



WORLD TRADE  
ORGANIZATION

**WT/DS544/R**

9 December 2022

(22-9156)

Page: 1/84

Original: English

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

REPORT OF THE PANEL

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US – COOL (Article 21.5 – Canada and Mexico)	Appellate Body Report, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , <a href="#">WT/DS384/AB/RW</a> / <a href="#">WT/DS386/AB/RW</a> , adopted 29 May 2015, DSR 2015:IV, p. 1725
US – Customs Bond Directive	Panel Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , <a href="#">WT/DS345/R</a> , adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VIII, p. 2925
US – Gasoline	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , <a href="#">WT/DS2/AB/R</a> , adopted 20 May 1996, DSR 1996:I, p. 3
US – Large Civil Aircraft (2 <sup>nd</sup> complaint) (Article 21.5 – EU)	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union</i> , <a href="#">WT/DS353/RW</a> and Add.1, adopted 11 April 2019, as modified by Appellate Body Report WT/DS353/AB/RW, DSR 2019:V, p. 2171
US – Line Pipe	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , <a href="#">WT/DS202/AB/R</a> , adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Offset Act (Byrd Amendment)	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , <a href="#">WT/DS217/AB/R</a> , <a href="#">WT/DS234/AB/R</a> , adopted 27 January 2003, DSR 2003:I, p. 375
US – Poultry (China)	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010, DSR 2010:V, p. 1909
US – Ripe Olives from Spain	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain</i> , <a href="#">WT/DS577/R</a> and Add.1, adopted 20 December 2021
US – Section 301 Trade Act	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , <a href="#">WT/DS152/R</a> , adopted 27 January 2000, DSR 2000:II, p. 815
US – Shrimp	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , <a href="#">WT/DS58/AB/R</a> , adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Softwood Lumber IV	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , <a href="#">WT/DS257/AB/R</a> , adopted 17 February 2004, DSR 2004:II, p. 571
US – Stainless Steel (Mexico)	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , <a href="#">WT/DS344/AB/R</a> , adopted 20 May 2008, DSR 2008:II, p. 513
US – Steel Safeguards	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Upland Cotton	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , <a href="#">WT/DS267/AB/R</a> , adopted 21 March 2005, DSR 2005:I, p. 3
US – Washing Machines	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , <a href="#">WT/DS464/R</a> and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS294/AB/RW</a> and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , <a href="#">WT/DS322/AB/RW</a> , adopted 31 August 2009, DSR 2009:VIII, p. 3441



## EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Short title (if applicable)	Title
CHN-1 and USA-1	Section 232	Trade Expansion Act, Public Law No. 87-794, 76 Stat. 877 (1962), United States Code, Title II, Section 232
CHN-4 and USA-7	Steel Report	US Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, <i>The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended</i> (11 January 2018)
CHN-5 and USA-8	Aluminium Report	US Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, <i>The Effect of Imports of Aluminum on the National Security, An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended</i> (17 January 2018)
CHN-6 and USA-10	Presidential Proclamation 9704	Proclamation 9704 of 8 March 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 51 (15 March 2018), p. 11619
CHN-7 and USA-9	Presidential Proclamation 9705	Proclamation 9705 of 8 March 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 51 (15 March 2018), p. 11625
CHN-8 and USA-12	Presidential Proclamation 9710	Proclamation 9710 of 22 March 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 60 (28 March 2018), p. 13355
CHN-9 and USA-11	Presidential Proclamation 9711	Proclamation 9711 of 22 March 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 60 (28 March 2018), p. 13361
CHN-10 and USA-14	Presidential Proclamation 9739	Proclamation 9739 of 30 April 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 88 (7 May 2018), p. 20677
CHN-11 and USA-13	Presidential Proclamation 9740	Proclamation 9740 of 30 April 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 88 (7 May 2018), p. 20683
CHN-12 and USA-16	Presidential Proclamation 9758	Proclamation 9758 of 31 May 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 108 (5 June 2018), p. 25849
CHN-13 and USA-15	Presidential Proclamation 9759	Proclamation 9759 of 31 May 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 108 (5 June 2018), p. 25857
CHN-15 and USA-19	Presidential Proclamation 9776	Proclamation 9776 of 29 August 2018, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 83, No. 171 (4 September 2018), p. 45019
CHN-16 and USA-18	Presidential Proclamation 9777	Proclamation 9777 of 29 August 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 171 (4 September 2018), p. 45025
CHN-17 and USA-20	March Interim Final Rule	Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum, Interim Final Rule, United States Federal Register, Vol. 83, No. 53 (19 March 2018), p. 12106
CHN-18 and USA-21	September Interim Final Rule	Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, Interim Final Rule, United States Federal Register, Vol. 83, No. 176 (11 September 2018), p. 46026
CHN-40 and USA-225	Presidential Proclamation 9980	Proclamation 9980 of 24 January 2020, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, United States Federal Register, Vol. 85, No. 19 (29 January 2020), p. 5281
CHN-14	Presidential Proclamation 9772	Proclamation 9772 of 10 August 2018, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 83, No. 158 (15 August 2018), p. 40429
CHN-23		Congressional Research Service, <i>Section 232 Investigations: Overview and Issues for Congress</i> (2 April 2019)
CHN-36		Harmonized Tariff Schedule of the United States (2018) Revision 4
CHN-39		United States Schedule of Concessions
CHN-47		Harmonized Tariff Schedule of the United States (2020) Revision 5
CHN-48		United States Schedule of Concessions pertaining to duties on derivative articles
USA-2	Section 232 regulations	United States Code of Federal Regulations, Title 15, Part 705

Panel Exhibit	Short title (if applicable)	Title
USA-22		<i>The New Shorter Oxford English Dictionary</i> , 4 <sup>th</sup> edn, L. Brown (ed.) (Clarendon Press, 1993)
USA-23		Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, Vol. II
USA-80		Council for Trade in Goods, Minutes of the Meeting held on 10 November 2017, G/C/M/130
USA-81		Council for Trade in Goods, Minutes of the Meeting held on 23 and 26 March 2018, G/C/M/131
USA-82		Committee on Safeguards, Communication from the United States, G/SG/168
USA-83		Statement dated 8 May 2018 of the Deputy US Trade Representative and US Permanent Representative to the WTO, WTO General Council
USA-84		Statements dated 29 October 2018, 21 November 2018, and 4 December 2018 of the United States, WTO Dispute Settlement Body
USA-85		Committee on Market Access, Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions (G/L/59/Rev.1), G/MA/QR/N/USA/4
USA-86		<i>The New Shorter Oxford English Dictionary</i> , 4 <sup>th</sup> edn, L. Brown (ed.) (Clarendon Press, 1993)
USA-93		S. Greenbaum, <i>English Grammar</i> (Oxford University Press, 1996)
USA-94		R. Flesch and A.H. Lass, <i>The Classic Guide to Better Writing</i> (HarperPerennial, 1996)
USA-95		<i>Merriam-Webster's Guide to Punctuation and Style</i> (Merriam-Webster, Incorporated, 1995)
USA-96		S. Benedict (ed.), <i>Harper's English Grammar</i> (Harper & Row, 1966)
USA-176		<i>Merriam-Webster's Guide to Punctuation and Style</i> (Merriam-Webster, Incorporated, 1995)
USA-222		<i>The New Shorter Oxford English Dictionary</i> , 4 <sup>th</sup> edn, L. Brown (ed.) (Clarendon Press, 1993)
USA-226		W. Strunk Jr. and E.B. White, <i>The Elements of Style</i> , 4 <sup>th</sup> edn (Allyn and Bacon, 1999)
USA-239		G20, <i>Global Forum on Steel Excess Capacity Report</i> (30 November 2017)
USA-240		Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel
USA-254		Statement of the Chair of the OECD Ministerial Council Meeting (2018)
USA-255		Charlevoix G7 Summit Communiqué (9 June 2018)

## 1 INTRODUCTION

1.1. This dispute concerns additional duties and related measures imposed by the United States on steel and aluminium products under Section 232 of the Trade Expansion Act of 1962, as amended. China challenges the consistency of these measures with the United States' obligations under the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards.

### 1.1 Complaint by China

1.2. On 5 April 2018, China requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the GATT 1994, and Article 14 of the Agreement on Safeguards with respect to the measures and claims set out below.<sup>1</sup>

1.3. Consultations were held on 19 July 2018 between China and the United States. These consultations failed to resolve the dispute.<sup>2</sup>

### 1.2 Panel establishment and composition

1.4. On 18 October 2018, China requested the establishment of a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 14 of the Agreement on Safeguards with standard terms of reference.<sup>3</sup> At its meeting on 21 November 2018, the Dispute Settlement Body (DSB) established a panel pursuant to China's request in document WT/DS544/8, in accordance with Article 6 of the DSU.<sup>4</sup>

1.5. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS544/8 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>5</sup>

1.6. On 7 January 2019, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 25 January 2019, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Elbio Rosselli

Members: Mr Esteban B. Conejos, Jr  
Mr Rodrigo Valenzuela

1.7. The Kingdom of Bahrain; Brazil; Canada; Colombia; Egypt; the European Union; Guatemala; Hong Kong, China; Iceland; India; Indonesia; Japan; Kazakhstan; Malaysia; Mexico; New Zealand; Norway; Qatar; the Russian Federation; the Kingdom of Saudi Arabia; Singapore; South Africa; Switzerland; Chinese Taipei; Thailand; Türkiye<sup>6</sup>; Ukraine; the United Arab Emirates<sup>7</sup>; and the Bolivarian Republic of Venezuela notified their interest in participating in the Panel proceedings as third parties.

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<sup>1</sup> See Request for consultations by China, WT/DS544/1.

<sup>2</sup> See Request for the establishment of a panel by China, WT/DS544/8 (China's panel request).

<sup>3</sup> See China's panel request.

<sup>4</sup> See Minutes of the DSB meeting held on 21 November 2018, WT/DSB/M/421, para. 6.5.

<sup>5</sup> See Note by the Secretariat, Constitution of the Panel established at the request of China, WT/DS544/9.

<sup>6</sup> Member formerly known as Turkey.

<sup>7</sup> On 19 July 2019, the United Arab Emirates notified the DSB and the Panel of its interest to participate as a third party. (See WT/DS544/9/Rev.1).

### 1.3 Panel proceedings

#### 1.3.1 General

1.8. The Panel held an organizational meeting with the parties on 12 March 2019.

1.9. After consultation with the parties, the Panel adopted its Working Procedures<sup>8</sup> and Timetable<sup>9</sup> on 5 April 2019.

1.10. The Panel held a first substantive meeting with the parties on 29-30 October 2019.<sup>10</sup> A session with the third parties took place on 18 November 2019. The Panel held a second substantive meeting with the parties on 11 and 25 January 2021. On 15 July 2021, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 June 2022. The Panel issued its Final Report to the parties on 16 November 2022.

#### 1.3.2 Request for the substantive meetings of the Panel to be open to the public

1.11. On 5 March 2019, the Panel received a communication from the United States inquiring whether China was willing to open the substantive meetings in the dispute to public observation and make its submissions to the Panel available to the public.<sup>11</sup> In the Panel's organizational meeting with the parties, China indicated its opposition to disclosing its statements or responses to questions to the public.<sup>12</sup>

1.12. The Panel transmitted its Working Procedures to the parties on 5 April 2019, which provided that the Panel "shall meet in closed session".<sup>13</sup>

#### 1.3.3 Request for enhanced third-party rights

1.13. On 7 June 2019, the Panel received a communication from Türkiye requesting enhanced third-party rights (a) to receive copies of all the parties' written submissions, oral statements, rebuttals and answers to questions from the Panel and each other, through all stages of the

<sup>8</sup> The Panel's Working Procedures were revised on 19 July 2019 and 20 February 2020. See the Panel's Working Procedures, adopted on 5 April 2019, as revised on 19 July 2019 and 20 February 2020, in Annex A-1.

<sup>9</sup> The Timetable for the Panel proceedings was revised on 19 July 2019, 13 December 2019, and 20 February 2020. The Panel subsequently communicated with the parties directly regarding additional dates and deadlines in the Panel proceedings.

<sup>10</sup> On 14 October 2019, the Panel informed the parties that the Chairperson of the Panel would not be able to travel to Geneva for the first substantive meeting due to an accident. In response to the Panel's invitation to provide views on the conduct of the meeting, the United States expressed concern that participation by videoconference could make the meeting less effective and queried whether the Chairperson would be able to participate in person with a modest delay in the timetable. After consulting the parties, the Panel decided on 22 October 2019 to proceed with the participation of the Chairperson through videoconferencing. In its decision, the Panel noted that the prompt settlement of disputes is a key principle under Article 3 of the DSU and, under Article 12.2 of the DSU, panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process. The Panel also informed the parties that several actions had been taken in order to guarantee an optimal quality of communication, including setting up multiple channels of communication between Geneva and Montevideo to maintain connectivity.

<sup>11</sup> United States' communication dated 5 March 2019.

<sup>12</sup> During the Panel's organizational meeting with the parties, the United States alternatively requested the Panel to partially open its substantive meetings to the public given the complainants' views in the other disputes in which the same three persons were appointed as panelists (See section 1.3.4 below). The United States argued in that context that providing for a partially open hearing would serve to facilitate the United States' right under Article 18.2 of the DSU to disclose statements of its own position. In its communication to the parties dated 5 April 2019, the Panel observed that nothing in the DSU provides that a party's right to disclose statements of its own positions to the public must be exercised through the holding of fully or partly open hearings. The Panel noted that there are other ways in which Members can make statements of their own position public and that by declining a party's request to hold partially open hearings, the Panel would not be depriving a Member of its rights under Article 18.2 or under any other provisions of the DSU. Having considered the disagreement between the parties on the United States' proposal, as well as the parties' views on the scope of the obligation to protect confidential information in the context of a partially open hearing, the Panel exercised its discretion under Article 12.1 of the DSU to deny the United States' request for partially open meetings.

<sup>13</sup> Working Procedures of the Panel, para. 10.

proceedings; (b) to be present for the entirety of all substantive meetings of the Panel with the parties; and (c) to review the draft summary of their own arguments in the descriptive part of the Panel Report.<sup>14</sup> On 17 June 2019 and 26 June 2019, the Panel invited the parties to comment on this request as well as other similar requests received from the European Union<sup>15</sup>, Norway<sup>16</sup>, Switzerland<sup>17</sup>, the Russian Federation<sup>18</sup>, and Hong Kong, China.<sup>19</sup> In response, the United States opposed the requests for enhanced rights to third parties<sup>20</sup>, whereas China supported the requests.<sup>21</sup>

1.14. Having consulted the parties on this matter and considering their due process interests, the Panel informed the parties and third parties on 19 July 2019 that it had decided to grant certain enhanced third-party rights to all third parties. The Panel implemented this decision in paragraph 30(e) of the Revised Working Procedures of 19 July 2019, granting third parties access to the parties' submissions up to and including their responses to the questions posed by the Panel following the first substantive meeting, as well as final versions of the oral statements made by the parties during the first substantive meeting. The Panel stated that it would address the requests for enhanced third-party rights in respect of further stages of the proceedings in due course.

1.15. After consultation with the parties, the Panel also granted enhanced third-party rights in respect of further stages of the proceedings. On 20 February 2020, the Panel amended its Working Procedures to provide third parties access to the parties' second written submissions, final versions of oral statements made by the parties during the second substantive meeting, their responses to the Panel's questions after the second substantive meeting, and comments on those responses.

1.16. In the interest of advancing the proceedings during the disruptions associated with the COVID-19 pandemic<sup>22</sup> and pursuant to paragraph 9 of the Panel's Working Procedures, the Panel sent additional questions to the parties on 26 August 2020. Based on consultations with the parties, the Panel decided on 8 September 2020 and 21 September 2020 that the parties' responses to the Panel's additional questions and comments on those responses should be made available to third parties.

1.17. Due to the impact of the COVID-19 pandemic on the second substantive meeting<sup>23</sup>, the Panel decided, on 10 November 2020, to modify its decision of 20 February 2020 so that third parties would not receive further access to any statements, submissions, or exchanges from the parties, including statements made by the parties during the second substantive meeting, their responses to the Panel's questions after the second substantive meeting, or comments on those responses.

### **1.3.4 Relationship with the other disputes where the same three persons act as panelists**

1.18. At the organizational meeting and at various points in the proceedings, the parties provided views regarding the relationship between this dispute and the other cases where the same three persons act as panelists.<sup>24</sup>

<sup>14</sup> Türkiye's communication dated 7 June 2019, para. 11.

<sup>15</sup> European Union's communication dated 7 June 2019, para. 11.

<sup>16</sup> Norway's communication dated 11 June 2019, para. 3.

<sup>17</sup> Switzerland's communication dated 11 June 2019, para. 3.

<sup>18</sup> Russian Federation's communication dated 14 June 2019, p. 3.

<sup>19</sup> Hong Kong, China's communication dated 25 June 2019, p. 1.

<sup>20</sup> United States' communications dated 24 June 2019, para. 2; United States' communication dated 1 July 2019, para. 2.

<sup>21</sup> China's communication dated 24 June 2019, para. 2; China's communication dated 1 July 2019, paras. 12-13.

<sup>22</sup> See section 1.3.5.2 below.

<sup>23</sup> See section 1.3.5.4 below.

<sup>24</sup> The other disputes where the same three persons are acting as panelists include DS547 (India), DS552 (Norway), DS554 (the Russian Federation), DS556 (Switzerland), and DS564 (Türkiye). Mutually agreed solutions were notified in DS550 (Canada) and DS551 (Mexico), where the same three persons were appointed as panelists. See *United States – Certain Measures on Steel and Aluminium Products (Canada)*, Notification of a Mutually Agreed Solution, WT/DS550/13, 27 May 2019 and *United States – Certain Measures on Steel and Aluminium Products (Mexico)*, Notification of a Mutually Agreed Solution, WT/DS551/13, 3 June 2019. On 17 January 2022, the United States and the European Union jointly notified the DSB that they were terminating the dispute in DS548 (European Union), where the same three persons were appointed as panelists. (WT/DS548/20). On 20 January 2022, that panel notified the DSB that it was in receipt of a

1.19. China considered that these complaints relate to the same matter and Article 9.3 of the DSU was therefore applicable, noting that this was recognized in the Director-General's decision to appoint the same panelists to serve on all these panels. Accordingly, China argued that these proceedings required harmonized timetables and consolidated hearings, which could significantly reduce the risk of unnecessary repetition and achieve important efficiencies.<sup>25</sup> For China, the notion of a "harmonized" timetable in Article 9.3 of the DSU implies "harmonized", or consolidated, substantive meetings.<sup>26</sup> China argued that, in previous practice, single panels were established under Article 9.1 of the DSU despite the absence of a complete overlap of the claims raised and that "[t]his logic applies *a fortiori* under Article 9.3 of the DSU."<sup>27</sup>

1.20. The United States considered that a single panel had not been established in these disputes pursuant to Article 9.1 of the DSU, but rather, nine<sup>28</sup> separate panels were established by the DSB to consider distinct matters. For the United States, the matters are distinct because the claims and measures identified by each complainant are different from the other complainants. For this reason, the United States submitted that Article 9.3 of the DSU is not applicable and, even if it were, it would only be relevant to the composition of the various panels and the timetables.<sup>29</sup> In the context of Article 9.3 of the DSU, the United States argued that to "harmonize" the timetables in these proceedings would mean to make them consistent or compatible and that harmonization does not suggest, much less require, that the Panel collapse the proceedings into a single, identical process. For the United States, the disparate sets of claims and measures identified by the complainants are important to considerations of both efficiency and procedural fairness.<sup>30</sup>

1.21. The Panel notes that, at its meeting on 21 November 2018, the DSB established a panel pursuant to the request from China in document WT/DS544/8, in accordance with Article 6 of the DSU.<sup>31</sup> While the same three persons that act as panelists in this dispute were also appointed as panelists in other related cases<sup>32</sup>, these proceedings are not substantively identical in all respects, for instance, in terms of the precise measures and claims at issue. The Panel was also mindful of the logistical complexities of coordinating multiple formally distinct disputes and, before adopting its Timetable and Working Procedures, consulted the parties on multiple possible alternatives for the conduct and configuration of the proceedings.<sup>33</sup>

1.22. The Panel, nonetheless, made arrangements at each stage of the proceedings to maintain harmonized timetables to the greatest extent possible in both the deadlines for written submissions and the dates for meetings across all disputes in which the same three persons act as panelists. In doing so, the Panel endeavoured to balance the efficient conduct of proceedings with the due process rights of the parties, taking into account the agreement of the parties, or lack thereof, on the different proposals on how to organize the proceedings. As elaborated in the next section, the harmonization of timetables was, in some instances, affected by the divergent views of the complainants across the different disputes.<sup>34</sup>

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communication from the European Union notifying the withdrawal of its complaint, and accordingly, had ceased all work in those proceedings. (WT/DS548/21).

<sup>25</sup> China's communication dated 22 February 2019.

<sup>26</sup> China's communication dated 1 March 2019.

<sup>27</sup> China's communication dated 1 March 2019.

<sup>28</sup> The Panel recalls that the disputes in DS548 (European Union), DS550 (Canada) and DS551 (Mexico) were active at the time of the Panel's organizational meeting and related consultations with the parties.

<sup>29</sup> United States' communication dated 22 February 2019.

<sup>30</sup> United States' communication dated 1 March 2019.

<sup>31</sup> See Note by the Secretariat, Constitution of the Panel established at the request of China, WT/DS544/9.

<sup>32</sup> DS547 (India), DS552 (Norway), DS554 (the Russian Federation), DS556 (Switzerland), and DS564 (Türkiye).

<sup>33</sup> Panel communication to the parties dated 7 March 2019. During the Panel's organizational meeting and related consultations with the parties, the Panel specifically sought the parties' views on the optimal scheduling and configuration of the substantive meetings in the disputes where the same three persons were appointed as panelists, particularly addressing three possible configurations for the substantive meetings: (a) combined substantive meetings with the parties in this dispute and the other eight disputes; (b) a "two-stage" approach proposed by the United States with a first stage devoted solely to the United States' arguments under Article XXI of the GATT 1994; and (c) separate meetings for each of the disputes in which the same panelists had been appointed.

<sup>34</sup> See section 1.3.5.4 below.



### 1.3.5 Impact of the COVID-19 pandemic on the Panel proceedings

#### 1.3.5.1 Filing of written submissions

1.23. On 17 March 2020, in response to the COVID-19 outbreak, the Panel suspended the requirement to deliver paper copies of a document or submission to the other parties or the DS Registry until further notice. The Panel decided that receipt of the electronic version would be deemed to be full service for the purposes of the Working Procedures. After briefly reverting to service of hard copies of documents on 22 July 2020, the Panel informed the parties that as of 28 October 2020, e-filing would be deemed full service again until further notice.<sup>35</sup>

#### 1.3.5.2 Scheduling of the second substantive meeting of the Panel with the parties

1.24. According to the revised Timetable adopted on 20 February 2020 after consultation with the parties<sup>36</sup>, the Panel's second meeting with the parties was scheduled for 23-24 July 2020.

1.25. On 27 May 2020, the Panel invited the parties to provide information on the travel restrictions that might impact the overall likelihood of holding the second meeting in person in July 2020. In addition, the Panel consulted the parties on possible alternative arrangements to meetings in person, including (a) holding the second substantive meeting through virtual participation in July 2020; (b) postponement of the meeting to a later date with a possibility for an exchange of written questions and responses in the interim; (c) adoption of written procedures as a substitute for the second substantive meeting; or (d) any other possible arrangement, should it not be possible to hold the meeting in person in July 2020.

1.26. In response to the Panel's communication, both parties indicated their inability to travel to Geneva for the second substantive meeting in July 2020.<sup>37</sup> China proposed an additional round of written briefs and/or an additional round of written answers to questions from the Panel as an alternative to meetings in person, arguing that the matter before the Panel was ripe for decision.<sup>38</sup> The United States disagreed with China's suggestion that a written exchange could serve as an alternative to a second substantive meeting with contemporaneous oral exchange.<sup>39</sup> The United States further opposed holding the meeting in a virtual format, citing consequent limitations on interactions between the parties and the Panel, within the parties' respective delegations, among the three panelists, and between the panelists and the Secretariat.<sup>40</sup> On this basis, the United States requested that the Panel reschedule the second substantive meeting for a later date.<sup>41</sup> After reviewing the parties' comments, the Panel in its communication dated 12 June 2020 decided to postpone the meeting, indicating that it tentatively intended to schedule the meeting between 10 September and 20 October 2020.

1.27. Through multiple communications sent to the parties on 22 July 2020, 31 July 2020, 26 August 2020, 21 September 2020, 13 October 2020, and 23 October 2020, the Panel regularly consulted the parties on the feasibility of in-person meetings in 2020 and possible alternative arrangements. Both parties identified numerous potential obstacles to holding in-person meetings in 2020, including evolving travel and quarantine restrictions due to the pandemic. The United States

<sup>35</sup> Panel communication to the parties dated 27 October 2020.

<sup>36</sup> Following its first substantive meeting with the parties, the Panel consulted the parties on various options for scheduling the second substantive meeting between 22 June-31 July 2020 or 14 September-16 October 2020, as well as an expedited timetable under which the second substantive meeting with the parties would be held in May 2020. While China favoured the earlier scheduling of the meeting, the United States requested that the meeting be scheduled between 14 September 2020 and 16 October 2020, citing conflicting summer holiday schedules, US federal holidays, and the need for sufficient time to adequately prepare for the second substantive meeting. Based on these consultations, the Panel scheduled its second meeting with the parties on 23 and 24 July 2020.

<sup>37</sup> United States' communication dated 2 June 2020, paras. 2-3; China's communication dated 2 June 2020, p. 1.

<sup>38</sup> China's communication dated 2 June 2020, pp. 1-2.

<sup>39</sup> United States' communication dated 2 June 2020, para. 15; United States' communication dated 5 June 2020, para. 1.

<sup>40</sup> United States' communication dated 2 June 2020, paras. 9-10.

<sup>41</sup> United States' communication dated 2 June 2020, para. 11; United States' communication dated 5 June 2020, para. 6.



maintained its preference for in-person meetings<sup>42</sup>, whereas China suggested that in-person meetings could be replaced with either written exchanges or virtual meetings.<sup>43</sup>

1.28. After it became apparent that no in-person meeting would be possible in the foreseeable future due to the COVID-19 pandemic, the Panel issued a decision on 10 November 2020 on the way forward in the proceedings. The Panel began by noting the various restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, including those instituted by Switzerland in November 2020, and that under these circumstances, holding the second substantive meeting in the manner originally envisaged in the Timetable was not feasible. The Panel indicated its consistent efforts over the course of the dispute to maintain a balance between the efficient conduct of proceedings, the parties' due process rights, and the particular preferences expressed by each party, including the complainant's request to keep the timetables harmonized across the disputes in which the same three persons act as panelists. Based on the parties' comments and in the interest of continuing to advance the Panel's work, the Panel decided to proceed by holding the second substantive meeting virtually.

### **1.3.5.3 Use of a virtual meeting platform for the second substantive meeting of the Panel with the parties**

1.29. In its decision of 10 November 2020, the Panel noted its intention to conduct the second meeting through the Cisco Webex platform and circulated draft additional working procedures requiring, among other things, that all remote participants follow the security rules contained in these additional working procedures as well as any additional security guidance that may be provided by the host. The Panel also proposed to arrange advance testing sessions with the parties to ensure their remote participation and invited comments from the parties on the draft additional working procedures.

1.30. In its comments on the draft additional working procedures, the United States requested that the Panel (a) provide all questions to the parties at least two weeks in advance; (b) refrain from asking additional or follow-up questions during the session; and (c) prohibit parties from commenting on each other's responses to the Panel's questions during the session. The United States reasoned that health concerns prevented its delegation from gathering in person to coordinate responses. The United States further cited technical considerations – "including the inability of USTR employees to participate in a meeting via Webex from telework locations" – in support of its request. Finally, the United States requested that the Panel enable the Webex dial-in feature to allow individuals from its delegation to connect by phone and reflect this adjustment in the proposed additional working procedures.<sup>44</sup>

1.31. Taking note of the parties' comments, the Panel declined the United States' request to (a) refrain from asking additional or follow-up questions during the session, and (b) prohibit parties from commenting on each other's responses to the Panel's questions during the session. The Panel observed that it had decided to divide the second substantive meeting into two four-hour sessions with two weeks between the sessions. The Panel found that this arrangement would allow each party the time to confer within its delegation and respond to possible questions from the Panel or the other party throughout the course of the meeting. The Panel also noted that the parties would have the opportunity to provide further comments in writing in response to questions after the meeting.<sup>45</sup>

1.32. In the Additional Working Procedures for virtual meetings, the Panel indicated that the meeting would be held in closed session, with remote access limited to registered participants. Accordingly, for security and confidentiality reasons, the Panel decided not to enable the dial-in feature on Webex.

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<sup>42</sup> United States' communication dated 28 July 2020, para. 5; United States' communication dated 9 September 2020, para. 5; United States' communication dated 20 October 2020, para. 1; and United States' communication dated 4 November 2020, para. 8.

<sup>43</sup> China's communication dated 28 July 2020, p. 1; China's communication dated 9 September 2020; China's communication dated 20 October 2020, paras. 4-5; and China's communication dated 28 October 2020.

<sup>44</sup> United States' communication dated 16 November 2020.

<sup>45</sup> Panel communication to the parties dated 1 December 2020.

#### **1.3.5.4 Impact on coordination with the other disputes where the same three persons act as panelists**

1.33. As discussed in section 1.3.4 of this Report, the Panel made several arrangements at each stage of the proceedings to maintain harmonized timetables in all disputes where the same three persons are acting as panelists. However, in its communications of 13 October 2020 and 23 October 2020, the Panel noted that the complainants across these disputes presented diverging views on the way forward for the second substantive meeting in light of the COVID-19 pandemic. The Panel indicated to the parties that this divergence was difficult to reconcile with China's initial request to maintain harmonized timetables in all disputes. Accordingly, the Panel sought the parties' views on the feasibility of maintaining such harmonization going forward. The Panel also invited the parties' comments on the implications of the differences among the complainants in these disputes on enhanced third-party rights, and in particular on access to written submissions and responses to Panel questions, if the Panel determined that it was not viable to maintain harmonized timetables.

1.34. China argued that the requirement of harmonization of timetables under Article 9.3 of the DSU applies to the present proceedings. China further argued that to resolve these disputes in a prompt and harmonized fashion, the Panel should exercise its authority under Article 12.1 of the DSU to devise a common solution for the second substantive meetings in all disputes where the same three persons are acting as panelists, even if certain parties preferred a different solution. China observed that a common solution to the organization of the second substantive meeting would facilitate the exercise of the enhanced third-party rights granted by the Panel.<sup>46</sup>

1.35. The United States objected to proceeding differently across the disputes in which the same three persons serve as panelists, arguing that doing so would provide a strategic benefit to the complainants to the disadvantage of the United States.<sup>47</sup> Moreover, the United States observed that should the Panel move forward with different formats and different timetables across these disputes, the United States would no longer agree to open any of the proceedings to public viewing.<sup>48</sup> The United States reasoned that complainants participating in later meetings would have an opportunity to view the earlier open meetings and adjust their statements and arguments accordingly.<sup>49</sup> For similar reasons, the United States also requested that the Panel rescind its decision on enhanced third-party rights in the event it acceded to the complainants' diverging requests, arguing that such enhanced rights would serve to unfairly advantage those third parties that are also parties in their own disputes.<sup>50</sup>

1.36. The Panel provided its decision on the second substantive meeting to the parties on 10 November 2020, where it noted that Article 9.3 of the DSU provides for harmonizing timetables to the "greatest extent possible". The Panel observed that the compatibility of positions taken by parties across disputes, or lack thereof, was a significant factor in assessing the possibility of harmonizing timetables. In particular, the Panel considered that the harmonization of timetables would not compel the adoption of alternative meeting procedures by virtual means even in those disputes where both the complainant and the respondent had expressed a preference to wait until in-person meetings were possible. In this light, the Panel concluded that if the divergent positions of the parties across the disputes resulted in certain meetings being held at a later date, it would no longer be possible to harmonize the timetables across the disputes. The Panel further noted that if the timetables across the disputes were not harmonized, the rights of third parties for subsequent stages in the disputes would be as provided for in Article 10 of the DSU, and the Panel would not grant third parties further access to any statements, submissions, or exchanges from the parties in each dispute.

1.37. Based on the foregoing, the Panel scheduled its second substantive meeting with the parties in this dispute for 11 and 25 January 2021. Rights of third parties for subsequent stages in the disputes were limited to those provided in Article 10 of the DSU.

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<sup>46</sup> China's communication dated 20 October 2020.

<sup>47</sup> United States' communication dated 20 October 2020, para. 2.

<sup>48</sup> United States' communication dated 4 November 2020, para. 6.

<sup>49</sup> United States' communication dated 20 October 2020, para. 5.

<sup>50</sup> United States' communication dated 4 November 2020, para. 6.

## 2 FACTUAL ASPECTS

### 2.1 Section 232 and the United States Department of Commerce reports on steel and aluminium

2.1. This section provides the legislative and regulatory background of the measures at issue in this dispute and, in particular, of:

- a. Section 232 of the Trade Expansion Act of 1962, as amended (United States Code, Title 19, Section 1862) (Section 232)<sup>51</sup> and its implementing regulation, United States Code of Federal Regulations, Title 15, Part 705<sup>52</sup>;
- b. "The Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended", United States Department of Commerce Report, 11 January 2018 (Steel Report)<sup>53</sup>; and
- c. "The Effects of Imports of Aluminum on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended", United States Department of Commerce Report, 17 January 2018 (Aluminium Report).<sup>54</sup>

#### 2.1.1 Section 232

2.2. Pursuant to Section 232, upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the United States (US) Secretary of Commerce shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.<sup>55</sup> The US Secretary of Commerce shall also immediately provide notice to the US Secretary of Defense of any such investigation, and shall consult with the Secretary of Defense regarding the methodological and policy questions raised in such investigation.<sup>56</sup>

2.3. Section 232 further provides that no later than 270 days after an investigation is initiated with respect to any article, the US Secretary of Commerce shall submit to the US President a report on the findings of the investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security. Section 232 directs the US Secretary of Commerce to make recommendations for action or inaction based on such findings. If the US Secretary of Commerce finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the US President in such report.<sup>57</sup>

2.4. Within 90 days of receiving such report, the US President shall: (a) determine whether the President concurs with the finding of the Secretary; and (b) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust imports of the article and its derivatives so that such imports will not threaten to impair national security.<sup>58</sup> If the US President determines to take action to adjust imports of the article and its derivatives, the US President shall implement such action within 15 days.<sup>59</sup> Further, the action taken by the US President may be the negotiation of an agreement which limits or restricts importation into, or exportation to, the United States of the article that threatens to impair US national security, or such other actions as the US President deems necessary to adjust the imports of the article so that the imports will not threaten to impair US national security.<sup>60</sup>

<sup>51</sup> Section 232, (Exhibit CHN-1 and USA-1).

