI(b) precludes a panel from exercising its jurisdiction with respect to the entire dispute because of the political nature of the essential security interests finds no basis in the DSU. Instead, several provisions of the DSU confirm that a panel is required to address and rule on the claims raised by the complainant which fall within its terms of reference. To find otherwise would be contrary to Articles 3.2, 3.3, 7, 11, 19 and 23 of the DSU. It would be also inconsistent with the aim of the WTO dispute settlement mechanism, which pursuant to Article 3.7 of the DSU is to "secure a positive solution to a dispute" and would undermine the security and predictability of the multilateral trading system as a whole. Switzerland further notes that other international courts and tribunals have previously explicitly rejected an argument that a "political question" constitutes an obstacle to the exercise of jurisdiction.

### **IV. THE INVOCATION OF ARTICLE XXI(B) OF THE GATT 1994 IS JUSTICIABLE**

11. The United States claims that the invocation of Article XXI is "non-justiciable" because Article XXI(b) is "self-judging". According to the United States, the allegedly "self-judging" nature derives from the text and context of Article XXI(b). That interpretation is wrong and must be rejected.

#### **A. The ordinary meaning of Article XXI(b) of the GATT 1994 taken in its context**

12. The United States argues that the text of Article XXI(b) of the GATT 1994 and, in particular, the words "which it considers" establishes the self-judging nature of that provision.

13. While the words "which it considers" imply that a certain degree of discretion be granted to a Member pursuant to Article XXI(b), that discretion relates only to the "necessity" of such action. This follows in particular from the function of the verb "consider" which is to link the adjective "necessary" to the noun "measures". Thus, the wording and the grammatical structure of that provision do not support the proposition that the words "which it considers" qualify the determination of the "essential security interests" or the elements listed in the subparagraphs of Article XXI(b).

14. The United States' interpretation of Article XXI(b) disregards that the chapeau refers to action which the Member concerned considers necessary "for the protection of its essential security interests". Thus, pursuant to the chapeau, not any interests may justify an action being taken under Article XXI(b). Only "essential security interests" do. Furthermore, the action undertaken by a WTO Member must be necessary "for the protection" of that Member's essential security interests. This suggests that, when a Member invokes Article XXI(b), a panel needs to review whether there is a rational relationship between the action taken and the protection of the Member's essential security interests.

15. In addition, the interpretation needs to fully take into account the subparagraphs of Article XXI(b). Subparagraphs (i) to (iii) set out specific requirements that must be objectively met by a measure to be justified under Article XXI(b). It is clear from the wording and the grammatical structure of Article XXI(b) that the three subparagraphs all relate to the word 'action' in the chapeau and are not part of the relative clause "which it considers necessary for the protection of its essential security interests". It demonstrates that the phrase "which it considers" does not qualify the three subparagraphs. This understanding is fully supported by the Spanish and French versions of Article XXI(b).

16. Furthermore, the interpretation put forward by the United States must be rejected as it would render subparagraphs (i) to (iii) *inutile*. Indeed, should a WTO Member enjoy absolute discretion with respect to actions that it may take for protecting its essential security interests, there would

have been no need to include in the text of Article XXI(b) of the GATT 1994 the conditions laid down in subparagraphs (i) to (iii).

17. Switzerland submits that *the immediate context* provided by the other paragraphs of Article XXI as well as *the broader context* provided by Article XX of the GATT 1994 and the provisions of other WTO agreements, including in particular Articles 7.1, 7.2, 11 and 23 of the DSU, support the interpretation that Article XXI(b) is reviewable by a panel.

#### **B. The object and purpose of the GATT 1994**

18. The object and purpose of the GATT 1994 further supports the understanding that Article XXI(b) is subject to review by WTO panels and the Appellate Body. Indeed, the possibility to completely shield a trade-restrictive measure from any scrutiny by merely raising Article XXI(b) would go against the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreement contrary to the object and purpose of the GATT 1994 as expressed in the third recital of its preamble.

#### **C. The negotiating history confirms that a panel may interpret and review the application of Article XXI(b) of the GATT 1994**

19. The United States claims that the negotiating history of Article XXI(b) of the GATT confirms that the Panel may not interpret Article XXI of the GATT 1994 and review its application. The United States' arguments appear to be based on a selective reading of some of the documents of the negotiating history, taken out of their context.

20. In Switzerland's view, the discussions of the ITO negotiating committee to which the United States refers confirm that the drafters did not envisage Article XXI(b) as a self-judging provision.

21. The negotiating history also offers no support to the United States' argument that a non-violation complaint is the only remedy available in case the Member taking the measure invokes Article XXI(b).

