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UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

REPORT OF THE PANEL

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<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R , adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R , WT/DS234/AB/R , adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R , adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Ripe Olives from Spain</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain</i> , WT/DS577/R and Add.1, adopted 20 December 2021
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R , adopted 27 January 2000, DSR 2000:II, p. 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R , adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R , adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R , WT/DS249/AB/R , WT/DS251/AB/R , WT/DS252/AB/R , WT/DS253/AB/R , WT/DS254/AB/R , WT/DS258/AB/R , WT/DS259/AB/R , adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R , adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Washing Machines</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/R and Add.1, adopted

Short Title	Full Case Title and Citation
	26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R, DSR 2016:V, p. 2505
<i>US – Zeroing (EC)</i> (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> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
<i>US – Zeroing (Japan)</i> (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> , WT/DS322/AB/RW , adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THIS REPORT

Panel Exhibit	Short title (if applicable)	Title
CHE-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
CHE-2 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)
CHE-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)
CHE-8 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
CHE-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
CHE-10 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
CHE-11 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
CHE-13 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
CHE-14 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
CHE-15 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
CHE-16 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
CHE-20 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
CHE-21 and USA-2	Section 232 regulations	United States Code of Federal Regulations, Title 15, Part 705
CHE-22 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
CHE-23 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
CHE-24 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
CHE-35 (excerpt) and USA-84 (full version)		Statements dated 29 October 2018, 21 November 2018, and 4 December 2018 of the United States, WTO Dispute Settlement Body
CHE-72 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
CHE-73 and USA-233	Presidential Proclamation 9894	Proclamation 9894 of 19 May 2019, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 84, No. 100 (23 May 2019), p. 23987

Panel Exhibit	Short title (if applicable)	Title
CHE-74 and USA-232	Presidential Proclamation 9893	Proclamation 9893 of 19 May 2019, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 84, No. 100 (23 May 2019), p. 23983
CHE-75 and USA-234	Presidential Proclamation 10060	Proclamation 10060 of 6 August 2020, Adjusting Imports of Aluminum Into the United States, United States Federal Register, Vol. 85, No. 158 (14 August 2020), p. 49921
CHE-76 and USA-235	Presidential Proclamation 10064	Proclamation 10064 of 28 August 2020, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 85, No. 171 (2 September 2020), p. 54877
CHE-77 and USA-230	Presidential Proclamation 9886	Proclamation 9886 of 16 May 2019, Adjusting Imports of Steel Into the United States, United States Federal Register, Vol. 84, No. 98 (21 May 2019), p. 23421
CHE-12	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
CHE-29		United States' Schedule of Concessions
CHE-31		Harmonized Tariff Schedule of the United States (2019) Revision 2, Chapter 76
CHE-56		<i>Shorter Oxford English Dictionary</i> , 6 th edn, A. Stevenson (ed.) (Oxford University Press, 2007)
CHE-60		Larousse, definition of "estimer", https://www.larousse.fr/dictionnaires/francais/estimer/31188?q=estimer31111 (accessed 11 February 2020)
CHE-61		Diccionario de la lengua española, definition of "estimar", https://www.dle.rae.es/estimar?m=form (accessed 11 February 2020)
USA-22		<i>The New Shorter Oxford English Dictionary</i> , 4 th 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-72		G20, <i>Global Forum on Steel Excess Capacity Report</i> (30 November 2017)
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-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 th 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 th edn, L. Brown (ed.) (Clarendon Press, 1993)
USA-226		W. Strunk Jr. and E.B. White, <i>The Elements of Style</i> , 4 th edn (Allyn and Bacon, 1999)
USA-240		Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel

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. Switzerland 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 Switzerland

1.2. On 9 July 2018, Switzerland requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the GATT 1994, and Article 14 of the Agreement on Safeguards with respect to the measures and claims set out below.¹

1.3. Consultations were held on 30 August 2018 between Switzerland and the United States. These consultations failed to resolve the dispute.²

1.2 Panel establishment and composition

1.4. On 8 November 2018, Switzerland requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 14 of the Agreement on Safeguards with standard terms of reference.³ At its meeting on 4 December 2018, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Switzerland in document WT/DS556/15, in accordance with Article 6 of the DSU.⁴

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 Switzerland in document WT/DS556/15 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁵

1.6. On 7 January 2019, Switzerland 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; China; Colombia; Egypt; the European Union; Guatemala⁶; 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; Chinese Taipei; Thailand; Türkiye⁷; Ukraine; the United Arab Emirates; and the Bolivarian Republic of Venezuela notified their interest in participating in the Panel proceedings as third parties.

¹ See Request for consultations by Switzerland, WT/DS556/1.

² See Request for the establishment of a panel by Switzerland, WT/DS556/15 (Switzerland's panel request).

³ See Switzerland's panel request.

⁴ See Minutes of the DSB meeting held on 4 December 2018, WT/DSB/M/422, para. 2.5.

⁵ See Note by the Secretariat, Constitution of the Panel established at the request of Switzerland, WT/DS556/16.

⁶ On 14 March 2019, Guatemala notified the Panel of its interest to participate as a third party. (See WT/DS556/16/Rev.1).

⁷ Member formerly known as Turkey.

1.3 Panel proceedings

1.3.1 General

1.8. The Panel held an organizational meeting with the parties on 18 March 2019.

1.9. After consultation with the parties, the Panel adopted its Working Procedures⁸ and Timetable⁹ on 5 April 2019.

1.10. The Panel held a first substantive meeting with the parties on 12 November 2019.¹⁰ A session with the third parties took place on 18 November 2019. The Panel held a second substantive meeting with the parties on 12 and 26 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 Switzerland was willing to open the substantive meetings in the dispute to public observation and make its submissions to the Panel available to the public.¹¹ In the Panel's organizational meeting with the parties, Switzerland expressed its willingness to make the opening statements available for public viewing.¹²

1.12. The Panel transmitted its Working Procedures to the parties on 5 April 2019, which provided that the Panel "may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties".¹³ On 28 May 2019, the Panel circulated draft additional working procedures on open meetings to the parties for comments. Based on the comments received from the parties on 14 June 2019 and 21 June 2019, the Panel adopted

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ United States' communication dated 5 March 2019.

¹² 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.

¹³ Working Procedures of the Panel, para. 10.

the Additional Working Procedures on open meetings on 19 July 2019, applicable to the first substantive meeting of the Panel with the parties.¹⁴

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 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.¹⁵ 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 China¹⁶, the European Union¹⁷, Norway¹⁸, the Russian Federation¹⁹, and Hong Kong, China.²⁰ In response, the United States opposed the requests for enhanced rights to third parties²¹, whereas Switzerland supported the requests.²²

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 pandemic²³ 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 meeting²⁴, 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.

¹⁴ See the Panel's Additional Working Procedures on Open Meeting, adopted on 19 July 2019, in Annex A-2.

¹⁵ Türkiye's communication dated 7 June 2019, para. 11.

¹⁶ China's communication dated 7 June 2019, para. 2.

¹⁷ European Union's communication dated 7 June 2019, para. 11.

¹⁸ Norway's communication dated 11 June 2019, para. 3.

¹⁹ Russian Federation's communication dated 14 June 2019, p. 3.

²⁰ Hong Kong, China's communication dated 25 June 2019, p. 1.

²¹ United States' communications dated 24 June 2019, para. 2; United States' communication dated 1 July 2019, para. 2.

²² Switzerland's communication dated 24 June 2019, p. 1; Switzerland's communication dated 1 July 2019, p. 4.

²³ See section 1.3.5.2 below.

²⁴ See section 1.3.5.4 below.

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.²⁵

1.19. Switzerland 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, Switzerland argued that these proceedings required harmonized timetables and consolidated hearings, which could significantly reduce the risk of unnecessary repetition and achieve important efficiencies.²⁶ For Switzerland, the notion of a "harmonized" timetable in Article 9.3 of the DSU implies "harmonized", or consolidated, substantive meetings.²⁷ Switzerland 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."²⁸

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, nine²⁹ 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.³⁰ 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.³¹

1.21. The Panel notes that, at its meeting on 4 December 2018, the DSB established a panel pursuant to the request of Switzerland in document WT/DS556/15, in accordance with Article 6 of the DSU.³² While the same three persons that act as panelists in this dispute were also appointed as panelists in other related cases³³, 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.³⁴

²⁵ The other disputes where the same three persons are acting as panelists include DS544 (China), DS547 (India), DS552 (Norway), DS554 (the Russian Federation), 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 communication from the European Union notifying the withdrawal of its complaint, and accordingly, had ceased all work in those proceedings. (WT/DS548/21).

²⁶ Switzerland's communication dated 22 February 2019.

²⁷ Switzerland's communication dated 1 March 2019.

²⁸ Switzerland's communication dated 1 March 2019.

²⁹ 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.

³⁰ United States' communication dated 22 February 2019.

³¹ United States' communication dated 1 March 2019.

³² Note by the Secretariat, Constitution of the Panel established at the request of Switzerland, WT/DS556/16.

³³ DS544 (China), DS547 (India), DS552 (Norway), DS554 (the Russian Federation), and DS564 (Türkiye).

³⁴ 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)

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.³⁵

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.³⁶

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 parties³⁷, the Panel's second meeting with the parties was scheduled for 16-17 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. The Panel further requested comments on the possibility of holding meetings open to the public given *inter alia* the restrictions on social gatherings in force in Switzerland.

1.26. In response to the Panel's communication, Switzerland noted its availability for in-person meetings in July 2020. Switzerland suggested that should it be impossible for all parties involved to travel to Geneva in July, participants unable to travel to Geneva could participate in the meeting via videoconferencing. With respect to meetings open to the public, Switzerland noted that prevailing recommendations and restrictions would permit open meetings as scheduled but argued that online live streaming would not be an adequate substitute for confidentiality reasons. Finally, Switzerland requested the Panel to foresee an alternative arrangement to in-person meetings at this stage to prevent excessive delays. In this regard, Switzerland stated that it would not object to exchanges in writing as an alternative solution if a postponed physical meeting could not take place in the fall and a virtual meeting would prove impractical, even though Switzerland considered that the purpose

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.

³⁵ See section 1.3.5.4 below.

³⁶ Panel communication to the parties dated 27 October 2020.

³⁷ 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 Switzerland 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 16 and 17 July 2020.

of a substantive meeting, which fosters active exchanges with the Panel and between the parties, would not be entirely achieved through written exchanges.³⁸

1.27. The United States indicated its inability to travel to Geneva for the second substantive meeting in July 2020. The United States 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.³⁹ The United States also opposed web-casting the meeting owing to concerns of security and protection against manipulation of such webcasts.⁴⁰ The United States further disagreed with Switzerland's suggestion that a written exchange could serve as an alternative to a second substantive meeting with contemporaneous oral exchange.⁴¹ Finally, with respect to hybrid meetings with both in-person and virtual participation, the United States argued that the Panel should decline to hold a meeting with the parties in a manner that would effectively curtail the participation of one party and the Panel, while allowing the full participation of another party.⁴² On this basis, the United States requested that the Panel reschedule the second substantive meeting for a later date.⁴³ The United States noted that the Panel need not foresee an alternative arrangement to in-person meetings at this stage, given the rapid evolution of the pandemic.⁴⁴

1.28. 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.

1.29. 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. The United States identified numerous potential obstacles to holding in-person meetings in 2020, including evolving travel and quarantine restrictions due to the pandemic, and maintained its preference for in-person meetings.⁴⁵ Switzerland suggested that in-person meetings could be replaced with (a) hybrid meetings, where participants unable to travel to Geneva would participate via videoconferencing; (b) fully virtual meetings, in which all parties would participate via videoconferencing; or (c) written exchanges.⁴⁶

1.30. 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. The Panel further indicated its intention to hold the second

³⁸ Switzerland's communication dated 2 June 2020, pp. 1-2.

³⁹ United States' communication dated 2 June 2020, paras. 9-10; United States' communication dated 5 June 2020, para. 2.

⁴⁰ United States' communication dated 2 June 2020, para. 17.

⁴¹ United States' communication dated 2 June 2020, para. 15; United States' communication dated 5 June 2020, para. 5.

⁴² United States' communication dated 5 June 2020, para. 3.

⁴³ United States' communication dated 2 June 2020, para. 11; United States' communication dated 5 June 2020, para. 5.

⁴⁴ United States' communication dated 5 June 2020, para. 4.

⁴⁵ United States' communication dated 28 July 2020; United States' communication dated 9 September 2020; United States' communication dated 20 October 2020; and United States' communication dated 4 November 2020.

⁴⁶ Switzerland's communication dated 28 July 2020; Switzerland's communication dated 9 September 2020; Switzerland's communication dated 20 October 2020; and Switzerland's communication dated 4 November 2020.

substantive meeting in closed session given *inter alia* the limited access to the WTO building and the logistical demands of holding virtual substantive meetings.

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

1.31. 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.

1.32. In its comments on the draft additional working procedures, Switzerland suggested including a procedure for parties to signal that they want to comment on the other party's statement or response to Panel's question, prohibiting recording of the virtual meeting, and providing for detailed contingency measures in case of sudden technical failures.⁴⁷ 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.⁴⁸

1.33. 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.⁴⁹

1.34. 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. Further, taking Switzerland's comments into consideration, the Panel expressly prohibited recording of the meeting by the parties in the Additional Working Procedures.

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

1.35. 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 Switzerland'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

⁴⁷ Switzerland's communication dated 16 November 2020.

⁴⁸ United States' communication dated 16 November 2020.

⁴⁹ Panel communication to the parties dated 1 December 2020.

responses to Panel questions, if the Panel determined that it was not viable to maintain harmonized timetables.

1.36. Switzerland argued that the Panel should maintain harmonized timetables in all the disputes as they related to the same matter. Switzerland indicated that it would not object to the Panel proceeding differently in these disputes if such harmonization of timetables was maintained.⁵⁰ In Switzerland's view, adopting different modalities for the second substantive meeting would not provide a strategic advantage to complainants in any of the disputes. However, Switzerland noted that the Panel should avoid arrangements that would preclude the possibility of maintaining harmonized timetables, such as proceeding via videoconferencing in some disputes and organizing in-person meetings in others at a later stage.⁵¹ Switzerland further requested that enhanced third-party rights already granted by the Panel in respect of the upcoming stages of the proceedings be maintained.⁵²

1.37. 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.⁵³ 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.⁵⁴ 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.⁵⁵ 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.⁵⁶

1.38. 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.

1.39. Based on the foregoing, the Panel scheduled its second substantive meeting with the parties in this dispute for 12 and 26 January 2021. Rights of third parties for subsequent stages in the disputes were limited to those provided in Article 10 of the DSU.

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:

⁵⁰ Switzerland's communication dated 20 October 2020, pp. 1-2.

⁵¹ Switzerland's communication dated 4 November 2020, paras. 3-4.

⁵² Switzerland's communication dated 20 October 2020, p. 2; Switzerland's communication dated 4 November 2020, para. 5.

⁵³ United States' communication dated 20 October 2020, para. 2.

⁵⁴ United States' communication dated 4 November 2020, para. 7.

⁵⁵ United States' communication dated 20 October 2020, para. 5.

⁵⁶ United States' communication dated 4 November 2020, para. 7.

- a. Section 232 of the Trade Expansion Act of 1962, as amended (United States Code, Title 19, Section 1862) (Section 232)⁵⁷ and its implementing regulation, United States Code of Federal Regulations, Title 15, Part 705⁵⁸;
- 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)⁵⁹; 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).⁶⁰

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.⁶¹ 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.⁶²

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.⁶³

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.⁶⁴ 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.⁶⁵ 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.⁶⁶

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;

⁵⁷ Section 232, (Exhibit CHE-1 and USA-1).

⁵⁸ Section 232 regulations, (Exhibit CHE-21 and USA-2).

⁵⁹ Steel Report, (Exhibit CHE-2 and USA-7).