<sup>52</sup> Section 232 regulations, (Exhibit USA-2).

<sup>53</sup> Steel Report, (Exhibit CHN-4 and USA-7).

<sup>54</sup> Aluminium Report, (Exhibit CHN-5 and USA-8).

<sup>55</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(b)(1)(A).

<sup>56</sup> Section 232, (Exhibit CHN-1 and USA-1), §§ 1862(b)(1)(B) and (b)(2)(A).

<sup>57</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(b)(3)(A).

<sup>58</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(c)(1)(A).

<sup>59</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(c)(1)(B).

<sup>60</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(c)(3)(A).

2.5. Section 232 also sets out factors that should be analysed when conducting an investigation to determine the effects of imports of a product on the national security. In particular, it provides that the US Secretary of Commerce and the US President shall, in light of the requirements of national security and without excluding other relevant factors, give consideration to:

- a. domestic production needed for projected national defence requirements;
- b. the capacity of domestic industries to meet such requirements;
- c. existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defence;
- d. the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth; and
- e. the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements.<sup>61</sup>

2.6. In addition to these factors, Section 232 provides that in the administration of this section, the US Secretary of Commerce and the US President shall further recognize the close relation of the economic welfare of the United States to its national security, and shall take into consideration:

- a. the impact of foreign competition on the economic welfare of individual domestic industries; and
- b. any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports.<sup>62</sup>

2.7. Additional regulations in the United States Code of Federal Regulations, Title 15, Part 705 set out the procedures according to which the US Department of Commerce shall commence and conduct its investigation to determine the effect on the national security of the imports of any article, as well as issue the report and recommendation to the President of the United States for action or inaction regarding an adjustment of the imports of the article(s) in question.<sup>63</sup>

### **2.1.2 The Steel Report**

2.8. The Steel Report of 11 January 2018 summarizes the findings of an investigation conducted by the US Department of Commerce pursuant to Section 232 into the effect of imports of steel mill products on the national security of the United States.

#### **2.1.2.1 Initiation and investigation process**

2.9. On 19 April 2017, the US Secretary of Commerce initiated an investigation to determine the effect of imported steel on national security under Section 232. The US Department of Commerce notified the US Department of Defense of the investigation in a letter dated 19 April 2017.<sup>64</sup> On 20 April 2017, the US President signed a Presidential Memorandum directing the US Secretary of Commerce to proceed expeditiously in conducting his investigation and submit a report on his findings to the President.<sup>65</sup> On 21 April 2017, the US Department of Commerce published in the Federal Register a notice about the initiation of the investigation. The notice also announced the opening of the public comment period as well as a public hearing to be held on 24 May 2017.<sup>66</sup> The

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<sup>61</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(d).

<sup>62</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(d).

<sup>63</sup> Section 232 regulations, (Exhibit USA-2), §§ 705.1-705.12.

<sup>64</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 18.

<sup>65</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 18.

<sup>66</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 18.

US Department of Commerce held a public hearing to elicit further information concerning the investigation in Washington, D.C., on 24 May 2017.<sup>67</sup>

2.10. In addition to the notification provided by its 19 April 2017 letter to the US Department of Defense, the US Department of Commerce carried out consultations with the US Department of Defense regarding methodological and policy questions that arose during the investigation. According to the Steel Report, discussions were held with the US Army Materiel Command, the Defense Logistics Agency, the US Navy/Naval Air Systems Command, and the Under Secretary of Defense for Acquisitions & Logistics, Manufacturing, and Industrial Base Policy. Discussions were also held with "appropriate officers of the United States", including the US Department of State, Department of the Treasury, Department of the Interior/US Geological Survey, the Department of Homeland Security/US Customs and Border Protection, the International Trade Commission, and the Office of the United States Trade Representative.<sup>68</sup>

### 2.1.2.2 Product scope

2.11. The Steel Report describes its product coverage as steel mill products which are defined at the Harmonized System 6-digit level as: 720610 through 721650, 721699 through 730110, 730210, 730240 through 730290, and 730410 through 730690, including any subsequent revisions to these HS codes.<sup>69</sup> Generally, these products fall into five categories:

- a. Carbon and Alloy Flat Products (Flat Products): Steel products produced by rolling semi-finished steel through varying sets of rolls. This category includes sheets, strips, and plates.<sup>70</sup>
- b. Carbon and Alloy Long Products (Long Products): Steel products that fall outside the flat products category. This category includes bars, rails, rods, and beams.<sup>71</sup>
- c. Carbon and Alloy Pipe and Tube Products (Pipe and Tube Products): Either seamless or welded pipe and tube products. Some of these products may include stainless as well as alloys other than stainless.<sup>72</sup>
- d. Carbon and Alloy Semi-finished Products (Semi-finished Products): The initial, intermediate solid forms of molten steel, to be re-heated and further forged, rolled, shaped, or otherwise worked into finished steel products. This category includes blooms, billets, slabs, ingots, and steel for castings.<sup>73</sup>

<sup>67</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 18.

<sup>68</sup> Steel Report, (Exhibit CHN-4 and USA-7), pp. 19-20.

<sup>69</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 21.

<sup>70</sup> Flat products are covered under the following 6-digit HS codes: 720810, 720825, 720826, 720827, 720836, 720837, 720838, 720839, 720840, 720851, 720852, 720853, 720854, 720890, 720915, 720916, 720917, 720918, 720925, 720926, 720927, 720928, 720990, 721011, 721012, 721020, 721030, 721041, 721049, 721050, 721061, 721069, 721070, 721090, 721113, 721114, 721119, 721123, 721129, 721190, 721210, 721220, 721230, 721240, 721250, 721260, 722511, 722519, 722530, 722540, 722550, 722591, 722592, 722599, 722611, 722619, 722691, 722692, 722693, 722694, 722699. (Steel Report, (Exhibit CHN-4 and USA-7), p. 21).

<sup>71</sup> Long products are covered under the following 6-digit HS codes: 721310, 721320, 721391, 721399, 721410, 721420, 721430, 721491, 721499, 721510, 721550, 721590, 721610, 721621, 721622, 721631, 721632, 721633, 721640, 721650, 721699, 721710, 721720, 721730, 721790, 722520, 722620, 722710, 722720, 722790, 722810, 722820, 722830, 722840, 722850, 722860, 722870, 722880, 722910, 722920, 722990, 730110, 730210, 730240, 730290. (Steel Report, (Exhibit CHN-4 and USA-7), pp. 21-22).

<sup>72</sup> Pipe and Tube products are covered under the following 6-digit HS codes: 730410, 730419, 730421, 730423, 730429, 730431, 730439, 730451, 730459, 730490, 730511, 730512, 730519, 730520, 730531, 730539, 730590, 730610, 730619, 730620, 730629, 730630, 730650, 730660, 730661, 730669, 730690. (Steel Report, (Exhibit CHN-4 and USA-7), p. 22).

<sup>73</sup> Semi-finished products are covered under the following 6-digit HS codes: 720610, 720690, 720711, 720712, 720719, 720720, 722410, 722490. (Steel Report, (Exhibit CHN-4 and USA-7), p. 22).

- e. Stainless Products: Steel products, in flat-rolled, long, pipe and tube, and semi-finished forms, containing at minimum 10.5% chromium and, by weight, 1.2% or less of carbon, offering better corrosion resistance than other steel.<sup>74</sup>

### 2.1.2.3 Findings and recommendations by the US Secretary of Commerce

2.12. The Steel Report refers to the nonexclusive lists of factors in Section 232 and its implementing regulations that the US Department of Commerce must consider in evaluating the effect of imports on the national security.<sup>75</sup> The Steel Report further refers to a determination by the US Department of Commerce in 2001 that (a) national defence includes both defence of the United States directly and its ability to project military capabilities globally, and (b) the term "national security" can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defence requirements that are critical to the minimum operations of the economy and government.<sup>76</sup>

2.13. In the Steel Report, the US Secretary of Commerce determined that the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global excess capacity in steel, were "weakening our internal economy" and therefore "threaten to impair" US national security as defined in Section 232.<sup>77</sup> According to the Steel Report, the continued rising levels of imports of foreign steel threaten to impair the national security by placing the US steel industry at substantial risk of displacing the basic oxygen furnace and other steelmaking capacity, and the related supply chain needed to produce steel for critical infrastructure and national defence.<sup>78</sup> The Steel Report refers to global excess steel capacity as a circumstance that contributes to the "weakening of [the US] internal economy" that "threaten[s] to impair" US national security as defined in Section 232.<sup>79</sup>

2.14. In arriving at this general conclusion, the Steel Report relied on four main overarching findings, which in turn, comprise several intermediate findings:

- a. Steel is important to US national security because<sup>80</sup>: (i) steel is needed for national defence requirements<sup>81</sup>; (ii) steel is required for US critical infrastructure<sup>82</sup>; (iii) domestic steel production is essential for national security<sup>83</sup>; (iv) domestic steel production depends on a healthy and competitive US industry<sup>84</sup>; and (v) steel is consumed in critical industries.<sup>85</sup>
- b. Imports in such quantities as are presently found adversely impact the economic welfare of the US steel industry due to<sup>86</sup>: (i) continued increase in imports of steel products<sup>87</sup>; (ii) high import penetration<sup>88</sup>; (iii) high import to export ratio<sup>89</sup>; (iv) prevailing steel

<sup>74</sup> Stainless steel products are covered under the following 6-digit HS codes: 721810, 721891, 721899, 721911, 721912, 721913, 721914, 721921, 721922, 721923, 721924, 721931, 721932, 721933, 721934, 721935, 721990, 722011, 722012, 722020, 722090, 722100, 722211, 722219, 722220, 722230, 722240, 722300, 730411, 730422, 730424, 730441, 730449, 730611, 730621, 730640. (Steel Report, (Exhibit CHN-4 and USA-7), p. 22).

<sup>75</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 13.

<sup>76</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 13 (referring to Department of Commerce, Bureau of Export Administration: The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, October 2001). The Steel Report further clarifies that it uses the more recent 16 critical infrastructure sectors identified in Presidential Policy Directive 21 instead of the 28 critical industry sectors used by the Bureau of Export Administration in the 2001 Report. (Ibid. p. 14).

<sup>77</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 55.

<sup>78</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 55.

<sup>79</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 55.

<sup>80</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 23.

<sup>81</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 23.

<sup>82</sup> Steel Report, (Exhibit CHN-4 and USA-7), pp. 23-24.

<sup>83</sup> Steel Report, (Exhibit CHN-4 and USA-7), pp. 24-25.

<sup>84</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 25.

<sup>85</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 25.

<sup>86</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 27.

<sup>87</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 27.

<sup>88</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 29.

<sup>89</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 30.



prices<sup>90</sup>; (v) steel mill closures<sup>91</sup>; (vi) declining employment trend since 1998<sup>92</sup>; (vii) trade actions such as anti-dumping and countervailing duties<sup>93</sup>; (viii) loss of domestic opportunities to bidders using imported steel<sup>94</sup>; (ix) financial distress<sup>95</sup>; and (x) limited capital expenditures arising from falling revenue and reduced profits.<sup>96</sup>

- c. Displacement of domestic steel by excessive quantities of imports has the serious effect of weakening the US internal economy because<sup>97</sup>: (i) domestic steel production capacity is stagnant and concentrated<sup>98</sup>; (ii) production is well below demand<sup>99</sup>; (iii) utilization rates are well below economically viable levels<sup>100</sup>; and (iv) declining steel production facilities limits capacity available for a national emergency.<sup>101</sup>
- d. Global excess steel capacity is a circumstance that contributes to the weakening of the domestic economy because<sup>102</sup>: (i) free markets globally are adversely affected by substantial chronic global excess steel production led by China<sup>103</sup>; and (ii) increasing global excess steel capacity will further weaken the internal economy as US steel producers will face increasing import competition.<sup>104</sup>

2.15. In the Steel Report, the US Secretary of Commerce recommends, due to the threat of steel imports to US national security, that the US President take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States, as well as direct additional actions to keep the US steel industry financially viable and able to meet US national security needs. The Steel Report states that the quota or tariff imposed should be sufficient, after accounting for any exclusions, to enable the US steel producers to be able to operate at about 80% or better of the industry's capacity utilization rate based on available capacity in 2017.<sup>105</sup>

2.16. In particular, the Steel Report recommends the following two alternative courses of action:

- a. Global quota or tariff: The Steel Report recommends that this should be done by (i) imposing a quota of 63% of the 2017 import level on all imported steel products, applied on a country and steel product basis, or (ii) applying a 24% tariff on all imported steel products, in addition to any anti-dumping or countervailing duty collections applicable to any imported steel product.<sup>106</sup>
- b. Tariff on a subset of countries: The Steel Report alternatively recommends applying a 53% tariff on all imported steel products from Brazil, the Republic of Korea, the Russian Federation, Türkiye, India, Viet Nam, China, Thailand, South Africa, Egypt, Malaysia, and Costa Rica, in addition to any anti-dumping or countervailing duty collections applicable to any steel products from these countries. All other countries would be limited to 100% of their 2017 import level.<sup>107</sup>

2.17. The Steel Report further states that, in selecting an alternative, the US President could determine that specific countries should be exempted from the proposed 63% quota or 24% tariff by granting those specific countries 100% of their prior imports in 2017, based on an overriding economic or security interest of the United States.<sup>108</sup> The Steel Report also recommends an appeal

<sup>90</sup> Steel Report, (Exhibit CHN-4 and USA-7), pp. 31-32.

<sup>91</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 33.

<sup>92</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 35.

<sup>93</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 36.

<sup>94</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 36.

<sup>95</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 37.

<sup>96</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 40.

<sup>97</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 41.

<sup>98</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 41.

<sup>99</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 46.

<sup>100</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 47.

<sup>101</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 49.

<sup>102</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 51.

<sup>103</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 51.

<sup>104</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 53.

<sup>105</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 58.

<sup>106</sup> Steel Report, (Exhibit CHN-4 and USA-7), pp. 59-60.

<sup>107</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 60.

<sup>108</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 60.



process by which affected US parties could seek an exclusion from the tariff or quota imposed and notes that the US Secretary of Commerce would grant such exclusions based on demonstrating (a) lack of sufficient US production capacity of comparable products or (b) specific national security based considerations.<sup>109</sup>

### 2.1.3 The Aluminium Report

2.18. The Aluminium Report of 17 January 2018 summarizes the findings of an investigation conducted by the US Department of Commerce pursuant to Section 232 into the effect of imports of aluminium products on the national security of the United States.

#### 2.1.3.1 Initiation and investigation process

2.19. On 26 April 2017, the US Secretary of Commerce initiated an investigation to determine the effect of imported aluminium on national security under Section 232.<sup>110</sup> The US Department of Commerce notified the US Department of Defense of the investigation in a letter dated 26 April 2017.<sup>111</sup> On 27 April 2017, the US President signed a Presidential Memorandum directing the US Secretary of Commerce to proceed expeditiously in conducting his investigation and submit a report on his findings to the President.<sup>112</sup> On 3 May 2017, the US Department of Commerce invited interested parties to submit written comments, opinions, data, information, or advice.<sup>113</sup> The US Department of Commerce held a public hearing to elicit further information concerning this investigation in Washington, D.C., on 22 June 2017.<sup>114</sup>

2.20. In addition to the notification to the US Department of Defense on 26 April 2017, the US Department of Commerce consulted with the US Department of Defense regarding methodological and policy questions that arose during the investigation and also consulted with other agencies of the US Government with expertise and information regarding the aluminium industry, including the US Geological Survey of the Department of the Interior and the US International Trade Commission.<sup>115</sup>

#### 2.1.3.2 Product scope

2.21. The Aluminium Report sets out its product scope in the following table:

**Table 1: Harmonized Tariff Schedule for Aluminum Products<sup>116</sup>**

Harmonized Tariff Schedule for Aluminum Products	
HTS Code	Description
7601	Unwrought aluminum
7604	Aluminum bars, rods and profiles
7605	Aluminum wire
7606	Aluminum plates, sheets, and strip, of a thickness exceeding 0.2 mm*
7607	Aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm
7608	Aluminum tubes and pipes
7609	Aluminum tube and pipe fittings
7616.99.51.60	Other articles of aluminum: castings
7616.99.51.70	Other articles of aluminum: forgings
*Note: This category includes can sheet for aluminum can packaging	

<sup>109</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 61.

<sup>110</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 18.

<sup>111</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 18.

<sup>112</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 18.

<sup>113</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 19.

<sup>114</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 19.

<sup>115</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 19.

<sup>116</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 20.

### 2.1.3.3 Findings and recommendations by the US Secretary of Commerce

2.22. The Aluminium Report refers to the nonexclusive lists of factors in Section 232 and its implementing regulations that the US Secretary of Commerce must consider in evaluating the effect of imports on national security.<sup>117</sup> The Aluminium Report further refers to a determination by the US Department of Commerce in 2001 that (a) national defence includes both defence of the United States directly and its ability to project military capabilities globally, and (b) the term "national security" can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defence requirements that are critical to the minimum operations of the economy and government.<sup>118</sup>

2.23. In the Aluminium Report, the US Secretary of Commerce determined that the present quantities and circumstance of aluminium imports were "weakening our internal economy" and "threaten to impair the national security as defined in Section 232".<sup>119</sup> According to the Aluminium Report, the continued rise in levels of imports of foreign aluminium threatens to impair US national security by placing the US aluminium industry at substantial risk of losing the capacity to produce aluminium and aluminium products needed to support critical infrastructure and national defence.<sup>120</sup> The Aluminium Report refers to excess production and capacity in China as a major factor contributing to the decline in US domestic aluminium production and loss of domestic production capacity.<sup>121</sup>

2.24. In arriving at this general conclusion, the Aluminium Report relies on findings including:

- a. Aluminium is essential to US national security because<sup>122</sup>: (i) aluminium is required for US national defence<sup>123</sup>; and (ii) aluminium is required for US critical infrastructure.<sup>124</sup>
- b. Domestic production of aluminium is essential to national security.<sup>125</sup>
- c. Domestic aluminium production capacity is declining because<sup>126</sup>: (i) the United States is a relatively high-cost producer<sup>127</sup>; and (ii) aluminium smelters are permanently shutting down.<sup>128</sup>
- d. Domestic production is well below demand.<sup>129</sup>
- e. US imports of aluminium are increasing in aggregate<sup>130</sup> and in particular, imports of (i) unwrought aluminium<sup>131</sup>; (ii) aluminium bars, rods and profiles<sup>132</sup>; (iii) aluminium

<sup>117</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 12.

<sup>118</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), pp. 12-13 (referring to Department of Commerce, Bureau of Export Administration: The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security, October 2001). The Aluminium Report further clarifies that while it uses these interpretations of "national defense" and "national security", it refers to the more recent 16 critical infrastructure sectors identified in Presidential Policy Directive 21 instead of the 28 critical industry sectors used by the Bureau of Export Administration in the 2001 Report. (Ibid. p. 13).

<sup>119</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 104.

<sup>120</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 104.

<sup>121</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 104.

<sup>122</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 23.

<sup>123</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 24.

<sup>124</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 36.

<sup>125</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 39.

<sup>126</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 40.

<sup>127</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 41.

<sup>128</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 48.

<sup>129</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 59.

<sup>130</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 63.

<sup>131</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 70.

<sup>132</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 71.

plate, sheet and strip<sup>133</sup>; (iv) aluminium foil<sup>134</sup>; (v) aluminium pipes and tubes<sup>135</sup>; and (vi) aluminium castings and forgings.<sup>136</sup>

- f. US aluminium exports are declining.<sup>137</sup>
- g. The United States' import to export ratio for the aluminium product categories subject to this investigation is high.<sup>138</sup>
- h. Aluminium imports are impacting the welfare of the US aluminium industry because:<sup>139</sup>
  - (i) employment in the aluminium industry is declining as several smelters were either permanently shut down or temporarily idled<sup>140</sup>; (ii) the financial status of the US aluminium industry is poor<sup>141</sup>; (iii) research and development expenditures are falling<sup>142</sup>; (iv) capital expenditures for the aluminium industry are increasing<sup>143</sup>; and (v) aluminium prices have dropped sharply.<sup>144</sup>

2.25. In the Aluminium Report, the US Secretary of Commerce recommends, due to the threat of aluminium imports to US national security, that the US President take immediate action by adjusting the level of these imports.<sup>145</sup> The recommended adjustments would be imposed on imports of: (i) unwrought aluminium (Harmonized Tariff Schedule (HTS) Code 7601); (ii) aluminium castings and forgings (HTS Codes 7616.99.51.60 and 7616.99.51.70); (iii) aluminium plate, sheet, strip, and foil (flat-rolled products) (HTS Codes 7606 and 7607); (iv) aluminium wire (HTS Code 7605); (v) aluminium bars, rods and profiles (HTS Code 7604); (vi) aluminium tubes and pipes (HTS Code 7608); and (vii) aluminium tube and pipe fittings (HTS Code 7609) based on 2017 annualized imports in those categories. The Aluminium Report states that the recommended quotas or tariffs would be designed, even after any exemptions (if granted), to enable US aluminium producers to utilize an average of 80% of their production capacity.<sup>146</sup>

2.26. In particular, the Aluminium Report recommends the following two alternative courses of action:

- a. Global quota or tariff: The Aluminium Report recommends that action should be taken by imposing on unwrought aluminium and the other aluminium product categories (i) a quota of 86.7% or (ii) a tariff rate of 7.7% in addition to any anti-dumping or countervailing duty collections applicable to such products.<sup>147</sup>
- b. Tariff on a subset of countries: The Aluminium Report alternatively recommends applying a 23.6% tariff on all imported aluminium products from China; Hong Kong, China; the Russian Federation; Venezuela; and Viet Nam; in addition to anti-dumping or countervailing duty collections applicable to aluminium products from these countries. All other countries would be limited to 100% of their 2017 import volumes.<sup>148</sup>

2.27. The Aluminium Report further states that, in selecting an alternative, the US President could determine that specific countries should be exempted from the proposed quota by granting those specific countries 100% of their prior imports in 2017 or exempting them entirely, based on an overriding economic or security interest of the United States, which could include their willingness to work with the United States to address global excess capacity and other challenges facing the US

<sup>133</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 72.

<sup>134</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 73.

<sup>135</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 74.

<sup>136</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 75.

<sup>137</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 75.

<sup>138</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 84.

<sup>139</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 89.

<sup>140</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 89.

<sup>141</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 91.

<sup>142</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 95.

<sup>143</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 97.

<sup>144</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 100.

<sup>145</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 107.

<sup>146</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 107.

<sup>147</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 108.

<sup>148</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), pp. 108-109.

aluminium industry.<sup>149</sup> The Aluminium Report also recommends an appeal process by which affected US parties could seek an exclusion from the tariff or quota imposed and notes that the US Secretary of Commerce would grant exclusions based on demonstrating (a) a lack of sufficient US production capacity of comparable products or (b) specific national security based considerations.<sup>150</sup>

#### 2.1.4 Presidential Proclamations

2.28. The US Secretary of Commerce transmitted the Steel Report and the Aluminium Report to the US President on 11 January 2018 and 19 January 2018 respectively.<sup>151</sup>

2.29. On 8 March 2018, the US President issued two proclamations adjusting imports into the United States: (a) Presidential Proclamation 9705 in relation to steel imports<sup>152</sup> and (b) Presidential Proclamation 9704 in relation to aluminium imports.<sup>153</sup> The US President concurred with the findings in the Steel and Aluminium Reports, and pursuant to the recommendations in these reports, imposed additional import duties of 25% and 10% respectively on certain steel and aluminium imports from all countries, with exemptions for imports from Canada and Mexico.<sup>154</sup> The US President welcomed any country with which the United States has a security relationship to discuss alternative ways to address the threatened impairment of US national security caused by imports from that country.<sup>155</sup> These proclamations also authorized the US Secretary of Commerce to provide relief from the additional duties for any steel or any aluminium article determined not to be produced in the United States in a sufficient and reasonably available amount or in a satisfactory quality, or based upon specific national security considerations.<sup>156</sup>

2.30. Following Presidential Proclamations 9704 and 9705, the US President issued additional proclamations adjusting steel and aluminium imports into the United States. As described in greater detail below, these proclamations removed the exemptions granted to Canada and Mexico<sup>157</sup>, granted various exemptions to certain WTO Members<sup>158</sup>, introduced import quotas on steel and aluminium imports from certain countries<sup>159</sup>, and increased the additional import duty applicable to steel imports from Türkiye to 50%.<sup>160</sup> Subsequent proclamations also note the existence of agreements between the United States and countries exempted from the additional duties.

#### 2.2 Measures at issue

2.31. In its panel request, China describes the measures it challenges as follows<sup>161</sup>:

- a. On 23 March 2018, the United States imposed 25% and 10% of additional import duty respectively on certain steel products and aluminium products from all countries except Canada, Mexico, Australia, Argentina, the Republic of Korea, Brazil, and the European Union.
- b. On 1 May 2018, the United States introduced a quota on imports of steel products from the Republic of Korea and removed the exemption from the additional import duty on imported aluminium products from the Republic of Korea.

<sup>149</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 109.

<sup>150</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), p. 109.

<sup>151</sup> Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11625; Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11619.

<sup>152</sup> Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11625.

<sup>153</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11619.

<sup>154</sup> Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11627; Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11621.

<sup>155</sup> Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11626; Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11620.

<sup>156</sup> Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11627; Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11621.

<sup>157</sup> See sections 2.2.1.2 and 2.2.2.2 below.

<sup>158</sup> See sections 2.2.1.2 and 2.2.2.2 below.

<sup>159</sup> See sections 2.2.1.3 and 2.2.2.3 below.

<sup>160</sup> See section 2.2.1.1 below.

<sup>161</sup> China's panel request, p. 1.

- c. On 1 June 2018, the United States removed the exemption from the additional import duty on imported steel products from Canada, Mexico and European Union, and removed the exemption from the additional import duty on imported aluminium products from Brazil, Canada, Mexico, and European Union. The United States also introduced quota on imports of steel products from Argentina and Brazil, and quota on imports of aluminium products from Argentina.
- d. The United States has also provided for and implemented the exclusion of certain products from certain sources, upon applications, from the additional import duties.

2.32. In addition to the above, China's panel request states that the measures at issue include, but are not limited to, the following instruments of the United States in relation to the above-referenced actions on the importation of certain steel products and aluminium products<sup>162</sup>:

- a. Presidential Proclamation 9704 of 8 March 2018;
- b. Presidential Proclamation 9705 of 8 March 2018;
- c. Presidential Proclamation 9710 of 22 March 2018;
- d. Presidential Proclamation 9711 of 22 March 2018;
- e. Presidential Proclamation 9739 of 30 April 2018;
- f. Presidential Proclamation 9740 of 30 April 2018;
- g. Presidential Proclamation 9758 of 31 May 2018;
- h. Presidential Proclamation 9759 of 31 May 2018;
- i. Presidential Proclamation 9772 of 10 August 2018;
- j. Presidential Proclamation 9776 of 29 August 2018;
- k. Presidential Proclamation 9777 of 29 August 2018;
- l. Interim Final Rule regarding Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum (US Department of Commerce);
- m. Interim Final Rule regarding Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum (the Bureau of Industry and Security, US Department of Commerce);
- n. Multiple BIS Decision Document – Steel Duty Exclusion Request and BIS Decision Document – Aluminum Duty Exclusion Request in response to various exclusion requests submitted to the Bureau of Industry and Security (the Bureau of Industry and Security, US Department of Commerce);
- o. Section 232 Tariffs on Aluminum and Steel, Additional Duty on Imports of Steel and Aluminum Articles under Section 232 of the Trade Expansion Act of 1962 (US Customs and Border Protection);

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<sup>162</sup> China's panel request, pp. 2-3.

- p. Section 232 of the Trade Expansion Act of 1962, as amended (United States Code, Title 19, Section 1862), cited in the Presidential Proclamations above for vesting authorities in the President of the United States to take the actions therein;
- q. The Effect of Imports of Steel on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended (US Department of Commerce, 11 January 2018); and
- r. The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended (US Department of Commerce, 17 January 2018).

2.33. China's panel request also states that it covers any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures.<sup>163</sup>

2.34. China explained in its first written submission that "[t]he measures at issue in this dispute consist of the additional import duties on steel and aluminum products; the country-specific exemptions granted from those duties and the related quota agreements; and the product-specific exclusion process."<sup>164</sup> In its responses to questions from the Panel, China further advances that it is challenging two distinct, broader measures, each of which comprises a set of individual measures that all address a particular category of products, i.e. steel or aluminium products.<sup>165</sup> According to China, the first broader measure comprises the set of measures addressing steel products and derivative steel articles<sup>166</sup> and the legal instruments corresponding to this set of measures consist of the Steel Report, the relevant Presidential Proclamations, and the related regulations issued by the USDOC.<sup>167</sup> China argues that at minimum, this measure consists of (1) the additional import duties imposed on steel products, including those imposed on derivative steel articles; (2) the country-specific exemptions, including those provided in relation to derivative steel articles; (3) import quotas pertaining to steel products; and (4) the product exclusion process as applied to steel products and individual product exclusions granted in relation to steel products.<sup>168</sup>

2.35. China considers that the second broader measure comprises the set of measures addressing aluminium products and derivative aluminium articles<sup>169</sup> and that the legal instruments corresponding to this set of measures consist of the Aluminium Report, the relevant Presidential Proclamations, and the related regulations issued by the USDOC.<sup>170</sup> China argues that at minimum, this measure consists of (1) the additional import duties imposed on aluminium products, including those imposed on derivative aluminium articles; (2) the country-specific exemptions, including those provided in relation to derivative aluminium articles; (3) import quotas pertaining to aluminium products; and (4) the product exclusion process as applied to aluminium products and individual product exclusions granted in relation to aluminium products.<sup>171</sup>

2.36. The following diagram depicts the Panel's understanding of China's presentation of the measures at issue and aspects of each measure at the time of the establishment of the Panel on 21 November 2018:

<sup>163</sup> China's panel request, p.3.

<sup>164</sup> China's first written submission, para. 13.

<sup>165</sup> China's response to Panel question Nos. 1.a and 1.b. See also China's response to Panel question No. 84.a, footnote 16 ("[r]eferences in China's prior submissions to 'individual measures' comprising the broader measures at issue are references to the individual elements comprising those broader measures").

<sup>166</sup> See section 2.3 below.

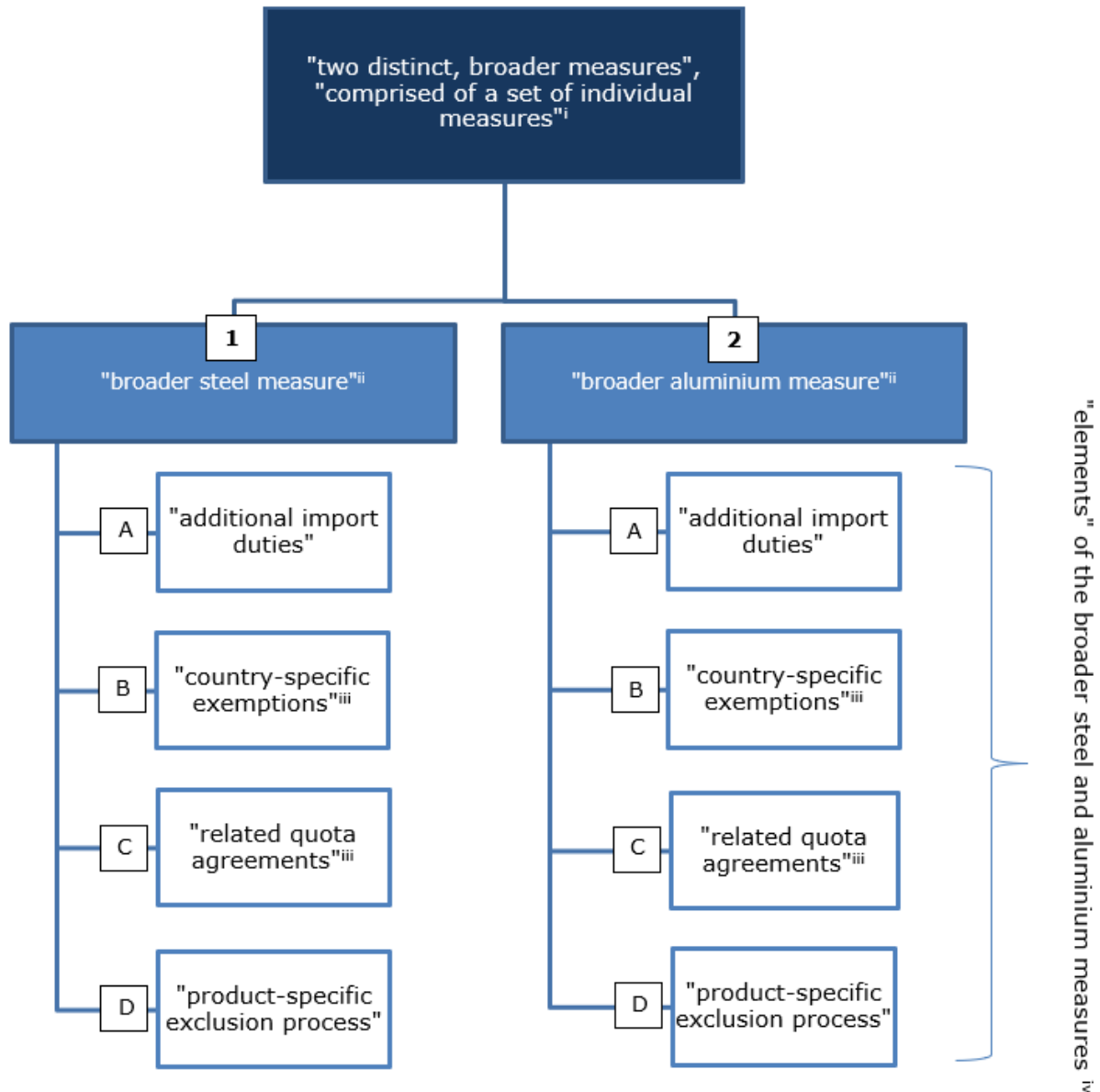
<sup>167</sup> China's response to Panel question Nos. 1.a and 1.b.