#### **V. THE PANEL'S SUBSTANTIVE ANALYSIS**

22. Once the Panel confirms its jurisdiction and that there is no obstacle to the exercise of its jurisdiction, the Panel should examine the dispute on its merits. Switzerland considers that Article XXI, being an affirmative defence, requires the Panel to first start its review by addressing the claims raised by Turkey.

23. The Panel should then, before entering into an analysis of the United States' defence, examine the relationship between Article XXI of the GATT 1994 and the claims raised under the Agreement on Safeguards and the GATT 1994. It is only to the extent that the Panel concludes that Article XXI(b) is available as a defence with respect to the claims at issue that the Panel should examine that defence.

#### **A. The applicability of the Agreement on Safeguards to the measures at issue**

24. Switzerland agrees with Turkey that the measures at issue fall within the scope of the Agreement on Safeguards and are inconsistent with several provisions of that Agreement.

1. *Whether the measures at issue constitute safeguard measures falling within the scope of the Agreement on Safeguards has to be determined by the Panel as part of its objective assessment of the matter*

25. The legal characterization of a measure for the purposes of determining the applicability of an agreement is not an issue to be decided unilaterally by the Member taking the measure. It is an issue that must be determined objectively. Article 11 of the DSU requires a panel to undertake an "objective assessment of the matter before it, including an objective assessment of the facts of the case and the *applicability of and conformity with* the relevant covered agreements". It follows that, as part of its objective assessment, a panel must examine whether the provisions of the covered

agreements invoked by the complainant as the basis for its claims are "applicable" to the challenged measures.<sup>1</sup>

26. The Panel's duty to conduct an "objective assessment of the matter" implies that the Panel is not bound by the way the Member concerned characterizes the measure in its municipal law. Rather, "a panel must assess the legal characterisation for purposes of the applicability of the relevant agreement on the basis of the 'content and substance' of the measure itself".<sup>2</sup> More specifically, a panel is called upon "to assess the design, structure, and expected operation of the measure as a whole".<sup>3</sup> For that purpose, "a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject".<sup>4</sup>

2. *The measures at issue constitute safeguard measures falling within the scope of the Agreement on Safeguards*

27. In order to constitute a safeguard measure, a measure must present two constituent features. First, the measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.<sup>5</sup>

28. The measures at issue are the import adjustments imposed by the United States on imports of certain steel and aluminium products which, among others, consist of additional import duties exceeding the bound rate provided for in the United States' Schedule of Concessions. As demonstrated by the Steel and Aluminium Reports of the USDOC, the Presidential Proclamations imposing the measures as well as countless statements of the US officials, those measures have been imposed in order to revive the US steel and aluminium industries and protect them from the harm caused by increasing imports. It follows that the measures at issue suspend at least one GATT obligation or withdraw or modify one GATT concession and are clearly designed to prevent or remedy serious injury to the US domestic steel and aluminium industries. Thus, those measures present both constituent features of a safeguard measure and fall within the scope of the Agreement on Safeguards. The fact that the United States has not adopted those measures pursuant to its domestic safeguard legislation or has not notified them to the WTO as safeguard measures does not change that conclusion.

29. This is further confirmed by certain additional features of those measures such as their extraordinary character, their complementary relationship with trade remedy measures, their focus on the "import" of the products concerned and the fact that they have been adopted pursuant to a procedure which is very similar to the procedure followed in US safeguard investigations.

### **B. The relationship between Article XXI(b) of the GATT 1994 and the Agreement on Safeguards**

30. The United States argues that Article XXI of the GATT 1994 is a defense to alleged breaches of the Agreement on Safeguards. Unlike other covered agreements, the Agreement on Safeguards does not, however, include any direct or indirect reference to Article XXI of the GATT 1994. There is, therefore, no basis for arguing that a defence under Article XXI(b) of the GATT 1994 should be available for violations of the Agreement on Safeguards.

31. Furthermore, contrary to what the United States argues, none of the general references to the GATT included in the Agreement on Safeguards suggests that Article XXI(b) should be available as a defence for measures inconsistent with the Agreement on Safeguards.

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<sup>1</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.31.

<sup>2</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.

<sup>3</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

<sup>4</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 6.6.

<sup>5</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

32. Article XXI can be invoked as a defence with respect to obligations assumed by WTO Members under the GATT 1994. It cannot, however, be invoked as a defence with respect to another GATT provision, such as Article XIX, which establishes a right to impose safeguard measures which *derogate* from the obligations under the GATT 1994, provided that certain conditions and circumstances listed in that provision and in the Agreement on Safeguards are satisfied. Given the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards, it logically follows that if Article XXI is not available as a defence for measures that fall within the scope of Article XIX (and are inconsistent with that provision), it is neither available as a defence for measures that are inconsistent with the Agreement on Safeguards.