⁶⁰ Aluminium Report, (Exhibit CHE-5 and USA-8).

⁶¹ Section 232, (Exhibit CHE-1 and USA-1), § 1862(b)(1)(A).

⁶² Section 232, (Exhibit CHE-1 and USA-1), §§ 1862(b)(1)(B) and (b)(2)(A).

⁶³ Section 232, (Exhibit CHE-1 and USA-1), § 1862(b)(3)(A).

⁶⁴ Section 232, (Exhibit CHE-1 and USA-1), § 1862(c)(1)(A).

⁶⁵ Section 232, (Exhibit CHE-1 and USA-1), § 1862(c)(1)(B).

⁶⁶ Section 232, (Exhibit CHE-1 and USA-1), § 1862(c)(3)(A).

- 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.⁶⁷

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.⁶⁸

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.⁶⁹

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 2017.⁷⁰ 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.⁷¹ 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 2017.⁷² The US Department of Commerce held a public hearing to elicit further information concerning the investigation in Washington, D.C., on 24 May 2017.⁷³

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

⁶⁷ Section 232, (Exhibit CHE-1 and USA-1), § 1862(d).

⁶⁸ Section 232, (Exhibit CHE-1 and USA-1), § 1862(d).

⁶⁹ Section 232 regulations, (Exhibit CHE-21 and USA-2), §§ 705.1-705.12.

⁷⁰ Steel Report, (Exhibit CHE-2 and USA-7), p. 18.

⁷¹ Steel Report, (Exhibit CHE-2 and USA-7), p. 18.

⁷² Steel Report, (Exhibit CHE-2 and USA-7), p. 18.

⁷³ Steel Report, (Exhibit CHE-2 and USA-7), p. 18.

Homeland Security/US Customs and Border Protection, the International Trade Commission, and the Office of the United States Trade Representative.⁷⁴

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.⁷⁵ Generally, these products fall into five categories:

- a. Carbon and Alloy Flat Products (Flat Products): Steel products produced by rolling semifinished steel through varying sets of rolls. This category includes sheets, strips, and plates.⁷⁶
- 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.⁷⁷
- 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.⁷⁸
- 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.⁷⁹
- 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.⁸⁰

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.⁸¹ 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

⁷⁴ Steel Report, (Exhibit CHE-2 and USA-7), pp. 19-20.

⁷⁵ Steel Report, (Exhibit CHE-2 and USA-7), p. 21.

⁷⁶ 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 CHE-2 and USA-7), p. 21).

⁷⁷ 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 CHE-2 and USA-7), pp. 21-22).

⁷⁸ 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 CHE-2 and USA-7), p. 22).

⁷⁹ Semi-finished products are covered under the following 6-digit HS codes: 720610, 720690, 720711, 720712, 720719, 720720, 722410, 722490. (Steel Report, (Exhibit CHE-2 and USA-7), p. 22).

⁸⁰ 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 CHE-2 and USA-7), p. 22).

⁸¹ Steel Report, (Exhibit CHE-2 and USA-7), p. 13.

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.⁸²

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 232.⁸³ 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.⁸⁴ 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 232.⁸⁵

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 because⁸⁶: (i) steel is needed for national defence requirements⁸⁷; (ii) steel is required for US critical infrastructure⁸⁸; (iii) domestic steel production is essential for national security⁸⁹; (iv) domestic steel production depends on a healthy and competitive US industry⁹⁰; and (v) steel is consumed in critical industries.⁹¹
- b. Imports in such quantities as are presently found adversely impact the economic welfare of the US steel industry due to⁹²: (i) continued increase in imports of steel products⁹³; (ii) high import penetration⁹⁴; (iii) high import to export ratio⁹⁵; (iv) prevailing steel prices⁹⁶; (v) steel mill closures⁹⁷; (vi) declining employment trend since 1998⁹⁸; (vii) trade actions such as anti-dumping and countervailing duties⁹⁹; (viii) loss of domestic opportunities to bidders using imported steel¹⁰⁰; (ix) financial distress¹⁰¹; and (x) limited capital expenditures arising from falling revenue and reduced profits.¹⁰²
- c. Displacement of domestic steel by excessive quantities of imports has the serious effect of weakening the US internal economy because¹⁰³: (i) domestic steel production capacity is stagnant and concentrated¹⁰⁴; (ii) production is well below demand¹⁰⁵; (iii) utilization

⁸² Steel Report, (Exhibit CHE-2 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).

⁸³ Steel Report, (Exhibit CHE-2 and USA-7), p. 55.

⁸⁴ Steel Report, (Exhibit CHE-2 and USA-7), p. 55.

⁸⁵ Steel Report, (Exhibit CHE-2 and USA-7), p. 55.

⁸⁶ Steel Report, (Exhibit CHE-2 and USA-7), p. 23.

⁸⁷ Steel Report, (Exhibit CHE-2 and USA-7), p. 23.

⁸⁸ Steel Report, (Exhibit CHE-2 and USA-7), pp. 23-24.

⁸⁹ Steel Report, (Exhibit CHE-2 and USA-7), pp. 24-25.

⁹⁰ Steel Report, (Exhibit CHE-2 and USA-7), p. 25.

⁹¹ Steel Report, (Exhibit CHE-2 and USA-7), p. 25.

⁹² Steel Report, (Exhibit CHE-2 and USA-7), p. 27.

⁹³ Steel Report, (Exhibit CHE-2 and USA-7), p. 27.

⁹⁴ Steel Report, (Exhibit CHE-2 and USA-7), p. 29.

⁹⁵ Steel Report, (Exhibit CHE-2 and USA-7), p. 30.

⁹⁶ Steel Report, (Exhibit CHE-2 and USA-7), pp. 31-32.

⁹⁷ Steel Report, (Exhibit CHE-2 and USA-7), p. 33.

⁹⁸ Steel Report, (Exhibit CHE-2 and USA-7), p. 35.

⁹⁹ Steel Report, (Exhibit CHE-2 and USA-7), p. 36.

¹⁰⁰ Steel Report, (Exhibit CHE-2 and USA-7), p. 36.

¹⁰¹ Steel Report, (Exhibit CHE-2 and USA-7), p. 37.

¹⁰² Steel Report, (Exhibit CHE-2 and USA-7), p. 40.

¹⁰³ Steel Report, (Exhibit CHE-2 and USA-7), p. 41.

¹⁰⁴ Steel Report, (Exhibit CHE-2 and USA-7), p. 41.

¹⁰⁵ Steel Report, (Exhibit CHE-2 and USA-7), p. 46.

rates are well below economically viable levels¹⁰⁶; and (iv) declining steel production facilities limits capacity available for a national emergency.¹⁰⁷

- d. Global excess steel capacity is a circumstance that contributes to the weakening of the domestic economy because¹⁰⁸: (i) free markets globally are adversely affected by substantial chronic global excess steel production led by China¹⁰⁹; and (ii) increasing global excess steel capacity will further weaken the internal economy as US steel producers will face increasing import competition.¹¹⁰

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 2017.¹¹¹

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.¹¹²
- 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.¹¹³

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.¹¹⁴ The Steel 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 such exclusions based on demonstrating (a) lack of sufficient US production capacity of comparable products or (b) specific national security based considerations.¹¹⁵

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.

¹⁰⁶ Steel Report, (Exhibit CHE-2 and USA-7), p. 47.

¹⁰⁷ Steel Report, (Exhibit CHE-2 and USA-7), p. 49.

¹⁰⁸ Steel Report, (Exhibit CHE-2 and USA-7), p. 51.

¹⁰⁹ Steel Report, (Exhibit CHE-2 and USA-7), p. 51.

¹¹⁰ Steel Report, (Exhibit CHE-2 and USA-7), p. 53.

¹¹¹ Steel Report, (Exhibit CHE-2 and USA-7), p. 58.

¹¹² Steel Report, (Exhibit CHE-2 and USA-7), pp. 59-60.

¹¹³ Steel Report, (Exhibit CHE-2 and USA-7), p. 60.

¹¹⁴ Steel Report, (Exhibit CHE-2 and USA-7), p. 60.

¹¹⁵ Steel Report, (Exhibit CHE-2 and USA-7), p. 61.

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 232.¹¹⁶ The US Department of Commerce notified the US Department of Defense of the investigation in a letter dated 26 April 2017.¹¹⁷ 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.¹¹⁸ On 3 May 2017, the US Department of Commerce invited interested parties to submit written comments, opinions, data, information, or advice.¹¹⁹ The US Department of Commerce held a public hearing to elicit further information concerning this investigation in Washington, D.C., on 22 June 2017.¹²⁰

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.¹²¹

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 Products¹²²

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	

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.¹²³ 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

¹¹⁶ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 18.

¹¹⁷ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 18.

¹¹⁸ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 18.

¹¹⁹ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 19.

¹²⁰ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 19.

¹²¹ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 19.

¹²² Aluminium Report, (Exhibit CHE-5 and USA-8), p. 20.

¹²³ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 12.

certain industries, beyond those necessary to satisfy national defence requirements that are critical to the minimum operations of the economy and government.¹²⁴

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".¹²⁵ 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.¹²⁶ 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.¹²⁷

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

- a. Aluminium is essential to US national security because¹²⁸: (i) aluminium is required for US national defence¹²⁹; and (ii) aluminium is required for US critical infrastructure.¹³⁰
- b. Domestic production of aluminium is essential to national security.¹³¹
- c. Domestic aluminium production capacity is declining because¹³²: (i) the United States is a relatively high-cost producer¹³³; and (ii) aluminium smelters are permanently shutting down.¹³⁴
- d. Domestic production is well below demand.¹³⁵
- e. US imports of aluminium are increasing in aggregate¹³⁶ and in particular, imports of (i) unwrought aluminium¹³⁷; (ii) aluminium bars, rods and profiles¹³⁸; (iii) aluminium plate, sheet and strip¹³⁹; (iv) aluminium foil¹⁴⁰; (v) aluminium pipes and tubes¹⁴¹; and (vi) aluminium castings and forgings.¹⁴²
- f. US aluminium exports are declining.¹⁴³
- g. The United States' import to export ratio for the aluminium product categories subject to this investigation is high.¹⁴⁴

¹²⁴ Aluminium Report, (Exhibit CHE-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).

¹²⁵ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 104.

¹²⁶ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 104.

¹²⁷ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 104.

¹²⁸ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 23.

¹²⁹ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 24.

¹³⁰ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 36.

¹³¹ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 39.

¹³² Aluminium Report, (Exhibit CHE-5 and USA-8), p. 40.

¹³³ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 41.

¹³⁴ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 48.

¹³⁵ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 59.

¹³⁶ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 63.

¹³⁷ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 70.

¹³⁸ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 71.

¹³⁹ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 72.

¹⁴⁰ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 73.

¹⁴¹ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 74.

¹⁴² Aluminium Report, (Exhibit CHE-5 and USA-8), p. 75.

¹⁴³ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 75.

¹⁴⁴ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 84.

- h. Aluminium imports are impacting the welfare of the US aluminium industry because:¹⁴⁵ (i) employment in the aluminium industry is declining as several smelters were either permanently shut down or temporarily idled¹⁴⁶; (ii) the financial status of the US aluminium industry is poor¹⁴⁷; (iii) research and development expenditures are falling¹⁴⁸; (iv) capital expenditures for the aluminium industry are increasing¹⁴⁹; and (v) aluminium prices have dropped sharply.¹⁵⁰

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.¹⁵¹ 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.¹⁵²

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.¹⁵³
- 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.¹⁵⁴

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 aluminium industry.¹⁵⁵ 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.¹⁵⁶

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.¹⁵⁷

¹⁴⁵ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 89.

¹⁴⁶ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 89.

¹⁴⁷ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 91.

¹⁴⁸ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 95.

¹⁴⁹ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 97.

¹⁵⁰ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 100.

¹⁵¹ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 107.

¹⁵² Aluminium Report, (Exhibit CHE-5 and USA-8), p. 107.

¹⁵³ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 108.

¹⁵⁴ Aluminium Report, (Exhibit CHE-5 and USA-8), pp. 108-109.

¹⁵⁵ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 109.

¹⁵⁶ Aluminium Report, (Exhibit CHE-5 and USA-8), p. 109.

¹⁵⁷ Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11625; Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11619.

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 imports¹⁵⁸ and (b) Presidential Proclamation 9704 in relation to aluminium imports.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶²

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 Mexico¹⁶³, granted various exemptions to certain WTO Members¹⁶⁴, introduced import quotas on steel and aluminium imports from certain countries¹⁶⁵, and increased the additional import duty applicable to steel imports from Türkiye to 50%.¹⁶⁶ Subsequent proclamations also note the existence of agreements between the United States and countries exempted from the additional duties.¹⁶⁷

2.2 Measures at issue

2.31. In its panel request, Switzerland describes the measures at issue as the import adjustments on certain steel products and certain aluminium products. Switzerland states in its panel request that the measures consist of the additional import duties and quotas as well as the exemptions and exclusions from such duties and quotas.¹⁶⁸ Switzerland further notes:

- a. Through Presidential Proclamations 9705 and 9711 of 8 and 22 March 2018, the United States imposed an additional import duty of 25% on certain steel products from all countries except Argentina, Australia, Brazil, Canada, the European Union, the Republic of Korea and Mexico, taking effect on 23 March 2018.¹⁶⁹
- b. Through Presidential Proclamations 9704 and 9710 of 8 and 22 March 2018, the United States imposed an additional import duty of 10% on certain aluminium products from all countries except Argentina, Australia, Brazil, Canada, the Republic of Korea, the European Union and Mexico, taking effect on 23 March 2018.¹⁷⁰
- c. Through Presidential Proclamations 9739 and 9740 dated 30 April 2018, the President of the United States exempted imports from Argentina, Australia, Brazil and the Republic of Korea from the additional duties on certain steel products and exempted imports from Argentina, Australia and Brazil from the additional duties on certain aluminium products. The United States also extended the exemption from the additional duties for imports from Canada, the European Union and Mexico until 31 May 2018.¹⁷¹

¹⁵⁸ Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11625.

¹⁵⁹ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11619.

¹⁶⁰ Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11627; Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11621.

¹⁶¹ Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11626; Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620.

¹⁶² Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11627; Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11621.

¹⁶³ See sections 2.2.1.2 and 2.2.2.2 below.

¹⁶⁴ See sections 2.2.1.2 and 2.2.2.2 below.

¹⁶⁵ See sections 2.2.1.3 and 2.2.2.3 below.

¹⁶⁶ See section 2.2.1.1 below.

¹⁶⁷ See sections 2.2.1.2 and 2.2.2.2 below.

¹⁶⁸ Switzerland's panel request, p. 2.

¹⁶⁹ Switzerland's panel request, p. 1.

¹⁷⁰ Switzerland's panel request, p. 1.

¹⁷¹ Switzerland's panel request, pp. 1-2.

- d. The United States has introduced quotas limiting the quantities of steel imports from Argentina, Brazil and the Republic of Korea, pursuant to an agreement with those countries, and quotas limiting the quantities of aluminium imports from Argentina, pursuant to an agreement with that country.¹⁷²
- e. Presidential Proclamations 9704 and 9705 of 8 March 2018 have authorized the US Secretary of Commerce to provide relief from the additional duties upon request of affected parties located in the United States if the steel or aluminium articles are determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality or based upon specific national security considerations. On 19 March 2018, the US Department of Commerce issued an Interim Final Rule introducing supplements No. 1 and No. 2 to 15 CFR Part 705 which set forth the requirements and process for how a directly affected party located in the United States may submit requests for product exclusions. The US Department of Commerce issued on 11 September 2018 an Interim Final Rule revising supplements No. 1 and No. 2 to 15 CFR Part 705. Through Presidential Proclamations 9777 and 9776 of 29 August 2018, the US President has authorized the Secretary of Commerce to provide relief from the quotas applicable to steel products and aluminium products from those countries subject to quotas, in certain circumstances, including where they are determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality, or upon specific national security considerations. The procedures for such requests for exclusion are included in the Interim Final Rule as published on 11 September 2018.¹⁷³

2.32. According to Switzerland, these measures have been imposed by and are evidenced by the following documents, considered alone and in any combination¹⁷⁴:

- 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. 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);
- m. 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);

¹⁷² Switzerland's panel request, p. 2.