<sup>168</sup> China's response to Panel question No. 2.a.

<sup>169</sup> See section 2.3 below.

<sup>170</sup> China's response to Panel question Nos. 1.a and 1.b.

<sup>171</sup> China's response to Panel question No. 2.a.

**Figure 1: China's presentation of measures at issue at the time of Panel establishment**

<sup>i</sup> China's response to Panel question No. 1. See also first written submission, para. 13 ("[t]he measures at issue in this dispute consist of the additional import duties on steel and aluminum products; the country-specific exemptions granted from those duties and the related quota agreements; and the product-specific exclusion process") and response to Panel question No. 84, footnote 16 ("[r]eferences in China's prior submissions to 'individual measures' comprising the broader measures at issue are references to the individual elements comprising those broader measures").

<sup>ii</sup> China's response to Panel question No. 1.

<sup>iii</sup> China's response to Panel question No. 2.a ("China is not challenging whatever other conditions may have been imposed by the United States on [Members] as a 'satisfactory alternative' to the additional import duties on steel and aluminium products ... China is challenging the country-specific exemptions granted to Australia, Argentina, Brazil, and South Korea as well as the quota agreements entered into by Argentina, Brazil, and South Korea in relation to steel and aluminium products.").

<sup>iv</sup> China's response to Panel question No. 1.

2.37. The following sections describe the measures that China challenges in this dispute.



## 2.2.1 The "broader steel measure"

### 2.2.1.1 Additional import duties

2.38. Pursuant to Presidential Proclamation 9705 of 8 March 2018, all imports of steel products as specified in the Proclamation shall be subject to an additional 25% *ad valorem* duty. According to this Proclamation, this rate of duty is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles.<sup>172</sup>

2.39. Subsequently, Presidential Proclamation 9772 of 10 August 2018 imposed a 50% *ad valorem* duty on steel articles imported from Türkiye, beginning on 13 August 2018.<sup>173</sup>

### 2.2.1.2 Country-specific exemptions

2.40. Presidential Proclamation 9705 of 8 March 2018 sets out that the additional 25% *ad valorem* duty on imports of steel shall not be applied to imports from Canada and Mexico.<sup>174</sup>

2.41. Subsequently, Presidential Proclamation 9711 of 22 March 2018 amended Presidential Proclamation 9705 and introduced exemptions for Australia, Argentina, the Republic of Korea, Brazil, and the member countries of the European Union, in addition to those already granted to Canada and Mexico, until 1 May 2018.<sup>175</sup>

2.42. Presidential Proclamation 9740 of 30 April 2018 introduced further modifications by (a) extending the exemptions granted to Canada, Mexico, and the European Union until 1 June 2018<sup>176</sup>; (b) extending the exemptions for Argentina, Australia, and Brazil until an unspecified date<sup>177</sup>; and (c) extending the exemption to the Republic of Korea until an unspecified date.<sup>178</sup>

2.43. Presidential Proclamation 9759 of 31 May 2018 further extended the exemptions from the additional import duties granted to Argentina, Australia, and Brazil until an unspecified date.<sup>179</sup> This Proclamation did not extend the exemptions for Canada, Mexico, and the European Union.

### 2.2.1.3 Import quotas

2.44. Presidential Proclamation 9740 of 28 April 2018 describes how the United States and the Republic of Korea agreed upon a quota on steel imports.<sup>180</sup> Part A of the Annex to this Proclamation sets out the amendments to US Note 16 of subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS) that provide for this quota treatment<sup>181</sup>, and Part B of the Annex to the Proclamation details the annual aggregate limits for the applicable quotas.<sup>182</sup>

2.45. Presidential Proclamation 9759 of 31 May 2018 introduced quotas on steel products from Argentina and Brazil.<sup>183</sup> The Annex to this Proclamation details the annual aggregate limits for the applicable quotas.<sup>184</sup>

### 2.2.1.4 Product-specific exclusion process

2.46. Presidential Proclamation 9705 of 8 March 2018 authorized the US Secretary of Commerce to provide relief from the additional duties set out therein for any steel article determined not to be

<sup>172</sup> Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11627.

<sup>173</sup> Presidential Proclamation 9772, (Exhibit CHN-14), p. 40430.

<sup>174</sup> Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), pp. 11626-11627.

<sup>175</sup> Presidential Proclamation 9711, (Exhibit CHN-9 and USA-11), pp. 13361-13363.

<sup>176</sup> Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), p. 20685.

<sup>177</sup> Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), p. 20684.

<sup>178</sup> Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), p. 20684.

<sup>179</sup> Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15), p. 25858.

<sup>180</sup> Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), p. 20683.

<sup>181</sup> Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), p. 20685.

<sup>182</sup> Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), pp. 20697-20705.

<sup>183</sup> Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15), pp. 25857-25858.

<sup>184</sup> Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15), p. 25861.

produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and also to provide such relief based on specific national security considerations.<sup>185</sup>

2.47. On 19 March 2018, the US Department of Commerce issued the requirements for submissions requesting exclusions from the remedies instituted in the Presidential Proclamations adjusting imports of steel and aluminium into the United States (March Interim Final Rule).<sup>186</sup> This document specifies the requirements and process by which parties in the United States may submit requests for exclusions from the duties instituted by the US President, including how parties in the United States may submit objections to exclusion requests. It further identifies the relevant time periods for submitting such exclusion requests and any objections to those requests, the method for submitting such requests, and the information that must be included in such requests and objections.<sup>187</sup>

2.48. On 11 September 2018, US Department of Commerce issued a document titled "Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum" (September Interim Final Rule).<sup>188</sup> This document introduces revisions to the requirements set out in the March Interim Final Rule and "changes to the exclusion processes in this rule ... informed by both the comments received in response to the March 19 rule and the Department's experience with managing the exclusion process".<sup>189</sup> According to this document, the modifications were aimed at improving transparency, effectiveness, and fairness of the product exclusion process, including by adding a rebuttal and surrebuttal process.<sup>190</sup>

2.49. Presidential Proclamation 9777 of 29 August 2018 authorized the US Secretary of Commerce to provide relief from quantitative limitations on steel articles adopted pursuant to Section 232, including those set forth in Presidential Proclamations 9740 and 9759, on the same basis as the Secretary is authorized to provide relief from the duty established in Presidential Proclamation 9705.<sup>191</sup>

## 2.2.2 The "broader aluminum measure"

### 2.2.2.1 Additional import duties

2.50. Pursuant to Presidential Proclamation 9704 of 8 March 2018, all imports of aluminium articles as specified in the Proclamation shall be subject to an additional 10% *ad valorem* duty. According to this Proclamation, this rate of duty is in addition to any other duties, fees, exactions, and charges applicable to such imported aluminium articles.<sup>192</sup>

### 2.2.2.2 Country-specific exemptions

2.51. Presidential Proclamation 9704 of 8 March 2018 sets out that the additional 10% *ad valorem* duty on imports of aluminium shall not be applied to imports from Canada and Mexico.<sup>193</sup>

2.52. Subsequently, Presidential Proclamation 9710 of 22 March 2018 amended Presidential Proclamation 9704 and introduced exemptions for Australia, Argentina, the Republic of Korea, Brazil, and the member countries of the European Union, in addition to those already granted to Canada and Mexico, until 1 May 2018.<sup>194</sup>

<sup>185</sup> Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11627. Presidential Proclamation 9711 of 22 March 2018 amended Presidential Proclamation 9705 of 8 March 2018 by introducing the following language: "Such relief may be provided to directly affected parties on a party-by-party basis taking into account the regional availability of particular articles, the ability to transport articles within the United States, and any other factors as the Secretary deems appropriate". (Presidential Proclamation 9711, (Exhibit CHN-9 and USA-11), p. 13364).

<sup>186</sup> March Interim Final Rule, (Exhibit CHN-17 and USA-20), pp. 12106-12112.

<sup>187</sup> March Interim Final Rule, (Exhibit CHN-17 and USA-20), p. 12110.

<sup>188</sup> September Interim Final Rule, (Exhibit CHN-18 and USA-21), pp. 46026-46065.

<sup>189</sup> September Interim Final Rule, (Exhibit CHN-18 and USA-21), p. 46027.

<sup>190</sup> September Interim Final Rule, (Exhibit CHN-18 and USA-21), p. 46027.

<sup>191</sup> Presidential Proclamation 9777, (Exhibit CHN-16 and USA-18), p. 45026.

<sup>192</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11621.

<sup>193</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), pp. 11620-11621.

<sup>194</sup> Presidential Proclamation 9710, (Exhibit CHN-8 and USA-12), p. 13357.

2.53. Presidential Proclamation 9739 of 30 April 2018 introduced further modifications by (a) extending the exemptions granted to Canada, Mexico, and the European Union until 1 June 2018<sup>195</sup>; (b) extending the exemption for Argentina, Australia, and Brazil until an unspecified date <sup>196</sup>; and (c) ending the exemption granted to the Republic of Korea.<sup>197</sup>

2.54. Presidential Proclamation 9758 of 31 May 2018 further extended the exemptions from the additional import duties granted to Argentina and Australia until an unspecified date.<sup>198</sup> This Proclamation did not extend the exemptions for Brazil, Canada, Mexico, and the European Union.<sup>199</sup>

### 2.2.2.3 Import quotas

2.55. Presidential Proclamation 9758 of 31 May 2018 introduced quotas for aluminium products from Argentina.<sup>200</sup> The Annex to this Proclamation details the annual aggregate limits for the applicable quotas.<sup>201</sup>

### 2.2.2.4 Product-specific exclusion process

2.56. Presidential Proclamation 9704 of 8 March 2018 authorized the US Secretary of Commerce to provide relief from the additional duties set out therein for any aluminium article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and also to provide such relief based on specific national security considerations.<sup>202</sup>

2.57. On 19 March 2018, the US Department of Commerce issued the requirements for submissions requesting exclusions from the remedies instituted in the Presidential Proclamations adjusting imports of steel and aluminium into the United States.<sup>203</sup> This document specifies the requirements and process by which parties in the United States may submit requests for exclusions from the duties instituted by the US President, including how parties in the United States may submit objections to exclusion requests. It further identifies the relevant time periods for submitting such exclusion requests and any objections to those requests, the method for submitting such requests, and the information that must be included in such requests and objections.<sup>204</sup>

2.58. On 11 September 2018, US Department of Commerce issued a document titled "Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum".<sup>205</sup> This document introduces revisions to the requirements set out in the March Interim Final Rule and "changes to the exclusion processes in this rule ... informed by both the comments received in response to the March 19 rule and the Department's experience with managing the exclusion process".<sup>206</sup> According to this document, the modifications were aimed at improving transparency, effectiveness, and fairness of the product exclusion process, including by adding a rebuttal and surrebuttal process.<sup>207</sup>

2.59. Presidential Proclamation 9776 of 29 August 2018 authorized the US Secretary of Commerce to provide relief from quantitative limitations on aluminium articles adopted pursuant to Section 232,

<sup>195</sup> Presidential Proclamation 9739, (Exhibit CHN-10 and USA-14), p. 20678.

<sup>196</sup> Presidential Proclamation 9739, (Exhibit CHN-10 and USA-14), pp. 20677-20678.

<sup>197</sup> Presidential Proclamation 9739, (Exhibit CHN-10 and USA-14), pp. 20678-20679.

<sup>198</sup> Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16), pp. 25849-25850.

<sup>199</sup> Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16), p. 25850.

<sup>200</sup> Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16), pp. 25850-25851.

<sup>201</sup> Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16), pp. 25853-25855.

<sup>202</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11621. Presidential Proclamation 9710 of 22 March 2018 amended Presidential Proclamation 9704 of 8 March 2018 by introducing the following language: "Such relief may be provided to directly affected parties on a party-by-party basis taking into account the regional availability of particular articles, the ability to transport articles within the United States, and any other factors as the Secretary deems appropriate". (Presidential Proclamation 9710, (Exhibit CHN-8 and USA-12), p. 13358).

<sup>203</sup> March Interim Final Rule, (Exhibit CHN-17 and USA-20), pp. 12106-12112.

<sup>204</sup> March Interim Final Rule, (Exhibit CHN-17 and USA-20), p. 12110.

<sup>205</sup> September Interim Final Rule, (Exhibit CHN-18 and USA-21), pp. 46026-46065.

<sup>206</sup> September Interim Final Rule, (Exhibit CHN-18 and USA-21), p. 46027.

<sup>207</sup> September Interim Final Rule, (Exhibit CHN-18 and USA-21), p. 46027.

including those set forth in Presidential Proclamation 9758, on the same basis as the Secretary is authorized to provide relief from the duty established in Presidential Proclamation 9704.<sup>208</sup>

### **2.3 Measures amended, modified, or replaced after the establishment of the Panel**

2.60. In its responses to questions from the Panel after the first meeting and in its second written submission, China describes certain factual and legal developments of the measures at issue that occurred after China's request for the establishment of the Panel.<sup>209</sup> China requests the Panel to consider within its terms of reference Presidential Proclamation 9980 imposing additional import duties on derivative steel and aluminium products and exempting certain WTO Members from said duties.<sup>210</sup>

## **3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

3.1. China requests the Panel to find that<sup>211</sup>:

- a. The United States has acted inconsistently with Article 2.1 of the Agreement on Safeguards and, consequently, Article XIX:1(a) of the GATT 1994, because the United States has applied safeguard measures to certain imported steel and aluminium products without first having determined, pursuant to the subsequent provisions of the Agreement on Safeguards, that such products are being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994;
- b. The United States has acted inconsistently with Article 2.2 of the Agreement on Safeguards, because the United States has not applied the safeguard measures to imported products irrespective of their sources;
- c. The United States has acted inconsistently with Article 4.1 of the Agreement on Safeguards, because the United States has not properly determined that there is serious injury, or threat thereof, to a domestic industry;
- d. The United States has acted inconsistently with Article 4.2 of the Agreement on Safeguards, because the United States has failed to properly evaluate all relevant factors having a bearing on the situation of the domestic industry and has failed to demonstrate the existence of a causal link between increased imports and serious injury or the threat thereof, including by not attributing injury caused by factors other than increased imports;
- e. The United States has acted inconsistently with Article 5.1 of the Agreement on Safeguards, because the United States has applied safeguard measures beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment;
- f. The United States has acted inconsistently with Article 7 of the Agreement on Safeguards, because the United States has applied safeguard measures without making provision for their application only for the period necessary to prevent or remedy serious injury and to facilitate adjustment, without limitation to four years, and without making provision for progressive liberalization at regular intervals;
- g. The United States has acted inconsistently with Article 11.1(a) of the Agreement on Safeguards because the United States has taken emergency action on imports of particular products as set forth in Article XIX of the GATT 1994, without such action conforming with that provision applied in accordance with the Agreement on Safeguards;

<sup>208</sup> Presidential Proclamation 9776, (Exhibit CHN-15 and USA-19), p. 45020.

<sup>209</sup> China's second written submission, para. 119; response to Panel question No. 86.

<sup>210</sup> China's response to Panel question No. 86.

<sup>211</sup> China's first written submission, para. 177. See also China's panel request, pp. 3-4.

- h. The United States has acted inconsistently with Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards, and, consequently, Article XIX:2 of the GATT 1994, because the United States has failed to comply with any of the notification and consultation obligations set out in these provisions;
- i. The United States has acted inconsistently with Article II:1(a) and (b) of the GATT 1994, because the United States has not provided treatment no less favourable to steel and aluminium products originating in China than that provided for in the United States' Schedule annexed to the GATT 1994;
- j. The United States has acted inconsistently with Article I:1 of the GATT 1994, because, with respect to customs duties and charges of any kind imposed on or in connection with importation, and with respect to all rules and formalities in connection with importation, the United States has not accorded certain advantages, favours, privileges or immunities granted to products originating in certain other Members immediately and unconditionally to the like products originating in the territories of all other Members, including China;
- k. The United States has acted inconsistently with Article X:3(a) of the GATT 1994, because the United States has failed to administer its laws, regulations, decisions and rulings in relation to the measures at issue in a uniform, impartial and reasonable manner.

3.2. China requests that the Panel recommend that the United States bring the challenged measures into conformity with its obligations under the relevant covered agreements.

3.3. The United States requests that the Panel find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and so report to the DSB.<sup>212</sup>

#### **4 ARGUMENTS OF THE PARTIES**

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annex B).

#### **5 ARGUMENTS OF THE THIRD PARTIES**

5.1. The arguments of certain third parties are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annex C).

#### **6 INTERIM REVIEW**

6.1. On 29 June 2022, the Panel issued its Interim Report to the parties. On 3 August 2022, the United States submitted written requests for review of the Interim Report. China did not submit any requests for review of the Interim Report. Neither party requested an interim review meeting. On 31 August 2022, China submitted comments on the United States' requests for review.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the requests made at the interim review stage, including certain requests discussed in greater detail below.

6.3. The Panel notes that the requests for review of the Interim Report include requests to provide more detailed summaries of the parties' arguments. Throughout the Report, the Panel has summarized the parties' arguments in order to facilitate understanding of the contested issues addressed in the Panel's reasoning and findings. The Panel has not comprehensively reproduced every aspect of the parties' arguments, which are more fully reflected in the executive summaries annexed to this Report. Rather, the Panel has summarized the relevant arguments in the context of its own objective assessment of the matter before it, having regard for its mandate and discretion to make such findings as will assist the DSB in making the recommendations or rulings provided for in the relevant covered agreements. In this regard, it is generally within the discretion of a panel to

<sup>212</sup> United States' first written submission, para. 186.

decide which arguments or evidence it addresses or relies on in reaching its findings.<sup>213</sup> Subject to the explanations and modifications described below, the Panel considers that the parties' arguments are adequately reflected and addressed in this Report, including the annexes thereto, to fulfil the requirements of the Panel's mandate under the DSU.<sup>214</sup>

6.4. In addition, the Panel has made typographical and other editorial modifications in the Report, including in response to the requests for review. The discussion below refers to the numbering of sections, paragraphs, and footnotes in the Final Report.

## 6.1 Article XIX of the GATT 1994 and the Agreement on Safeguards

6.5. The United States requests the Panel to include in **paragraph 7.77** "additional support" for its conclusions regarding the terms "pursuant to" in Article 11.1(c) of the Agreement on Safeguards. In particular, the United States argues that the Panel's conclusions in this paragraph are supported by the ordinary meaning of the terms "sought, taken or maintained" in Article 11.1(c). China considers that incorporating the United States' arguments on the ordinary meaning of the words "sought, taken or maintained" in this paragraph is unnecessary and requests that the Panel deny the changes requested by the United States.

6.6. In section 7.7.2 of its Report, the Panel has examined the terms "pursuant to" in Article 11.1(c) considering their ordinary meaning and having regard for the relevant context provided by terms used elsewhere in the Agreement on Safeguards, including those that appear to convey a relationship of consistency with the requirements of another provision of the covered agreements. The Panel has further considered the use of terms in the three authentic language versions of the Agreement on Safeguards in accordance with the customary rules of interpretation of public international law. The Panel has also found support for its conclusions in the object and purpose of the Agreement on Safeguards, as expressed in its preamble, and the negotiating history of Article 11.1(c). Accordingly, the Panel does not consider it necessary to additionally address the United States' arguments concerning the terms "sought, taken or maintained" in Article 11.1(c) to determine the meaning of "pursuant to" in that provision.

6.7. The Panel has taken note of the United States' arguments concerning the meaning of "sought" in Article 11.1(c), which are related to the United States' contention that formal notification of safeguard measures to the WTO is a "condition precedent" to the applicability of safeguard disciplines. As part of its objective assessment of the legal characterization of the measures under Article 11.1(c), the Panel has taken into account the manner in which the measures at issue were notified to relevant WTO bodies or committees. Recalling the nature of the Panel's inquiry on the applicability of safeguard disciplines to the measures at issue, the Panel does not consider it necessary to address in further detail the United States' arguments on the meaning of "sought" in Article 11.1(c). In this respect, the Panel additionally recalls its mandate and discretion to make such findings as will assist the DSB in making the rulings and recommendations provided for in the relevant covered agreements.

6.8. The United States requests the Panel to revise **paragraph 7.84** to accurately reflect its argument that "a key condition precedent to the exercise of [the right to apply a safeguard measure] is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult." According to the United States, by suggesting "the United States' [contends] that, based on Article XIX:2 of the GATT 1994, formal notification of safeguard measures to the WTO is a 'condition precedent' to the applicability of safeguard disciplines", the Panel misstates the United States' position. China requests that the Panel deny the changes requested by the United States as the argument that "invocation" is a "condition precedent" for the applicability of safeguards disciplines is, in fact, an argument that formal notification under Article XIX:2 of the GATT 1994 is a "condition precedent". Should the Panel nevertheless accept the United States' request, China requests that the Panel incorporate reference to China's responsive arguments.

6.9. The Panel notes that, in its submissions, the United States refers variously to "notice", "invocation", and "invocation through notice" under Article XIX:2 of the GATT 1994 as a "condition

<sup>213</sup> See e.g. Appellate Body Reports, *Ukraine – Ammonium Nitrate*, para. 6.42; *US – COOL*, para. 299; *EC – Poultry*, para. 135; *EC – Hormones*, para. 135.

<sup>214</sup> See section 7.1 below.



precedent" for applicability of safeguard disciplines. The Panel has accordingly retained its summary of the United States' arguments in this respect and revised the corresponding footnote to clarify the various terms used by the United States in its submissions to the Panel.

## 6.2 Article XXI(b) of the GATT 1994

6.10. The United States requests an addition to **paragraph 7.106** of certain arguments it puts forward on the interpretation of Article XXI(b), including its arguments on which phrase in Article XXI(b) is modified by subparagraphs (i) and (ii) and the reconciliation of different language versions of Article XXI(b). The United States also requests that **paragraph 7.107** include a more complete description of the complainant's arguments on the interpretation of Article XXI(b). China disagrees with the United States' request and considers that the Panel has adequately described the United States' proposed interpretation of Article XXI(b), including by reference to relevant submissions of the United States. In addition, China does not consider further elaboration of China's interpretation of Article XXI(b) to be necessary.

6.11. Recalling its approach to reflecting the parties' arguments on the issues raised in this dispute, the Panel declines to expand the summaries of the parties' arguments in these paragraphs. In response to the United States' request, the Panel further notes that modifications to the Interim Report discussed below include expanded reference to arguments that the United States requested to be reproduced in these paragraphs.

6.12. The United States requests that the Panel delete the **footnote to paragraph 7.112** and instead address its substantive content in the body of the Report, particularly concerning the United States' arguments on the differences in the French and Spanish versions of Article XXI(b) and the reconciliation of the three language versions of the text. In the United States' view, the Panel does not engage with these arguments and "misstates them in a footnote reference". The United States requests further engagement with these arguments and, specifically, that the Panel "explain why it is incorrect to read the sentence [in Article XXI(b)] as consisting of three alternatives" for each subparagraph. China requests that the Panel deny the United States' request. In China's view, the Panel has adequately explained the basis for its finding in the relevant paragraph and has made sufficient reference to the United States' arguments in the accompanying footnote, which makes clear that the Panel evaluated but did not consider it necessary to further explore the parties' arguments on the reconciliation of the three authentic texts.

6.13. The Panel acknowledges the United States' indication in its request for interim review that it "agrees (in the interpretation that best reconciles the three language versions) with the Panel that each of the paragraphs 'describe[s] the action referred to in Article XXI(b)', but mediated through the relative clause 'which it considers'." The Panel has accordingly retained the statement of its understanding that the parties agree that the subparagraphs qualify and relate to the "action" in Article XXI(b), notwithstanding some disagreement as to the precise basis for this conclusion. The Panel has also expanded the summary of the United States' arguments regarding the reconciliation of texts in the three authentic language versions and its contention that, under this reconciled interpretation, the terms of the provision still form a "single relative clause" that begins with the phrase "which it considers" and contains the entirety of each subparagraph.

6.14. Regarding the United States' request for further elaboration in the body of the Report, the Panel briefly reviews certain points of its analysis of the United States' arguments to clarify the overall context in which the footnote appears in the Panel's reasoning regarding the interpretation of Article XXI(b) in this dispute. In section 7.8.2, the Panel focuses specifically on the United States' argument that "which it considers" qualifies the subparagraphs of Article XXI(b) within a "single relative clause" that entirely reserves the subparagraphs to the judgment of the invoking Member. In accordance with Article 3.2 of the DSU, the Panel's textual analysis addresses the function and ordinary meaning of the subparagraphs as describing certain kinds of permitted "action", including reference to the structure and punctuation of Article XXI of the GATT 1994. In this regard, the Panel concludes that the paragraphs and subparagraphs form alternative endings to a complete sentence under Article XXI, and the opening terms of each of the subparagraphs ("relating to" and "taken") qualify the "action" in paragraph (b). Moreover, the subparagraphs are exhaustive in establishing the circumstances in which a Member may take the "action" under Article XXI(b).



6.15. Following these textual conclusions, the Panel addresses grammatical aspects of the parties' arguments as well as other aspects of textual interpretation and ordinary meaning, particularly the principle of effective treaty interpretation and the exhaustive types of "action" specified in the subparagraphs of Article XXI(b). The Panel additionally addresses relevant context in Articles XXII and XXIII of the GATT 1994 and the DSU, the object and purpose of maintaining the balance of rights and obligations under the covered agreements, and non-treaty materials submitted by the parties relating to the interpretation of Article XXI of the DSU. Based on the entirety of this analysis, the Panel concludes that the terms "which it considers" in Article XXI(b) do not qualify the subparagraphs to render them "self-judging" or "non-justiciable" as argued by the United States.

6.16. In this manner, the Panel has addressed multiple aspects of the interpretation of Article XXI(b) with specific reference to the United States' argument regarding a "single relative clause" purportedly encompassing the subparagraphs of that provision. As one element of this analysis, the Panel has noted the concordance of plural and feminine terms in the French and Spanish versions of Article XXI(b) to support the qualification of the term "action" by the subparagraphs. In other parts of its assessment, the Panel has also examined the ordinary meaning of actions "relating to" specified "materials" and "traffic" and to actions "taken in time of" specified circumstances. The Panel has further accounted for the structure of Article XXI(b) and the textual separation of the subparagraphs into an enumerated list, which corresponds to the role of the subparagraphs as alternative sentence endings that collectively and exhaustively delimit the scope of Article XXI(b).

6.17. The Panel recalls its mandate and discretion to make such findings as will assist the DSB in making the recommendations or rulings provided for in the relevant covered agreements. In assessing the contested issues of interpretation regarding Article XXI(b) and the review of its invocation by a Member in dispute settlement proceedings, the Panel did not find it necessary to address in greater detail the parties' arguments on the reconciliation of the three authentic texts of the provision. In addition, the United States does not explain the relevance of these arguments to the Panel's overall analysis and conclusions on whether a "single relative clause" beginning with the phrase "which it considers" renders Article XXI(b) "self-judging" or "non-justiciable" in the sense argued by the United States. To the extent the United States' request concerns the weight assigned to its arguments and the merits of the Panel's analysis, the Panel notes that interim review is not an appropriate stage for relitigating arguments already submitted by the parties and addressed to the extent necessary in the Panel's findings.<sup>215</sup> In these circumstances, the Panel has modified this footnote to expand the summary of the parties' arguments and to clarify that the Panel does not consider it necessary for the purposes of this dispute to address in further detail the parties' arguments on the reconciliation of the three authentic texts in relation to the contested issues of interpretation under of Article XXI(b) and its application to the measures at issue in this dispute.

6.18. The United States requests that the Panel introduce certain modifications to **paragraphs 7.119 and 7.120** in order to more accurately reflect its arguments on English grammar rules in the context of the interpretation of Article XXI(b). China does not object to the proposed clarification to paragraph 7.119 but requests that the Panel deny certain changes requested by the United States. In particular, China disagrees with the incorporation of additional details of the United States' arguments as the Panel is not obligated to address every specific argument raised by the parties.

6.19. The Panel has made the requested modification in paragraph 7.119 to clarify the context regarding subparagraphs (i) and (ii) of Article XXI(b) in which the United States referred to the rules of English grammar. The Panel declines the additional suggested text in paragraph 7.120 in which the Panel is addressing grammatical considerations as part of its overall assessment of the contested issues of interpretation under Article XXI(b) in this dispute. In particular, the Panel's analysis in these paragraphs notes the absence of a definitive rule of grammar supporting the United States' construction of the provision as containing a "single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member. The Panel has modified these paragraphs to clarify that, with respect to the interpretation of Article XXI(b), the qualification of the noun "action" in paragraph (b) by the subparagraphs is not solely determined by rigid application of grammar but follows from the ordinary meaning of these terms, as elaborated in the remainder of the Panel's analysis.

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<sup>215</sup> See e.g. Panel Reports, *India – Solar Cells*, para. 6.24; *Indonesia – Iron or Steel Products*, Annex A-3, paras. 2.3-2.4; *US – Poultry (China)*, para. 6.32.

6.20. The United States requests that the Panel expand the summary of arguments in **paragraph 7.133** on the interpretation of the terms "emergency in international relations" in Article XXI(b)(iii), and that the Panel address these arguments in **paragraph 7.137** setting out the Panel's interpretation of these terms. China requests that the Panel deny the United States' requests to further address its argument concerning the definition of the term "emergency in international relations". In China's view, the elaboration on the United States' interpretation of the term "emergency" in Article XXI(b)(iii) does not constitute a "key" argument as commented by the United States in its requests for interim review.

6.21. As noted, the Panel has not comprehensively reproduced every aspect of the parties' arguments but rather has referred to the parties' arguments in order to facilitate understanding of the contested issues addressed in the Panel's reasoning and findings. In this connection, the Panel has focused on the gravity or severity of an "emergency in international relations" within the meaning of Article XXI(b)(iii), particularly regarding the impact on international relations of situations falling under that provision. Moreover, the Panel has interpreted the terms "emergency in international relations" in accordance with Article 3.2 of the DSU and its mandate to make such findings as will assist the DSB in making the recommendations or rulings provided for in the covered agreements. In section 7.8.3, the Panel has addressed the interpretation of Article XXI(b)(iii) to the extent necessary to assess whether, based on the evidence and arguments submitted by the parties, the measures at issue were "taken in time of war or other emergency in international relations". On the basis of the foregoing, the Panel does not consider it necessary to further address the United States' arguments in this regard.

### 6.3 Appendices

6.22. The United States requests that the Panel incorporate the analysis and conclusions contained in **Appendices A and B** into the main body of the Report. The United States considers the materials described in these appendices to be integral to the Panel's analysis and notes that they were a subject of disagreement and argument by the parties. China does not consider it necessary for the Panel to incorporate the analysis and conclusions currently reflected in the appendices into its Report.

6.23. The Panel recalls its conclusion in Appendix A that its review of the negotiating history of Article 11.1(c) of the Agreement on Safeguards confirms its interpretation of that provision. The Panel has also concluded that the materials examined in Appendix B support the general conclusion that the terms of Article XXI(b) of the GATT 1994 establish a right to take action for the protection of essential security interests in the conditions and circumstances described in the three subparagraphs. The appendices set out in greater detail the specific materials examined, the arguments advanced by the parties, and the bases for the Panel's conclusions. The Panel therefore declines the United States' request, and the Panel has modified the references to the appendices in the Report to specify which appendix is being referred to in the Panel's analysis.

## 7 FINDINGS

### 7.1 Mandate under the DSU

7.1. The Panel was established by the DSB in accordance with Article 6 of the DSU with standard terms of reference, as provided in Article 7.1 of the DSU, "[t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB" in the complainant's panel request and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements". Pursuant to Article 7.2 of the DSU, the Panel is required to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

7.2. The matter referred to the DSB in the complainant's panel request comprises claims under the GATT 1994 and the Agreement on Safeguards with respect to the measures at issue.<sup>216</sup> In response to these claims, the United States requests that the Panel find that the United States has invoked its essential security interests under Article XXI(b) of the GATT 1994 and so report to the DSB.<sup>217</sup> Although the United States acknowledges that "the Panel has jurisdiction over this dispute, because

<sup>216</sup> See section 3 above.

<sup>217</sup> United States' first written submission, para. 186.

the DSB has established the Panel to examine the matter set out in the panel request"<sup>218</sup>, it argues that its "invocation of Article XXI is a non-justiciable issue as Article XXI makes its invocation self-judging by the Member taking the security action".<sup>219</sup> In the United States' view, "[i]t follows that the Panel may not make findings on the complainant's claims because they are not appropriate or suitable for adjudication by the Panel and may not make recommendations because no finding of WTO-inconsistency can be made."<sup>220</sup>

7.3. In response to questions from the Panel, the United States clarifies that "the United States is not requesting that the Panel refrain from applying the rules and procedures of the DSU" but rather submits that "[the United States'] approach reflects an outcome consistent with a panel's terms of reference from the DSB and function of a panel under the DSU, and a proper interpretation of Article XXI(b) under the Vienna Convention" on the Law of Treaties (Vienna Convention).<sup>221</sup> According to the United States, the Panel's "jurisdiction" conferred by Articles 7.1 and 11 of the DSU is constrained by "the ordinary meaning of the terms in Article XXI(b)", as interpreted in accordance with the customary rules of interpretation of public international law. The United States thus clarifies that its arguments on "justiciability" and the "political" nature of the questions involved rest on the interpretation of the terms of Article XXI(b) in accordance with the interpretive principles of Article 3.2 of the DSU and the Panel's terms of reference.<sup>222</sup> As addressed in greater detail below, the complainant also refers to these interpretive principles and the requirements of the Panel's terms of reference in contesting the United States' characterization of Article XXI(b) as "non-justiciable".<sup>223</sup>

7.4. Based on its terms of reference, the Panel's mandate under the DSU is to examine the matter raised by the complainant in its panel request and to address the United States' invocation of Article XXI(b) of the GATT 1994. The purpose of this examination is to enable the Panel to make such findings as will assist the DSB in discharging its responsibilities under the covered agreements. In fulfilling this mandate, the Panel is mindful of its function and duty under Article 11 of the DSU to make 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. The Panel is further guided by the role of WTO dispute settlement, as recognized in Article 3.2 of the DSU, to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.<sup>224</sup>

7.5. The Panel observes that the parties affirm these fundamental principles regarding the assessment of the complainant's claims and the United States' invocation of Article XXI(b) of the GATT 1994 under the rules and procedures of the DSU.<sup>225</sup> However, the parties dispute the application of these principles to the matter before the Panel, particularly with respect to the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue, and the relationship between those disciplines and Article XXI(b) of the GATT 1994. Regarding the United States' invocation of Article XXI(b), the parties further dispute the extent to which the terms of this provision reserve discretion to the invoking Member taking action that it considers necessary for the protection of its essential security interests, as well as the applicability of this

<sup>218</sup> United States' first written submission, para. 183.