33. Finally, an interpretation allowing WTO Members to justify impermissible safeguard measures under Article XXI would, in fact, render Article 11.1(a) of the Agreement on Safeguards *inutile*.

**C. General remarks on the United States' defence under Article XXI(b) of the GATT 1994**

34. Switzerland notes that, although the United States invokes Article XXI(b) of the GATT 1994, it does not address any of the substantive requirements imposed by that provision. The United States does not even identify under which subparagraph of Article XXI(b) it submits its defence.

35. Since Article XXI(b) constitutes an affirmative defence, the burden of proof rests on the respondent, the United States, to show that the conditions set out in Article XXI(b) are met. Switzerland notes that so far, the United States has failed to meet its burden.

**ANNEX C-11****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE\*****1. INTRODUCTION**

1. Mr. Chairperson, distinguished Members of the Panel, Ukraine welcomes the opportunity to express its views to the Panel as a Third Party in the current proceedings.

2. Ukraine has a systemic interest in a proper and consistent interpretation of the provisions of the World Trade Organization ("WTO") covered agreements, therefore in its oral statement Ukraine is not commenting on the merits of the claims and the defences raised by the parties to this dispute, but rather focuses on some key issues relating to the order of analyses and application of Article XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

**2. JURISDICTIONAL ISSUES OF ARTICLE XXI OF THE GATT 1994**

3. The United States in its first written submissions or oral statements does not address any of the claims raised by the complainants. The United States focuses only on Article XXI(b) of the GATT 1994 stating that it is self-judging and its invocation is non-justiciable.

4. The United States submits that the adjustment measures on imports of steel and aluminium constitute national security action justified under Article XXI of the GATT 1994. In the United States' view, the measures at issue cannot be reviewed by this Panel which should limit its findings to noting that the United States has invoked Article XXI(b) of the GATT 1994, given that Article XXI(b) is self-judging.

5. Ukraine believes that the useful guidance for the Panel can be found in the Understanding on rules and procedures governing the settlement of disputes ("DSU"). Article 7.2 of the DSU states that "panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute" in order to make "an objective assessment" of the case under Article 11 of the DSU.

6. Ukraine is of the opinion that jurisdictional question under Article XXI of the GATT 1994 should not be a matter of a panel's analysis in any further disputes. Without repetition of the findings in *Russia – Traffic in Transit*, Ukraine believes that a panel may interpret Article XXI(b) of the GATT 1994 and review the reliance on this provision. It means that Article XXI(b) of the GATT 1994 is justiciable in the same manner as any other provision of the WTO covered agreements.

7. Ukraine would like to emphasise that the Panel in *Russia – Traffic in Transit* made a very important and welcome contribution by rejecting arguments that the panel has no jurisdiction to review invocation of Article XXI of the GATT 1994 and therefore by confirming that Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU.<sup>1</sup>

8. There is therefore no need for a Panel to examine the issue of justiciability of Article XXI(b)(iii) of the GATT 1994 not only in this particular case, but in general. In Ukraine's view, this conclusion is constant.

**3. STANDARD OF REVIEW**

9. Ukraine would like to present its views on the proper order of analysis in reviewing the United States' reliance on "security exceptions" provision.

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\* Ukraine requested that its written submission is used as its integrated executive summary.

<sup>1</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.56 and 7.104.

10. Taking into account the special nature of "security exceptions" provision, Ukraine wishes to emphasize that the fact that the text of Article XXI(b) expressly states that it is for a Member to decide what action it considers necessary for protecting its essential security interests does not mean that a Member enjoys total discretion.

11. In Ukraine's view, a panel has to examine whether (i) the interests or reasons advanced by a defendant for imposing the measures fall within the scope of the phrase "its essential security interests"; and whether (ii) the measures are directed at safeguarding a defendant Member's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.

12. That means that a defending Member must show and a panel must review that, taking into account the structure, content and design of the measure, there is a rational relationship between the action taken and the protection of the essential security interest at issue.

13. Due to the exceptional features of the disputes involving the "security exceptions" provisions, Ukraine notes that it is important that the Panel considers each invocation carefully, in light of the particular circumstances of the disputes before it.

#### **4. CONCLUSION**

14. This concludes our oral statement. Ukraine thanks the Panel for its consideration of Ukraine's views.

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