¹⁷³ Switzerland's panel request, p. 2.

¹⁷⁴ Switzerland's panel request, p. 2.

- n. Interim Final Rule regarding the 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; and
- o. Interim Final Rule regarding Submissions of Exclusions Requests and Objections to Submitted Requests for Steel and Aluminum.

2.33. In its panel request, Switzerland states that it is also challenging any additional measures amending, superseding, supplementing, updating, extending, replacing, or implementing the measures referred to above as well as any exemptions or exclusions applied.¹⁷⁵

2.34. In addition to the above, Switzerland considers that Section 232, as repeatedly interpreted by the United States' authorities, including in the context of the above and other measures, is inconsistent with the United States' obligations under the covered agreements. Switzerland considers that Section 232 as interpreted by the United States' authorities provides for the imposition of measures (such as additional import duties or quotas) that restrict imports from other WTO Members to shield the domestic production in the United States from competition with foreign products on the grounds of an alleged threat to the national security in a manner inconsistent with the disciplines set out in the GATT 1994 and the Agreement on Safeguards.¹⁷⁶ In the alternative, Switzerland submits that the ongoing use of Section 232 by the United States' authorities so as to afford protection to the domestic production by restricting imports from other WTO Members on the grounds of an alleged threat to US national security is inconsistent with the United States' obligations under the covered agreements.¹⁷⁷

2.35. In response to questions from the Panel, Switzerland further clarifies that it is challenging two sets of measures. First, Switzerland challenges the import adjustment measures imposed by the United States on imports of steel and aluminium products. These two measures¹⁷⁸ consist of different elements including the additional import duties, the import quotas, the country exemptions, and the product exclusions from such duties and quotas. Switzerland further argues that the "country exemptions" element includes the seeking of and/or the conclusion of agreements by the United States with certain countries with a view to exempt those countries from the duties and/or quotas. Second, Switzerland challenges Section 232 as repeatedly interpreted by the US authorities and, in the alternative, the ongoing use of Section 232 by the US authorities so as to afford protection to the domestic production by restricting imports from other WTO Members on the grounds of an alleged threat to US national security.¹⁷⁹

2.36. The following diagram depicts the Panel's understanding of Switzerland's presentation of the measures at issue and aspects of each measure at the time of the establishment of the Panel on 4 December 2018:

¹⁷⁵ Switzerland's panel request, p. 3.

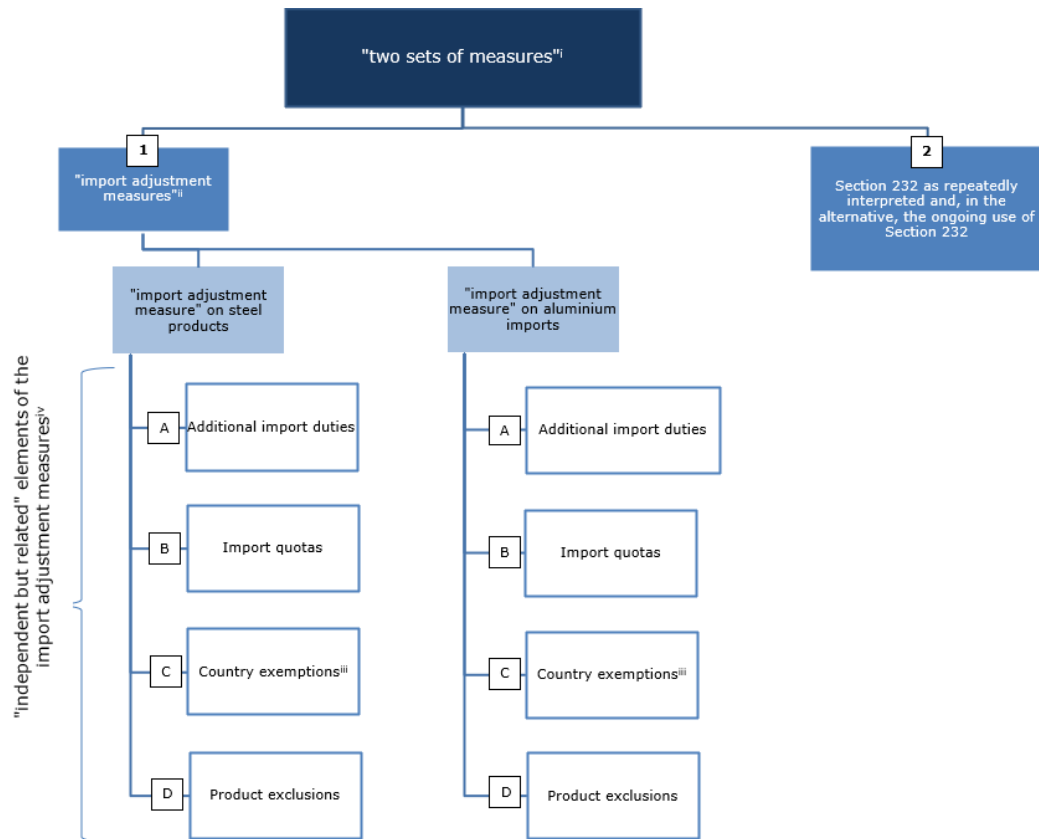
¹⁷⁶ Switzerland's panel request, p. 5.

¹⁷⁷ Switzerland's panel request, p. 6.

¹⁷⁸ Switzerland's second written submission, para. 8, fn 1 ("Switzerland challenges independently the import adjustment measure on steel products on the one hand and the import adjustment measure on aluminium products on the other hand").

¹⁷⁹ Switzerland's response to Panel question No. 1.a; second written submission, paras. 8 and 17.

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



ⁱ Switzerland's response to Panel question No. 1.a ("[i]n this dispute, Switzerland is challenging two sets of measures. Switzerland first challenges the import adjustment measures imposed by the United States on imports of steel and aluminium products. Second, Switzerland challenges Section 232 as repeatedly interpreted by the US authorities and, in the alternative, the ongoing use of Section 232 by the US authorities so as to afford protection to the domestic production by restricting imports from other WTO Members on the ground of an alleged threat to the US national security"); second written submission, para. 7. See also response to Panel question No. 2.b ("Switzerland is bringing independent challenges with respect to the (i) steel and aluminium import adjustment measures, and (ii) Section 232 as repeatedly interpreted or, in the alternative, the ongoing use of Section 232").

ⁱⁱ Switzerland's second written submission, para. 8 ("Switzerland challenges the import adjustment measures imposed by the United States on imports of steel and aluminium products. These two measures consist of different elements including the additional import duties, the import quotas, the country exemptions and the product exclusions from such duties and quotas") and footnote 1 ("Switzerland challenges independently the import adjustment measure on steel products on the one hand and the import adjustment measure on aluminium products on the other hand").

ⁱⁱⁱ Switzerland's response to Panel question No. 1.a ("[t]he 'country exemptions' element includes the seeking of and/or the conclusion of agreements by the United States with certain countries with a view to exempt those countries from the duties and/or quotas.").

^{iv} Switzerland's response to Panel question No. 2.a.

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

2.2.1 The "import adjustment measure" on steel products

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.¹⁸⁰

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 2018.¹⁸¹

¹⁸⁰ Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11627.

¹⁸¹ Presidential Proclamation 9772, (Exhibit CHE-12), p. 40430.

2.2.1.2 Country 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.¹⁸²

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 2018.¹⁸³

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 2018¹⁸⁴; (b) extending the exemptions for Argentina, Australia, and Brazil until an unspecified date¹⁸⁵; and (c) extending the exemption to the Republic of Korea until an unspecified date.¹⁸⁶

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.¹⁸⁷ This Proclamation did not extend the exemptions for Canada, Mexico, and the European Union.

2.44. Presidential Proclamation 9705 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.¹⁸⁸ Several of the Presidential Proclamations set out above refer to the existence of certain agreements reached between the United States and some countries, including Australia, Argentina, Brazil, and the Republic of Korea, in respect of "satisfactory alternative means" to address the threatened impairment of US national security.

2.45. With regard to the Republic of Korea, Presidential Proclamation 9740 of 30 April 2018 states that:

The United States has successfully concluded discussions with the Republic of Korea on satisfactory alternative means to address the threatened impairment to our national security posed by steel articles imports from the Republic of Korea. The United States and South Korea have agreed on a range of measures, including measures to reduce excess steel production and excess steel capacity, and measures that will contribute to increased capacity utilization in the United States, including a quota that restricts the quantity of steel articles imported into the United States from South Korea.¹⁸⁹

2.46. With regard to Argentina, Australia, and Brazil, this same Proclamation states that "[t]he United States has agreed in principle with Argentina, Australia, and Brazil on satisfactory alternative means to address the threatened impairment to our national security posed by steel articles imported from these countries".¹⁹⁰ Presidential Proclamation 9759 of 31 May 2018 further states that "[t]he United States has agreed on a range of measures with these countries, including measures to reduce excess steel production and excess steel capacity, measures that will contribute to increased capacity utilization in the United States, and measures to prevent the transshipment of steel articles and avoid import surges".¹⁹¹

2.2.1.3 Import quotas

2.47. Presidential Proclamation 9740 of 28 April 2018 describes how the United States and the Republic of Korea agreed upon a quota on steel imports.¹⁹² Part A of the Annex to this Proclamation

¹⁸² Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), pp. 11626-11627.

¹⁸³ Presidential Proclamation 9711, (Exhibit CHE-9 and USA-11), pp. 13361 and 13363.

¹⁸⁴ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20685.

¹⁸⁵ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20684.

¹⁸⁶ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20684.

¹⁸⁷ Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), p. 25858.

¹⁸⁸ Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11626.

¹⁸⁹ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20683.

¹⁹⁰ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20684.

¹⁹¹ Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), pp. 25857-25858.

¹⁹² Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20683.

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 treatment¹⁹³, and Part B of the Annex to the Proclamation details the annual aggregate limits for the applicable quotas.¹⁹⁴

2.48. Presidential Proclamation 9759 of 31 May 2018 introduced quotas on steel products from Argentina and Brazil.¹⁹⁵ The Annex to this Proclamation details the annual aggregate limits for the applicable quotas.¹⁹⁶

2.2.1.4 Product exclusions

2.49. 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 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.¹⁹⁷

2.50. 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).¹⁹⁸ 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.¹⁹⁹

2.51. 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).²⁰⁰ 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".²⁰¹ 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.²⁰²

2.52. 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 9705.²⁰³

2.2.2 The "import adjustment measure" on aluminium products

2.2.2.1 Additional import duties

2.53. 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

¹⁹³ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20685.

¹⁹⁴ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), pp. 20697-20705.

¹⁹⁵ Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), pp. 25857-25858.

¹⁹⁶ Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), p. 25861.

¹⁹⁷ Presidential Proclamation 9705, (Exhibit CHE-8 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 CHE-9 and USA-11), p. 13364).

¹⁹⁸ March Interim Final Rule, (Exhibit CHE-20 and USA-20), pp. 12106-12112.

¹⁹⁹ March Interim Final Rule, (Exhibit CHE-20 and USA-20), p. 12110.

²⁰⁰ September Interim Final Rule, (Exhibit CHE-22 and USA-21), pp. 46026-46065.

²⁰¹ September Interim Final Rule, (Exhibit CHE-22 and USA-21), p. 46027.

²⁰² September Interim Final Rule, (Exhibit CHE-22 and USA-21), p. 46027.

²⁰³ Presidential Proclamation 9777, (Exhibit CHE-23 and USA-18), p. 45026.

to this Proclamation, this rate of duty is in addition to any other duties, fees, exactions, and charges applicable to such imported aluminium articles.²⁰⁴

2.2.2.2 Country exemptions

2.54. 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.²⁰⁵

2.55. 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 2018.²⁰⁶

2.56. 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 2018²⁰⁷; (b) extending the exemption for Argentina, Australia, and Brazil until an unspecified date²⁰⁸; and (c) ending the exemption granted to the Republic of Korea.²⁰⁹

2.57. 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.²¹⁰ This Proclamation did not extend the exemptions for Brazil, Canada, Mexico, and the European Union.²¹¹

2.58. Presidential Proclamation 9704 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.²¹² Several of the Presidential Proclamations set out above refer to the existence of certain agreements reached between the United States and some countries, including Australia, Argentina, and Brazil, in respect of "satisfactory alternative means" to address the threatened impairment of US national security.

2.59. With respect to Argentina, Australia, and Brazil, Presidential Proclamation 9739 of 30 April 2018 states that:

The United States has agreed in principle with Argentina, Australia, and Brazil on satisfactory alternative means to address the threatened impairment to our national security posed by aluminum articles imported from these countries. I have determined that the necessary and appropriate means to address the threat to national security posed by imports of aluminum articles from Argentina, Australia, and Brazil is to extend the temporary exemption of these countries from the tariff proclaimed in Proclamation 9704, in order to finalize the details of these satisfactory alternative means to address the threatened impairment to our national security posed by aluminum articles imported from these countries.²¹³

2.60. Presidential Proclamation 9758 of 31 May 2018 also states that the United States agreed on a range of measures with Argentina and Australia, including measures to reduce excess aluminium production and excess aluminium capacity.²¹⁴

²⁰⁴ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11621.

²⁰⁵ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), pp. 11620-11621.

²⁰⁶ Presidential Proclamation 9710, (Exhibit CHE-14 and USA-12), p. 13357.

²⁰⁷ Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14), p. 20678.

²⁰⁸ Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14), pp. 20677-20678.

²⁰⁹ Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14), pp. 20678-20679.

²¹⁰ Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), pp. 25849-25850.

²¹¹ Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), p. 25850.

²¹² Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620.

²¹³ Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14), pp. 20677-20678.

²¹⁴ Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), pp. 25849-25850.

2.2.2.3 Import quotas

2.61. Presidential Proclamation 9758 of 31 May 2018 introduced quotas for aluminium products from Argentina.²¹⁵ The Annex to this Proclamation details the annual aggregate limits for the applicable quotas.²¹⁶

2.2.2.4 Product exclusions

2.62. 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.²¹⁷

2.63. 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.²¹⁸ 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.²¹⁹

2.64. 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".²²⁰ 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".²²¹ 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.²²²

2.65. 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, 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 9704.²²³

2.2.3 Section 232 as "repeatedly" interpreted

2.66. Switzerland also challenges Section 232 as repeatedly interpreted by US authorities. According to Switzerland, this measure provides for the imposition of measures that restrict imports from other WTO Members in order to shield domestic production in the United States from competition with foreign products on the grounds of an alleged threat to its national security.²²⁴ Switzerland clarifies that by challenging Section 232 as repeatedly interpreted, it is not challenging the legal act itself, i.e. Section 232, but rather the interpretation of that act by US authorities.²²⁵

²¹⁵ Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), pp. 25850-25851.

²¹⁶ Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), pp. 25853-25855.

²¹⁷ Presidential Proclamation 9704, (Exhibit CHE-13 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 CHE-14 and USA-12), p. 13358).

²¹⁸ March Interim Final Rule, (Exhibit CHE-20 and USA-20), pp. 12106-12112.

²¹⁹ March Interim Final Rule, (Exhibit CHE-20 and USA-20), p. 12110.

²²⁰ September Interim Final Rule, (Exhibit CHE-22 and USA-21), pp. 46026-46065.

²²¹ September Interim Final Rule, (Exhibit CHE-22 and USA-21), p. 46027.

²²² September Interim Final Rule, (Exhibit CHE-22 and USA-21), p. 46027.

²²³ Presidential Proclamation 9776, (Exhibit CHE-24 and USA-19), p. 45020.

²²⁴ Switzerland's first written submission, para. 555.

²²⁵ Switzerland's first written submission, para. 556.