<sup>219</sup> United States' first written submission, para. 185. The United States submits that "'jurisdiction' can be defined as the extent of power of the Panel under the DSU to exercise its judicial authority or decide a particular case", while "'justiciability', by contrast, relates to whether a matter is appropriate or suitable for adjudication by a court, or in this context, whether an issue is subject to findings by the Panel under the DSU." (Ibid. para. 183).

<sup>220</sup> United States' first written submission, para. 185. The United States further argues that "the self-judging text included in Article XXI" reflects a recognition that "issues of essential security are inherently political in nature, and there are no legal criteria by which a Member's consideration of its essential security interests can be objectively determined". (Ibid.).

<sup>221</sup> United States' response to Panel question Nos. 26-29.

<sup>222</sup> See United States' response to Panel question No. 54 (arguing that "it is not the political nature of the issues covered under Article XXI(b) that lead to an interpretation that the provision is self-judging" but rather "[i]t is the text of Article XXI(b) that establishes its self-judging nature"); see also United States' opening statement at the first meeting of the Panel, paras. 3-4 and 49.

<sup>223</sup> See section 7.8 below.

<sup>224</sup> See Appellate Body Reports, *Japan – Alcoholic Beverages II*, para. 31; *EC – Computer Equipment*, para. 82; Panel Report, *US – Section 301 Trade Act*, para. 7.75.

<sup>225</sup> See e.g. United States' response to Panel question No. 25 ("the Panel's function is to objectively assess the matter before it by interpreting Article XXI(b) in accordance with the customary rules of interpretation"); China's response to Panel question No. 26.

provision to the challenged measures based on the arguments and evidence submitted in these proceedings.

7.6. The Panel is required under the DSU to assess these disputed issues in an objective manner and to make findings on the basis of that assessment that will assist the DSB in making the recommendations or rulings provided for in the covered agreements. In furtherance of this mandate, the Panel will examine the matter within its terms of reference by assessing the applicability of and conformity with the relevant provisions of the GATT 1994 and the Agreement on Safeguards, based on the interpretive principles of Article 3.2 of the DSU and the arguments and evidence presented by the parties. As prescribed by Article 12.7 of the DSU, the Panel will set out its relevant findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it makes.

## 7.2 Order of analysis

7.7. In considering the appropriate order of analysis of the issues outlined above, the Panel has discretion to structure its analysis taking into account the specific measures, claims, arguments, and relevant provisions at issue.<sup>226</sup> Having considered the arguments presented by the parties in this dispute<sup>227</sup>, the Panel will first address issues concerning its terms of reference and the identification of the measures at issue. Following this determination of the measures within its terms of reference, the Panel will examine the complainant's claims that the measures are inconsistent with certain provisions of the covered agreements.

7.8. In principle, the obligations set forth in the WTO covered agreements apply cumulatively.<sup>228</sup> In this dispute, the parties disagree as to whether the WTO rules on safeguards set forth in Article XIX of the GATT 1994 and the Agreement on Safeguards apply to the measures at issue, and the complainant raises other claims under the GATT 1994 which are independent of those contested issues of applicability. Taking these circumstances into account, along with the operation of the measures at issue and the manner in which the parties have presented their arguments, the Panel considers it appropriate to begin its assessment with the claims under Articles I:1, II:1, and X:3 of the GATT 1994.

7.9. The Panel will first assess the consistency of the relevant measures with Article II:1 of the GATT 1994 and the relevant commitments in the United States' Schedule of Concessions. The Panel will then assess the claims under Article I:1 of the GATT 1994 concerning most-favoured-nation treatment. The Panel will next address the claims under Article X:3 of the GATT 1994 concerning the administration of measures. The Panel will then assess the remainder of the complainant's claims under Article XIX of the GATT 1994 and the Agreement on Safeguards, including the parties' disagreement as to the applicability of this provision and agreement to the measures at issue.

7.10. The Panel will next address the United States' invocation of Article XXI(b) of the GATT 1994 in relation to any measures falling within the Panel's terms of reference found to be inconsistent with provisions of the covered agreements. The Panel will assess the arguments and evidence

<sup>226</sup> See Appellate Body Reports, *Canada – Wheat Exports and Grain Imports*, para. 126; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.229; Panel Reports, *India – Solar Cells*, paras. 7.41-7.42; *Russia – Pigs (EU)*, para. 7.30. In disputes involving security exceptions under Article XXI(b) of the GATT 1994 and Article 73 of the TRIPS Agreement, previous panels have exercised discretion regarding the order of analysis based on their consideration of the specific circumstances of the dispute, including arguments made by the parties and other relevant provisions at issue. (See Panel Reports, *Russia – Traffic in Transit*, paras. 7.20-7.26; *Saudi Arabia – IPRs*, paras. 7.1-7.3).

<sup>227</sup> While not bound by the presentation of claims and arguments by the parties, the Panel notes that the parties have taken different views on the appropriate order of analysis of the issues in this dispute. The complainant considers that the Panel should commence with examination of the claims under the Agreement on Safeguards and Article XIX of the GATT 1994, followed by other claims under the GATT 1994, before turning to the United States' invocation of Article XXI(b). The United States maintains that the Panel should begin by addressing Article XXI(b) as the invocation of this provision means that there are no findings that would assist the DSB in making recommendations or giving rulings as to the complainant's claims. (United States' response to Panel question Nos. 21-23).

<sup>228</sup> The Panel is also mindful that there may be circumstances in disputes where more than one covered agreement applies and it is appropriate to begin the analysis with provisions from an agreement that "deals specifically, and in detail" with the measures at issue. (See Appellate Body Reports, *Brazil – Desiccated Coconut*, pp. 12-13; *Canada – Periodicals*, p. 19; and *EC – Bananas III*, para. 204; Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.76-7.79; *US – Customs Bond Directive*, paras. 7.170-7.171).

submitted by the parties in relation to the measures at issue beginning with the parties' disagreement as to the meaning of the terms of Article XXI(b) of the GATT 1994 interpreted in accordance with Article 3.2 of the DSU and the customary rules of interpretation of public international law. On the basis of this assessment, the Panel will provide its findings and recommendations in accordance with the DSU.

### **7.3 Terms of reference and measures at issue**

#### **7.3.1 Introduction**

7.11. In this section, the Panel will examine issues raised by the parties relating to Article 6.2 of the DSU, which provides in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.12. The parties have raised a number of issues relating to the requirements of Article 6.2 of the DSU and the Panel's terms of reference.<sup>229</sup> Specifically, China argues that the Panel's terms of reference include the additional import duties imposed on derivative steel and aluminium products after the Panel's establishment and the country-specific exemptions granted from those duties.<sup>230</sup> The United States argues that the duties on derivative products did not exist at the time of the Panel's establishment and thus fall outside the Panel's terms of reference.<sup>231</sup>

7.13. The Panel will accordingly examine whether it can make findings and recommendations on the duties applicable to derivative steel and aluminium products and the related exemptions.

#### **7.3.2 Additional duties on derivative steel and aluminium products and the corresponding country exemptions**

7.14. On 24 January 2020, the US President issued Presidential Proclamation 9980 under the authority granted by Section 232.<sup>232</sup> Presidential Proclamation 9980 introduced additional duties of 25% on derivative steel products and 10% on derivative aluminium products with effect from 8 February 2020.<sup>233</sup> This Presidential Proclamation also exempted from these duties: (a) derivative steel products from Australia, Argentina, Brazil, the Republic of Korea, Canada, and Mexico; and (b) derivative aluminium products from Australia, Argentina, Canada, and Mexico.<sup>234</sup>

7.15. China requests the Panel to include the additional duties and corresponding country exemptions imposed by Presidential Proclamation 9980 in its terms of reference.<sup>235</sup> According to China, Presidential Proclamation 9980 falls within the scope of China's panel request as a related measure that supplements the prior measures imposed on steel and aluminium products.<sup>236</sup> In particular, China considers that the duties on derivative steel and aluminium products amend the scope of the initial import duties on steel and aluminium products by extending the initial duties to

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<sup>229</sup> In addition to the issues discussed in this section, the parties also dispute whether China's panel request adequately identifies measures concerning the administration of the product exclusion process. As the Panel declines to make findings on the claims concerning the administration of the product exclusion process, the Panel does not find it necessary to further address whether measures related to those claims are within its terms of reference. See section 7.6 below.

<sup>230</sup> See section 2.3 above. While China initially argued that "[a]ny exclusion process that may be established in relation to derivative steel articles ... and any exclusions granted pursuant to that process" would also fall within the Panel's terms of reference, it subsequently clarified that it was not challenging any product-specific exclusions that may be granted in relation to the additional import duties on derivative products. (See China's response to Panel question No. 2.a, fns 25 and 26, and China's second written submission, para. 119, fn 71).

<sup>231</sup> United States' response to Panel question No. 87.

<sup>232</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), pp. 5281 and 5283.

<sup>233</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5283.

<sup>234</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5283.

<sup>235</sup> China's second written submission, para. 119; response to Panel question No. 86.

<sup>236</sup> China's second written submission, para. 123.

derivative products.<sup>237</sup> The United States notes that Presidential Proclamation 9980 was issued more than a year after the establishment of the Panel, and therefore, the duties on derivative products did not exist at the time of the Panel's establishment, were not and could not have been identified in China's panel request, and fall outside the Panel's terms of reference.<sup>238</sup>

7.16. The Panel begins by noting that the measures within a panel's terms of reference are generally those in existence at the time of the establishment of the panel. This does not preclude a panel, in certain circumstances, from reviewing measures enacted or modified after its establishment, taking into account the specific terms used in a panel request and in light of the aim of the dispute settlement mechanism to provide a positive solution to the dispute.<sup>239</sup> In assisting the DSB in making its recommendations, a panel may review measures that come into existence after panel establishment that bear a close relationship to measures described in the panel request.<sup>240</sup> The Panel will thus assess the relationship between the measures identified in China's panel request and the additional duties on derivative products imposed by Presidential Proclamation 9980, including the corresponding exemptions set out therein.

7.17. In its panel request, China challenges the "25 percent and 10 percent of additional import duty respectively on certain steel products and aluminum products, from all countries except Canada, Mexico, Australia, Argentina, Korea, Brazil and the European Union".<sup>241</sup> China describes these duties and exemptions as "actions on the importation of certain steel products and aluminium products".<sup>242</sup> China's panel request also states that the measures at issue include, but are not limited to, a number of instruments of the United States in relation to the previously referenced actions on the importation of certain steel and aluminium products.<sup>243</sup> Among those instruments are Presidential Proclamations 9704 and 9705 and the Steel and Aluminium Reports.<sup>244</sup> China's panel request further states that it "also covers any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures".<sup>245</sup>

7.18. The Panel notes that Presidential Proclamation 9980 explicitly refers to the Steel and Aluminium Reports and earlier Presidential Proclamations 9704 and 9705 on aluminium and steel, respectively, in setting out its legal basis and justification. In particular, Presidential Proclamation 9980 refers to the direction in Presidential Proclamations 9704 and 9705 to the US Secretary of Commerce to "inform [the US President] of any circumstances that in the Secretary's opinion might indicate the need for further action under section 232".<sup>246</sup> The US President decided to "adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles"<sup>247</sup> specifically based on the Secretary's assessments that foreign producers of derivative steel and aluminium products "have increased shipments of such articles to the United States to circumvent the duties on steel and aluminum articles imposed in Presidential Proclamations 9704 and 9705"<sup>248</sup> and that "imports of these derivative articles threaten to undermine the actions taken to address the risk to the national security of the United States found in Presidential Proclamations

<sup>237</sup> China's response to Panel question No. 87.

<sup>238</sup> United States' response to Panel question No. 87.

<sup>239</sup> Articles 3.7 and 11 of the DSU. See also Appellate Body Reports, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 121 and 125; *EC – Chicken Cuts*, paras. 156-159; and *Chile – Price Band System*, paras. 126-144; Panel Reports, *US – Ripe Olives from Spain*, para. 7.12; *US – Washing Machines*, paras. 7.248-7.249; *EC – Fasteners (China)*, para. 7.34; and *Colombia – Ports of Entry*, paras. 7.52-7.54.

<sup>240</sup> See Panel Reports, *US – Ripe Olives from Spain*, para. 7.14; *Russia – Pigs (EU)*, para. 7.160; *US – Carbon Steel*, para. 8.11; *India – Agricultural Products*, para. 7.78-7.80; *EC – Fasteners (China)*, para. 7.38; *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subpara. 27; and *Japan – Film*, paras. 10.8-10.9. Similarly, previous panels and Appellate Body reports have considered (a) whether the terms of the panel request are broad enough to cover amendments to the measures and (b) whether the measures remain in essence the same as those identified in the panel request. Appellate Body Report, *Chile – Price Band System*, paras. 135-139. See also Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 190-191 and 383-384; *EC – Selected Customs Matters*, para. 184; *EC – Chicken Cuts*, paras. 156-161; Panel Reports, *US – Ripe Olives from Spain*, para. 7.14; *Indonesia – Chicken*, paras. 7.84-7.85; and *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, para. 7.524.

<sup>241</sup> China's panel request, p. 1.

<sup>242</sup> China's panel request, p. 1.

<sup>243</sup> China's panel request, pp. 2-3.

<sup>244</sup> China's panel request, pp. 1-2. See also section 2.2 above.

<sup>245</sup> China's panel request, p. 3.

<sup>246</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5281.

<sup>247</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5283.

<sup>248</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5282.

9704 and 9705".<sup>249</sup> In this respect, the measures introduced by Presidential Proclamation 9980 have a close connection to the instruments identified in China's panel request.<sup>250</sup>

7.19. The legal basis for Presidential Proclamation 9980 is Section 232.<sup>251</sup> Section 232 in turn authorizes the US President, if he concurs with the findings in the US Secretary of Commerce's reports, "to adjust the imports of [an] article and its derivatives so that such imports will not threaten to impair the national security".<sup>252</sup> In Presidential Proclamation 9980, the US President notes the importance of stabilizing domestic capacity utilization in the steel and aluminium industries at the levels recommended by the US Secretary of Commerce in the Steel and Aluminium Reports.<sup>253</sup> The US President further relies on the Secretary's conclusion that "reducing imports of the derivative articles ... would reduce circumvention and facilitate the adjustment of imports that Proclamation 9704 and Proclamation 9705, as amended, made to increase domestic capacity utilization".<sup>254</sup> This further demonstrates the connection between Presidential Proclamation 9980 on derivative products and the earlier Presidential Proclamations 9704 and 9705 stemming from Section 232 and the Steel and Aluminium Reports.

7.20. The duties and exemptions on derivative steel and aluminium products are also explicitly linked to the objectives of the earlier measures taken under Section 232 identified in China's panel request. Presidential Proclamation 9980 provides that imports of certain derivative steel and aluminium products have significantly increased since tariffs and quotas were imposed on certain steel and aluminium products, and that the net effect of this increase has been to "undermine the purpose of the proclamations adjusting imports of aluminum and steel articles to remove the threatened impairment of the national security".<sup>255</sup> This Proclamation states that the duties on derivative steel and aluminium products are "necessary and appropriate to address circumvention that is undermining the effectiveness of the adjustment of imports made in Proclamation 9704 and Proclamation 9705".<sup>256</sup> This confirms that Presidential Proclamation 9980 supplements Presidential Proclamations 9704 and 9705 in pursuit of the same objectives under Section 232 based on recommendations by the Secretary of Commerce in the Steel and Aluminium Reports.

7.21. For the foregoing reasons, the Panel concludes that Presidential Proclamation 9980 and the actions set out therein, i.e. the imposition of duties on derivative steel and aluminium products and corresponding exemptions, bear a close connection to the earlier measures on steel and aluminium that are identified in China's panel request. Moreover, China's panel request was formulated so as to encompass such supplements, extensions, or related measures. The Panel therefore finds that these measures are within its terms of reference.

### 7.3.3 Conclusion

7.22. Based on the foregoing and in light of the specific circumstances of the present dispute, the Panel finds that the additional import duties imposed on derivative steel and aluminium products after the Panel's establishment, and the country-specific exemptions granted from those duties, are within its terms of reference.

<sup>249</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5282.

<sup>250</sup> The Panel also notes that Presidential Proclamation 9980 defines its product scope with reference to the steel and aluminium articles envisaged in Presidential Proclamations 9704 and 9705. (Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5282).

<sup>251</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5283 ("Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and *its derivatives* that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security of the United States" (emphasis added)).

<sup>252</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(c)(1)(A).

<sup>253</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), pp. 5281-5282.

<sup>254</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5282.

<sup>255</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5282.

<sup>256</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225), p. 5283.



## 7.4 Article II:1 of the GATT 1994

### 7.4.1 Introduction

7.23. China argues that the United States' additional import duties on steel and aluminium products are in violation of Article II:1(a) and (b) of the GATT 1994.<sup>257</sup> In China's view, the additional duties constitute "ordinary customs duties" under Article II:1(b) and are also effective "on importation".<sup>258</sup> Even if they were not "ordinary customs duties", China considers that these measures would not be covered by Article II:2, and must therefore constitute "other duties or charges ... imposed on or in connection with importation".<sup>259</sup> In China's view, such "other duties or charges" would be imposed inconsistently with Article II:1(b) because they were not recorded in the United States' Schedule of Concessions.<sup>260</sup> Finally, China argues that the measures impose duties in excess of those provided for in that Schedule, as the covered products could previously enter the United States at rates ranging from duty-free to 6.5%, and the additional import duties exceed those bound levels for all tariff headings and subheadings covered by the measures.<sup>261</sup>

7.24. The United States has not advanced any arguments or evidence contesting the claims under Articles II:1(a) and (b) of the GATT 1994.<sup>262</sup>

7.25. Article II:1 of the GATT 1994 provides in relevant part:

(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.26. Additionally, the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 provides in relevant part:

Members hereby agree as follows:

1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".

<sup>257</sup> China's first written submission, paras. 6, 42, and 151; opening statement at the first meeting of the Panel, para. 10; response to Panel question No. 5, paras. 25 and 32; and second written submission, para. 129. China's arguments in this respect include the 50% additional duty in case of steel imports from Türkiye. (See China's first written submission, para. 155). China also considers that the additional import duties on derivative steel and aluminium products are inconsistent with Article II:1. (See China's second written submission, paras. 130-134; responses to Panel's questions following the first meeting, Annex I; and comments on the United States' response to Panel question No. 87, para. 26).

<sup>258</sup> China's first written submission, paras. 151-152; second written submission, para. 129.

<sup>259</sup> China's first written submission, para. 153.

<sup>260</sup> China's first written submission, para. 154; second written submission, para. 129.

<sup>261</sup> China's first written submission, para. 155.

<sup>262</sup> See United States' closing statement at the second meeting of the Panel, para. 7 (indicating that the United States "has imposed duties on certain steel and aluminum products on a non-MFN basis and in excess of the levels set out in its WTO Goods Schedule").

7.27. Article II:1(a) of the GATT 1994 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule.<sup>263</sup> The first sentence of Article II:1(b) prohibits the imposition of ordinary customs duties on importation in excess of those rates set forth in a Member's Schedule.<sup>264</sup> The second sentence of Article II:1(b) prohibits the imposition of other duties or charges of any kind on or in connection with importation in excess of those imposed on the date of entry into force of the GATT 1994 (or those directly and mandatorily required to be imposed thereafter by legislation in force on that date).<sup>265</sup> According to the Understanding on the Interpretation of Article II:1(b), the nature and level of any such "other duties or charges" must be recorded in a Member's Schedule.<sup>266</sup>

7.28. In this dispute, the complainant focuses its arguments on inconsistency with Article II:1(b) and alleges a consequential violation of Article II:1(a).<sup>267</sup> Prior WTO adjudicators have considered that Article II:1(b) prohibits "a specific kind of practice that will always be inconsistent with paragraph (a)" because application of duties in excess of what is provided for in a Member's Schedule necessarily constitutes "less favourable" treatment within the meaning of Article II:1(a).<sup>268</sup> Given these considerations, the Panel will assess whether the challenged measures result in the imposition of duties in excess of what is provided for in the United States' Schedule under Article II:1(b), and thus accord less favourable treatment than that provided for in the Schedule in violation of Article II:1(a).

7.29. The Panel will begin by identifying the concessions and obligations for the relevant products in the United States' Schedule before turning to the treatment of those products under the challenged measures, specifically concerning:

- a. the additional duties of 25% on steel products and 10% on aluminium products;
- b. the additional duty of 50% on steel products from Türkiye; and
- c. the additional duties of 25% on derivative steel products and 10% on derivative aluminium products.<sup>269</sup>

#### 7.4.2 Additional duties on steel and aluminium products

7.30. In March 2018, the United States imposed additional duties of 25% on steel products and 10% on aluminium products.<sup>270</sup> The following tables identify the steel and aluminium products covered by the additional duties and provide a comparative analysis of the United States' bound rates and its additional duty rates in relation to those products. The United States' Schedule does not record any "other duties or charges" with respect to the steel and aluminium products at issue.<sup>271</sup>

<sup>263</sup> See Appellate Body Reports, *Argentina – Textiles and Apparel*, para. 45; *Colombia – Textiles*, para. 5.34. See also Panel Reports, *EC – Chicken Cuts*, para. 7.63; *EC – IT Products*, para. 7.99.

<sup>264</sup> See Appellate Body Reports, *India – Additional Import Duties*, para. 150; *Colombia – Textiles*, para. 5.35.

<sup>265</sup> See Appellate Body Report, *India – Additional Import Duties*, para. 151; Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.78.

<sup>266</sup> See Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.78. See also Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.84-7.90.

<sup>267</sup> China's first written submission, para. 150.

<sup>268</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 45-47. See also Panel Reports, *EC – Chicken Cuts*, paras. 7.64-7.65; *EC – IT Products*, para. 7.747.

<sup>269</sup> See China's first written submission, paras. 6, 42, and 151-155; opening statement at the first meeting of the Panel, para. 10; response to Panel question No. 5, paras. 25 and 32; responses to Panel's questions following the first meeting, Annex I; and second written submission, paras. 129-134.

<sup>270</sup> See Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10); Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9). See also sections 2.2.1.1 and 2.2.2.1 for a detailed description.

<sup>271</sup> United States Bound Concessions at the HS 6-digit subheading level.

**Table 2: Steel Products Subject to Additional Duties under Section 232**

Steel Products Subject to Additional Duties			
#	HTS Code	Rates of customs duties	
		Bound rates <sup>272</sup>	Additional duty
1.	7206-7215	0	+25%
2.	7216 (except certain subheadings) <sup>273</sup>		
3.	7217-7229		
4.	7301.10.00		
5.	7302.10		
6.	7302.40.00		
7.	7302.90.00		
8.	7304-7306		

Source: United States Bound Concessions at the HS 6-digit subheading level; Presidential Proclamation 9705<sup>274</sup>

**Table 3: Aluminium Products Subject to Additional Duties under Section 232**

Aluminium Products Subject to Additional Duties			
#	HTS Code	Rates of customs duties	
		Bound rates <sup>275</sup>	Additional duty
1.	7601	0-2.6%	+10%
2.	7604	1.5-5%	
3.	7605	2.6-4.2%	
4.	7606	2.7-6.5%	
5.	7607	0-5.8%	
6.	7608	0-5.7%	
7.	7609	5.7%	
8.	7616.99.51	2.5% <sup>276</sup>	

Source: United States Bound Concessions at the HS 6-digit subheading level; Presidential Proclamation 9704<sup>277</sup>

<sup>272</sup> Pursuant to Chapters 72 and 73 of the HTSUS, the generally applied rate for these products is also 0% for all relevant subheadings.

<sup>273</sup> Exceptions for subheadings 7216.61.00, 7216.69.00, and 7216.91.00.

<sup>274</sup> See Harmonized Tariff Schedule of the United States (2018) Revision 4, (Exhibit CHN-36); United States Schedule of Concessions, (Exhibit CHN-39); and Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9). The Panel additionally relied on data from the WTO's Consolidated Tariff Schedule (CTS) Database and online versions of the United States' harmonized tariff schedule, <https://hts.usitc.gov/current> (accessed 22 June 2022).

<sup>275</sup> Pursuant to Chapter 76 of the HTSUS, the generally applied rate for the relevant subheadings are as follows: for HTS Code 7601, 0-2.6%; for HTS Code 7604, 1.5-5%; for HTS Code 7605, 2.6-4.2%; for HTS Code 7606, 2.7-6.5%; for HTS Code 7607, 0-5.8%; for HTS Code 7608, 5.7%; for HTS Code 7609, 5.7%; and for HTS Code 7616.99.51, 2.5%. In respect of HTS Code 7608, tariff lines 7608.10.00 and 7608.20.000, as described in the United States' Schedule, are subdivided into two categories of (A) and (B). The former applies to products certified for use in civil aircraft, for which a bound rate of zero applies. The latter applies to all other products, for which a bound rate of 5.7% applies. The HTSUS does not draw a distinction between (A) and (B) by simply providing for a rate of 5.7%.

<sup>276</sup> In WTO document WT/Let/493, the heading is elaborated to 7616.99.50 ("Other"), for which the duty rate is listed as 2.5%. In the HTSUS, this heading is elaborated to 7616.99.51 ("Other"), for which the duty rate is listed as 2.5%. China lists this figure as 0-2.5%, which appears to be an error. (See China's first written submission, para. 155).

7.31. The Panel recalls that the first sentence of Article II:1(b) prohibits the imposition of ordinary customs duties on importation in excess of those rates set forth in a Member's Schedule, whereas the second sentence prohibits the imposition of all other duties or charges of any kind on or in connection with importation except as recorded in a Member's Schedule. To fall within the scope of Article II:1(b), the additional duties must therefore qualify as either "ordinary customs duties" under the first sentence, or "other duties or charges" under the second sentence.

7.32. The term "ordinary customs duties" is not defined in the GATT 1994.<sup>278</sup> However, previous WTO panels and the Appellate Body have highlighted several factors that are relevant to this characterization. First, the word "ordinary" has been defined as referring to duties "of the usual kind, not singular or exceptional"<sup>279</sup> or "occurring in regular custom or practice".<sup>280</sup> Second, the "customs dut[y]" must be imposed "on [the product's] importation"; in other words, the obligation to pay must accrue at the moment of or by virtue of the product's importation into the Member's customs territory.<sup>281</sup> Third, neither the form which the duty takes, nor the basis on which it is calculated, will necessarily be dispositive.<sup>282</sup> Rather, panels have examined duties by their design and structure<sup>283</sup> and found certain duties and charges, based on their particular features, not to constitute "ordinary customs duties" in the sense of Article II:1(b).<sup>284</sup> The term "all other duties or charges of any kind" has been interpreted broadly as a residual category, which covers all duties or charges on or in connection with importation that are neither "ordinary customs duties" nor the duties or charges expressly provided for in Article II:2 of the GATT 1994.<sup>285</sup>

7.33. In the present dispute, China argues that the additional duties of 25% on steel products and 10% on aluminium products constitute "ordinary customs duties" inconsistent with the first sentence of Article II:1(b) of the GATT 1994. In particular, China highlights the following features:

- a. the additional duties are effective upon the importation of those steel and aluminium products into the United States<sup>286</sup>;
- b. the additional duties are charged at an *ad valorem* rate<sup>287</sup>; and
- c. the additional duties are explicitly defined as "ordinary customs dut[ies]" in the relevant Presidential Proclamations.<sup>288</sup>

<sup>277</sup> See Harmonized Tariff Schedule of the United States (2018) Revision 4, (Exhibit CHN-36); United States Schedule of Concessions, (Exhibit CHN-39); and Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10). The Panel additionally relied on data from the WTO's CTS Database and online versions of the United States' harmonized tariff schedule, <https://hts.usitc.gov/current> (accessed 22 June 2022).

<sup>278</sup> See Appellate Body Report, *Chile – Price Band System*, para. 265.

<sup>279</sup> See Panel Report, *Chile – Price Band System*, para. 7.51.

<sup>280</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.83.

<sup>281</sup> Appellate Body Report, *China – Auto Parts*, para. 158. In *Dominican Republic – Safeguard Measures*, the panel thus noted that: "the expression 'ordinary customs duties' in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute 'customs duties' in the strict sense of the term" and "this expression does not cover all possible extraordinary or exceptional duties collected in customs." (Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85).

<sup>282</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.84 (referring to Appellate Body Report, *Chile – Price Band System*, paras. 216 and 271-278). See also Appellate Body Reports, *China – Auto Parts*, para. 162 (noting that "the time at which a charge is collected or paid is not decisive"); *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 416 (noting in passing that "it is unusual that a tariff concession inscribed in a Member's Schedule would be limited in time").

<sup>283</sup> See Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.85 (noting that to determine whether the duties are "ordinary customs duties", panels "must consider the design and structure of the measures concerned"). See also Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55; Panel Report, *Russia – Tariff Treatment*, para. 7.92.

<sup>284</sup> See e.g. Appellate Body Reports, *Peru – Agricultural Products*, paras. 5.70-5.76; *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 167 and 171; Panel Reports, *Peru – Agricultural Products*, paras. 7.373-7.374; *Dominican Republic – Import and Sale of Cigarettes*, para. 7.115.

<sup>285</sup> Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.113; *Dominican Republic – Safeguard Measures*, para. 7.79. See also Appellate Body Report, *India – Additional Import Duties*, para. 157.

<sup>286</sup> China's first written submission, para. 152.

<sup>287</sup> China's first written submission, para. 151.

<sup>288</sup> China's first written submission, para. 151.

7.34. In the alternative, China argues that even if they were not "ordinary customs duties", the additional duties would not be covered by Article II:2 of the GATT 1994, and must therefore constitute "other duties or charges ... imposed on or in connection with importation" under the second sentence of Article II:1(b).<sup>289</sup> China contends that such "other duties or charges" would be imposed inconsistently with Article II:1(b) because they were not recorded in the United States' Schedule of Concessions.<sup>290</sup>

7.35. In the Panel's view, the additional duties at issue bear certain features which suggest that they may best be characterized as "ordinary customs duties" for the purposes of Article II:1(b). In particular, the additional duties are: (a) levied on all imports of the covered steel and aluminium products; (b) calculated on an *ad valorem* basis; (c) described as "tariffs" and "ordinary customs dut[ies]" in the relevant Presidential Proclamations; and (d) operationalized as "ordinary customs dut[ies]" and inscribed in the "Rates of Duty – General" column of the United States' tariff schedule.<sup>291</sup> These duties are also clearly applicable to products "on their importation into the territory" of the United States in the sense of Article II:1(b). Moreover, the United States has not contested China's characterization of the duties under Article II:1(b), but rather accepts that it has imposed duties "in excess of the levels set out in its WTO Goods Schedule".<sup>292</sup> Accordingly, the Panel considers that the additional duties are "ordinary customs duties" under the first sentence of Article II:1(b).

7.36. However, the Panel is cognizant that the additional duties also bear other features which reflect the particular process under Section 232 through which they were imposed and maintained. First, the additional duties were not inscribed through an amendment or replacement of the existing MFN tariff, but rather through inscription in subchapter III of chapter 99 of the HTSUS, titled "Temporary Modifications Established Pursuant to Trade Legislation".<sup>293</sup> As such, the duties expressly apply "in addition" to any pre-existing tariffs.<sup>294</sup> Second, although the additional duties are generally applicable on an MFN basis, they are subject to a number of country exemptions.<sup>295</sup> Finally, while the additional duties are not expressly imposed for a temporary period, certain aspects of their implementation suggest that they may not be intended as permanent adjustments to the MFN tariff rate. These include the aforementioned inscription in subchapter III of chapter 99, as well as the stipulated requirement in the relevant Presidential Proclamations that "[t]he Secretary shall continue to monitor" these duties.<sup>296</sup> In the circumstances of this dispute and mindful of these other features, the Panel will also consider whether the additional duties as "other duties or charges" would be inconsistent with the second sentence of Article II:1(b).

7.37. As "ordinary customs duties" under Article II:1(b), it is evident that the additional duties of 25% on steel products and 10% on aluminium products exceed the United States' bound rates of 0% and 0-6.5% on steel and aluminium products respectively.<sup>297</sup> These products are therefore not exempt from ordinary customs duties in excess of those set forth in the United States' Schedule, in a manner inconsistent with the first sentence of Article II:1(b). Moreover, the United States' Schedule does not record any "other duties or charges" with respect to the steel and aluminium products at issue.<sup>298</sup> Even if considered to be "other duties or charges", the additional duties would

<sup>289</sup> China's first written submission, para. 153.

<sup>290</sup> China's first written submission, para. 154; second written submission, para. 129.

<sup>291</sup> See Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10); Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9).

<sup>292</sup> See United States' closing statement at the second meeting of the Panel, para. 7.

<sup>293</sup> See Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), Annex; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), Annex.

<sup>294</sup> See Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11621; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11627 (stating that the duties apply "*in addition to* any other duties, fees, exactions or charges applicable" to the imported articles). (emphasis added)

<sup>295</sup> See sections 2.2.1.2 and 2.2.2.2 for a detailed description. See also Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11626. See also Presidential Proclamation 9710, (Exhibit CHN-8 and USA-12); Presidential Proclamation 9711, (Exhibit CHN-9 and USA-11); Presidential Proclamation 9739, (Exhibit CHN-10 and USA-14); Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13); Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16); and Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15). These will be elaborated in more detail in the context of China's claim under Article I:1 of the GATT 1994.

<sup>296</sup> See Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10); Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9).

<sup>297</sup> See para. 7.30 above.

<sup>298</sup> United States Bound Concessions at the HS 6-digit subheading level.

therefore exceed those imposed on the entry into force of the GATT 1994 or directly and mandatorily required to be imposed thereafter, in a manner inconsistent with the second sentence of Article II:1(b).

7.38. Accordingly, the Panel considers that the additional duties are inconsistent with the first sentence of Article II:1(b) as "ordinary customs duties" exceeding the United States' bound rates for the relevant products. Even if the additional duties were considered "other duties or charges", the Panel considers that these duties would also be inconsistent with the second sentence of Article II:1(b). On either basis, the additional duties on steel and aluminium products would therefore be inconsistent with Article II:1(b) of the GATT 1994. As the additional duties are inconsistent with Article II:1(b) by exceeding the levels in the United States' Schedule, the United States has necessarily accorded treatment less favourable than that provided for in its Schedule. The Panel therefore concludes that the additional duties are also inconsistent with Article II:1(a) of the GATT 1994.