2.67. Switzerland considers that this interpretation can be found²²⁶ in: (a) the Steel and Aluminium investigations and Reports²²⁷; (b) the decision of the US President pursuant to Section 232(c) following the Steel and Aluminium Reports, where the US President concurred with the findings of the US Secretary of Commerce and referred to import adjustment measures as a relief for domestic steel and aluminium industries²²⁸; (c) a number of statements by US authorities and officials²²⁹; and (d) the US investigation under Section 232 on imports of automobiles, including cars, SUVs, vans and light trucks, and automotive Parts (the 2018 Autos Investigation) as well as the information relating to the investigation concerning imports of automobiles.²³⁰

2.2.4 Ongoing use of Section 232

2.68. In the alternative, Switzerland challenges the ongoing use of Section 232 by United States authorities so as to afford protection to domestic production by restricting imports from other WTO Members on the grounds of an alleged threat to its national security.²³¹ Switzerland argues that through this description of the measure at issue, Switzerland is referring to the "action" of United States authorities "using" Section 232 "so as to afford protection to the domestic production by restricting imports from other WTO members". Switzerland notes that by describing that use as "ongoing", it refers to a "repeated" use that is "likely to continue in the future".²³²

2.69. Switzerland considers that the existence of this measure is evidenced by: (a) the fact that Section 232 has been used by US authorities since 2017 in order to protect domestic industry from competition with imported products under the guise of protecting national security²³³; (b) the fact that the use of Section 232 is repeated and likely to continue in future investigations²³⁴; (c) US authorities' position in the 2018 Autos Investigation²³⁵; (d) statements by US authorities and officials in the context of the 2018 Autos Investigation²³⁶; (e) the ongoing investigation into imports of titanium sponge²³⁷; and (f) the fact that the ongoing use of Section 232 will likely continue because it is likely to survive any challenge before US courts.²³⁸

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

2.70. In its responses to questions from the Panel, Switzerland refers to certain factual and legal developments of the measures at issue that occurred after Switzerland's request for the establishment of the Panel.²³⁹ Switzerland requests the Panel to consider within its terms of reference the following amended, modified, or replaced measures²⁴⁰:

- a. Changes to the additional import duty for steel products applicable to imports from Türkiye from 50% *ad valorem* to 25% *ad valorem*²⁴¹;
- b. Exclusion of imports of steel and aluminium products from Canada and Mexico from the additional import duties²⁴²;

²²⁶ Switzerland's first written submission, para. 558.

²²⁷ Switzerland's first written submission, paras. 559-560.

²²⁸ Switzerland's first written submission, para. 561.

²²⁹ Switzerland's first written submission, para. 562.

²³⁰ Switzerland's first written submission, para. 564; Switzerland's opening statement at the first meeting of the Panel, para. 125.

²³¹ Switzerland's first written submission, para. 566.

²³² Switzerland's first written submission, para. 569.

²³³ Switzerland's first written submission, para. 571.

²³⁴ Switzerland's first written submission, para. 572.

²³⁵ Switzerland's first written submission, para. 574.

²³⁶ Switzerland's first written submission, paras. 575-576.

²³⁷ Switzerland's opening statement at the first meeting of the Panel, para. 126.

²³⁸ Switzerland's first written submission, para. 577.

²³⁹ Switzerland's response to Panel question No. 86.

²⁴⁰ Switzerland's response to Panel question No. 86.

²⁴¹ Presidential Proclamation 9886, (Exhibit CHE-77 and USA-230).

²⁴² Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233); Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232).

- c. Additional import duties on the derivatives of steel and aluminium products²⁴³;
- d. Re-imposition of the 10% additional duties on imports of non-alloyed unwrought aluminium articles from Canada²⁴⁴; and
- e. Changes to import quotas agreed between the United States and Brazil.²⁴⁵

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. In its panel request, Switzerland requests that the Panel find that the measures listed in its request are inconsistent with the United States' obligations under the following provisions of the covered agreements²⁴⁶:

- a. Article I:1 of the GATT 1994, because, by applying selectively the additional import duties on certain steel and aluminium products originating in different Members, including by providing exemptions or applying alternative means to certain countries, the United States fails, 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, to accord immediately and unconditionally any advantage, favour, privilege or immunity granted to products originating in other countries to like products originating in Switzerland;
- b. Article II:1(a) and (b) of the GATT 1994, because, through the measures at issue, the United States fails to accord to the commerce of most other WTO Members, including Switzerland, treatment no less favourable than that provided for in the appropriate part of the United States' Schedule of Concessions. The United States also fails to exempt the products at issue from most WTO Members, including Switzerland, from ordinary customs duties in excess of those set forth and provided for in the United States' Schedule of Concessions and from all other duties or charges in excess of those imposed on the date of the GATT 1994 or those directly and mandatorily required to be imposed thereafter by legislation in force in the United States on that date;
- c. Article X:3(a) of the GATT 1994, because the United States has failed and fails to administer its laws, regulations, decisions and rulings in relation to the measures at issue in a uniform, impartial and reasonable manner;
- d. Article XI:1 of the GATT 1994, because, through the measures at issue, the United States has instituted restrictions other than duties, taxes or other charges, made effective through quotas, on the importation of products of the territory of other Members;
- e. Article XIX:1(a) of the GATT 1994, because the United States has suspended tariff concessions and other obligations without the products at issue being imported into the territory of the United States in such increased quantities and under such conditions as to cause or to threaten serious injury to domestic producers in the United States of like or directly competitive products, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994;
- f. Article 2.1 of the Agreement on Safeguards, because the United States applies safeguard measures to the products at issue 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;

²⁴³ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225).

²⁴⁴ Presidential Proclamation 10060, (Exhibit CHE-75 and USA-234).

²⁴⁵ Presidential Proclamation 10064, (Exhibit CHE-76 and USA-235).

²⁴⁶ Switzerland's panel request, pp. 3-6.

- g. Article 2.2 of the Agreement on Safeguards, because the United States does not apply the safeguard measures to imported products irrespective of their source;
- h. Article 3.1 of the Agreement on Safeguards, because the United States applies safeguard measures to the products in question without having properly conducted an investigation and published a report that sets forth findings and reasoned conclusions on all pertinent issues of fact and law;
- i. 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 as provided for in that provision;
- j. 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; has failed to demonstrate the existence of a causal link between increased imports and serious injury or the threat thereof; has failed to ensure that the injury caused by factors other than increased imports was not attributed to increased imports; and has failed to publish a detailed analysis and demonstration of its conclusions;
- k. Article 5.1 of the Agreement on Safeguards, because the United States is applying safeguard measures beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment;
- l. Article 7 of the Agreement on Safeguards, because the United States is applying 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;
- m. 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 the provisions of Article XIX applied in accordance with the Agreement on Safeguards;
- n. Article 11.1(b) of the Agreement on Safeguards, because the United States has sought, taken or maintained voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side; and
- o. Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards and 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.

3.2. With respect to Section 232 as repeatedly interpreted by the United States' authorities and the ongoing use of Section 232, Switzerland considers that the measures violate:

- a. Articles I:1, II:1(a) and (b) and XI:1 of the GATT 1994 since the measure at issue provides for the imposition of import restrictions in a manner inconsistent with the disciplines set out in those provisions;
- b. Article XIX:1 of the GATT 1994 and Articles 2.1, 4.1 and 4.2 of the Agreement on Safeguards since the measure at issue provides for the imposition of restrictions on imports of products in order to protect the domestic industry, without examining whether the products at issue are being imported into the territory of the United States in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the US domestic producers of like or directly competitive products, as a result of unforeseen developments and of the effect of the obligations incurred under the GATT 1994;
- c. Article 3.1 of the Agreement on Safeguards since the measure at issue provides for the imposition of safeguard measures without conducting an investigation and publishing a report that sets forth findings and reasoned conclusions on all pertinent issues of fact and law;

- d. Articles 5.1 and 7 of the Agreement on Safeguards since the measure at issue does not provide for the imposition of safeguard measures only to the extent and for such time as may be necessary to prevent or remedy serious injury and to facilitate adjustment and since it fails to provide that those measures cannot exceed four years and that they shall be progressively liberalized at regular intervals;
- e. Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 since the measure at issue does not provide for the notifications required under Articles 12.1 and 12.2 of the Agreement on Safeguards and does not provide for an opportunity for prior consultations as required under Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994;
- f. Article 11.1(a) of the Agreement on Safeguards since the measure at issue constitutes a mechanism of "emergency action" as set forth in Article XIX of the GATT 1994 that does not conform with the provisions of that Article and is not applied in accordance with the Agreement on Safeguards; and
- g. Article XVI:4 of the WTO Agreement since, through the measure at issue, the United States fails to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreement.

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.²⁴⁷

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 parties submitted written requests for review of the Interim Report. Neither party requested an interim review meeting. On 31 August 2022, the parties submitted comments on each other's requests for review of the Interim Report.

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 by the parties discussed in greater detail below.

6.3. The Panel notes that the parties' requests for review of the Interim Report include requests to provide more detailed summaries of their 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 decide which arguments or evidence it addresses or relies on in reaching its findings.²⁴⁸ Subject to the explanations and modifications described below, the Panel considers that the parties' arguments

²⁴⁷ United States' first written submission, para. 187.

²⁴⁸ See e.g. Appellate Body Reports, *Ukraine – Ammonium Nitrate*, para. 6.42; *US – COOL*, para. 299; *EC – Poultry*, para. 135; *EC – Hormones*, para. 135.

are adequately reflected and addressed in this Report, including the annexes thereto, to fulfil the requirements of the Panel's mandate under the DSU.²⁴⁹

6.4. In addition, the Panel has made typographical and other editorial modifications in the Report, including in response to the parties' requests. 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 7.95** "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). Switzerland requests that the Panel reject the United States' suggestion as it reflects the United States' arguments relating to the meaning of the terms "sought, taken or maintained" and should not be included in a paragraph setting out the Panel's interpretation.

6.6. In section 7.8.2 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 7.102** 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. Switzerland considers that this paragraph accurately reflects the United States' position regarding the "condition precedent" for the application of Article XIX of the GATT 1994.

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 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.

²⁴⁹ See section 7.1 below.

6.2 Article XXI(b) of the GATT 1994

6.10. The United States requests an addition to **paragraph 7.124** 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 7.125** include a more complete description of the complainant's arguments on the interpretation of Article XXI(b). In addition, the United States does not object to Switzerland's request for further reflection of its arguments in paragraph 7.125 and, should the Panel accept Switzerland's comment, requests that the Panel set out Switzerland's interpretation of Article XXI on what is qualified by the term "consider". Switzerland suggests revisions to paragraph 7.125 to reflect its arguments on the interpretation of Article XXI(b) more accurately. In response to the United States' requests, Switzerland considers that it is not necessary to add the additional explanation as suggested by the United States. Switzerland considers that this paragraph accurately and sufficiently reflects the United States' arguments and the additional points raised by the United States are already covered in the Panel Report.

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. The Panel has also expanded the footnote citations to Switzerland's submissions with its arguments on the interpretation of Article XXI(b).

6.12. The United States requests that the Panel delete the **footnote to paragraph 7.130** 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. Switzerland proposes additions to this paragraph to reflect its arguments and, in response to the United States' requests, does not object to moving the explanation in this footnote to the body of the text. However, Switzerland considers that given that the Panel addressed the meaning of the terms "which it considers" and the arguments made by the United States, it is not necessary to include any additional explanation in the paragraph, as suggested by the United States.

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 7.9.2, 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.²⁵⁰ 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. 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 7.137 and 7.138** in order to more accurately reflect its arguments on English grammar rules in the context of the interpretation of Article XXI(b). Switzerland does not comment on the United States' request.

6.19. The Panel has made the requested modification in paragraph 7.137 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 7.138 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.

6.20. The United States requests that the Panel expand the summary of arguments in **paragraph 7.151** on the interpretation of the terms "emergency in international relations" in Article XXI(b)(iii),

²⁵⁰ 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.

and that the Panel address these arguments in **paragraph 7.155** setting out the Panel's interpretation of these terms. Switzerland does not comment on the United States' request.

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 7.9.3, 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. Switzerland considers that there is no need to incorporate the text of Appendices A and B in the Report and that the reference to the appendices in the relevant paragraphs of the Report is sufficient. Switzerland suggests that the Panel may, however, wish to specify which appendix it is referring to in the relevant paragraphs.

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.

6.24. In response to requests by Switzerland, the Panel has modified **paragraphs 2.2, 2.11, 2.14, 2.23, 7.60, and 8.40 and footnotes 6, 47, 128, 129, 230, 236, and 300 of Appendix B** to more accurately reflect Switzerland's arguments.

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.²⁵¹ 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.²⁵² Although the United States acknowledges that "the Panel has jurisdiction over this dispute, because

²⁵¹ See section 3 above.

²⁵² United States' first written submission, para. 187.

the DSB has established the Panel to examine the matter set out in the panel request"²⁵³, 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".²⁵⁴ 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."²⁵⁵

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).²⁵⁶ 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.²⁵⁷ 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".²⁵⁸

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.²⁵⁹

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.²⁶⁰ 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

²⁵³ United States' first written submission, para. 184.

²⁵⁴ United States' first written submission, para. 186. 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. 184).

²⁵⁵ United States' first written submission, para. 186. 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.).

²⁵⁶ United States' response to Panel question Nos. 26-29.

²⁵⁷ 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 67.

²⁵⁸ See section 7.9 below.

²⁵⁹ 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.

²⁶⁰ 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"); Switzerland'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.²⁶¹ Having considered the arguments presented by the parties in this dispute²⁶², 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.²⁶³ 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, XI: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 XI:1 of the GATT 1994 concerning quantitative restrictions, followed by 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

²⁶¹ 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).

²⁶² 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).

²⁶³ 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).

with provisions of the covered agreements. The Panel will assess the arguments and evidence 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.²⁶⁴ Specifically, Switzerland argues that the Panel's terms of reference include: (a) the additional import duties imposed on derivative steel and aluminium products and the country-specific exemptions granted from those duties; (b) the exclusion of imports of steel and aluminium products from Canada and Mexico from the additional import duties; and (c) changes to the additional import duty applicable to steel products from Türkiye.²⁶⁵ The United States argues that these measures, which did not exist at the time of the panel request, could not have been identified in the panel request and therefore are not within the Panel's terms of reference.²⁶⁶

7.13. The Panel will accordingly examine whether it can make findings and recommendations on the measures described above.

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

7.14. On 24 January 2020, the US President issued Presidential Proclamation 9980 under the authority granted by Section 232.²⁶⁷ Presidential Proclamation 9980 introduced additional duties of 25% on derivative steel products and 10% on derivative aluminium products with effect from 8 February 2020.²⁶⁸ 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.²⁶⁹

²⁶⁴ In addition to the issues discussed in this section, the parties also dispute whether Switzerland's panel request adequately identifies the seeking of/conclusions of agreements by the United States with certain countries with a view to exempt imports from those countries from the additional duties on steel and aluminium. As the Panel declines to make findings in respect of the claims concerning any alternative treatment of exempted products, the Panel does not find it necessary to further address whether measures related to those claims are within its terms of reference. See sections 7.5 and 7.7 below.

²⁶⁵ See section 2.3 above and Switzerland's response to Panel question No. 97. Switzerland also requests the Panel to include within its terms of reference (i) Presidential Proclamation 10060 of 6 August 2020, which re-imposed the 10% additional duty on imports of non-alloyed unwrought aluminium articles from Canada and (ii) Presidential Proclamation 10064, which changed the import quotas agreed between the United States and Brazil. Switzerland identifies challenges under Articles II, X and XI of the GATT 1994 in respect of these proclamations. In light of the Panel's findings under Articles II, X and XI of the GATT 1994 and in the circumstances of this dispute, the Panel does not consider it necessary to address whether these Presidential Proclamations are within its terms of reference. See sections 7.4, 7.6, and 7.7.

²⁶⁶ United States' response to Panel question No. 87.

²⁶⁷ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), pp. 5281 and 5283.

²⁶⁸ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5283.

²⁶⁹ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5283.

7.15. Switzerland requests the Panel to include the additional duties and corresponding country exemptions imposed by Presidential Proclamation 9980 in its terms of reference.²⁷⁰ According to Switzerland, Presidential Proclamation 9980 simply extends the same additional duties as imposed by Presidential Proclamations 9704 and 9705 to derivative steel and aluminium articles and thus amounts to a measure "amending", "complementing" or "extending" the scope of the original measures.²⁷¹ Switzerland further argues that Presidential Proclamation 9980 is an anti-circumvention measure and pursues exactly the same objective as the original import adjustment measures.²⁷² 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 Switzerland's panel request, and fall outside the Panel's terms of reference.²⁷³

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.²⁷⁴ 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.²⁷⁵ The Panel will thus assess the relationship between the measures identified in Switzerland'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, Switzerland challenges "the import adjustments on certain steel products and certain aluminium products"²⁷⁶, including the "additional import duty of 25% on certain steel products" and "additional import duty of 10% on certain aluminium products" as well as the exemptions granted to Argentina, Australia, Brazil and the Republic of Korea.²⁷⁷ According to Switzerland, these measures have been imposed through a number of documents of the United States, considered alone or in any combination.²⁷⁸ Among those documents are Presidential Proclamations 9704 and 9705, and the Steel and Aluminium Reports.²⁷⁹ Switzerland's panel request further states that it "also covers any additional measures amending, superseding, supplementing, updating, extending, replacing or implementing the measures referred to above as well as any exemptions or exclusions applied".²⁸⁰

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

²⁷⁰ Switzerland's response to Panel question No. 87; see also second written submission, paras. 9 and 11, and response to Panel question No. 97.

²⁷¹ Switzerland's response to Panel question Nos. 87 and 96.

²⁷² Switzerland's response to Panel question Nos. 87 and 96.

²⁷³ United States' response to Panel question No. 87.

²⁷⁴ 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.

²⁷⁵ 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 (2nd complaint) (Article 21.5 – EU)*, para. 7.524.

²⁷⁶ Switzerland's panel request, p. 2.

²⁷⁷ Switzerland's panel request, pp. 1-2.

²⁷⁸ Switzerland's panel request, p. 2.

²⁷⁹ Switzerland's panel request, pp. 2-3. See also section 2.2 above.

²⁸⁰ Switzerland's panel request, p. 3.

indicate the need for further action under section 232".²⁸¹ The US President decided to "adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles"²⁸² 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"²⁸³ 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 9704 and 9705".²⁸⁴ In this respect, the measures introduced by Presidential Proclamation 9980 have a close connection to the instruments identified in Switzerland's panel request.²⁸⁵

7.19. The legal basis for Presidential Proclamation 9980 is Section 232.²⁸⁶ 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".²⁸⁷ 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.²⁸⁸ 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".²⁸⁹ 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 Switzerland'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".²⁹⁰ 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".²⁹¹ 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 Switzerland's panel request. Moreover, Switzerland's panel request was formulated so as to encompass such supplements or extensions. The Panel therefore finds that these measures are within its terms of reference.

²⁸¹ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5281.

²⁸² Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5283.

²⁸³ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5282.

²⁸⁴ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5282.

²⁸⁵ 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 CHE-72 and USA-225), p. 5282).

²⁸⁶ Presidential Proclamation 9980, (Exhibit CHE-72 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)).

²⁸⁷ Section 232, (Exhibit CHE-1 and USA-1), § 1862(c)(1)(A).

²⁸⁸ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), pp. 5281-5282.

²⁸⁹ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5282.

²⁹⁰ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5282.

²⁹¹ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225), p. 5283.

7.3.3 Exclusion of imports of steel and aluminium products from Canada and Mexico from the additional duties

7.22. Presidential Proclamation 9893 provides that the "United States has successfully concluded discussions with Canada and Mexico on satisfactory alternative means"²⁹² and that as a consequence, the United States has "decided to exclude Canada and Mexico from the tariff proclaimed in Proclamation 9704" on aluminium products.²⁹³ Similarly, Presidential Proclamation 9894 states that the "United States has successfully concluded discussions with Canada and Mexico on satisfactory alternative means"²⁹⁴ and that as a consequence, the United States has "decided to exclude Canada and Mexico from the tariff proclaimed in Proclamation 9705" on steel products.²⁹⁵ Switzerland argues that the modifications introduced by Presidential Proclamations 9893 and 9894 fall within the Panel's terms of reference.²⁹⁶

7.23. The Panel recalls that between March and May 2018, the United States issued several Presidential Proclamations exempting certain countries from the additional duties on steel and aluminium imports.²⁹⁷ These exemptions were granted based on the US President's determination in Presidential Proclamations 9704 and 9705 that "should the United States and any [country] arrive at a satisfactory alternative means to address the threat to the national security ... [the US President] may remove or modify the restriction on [steel and aluminium] articles imports from that country".²⁹⁸ Switzerland's panel request identifies Presidential Proclamations 9704 and 9705 as well as subsequent proclamations granting exemptions to countries including Australia, Argentina, Brazil and the Republic of Korea.²⁹⁹

7.24. As discussed above³⁰⁰, a panel may review measures that come into existence after panel establishment that bear a close relationship to measures described in the panel request. In this regard, the Panel notes that Presidential Proclamations 9893 and 9894 directly refer to Presidential Proclamations 9704 and 9705 in setting out their legal basis. In particular, they recall the US President's determination in Presidential Proclamations 9704 and 9705 on the circumstances under which exemptions from the additional duties could be granted.³⁰¹ Presidential Proclamations 9893 and 9894 also refer to the authority of the US President under Section 232 and the findings of the US Secretary of Commerce in the Steel and Aluminium Reports, a feature shared by the Presidential Proclamations identified in Switzerland's panel request, including Presidential Proclamations 9704 and 9705.³⁰² For the Panel, this demonstrates the connection between Presidential Proclamations 9893 and 9894 and the Presidential Proclamations identified in Switzerland's panel request relating to the country exemptions.

7.25. In addition to the above, the Panel notes the similarities between the exemptions granted through Presidential Proclamations 9893 and 9894 and the exemptions identified in Switzerland's panel request. Each exemption is designed to exclude countries from the additional duties applicable to an identical set of products, namely those set out in the annexes to Presidential Proclamations

²⁹² Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232), p. 23983.

²⁹³ Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232), p. 23983.

²⁹⁴ Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233), p. 23987.

²⁹⁵ Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233), p. 23988.

²⁹⁶ Switzerland's response to Panel question No. 87.

²⁹⁷ See sections 2.2.1.2 and 2.2.2.2 above.

²⁹⁸ Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14), pp. 20677-20678; Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), pp. 20683-20684; Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), pp. 25849-25850; Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), pp. 25857-25858. See also Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11626.

²⁹⁹ Switzerland's panel request, pp. 2-3.

³⁰⁰ See para. 7.16 above.

³⁰¹ Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232), p. 23983; Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233), p. 23987 ("should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that ... imports from that country no longer threaten to impair the national security, [the US President] may remove or modify the restriction on steel articles imports from that country").

³⁰² Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232), p. 23983; Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233), p. 23987. See also Steel Report, (Exhibit CHE-2 and USA-7), pp. 60-61; Aluminium Report, (Exhibit CHE-5 and USA-8), p. 109.

9704 and 9705.³⁰³ The exemptions to Canada and Mexico were also granted under the same circumstances as the exemptions identified in Switzerland's panel request, i.e. concluded discussions on "satisfactory alternative means to address the threatened impairment to [US] national security" posed by imports from the exempted country³⁰⁴ and the US President's determination that imports from the exempted country "no longer threaten to impair the national security".³⁰⁵ These similarities confirm the close connection between exemptions granted through Presidential Proclamations 9893 and 9894 and those identified in Switzerland's panel request.

7.26. For these reasons and in light of the specific circumstances of this case, the Panel concludes that Presidential Proclamations 9893 and 9894 and the actions set out therein, i.e. the exemptions from the additional duties to imports from Canada and Mexico, bear a close connection to the earlier measures on steel and aluminium products identified in Switzerland's panel request. Moreover, Switzerland's panel request was formulated so as to encompass such extensions of exemptions.³⁰⁶ The Panel therefore finds that these measures are within its terms of reference.

7.3.4 Changes to the additional import duty for steel products from Türkiye

7.27. Switzerland argues that the Panel should take into account the change of the additional import duty applicable to steel imports from Türkiye from 50% to 25%.³⁰⁷ The Panel notes that, as evidenced in Presidential Proclamation 9886 of 16 May 2019, the US President decided to remove the 50% duty on steel imports from Türkiye imposed by Presidential Proclamation 9772 and reduce it to 25%.³⁰⁸

7.28. As discussed above³⁰⁹, a panel may review measures that come into existence after panel establishment that bear a close relationship to measures described in the panel request. The Panel notes that Presidential Proclamation 9886 introduces a modification to Presidential Proclamation 9772 of 10 August 2018, which was identified in Switzerland's panel request.³¹⁰ For the Panel, modifying the applicable rate of the additional import duty on steel products from Türkiye without introducing any other change confirms the close connection between the original measure identified by Switzerland and the measure introduced by Presidential Proclamation 9886 of 16 May 2019. Therefore, in making its findings and recommendations, the Panel will take into account the change to the additional import duty applicable to steel imports from Türkiye from 50% to 25%.

7.3.5 Conclusion

7.29. Based on the foregoing and in light of the specific circumstances of the present dispute, the Panel finds that (i) Presidential Proclamation 9980, (ii) Presidential Proclamations 9893 and 9894; and (iii) Presidential Proclamation 9886 are within its terms of reference.

³⁰³ Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14), pp. 20677-20678; Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20684; Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), p. 25850; Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), p. 25858; Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232), p. 23983; and Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233), p. 23988.

³⁰⁴ Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14), p. 20677; Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), pp. 20683-20684; Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), p. 25849; Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), p. 25857; Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232), p. 23983; and Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233), p. 23987.

³⁰⁵ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20684; Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), p. 25850; Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), p. 25858; Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232), p. 23983; and Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233), p. 23988.

³⁰⁶ Switzerland's panel request states that it "also covers any additional measures amending, superseding, supplementing, updating, extending, replacing or implementing the measures referred to above as well as any exemptions or exclusions applied". (Switzerland's panel request, p. 3).

³⁰⁷ Switzerland's response to Panel question No. 86.

³⁰⁸ "[The US President] determined that it is necessary and appropriate to remove the higher tariff on steel imports from Turkey imposed by Proclamation 9772, and to instead impose a 25 percent ad valorem tariff on steel imports from Turkey, commensurate with the tariff imposed on such articles imported from most countries." (Presidential Proclamation 9886, (Exhibit CHE-77 and USA-230), p. 23422).

³⁰⁹ See para. 7.16 above.

³¹⁰ Switzerland's panel request, p. 2.

7.4 Article II:1 of the GATT 1994

7.4.1 Introduction

7.30. Switzerland argues that the additional import duties on steel and aluminium products are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.³¹¹ Switzerland recalls that the United States has applied *ad valorem* import duties of 25% on steel products, 50% on steel products from Türkiye, and 10% on aluminium products.³¹² Switzerland submits that these additional import duties constitute "other duties or charges" within the meaning of Article II:1(b).³¹³ As the United States' Schedule does not report any other duties or charges with respect to the products at issue, Switzerland advances that the additional import duties are therefore inconsistent with Article II:1(b).³¹⁴ To the extent that they are considered "ordinary customs duties", Switzerland argues that the United States' tariff bindings are 0% and 0-6.5% respectively for the steel and aluminium products concerned, and it follows that the additional duties of 25% and 10% on steel and aluminium products respectively are inconsistent with Article II:1(b) because they exceed these bound rates.³¹⁵ Finally, Switzerland contends that this violation of Article II:1(b) will necessarily result in less favourable treatment under Article II:1(a).³¹⁶

7.31. The United States has not advanced any arguments or evidence contesting the claims under Articles II:1(a) and (b) of the GATT 1994.³¹⁷

7.32. 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.

7.33. 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".

³¹¹ Switzerland's first written submission, paras. 10, 376-377, and 408. See also Switzerland's second written submission, paras. 22-23; and response to Panel question No. 97.

³¹² Switzerland's first written submission, paras. 381-390.

³¹³ Switzerland's first written submission, paras. 391 and 393-402.

³¹⁴ Switzerland's first written submission, paras. 403-404.

³¹⁵ Switzerland's first written submission, paras. 392 and 405-407.

³¹⁶ Switzerland's first written submission, paras. 408-413.

³¹⁷ 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").

7.34. 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.³¹⁸ 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.³¹⁹ 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).³²⁰ 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.³²¹

7.35. 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).³²² 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).³²³ 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).

7.36. 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.³²⁴

7.4.2 Additional duties on steel and aluminium products

7.37. In March 2018, the United States imposed additional duties of 25% on steel products and 10% on aluminium products.³²⁵ 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.³²⁶

³¹⁸ 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.

³¹⁹ See Appellate Body Reports, *India – Additional Import Duties*, para. 150; *Colombia – Textiles*, para. 5.35.

³²⁰ See Appellate Body Report, *India – Additional Import Duties*, para. 151; Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.78.

³²¹ 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.

³²² See Switzerland's first written submission, paras. 408-413.

³²³ 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.

³²⁴ See Switzerland's first written submission, paras. 10 and 376-413. See also Switzerland's second written submission, paras. 22-23; response to Panel question No. 97 (identifying challenges under Article II:1 in respect of Presidential Proclamation 9886 (amending the duty for steel products from Türkiye), 9980 (imposing duties on derivative products), and Presidential Proclamation 10060 (re-imposing a 10% duty on steel products from Canada). With respect to Presidential Proclamation 10060, see fn 265 above. Switzerland also challenges Section 232 as repeatedly interpreted and the ongoing use of Section 232 under Article II of the GATT 1994 and, relatedly, Article XVI:4 of the WTO Agreement (Switzerland's first written submission, paras. 604 and 613). The Panel does not find it necessary to rule on this claim given the circumstances of the present dispute, its overall findings, and its mandate to make such findings as will assist the DSB in making the recommendations or giving the rulings provided for in the covered agreements.

³²⁵ See Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10); Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9). See also section 2.2 for a detailed description.

³²⁶ 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 ³²⁷	Additional duty
1.	7206-7215	0	+25%
2.	7216 (except certain subheadings) ³²⁸		
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 9705³²⁹

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 ³³⁰	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%	

Source: United States Bound Concessions at the HS 6-digit subheading level; Presidential Proclamation 9704³³¹

³²⁷ Pursuant to Chapters 72 and 73 of the HTSUS, the generally applied rate for these products is also 0% for all relevant subheadings.

³²⁸ Exceptions for subheadings 7216.61.00, 7216.69.00, and 7216.91.00.

³²⁹ See United States' Schedule of Concessions, (Exhibit CHE-29); Harmonized Tariff Schedule of the United States (2019) Revision 2, Chapter 76, (Exhibit CHE-31); and Presidential Proclamation 9705, (Exhibit CHE-8 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).

³³⁰ 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%.

³³¹ See United States' Schedule of Concessions, (Exhibit CHE-29); Harmonized Tariff Schedule of the United States (2019) Revision 2, Chapter 76, (Exhibit CHE-31); and Presidential Proclamation 9704, (Exhibit CHE-13 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).

7.38. 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.

7.39. The term "ordinary customs duties" is not defined in the GATT 1994.³³² 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"³³³ or "occurring in regular custom or practice".³³⁴ 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.³³⁵ Third, neither the form which the duty takes, nor the basis on which it is calculated, will necessarily be dispositive.³³⁶ Rather, panels have examined duties by their design and structure³³⁷ 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).³³⁸ 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 1994.³³⁹

7.40. In the present dispute, Switzerland argues that the additional duties of 25% on steel products and 10% on aluminium products constitute "other duties or charges" inconsistent with the second sentence of Article II:1(b) of the GATT 1994. In particular, Switzerland highlights the following features:

- a. the additional duties do not replace, but rather coexist with the pre-existing MFN tariffs;³⁴⁰
- b. the additional duties are extraordinary in nature as "emergency measures" and thus cannot be classified as "ordinary" customs duties;³⁴¹
- c. the additional duties are not applied on an MFN basis, as imports of steel and aluminium products originating in certain countries are exempted from these additional duties;³⁴²

³³² See Appellate Body Report, *Chile – Price Band System*, para. 265.