#### 7.4.3 Additional duty on steel products from Türkiye

7.39. In August 2018, an additional duty of 50% was imposed on steel products from Türkiye.<sup>299</sup> As this duty is applicable to the same steel products as listed in Table 2 above, the United States' bound rates in respect of those products have already been set out in that Table.<sup>300</sup>

7.40. As previously noted, China argues that the additional duties on steel and aluminium products constitute "ordinary customs duties" under the first sentence of Article II:1(b), and in the alternative, "other duties or charges" under the second sentence of Article II:1(b).<sup>301</sup> These arguments include the additional duty of 50% on steel products in the case of Türkiye.<sup>302</sup> China further argues that covered products could previously enter the United States at rates ranging from duty-free to 6.5%, and for all tariff headings and subheadings covered by the measures, the additional import duties of 50% in the case of steel products from Türkiye exceed those bound levels.<sup>303</sup>

7.41. In the Panel's view, the additional duty on steel products from Türkiye raises similar issues in terms of its characterization as either an "ordinary customs dut[y]" or "other dut[y] or charge[]" under Article II:1(b). For reasons similar to those outlined above<sup>304</sup>, the Panel considers that the additional duty is an "ordinary customs dut[y]" under the first sentence of Article II:1(b). In particular, the additional duty is: (a) levied on all imports of the covered steel products from Türkiye; (b) calculated on an *ad valorem* basis; (c) described as a "tariff" or "ordinary customs duty" in the relevant Presidential Proclamations; and (d) operationalized as an "ordinary customs duty" and inscribed in the "Rates of Duty – General" column of the United States' tariff schedule.<sup>305</sup>

7.42. As an "ordinary customs dut[y]", it is evident that the additional duty of 50% on steel products from Türkiye exceeds the United States' bound rates for the steel products at issue (0%), in a manner inconsistent with the first sentence of Article II:1(b). Moreover, even if considered to be "other duties or charges" under the second sentence<sup>306</sup>, the United States' Schedule does not record any "other duties or charges" with respect to the steel products at issue.<sup>307</sup> On either basis, the additional duty on steel products from Türkiye would therefore be inconsistent with Article II:1(b) of the GATT 1994. As the additional duty on steel products from Türkiye exceeds the levels set out in the United States' Schedule, it follows that the United States has accorded treatment less favourable than that provided for in its Schedule. The Panel therefore concludes that the additional duty on steel products from Türkiye is also inconsistent with Article II:1(a) of the GATT 1994.

<sup>299</sup> See Presidential Proclamation 9772, (Exhibit CHN-14). See also section 2.2.1.1 for a detailed description.

<sup>300</sup> See para. 7.30 above.

<sup>301</sup> See paras. 7.33-7.34 above.

<sup>302</sup> See China's first written submission, para. 155.

<sup>303</sup> China's first written submission, para. 155.

<sup>304</sup> See para. 7.35 above.

<sup>305</sup> See Presidential Proclamation 9772, (Exhibit CHN-14).

<sup>306</sup> These considerations may be relevant in light of other features of the additional duty on steel products from Türkiye, such as: (a) being inscribed in subchapter III of chapter 99 of the HTSUS titled "Temporary Modifications Established Pursuant to Trade Legislation"; (b) applying "in addition" to any pre-existing duties; and (c) solely applying to Türkiye. (See Presidential Proclamation 9772, (Exhibit CHN-14)).

<sup>307</sup> United States Bound Concessions at the HS 6-digit subheading level.



#### 7.4.4 Additional duties on derivative steel and aluminium products

7.43. In January 2020, the United States announced additional duties of 25% on derivative steel and 10% on derivative aluminium products.<sup>308</sup> The following tables identify the derivative steel and aluminium products covered by these additional duties, and provide a comparative analysis of the United States' bound rates and its additional duty rates in relation to those products. As with the other steel and aluminium products, the United States' Schedule similarly does not record any "other duties or charges" with respect to these products.<sup>309</sup>

**Table 4: Derivative Steel Products Subject to Additional Duties under Section 232**

Derivative Steel Products Subject to Additional Duties			
#	HTS Code	Rates of customs duties	
		Bound rates <sup>310</sup>	Additional duty
1.	7317.00.30	0-2.5%	+25%
2.	7317.00.5503		
3.	7317.00.5505		
4.	7317.00.5507		
5.	7317.00.5560		
6.	7317.00.5580		
7.	7317.00.6560		
8.	8708.10.30		
9.	8708.29.21		

Source: United States Bound Concessions at the HS 6-digit subheading level; Presidential Proclamation 9980<sup>311</sup>

**Table 5: Derivative Aluminium Products Subject to Additional Duties under Section 232**

Derivative Aluminium Products Subject to Additional Duties			
#	HTS Code	Rates of customs duties	
		Bound rates <sup>312</sup>	Additional duty
1.	7614.10.50	2.5-5.7%	+10%
2.	7614.90.20		
3.	7614.90.40		
4.	7614.90.50		
5.	8708.10.30		
6.	8708.29.21		

Source: United States Bound Concessions at the HS 6-digit subheading level; Presidential Proclamation 9980<sup>313</sup>

<sup>308</sup> See Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225).

<sup>309</sup> United States Bound Concessions at the HS 6-digit subheading level.

<sup>310</sup> Pursuant to Chapters 73 and 87 of the HTSUS, the generally applied rate for these products is also 0-2.5% for all relevant subheadings.

<sup>311</sup> See Harmonized Tariff Schedule of the United States (2020) Revision 5, (Exhibit CHN-47); United States Schedule of Concessions pertaining to duties on derivative articles, (Exhibit CHN-48); and Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225). The Panel additionally relied on data from the WTO's CTS Database and online versions of the United States' harmonized tariff schedule, <https://hts.usitc.gov/current> (accessed 22 June 2022).

<sup>312</sup> Pursuant to Chapters 76 and 87 of the HTSUS, the generally applied rate for these products is 0-5.7% for all relevant subheadings. In respect of HTS Code 8708.29.21, WTO document WT/Let/1098 lists this sub-heading 8708.29.21 at a bound duty rate of 2.5%. In the HTSUS, sub-heading 8708.29.21 is duty free.

<sup>313</sup> See Harmonized Tariff Schedule of the United States (2020) Revision 5, (Exhibit CHN-47); United States Schedule of Concessions pertaining to duties on derivative articles, (Exhibit CHN-48); and Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225). The Panel additionally relied on data from the WTO's CTS Database and online versions of the United States' harmonized tariff schedule, <https://hts.usitc.gov/current> (accessed 22 June 2022).



7.44. China submits that the additional duties on derivative steel and aluminium products constitute "ordinary customs duties", as they were also imposed on *ad valorem* basis and are classified as ordinary customs duties in the HTSUS and Presidential Proclamation 9980.<sup>314</sup> As in respect of the other duties, China argues that the additional duties on derivative products are effective "on importation" and exceed the bound rates set out in the United States' Schedule.<sup>315</sup> Finally, China similarly argues that, even if the Panel were to conclude that they do not constitute "ordinary customs duties", these duties would constitute "other duties or charges" prohibited by Article II:1(b).<sup>316</sup>

7.45. In the Panel's view, the additional duties on derivative steel and aluminium products raise similar issues in terms of their characterization as either "ordinary customs duties" or "other duties or charges" under Article II:1(b). For reasons similar to those outlined above<sup>317</sup>, the Panel considers that the additional duties on derivative products are "ordinary customs duties" under the first sentence of Article II:1(b). In particular, the additional duties are: (a) levied on all imports of the covered derivative steel and aluminium products; (b) calculated on an *ad valorem* basis; (c) described as "tariffs" or "ordinary customs dut[ies]" in the relevant Presidential Proclamations; and (d) operationalized as "ordinary customs dut[ies]" and inscribed in the "Rates of Duty – General" column of the United States' tariff schedule.<sup>318</sup>

7.46. As "ordinary customs duties", it is evident that the additional duties of 25% on derivative steel products and 10% on derivative aluminium products exceed the United States' bound rates, which range from 0-2.5% and 2.5-5.7% for the derivative aluminium and steel products at issue respectively, in a manner inconsistent with the first sentence of Article II:1(b).<sup>319</sup> Moreover, even if considered to be "other duties or charges" under the second sentence<sup>320</sup>, the United States' Schedule does not record any "other duties or charges" with respect to the steel and aluminium products at issue.<sup>321</sup> On either basis, the additional duties on derivative products would therefore be inconsistent with Article II:1(b) of the GATT 1994. As the additional duties on derivative steel and aluminium products exceed the levels set on in the United States' Schedule, it follows that the United States has accorded treatment less favourable than that provided for in its Schedule. The Panel therefore concludes that the additional duties on derivative steel and aluminium products are also inconsistent with Article II:1(a) of the GATT 1994.

#### 7.4.5 Conclusion

7.47. Regarding China's claims under Article II of the GATT 1994, the Panel concludes that:

- a. the additional duties of 25% on steel products and 10% on aluminium products do not accord the treatment provided for in the United States' Schedule, contrary to Article II:1(b) and Article II:1(a) of the GATT 1994;
- b. the additional duty of 50% on steel products from Türkiye does not accord the treatment provided for in the United States' Schedule, contrary to Article II:1(b) and Article II:1(a) of the GATT 1994; and
- c. the additional duties of 25% on derivative steel products and 10% on derivative aluminium products do not accord the treatment provided for in the United States' Schedule, contrary to Article II:1(b) and Article II:1(a) of the GATT 1994.

<sup>314</sup> China's second written submission, paras. 130-131.

<sup>315</sup> China's second written submission, para. 133.

<sup>316</sup> China's second written submission, para. 134.

<sup>317</sup> See para. 7.35 above.

<sup>318</sup> See Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225).

<sup>319</sup> See para. 7.43 above.

<sup>320</sup> These considerations may be relevant in light of other features of the additional duties on derivative steel and aluminium products, such as: (a) being inscribed in subchapter III of chapter 99 of the HTSUS titled "Temporary Modifications Established Pursuant to Trade Legislation"; (b) applying "in addition" to any pre-existing duties; and (c) being subject to exemptions for certain countries. (See Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225)).

<sup>321</sup> United States Bound Concessions at the HS 6-digit subheading level.

## 7.5 Article I:1 of the GATT 1994

### 7.5.1 Introduction

7.48. China argues that the United States' country-specific exemptions to the Section 232 measures and related quota agreements are inconsistent with Article I:1 of the GATT 1994.<sup>322</sup> In China's view, the country exemptions have been granted from "customs duties and charges of any kind" under Article I:1.<sup>323</sup> China also considers that the imported products at issue are "like products", as where measures explicitly discriminate on the basis of origin, "likeness" may be presumed.<sup>324</sup> Finally, China considers that the United States has created a certain category of Members, who can choose to negotiate unconditional exemptions or exemptions in exchange for quota agreements.<sup>325</sup> As no other Members have been permitted to maximize competitive opportunities in the same manner, China considers that this "advantage" has not been granted "immediately" and "unconditionally" to all other Members, in violation of Article I:1 of the GATT 1994.<sup>326</sup>

7.49. The United States has not advanced any arguments or evidence contesting the complainant's claim under Article I:1 of the GATT 1994.<sup>327</sup>

7.50. Article I:1 of the GATT 1994 provides:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,\* any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].

7.51. Article I:1 of the GATT 1994 prohibits, with respect to measures falling within its scope of application, discrimination among like products originating in or destined for different countries.<sup>328</sup> The obligation to accord most-favoured-nation treatment as set out in Article I:1 of the GATT 1994 has been understood to require equality of competitive opportunities for like imported products from any Member.<sup>329</sup>

7.52. The Panel will proceed by examining the challenged measures under Article I:1 of the GATT 1994, specifically concerning: (a) the country exemptions for steel and aluminium products and (b) the country exemptions for derivative steel and aluminium products.<sup>330</sup>

<sup>322</sup> China's first written submission, para. 156. See also China's second written submission, paras. 136-137; responses to Panel's questions following the first meeting, Annex I.

<sup>323</sup> China's first written submission, para. 158. China further considers that the quota agreements entered into by Argentina, Brazil, and the Republic of Korea constitute "rules and formalities in connection with importation". (Ibid).

<sup>324</sup> China's first written submission, para. 159.

<sup>325</sup> China's first written submission, paras. 160-163.

<sup>326</sup> China's first written submission, paras. 163-164.

<sup>327</sup> See United States' closing statement at the second meeting of the Panel, para. 7 (the United States accepting that it "has imposed duties on certain steel and aluminum products on a non-MFN basis and in excess of the levels set out in its WTO Goods Schedule").

<sup>328</sup> Appellate Body Report, *Canada – Autos*, para. 84.

<sup>329</sup> See Appellate Body Report, *EC – Seal Products*, paras. 5.86-5.87. Under Article I:1 of the GATT 1994, a complainant must demonstrate that: (a) the measure at issue falls within the scope of Article I:1; (b) the imported products at issue are "like"; (c) the measure confers an "advantage, favour, privilege or immunity" on any product originating in the territory of any country; and (d) the advantage, favour, privilege or immunity granted is not extended "immediately" and "unconditionally" to like products originating in the territory of all Members. (See Appellate Body Report, *EC – Seal Products*, para. 5.86).

<sup>330</sup> See China's first written submission, paras. 156-164; second written submission, paras. 136-137; and responses to Panel's questions following the first meeting, Annex I.

## 7.5.2 Country exemptions for steel and aluminium products

7.53. As described in greater detail above<sup>331</sup>, in March 2018, the United States imposed additional import duties of 25% on steel products and 10% on aluminium products.<sup>332</sup> At that time, Australia, Argentina, Brazil, and the Republic of Korea were temporarily exempted from the additional duties on both steel and aluminium products.<sup>333</sup> By May 2018, the United States had agreed to various "satisfactory alternative means" with these countries, including: (a) exemptions for steel and aluminium products from Australia; and (b) exemptions for steel and aluminium products from Argentina, as well as steel products from Brazil and the Republic of Korea, including through the alternative of import quotas.<sup>334</sup> In China's view, through the creation of these country-specific exemptions, the United States has modified the conditions of competition to the detriment of steel and aluminium products imported from all Members aside from Australia, Argentina, Brazil, and the Republic of Korea, thus violating Article I:1 of the GATT 1994.<sup>335</sup>

7.54. The Panel recalls that the exemptions in question relate to the additional duties on steel and aluminium products, which have been found under Article II:1(b) of the GATT 1994 to constitute "ordinary customs duties" applicable on importation into the territory of the United States.<sup>336</sup> As such, they also relate to "customs duties and charges" connected with importation falling within the scope of Article I:1 of the GATT 1994.<sup>337</sup>

7.55. By design, the country exemptions exclude steel and aluminium products of certain origins from the application of the additional duties, conferring differential treatment to exempted products in comparison to those subject to the duties. Furthermore, it is undisputed that the additional duties apply to all qualifying products imported into the United States and that the relevant country exemptions apply to products from select countries (i.e. Australia, Argentina, Brazil, and the Republic of Korea) solely on the basis of origin.<sup>338</sup> The United States does not contest that the measures exempt certain products based exclusively on origin contrary to the obligation to accord most-favoured-nation treatment under Article I:1.<sup>339</sup> Therefore, with respect to the imposition of customs duties, the country exemptions accord an "advantage"<sup>340</sup> to steel and aluminium products from the exempted countries that is not accorded immediately and unconditionally to "like products"<sup>341</sup> originating in non-exempted countries. The Panel thus concludes that, by granting

<sup>331</sup> See section 2.2 above.

<sup>332</sup> See Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10); Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9).

<sup>333</sup> See Presidential Proclamation 9710, (Exhibit CHN-8 and USA-12); Presidential Proclamation 9711, (Exhibit CHN-9 and USA-11).

<sup>334</sup> See Presidential Proclamation 9739, (Exhibit CHN-10 and USA-14); Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13); Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16); and Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15). These exemptions were extended based on the United States' "security relationship" with these Members. (Ibid).

<sup>335</sup> China's first written submission, paras. 160-164.

<sup>336</sup> Moreover, even if not considered to qualify as "ordinary customs duties", the additional duties would in any event be inconsistent with the second sentence of Article II:1(b) of the GATT 1994 as "other duties or charges". See section 7.4 above.

<sup>337</sup> Previous panels have found exemptions from import duties to fall within the scope of Article I:1 of the GATT 1994. (See e.g. Panel Reports, *Canada – Autos*, para. 10.16; *Indonesia – Autos*, paras. 7.3-7.5).

<sup>338</sup> See sections 2.2.1.2 and 2.2.2.2 above. The Panel notes that a "presumption of likeness" has been applied in prior disputes in situations where the only distinguishing factor under the challenged measure was the origin of the products. These previous disputes suggest that, where a measure makes distinctions exclusively on the basis of origin, it will typically not be necessary to conduct a detailed analysis of "likeness" of the relevant products. (See Panel Report, *Russia – Railway Equipment*, paras. 7.897-7.899; see also Panel Reports, *Colombia – Ports of Entry*, paras. 7.355-7.356; *US – Poultry (China)*, paras. 7.424-7.432).

<sup>339</sup> See United States' closing statement at the second meeting of the Panel, para. 7 (accepting that it has imposed duties on certain steel and aluminium products "on a non-MFN basis").

<sup>340</sup> See Appellate Body Report, *Canada – Autos*, para. 79; Panel Reports, *EC – Bananas III*, para. 7.239; *EC – Seal Products*, para. 7.595. Previous panels have found country exemptions conferring duty-free treatment to constitute an "advantage" under Article I:1. (See Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, paras. 7.152-7.153. See also Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US)*, para. 353).

<sup>341</sup> See fn 338 above. In the specific circumstances of this dispute, including the lack of any rebuttal by the United States, the Panel considers that the challenged measures apply to "like products" within the meaning of Article I:1 of the GATT 1994, without the need to conduct a detailed "likeness" analysis.

country exemptions from the additional duties to Australia, Argentina, Brazil, and the Republic of Korea, the United States acted inconsistently with Article I:1 of the GATT 1994.

7.56. In the context of its claim under Article I:1, China also challenges the quota agreements with Argentina, Brazil, and the Republic of Korea, to the extent that they afford an alternative to the additional duties for the exempted countries.<sup>342</sup> The Panel notes that such quotas relate solely to countries that are exempted from the additional duties, and the existence of such quotas does not negate the fact that the products to which they apply are exempted from the additional duties.<sup>343</sup> Given the foregoing finding on the advantage accorded by the exemptions, the Panel does not consider it necessary for the purposes of this dispute to determine whether any particular alternative treatment of exempted products from Argentina, Brazil, and the Republic of Korea, including under any import quota, would constitute a distinct violation of Article I:1 of the GATT 1994.

### 7.5.3 Country exemptions for derivative steel and aluminium products

7.57. In January 2020, the United States announced additional duties of 25% on derivative steel and 10% on derivative aluminium products. It also announced the following exemptions from these duties: (a) exemptions for derivative steel products from Australia, Argentina, Brazil, the Republic of Korea, Canada, and Mexico; and (b) exemptions for derivative aluminium products from Australia, Argentina, Canada, and Mexico.<sup>344</sup> In China's view, by exempting Argentina, Australia, Brazil, the Republic of Korea, Canada, and Mexico from the additional duties on derivative aluminium and/or steel products, the United States has conferred an advantage on products originating within those Members that it has failed to accord to imports of like derivative products from all other Members, including China.<sup>345</sup>

7.58. The Panel has previously found that the additional duties on derivative products qualify as "ordinary customs duties" under Article II:1(b) of the GATT 1994, and thus similarly considers that the country exemptions from these duties relate to "customs duties and charges" in the sense of Article I:1 of the GATT 1994.<sup>346</sup> It is also undisputed that these country exemptions apply to products from select countries (i.e. Australia, Argentina, Brazil, the Republic of Korea, Canada, and Mexico) exclusively on the basis of origin.<sup>347</sup> Therefore, with respect to the imposition of customs duties, these country exemptions accord an "advantage" to steel and aluminium products from the exempted countries that is not accorded immediately and unconditionally to "like products" originating in non-exempted countries.<sup>348</sup> The Panel thus concludes that, by granting country exemptions from the additional duties on derivative products to Australia, Argentina, Brazil, the Republic of Korea, Canada, and Mexico, the United States acted inconsistently with Article I:1 of the GATT 1994.

### 7.5.4 Conclusion

7.59. Regarding China's claims under Article I of the GATT 1994, the Panel concludes that:

<sup>342</sup> See China's first written submission, paras. 156 (referring to the country-specific exemptions and "related quota agreements") and 163 (referring to the United States negotiating either "unconditional exemptions" or "exemptions in exchange for quota agreements"). The Panel notes that China has clarified that it is not challenging any other conditions which may have been imposed by the United States on these Members as an alternative to the additional import duties on steel and aluminium products, other than the quota agreements. (See China's response to Panel question No. 1).

<sup>343</sup> The Panel further notes that all the "satisfactory alternative means", regardless of their specific form, were extended by the United States on the basis of their "security relationship" with the exempted countries and based on the determination that "imports from these countries [would] no longer threaten to impair the national security". (See Presidential Proclamation 9710, (Exhibit CHN-8 and USA-12); Presidential Proclamation 9711, (Exhibit CHN-9 and USA-11); Presidential Proclamation 9739, (Exhibit CHN-10 and USA-14); Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13); Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16); and Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15)).

<sup>344</sup> Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225).

<sup>345</sup> China's second written submission, para. 137. See also China's response to Panel question Nos. 2, para. 8, and No. 86, para. 23; and comments on the United States' response to Panel question No. 87, para. 26.

<sup>346</sup> See sections 7.4.4 and 7.4.5 above. See also para. 7.54 above.

<sup>347</sup> See para. 7.55 above.

<sup>348</sup> See fns 338 and 340.

- a. the country exemptions for steel and aluminium products confer an advantage to products from Australia, Argentina, Brazil, and the Republic of Korea that has not been accorded immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 of the GATT 1994; and
- b. the country exemptions for derivative steel and aluminium products confer an advantage to products from Australia, Argentina, Brazil, the Republic of Korea, Canada, and Mexico that has not been accorded immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 of the GATT 1994.

## 7.6 Article X:3 of the GATT 1994

7.60. China argues that the United States' administration of the product exclusion process, through which relief from the additional duties on steel and aluminium products can be sought, is not consistent with Article X:3(a) of the GATT 1994.<sup>349</sup> China notes that the product exclusion process permits individuals and organizations in the United States, including US producers, to object to exclusion requests submitted by other US producers. China considers that allowing interested parties to submit objections to exclusion requests injects a significant risk of partiality in their adjudication. China further contends that this risk has been realized as product exclusions requests opposed by US steel and aluminium producers are rejected.<sup>350</sup> According to China, the differential treatment of exclusion requests where an objection is filed does not meet the requirements of Article X:3(a).<sup>351</sup> The United States has not advanced any arguments or evidence contesting China's claim under Article X:3(a) of the GATT 1994.

7.61. The Panel recalls its findings of inconsistency in relation to the additional duties on steel and aluminium under the GATT 1994. The Panel considers that the findings of inconsistency under other provisions of the GATT 1994 are sufficient, in the circumstances of the present dispute, to assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements as required under the DSU.<sup>352</sup> In light of these findings, the Panel does not consider it necessary to make findings on China's claims relating to the administration of the process for excluding products from duties that have already been found inconsistent with other obligations under the GATT 1994. The Panel thus declines to make findings regarding the claims under Article X:3(a) of the GATT 1994.

## 7.7 Article XIX of the GATT 1994 and the Agreement on Safeguards

### 7.7.1 Introduction

7.62. China claims that certain measures at issue are safeguard measures and are inconsistent with certain obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards. The United States disputes the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue and additionally argues that Article XXI of the GATT 1994 is a defence to the complainant's claims under Article XIX of the GATT 1994 and the Agreement on Safeguards.

7.63. The Panel will first address the parties' disagreement as to the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue. In doing so, the Panel will address specific issues of interpretation contested by the parties in accordance with Article 3.2 of the DSU and customary rules of interpretation of public international law. The Panel will then assess the evidence and arguments submitted by the parties in relation to the relevant measures at

<sup>349</sup> China's response to Panel question No. 2.b and 2.d; see also first written submission, para. 172.

<sup>350</sup> China's first written submission, paras. 172-173 (referring to Congressional Research Service, *Section 232 Investigations: Overview and Issues for Congress* (2 April 2019), (Exhibit CHN-23), p. 10).

<sup>351</sup> China's first written submission, para. 174.

<sup>352</sup> See e.g. Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.189-5.190 and 5.194; *US – Upland Cotton*, para. 732. The Panel further notes various instances in which previous panels have declined to make findings under Article X:3 of the GATT 1994 based on other findings of inconsistency concerning the underlying measure being administered, including duties in excess of the bound rates in a Member's Schedule of Concessions. (See Panel Reports, *Peru – Agricultural Products*, para. 7.501; *Argentina – Import Measures*, para. 6.498; *Indonesia – Autos*, para. 14.152; and *Russia – Railway Equipment*, para. 7.939).



issue in light of the conclusions reached regarding the interpretation of Article XIX of the GATT 1994 and the Agreement on Safeguards.

### **7.7.2 Interpretation of Article XIX of the GATT 1994 and the Agreement on Safeguards in accordance with Article 3.2 of the DSU**

7.64. Article XIX of the GATT 1994 is entitled "Emergency Action on Imports of Particular Products" and provides in relevant part:

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

7.65. Article 1 of the Agreement on Safeguards is a "General Provision" and provides:

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

7.66. Article 11 of the Agreement on Safeguards contains the following provisions on "Prohibition and Elimination of Certain Measures":

1. (a) 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.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.<sup>[3]</sup>,<sup>[4]</sup> These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

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<sup>3</sup> An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

<sup>4</sup> Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

7.67. The Panel notes that a threshold question presented by the parties' arguments concerns the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue. China emphasizes the characterization of the measures at issue as safeguards based on objective features of the measures at issue.<sup>353</sup> The United States refers to Article XXI of the GATT 1994 and contends that the Agreement on Safeguards is inapplicable to the measures at issue

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<sup>353</sup> China's first written submission, paras. 32-83. China specifically argues that the measures at issue objectively present the constituent features of safeguard measures under Article XIX of the GATT 1994. (See *ibid.* (referring to Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60)).

by virtue of Article 11.1(c) as the measures were "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX".<sup>354</sup>

7.68. The Panel recalls that it is required under Article 11 of the DSU to make 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.<sup>355</sup> Moreover, the Panel is required to address the parties' disagreement regarding the applicability of the relevant covered agreements in accordance with Article 3.2 of the DSU and the customary rules of interpretation of public international law.<sup>356</sup> The rule of interpretation set out in Article 31(1) of the Vienna Convention forms part of such "customary rules of interpretation of public international law" and provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose."<sup>357</sup> Regarding the interpretation of treaties authenticated in two or more languages, the customary rules in Article 33 of the Vienna Convention provide that "[t]he terms of the treaty are presumed to have the same meaning in each authentic text" and that in case of a difference between authentic texts "which the application of articles 31 and 32 [of the Vienna Convention] does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".<sup>358</sup>

7.69. The Panel notes 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".<sup>359</sup> In this regard, 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." Article 11.1(a) is one of three paragraphs under Article 11.1 of the Agreement on Safeguards as part of provisions entitled "Prohibition and Elimination of Certain Measures" under which Article 11.1(b) prohibits "voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side". Article 11.1(c) refers to measures "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX", to which the Agreement on Safeguards "does not apply".

7.70. According to its express terms, Article 11.1(c) removes certain measures from the scope of application of the Agreement on Safeguards, including the rules specified in Article 11.1(a) and the prohibition under Article 11.1(b).<sup>360</sup> This is supported by the unambiguous reference in Article 11.1(c) to the inapplicability of the Agreement on Safeguards as a whole in respect of measures "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX". The Panel notes that the paragraphs of Article 11.1 of the Agreement on Safeguards do not contain any terms explicitly indicating the limitation or qualification of any paragraph in relation to

<sup>354</sup> United States' response to Panel question Nos. 77 and 78; see also second written submission, section II.A.

<sup>355</sup> The Panel further notes the principle affirmed in past disputes that panels under the DSU have independence in the structure of their analysis and the development of legal reasoning, as well as latitude in the evidence on the record relied upon to reach findings that will assist the DSB. (See e.g. Appellate Body Reports, *EC – Hormones*, para. 156; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.61; Panel Reports, *India – Solar Cells*, para. 7.41; *EC – Export Subsidies on Sugar (Australia)*, para. 7.121 and fn 437).

<sup>356</sup> See section 7.1 above.

<sup>357</sup> See e.g. Appellate Body Reports, *US – Gasoline*, p. 17; *India – Patents (US)*, para. 46; *Argentina – Textiles and Apparel*, para. 42; *US – Carbon Steel*, para. 61. The Panel notes the parties' agreement that the Panel should be guided by the ordinary meaning of the terms of the Agreement on Safeguards in their context and in light of the object and purpose of the agreement. (See United States' response to Panel question No. 20 and China's response to Panel question No. 97. See also United States' second written submission, section IV.B).

<sup>358</sup> See e.g. Appellate Body Reports, *US – Softwood Lumber IV*, para. 59; *EC – Bed Linen (Article 21.5 – India)*, fn 153; *US – Upland Cotton*, para. 424; and *US – Stainless Steel (Mexico)*, fn 200.

<sup>359</sup> Article 1 of the Agreement on Safeguards.

<sup>360</sup> The French and Spanish versions of Article 11.1(c) use the terms "*ne s'applique pas*" and "*no es aplicable*" respectively to denote that the Agreement on Safeguards is inapplicable to "*mesures*" or "*medidas*" described in that provision. The Panel understands that the parties agree that Article 11.1(c) excludes certain measures from the scope of application of the Agreement on Safeguards, notwithstanding their disagreement as to when such measures may be considered to have been "sought, taken or maintained ... pursuant to provisions of the GATT 1994 other than Article XIX" within the meaning of Article 11.1(c). (See China's response to Panel question Nos. 20 and 22; United States' response to Panel question Nos. 20 and 22).



another.<sup>361</sup> In this respect, Article 11.1 does not subordinate any of the paragraphs in relation to one another concerning the applicability of the Agreement on Safeguards. The Panel thus considers that finding the measures at issue to fall within the scope of Article 11.1(c) would fully address the matter within the Panel's terms of reference under the Agreement on Safeguards as there would be no basis to assess claims of inconsistency under an agreement that "does not apply" to the measures at issue. The Panel is mindful in this connection of its mandate to make only such findings under the covered agreements as will assist the DSB in this dispute, taking into account the specific measures at issue, the evidence and arguments submitted by the parties, and the Panel's overall conclusions reached with respect to the matter referred to the DSB.<sup>362</sup>

7.71. In the circumstances of this dispute, the Panel therefore considers that it is appropriate to determine whether the measures at issue can be characterized as having been "sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX" within the meaning of Article 11.1(c) of the Agreement on Safeguards. The Panel will focus its assessment on the terms of Article 11.1(c) of the Agreement on Safeguards, and particularly, the terms "pursuant to" and "other than", in their context and in light of the object and purpose of the Agreement on Safeguards.

7.72. Regarding the terms "pursuant to" in Article 11.1(c), China argues that this phrase refers to measures that are in conformity with or consistent with provisions of the GATT 1994. As a consequence, China considers that the measures sought, taken or maintained by a Member must satisfy the conditions of "provisions of GATT 1994 other than Article XIX" to be excluded from the scope of the Agreement on Safeguards.<sup>363</sup> For the United States, the expression "pursuant to" is different from the terms "in compliance with" or "consistent with", and serves the function of "direct[ing] the Panel to the other GATT 1994 provision pursuant to which the measure in question was attempted or tried".<sup>364</sup>

7.73. The Panel will assess the meaning of "pursuant to" as it is used in Article 11.1(c) having regard for relevant context and the use of terms in the three authentic language versions of the Agreement on Safeguards, in accordance with the customary rules of interpretation of public international law. The expression "pursuant to" in Article 11.1(c) denotes the existence of a relationship between the measures of a Member and provisions of the GATT 1994 other than Article XIX.<sup>365</sup> The term "pursuant" when used with the preposition "to" may mean "under", "in accordance with", "in consequence of", or "as authorized by".<sup>366</sup> Taken in isolation, the terms "pursuant to" could potentially accommodate a range of meanings. Within this range of meanings, the terms "pursuant to" in the context of Article 11.1(c) could be understood as consistency with the requirements of a provision of the GATT 1994 other than Article XIX, or a different relationship that does not require such consistency. For example, a measure could be characterized under Article 11.1(c) as being "pursuant to" a provision in the sense of being sought, taken, or maintained under the purview of that provision without necessarily meeting the requirements of the specific terms of such other provision.

7.74. The Panel finds instructive the contrast between "pursuant to" in Article 11.1(c) and terms used elsewhere in the Agreement on Safeguards that appear to convey a relationship of consistency

<sup>361</sup> The paragraphs of Article 11.1 can be contrasted in this respect with other provisions of the covered agreements that explicitly limit or qualify the scope of that provision by reference to another provision in the covered agreements, including within the same article. See e.g. Article 5.6 of the Agreement on Safeguards ("Notwithstanding the provisions of paragraph 5 ..."); Article 3.3 of the SPS Agreement ("Notwithstanding the above ..."); Article X:6 of the WTO Agreement ("Notwithstanding the other provisions of this Article ..."); Article 3.1 of the Agreement on Agriculture ("Subject to the provisions of Article 6 ..."); Article XII:1 of the GATT 1994 ("... subject to the provisions of the following paragraphs of this Article"); Article 7.1 of the Agreement on Safeguards ("... provided that the pertinent provisions of Articles 8 and 12 are observed").

<sup>362</sup> In the particular circumstances of this dispute, if the Agreement on Safeguards were determined to be inapplicable to the measures at issue, the Panel does not consider that there would be anything additional under Article XIX of the GATT 1994 within the Panel's terms of reference on which it could make findings to assist the DSB in this matter.

<sup>363</sup> China's response to Panel question No. 20, paras. 60-61.

<sup>364</sup> United States' response to Panel question Nos. 20 and 96.

<sup>365</sup> Similarly, in the French and Spanish versions of Article 11.1(c), the phrases "*en vertu de*" and "*de conformidad con*" respectively describe the relationship between the measures ("*aux mesures*" and "*las medidas*") and provisions of the GATT 1994 other than Article XIX ("*disposiciones del GATT de 1994 autres que l'article XIX*" and "*disposiciones del GATT de 1994, aparte del artículo XIX*").