³³³ See Panel Report, *Chile – Price Band System*, para. 7.51.

³³⁴ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.83.

³³⁵ 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).

³³⁶ 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").

³³⁷ 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.

³³⁸ 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.

³³⁹ 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.

³⁴⁰ Switzerland's first written submission, para. 397.

³⁴¹ Switzerland's first written submission, para. 398.

³⁴² Switzerland's first written submission, para. 399.

- d. the additional duties appear to be imposed on a temporary rather than a permanent basis;³⁴³ and
- e. the characterization of the additional duties as "ordinary customs duties" under the United States' domestic law is not dispositive for its characterization under WTO law.³⁴⁴

7.41. In the alternative, Switzerland argues that to the extent that the additional duties are considered "ordinary customs duties" under the first sentence, they would be inconsistent with Article II:1(b) because they exceed the United States' bound rates.³⁴⁵

7.42. The Panel takes due note of Switzerland's view that the additional duties qualify as "other duties or charges" under the second sentence of Article II:1(b), and recognizes that the United States has not raised any arguments contesting this characterization.³⁴⁶ However, the Panel is not bound by the arguments raised by a party and can use those arguments freely to develop its own legal reasoning.³⁴⁷ Moreover, in some circumstances, a panel's duty to conduct an objective assessment under Article 11 of the DSU may require it to assess for itself the applicability of a relevant provision, regardless of whether such applicability has been disputed by the parties.³⁴⁸ In light of the specific circumstances of this dispute, including the features of the duties at issue, the Panel considers it necessary to conduct an independent assessment of their characterization as "ordinary customs duties" or "other duties or charges" under Article II:1(b).

7.43. Having examined the design and structure of the additional duties, as well as the domestic instruments through which they were operationalized, the Panel considers that the duties are more appropriately characterized as "ordinary customs duties" under Article II:1(b). In particular, the Panel observes that 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.³⁴⁹ 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).

7.44. Nonetheless, 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".³⁵⁰ As such, the duties expressly apply "in addition" to any pre-existing tariffs.³⁵¹ Second, although the additional duties are generally applicable on an MFN basis, they are subject to a number of country exemptions.³⁵² Finally, while

³⁴³ Switzerland's first written submission, para. 400. Switzerland highlights two key factors in this regard: (a) that the Presidential Proclamations expressly provide that "[t]he Secretary shall continue to monitor" the imports of steel and aluminium and articles; and (b) that subchapter III of chapter 99 of the HTSUS refers to "[t]emporary modifications established pursuant to trade legislation." (Ibid). (emphasis original)

³⁴⁴ Switzerland's first written submission, para. 401.

³⁴⁵ Switzerland's first written submission, paras. 392 and 405-407.

³⁴⁶ See, however, 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 aluminium products "in excess of the levels set out in its WTO Goods Schedule").

³⁴⁷ See Appellate Body Report, *Brazil – Taxation*, para. 5.171.

³⁴⁸ See Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.32-5.33.

³⁴⁹ See Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10); Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9).

³⁵⁰ See Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), Annex; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), Annex.

³⁵¹ See Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11621; Presidential Proclamation 9705, (Exhibit CHE-8 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)

³⁵² See sections 2.2.1.2 and 2.2.2.2 for a detailed description. See also Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11626. See also Presidential Proclamation 9710, (Exhibit CHE-14 and USA-12); Presidential Proclamation 9711, (Exhibit CHE-9 and USA-11); Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14); Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13); Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16); and Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15). These will be elaborated in more detail in the context of Switzerland's claim under Article I:1 of the GATT 1994.

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.³⁵³ 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).

7.45. 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.³⁵⁴ 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.³⁵⁵ Even if considered to be "other duties or charges", the additional duties would 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).

7.46. 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

7.47. In August 2018, an additional duty of 50% was imposed on steel products from Türkiye.³⁵⁶ 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 that Table.³⁵⁷

7.48. As previously noted, Switzerland argues generally that the additional duties on steel and aluminium products constitute "other duties or charges" under the second sentence of Article II:1(b), and in the alternative, "ordinary customs duties" under the first sentence.³⁵⁸ These arguments include the additional duty of 50% on steel products in the case of Türkiye.³⁵⁹

7.49. 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[...]"

³⁵³ See Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10); Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9).

³⁵⁴ See para. 7.37 above.

³⁵⁵ United States Bound Concessions at the HS 6-digit subheading level.

³⁵⁶ See section 2.2.1.1 for a detailed description. To recall, the additional duty of 50% on steel products from Türkiye was originally imposed in August 2018, and was amended in May 2019 to decrease the duty rate to 25%. (See Presidential Proclamation 9772, (Exhibit CHE-12); Presidential Proclamation 9886, (Exhibit CHE-77 and USA-230)). Presidential Proclamation 9886, which amends the duty rate to 25%, states that the United States has "remove[d] the higher tariff on steel imports from Turkey, and [] instead impose[d] a 25 per cent ad valorem tariff on steel imports from Turkey, commensurate with the tariff imposed on such articles imported from most countries". (See Presidential Proclamation 9886, (Exhibit CHE-77 and USA-230), p. 23422). The Panel recalls that Switzerland has also requested findings under Article II:1 of the GATT 1994 in respect of Presidential Proclamation 9986. (See Switzerland's response to Panel question No. 97). In this regard and taking into account the Panel's findings in section 7.3.4, we note that any findings concerning the general additional duty rate of 25% on steel products would also be applicable to this amended duty rate for steel imports from Türkiye.

³⁵⁷ See para. 7.37 above.

³⁵⁸ See paras. 7.40-7.41 above.

³⁵⁹ See Switzerland's first written submission, paras. 381-390.

under Article II:1(b). For reasons similar to those outlined above³⁶⁰, 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.³⁶¹

7.50. 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 sentence³⁶², the United States' Schedule does not record any "other duties or charges" with respect to the steel products at issue.³⁶³ 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.

7.4.4 Additional duties on derivative steel and aluminium products

7.51. In January 2020, the United States announced additional duties of 25% on derivative steel and 10% on derivative aluminium products.³⁶⁴ 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.³⁶⁵

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 ³⁶⁶	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 9980³⁶⁷

³⁶⁰ See para. 7.43 above.

³⁶¹ See Presidential Proclamation 9772, (Exhibit CHE-12).

³⁶² 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 CHE-12)).

³⁶³ United States Bound Concessions at the HS 6-digit subheading level.

³⁶⁴ See Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225). As noted above, Switzerland argues generally that the additional duties on steel and aluminium products constitute "other duties or charges" inconsistent with Article II:1(b) but did not raise specific arguments in respect of the additional duties on derivative products. (See paras. 7.40-7.41 above).

³⁶⁵ United States Bound Concessions at the HS 6-digit subheading level.

³⁶⁶ 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.

³⁶⁷ See Presidential Proclamation 9980, (Exhibit CHE-72 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).

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 ³⁶⁸	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 9980³⁶⁹

7.52. 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 above³⁷⁰, 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.³⁷¹

7.53. 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).³⁷² Moreover, even if considered to be "other duties or charges" under the second sentence³⁷³, the United States' Schedule does not record any "other duties or charges" with respect to the steel and aluminium products at issue.³⁷⁴ 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

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

³⁶⁸ 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.

³⁶⁹ See Presidential Proclamation 9980, (Exhibit CHE-72 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).

³⁷⁰ See para. 7.43 above.

³⁷¹ See Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225).

³⁷² See para. 7.51 above.

³⁷³ 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 CHE-72 and USA-225)).

³⁷⁴ United States Bound Concessions at the HS 6-digit subheading level.

- 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.

7.5 Article I:1 of the GATT 1994

7.5.1 Introduction

7.55. Switzerland argues that the United States has imposed the additional duties on imports of steel products from all countries except Australia, Argentina, the Republic of Korea, and Brazil, and on imports of aluminium products from all countries except Argentina and Australia, inconsistently with Article I:1 of the GATT 1994.³⁷⁵ In Switzerland's view, the additional duties constitute "customs duties" and thus fall within the scope of Article I:1.³⁷⁶ Switzerland also considers that origin is the sole criterion to distinguish between the products and it follows that the products must be considered "like" within the meaning of Article I:1.³⁷⁷ Switzerland further advances that, by excluding from the application of the additional import duties products which originate in certain countries, the United States is granting an "advantage" within the meaning of Article I:1, as it is clear that the exemption creates more favourable competitive opportunities for those products in comparison to products from all other countries that are subject to those duties.³⁷⁸ Finally, Switzerland argues that this advantage has not been accorded "immediately" and "unconditionally" to like products from other WTO Members, and that the United States has thus acted inconsistently with Article I:1 of the GATT 1994.³⁷⁹

7.56. The United States has not advanced any arguments or evidence contesting the complainant's claim under Article I:1 of the GATT 1994.³⁸⁰

7.57. 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].

7.58. 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.³⁸¹ The obligation to accord most-favoured-nation treatment as set out in Article I:1 of the GATT 1994

³⁷⁵ Switzerland's first written submission, paras. 414 and 422-434. See also Switzerland's response to Panel's questions following the first meeting, Annex I, fn 1; response to Panel question No. 97, para. 81.

³⁷⁶ Switzerland's first written submission, paras. 425-428.

³⁷⁷ Switzerland's first written submission, para. 429.

³⁷⁸ Switzerland's first written submission, paras. 430-432. Switzerland argues that, in fact, the panels and the Appellate Body have expressly recognized that duty free treatment or an import duty exemption available to imports of a products originating in certain countries is an "advantage" within the meaning of Article I:1. (Ibid. para. 430).

³⁷⁹ Switzerland's first written submission, paras. 433-434.

³⁸⁰ 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").

³⁸¹ Appellate Body Report, *Canada – Autos*, para. 84.

has been understood to require equality of competitive opportunities for like imported products from any Member.³⁸²

7.59. 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.³⁸³

7.5.2 Country exemptions for steel and aluminium products

7.5.2.1 Australia, Argentina, Brazil, and the Republic of Korea

7.60. As described in greater detail above³⁸⁴, in March 2018, the United States imposed additional import duties of 25% on steel products and 10% on aluminium products.³⁸⁵ At that time, Australia, Argentina, Brazil, and the Republic of Korea were temporarily exempted from the additional duties on both steel and aluminium products.³⁸⁶ 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.³⁸⁷ In Switzerland's view, by imposing additional duties on imports of steel and aluminium products from all countries except Australia, Argentina, the Republic of Korea, and Brazil, the United States has granted to products from those countries an "advantage, favour, privilege or immunity" within the meaning of Article I:1 which has not been accorded immediately and unconditionally to like products originating in other WTO Members, including Switzerland.³⁸⁸

7.61. 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.³⁸⁹ As such, they also relate to "customs duties and charges" connected with importation falling within the scope of Article I:1 of the GATT 1994.³⁹⁰

7.62. 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

³⁸² 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).

³⁸³ See Switzerland's first written submission, paras. 422-434; response to Panel's questions following the first meeting, Annex I, fn 1; and response to Panel question No. 97. As part of its claim under Article I:1, Switzerland clarified that any references to the additional import duty of 25% on imports of certain steel products "should be understood as equally referring to the additional duty of 50% applicable to imports of certain steel products from Turkey". (See Switzerland's first written submission, para. 414 and fn 476). As such, the Panel does not understand Switzerland to have raised a distinct claim under Article I:1 in respect of the 50% duty, but to have included it as part of the "additional duties" to which the challenged country exemptions relate. The Panel has therefore not made distinct findings in respect of this duty under Article I:1.

³⁸⁴ See section 2.2 above.

³⁸⁵ See Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10); Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9).

³⁸⁶ See Presidential Proclamation 9710, (Exhibit CHE-14 and USA-12); Presidential Proclamation 9711, (Exhibit CHE-9 and USA-11).

³⁸⁷ See Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14); Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13); Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16); and Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15). These exemptions were extended based on the United States' "security relationship" with these Members. (Ibid).

³⁸⁸ Switzerland's first written submission, para. 414.

³⁸⁹ 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.

³⁹⁰ 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).

of Korea) solely on the basis of origin.³⁹¹ 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:1.³⁹² Therefore, with respect to the imposition of customs duties, the country exemptions accord an "advantage"³⁹³ to steel and aluminium products from the exempted countries that is not accorded immediately and unconditionally to "like products"³⁹⁴ originating in non-exempted countries. The Panel thus concludes that, by granting 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.

7.63. In the context of its claim under Article I:1, Switzerland also raised specific arguments in respect of the import quotas granted to Argentina, Brazil, and the Republic of Korea³⁹⁵, and clarified that in its view, the relevant "country exemptions" include "the seeking of and/or conclusion of 'agreements' with a view to exempt imports from those countries from the duties and/or quotas".³⁹⁶ The Panel notes that such quotas and any other "agreements" relate solely to countries that are exempted from the additional duties, and the existence of such quotas or "agreements" does not negate the fact that the products to which they apply are exempted from the additional duties.³⁹⁷ 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 countries such as Australia, Argentina, Brazil, and the Republic of Korea, including under any import quota or other "agreements", would constitute a distinct violation of Article I:1 of the GATT 1994.

7.5.2.2 Canada and Mexico

7.64. When the United States imposed additional import duties of 25% on steel products and 10% on aluminium products in March 2018, it exempted steel and aluminium products from Canada and Mexico from those additional duties.³⁹⁸ After March 2018, the country exemptions for Canada and Mexico went through a number of iterations, as elaborated in further detail in earlier sections of this Report.³⁹⁹ Switzerland challenges the exemptions for steel and aluminium products from Canada

³⁹¹ 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).

³⁹² 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").

³⁹³ 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).

³⁹⁴ See fn 391 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.

³⁹⁵ See Switzerland's first written submission, para. 431. The Panel notes that, in response to its questions, Switzerland clarified that its claim under Article I:1 related only to the "country exemptions", and not to the "import quotas". (Switzerland's response to Panel's questions following the first meeting, Annex I).

³⁹⁶ See Switzerland's response to Panel's questions following the first meeting, Annex I, fn 1.

³⁹⁷ 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 CHE-14 and USA-12); Presidential Proclamation 9711, (Exhibit CHE-9 and USA-11); Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14); Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13); Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16); and Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15)).

³⁹⁸ See Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10); Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9).

³⁹⁹ See sections 2.2 and 7.3 above. See also Presidential Proclamation 9739, (Exhibit CHE-15 and USA-14); Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13); Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16); Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15); Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232); Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233); and Presidential Proclamation 10060, (Exhibit CHE-75 and USA-234).

and Mexico, as set forth in Presidential Proclamations 9893 and 9894 of May 2019, under Article I:1 of the GATT 1994.⁴⁰⁰

7.65. The country exemptions for Canada and Mexico relate to the same "customs duties and charges" connected with importation in the sense of Article I:1 of the GATT 1994.⁴⁰¹ It is also undisputed that these country exemptions apply to products from select countries (i.e. Canada and Mexico) exclusively on the basis of origin.⁴⁰² 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.⁴⁰³ The Panel thus concludes that, by granting country exemptions from the additional duties to Canada and Mexico, the United States acted inconsistently with Article I:1 of the GATT 1994.

7.66. Given this finding, the Panel again does not consider it necessary to determine whether any particular alternative treatment of exempted products from Canada and Mexico, including under any other "agreements", would constitute a distinct violation of Article I:1 of the GATT 1994.⁴⁰⁴

7.5.3 Country exemptions for derivative steel and aluminium products

7.67. 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.⁴⁰⁵ Switzerland has challenged the Presidential Proclamation setting forth these duties and exemptions under Article I:1 of the GATT 1994.⁴⁰⁶

7.68. 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 1994.⁴⁰⁷ 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.⁴⁰⁸ 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.⁴⁰⁹ 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

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

- 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

⁴⁰⁰ See also Switzerland's response to Panel's questions following the first meeting, Annex I, fn 1; response to Panel question No. 87, paras. 38-44 (challenging the "exclusion of imports of steel and aluminium products from Canada and Mexico from the additional import duties"), and No. 97, para. 81 (challenging the "exclusion of imports of steel and aluminium products from Canada and Mexico from the additional import duties" set out in Presidential Proclamations 9893 and 9894 under Article I:1).