<sup>366</sup> *Shorter Oxford English Dictionary*, 5th Edition (Oxford University Press, 2003), p. 2411; *Garner's Dictionary of Legal Usage*, 3rd Edition (Oxford University Press, 2011), p. 737.

with the requirements of another provision of the covered agreements. This is particularly evident in the other paragraphs of Article 11.1 of the Agreement on Safeguards that provide immediate context to the terms of Article 11.1(c) and use the expressions "in accordance with" and "in conformity with" other provisions. The obligation for safeguard measures to meet the requirements of Article XIX of the GATT 1994 and the Agreement on Safeguards is expressed in Article 11.1(a) by providing that Members' safeguard measures must "*conform[]* with the provisions of that Article applied *in accordance with* this Agreement".<sup>367</sup> Similarly, the elimination of measures prohibited under Article 11.1(b) is expressed in the obligation that such measures "shall be brought into *conformity with* this Agreement or phased out *in accordance with*" the mandatory timetables and requirements set out in Article 11.2.<sup>368</sup> These explicit references in Article 11.1 to "conformity" and actions "in accordance with" other provisions are comparable to other uses of these terms in the Agreement on Safeguards that similarly appear to denote consistency with the referenced requirements.<sup>369</sup>

7.75. The contrast in meaning between "pursuant to" in Article 11.1(c) and terms expressing a standard of consistency finds support in the French version of the provision referring to "*mesures ... en vertu de dispositions de GATT de 1994 autre que l'article XIX*". As in the English text, the Agreement on Safeguards uses the French terms "*conformes*" and "*conformément*" in Articles 11.1(a) and 11.1(b) for "conforms" and "in accordance with", which similarly appear to indicate consistency or conformity with the legal provisions specified in those paragraphs.<sup>370</sup> In contrast, the French version of Article 11.1(c) foregoes the term "*conformément*" in favour of "*en vertu de*", whose dictionary meanings include "*en conséquence de*" (as a consequence of), "*par l'effet de*" (by the effect of), "*par le pouvoir de*" (by the power of), and "*au nom de*" (in the name of or on behalf of).<sup>371</sup> The Panel further notes that the use of the French term "*conformément*" in various provisions of the Agreement on Safeguards corresponds to English references to "conformity" and actions being "in accordance with" other provisions.<sup>372</sup> The terms of Article 11.1(c) in both English and French thus reflect a departure from terms used in other provisions of the Agreement on Safeguards that appear to convey a requirement of conformity or consistency.

7.76. The Panel notes the terminology used in the Spanish version of the Agreement on Safeguards, which in Article 11.1(c) provides that the Agreement does not apply to measures sought, taken or maintained "*de conformidad con otras disposiciones del GATT de 1994*". Dictionary meanings of the terms "*de conformidad con*" include "*con arreglo a*" or "*a tenor de*" (according to), "*en proporción o correspondencia a*" (in proportion or correspondence to), or "*de la misma suerte o manera que*" (in the same way or manner).<sup>373</sup> The Spanish terms "*de conformidad con*" are also used in the provisions referred to above in which the English and French terms use variants of "conformity" or "*conformité*", as well as "in accordance with" in English, and appear to indicate a requirement of conformity or consistency with the other referenced legal provisions. This is notably the case in Articles 11.1(a) and (b) where the Spanish text uses similar terms ("*conformes*" and "*de conformidad con*") as those used in English and French. The Spanish version of Article 11.1(c) refers to "*conformidad con otras*

<sup>367</sup> Emphasis added.

<sup>368</sup> Emphasis added. See also footnote 3 to Article 11.1(b) of the Agreement on Safeguards ("[a]n import quota applied as a safeguard measure *in conformity with* the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member") (emphasis added). The indication of consistency or conformity with certain requirements is further supported by the mandatory terms "shall" and "must" in Article 11.2 establishing the obligations with which a measure must be in conformity or accordance.

<sup>369</sup> See e.g. Article 4.1(b) ("'threat of serious injury' shall be understood to mean serious injury that is clearly imminent, *in accordance with* the provisions of paragraph 2") (emphasis added); Article 4.2(c) ("The competent authorities shall publish promptly, *in accordance with* the provisions of Article 3 ...") (emphasis added); Article 7.2 ("[t]he period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, *in conformity with* the procedures set out in Articles 2, 3, 4 and 5 ...") (emphasis added). In prior disputes under the Agreement on Safeguards, the Appellate Body has referred to other provisions in the Agreement on Safeguards establishing requirements with which safeguard measures must be in conformity, such as the conditions in Article 2.1 and the requirements of Articles 3 and 4. (See Appellate Body Reports, *US – Line Pipe*, para. 84; *US – Steel Safeguards*, para. 264).

<sup>370</sup> See also footnote 3 to Article 11.1(b) of the Agreement on Safeguards ("*Un contingent d'importation appliqué en tant que mesure de sauvegarde conformément aux dispositions pertinentes du GATT de 1994 et du présent accord pourra, par accord mutuel, être administré par le Membre exportateur*").

<sup>371</sup> Le Petit Robert Dictionnaire de la Langue Française (2000), p. 2663.

<sup>372</sup> See e.g. Article 4.1(b) ("*conformément aux dispositions du paragraphe 2*"); Article 4.2(c) ("*conformément aux dispositions de l'article 3*"); and Article 7.2 ("*conformément aux procédures énoncées aux articles 2, 3, 4 et 5*").

<sup>373</sup> *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), pp. 420-421.

*disposiciones del GATT de 1994*", unlike the English and French terms in Article 11.1(c) that reflect a clear departure from references to "conformity" or being "in accordance with" other legal provisions.<sup>374</sup>

7.77. On balance, these considerations indicate that the terms "pursuant to" in Article 11.1(c) of the Agreement on Safeguards do not require consistency with provisions of the GATT 1994 other than Article XIX for a measure to fall under that paragraph. The text of Article 11.1(c) does not make any explicit reference to a requirement of conformity with the provisions of GATT 1994 in English or French in contrast to other provisions of the Agreement on Safeguards, including those that provide immediate context for Article 11.1(c). The use of the French terms "*en vertu de*" in Article 11.1(c) is especially compelling in this regard in signalling a contrast to the term "*conformément*" and indicates a different legal relationship than consistency or conformity with the requirements of a provision of the GATT 1994 other than Article XIX.

7.78. The comparison of terms in the different language versions is instructive but not in itself dispositive regarding the interpretation of Article 11.1(c) of the Agreement on Safeguards in accordance with Article 3.2 of the DSU.<sup>375</sup> The terms of Article 11.1(c) must be interpreted in accordance with their ordinary meaning in their context and in light of the object and purpose of the Agreement on Safeguards. Moreover, to the extent that the Spanish text "discloses a difference of meaning" when compared to the text of Article 11.1(c) in English and French, the Panel finds guidance in the rule of interpretation in Article 33(4) of the Vienna Convention that, if such difference cannot be removed by application of Articles 31 and 32 of the Vienna Convention, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.<sup>376</sup>

7.79. The Panel considers that interpreting the terms "pursuant to" in Article 11.1(c) to refer to measures sought, taken, or maintained under the purview of another provision of the GATT 1994, without entailing consistency with the requirements of such other provision, accords with the specific context in which those terms appear. The terms "pursuant to" in Article 11.1(c) form part of a provision governing the applicability of the Agreement on Safeguards rather than the consistency of measures with the rules and requirements of that agreement.<sup>377</sup> Accordingly, the nature of the relevant inquiry under Article 11.1(c) does not relate to another provision of the GATT 1994 as a legal exception or justification for inconsistencies with the Agreement on Safeguards.<sup>378</sup> Rather, the

<sup>374</sup> The Spanish terms "*de conformidad con*" are also used in other provisions of the Agreement on Safeguards that appear to indicate a standard of consistency across all language versions. (See e.g. Article 4.1(b) ("*de conformidad con las disposiciones del párrafo 2*"); Article 4.2(c) ("*de conformidad con las disposiciones del artículo 3*"); and Article 7.2 ("*de conformidad con los procedimientos establecidos en los artículos 2, 3, 4 y 5*"). The Panel further notes that the terms "*de conformidad con*" are translated with some variation in English, including provisions in which the corresponding term for "*de conformidad con*" in the English version is "under" within the specific context of the provision in question. (See Article 7.1 ("The period shall not exceed four years, unless it is extended *under* paragraph 2.") (emphasis added); Article 7.4 ("A measure extended *under* paragraph 2 ...") (emphasis added)).

<sup>375</sup> The Panel notes that the terms "pursuant to" appear in various provisions of the Agreement on Safeguards for which the corresponding French and Spanish terms reflect the potential range of meanings of these terms according to their specific context. For example, Article 2.1 provides that a safeguard measure may be applied "only if that Member has determined, pursuant to the provisions set out below," various conditions for the application of safeguard measures. The context of mandatory conditionality in which "pursuant to" appears in Article 2.1 ("may apply a safeguard measure ... only if") is reflected in the French and Spanish, respectively, as "*conformément*" and "*con arreglo a*". As another example, Article 10 of the Agreement on Safeguards refers to "safeguard measures taken pursuant to Article XIX of GATT 1947" where the corresponding French and Spanish terms ("*au titre de*" and "*al amparo del*" respectively) do not appear to indicate consistency or conformity.

<sup>376</sup> As noted above, this rule of interpretation forms part of the "customary rules of interpretation of public international law" referred to in Article 3.2 of the DSU. See para. 7.68 above.

<sup>377</sup> See Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57 (distinguishing "factors pertaining to the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines" from "the substantive conditions and procedural requirements that determine the WTO *consistency* of a safeguard measure") (emphasis original).

<sup>378</sup> The Panel notes in this regard that Article 11.1(c) of the Agreement on Safeguards serves a similar role to certain provisions in the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which allow Members to take measures "under" other provisions of the GATT 1994 but do not indicate a requirement of conformity with such other provisions. Moreover, the French and Spanish versions of these provisions do not use terms such as "*conformément*" and "*conformidad*" but rather "*au titre*" and "*al amparo*" respectively. (See Article 18.1 of the Anti-Dumping Agreement, footnote 24

relevant inquiry under Article 11.1(c) corresponds to the threshold issue of applicability and leaves as a separate inquiry whether a measure is consistent with the requirements of such other provision "pursuant to" which the measure was sought, taken, or maintained.

7.80. These considerations are also relevant for the interpretation of the terms "other than" in Article 11.1(c) of the Agreement on Safeguards. The parties dispute the meaning of these terms particularly in relation to their arguments on the characterization of measures as safeguards within the meaning of Article XIX of the GATT 1994 and Article 1 of the Agreement on Safeguards. In this connection, China contends that a measure may possess certain objective features of a safeguard measure and, if so, such measure would not be pursuant to a provision "other than" Article XIX in the sense of Article 11.1(c).<sup>379</sup> In the Panel's view, China's interpretation of the terms "provisions ... other than" amounts to meaning provisions that are exclusively other than Article XIX of the GATT 1994. The Panel understands this interpretation to mean that the Agreement on Safeguards could still be applicable to a measure notwithstanding its characterization as being pursuant to another provision of the GATT 1994.

7.81. With respect to the ordinary meaning of the terms "other than", dictionary definitions include "besides", "except" or "apart from".<sup>380</sup> The Panel notes that all three language versions of Article 11.1(c) contain terms that are not qualified by any specification or limitation with respect to being "other than" Article XIX of the GATT 1994. The ordinary meaning of these terms in their context encompasses measures that are pursuant to another provision of the GATT 1994, and the Panel does not find in the text of Article 11.1(c) the imposition of an additional requirement or limitation of being exclusively pursuant to such other provision. This interpretation is consonant with the context of the paragraphs of Article 11.1 that together establish the conditions for the applicability of the Agreement on Safeguards. The question of applicability is addressed under Article 11.1(c) by terms specifying a relationship between a measure and a provision of the GATT 1994 "other than" Article XIX, namely that a measure is "pursuant to" such other relevant provision, and providing that the Agreement on Safeguards does not apply to such measure.<sup>381</sup>

7.82. The Panel finds support for these conclusions in the object and purpose of the Agreement on Safeguards as expressed in its preamble recognizing "the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control". In this regard, the preamble further expresses recognition of the need for "a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994". An essential corollary of the "multilateral control over safeguards" and elimination of "measures that escape such control" under the Agreement on Safeguards is the explicit preservation under Article 11.1(c) of the right for Members to adopt measures under legal provisions of the GATT 1994 that are part of the "basic principles" affirmed and reinforced by the Agreement on Safeguards. The Panel considers significant in this regard the placement of Article 11.1(c) in the list of paragraphs under Article 11.1 as part of provisions entitled "Prohibition and Elimination of Certain Measures". The imposition of obligations to "clarify and reinforce the disciplines of GATT 1994", as notably expressed in Articles 11.1(a) and (b), is explicitly conditioned by the terms of Article 11.1(c) on the applicability of the agreement as a whole. The requirement under Article 11.1(c) for a

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and Article 32.1 of the SCM Agreement, footnote 56). At the same time, the Panel notes differences in the terminology and structure of Article 11.1(c) of the Agreement on Safeguards compared to these footnotes, which provide that the particular terms of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement are "not intended to preclude actions under other relevant provisions of GATT 1994". By contrast, Article 11.1(c) is in the main text of the provision and expressly states conditions under which the agreement "does not apply". (See Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 262 (referring to Appellate Body Report, *US – 1916 Act*, para. 123) (describing the "accessory footnotes" as "clarifications of the main provisions" on the "specific action" Members are permitted to take against dumping or subsidies)).

<sup>379</sup> China's second written submission, para. 30.

<sup>380</sup> The terms of Article 11.1(c) in French and Spanish ("*autres que*" and "*aparte del*" respectively) similarly mean different from or with the omission of. See *Le Petit Robert Dictionnaire de la Langue Française* (2000), pp. 185-186 and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 120.

<sup>381</sup> In the context of the objective assessment required under Article 11 of the DSU, the relevant provision under Article 11.1(c) of the Agreement on Safeguards (i.e. the provision of the GATT 1994 "other than" Article XIX) depends on the specific circumstances of the dispute, including the measures and claims at issue, legal provisions raised by the parties, as well as the relevant evidence and arguments submitted by the parties.

measure to be "pursuant to" a provision "other than" Article XIX of the GATT 1994 thus serves the maintenance of a balance of rights and obligations that are in turn based on the terms of such other provision.

7.83. The relevant provision of the GATT 1994 other than Article XIX in this dispute is Article XXI entitled "Security Exceptions", which provides *inter alia* that "[n]othing in this Agreement shall be construed ... to prevent any [Member] from taking any action which it considers necessary for the protection of its essential security interests".<sup>382</sup> In accordance with the requirements of Article 11 of the DSU, the Panel will assess the applicability of the Agreement on Safeguards to the measures at issue in light of the foregoing interpretive considerations on Article 11.1(c) as well as the evidence and arguments submitted by the parties in this dispute. Taking into account the case-specific nature of the relevant inquiry on applicability rather than conformity, the Panel will identify relevant aspects of the design and application of the measures with specific reference to their legal characterization under Article 11.1(c) of the Agreement on Safeguards. The Panel will give due consideration to all relevant evidence in this regard including the domestic law and procedures under which the measures were adopted as well as any relevant notifications or statements to the official bodies of the WTO.<sup>383</sup>

7.84. The Panel takes note of the United States' arguments in relation to the meaning of the term "sought" in Article 11.1(c) of the Agreement on Safeguards, which are related to the United States' contention that, based on Article XIX:2 of the GATT 1994, formal notification of safeguard measures to the WTO is a "condition precedent" to the applicability of safeguard disciplines.<sup>384</sup> As detailed below, the Panel considers the manner in which the measures were raised before the WTO, including notifications to relevant WTO bodies or committees, as part of the assessment of the evidence and arguments submitted on all relevant aspects of the measures at issue in this dispute. The Panel does not consider it necessary for the purposes of this dispute to address in further detail the United States' arguments on WTO notification being a "condition precedent" for the applicability of safeguard disciplines.

7.85. Finally, the Panel notes that the parties have referred to certain aspects of the negotiating history of the Agreement on Safeguards in support of their respective positions. Under Article 32 of the Vienna Convention, recourse to supplementary means of interpretation, including the preparatory work of a treaty, may be had either to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. The Panel does not consider that the application of Article 31 of the Vienna Convention to the interpretation of Article 11.1(c) of the Agreement on Safeguards leaves the meaning of the provision ambiguous or obscure, nor does the Panel find that it leads to a result which is manifestly absurd or unreasonable. Nevertheless, the Panel has examined the negotiating history of the provision in order to confirm the meaning resulting from the application of Article 31 of the Vienna Convention. As detailed in Appendix A to this Report, the Panel's review of the negotiating

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<sup>382</sup> See section 7.8 below.

<sup>383</sup> The Panel notes that the Appellate Body identified various relevant factors for the determination of whether measures constitute safeguard measures under Article XIX of the GATT 1994. In this dispute, the relevant inquiry is directed by the terms of Article 11.1(c) to a provision other than Article XIX of the GATT 1994. Nevertheless, there is a broad parallel in both contexts of distinguishing questions of legal applicability from those concerning legal consistency and, for the former, making an objective examination of the specific measures at issue according to the relevant provision of the GATT 1994 upon which to determine the applicability of the Agreement on Safeguards. (See Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60).

<sup>384</sup> United States' second written submission, sections IV.B.1 ("Article 11.1(c) Supports That Invocation is a Condition Precedent for ... a Member's exercise of its right to take action under Article XIX and Application of Safeguards Rules") and IV.B.2 ("Other Provisions of the Agreement on Safeguards Also Support that Notice is a Condition Precedent for Action Under Article XIX"). For the various terms used by the United States to describe the "condition precedent" for the applicability of safeguard disciplines, see United States' second written submission, para. 134 ("notice is a condition precedent to taking action under Article XIX"); paras. 136-137 ("[t]he text of Article XIX:2 explicitly sets out a requirement to invoke the provision through notice as a condition precedent to action under Article XIX:1... [w]ithout such notice, a Member is not seeking legal authority pursuant to Article XIX"); para. 162 ("notice under Article XIX:2 is a fundamental, condition precedent to a Member's exercise of its right to take action under Article XIX and the application of safeguards disciplines"); and para. 194 ("invocation through written notice is a condition precedent to a Member's exercise of its right to take action under Article XIX and the application of safeguards rules to that action").

history of Article 11.1(c) of the Agreement on Safeguards confirms the conclusions reached by the Panel regarding the interpretation of that provision.

7.86. Based on the foregoing, the Panel will assess the applicability of the Agreement on Safeguards in this dispute according to whether the measures at issue were sought, taken, or maintained pursuant to Article XXI of the GATT 1994 within the meaning of Article 11.1(c) of the Agreement on Safeguards.

### 7.7.3 Assessment of the measures at issue

7.87. The United States adopted the measures at issue under Section 232 and the related procedures set out in Title 15, Part 705 of the Code of Federal Regulations.<sup>385</sup> According to the terms of the domestic legislation, Section 232 concerns actions taken by the United States for "[s]afeguarding national security".<sup>386</sup> Moreover, Section 232 authorizes the US Secretary of Commerce to investigate the effects of imports of an article on US national security<sup>387</sup>, in consultation with the Secretary of Defense and other appropriate officers of the United States.<sup>388</sup> If the Secretary of Commerce determines that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the US President may adjust the imports of that article into the United States.<sup>389</sup> In this respect, Section 232 directs the US Secretary of Commerce and the US President to give consideration among other factors to the domestic production needed for projected national defence and the impact of foreign competition on the economic welfare of domestic industries essential to US national security.<sup>390</sup>

7.88. The US Secretary of Commerce commenced investigations under Section 232 to determine the effects of imports of certain steel and aluminium products on US national security in April 2017.<sup>391</sup> The findings of these investigations were published in January 2018 in the Steel and Aluminium Reports, where the US Secretary of Commerce determined that present quantities of steel and aluminium imports were "weakening [the United States'] internal economy" and therefore "threaten to impair" its national security.<sup>392</sup> According to these reports, rising levels of imports of foreign steel and aluminium place at substantial risk the capacity of domestic industries to produce steel and aluminium for critical infrastructure and national defence<sup>393</sup>, especially in times of national emergencies.<sup>394</sup> The reports recommend corrective actions against imports in the form of tariffs and quotas with a view to improve domestic capacity utilization and stabilize US production at the level required for its security needs.<sup>395</sup>

7.89. The measures at issue in this dispute on imports of steel and aluminium into the United States are based on the abovementioned findings and recommendations by the US Secretary of

<sup>385</sup> See section 2.1 above.

<sup>386</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862. Title 15, Part 705 of the Code of Federal Regulations sets out the procedures by which the US Department of Commerce commences and conducts an investigation "to determine the effect on the national security of the imports of any article". (See Section 232 regulations, (Exhibit USA-2), § 705.2).

<sup>387</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(b)(1)(A).

<sup>388</sup> Section 232, (Exhibit CHN-1 and USA-1), §§ 1862(b)(2)(A)(i) and b(2)(A)(ii).

<sup>389</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(c)(1)(A).

<sup>390</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(d); Section 232 regulations, (Exhibit USA-2), § 705.4.

<sup>391</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 18; Aluminium Report, (Exhibit CHN-5 and USA-8), p. 18. See also sections 2.1.2 and 2.1.3 above.

<sup>392</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 55; Aluminium Report, (Exhibit CHN-5 and USA-8), p. 104.

<sup>393</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 55; Aluminium Report, (Exhibit CHN-5 and USA-8), p. 104.

<sup>394</sup> Steel Report, (Exhibit CHN-4 and USA-7), pp. 55-56; Aluminium Report, (Exhibit CHN-5 and USA-8), p. 105 (also noting that rising imports have placed at risk the capability of domestic industries to "quickly shift production capacity used for commercial products to defense and critical infrastructure production that provides the United States a surge capability that is vital to national security, especially in an unexpected or extended conflict or national emergency").

<sup>395</sup> Aluminium Report, (Exhibit CHN-5 and USA-8), pp. 104-105. See also Steel Report, (Exhibit CHN-4 and USA-7), p. 58 (recommending quotas or tariffs on steel imported into the United States to increase domestic capacity utilization and to keep the domestic steel industry financially viable and able to meet US national security needs).

Commerce.<sup>396</sup> The Presidential Proclamations concurring with these findings and recommendations describe the measures as "necessary" and "appropriate" to address the threatened impairment of national security.<sup>397</sup> Presidential Proclamations 9704 and 9705 providing for additional duties on steel and aluminium imports state that "[t]his relief will ... revive idled facilities, open closed [smelters and] mills, preserve necessary skills by hiring new [steel and aluminium workers], and maintain or increase production", which in turn will "reduce [the United States'] need to rely on foreign producers for [steel and aluminium] and ensure that domestic producers can continue to supply all the [steel and aluminium] necessary for critical industries and national defense".<sup>398</sup> These proclamations further describe the additional duties as "an important first step in ensuring the economic viability" of the United States' domestic steel and aluminium industry, without which "the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers ... to meet [its] national security needs".<sup>399</sup> These Presidential Proclamations thus describe the national security objectives that the United States seeks to achieve by adopting measures against a "high level of imports".<sup>400</sup>

7.90. The national security considerations expressed in the domestic legal instruments and acts underlying the measures at issue are also observable in the application of the additional duties on steel and aluminium imports, including their country and product scope. In this regard, Presidential Proclamations 9704 and 9705 recognize that the United States may remove or modify the restriction on steel and aluminium imports from a country if it determines that imports from the country no longer threaten to impair its national security.<sup>401</sup> The United States exempted various countries from the additional duties on steel and aluminium imports following such determinations<sup>402</sup>, based on its "important security relationships" and "security, defense, and intelligence partnership[s]" with these countries as well as their "shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of [US] national security".<sup>403</sup> The Panel also notes that the additional duties are applied to products that are determined by the relevant domestic authorities of the United States to be important for its military systems and critical infrastructure.<sup>404</sup>

7.91. These considerations indicate that the measures at issue were designed and expected to operate in relation to the United States' determination of a threat to its national security under the relevant domestic laws. In this regard, the Panel notes several other relevant aspects of the measures at issue and their application supporting this conclusion. For example, Presidential Proclamations 9740, 9758 and 9759 introduce quotas restricting steel and aluminium imports from certain countries to provide "effective, long-term alternative means" to address their contribution to

<sup>396</sup> See e.g. Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11619 and Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11626 noting that the US President concurs with the Secretary's findings in the Steel and Aluminium Reports and has considered the recommendations in these reports.

<sup>397</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11626.

<sup>398</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11626.

<sup>399</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), pp. 11626-11627.

<sup>400</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11626.

<sup>401</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11626 (further noting that the United States may make corresponding adjustments to the additional duties applicable to other countries as its national security interests require).

<sup>402</sup> See sections 2.2.1.2 and 2.2.2.2 above for a list of the exempted countries.

<sup>403</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11626; Presidential Proclamation 9710, (Exhibit CHN-8 and USA-12), pp. 13355-13356; Presidential Proclamation 9711, (Exhibit CHN-9 and USA-11), pp. 13361-13362.

<sup>404</sup> Steel Report, (Exhibit CHN-4 and USA-7), Appendix H and Appendix I; Aluminium Report, (Exhibit CHN-5 and USA-8), pp. 24-39. See also Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11623 (providing for additional duties on imports of unwrought aluminium; aluminium bars, rods and profiles; aluminium wires; aluminium plates, sheets, strips and foil; aluminium tubes, pipes and tube or pipe fittings; and aluminium castings and forgings) and Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11629 (providing for additional duties on imports of flat-rolled steel products; steel bars and rods; steel wire; steel sheet piling; steel rails; steel fish-plates and sole plates; steel tubes, pipes and hollow profiles; steel ingots; products of stainless steel; and other products of iron or steel). See also Steel Report, (Exhibit CHN-4 and USA-7), pp. 21-22; Aluminium Report, (Exhibit CHN-5 and USA-8), p. 20.



the threat to national security as determined by the United States.<sup>405</sup> These quotas are applied only in respect of countries with which the United States has identified "important security relationships".<sup>406</sup> Presidential Proclamations 9704, 9705, 9776, and 9777 set out a product exclusion process to provide relief from the additional duties and import quotas based on "specific national security considerations".<sup>407</sup> Moreover, the Presidential Proclamations discussed above indicate that the measures at issue may be modified or removed based on monitoring by the US Secretary of Commerce and review of "the status of [steel and aluminium] imports with respect to national security".<sup>408</sup> The Panel also considers relevant the procedures under which the measures were adopted and applied, and in particular the consultations carried out with departments of government such as the US Department of Defense in relation to certain criteria for determining effects of imports on national security.<sup>409</sup>

7.92. The Panel further notes that the national security considerations described above are reflected in notifications and statements made by the United States before various official bodies of the WTO both prior to and following the adoption of the measures at issue. In a meeting of the WTO Council of Goods on 10 November 2017, before completing its Section 232 investigations into steel and aluminium imports, the United States noted that these investigations "were being conducted by the Bureau of Industry and Security (BIS), a Department of the US Commerce Agency". The United States further remarked that the purpose of these investigations was to "determine the effect of steel and aluminium imports on US national security, and whether the global excess capacity problem in those industries was threatening the ability of the United States to meet its national security needs".<sup>410</sup>

7.93. In subsequent discussions at the WTO, the United States explicitly referred to Article XXI of the GATT 1994 in connection with the measures on steel and aluminium under Section 232. Shortly after Presidential Proclamations 9704 and 9705 introduced the additional duties discussed above, the United States provided information concerning these proclamations in a meeting of the WTO Council for Trade in Goods. At this meeting, the United States referred to "the findings and recommendations in investigations concerning the impact of steel and aluminium imports on US national security" and indicated that it was providing this information "pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, and consistent with the Decision Concerning

<sup>405</sup> Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), pp. 20683-20684; Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16), p. 25850; and Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15), pp. 25857-25858. Moreover, these proclamations follow Presidential Proclamations 9710 and 9711 discussing the appropriate means to ensure that exemptions from the additional duties do not undermine the national security objectives of the duties and noting that without "satisfactory alternative means addressing long-term solutions... the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of [steel and aluminium] to meet [its] national security needs". (See Presidential Proclamation 9710, (Exhibit CHN-8 and USA-12), pp. 13356-13357 and Presidential Proclamation 9711, (Exhibit CHN-9 and USA-11), pp. 13362-13363).

<sup>406</sup> See Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), p. 20683; Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16), p. 25849; and Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15), p. 25857.

<sup>407</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), p. 11621; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11627; Presidential Proclamation 9776, (Exhibit CHN-15 and USA-19), p. 45020; and Presidential Proclamation 9777, (Exhibit CHN-16 and USA-18), p. 45026. See also the March Interim Final Rule, (Exhibit CHN-17 and USA-20), p. 12111 and the September Interim Final Rule, (Exhibit CHN-18 and USA-21), p. 46058 (explaining that this criterion allows the US Department of Commerce, in consultation with other parts of the US Government as warranted, to consider impacts on US national security that may result from not approving an exclusion and that the demonstrated concern with US national security would need to be tangible, clearly explained and would be ultimately determined by the US Government).

<sup>408</sup> Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10), pp. 11621-11622; Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9), p. 11628. See also Presidential Proclamation 9740, (Exhibit CHN-11 and USA-13), p. 20684; Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16), p. 25850; and Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15), p. 25858. The Panel notes that the measures applicable to imports from certain countries have been modified under this authority. (See e.g. Presidential Proclamation 9772, (Exhibit CHN-14) and Presidential Proclamation 9980, (Exhibit CHN-40 and USA-225)).

<sup>409</sup> See Steel Report, (Exhibit CHN-4 and USA-7), pp. 18-20 and Appendices E-G; Aluminium Report, (Exhibit CHN-5 and USA-8), pp. 18-19 and Appendices A-B. See also Presidential Proclamation 9704, (Exhibit CHN-6 and USA-10); Presidential Proclamation 9705, (Exhibit CHN-7 and USA-9); Presidential Proclamation 9758, (Exhibit CHN-12 and USA-16); and Presidential Proclamation 9759, (Exhibit CHN-13 and USA-15) (directing the US Secretary of Commerce to consider adjustments to the additional duties and import quotas in consultation with the Secretary of Defense).

<sup>410</sup> Council for Trade in Goods, Minutes of the Meeting held on 10 November 2017, G/C/M/130, (Exhibit USA-80), pp. 26-27.

Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".<sup>411</sup> In a communication shortly thereafter to the Committee on Safeguards, the United States responded to a request for consultations under Article 12.3 of the Agreement on Safeguards and referred to information it had provided to the WTO Council for Trade in Goods "consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".<sup>412</sup>

7.94. In a meeting of the WTO General Council on 8 May 2018, the United States referred to "the reasons underlying the United States' defense of critical national security interests" and recalled the Presidential Proclamations under Section 232 "determining that tariffs are necessary to adjust imports of steel and aluminum articles that threaten to impair the national security of the United States". The United States further referred at that meeting to having "previously informed Members about the proclamations issued by the President pursuant to Section 232 of the Trade Expansion Act of 1962, as amended". The United States additionally referred to its "statement at the Council for Trade in Goods meeting on March 23 – a statement we provided consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".<sup>413</sup> At a meeting of the DSB following the complainant's request for establishment of a panel in this dispute, the United States referred to the determination that "imports of steel and aluminum threaten to impair U.S. national security".<sup>414</sup>

7.95. On 28 September 2018, the United States notified import quotas on steel products from the Republic of Korea, Argentina, and Brazil, and aluminium products from Argentina to the WTO Committee on Market Access. In this notification, the United States listed Article XXI of the GATT 1994 as the "WTO Justification and Grounds for Restriction".<sup>415</sup>

7.96. Based on the foregoing evidence, the Panel considers that a central aspect of the design and application of the measures at issue is their relation to the United States' determination of a threat to its national security under the relevant domestic laws. The national security considerations of the United States are manifest in the application, modification, and removal of the additional duties, quotas, and exemptions discussed above. Moreover, this aspect of the measures was emphasized and explicitly linked to Article XXI of the GATT 1994 by the United States in a series of notifications and statements to various official bodies of the WTO. The Panel considers significant the indications at both the domestic and multilateral levels that the measures at issue related to the United States' determination of a threat to its national security and the explicit references to Article XXI of the GATT 1994 as the legal basis under the covered agreements pursuant to which the measures were sought, taken, or maintained.<sup>416</sup> While the domestic legal status or statements by a Member to official WTO bodies are not determinative of the legal characterization of measures under the covered agreements in dispute settlement, the Panel considers such evidence to be relevant within the context of an objective assessment under Article 11.1(c) of the Agreement on Safeguards. This is particularly so where there is evidence contemporaneous with the adoption of the measures that is

<sup>411</sup> Council for Trade in Goods, Minutes of the Meeting held on 23 and 26 March 2018, G/C/M/131, (Exhibit USA-81), pp. 26-27.

<sup>412</sup> Committee on Safeguards, Communication from the United States, G/SG/168, (Exhibit USA-82), pp. 1-2 and fn 2.

<sup>413</sup> Statement dated 8 May 2018 of the Deputy US Trade Representative and US Permanent Representative to the WTO, WTO General Council, (Exhibit USA-83), p. 3 (further noting that the United States did not take action pursuant to Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures).

<sup>414</sup> Statements dated 29 October 2018, 21 November 2018, and 4 December 2018 of the United States, WTO Dispute Settlement Body, (Exhibit USA-84). The United States further stated as follows at this meeting with respect to Article XXI of the GATT 1994 and the measures at issue:

The United States has given detailed explanations that the measures at issue are justified under Article XXI of the GATT 1994. In particular, we have explained that these measures are necessary to address the threatened impairment that these imports of steel and aluminum articles pose to U.S. national security.

<sup>415</sup> Committee on Market Access, Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions (G/L/59/Rev.1), G/MA/QR/N/USA/4, (Exhibit USA-85), p. 6.