⁴⁰¹ See para. 7.61 above.

⁴⁰² See para. 7.62 above.

⁴⁰³ See fns 391 and 393 above.

⁴⁰⁴ See para. 7.63 above.

⁴⁰⁵ Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225).

⁴⁰⁶ Switzerland's response to Panel question No. 97, para. 81 (challenging the "[a]dditional import duties on the derivatives of steel and aluminium products" imposed by Presidential Proclamation 9980 under Article I:1 of the GATT 1994).

⁴⁰⁷ See sections 7.4.4 and 7.4.5 above. See also para. 7.61 above.

⁴⁰⁸ See para. 7.62 above.

⁴⁰⁹ See fns 391 and 393 above.

immediately and unconditionally to like products from all other Members, in a manner inconsistent with Article I:1 of the GATT 1994;

- b. the country exemptions for steel and aluminium products confer an advantage to products from 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; and
- c. 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 XI:1 of the GATT 1994

7.6.1 Introduction

7.70. Switzerland argues that the import adjustments also consist of quotas imposed on imports of steel products from the Republic of Korea, Argentina, and Brazil, and on imports of aluminium products from Argentina, inconsistently with Article XI:1 of the GATT 1994.⁴¹⁰ In Switzerland's view, these quotas restrict the quantities of steel and aluminium products that can be imported from those countries by imposing a maximum ceiling on those products; in other words, they have a limiting effect. Thus, Switzerland considers that the measures at issue, on their face, impose quantitative restrictions in violation of Article XI:1.⁴¹¹

7.71. The United States has not advanced any arguments or evidence contesting the complainant's claim under Article XI:1 of the GATT 1994.⁴¹²

7.72. Article XI:1 of the GATT 1994 provides that:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

7.73. Article XI:1 lays down a general obligation to eliminate quantitative restrictions by prohibiting Members from instituting or maintaining prohibitions or restrictions other than duties, taxes, or other charges on the importation, exportation, or sale for export of any product of another Member or destined for another Member.⁴¹³ Such prohibitions or restrictions are prohibited whether or not they are "made effective" through "quotas, import or export licenses or other measures".⁴¹⁴

7.74. The Panel will proceed by examining the challenged measures under Article XI:1 of the GATT 1994, specifically concerning the import quotas for steel and aluminium products.⁴¹⁵

⁴¹⁰ Switzerland's first written submission, para. 435. See also Switzerland's second written submission, paras. 22-23; response to Panel's questions following the first meeting, Annex I.

⁴¹¹ Switzerland's first written submission, paras. 446-448.

⁴¹² See United States' closing statement at the second meeting of the Panel, para. 7.

⁴¹³ Previous panels and the Appellate Body have noted that the scope of Article XI:1 is broad, capturing any measures through which a prohibition or restriction is produced or becomes operative. (See e.g. Appellate Body Reports, *Argentina – Import Measures*, paras. 5.216-5.219; Panel Report, *India – Quantitative Restrictions*, para. 5.128).

⁴¹⁴ See e.g. Panel Report, *Colombia – Textiles (Article 21.5 – Colombia)/ Colombia – Textiles (Article 21.5 – Panama)*, para. 7.160.

⁴¹⁵ See Switzerland's first written submission, paras. 435-448; response to Panel's questions following the first meeting, Annex I. Switzerland also challenges Section 232 as repeatedly interpreted and the ongoing use of Section 232 under Article XI of the GATT 1994 and, relatedly, Article XVI:4 of the WTO Agreement (Switzerland's first written submission, paras. 610 and 613). The Panel does not find it necessary to rule on this claim given the circumstances of the present dispute, its overall findings, and its mandate to make such findings as will assist the DSB in making the recommendations or giving the rulings provided for in the covered agreements.

7.6.2 Import quotas for steel and aluminium products

7.75. By May 2018, the United States imposed import quotas as an alternative to the additional duties on steel and aluminium products for: (a) steel and aluminium products from Argentina; (b) steel products from Brazil; and (c) steel products from the Republic of Korea.⁴¹⁶ Switzerland challenges these as quantitative restrictions that are prohibited under Article XI:1 of the GATT 1994.⁴¹⁷

7.76. The challenged measures comprise import quotas for steel and aluminium products from Argentina, Brazil, and the Republic of Korea. Such "quotas" are expressly listed in Article XI:1 as a method by which prohibitions or restrictions on importation may not be made effective.⁴¹⁸ The United States does not contest that the import quotas prohibit or restrict importation of steel and aluminium products, contrary to the obligation to eliminate quantitative restrictions set forth in Article XI:1 of the GATT 1994.⁴¹⁹ Based on these considerations, the Panel concludes that the import quotas for steel and aluminium products from Argentina, Brazil, and the Republic of Korea are inconsistent with Article XI:1 of the GATT 1994.

7.6.3 Conclusion

7.77. Regarding Switzerland's claims under Article XI of the GATT 1994, the Panel concludes that by imposing import quotas on steel and aluminium products from Argentina, Brazil, and the Republic of Korea, the United States has instituted prohibitions or restrictions other than duties, taxes or other charges on the importation of those products of the territory of those Members, inconsistently with Article XI:1 of the GATT 1994.

7.7 Article X:3 of the GATT 1994

7.78. Switzerland challenges the administration of the Presidential Proclamations adjusting steel and aluminium imports into the United States under Article X:3(a) of the GATT 1994.⁴²⁰ According to Switzerland, the manner in which the United States administers these proclamations in relation to the possibility of agreeing on "alternative means" to the additional duties on steel and aluminium imports is inconsistent with Article X:3(a) of the GATT 1994.⁴²¹ Switzerland also considers that the United States fails to administer in a reasonable manner the product exclusion mechanism set out in these proclamations, through which relief can be sought from the additional duties on steel and aluminium products.⁴²² Finally, Switzerland argues that the administration of the Presidential Proclamations is not uniform or reasonable due to the lack of any criteria or guidelines as to how the US Secretary of Commerce should assess the need to amend or discontinue the measures at issue.⁴²³ The United States has not advanced any arguments or evidence contesting Switzerland's claims under Article X:3(a) of the GATT 1994.

7.79. The Panel recalls its findings of inconsistency in relation to the additional duties, country exemptions and import quotas 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

⁴¹⁶ See Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13); Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16); and Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15).

⁴¹⁷ Switzerland's first written submission, paras. 435-448.

⁴¹⁸ WTO and GATT panels have previously found import and export quotas to constitute "restrictions" prohibited by Article XI:1, as such quotas necessarily have a limiting effect. (See Panel Reports, *China – Raw Materials*, paras. 7.207-7.209 and 7.224; *China – Rare Earths*, para. 7.200; and GATT Panel Report, *EEC – Import Restrictions*, paras. 9 and 31-32).

⁴¹⁹ See United States' closing statement at the second meeting of the Panel, para. 7.

⁴²⁰ Switzerland's first written submission, section IV.E.5. See also Switzerland's response to Panel question No. 97 (clarifying that its claims under Article X:3(a) extend to Presidential Proclamations 9886 (amending duty for steel products from Türkiye), 9893 and 9894 (exempting imports from Canada and Mexico from the additional duties), 9980 (imposing duties on derivative products), and 10060 (re-imposing duty of 10% on steel products from Canada)).

⁴²¹ Switzerland's first written submission, paras. 449 and 472-479.

⁴²² Switzerland's first written submission, paras. 450 and 480-488.

⁴²³ Switzerland's first written submission, paras. 451 and 489-492.

the rulings provided for in the covered agreements as required under the DSU.⁴²⁴ In light of these findings, the Panel does not consider it necessary to make findings on Switzerland's claims relating to the administration of the processes for excluding certain countries or products from measures that have already been found inconsistent with other obligations under the GATT 1994.⁴²⁵ The Panel thus declines to make findings regarding the claims under Article X:3(a) of the GATT 1994.

7.8 Article XIX of the GATT 1994 and the Agreement on Safeguards

7.8.1 Introduction

7.80. Switzerland 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. Switzerland also claims that certain measures at issue constitute "voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side" within the meaning of Article 11.1(b) of 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.

7.81. 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.⁴²⁶ 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 issue in light of the conclusions reached regarding the interpretation of Article XIX of the GATT 1994 and the Agreement on Safeguards.

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

7.82. 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.

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

⁴²⁴ 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).

⁴²⁵ The Panel similarly does not consider it necessary to address claims relating to the administration of the process by which such measures, which have already been found inconsistent with other obligations under the GATT 1994, may be amended or discontinued.

⁴²⁶ Switzerland also challenges Section 232 as repeatedly interpreted and the ongoing use of Section 232 under Article XIX of the GATT 1994, the Agreement on Safeguards and, relatedly, Article XVI:4 of the WTO Agreement (Switzerland's first written submission, paras. 584 and 613). The Panel does not find it necessary to rule on this claim given the circumstances of the present dispute, its overall findings, and its mandate to make such findings as will assist the DSB in making the recommendations or giving the rulings provided for in the covered agreements.

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.

7.84. 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.^{[3],[4]} 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.

³ 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.

⁴ 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.

7.85. 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. Switzerland emphasizes the characterization of the measures at issue as safeguards or other prohibited measures under Article 11.1(b) of the Agreement on Safeguards based on objective features of the measures at issue.⁴²⁷ 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 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".⁴²⁸

7.86. 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.⁴²⁹ 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.⁴³⁰ 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."⁴³¹ Regarding the interpretation of

⁴²⁷ Switzerland's first written submission, paras. 127-177. Switzerland 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)).

⁴²⁸ United States' response to Panel question Nos. 77 and 78; see also second written submission, section II.A.

⁴²⁹ 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).

⁴³⁰ See section 7.1 above.

⁴³¹ 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

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".⁴³²

7.87. 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".⁴³³ 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".

7.88. 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).⁴³⁴ 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 another.⁴³⁵ 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.⁴³⁶

7.89. 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

and in light of the object and purpose of the agreement. (See Switzerland's response to Panel question No. 20 and United States' response to Panel question No. 20. See also Switzerland's second written submission, paras. 80-88; United States' second written submission, section IV.B).

⁴³² 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.

⁴³³ Article 1 of the Agreement on Safeguards.

⁴³⁴ 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 Switzerland's response to Panel question Nos. 20 and 22; United States' response to Panel question Nos. 20 and 22).

⁴³⁵ 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").

⁴³⁶ 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.

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.

7.90. Regarding the terms "pursuant to" in Article 11.1(c), Switzerland contends that the terms "pursuant to" refer to measures falling "within the scope" of the relevant provisions of the GATT 1994 and argues that the determination of this question requires an objective assessment of the relevant features of the measures at issue.⁴³⁷ 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".⁴³⁸

7.91. 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.⁴³⁹ The term "pursuant" when used with the preposition "to" may mean "under", "in accordance with", "in consequence of", or "as authorized by".⁴⁴⁰ 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.

7.92. 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 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*".⁴⁴¹ 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 11.2.⁴⁴² 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.⁴⁴³

⁴³⁷ Switzerland's response to Panel question No. 20.b (also arguing that if Article 11.1(c) is interpreted as referring to measures that are in conformity with a given GATT provision, this would amount to conflating the issue of applicability of legal disciplines with the issue of WTO-consistency); see also second written submission, para. 87.

⁴³⁸ United States' response to Panel question Nos. 20 and 98.

⁴³⁹ 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 du GATT de 1994 autres que l'article XIX*" and "*disposiciones del GATT de 1994, aparte del artículo XIX*").

⁴⁴⁰ 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.

⁴⁴¹ Emphasis added.

⁴⁴² 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.

⁴⁴³ 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

7.93. 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.⁴⁴⁴ 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).⁴⁴⁵ 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.⁴⁴⁶ 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.

7.94. 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).⁴⁴⁷ 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 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.⁴⁴⁸

7.95. 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

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).

⁴⁴⁴ 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*").

⁴⁴⁵ Le Petit Robert Dictionnaire de la Langue Française (2000), p. 2663.

⁴⁴⁶ 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*").

⁴⁴⁷ *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), pp. 420-421.

⁴⁴⁸ 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)).

indicates a different legal relationship than consistency or conformity with the requirements of a provision of the GATT 1994 other than Article XIX.

7.96. 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.⁴⁴⁹ 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.⁴⁵⁰

7.97. 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.⁴⁵¹ 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.⁴⁵² Rather, the 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.

7.98. 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, Switzerland 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).⁴⁵³ In the Panel's view, Switzerland's interpretation of the

⁴⁴⁹ 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.

⁴⁵⁰ 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. 7.86 above.

⁴⁵¹ 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).

⁴⁵² 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 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)).

⁴⁵³ Switzerland's second written submission, para. 88.

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.

7.99. With respect to the ordinary meaning of the terms "other than", dictionary definitions include "besides", "except" or "apart from".⁴⁵⁴ 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.⁴⁵⁵

7.100. 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 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.

7.101. 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".⁴⁵⁶ 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

⁴⁵⁴ 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.

⁴⁵⁵ 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.

⁴⁵⁶ See section 7.9 below.

measures were adopted as well as any relevant notifications or statements to the official bodies of the WTO.⁴⁵⁷

7.102. 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.⁴⁵⁸ 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.

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

7.104. 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.

7.8.3 Assessment of the measures at issue

7.105. 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.⁴⁵⁹ According to the terms of the domestic legislation, Section 232 concerns actions taken by the United States for

⁴⁵⁷ 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).

⁴⁵⁸ 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. 145 ("notice is a condition precedent to taking action under Article XIX"); paras. 147-148 ("[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. 172 ("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. 203 ("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").

⁴⁵⁹ See section 2.1 above.

"[s]afeguarding national security".⁴⁶⁰ Moreover, Section 232 authorizes the US Secretary of Commerce to investigate the effects of imports of an article on US national security⁴⁶¹, in consultation with the Secretary of Defense and other appropriate officers of the United States.⁴⁶² 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.⁴⁶³ 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.⁴⁶⁴

7.106. 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 2017.⁴⁶⁵ 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.⁴⁶⁶ 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 defence⁴⁶⁷, especially in times of national emergencies.⁴⁶⁸ 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.⁴⁶⁹

7.107. 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 Commerce.⁴⁷⁰ The Presidential Proclamations concurring with these findings and recommendations describe the measures as "necessary" and "appropriate" to address the threatened impairment of national security.⁴⁷¹ 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

⁴⁶⁰ Section 232, (Exhibit CHE-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 CHE-21 and USA-2), § 705.2).

⁴⁶¹ Section 232, (Exhibit CHE-1 and USA-1), § 1862(b)(1)(A).

⁴⁶² Section 232, (Exhibit CHE-1 and USA-1), §§ 1862(b)(2)(A)(i) and b(2)(A)(ii).

⁴⁶³ Section 232, (Exhibit CHE-1 and USA-1), § 1862(c)(1)(A).

⁴⁶⁴ Section 232, (Exhibit CHE-1 and USA-1), § 1862(d); Section 232 regulations, (Exhibit CHE-21 and USA-2), § 705.4.

⁴⁶⁵ Steel Report, (Exhibit CHE-2 and USA-7), p. 18; Aluminium Report, (Exhibit CHE-5 and USA-8), p. 18. See also sections 2.1.2 and 2.1.3 above.

⁴⁶⁶ Steel Report, (Exhibit CHE-2 and USA-7), p. 55; Aluminium Report, (Exhibit CHE-5 and USA-8), p. 104.