<sup>416</sup> Given the consistent indications both prior and subsequent to the adoption of the measures at issue, the Panel finds support for the measures being "sought, taken or maintained" within the meaning of Article 11.1(c). The Panel notes in this regard the disjunctive nature of these requirements and does not consider it necessary in the circumstances of this dispute to make separate determinations as to which evidence reflects the measures having been "sought", "taken", or "maintained" pursuant to a provision of the GATT 1994 other than Article XIX.

confirmed by other relevant evidence of the measures' design and application. In this dispute, the features of the measures outlined above indicate that the United States' determination of a threat to its national security under Section 232 is a central aspect of the measures with respect to their legal characterization as being sought, taken, or maintained pursuant to Article XXI of the GATT 1994.<sup>417</sup>

7.97. Regarding the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards, China refers to the findings in the Steel and Aluminium Reports pertaining to the adverse impact of imports on domestic steel and aluminium industries of the United States. In particular, China highlights that the reports identify increased imports of steel and aluminium to the United States, determine that there was injury to the domestic steel and aluminium industries due to increased imports, and examine such injury by reference to factors that are typically associated with a finding under Article 4.2(a) of the Agreement on Safeguards.<sup>418</sup>

7.98. The Panel notes that the findings in the Steel and Aluminium Reports pertaining to the state of the United States' domestic steel and aluminium industries, including the decrease in domestic production, high import penetration, low-capacity utilization and declining employment, are made in the context of the determination by the US Secretary of Commerce that steel and aluminium are important to the United States' national defence requirements and critical infrastructure sectors. These reports discuss the displacement of domestic steel and aluminium by imports in relation to the risk that the United States' domestic industries will be rendered incapable of meeting its national security needs, especially in times of national emergencies. The Steel and Aluminium Reports also recall the direction under Section 232 that the relationship between the weakening of the United States' internal economy and impairment of its national security shall be determined by reference to factors including "any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects".<sup>419</sup> The reports recommend measures to increase the capacity utilization of the United States' domestic industries with the specific objective of enabling them to meet projected national security needs.<sup>420</sup>

7.99. Viewed in their context, the findings in the Steel and Aluminium Reports confirm that the aspects of the measures most central to their legal characterization under Article 11.1(c) of the Agreement on Safeguards concern the national security considerations as reflected in Section 232 and reiterated in the relevant domestic legal acts and instruments. The examination in the Steel and Aluminium Reports of the state of the domestic steel and aluminium industries is an element of the United States' determination of a threat to its national security under the relevant domestic laws. The Panel considers that it would be improper to assess such factors in isolation from the threat to national security that was determined to exist under Section 232 on the basis of those and other factors.

#### 7.7.4 Conclusion

7.100. In conclusion, the evidence before the Panel in relation to the design and application of the measures at issue indicates that the measures were sought, taken, or maintained pursuant to Article XXI of the GATT 1994. Accordingly, the measures were sought, taken, or maintained pursuant

<sup>417</sup> See e.g. Appellate Body Reports, *China – Auto Parts*, para. 171; *Indonesia – Iron or Steel Products*, para. 5.60.

<sup>418</sup> China's first written submission, section IV.A.

<sup>419</sup> Section 232, (Exhibit CHN-1 and USA-1), § 1862(d); Section 232 regulations, (Exhibit USA-2), § 705.4.

<sup>420</sup> See Aluminium Report, (Exhibit CHN-5 and USA-8), p. 107 ("import restrictions could help address the threat to U.S. national security... [Q]uotas or tariffs would be designed, even after any exemptions (if granted), to enable U.S. aluminum producers to utilize an average of 80 percent of their production capacity. The quotas and tariffs described below should be sufficient to enable U.S. aluminum producers to operate profitably under current market prices for aluminum and will allow them to reopen idled capacity") and 108 ("A worldwide quota ...would help ensure the viability of those U.S. producers to meet national security needs"). See also Steel Report, (Exhibit CHN-4 and USA-7), p. 58 ("Due to the threat of steel imports to the national security, as defined in Section 232, the Secretary recommends that the President take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States, as well as direct additional actions to keep the U.S. steel industry financially viable and able to meet U.S. national security needs. The quota or tariff imposed should be sufficient, after accounting for any exclusions, to enable the U.S. steel producers to be able to operate at about an 80 percent or better of the industry's capacity utilization rate based on available capacity in 2017").

to a provision of the GATT 1994 other than Article XIX within the meaning of Article 11.1(c) of the Agreement on Safeguards.

7.101. The Panel's assessment of the measures being under the purview of Article XXI of the GATT 1994 is without prejudice to the consistency of the measures with the specific terms and requirements of Article XXI. The Panel recalls that its conclusions under Article 11.1(c) pertain solely to the issue of applicability of the Agreement on Safeguards rather than the consistency of the measures at issue with the requirements of the other provision, namely Article XXI of the GATT 1994, pursuant to which the measures were sought, taken, or maintained.

## **7.8 Article XXI(b) of the GATT 1994**

### **7.8.1 Introduction**

7.102. The United States invokes Article XXI(b) of the GATT 1994 in relation to the measures at issue as "action[s] which [the United States] considers necessary for the protection of its essential security interests". The Panel will address the United States' invocation of Article XXI(b) of the GATT 1994 in relation to whether the measures found to be inconsistent with Articles I:1 and II:1 of the GATT 1994 are "actions" falling within the scope of Article XXI(b) of the GATT 1994.

7.103. The Panel will first address the parties' interpretive disagreement on the extent to which the terms of Article XXI(b) of the GATT 1994 permit review of a Member's invocation of that provision in proceedings under the DSU. In doing so, the Panel will address specific issues of interpretation contested by the parties, including the United States' arguments as to the "self-judging" nature and "non-justiciability" of Article XXI(b) of the GATT 1994, in accordance with Article 3.2 of the DSU and customary rules of interpretation of public international law. The Panel will then assess the evidence and arguments submitted by the parties in relation to the measures found to be inconsistent with provisions of the GATT 1994 in light of the conclusions reached regarding the interpretation of Article XXI(b) of the GATT 1994.

### **7.8.2 Interpretation of Article XXI(b) of the GATT 1994 in accordance with Article 3.2 of the DSU**

7.104. Article XXI of the GATT 1994 is entitled "Security Exceptions" and provides:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any 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; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

7.105. The United States submits that the Panel should limit its findings in this dispute to recognizing the invocation of Article XXI(b) because "[t]he text of [the provision], in its context and in the light of the agreement's object and purpose, establishes that the exception is self-judging."<sup>421</sup> According to the United States, "[t]he self-judging nature of ... Article XXI(b) is demonstrated by

<sup>421</sup> United States' first written submission, para. 23.

that provision's reference to actions that the Member 'considers necessary' for the protection of its essential security interests."<sup>422</sup> Consequently, "the only requirement for the Member invoking Article XXI is for the Member to consider that a particular action is necessary to protect its essential security interests in any of the circumstances identified in Article XXI(b)."<sup>423</sup> The United States maintains that this requirement is met "once the Member indicates, in the context of dispute settlement, that it has made such a determination" that it "consider[s] one or more of the circumstances set forth in Article XXI(b) to be present".<sup>424</sup>

7.106. A premise of the United States' characterization of Article XXI(b) as "self-judging" is that, based on "the text and grammatical structure" of the provision, "the phrase 'which it considers' qualifies all of the terms in the single relative clause that follows the word 'action'".<sup>425</sup> According to the United States, this "single relative clause" in Article XXI(b) "begins with 'which it considers necessary' and ends at the end of each subparagraph" and "describes the situation which the Member 'considers' to be present when it takes such 'action'".<sup>426</sup> The United States argues from this premise that, "[b]ecause the relative clause describing the action begins with 'which it considers', the other elements of this clause are committed to the judgment of the Member taking the action."<sup>427</sup> The United States thus posits an "overall grammatical structure" of Article XXI(b) according to which a panel may not "determine, for itself, whether a security interest is 'essential' to the Member in question, or whether the circumstances described in one of the subparagraphs exists".<sup>428</sup>

7.107. China contests the interpretive and grammatical basis of the United States' argument and emphasizes the objective review in dispute settlement proceedings of terms in Article XXI(b) that are not qualified by the phrase "which it considers".<sup>429</sup> China thus disputes the characterization of Article XXI(b) as "self-judging" and contends that the measures are not justified under this provision based on the arguments and evidence before the Panel. In particular, China argues that the United States' interpretation fails to give effective meaning to the subparagraphs of Article XXI(b) and is incompatible with the requirements of the DSU concerning the independent review of matters raised under the covered agreements.<sup>430</sup>

7.108. The Panel recalls that it is required to address the United States' invocation of Article XXI(b) of the GATT 1994 in accordance with Article 3.2 of the DSU and the customary rules of interpretation of public international law.<sup>431</sup> A threshold point of interpretive disagreement between the parties is the extent to which the terms of Article XXI(b) of the GATT 1994 permit review of a Member's invocation of that provision by a panel established under the DSU. While the parties refer to numerous aspects of treaty interpretation in relation to this question, both parties base their positions primarily on the terms of Article XXI(b) of the GATT 1994 and the rule of interpretation set out in Article 31(1) of the Vienna Convention that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose."<sup>432</sup> As noted above<sup>433</sup>, this rule of interpretation forms part of the "customary rules of interpretation of public international law" referred to in Article 3.2 of the DSU.<sup>434</sup> Accordingly, the Panel will examine the ordinary meaning of the terms of Article XXI(b) of the GATT 1994 in their context and in light of the treaty's object and purpose, focusing on the parties' disagreement as to whether the terms of the provision permit review of its invocation in proceedings under the DSU.

<sup>422</sup> United States' first written submission, para. 25.

<sup>423</sup> United States' response to Panel question No. 33.

<sup>424</sup> United States' response to Panel question No. 52.a; see also response to Panel question Nos. 35 and 38; second written submission, para. 23.

<sup>425</sup> United States' second written submission, paras. 7-8; see also *ibid.* para. 13 ("the ordinary meaning of the terms of Article XXI(b) establishes that, contrary to the complainant's arguments, the word 'considers' qualifies all the terms in the *chapeau* and the subparagraph endings of Article XXI(b)").

<sup>426</sup> United States' response to Panel question No. 36.

<sup>427</sup> United States' second written submission, para. 22; see also response to Panel question Nos. 39 and 40 ("The text reserves to the Member the judgment as to whether action is necessary in one or more of those circumstances for the protection of its essential security interests.").

<sup>428</sup> United States' response to Panel question No. 37.

<sup>429</sup> See China's response to Panel question Nos. 35-37.

<sup>430</sup> See e.g. China's opening statement at the first meeting of the Panel.

<sup>431</sup> See section 7.1 above.

<sup>432</sup> See China's response to Panel question No. 56; United States' response to Panel question No. 56.

<sup>433</sup> See para. 7.68 above. See also Appellate Body Reports, *US – Gasoline*, p. 17; *India – Patents (US)*, para. 46; *Argentina – Textiles and Apparel*, para. 42; *US – Carbon Steel*, para. 61.

<sup>434</sup> See e.g. Appellate Body Report, *US – Gasoline*, p. 17.

7.109. Pursuant to the security exceptions under Article XXI of the GATT 1994, "[n]othing in this Agreement shall be construed to require" a Member "to furnish any information" described under paragraph (a) or "to prevent" a Member "from taking any action" described under paragraphs (b) or (c) of that provision. The three paragraphs (a) to (c) are separated by semicolons followed by the word "or" and Article XXI concludes in a full stop at the end of paragraph (c). Paragraph (b) of Article XXI provides that the "action" that a Member is not prevented from taking is "any action which [the Member] considers necessary for the protection of its essential security interests", followed by three subparagraphs that are enumerated (i) to (iii).<sup>435</sup> These subparagraphs are separated by semicolons and the word "or" appears after the semicolons at the end of paragraph (a) and subparagraph (iii) of Article XXI(b).<sup>436</sup>

7.110. In providing for "any action" that "[n]othing in this Agreement shall be construed ... to prevent", Article XXI(b) establishes an exception to obligations under other provisions of the GATT 1994. The "action" covered by this provision is one that a Member "considers necessary for the protection of its essential security interests". Dictionary definitions of the term "consider" include to "regard in a certain light or aspect, look upon as" or "think or take to be".<sup>437</sup> Under Article XXI(b), a Member must consider that its action is "necessary for" a defined purpose, namely "the protection of its essential security interests". Dictionary definitions of "interest" include "the relation of being involved or concerned as regards potential detriment or (esp.) advantage".<sup>438</sup> The relevant interests under Article XXI(b) pertain to "security", which may be defined as "the condition of being protected from or not exposed to danger".<sup>439</sup> The description of these security interests as "essential" indicates the heightened significance of the security interests that Members are not prevented from taking action to protect under Article XXI(b).<sup>440</sup> As indicated by the possessive pronoun "its", the relevant "security interests" are those of the Member taking action under Article XXI(b).<sup>441</sup>

<sup>435</sup> The parties have used different terminology to refer to the different parts of Article XXI, including "chapeau", "subparagraph", and "subparagraph ending". The Panel considers that such terminology is not determinative of the proper interpretation so long as it is consistently applied in describing the provision. (See also China's response to Panel question No. 91; United States' response to Panel question No. 91).

<sup>436</sup> The French and Spanish texts are similarly structured with minor differences, including a colon at the end of paragraph (b) before the three subparagraphs. In addition, the Spanish text contains a colon after the opening terms of Article XXI before paragraph (a), and in the French text the conjunction "ou" appears at the beginning of paragraphs (b) and (c).

<sup>437</sup> *Shorter Oxford English Dictionary*, 5th Edition (Oxford University Press, 2003), p. 493. See also *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 921 (defining "estimer" as "[a]voir une opinion sur" (to have an opinion on), "considérer" (to consider), "croire" (to believe), "regarder" (to regard), or "penser" (to think)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 676 (defining "estimar" as "creer" (to believe) or "hacer aprecio y estimación de alguien o de algo" (make appreciation or estimation of someone or something)); and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 485.

<sup>438</sup> *Shorter Oxford English Dictionary*, 5th Edition (Oxford University Press, 2003), p. 1400 (also defining "interest" as "[a] thing that is of some importance to a person, company, state"). See also *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 1340 (defining "intérêt" as "[c]e qui importe, ce qui convient (en quelque domaine que ce soit)" (what matters or what suits in any domain)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 874 (defining "interés" as "[i]nclinación del ánimo hacia un objeto, una persona, una narración, etc." (inclination of mind towards an object, a person, a narration, etc.)); and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 1393.

<sup>439</sup> *Shorter Oxford English Dictionary*, 5th Edition (Oxford University Press, 2003), p. 2734. See also *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 2310 (defining "sécurité" as "[s]ituation, état tranquille qui résulte de l'absence réelle de danger" (tranquil situation, state which results from the real absence of danger)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 1385 (defining "seguridad" as "[c]ualidad de seguro" and "seguro" as "[l]ibre y exento de todo peligro, daño o riesgo" (free and exempt from all danger, damage or risk)); and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 2754.

<sup>440</sup> Dictionary definitions of "essential" include "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important". See also *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 918 (defining "essentiel" as "[q]ui est absolument nécessaire" (absolutely necessary) or "[l]e plus important" (the most important)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 655 (defining "esencial" as "[s]ustancial", "principal", or "notable"); and *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 852.

<sup>441</sup> The French and Spanish language versions similarly use the possessive pronouns "sa" and "su" respectively. See *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 2365 and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 1424.

7.111. Interpreting the terms of Article XXI(b) within the structure and context of the provision as a whole, the Panel notes the textual separation and indentation under Article XXI of the three paragraphs and a similar separation and indentation of the three subparagraphs under paragraph (b) of Article XXI. The introductory terms of Article XXI ("Nothing in this Agreement shall be construed") form the beginning of a sentence with three alternative endings to this sentence in each of the paragraphs (a) to (c). Under paragraph (b) of Article XXI, the enumerated subparagraphs (i) to (iii) are alternative endings to the sentence following the terms "any action which it considers necessary for the protection of its essential security interests". The punctuation and conjunctions linking these various parts of Article XXI serve the function of listing the alternative endings to the provision. These considerations indicate that Article XXI(b) forms part of, and provides in its own subparagraphs, a list of alternative endings to form a sentence. Therefore, Article XXI(b) is to be given meaning as a complete sentence with the enumerated subparagraphs (i) to (iii) representing alternative endings to the sentence that begins "Nothing in this Agreement shall be construed".

7.112. In continuation of the sentence formed under Article XXI(b), subparagraphs (i) and (ii) begin with the terms "relating to" and subparagraph (iii) begins with the terms "taken in time of". The terms "relating to" indicate a connection to the "materials" and "traffic" in subparagraphs (i) and (ii), respectively, while the terms "taken in time of" indicate a temporal relationship to the circumstances in subparagraph (iii). The Panel understands these opening terms in each subparagraph to qualify and describe the "action" referred to in Article XXI(b). This is confirmed in the French and Spanish versions of Article XXI(b) in which the corresponding terms ("*se rapportant*" and "*appliquées*" in French and "*relativas*" and "*aplicadas*" in Spanish) qualify nouns that are feminine and plural translations of "any action" ("*toutes mesures*" in French and "*todas las medidas*" in Spanish).<sup>442</sup> The relation of the opening terms of each subparagraph to the "action" in Article XXI(b) is further supported by their parallel positioning in the text and their common function of linking the remaining terms of each subparagraph to those in paragraph (b).

7.113. As a result, Article XXI(b) applies to actions "relating to" the "materials" and "traffic" described in subparagraphs (i) and (ii), respectively, and to actions "taken in time of" the circumstances referred to in subparagraph (iii). These subparagraphs provide alternative endings that are an integral part of complete sentences formed under Article XXI(b). Moreover, there is no textual indication that the sentence endings in the subparagraphs of Article XXI(b) are merely illustrative or that Article XXI(b) may apply to actions other than those described in the

<sup>442</sup> The Panel understands that the parties agree that the subparagraphs qualify and relate to the "action" in Article XXI(b), notwithstanding some disagreement as to the precise basis for this conclusion. The United States submits in this regard that, under "[t]he most natural reading" of Article XXI(b), subparagraphs (i) and (ii) relate to a Member's "essential security interests" whereas subparagraph (iii) modifies "action" that is "taken" by a Member. At the same time, the United States considers that "an interpretation that best reconciles the idiosyncratic Spanish text with the English and French texts" is one in which the "action" is modified by the terms following it and "all three subparagraph endings refer to 'any action which it considers'." (United States' response to Panel question Nos. 39 and 40; see also second written submission, paras. 17-19). Under this reading, the United States argues that the terms of the provision still form a "single relative clause" in which the phrase "which it considers" modifies the entirety of the subparagraphs. (United States' response to Panel question Nos. 41-43; United States' second written submission, paras. 3 and 83-84; United States' opening statement at the second meeting of the Panel, paras. 8-9). China contests the grammatical basis of the United States' argument on a "single relative clause" in Article XXI(b) and argues that the subparagraphs qualify the term "action". (See e.g. China's response to Panel question Nos. 40 and 90).

For the purposes of resolving the contested issues of interpretation under Article XXI(b) in this dispute, the Panel considers that it is sufficient to conclude that the term "action" is qualified by the subparagraphs, as supported by the textual analysis in this section and the concordance of plural and feminine terms in the French and Spanish versions of Article XXI(b). The Panel notes the United States' argument on the reconciliation of texts under Article 33 of the VCLT relates to its contentions regarding a "single relative clause" in Article XXI(b) and the "self-judging" nature of the provision, which the Panel addresses in this section in accordance with Article 3.2 of the DSU and its mandate to make such findings as will assist the DSB in making the recommendations or rulings provided for in the covered agreements. To the extent that the comparison of authentic texts discloses any difference in meaning under Article 33(4) of the VCLT, the Panel considers that the application of Articles 31 and 32 of the VCLT removes any such difference so as to resolve the contested issues of interpretation in this dispute. Accordingly, the Panel does not consider it necessary for the purposes of this dispute to address in further detail the parties' arguments on the reconciliation of authentic texts in relation to the contested issues of interpretation under Article XXI(b) and its application to the measures at issue in this dispute.



subparagraphs.<sup>443</sup> These considerations indicate that the subparagraphs are exhaustive in establishing the circumstances in which a Member may take the "action which it considers necessary for the protection of its essential security interests" within the meaning of Article XXI(b).<sup>444</sup>

7.114. Regarding the discretion of Members taking "action" under Article XXI(b), the parties acknowledge the deference accorded to a Member's judgment for "any action which it considers necessary for the protection of its essential security interests".<sup>445</sup> The terms "which it considers" denote the consideration or judgment of the Member taking action under Article XXI(b)<sup>446</sup>, which is further reinforced by providing that the Member shall not be prevented from taking "any" action within the terms of the provision.<sup>447</sup> Regarding the extent of discretion accorded by the terms "which it considers", the parties disagree as to what precisely in Article XXI(b) is qualified by these terms and the implications of such qualification for the review of a Member's invocation of Article XXI(b) in dispute settlement proceedings. In particular, the parties dispute whether the three enumerated subparagraphs (i) to (iii) of Article XXI(b) are qualified by the terms "which it considers" and, relatedly, how to interpret those subparagraphs in accordance with the requirements of the DSU. A specific question in this regard is whether, as argued by the United States and contested by China<sup>448</sup>, the clause beginning with the relative pronoun "which" constitutes a "single relative clause" that includes the terms in subparagraphs (i) to (iii) of Article XXI(b).

7.115. The Panel notes that the United States submits certain reference materials on English grammar in support of its contention that the subparagraphs of Article XXI(b) form part of a "single relative clause" that is entirely reserved to the judgment of the Member taking action under the provision.<sup>449</sup> Due to the grammatical dimension of the United States' arguments concerning the "single relative clause" in Article XXI(b), the Panel examines the grammatical construction of the provision in relation to the contested issue of whether the subparagraphs of Article XXI(b) are qualified by the terms "which it considers". The grammatical considerations raised by the parties reinforce the Panel's preceding textual analysis of Article XXI(b) and are addressed insofar as they may inform the assessment of the ordinary meaning of the terms in their context.

7.116. The grammatical analysis of Article XXI(b) for the purposes of this dispute particularly concerns the relationship between various phrases and clauses within the overall sentence structure

<sup>443</sup> The subparagraphs of Article XXI(b) of the GATT 1994 may be contrasted with other provisions of the covered agreements containing terms that explicitly indicate the illustrative nature of the provisions. (See e.g. Article 2.2 of the TBT Agreement ("such legitimate objectives are, *inter alia*, national security requirements ..."); Article 3.5 of the Anti-Dumping Agreement ("factors which may be relevant [for determining injury] include, *inter alia*, the volume and prices of imports ..."); Article 1.1(a)(1) of the SCM Agreement ("a direct transfer of funds (e.g. grants, loans and equity infusion)"); and Annex I to the SCM Agreement ("Illustrative List of Export Subsidies")).

<sup>444</sup> The Panel notes the agreement of parties as to the exhaustive nature of subparagraphs of Article XXI(b), notwithstanding their disagreement on the implications of this for review in by a panel established under the DSU. (See China's response to Panel question No. 39; United States' response to Panel question Nos. 39 and 40). For example, the United States argues that the subparagraphs of Article XXI(b) "form an integral part of the provision in that they complete the sentence begun in the chapeau, establishing three exhaustive circumstances in which a Member may act". At the same time, the United States maintains that "[t]he fact that these circumstances are exhaustive, however, does not mean that the Member's invocation of Article XXI(b) is subject to review." (United States' response to Panel question Nos. 39 and 40).

<sup>445</sup> China's response to Panel question No. 35; United States' response to Panel question No. 35.

<sup>446</sup> The French and Spanish language versions of Article XXI(b) respectively use the phrases "*qu'elle estimera*" and "*que estime*", indicating the estimation or consideration of the Member taking action under that Article. See *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 824 and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 1270.

<sup>447</sup> The terms corresponding to "any action" in Article XXI(b) in the French and Spanish versions are "*toutes mesures*" and "*todas las medidas*", which may be understood as all measures. See *Le Petit Robert Dictionnaire de la Langue Française* (2000), pp. 2551-2552; and *Diccionario de la Lengua Española*, 22<sup>nd</sup> Edition (Real Academia Española, 2001), pp. 1485-1486.

<sup>448</sup> China's response to Panel question No. 90.

<sup>449</sup> The Panel notes that the parties' arguments concerning the grammar of Article XXI(b) focus on the English text of the provision, and the Panel accordingly focuses its assessment on the English text and the specific reference materials on English grammar submitted by the parties. The Panel does not make any determination as to the status or authority of such reference materials but rather refers to them as relevant to addressing the parties' arguments and describing the grammatical construction of Article XXI(b).

of the provision.<sup>450</sup> As noted above, Article XXI begins a sentence that is completed by the terms of paragraph (b) and the alternative endings in the subparagraphs thereunder. The opening terms of Article XXI form a clause beginning with the terms "Nothing in this Agreement" and ending with the terms "any action" in paragraph (b). This clause can be characterized as an independent clause in that it contains a subject ("Nothing") and predicate ("shall be construed to prevent any Member from taking any action") that can stand alone as a complete sentence.<sup>451</sup>

7.117. Following this independent clause, the relative pronoun "which" in Article XXI(b) begins a relative clause that can be grammatically characterized as a dependent clause in the sense that it is a group of words with a subject and verb that, unlike an independent clause, cannot stand on its own as a complete sentence.<sup>452</sup> This relative clause is grammatically subordinate to the independent clause at the beginning of Article XXI that ends with the word "action" in paragraph (b), qualifying the noun "action" to describe the action that a Member may take notwithstanding the obligations under the GATT 1994.<sup>453</sup> The pronoun "it" refers to the Member taking action under Article XXI(b) and is the subject of this relative clause. The verb "considers" is followed by an immediate object ("necessary") that is further modified by a prepositional phrase ("for the protection of") and noun phrase ("its essential security interests").<sup>454</sup>

7.118. Each of the subparagraphs of Article XXI(b) begins with a participle that forms the beginning of a participle phrase.<sup>455</sup> Specifically, subparagraphs (i) and (ii) begin with the present participle "relating" and subparagraph (iii) begins with the past participle "taken". As these participles qualify the noun "action"<sup>456</sup>, the terms following each participle function as adjectives describing the "action" under Article XXI(b) and thus can be characterized as participle or adjectival phrases qualifying that noun.<sup>457</sup>

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<sup>450</sup> A "clause" in this context has been defined as "a group of words containing both a subject and a predicate" that "functions as an element of a compound or complex sentence". A "phrase", by contrast, is "a brief expression that consists of two or more grammatically related words but that does not constitute a clause" (i.e. does not contain a noun and a verb). (*Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), pp. 231 and 233).

<sup>451</sup> See W. Strunk Jr. and E.B. White, *The Elements of Style*, 4<sup>th</sup> edn (Allyn and Bacon, 1999), (Exhibit USA-226), pp. 91 and 93 (an "independent clause" is "[a] group of words with a subject and verb that can stand alone as a sentence". A "predicate" refers to "[t]he verb and its related words in a clause or sentence" and "expresses what the subject does, experiences, or is"). According to the United States, through the language in this independent clause, "Article XXI(b) creates an exception to the obligations in the [GATT 1994]". (See United States' response to Panel question No. 90).

<sup>452</sup> S. Greenbaum, *English Grammar* (Oxford University Press, 1996), (Exhibit USA-93), p. 631 (a "relative clause" is used to "postmodify nouns" and is "introduced by a relative item" such as the relative pronoun "which"); R. Flesch and A.H. Lass, *The Classic Guide to Better Writing* (HarperPerennial, 1996), (Exhibit USA-94), p. 69 ("[w]ho and which are called relative pronouns and introduce relative clauses". Using these relative pronouns "[makes] an independent clause into a relative or dependent clause – a group of words that can't stand by itself") (emphasis omitted); and W. Strunk Jr. and E.B. White, *The Elements of Style*, 4<sup>th</sup> edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 91 (a "dependent clause" is "subordinate to an independent clause in a sentence" and begins with either a subordinating conjunction or a relative pronoun such as "which".) (emphasis omitted).

<sup>453</sup> See e.g. S. Greenbaum, *English Grammar* (Oxford University Press, 1996), (Exhibit USA-93), p. 631 (a "relative clause" is used to "postmodify nouns"); *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), p. 233 (a subordinate clause "cannot stand alone, and must be either preceded or followed by a main clause"); and W. Strunk Jr. and E.B. White, *The Elements of Style*, 4<sup>th</sup> edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 95 (a "subordinate clause" is a "clause dependant on the main clause in a sentence").

<sup>454</sup> See *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), p. 232 (a "noun phrase" consists of "a noun and its modifiers" whereas a "prepositional phrase" consist of "a preposition and its object"); W. Strunk Jr. and E.B. White, *The Elements of Style*, 4<sup>th</sup> edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 93 (a prepositional phrase is "[a] group of words consisting of a preposition, its object, and any of the object's modifiers").

<sup>455</sup> See *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), p. 232 (a "participial phrase includes a participle and functions as an adjective"); W. Strunk Jr. and E.B. White, *The Elements of Style*, 4<sup>th</sup> edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 93 (a "participial phrase" is "[a] present or past participle with accompanying modifiers, objects, or complements").

<sup>456</sup> See para. 7.112 above.

<sup>457</sup> See *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-95), pp. 232-233 ("[a] participle phrase includes a participle and functions as an adjective". An "adjective clause modifies a noun or pronoun and normally follows the word it modifies").

7.119. The Panel does not consider that the grammatical construction of Article XXI(b) definitively resolves whether the subparagraphs are qualified by the phrase "which it considers" as part of a "single relative clause" in the manner contended by the United States. The adjectival phrases in the subparagraphs of Article XXI(b) could be regarded as continuations of the relative clause that begins with the relative pronoun "which" in the sense that they provide alternative endings to the sentence formed under the provision. However, this does not necessarily compel the conclusion that the subparagraphs form part of a "single relative clause" in the sense argued by the United States that, "[b]ecause the relative clause describing the action begins 'which it considers', the other elements of this clause are committed to the judgment of the Member taking the action."<sup>458</sup> In support of its view that, under the ordinary meaning of the English text of Article XXI(b), subparagraphs (i) and (ii) modify the phrase "essential security interests"<sup>459</sup>, the United States refers to rules of English grammar according to which "an adjectival phrase normally follows the word it modifies or is otherwise placed as closely to the word it modifies".<sup>460</sup> According to this argument, the adjectival phrases in the subparagraphs of Article XXI(b) would thus be part of the relative clause that begins with the word "which" and would modify the terms in that relative clause that appear closest to the subparagraphs.

7.120. The grammatical references cited by the United States do not indicate a categorical rule according to which the relative clause in Article XXI(b) that begins "which it considers" must contain and qualify any following adjectival phrase (i.e. those contained in the subparagraphs). Indeed, the United States acknowledges a deviation in Article XXI(b) from the general rule it cites as "the drafters departed from typical English usage" in subparagraph (iii) by placing the adjectival phrase in that subparagraph next to "essential security interests", rather than next to the term modified by that adjectival phrase ("action").<sup>461</sup> With respect to the interpretation of Article XXI(b), the qualification of the noun "action" in paragraph (b) by the participle phrases in the subparagraphs is not solely determined by rigid application of grammar but follows from the ordinary meaning of these terms, notwithstanding the existence of a relative clause in paragraph (b) between the noun "action" and textually discrete adjectival phrases qualifying that "action".

7.121. The foregoing considerations reflect the potential limitations of a purely grammatical analysis of the terms of Article XXI(b) and the significance of additional interpretive considerations in ascertaining the ordinary meaning of the terms in their context. In addressing the parties' dispute as to the interpretation of Article XXI(b) of the GATT 1994, the Panel is mindful of the principle of effective treaty interpretation according to which all terms of a treaty are to be given meaning and effect. Relatedly, the terms used in a treaty must not be reduced to redundancy or inutility.<sup>462</sup> The meaning and effect of the subparagraphs derives not only from considerations of grammatical qualification but also the specific terms used within the overall structure of the provision. Characterizing the subparagraphs as part of a "single relative clause", even if grammatically permissible, does not account for the ordinary meaning of actions "relating to" specified "materials" and "traffic" and to actions "taken in time of" specified circumstances. Nor does it account for the structure of Article XXI(b) and the textual separation of the subparagraphs into an enumerated list, which corresponds to the role of the subparagraphs as alternative sentence endings that collectively delimit the scope of Article XXI(b).

7.122. The Panel notes the United States' argument that Article XXI(b) "should be read as a single clause and not as introducing separate conditions".<sup>463</sup> Further, the United States cautions against an approach that would "atomize this single relative clause" because "[a]rtificially separating the words 'which it considers necessary' from the language that immediately follows and continues the clause

<sup>458</sup> United States' response to Panel question No. 36.

<sup>459</sup> See fn 442 above.

<sup>460</sup> United States' response to Panel question No. 90 (referring to *Merriam-Webster's Guide to Punctuation and Style* (Merriam-Webster, Incorporated, 1995), (Exhibit USA-176), pp. 232-233 ("[t]he adjective clause modifies a noun or pronoun and normally follows the word it modifies" and "[u]sage problems with phrases occur most often when a modifying phrase is not placed close enough to the word or words that it modifies") and S. Benedict (ed.), *Harper's English Grammar* (Harper & Row, 1966), (Exhibit USA-96), p. 186 ("adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify")).

<sup>461</sup> United States' response to Panel question No. 90.

<sup>462</sup> See e.g. Appellate Body Reports, *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages II*, p. 12; *India – Patents (US)*, para. 45.

<sup>463</sup> United States' response to Panel question No. 40.

– for the protection of – would erroneously interpret certain terms of Article XXI(b) in isolation."<sup>464</sup> In the Panel's view, giving meaning and effect to the terms of the subparagraphs does not entail reading them in isolation from the other terms of Article XXI(b) or "introducing separate conditions" beyond what is reflected in the terms themselves.<sup>465</sup> The terms of Article XXI(b) grant discretion to Members for actions that they "consider necessary for the protection of their essential security interests" while also enumerating circumstances and conditions under which that discretion may be exercised.<sup>466</sup> The right to take action under Article XXI(b) thus consists of an express provision of deference to a Member's consideration that is complemented by subparagraphs that must be given meaning and effect according to the ordinary meaning of their terms.<sup>467</sup>

7.123. The Panel finds relevant context for the interpretive issues raised in this dispute in the provisions of the GATT 1994 concerning consultation and potential recourse in cases of nullification or impairment, as well as the rules and procedures of the DSU, noting that these agreements are both "integral parts of [the WTO] Agreement, binding on all Members".<sup>468</sup> Article XXII of the GATT 1994 provides for consultation "with respect to any matter affecting the operation of this Agreement" and Article XXIII of the GATT 1994 addresses nullification or impairment of "any benefit accruing to [a Member] under this Agreement". The DSU elaborates upon these provisions<sup>469</sup> and establishes the rules and procedures applicable to disputes concerning the covered agreements in Appendix 1 of the DSU. Neither the relevant provisions of the GATT 1994 nor the DSU make any explicit reference to Article XXI of the GATT 1994 or the potential review of its invocation in dispute settlement proceedings.<sup>470</sup> In the absence of any special or additional rule of dispute settlement concerning Article XXI(b) of the GATT 1994, any review of its invocation must be carried out in accordance with the DSU as a function of the terms of the provision interpreted in accordance with customary rules of interpretation of public international law.

7.124. The Panel finds further guidance in the object and purpose as expressed in the preamble of the WTO Agreement "to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations". In addition, the preambles of both the WTO Agreement and the GATT 1994 refer to the desire to contribute to the objectives of these agreements "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations".<sup>471</sup> In furtherance of these objectives, the WTO Agreement establishes a legal framework of rights and obligations that includes

<sup>464</sup> United States' response to Panel question No. 36; see also second written submission, para. 8.

<sup>465</sup> The United States draws the Panel's attention to commentaries of the International Law Commission that, "[p]roperly limited and applied, the maxim [of effective treaty interpretation] does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty." (United States' response to Panel question No. 47 citing Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, Vol. II, (Exhibit USA-23), p. 219). The Panel agrees that the rule of effectiveness requires that treaty interpretation neither expand nor diminish the actual terms used. In the present case, the Panel does not consider its interpretation to require any addition to the terms of Article XXI(b), as the effectiveness of the subparagraphs derives from their existing terms read within the overall structure of the provision. (See United States' response to Panel question No. 36, paras. 134-135 (arguing that the subparagraphs would require additional terms at the beginning of the subparagraphs to establish their separation from the relative clause beginning with "which it considers")).

<sup>466</sup> The Panel notes that the scope of the circumstances set out in the subparagraphs does not detract from a Member's consideration that action within the scope of the subparagraphs is necessary "for" a specific purpose and that the Member's action pertain to "its" interest. (See United States' response to Panel question No. 36).

<sup>467</sup> In this sense, the United States' view that "the subparagraphs *guide a Member's exercise of its rights* under this provision" is compatible with the delimiting function served by the subparagraphs to define the circumstances and conditions under which action may be taken, "while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests". (United States' first written submission, para. 34 (emphasis added); see also Response to Panel question No. 35).

<sup>468</sup> Article II:2 of the WTO Agreement.

<sup>469</sup> Pursuant to Article 3.2 of the DSU, "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

<sup>470</sup> Appendix 2 of the DSU does not provide any special or additional rules applying to disputes in which Article XXI of the GATT 1994 is invoked.

<sup>471</sup> The preamble of the GATT 1994 refers to "international commerce" instead of "international trade relations".

the rules and procedures applicable to disputes concerning the covered agreements in the DSU. The DSU "serves to preserve the rights and obligations of Members under the covered agreements"<sup>472</sup> and "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under [the DSU] and the covered agreements".<sup>473</sup> The rules and procedures of the DSU are thus intended to maintain the balance between the rights and obligations of the Members<sup>474</sup> as embodied in the covered agreements and the relevant provisions thereof raised by the parties to proceedings under the DSU.

7.125. The provision of relevance to this dispute, Article XXI(b) of the GATT 1994, establishes a right to take action for the protection of a Member's essential security interests and explicitly enumerates conditions in the subparagraphs that are an integral part of that right. The absence of explicit provision or elaboration in Article XXI(b) of the GATT 1994 as to whether and how its invocation may be reviewed does not, in itself, preclude or otherwise determine the review of that provision in dispute settlement proceedings.<sup>475</sup> Rather, the scope and nature of such review derives from the terms of Article XXI(b) of the GATT 1994 and requirements of the DSU established under the WTO Agreement, which acknowledges *inter alia* the role of the WTO dispute settlement system in "providing security and predictability to the multilateral trading system".<sup>476</sup> If Article XXI(b) of the GATT 1994 is raised in dispute settlement proceedings, the DSU requires that it be addressed in accordance with the terms of the provision itself and within an objective assessment of the relevant measures and claims to make findings that will assist the DSB to make recommendations provided for in the covered agreements.

7.126. In addition to the relevant text, context, and object and purpose of the covered agreements, the parties have referred to various other materials regarding the interpretation of Article XXI(b) of the GATT 1994. These materials include: (a) negotiating history of Article XXI of the GATT 1947 and preparatory works of the Havana Charter for the International Trade Organization (ITO); (b) internal documents of the US delegation to the negotiation of the ITO draft charter and GATT 1947; (c) GATT Council Decisions under the GATT 1947; (d) views expressed by GATT contracting parties prior to the creation of the WTO; and (e) negotiating history of the Uruguay Round. Both parties contend that these materials provide support for their primary arguments on the terms of Article XXI(b) of the GATT 1994 and the rule of interpretation in Article 31(1) of the Vienna Convention.<sup>477</sup> In Appendix B to this Report, the Panel addresses the parties' arguments on the relevance of these materials to the interpretation of Article XXI(b) of the GATT 1994.

7.127. As detailed in Appendix B, these materials do not provide clear guidance regarding the contested issues in this dispute, particularly concerning the scope and nature of the review of a Member's invocation of Article XXI(b) of the GATT 1994 in proceedings under the DSU. In addition to questions on the precise legal status of these materials for the purpose of treaty interpretation, the Panel does not find any clear indication in these materials of the "self-judging nature" or "non-justiciability" of Article XXI(b) of the GATT 1994 as contended by the United States.<sup>478</sup> Rather, the Panel finds these materials to support the general conclusion that the terms of Article XXI(b) of the GATT 1994 establish a right to take action for the protection of essential security interests in the conditions and circumstances described in the three subparagraphs.

7.128. In conclusion, the entirety of Article XXI(b) of the GATT 1994 is to be given meaning and effect in a manner that preserves the right and discretion of a Member to take action it considers necessary for the protection of its essential security interests under the conditions and circumstances described in subparagraphs (i) to (iii). The Panel does not consider that Article XXI(b) of the GATT 1994 is "self-judging" or "non-justiciable" in the sense argued by the United States, nor that the provision contains a "single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member. In light of this

<sup>472</sup> Article 3.2 of the DSU.

<sup>473</sup> Article 3.4 of the DSU.

<sup>474</sup> See Article 3.3 of the DSU.

<sup>475</sup> The Panel notes that the invocation of Article XX of the GATT 1994 titled "General Exceptions" has been reviewed in WTO dispute settlement proceedings notwithstanding the absence of an explicit provision in Article XX on whether and how its invocation may be reviewed.

<sup>476</sup> Article 3.2 of the DSU.

<sup>477</sup> China's response to Panel question No. 56; United States' response to Panel question No. 56.

<sup>478</sup> See United States' first written submission, paras. 47, 56, and 106.

conclusion and in accordance with relevant requirements of the DSU, the Panel turns to assess the United States' invocation of Article XXI(b) of the GATT 1994 in relation to the measures at issue.

### 7.8.3 Assessment of the measures at issue

7.129. The Panel will assess whether the measures found to be inconsistent with Articles I:1 and II:1 of the GATT 1994 were taken under the conditions and circumstances described in the subparagraphs of Article XXI(b) of the GATT 1994.<sup>479</sup>

7.130. As an initial matter, the Panel notes the objections by the complainant to the manner and timeliness of the United States' defence under Article XXI(b)(iii), including concerns regarding due process and the Panel's independent assessment of the evidence and arguments on the record.<sup>480</sup> The Panel considers that the parties' due process rights have been fully maintained in these proceedings, during which the Panel has endeavoured to provide ample time and opportunity to address any evidence or arguments raised by the other party.<sup>481</sup> Moreover, the Panel has engaged with such evidence and arguments in written questions and substantive meetings in order to fulfil its mandate under the DSU to make an objective assessment of the matter referred to the DSB and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.<sup>482</sup>

7.131. The United States has presented its specific arguments on the challenged measures subject to its interpretive argument that Article XXI(b) is entirely "self-judging" and imposes no requirement to explain or identify a relevant circumstance in subparagraphs (i) to (iii).<sup>483</sup> Although the United States has focused its arguments on the interpretation of Article XXI(b) and the discretion accorded by its terms to Members, it has also submitted an extensive record of material relating to the measures at issue. Of particular note in this context are the Steel and Aluminium Reports of the USDOC and Presidential Proclamations setting out the legal basis under Section 232 for taking action on steel and aluminium products. As described below, the United States has also elaborated its position throughout the course of the proceedings concerning the measures at issue and, in particular, the existence of an "emergency in international relations" within the meaning of Article XXI(b)(iii) "in time of" which the measures were taken.

7.132. The United States' first written submission focused on the argument that Article XXI of the GATT 1994 is "self-judging" as a defence against WTO-inconsistencies and that its invocation by a Member is "non-justiciable" in WTO dispute settlement proceedings. Following the first substantive meeting, the United States argued that "publicly available information" concerning its measures "could be understood to relate most naturally to the circumstance described in Article XXI(b)(iii)".<sup>484</sup> At the same time, the United States maintained its interpretive view that it is not necessary under Article XXI for any Member to provide details relating to its invocation of the exception, nor "to

<sup>479</sup> In light of the Panel's conclusion on the interpretation of Article XXI(b) and the arguments of the parties in this dispute, the Panel considers it appropriate to focus its assessment of the measures at issue on subparagraph (iii) and whether the measures were "taken in time of war or other emergency in international relations". The Panel notes that previous panels have assessed measures under Security Exceptions for "action which [a Member] considers necessary for the protection of its essential security interests" beginning with the relevant subparagraph of the provision at issue. (See Panel Reports, *Russa – Traffic in Transit*, paras. 7.108-7.109; *Saudi Arabia – IPRs*; para. 7.242).

<sup>480</sup> See China's response to Panel question No. 71; comments after the second meeting of the Panel.

<sup>481</sup> For example, at the closing of the second substantive meeting, the Panel indicated that the parties would have an opportunity to provide written comments on any issue raised during the meeting, including arguments on Article XXI(b)(iii) made during closing statements. The parties were accordingly invited to provide written comments following the second substantive meeting and given an opportunity to make any additional comments in response. The Panel considers the procedural arrangements in this dispute, including the overall time given to the parties for written submissions and comments, to have afforded the parties adequate opportunity to be heard and to respond to arguments made by the other party as required for the protection of their due process rights. (See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147).

<sup>482</sup> See e.g. Appellate Body Reports, *US – Shrimp*, para. 106; *EC and certain member states – Large Civil Aircraft*, para. 1317; *Australia – Tobacco Plain Packaging*, para. 6.244.

<sup>483</sup> See e.g. United States' response to Panel question No. 92.

<sup>484</sup> United States' second written submission, para. 24.

identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant".<sup>485</sup>

7.133. The United States subsequently elaborated its arguments regarding the measures at issue based on its interpretation of an "other emergency in international relations" as meaning "a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention".<sup>486</sup> In particular, the United States argued that "the extensive findings in the steel and aluminum reports are consistent with the United States considering the measures at issue to be taken 'in time of war or other emergency in international relations'".<sup>487</sup> The United States cited various findings in the Steel and Aluminium Reports and argued that "the findings cited above relating to the threatened impairment of national security by steel and aluminum imports, and the global crisis circumstances under which such importations were occurring, are consistent with the United States considering that an 'other emergency in international relations' exists – that is, a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention".<sup>488</sup>

7.134. In its closing statement at the second substantive meeting, the United States argued that, "even on the complainant's understanding of Article XXI(b) as *not* self-judging, ... [t]he record before the Panel demonstrates that the United States considers the measures at issue to be necessary for the protection of its essential security interests and taken 'in time of war or other emergency in international relations'".<sup>489</sup> The United States referred to findings in the Steel Report on "whether an emergency related to steel excess capacity exists" to comment that, "in 2017, it emerged that global efforts to address these crises would be insufficient. While the DOC steel report noted that the excess capacity crisis is a global problem that steel-producing nations have committed to 'work together on possible solutions,' the report observed the limits of the global efforts, including the work of the Global Forum on Steel Excess Capacity".<sup>490</sup> The United States argued that "what the DOC steel report conveys is that the United States was at a crucial point [and] that without immediate action, the steel industry could suffer damages that may be difficult to reverse and reach a point where it cannot maintain or increase production to address national emergencies".<sup>491</sup> The United States additionally argued that "[a]n industry facing 'fundamental changes' brought on by a 'production revolution' can certainly lead to unexpected developments, particularly when that industry is facing an 'acute' situation of global excess capacity that is the highest in the industry's history".<sup>492</sup>

7.135. The Panel notes that the United States has referred to appendices in the Steel and Aluminium Reports concerning global excess capacity in connection with the existence of an "emergency in international relations" under Article XXI(b)(iii).<sup>493</sup> In addition, the United States has referred to the

<sup>485</sup> United States' second written submission, para. 23. According to the United States, its invocation of Article XXI(b) indicated its consideration "that any or all of the three circumstances described in the subparagraphs are present", and whatever burden of proof attached to Article XXI(b) "is discharged once the Member indicates, in the context of dispute settlement, that it has made such a determination" that it "consider[s] one or more of the circumstances set forth in Article XXI(b) to be present". (United States' response to Panel question Nos. 50 and 52. See also United States' second written submission, para. 40).

<sup>486</sup> See United States' response to Panel question No. 92.

<sup>487</sup> United States' response to Panel question No. 92, para. 42.

<sup>488</sup> United States' response to Panel question No. 92, para. 49.

<sup>489</sup> United States' closing statement at the second meeting, para. 49. (emphasis original)

<sup>490</sup> United States' closing statement at the second meeting, paras. 55-56.

<sup>491</sup> United States' closing statement at the second meeting, para. 58. The United States also argued that "the situation at issue did arise unexpectedly and remained an 'emergency in international relations' when the measures were taken. The confluence of events in 2017 made the emergency even more pressing to address for the United States." (United States' closing statement at the second meeting, para. 55).

<sup>492</sup> United States' closing statement at the second meeting, para. 59. The United States cited the following passages in G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-239): "The situation of excess steelmaking capacity 'has become particularly acute since 2015'; 'the steel industry will have to adjust in response to fundamental changes in economic activity brought on by the 'next production revolution.'" (Ibid. p. 2); "In 2016, the global surplus in steelmaking capacity is estimated to have reached around 737 million metric tonnes, the highest level seen in the history of the steel industry. If the announced capacity expansions until 2020 take place, this excess capacity will further increase". (Ibid. p. 4).

<sup>493</sup> See United States' response to Panel question No. 92, para. 45; (referring to Steel Report, (Exhibit CHN-4 and USA-7), Appendix L: "Global Excess Capacity in Steel Production" and its commentary on OECD analyses and the policy recommendations from the Global Forum on Steel Excess Capacity); United States' comments on comments after the second meeting of the Panel, para. 22 (referring to Aluminium Report, (Exhibit CHN-5 and USA-8), Appendix E "Global Excess Aluminum Production").



G20 Global Steel Forum Report of 2017 that describes the situation of excess steelmaking capacity as "particularly acute since 2015" and addresses the outlook of global steelmaking capacity.<sup>494</sup> Further, the United States refers to remarks of the EU Commissioner for Trade at the OECD High-Level Symposium on Steel expressing concerns on steel overcapacity.<sup>495</sup> The United States has also referred to a statement of the chairperson of the OECD Ministerial Council Meeting in 2018 that OECD members "share the view that severe excess capacity in key sectors such as steel and aluminium are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy" and "stress the urgent need to avoid excess capacity in ... sectors such as aluminium and high technology."<sup>496</sup> The United States additionally refers to the Charlevoix G7 Summit Communiqué which "stressed the urgent need to avoid excess capacity" in the aluminium sector.<sup>497</sup>

7.136. The Panel will assess the evidence and arguments submitted in this dispute in accordance with the requirement under Article 11 of the DSU to make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". In addition to the interpretive conclusions reached above<sup>498</sup>, the Panel's assessment will be based on an interpretation of the terms of subparagraph (iii) of Article XXI(b) in accordance with Article 3.2 of the DSU and customary rules of interpretation of public international law. Based on this interpretation as well as the evidence and arguments submitted by the parties, the Panel will assess whether the "action[s] which [the United States] considers necessary for the protection of its essential security interests" were taken under the circumstances described in the subparagraphs of Article XXI(b)(iii) of the GATT 1994.

7.137. Under subparagraph (iii) of Article XXI(b), a Member may take action which it considers necessary for the protection of its essential security interests "in time of war or other emergency in international relations". Dictionary definitions of the term "emergency" include "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention", "a condition requiring immediate treatment", or a "pressing need".<sup>499</sup> The relevant emergency within the meaning of subparagraph (iii) must be "in international relations". The term "relations" may be defined as "[t]he various ways by which a country, State, etc., maintains political or economic contact with another"<sup>500</sup>, while the term "international" may be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations".<sup>501</sup> The phrase "international relations" may thus be understood to mean interactions between nations or national governments.<sup>502</sup> The terms of Article XXI(b)(iii) appear to distinguish the relevant emergency under that subparagraph from an emergency in purely domestic or national affairs and indicate the "international" character of the emergency in time of which Members are not prevented from taking action under Article XXI(b).

7.138. The term "war" precedes the phrase "or other emergency in international relations" in subparagraph (iii) of Article XXI(b) and provides immediate context for its interpretation. Dictionary definitions of "war" include "[h]ostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed

<sup>494</sup> See G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-239); United States' closing statement at the second meeting of the Panel, para. 59.

<sup>495</sup> See Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel, (Exhibit USA-240); United States' closing statement at the second meeting of the Panel, para. 60.

<sup>496</sup> United States' comments on comments after the second meeting of the Panel, para. 25.

<sup>497</sup> United States' comments on comments after the second meeting of the Panel, para. 25.

<sup>498</sup> See section 7.8.2 above.

<sup>499</sup> *Shorter Oxford English Dictionary*, 5th Edition (Oxford University Press, 2003), p. 814. See also United States' response to Panel question No. 51 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-86), p. 806).

<sup>500</sup> *Shorter Oxford English Dictionary*, 5th Edition (Oxford University Press, 2003), p. 2520. See also United States' response to Panel question No. 92 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-222), p. 2534).

<sup>501</sup> *Shorter Oxford English Dictionary*, 5th Edition (Oxford University Press, 2003), p. 1404. See also United States' response to Panel question No. 92 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-222), p. 1397).

<sup>502</sup> See also *Oxford English Dictionary Online* (Oxford University Press, March 2022) (defining "international relations" as "relations between nations, national governments, international organizations") and Black's Law Dictionary, 9th edn, B.A. Garner (ed.) (West Group 2009), p. 893 (defining "international relations" as "[g]lobal political interaction, primarily among sovereign nations").

forces against a foreign power, or against an opposing party in the state".<sup>503</sup> Based on its ordinary meaning, "war" involves a state of conflict characterized by the use of force. This is further confirmed by the French and Spanish language versions of Article XXI(b)(iii), where the terms "*guerre*" and "*guerra*" similarly signify armed struggles or outbreak of hostilities.<sup>504</sup>

7.139. The Panel finds that the reference to "war" informs the meaning of "emergency in international relations" as part of the circumstances "in time of" which a Member may act under Article XXI(b) for the protection of its essential security interests. In particular, the Panel considers that an "emergency in international relations" within the meaning of Article XXI(b)(iii) must be, if not equally grave or severe, at least comparable in its gravity or severity to a "war" in terms of its impact on international relations. This understanding is supported by the French and Spanish language versions of Article XXI(b)(iii) of the GATT 1994, where the terms corresponding to "emergency in international relations" are "*grave tension internationale*" and "*grave tensión internacional*" respectively. The term "*grave*" in these languages may be understood as referring to international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.

7.140. Further, under subparagraph (iii) of Article XXI(b), action for the protection of essential security interests must be "taken in time of" an emergency in international relations. As discussed above, the Panel understands these opening terms of subparagraph (iii) to qualify and describe the "action" referred to in Article XXI(b). The phrase "taken in time of" in subparagraph (iii) describes the temporal link between the action taken by a Member under Article XXI(b) and the "war or other emergency in international relations" in subparagraph (iii) of that Article.

7.141. The Panel also considers relevant the context provided by the subparagraphs of Article XXI(b) in conjunction with the terms used in paragraph (b) of Article XXI, which concerns actions taken by a Member for the protection of its "essential security interests". As discussed above, the description of these security interests as "essential" indicates the heightened significance of the security interests that Members are not prevented from taking action to protect pursuant to Article XXI(b). Actions taken by a Member for the protection of its essential security interests may concern "fissionable materials" under subparagraph (i), "traffic" involving certain military interests under subparagraph (ii), and "war or other emergency in international relations" under subparagraph (iii). The Panel is guided by the delimiting function of the subparagraphs in construing subparagraph (iii) to refer to circumstances of a certain gravity or severity in terms of their impact on the conduct of international relations, as part of the balance of rights and obligations reflected in the ordinary meaning of the terms of Article XXI(b), interpreted in their context and in light of the object and purpose of the GATT 1994 and WTO Agreement.<sup>505</sup>

7.142. With respect to the measures at issue, the Panel notes that the United States has referred in its arguments regarding Article XXI(b)(iii) to factors considered by the USDOC in the Steel and Aluminium Reports. These Reports reflect the domestic legislative basis and statutory terms of Section 232, particularly the factors to be considered in investigations by the USDOC and the reference to importation "in such quantities or under such circumstances" that the imports "threaten to impair the national security".<sup>506</sup> The Panel notes that various factors relied upon by US authorities are treated cumulatively in support of the determination to act under Section 232. Specifically, the Steel and Aluminium Reports identify "three factors" as the basis for finding with respect to steel and aluminium that "weakening of our internal economy may impair the national security", namely: (a) displacement of domestic steel/aluminium by excessive imports; (b) the consequent adverse impact on the economic welfare of the domestic steel/aluminium industry; and (c) the global excess

<sup>503</sup> Oxford English Dictionary Online (Oxford University Press, March 2022).

<sup>504</sup> See *Le Petit Robert Dictionnaire de la Langue Française* (2000), p. 1183 (defining "*guerre*" as "[l]utte armée entre groupes sociaux" (armed struggle between social groups) or "[l]es questions militaires" (military matters)); *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 795 (defining "*guerra*" as "[d]esavenencia y rompimiento de la paz entre dos o más potencias" (disagreement and breach of peace between two or more powers) or "[l]ucha armada entre dos o más naciones o entre bandos de una misma nación" (armed struggle between two or more nations or between sides of the same nation)).

<sup>505</sup> See paras. 7.124-7.125 above.

<sup>506</sup> The USDOC noted the non-exhaustive list of factors to be considered in connection with "national security" under Section 232 and the list of factors for the US Secretary of Commerce to consider in determining if imports "threaten to impair the national security". (See Steel Report, (Exhibit CHN-4 and USA-7), pp. 13-15; Aluminium Report, (Exhibit CHN-5 and USA-8), pp. 12-14 (referring to Section 232(d))).

capacity in steel and aluminium.<sup>507</sup> The Panel notes that the first two factors focus predominantly on developments relating to the domestic situation of steel and aluminium industries in the United States<sup>508</sup>, while the third focuses on a global aspect of the situation.

7.143. The analysis and conclusions of the USDOC in the Steel and Aluminium Reports do not purport to identify or address the existence of an "emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. The determinations of US domestic authorities under Section 232 relate to a different legal standard and basis under US municipal law than the provisions of the covered agreements within the Panel's mandate under the DSU. Accordingly, the factors relied upon by the USDOC and conclusions in the Steel and Aluminium Reports are distinct from, and cannot be directly transposed to, the terms of Article XXI(b)(iii) of the GATT 1994 and the objective assessment required under Article 11 of the DSU. Therefore, the factors treated cumulatively by US domestic authorities under Section 232 may not be regarded as having commensurate relevance or weight in the Panel's objective assessment as to whether the measures were taken "in time of war or other emergency in international relations" under Article XXI(b)(iii) of the GATT 1994. The assessment of the Panel in this dispute concerns the United States' specific arguments in connection with the existence of an "emergency in international relations" under Article XXI(b)(iii) and, in particular, its references to an international situation of global excess capacity in steel and aluminium.<sup>509</sup>

7.144. The Panel observes that, in its arguments under Article XXI(b), the United States refers to this international situation – i.e. global excess capacity in steel and aluminium – in connection with the impact of imports on domestic producers of steel and aluminium, as reflected in the conclusions of the USDOC in the Steel and Aluminium Reports.<sup>510</sup> The United States refers to factors addressed by the USDOC in the Steel and Aluminium Reports as evidence that it "considers" the measures at issue to have been "taken in time" of an "emergency in international relations" within the meaning of Article XXI(b)(iii). In this regard, the Panel notes the United States' argument that "the extensive findings in the steel and aluminum reports are consistent with the United States considering the measures at issue to be taken 'in time of war or other emergency in international relations'".<sup>511</sup> The United States additionally argues that "the Panel should find [that] the United States has provided information that it considers the measure necessary for the protection of its essential security interests ... [and] that the United States has provided information that it considers the measure 'taken in time of war or other emergency in international relations', the circumstance in subparagraph ending (iii)".<sup>512</sup>

7.145. The Panel recalls its conclusion that the terms "which it considers" in Article XXI(b) do not qualify the subparagraphs to render them "self-judging" as argued by the United States.<sup>513</sup> While the United States contends that it has "provided information that it considers" the measures at issue to fall under Article XXI(b)(iii), the review of such information in accordance with the DSU requires an objective ascertainment of factors relating to the relevant "emergency in international relations" under subparagraph (iii), as distinguished from factors pertaining to what is reserved to a Member's consideration under paragraph (b) of Article XXI. The United States refers to factors that were cumulatively considered by domestic authorities in support of the determination to act under Section 232. As noted, these factors concern both the domestic situation of steel and aluminium industries as well as global excess capacity.

7.146. In the Panel's view, the factors raised by the United States on the impact of imports on domestic producers of steel and aluminium, including the consideration of US domestic authorities

<sup>507</sup> Steel Report, (Exhibit CHN-4 and USA-7), p. 16; Aluminium Report, (Exhibit CHN-5 and USA-8), p. 15.

<sup>508</sup> See e.g. Steel Report, (Exhibit CHN-4 and USA-7), sections V.B.4-10 and V.C; Aluminium Report, (Exhibit CHN-5 and USA-8), sections VI.H and VI.C.

<sup>509</sup> United States' response to Panel question No. 92, para. 45 (referring to Steel Report, (Exhibit CHN-4 and USA-7), Appendix L: "Global Excess Capacity in Steel Production" and its commentary on OECD analyses and the policy recommendations from the Global Forum on Steel Excess Capacity); United States' comments on comments after the second meeting of the Panel, para. 25. See also United States' closing statement at the second meeting, paras. 55-56.

<sup>510</sup> See Steel Report, (Exhibit CHN-4 and USA-7), section VI; Aluminium Report, (Exhibit CHN-5 and USA-8), section VII.

<sup>511</sup> United States' response to Panel question No. 92, para. 42.

<sup>512</sup> United States' closing statement at the second meeting, para. 50.

<sup>513</sup> See para. 7.128 above.

of "national security" under Section 232, pertain more to the "action which [the United States] considers necessary for the protection of its essential security interests" under paragraph (b) of Article XXI.<sup>514</sup> However, in accordance with the ordinary meaning of its terms, subparagraph (iii) requires a distinct inquiry as to whether the actions were taken in time of an "emergency in international relations" based on an objective assessment of relevant evidence and arguments.

7.147. In this connection, the Panel notes the evidence submitted by the United States of international concerns regarding global excess capacity in steel and aluminium, including the discussion of such concerns in the Steel and Aluminium Reports. The statements at the international level referred to by the United States indicate that the issue of global excess capacity in steel and aluminium has been a topic of high-level discussion and expressions of concern in various international fora.<sup>515</sup> As reflected in information provided by the United States in this dispute, the discussion of global excess capacity focuses on specific sectors and is evidence of the fact that the issue has been raised as a matter of international attention within the conduct of international relations of various countries. Notwithstanding such evidence of international engagement, the Panel recalls that an "emergency in international relations" under Article XXI(b)(iii) refers to situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.

7.148. Having carefully reviewed the relevant evidence and arguments submitted in this dispute, and particularly those submitted by the United States in relation to global excess capacity, the Panel is not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an "emergency in international relations" during which a Member may act under Article XXI(b)(iii).<sup>516</sup> For example, the G20 Global Steel Forum Report "focuses on the steel sector and provides concrete policy solutions to reduce steel excess capacity".<sup>517</sup> In referring to excess steelmaking capacity as "a global challenge that has become particularly acute since 2015", the report highlights various efforts within the Global Steel Forum in light of trends in the sector as part of "[g]lobal cooperation to find solutions to tackle excess capacity in the steel market".<sup>518</sup> Such evidence submitted by the United States in this dispute reflects international concern expressed in the context of cooperative efforts to address excess capacity in a specific sector.<sup>519</sup> In the Panel's view, however, the gravity or severity of an "emergency in

<sup>514</sup> See e.g. United States' closing statement at the second meeting, para. 17 (stating that "the measures challenged are measures on steel and aluminum (key sources for producing military vehicles, weapons, and systems for critical national infrastructure) that the United States has taken for national security purposes" and referring to "an industry that is vital to our national security and whose decline threatens to impair our national security"); response to Panel question No. 92(a). See also paras. 7.83, 7.88-7.91, and 7.98-7.99 above.

<sup>515</sup> See e.g. G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-239); Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel, (Exhibit USA-240); Charlevoix G7 Summit Communiqué (9 June 2018), (Exhibit USA-255).

<sup>516</sup> The Panel notes in this regard that previous panels have found situations to constitute an "emergency in international relations" under Security Exceptions based on the particular evidence and circumstances at issue in those disputes. In a dispute under Article XXI(b)(iii) of the GATT 1994, such evidence included international recognition of the degree of deterioration of relations between two Members and a situation involving armed conflict during a certain time period. (See Panel Report, *Russa – Traffic in Transit*, paras. 7.122-7.123). In another dispute under Article 73(b)(iii) of the TRIPS Agreement (the corresponding provision to Article XXI(b)(iii) of the GATT 1994 in the TRIPS Agreement), such evidence included the severance of all diplomatic, consular, and economic relations between two Members. (See Panel Report, *Saudi Arabia – IPRs*, paras. 7.257-7.266).

<sup>517</sup> G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-239), p. 2.

<sup>518</sup> G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-239), pp. 2-3. The report describes the formal establishment of the Global Forum on Steel Excess Capacity and notes that "the OECD acts as the facilitator to the Global Forum". (Ibid. para. 6). The report further describes efforts to develop an "information-sharing mechanism" in a "tangible process [that] contributes to the collective trust and confidence that are necessary to find collective solutions to the challenge of excess capacity". (Ibid. paras. 7-8).

<sup>519</sup> The United States refers to other evidence that similarly reflects expressions of concern in the context of specific international initiatives. For example, the United States refers to remarks by the EU Commissioner for Trade at the OECD High-Level Symposium on Steel expressing concerns on steel overcapacity while noting ongoing interventions as well as recommendations for international cooperation. (Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level

international relations" within the meaning of Article XXI(b)(iii), particularly regarding the impact on international relations of situations falling under that provision, has not been established based on the evidence and arguments submitted in this dispute. In reaching this conclusion, the Panel is mindful of its mandate in this dispute<sup>520</sup> as well as the balance of rights and obligations reflected in the terms of Article XXI of the GATT 1994 interpreted in accordance with the DSU.

#### 7.8.4 Conclusion

7.149. In conclusion, the Panel does not find, based on the evidence and arguments submitted in this dispute, that the measures at issue were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. Therefore, the Panel finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994.

### 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. Regarding China's claims under Article II of the GATT 1994:
  - i. the additional duties of 25% on steel products and 10% on aluminium products do not accord the treatment provided for in the United States' Schedule, contrary to Article II:1(b) and Article II:1(a) of the GATT 1994;
  - ii. the additional duty of 50% on steel products from Türkiye does not accord the treatment provided for in the United States' Schedule, contrary to Article II:1(b) and Article II:1(a) of the GATT 1994; and
  - iii. the additional duties of 25% on derivative steel products and 10% on derivative aluminium products do not accord the treatment provided for in the United States' Schedule, contrary to Article II:1(b) and Article II:1(a) of the GATT 1994.
- b. Regarding China's claims under Article I of the GATT 1994:
  - i. the country exemptions for steel and aluminium products confer an advantage to products from Australia, Argentina, Brazil, and the Republic of Korea that has not been accorded immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 of the GATT 1994; and
  - ii. the country exemptions for derivative steel and aluminium products confer an advantage to products from Australia, Argentina, Brazil, the Republic of Korea, Canada, and Mexico that has not been accorded immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 of the GATT 1994.
- c. Regarding China's claims under Article X of the GATT 1994, the Panel does not consider it necessary to make findings on China's claims relating to the administration of the process for excluding products from duties that have already been found inconsistent with other

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Symposium on Steel (Exhibit USA-240)). The statement of the chairperson of the OECD Ministerial Council Meeting addressed multiple topics related to "[r]eshaping the foundations of multilateralism for more responsible, effective and inclusive outcomes", including a series of points reflecting the chairperson's understanding of the views of OECD members on "[i]nternational trade and investment for strong and inclusive growth". In this context, the chairperson of the OECD Ministerial Council Meeting referred to "the view that severe excess capacity in key sectors such as steel and aluminium are serious concerns" and, "[t]o address this critical concern", indicated an agreement "to enhance cooperation in the WTO and in other fora, as appropriate". (Statement of the Chair of the OECD Ministerial Council Meeting (2018), (Exhibit USA-254), p. 5). The Charlevoix G7 Summit Communiqué similarly addresses a number of topics of international engagement and international economic concerns, which includes G7 leaders "call[ing] on all members of the Global Forum on Steel Excess Capacity to fully and promptly implement its recommendations" while "stress[ing] the urgent need to avoid excess capacity in other sectors such as aluminium and high technology". (Charlevoix G7 Summit Communiqué (9 June 2018), (Exhibit USA-255), p. 2).

<sup>520</sup> See section 7.1 above.

obligations under the GATT 1994. The Panel therefore declines to make findings regarding the claims under Article X:3(a) of the GATT 1994.

- d. Regarding China's claims under Article XIX of the GATT 1994 and the Agreement on Safeguards, the Panel finds that the relevant measures at issue were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX, namely Article XXI of the GATT 1994, within the meaning of Article 11.1(c) of the Agreement on Safeguards. The Panel therefore finds that the Agreement on Safeguards does not apply to the measures at issue.
- e. Regarding Article XXI of the GATT 1994, the Panel does not find that the measures at issue were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. The Panel therefore finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with certain provisions of the GATT 1994, they have nullified or impaired benefits accruing to China under that Agreement.

8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends that the United States bring its WTO-inconsistent measures into conformity with its obligations under the GATT 1994.

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