⁴⁶⁷ Steel Report, (Exhibit CHE-2 and USA-7), p. 55; Aluminium Report, (Exhibit CHE-5 and USA-8), p. 104.

⁴⁶⁸ Steel Report, (Exhibit CHE-2 and USA-7), pp. 55-56; Aluminium Report, (Exhibit CHE-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").

⁴⁶⁹ Aluminium Report, (Exhibit CHE-5 and USA-8), pp. 104-105. See also Steel Report, (Exhibit CHE-2 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).

⁴⁷⁰ See e.g. Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11619 and Presidential Proclamation 9705, (Exhibit CHE-8 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.

⁴⁷¹ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11626.

national defense".⁴⁷² 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".⁴⁷³ 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".⁴⁷⁴

7.108. 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.⁴⁷⁵ The United States exempted various countries from the additional duties on steel and aluminium imports following such determinations⁴⁷⁶, 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".⁴⁷⁷ 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.⁴⁷⁸

7.109. 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 the threat to national security as determined by the United States.⁴⁷⁹ These quotas are applied only in respect of countries with which the United States has identified "important security relationships".⁴⁸⁰ 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

⁴⁷² Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11626.

⁴⁷³ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), pp. 11626-11627.

⁴⁷⁴ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11626.

⁴⁷⁵ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHE-8 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).

⁴⁷⁶ See sections 2.2.1.2 and 2.2.2.2 above for a list of the exempted countries.

⁴⁷⁷ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11620; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11626; Presidential Proclamation 9710, (Exhibit CHE-14 and USA-12), pp. 13355-13356; Presidential Proclamation 9711, (Exhibit CHE-9 and USA-11), pp. 13361-13362.

⁴⁷⁸ Steel Report, (Exhibit CHE-2 and USA-7), Appendix H and Appendix I; Aluminium Report, (Exhibit CHE-5 and USA-8), pp. 24-39. See also Presidential Proclamation 9704, (Exhibit CHE-13 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 CHE-8 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 CHE-2 and USA-7), pp. 21-22; Aluminium Report, (Exhibit CHE-5 and USA-8), p. 20.

⁴⁷⁹ Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), pp. 20683-20684; Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), p. 25850; and Presidential Proclamation 9759, (Exhibit CHE-11 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 CHE-14 and USA-12), pp. 13356-13357 and Presidential Proclamation 9711, (Exhibit CHE-9 and USA-11), pp. 13362-13363).

⁴⁸⁰ See Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20683; Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), p. 25849; and Presidential Proclamation 9759, (Exhibit CHE-11 and USA-15), p. 25857.

security considerations".⁴⁸¹ 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".⁴⁸² 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.⁴⁸³

7.110. 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".⁴⁸⁴

7.111. 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 Article XXI of the General Agreement taken by the GATT Council on 30 November 1982".⁴⁸⁵ 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".⁴⁸⁶

⁴⁸¹ Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), p. 11621; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11627; Presidential Proclamation 9776, (Exhibit CHE-24 and USA-19), p. 45020; and Presidential Proclamation 9777, (Exhibit CHE-23 and USA-18), p. 45026. See also the March Interim Final Rule, (Exhibit CHE-20 and USA-20), p. 12111 and the September Interim Final Rule, (Exhibit CHE-22 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).

⁴⁸² Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), pp. 11621-11622; Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), p. 11628. See also Presidential Proclamation 9740, (Exhibit CHE-10 and USA-13), p. 20684; Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16), p. 25850; and Presidential Proclamation 9759, (Exhibit CHE-11 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 CHE-12); Presidential Proclamation 9893, (Exhibit CHE-74 and USA-232); Presidential Proclamation 9894, (Exhibit CHE-73 and USA-233); Presidential Proclamation 9980, (Exhibit CHE-72 and USA-225); Presidential Proclamation 10060, (Exhibit CHE-75 and USA-234); and Presidential Proclamation 10064, (Exhibit CHE-76 and USA-235)).

⁴⁸³ See Steel Report, (Exhibit CHE-2 and USA-7), pp. 18-20 and Appendices E-G; Aluminium Report, (Exhibit CHE-5 and USA-8), pp. 18-19 and Appendices A-B. See also Presidential Proclamation 9704, (Exhibit CHE-13 and USA-10), Presidential Proclamation 9705, (Exhibit CHE-8 and USA-9), Presidential Proclamation 9758, (Exhibit CHE-16 and USA-16); and Presidential Proclamation 9759, (Exhibit CHE-11 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).

⁴⁸⁴ Council for Trade in Goods, Minutes of the Meeting held on 10 November 2017, G/C/M/130, (Exhibit USA-80), pp. 26-27.

⁴⁸⁵ 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.

⁴⁸⁶ Committee on Safeguards, Communication from the United States, G/SG/168, (Exhibit USA-82), pp. 1-2 and fn 2.

7.112. 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".⁴⁸⁷ 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".⁴⁸⁸

7.113. 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".⁴⁸⁹

7.114. 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.⁴⁹⁰ 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 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 1994.⁴⁹¹

7.115. Regarding the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards, Switzerland 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

⁴⁸⁷ 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).

⁴⁸⁸ Statements dated 29 October 2018, 21 November 2018, and 4 December 2018 of the United States, WTO Dispute Settlement Body (CHE-35 (excerpt) and USA-84 (full version)). 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.

⁴⁸⁹ 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.

⁴⁹⁰ 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.

⁴⁹¹ See e.g. Appellate Body Reports, *China – Auto Parts*, para. 171; *Indonesia – Iron or Steel Products*, para. 5.60.

particular, Switzerland 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.⁴⁹²

7.116. 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".⁴⁹³ 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.⁴⁹⁴

7.117. 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.

7.8.4 Conclusion

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

7.119. 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.

⁴⁹² Switzerland's first written submission, section IV.D.1.

⁴⁹³ Section 232, (Exhibit CHE-1 and USA-1), § 1862(d); Section 232 regulations, (Exhibit CHE-21 and USA-2), § 705.4.

⁴⁹⁴ See Aluminium Report, (Exhibit CHE-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 CHE-2 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").

7.9 Article XXI(b) of the GATT 1994

7.9.1 Introduction

7.120. 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, II:1, and XI:1 of the GATT 1994 are "actions" falling within the scope of Article XXI(b) of the GATT 1994.

7.121. 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.

7.9.2 Interpretation of Article XXI(b) of the GATT 1994 in accordance with Article 3.2 of the DSU

7.122. 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.

7.123. 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."⁴⁹⁵ According to the United States, "[t]he self-judging nature of ... Article XXI(b) is demonstrated by that provision's reference to actions that the Member 'considers necessary' for the protection of its essential security interests."⁴⁹⁶ 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)."⁴⁹⁷ The United States maintains that this requirement is met "once the Member indicates, in the context of dispute

⁴⁹⁵ United States' first written submission, para. 23.

⁴⁹⁶ United States' first written submission, para. 25.

⁴⁹⁷ United States' response to Panel question No. 33.

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".⁴⁹⁸

7.124. 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'".⁴⁹⁹ 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'".⁵⁰⁰ 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."⁵⁰¹ 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".⁵⁰²

7.125. Switzerland 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".⁵⁰³ Switzerland 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, Switzerland 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.⁵⁰⁴

7.126. 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.⁵⁰⁵ 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."⁵⁰⁶ As noted above⁵⁰⁷, 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.⁵⁰⁸ 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.

7.127. 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

⁴⁹⁸ United States' response to Panel question No. 52.a; see also response to Panel question Nos. 35 and 38; second written submission, para. 26.

⁴⁹⁹ United States' second written submission, paras. 7-8; see also *ibid.* para. 15 ("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)").

⁵⁰⁰ United States' response to Panel question No. 36.

⁵⁰¹ United States' second written submission, para. 25; 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.").

⁵⁰² United States' response to Panel question No. 37.

⁵⁰³ See Switzerland's response to Panel question Nos. 35-38; opening statement at the first meeting of the Panel, paras. 30-73.

⁵⁰⁴ See e.g. Switzerland's opening statement at the first meeting of the Panel, paras. 19-29; second written submission, paras. 136-148.

⁵⁰⁵ See section 7.1 above.

⁵⁰⁶ See Switzerland's response to Panel question No. 56; United States' response to Panel question No. 56.

⁵⁰⁷ See para. 7.86 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.

⁵⁰⁸ See e.g. Appellate Body Report, *US – Gasoline*, p. 17.

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).⁵⁰⁹ 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).⁵¹⁰

7.128. 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".⁵¹¹ 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".⁵¹² 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".⁵¹³ 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).⁵¹⁴ As indicated by the possessive pronoun "its", the relevant "security interests" are those of the Member taking action under Article XXI(b).⁵¹⁵

7.129. 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

⁵⁰⁹ 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.

⁵¹⁰ 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).

⁵¹¹ 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)); *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), (Exhibit USA-22), p. 485; *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), (Exhibit CHE-56), p. 496; Larousse, definition of "estimer", <https://www.larousse.fr/dictionnaires/francais/estimer/31188?q=estimer31111> (accessed 11 February 2020), (Exhibit CHE-60); and *Diccionario de la lengua española*, definition of "estimar", <https://www.dle.rae.es/estimar?m=form> (accessed 11 February 2020), (Exhibit CHE-61).

⁵¹² 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.

⁵¹³ 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.

⁵¹⁴ 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.

⁵¹⁵ 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.

(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".

7.130. 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).⁵¹⁶ 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).

7.131. 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 subparagraphs.⁵¹⁷ These considerations indicate that the subparagraphs are exhaustive in

⁵¹⁶ 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. 20-22). 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. 93-94; United States' opening statement at the second meeting of the Panel, paras. 8-9). Switzerland 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. Switzerland'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.

⁵¹⁷ 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

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).⁵¹⁸

7.132. 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".⁵¹⁹ The terms "which it considers" denote the consideration or judgment of the Member taking action under Article XXI(b)⁵²⁰, which is further reinforced by providing that the Member shall not be prevented from taking "any" action within the terms of the provision.⁵²¹ 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 Switzerland⁵²², 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).

7.133. 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.⁵²³ 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.

7.134. 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 of the provision.⁵²⁴ 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

direct transfer of funds (e.g. grants, loans and equity infusion)"); and Annex I to the SCM Agreement ("Illustrative List of Export Subsidies")).

⁵¹⁸ 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 Switzerland'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).

⁵¹⁹ Switzerland's response to Panel question No. 35; United States' response to Panel question No. 35.

⁵²⁰ The French and Spanish language versions of Article XXI(b) respectively use the phrases "*qu'elle estime*" and "*que estime*", indicating the estimation or consideration of the Member taking action under that Article. See *Le Petit Robert Dictionnaire de la Langue Francaise* (2000), p. 824 and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), p. 1270.

⁵²¹ 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 Francaise* (2000), pp. 2551-2552; and *Diccionario de la Lengua Española*, 22nd Edition (Real Academia Española, 2001), pp. 1485-1486.

⁵²² Switzerland's response to Panel question No. 90.

⁵²³ 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).

⁵²⁴ 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).

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.⁵²⁵

7.135. 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.⁵²⁶ 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 1994.⁵²⁷ 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").⁵²⁸

7.136. Each of the subparagraphs of Article XXI(b) begins with a participle that forms the beginning of a participle phrase.⁵²⁹ 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"⁵³⁰, 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.⁵³¹

7.137. 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."⁵³² In support of its

⁵²⁵ See W. Strunk Jr. and E.B. White, *The Elements of Style*, 4th 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).

⁵²⁶ 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*, 4th 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).

⁵²⁷ 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*, 4th edn (Allyn and Bacon, 1999), (Exhibit USA-226), p. 95 (a "subordinate clause" is a "clause dependant on the main clause in a sentence").

⁵²⁸ 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*, 4th 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").

⁵²⁹ 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*, 4th 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").

⁵³⁰ See para. 7.130 above.

⁵³¹ 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").

⁵³² United States' response to Panel question No. 36.

view that, under the ordinary meaning of the English text of Article XXI(b), subparagraphs (i) and (ii) modify the phrase "essential security interests"⁵³³, 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".⁵³⁴ 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.

7.138. 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").⁵³⁵ 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".

7.139. 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.⁵³⁶ 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).

7.140. The Panel notes the United States' argument that Article XXI(b) "should be read as a single clause and not as introducing separate conditions".⁵³⁷ 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 – for the protection of – would erroneously interpret certain terms of Article XXI(b) in isolation."⁵³⁸ 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.⁵³⁹ The terms of Article XXI(b) grant discretion to

⁵³³ See fn 516 above.

⁵³⁴ 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")).

⁵³⁵ United States' response to Panel question No. 90.

⁵³⁶ See e.g. Appellate Body Reports, *US – Gasoline*, p. 23; *Japan – Alcoholic Beverages II*, p. 12; *India – Patents (US)*, para. 45.

⁵³⁷ United States' response to Panel question No. 40.

⁵³⁸ United States' response to Panel question No. 36; see also second written submission, para. 8.

⁵³⁹ 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

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.⁵⁴⁰ 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.⁵⁴¹

7.141. 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".⁵⁴² 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 provisions⁵⁴³ 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.⁵⁴⁴ 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.

7.142. 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".⁵⁴⁵ In furtherance of these objectives, the WTO Agreement establishes a legal framework of rights and obligations that includes 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"⁵⁴⁶ 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".⁵⁴⁷ The rules and procedures of the DSU are thus intended to maintain the balance between the rights and obligations of the Members⁵⁴⁸ as embodied in the covered agreements and the relevant provisions thereof raised by the parties to proceedings under the DSU.

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. 133-134 (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"))).

⁵⁴⁰ 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).

⁵⁴¹ 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).

⁵⁴² Article II:2 of the WTO Agreement.

⁵⁴³ 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."

⁵⁴⁴ 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.

⁵⁴⁵ The preamble of the GATT 1994 refers to "international commerce" instead of "international trade relations".

⁵⁴⁶ Article 3.2 of the DSU.

⁵⁴⁷ Article 3.4 of the DSU.

⁵⁴⁸ See Article 3.3 of the DSU.

7.143. 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.⁵⁴⁹ 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".⁵⁵⁰ 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.

7.144. 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.⁵⁵¹ 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.

7.145. 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 purposes 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.⁵⁵² 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.

7.146. 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 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.

7.9.3 Assessment of the measures at issue

7.147. The Panel will assess whether the measures found to be inconsistent with Articles I:1, II:1, and XI:1 of the GATT 1994 were taken under the conditions and circumstances described in the subparagraphs of Article XXI(b) of the GATT 1994.⁵⁵³

⁵⁴⁹ 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.

⁵⁵⁰ Article 3.2 of the DSU.

⁵⁵¹ Switzerland's response to Panel question No. 56; United States' response to Panel question No. 56.

⁵⁵² See United States' first written submission, paras. 47, 56, and 106.

⁵⁵³ 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

7.148. 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.⁵⁵⁴ 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.⁵⁵⁵ 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.⁵⁵⁶

7.149. 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).⁵⁵⁷ 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.

7.150. 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)".⁵⁵⁸ 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 identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant".⁵⁵⁹

7.151. 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".⁵⁶⁰ In particular, the United States argued that "the extensive findings in the steel and aluminum reports are consistent with the United States

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).

⁵⁵⁴ See Switzerland's response to Panel question No. 71; comments after the second meeting of the Panel, paras. 55-57.

⁵⁵⁵ 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).

⁵⁵⁶ 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.

⁵⁵⁷ See e.g. United States' response to Panel question No. 92.

⁵⁵⁸ United States' second written submission, para. 27.

⁵⁵⁹ United States' second written submission, para. 26. 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. 45).

⁵⁶⁰ See United States' response to Panel question No. 92.

considering the measures at issue to be taken 'in time of war or other emergency in international relations'.⁵⁶¹ 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."⁵⁶²

7.152. 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'."⁵⁶³ 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 the 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."⁵⁶⁴ 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."⁵⁶⁵ 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."⁵⁶⁶

7.153. The Panel notes that the United States has referred to the appendix in the Steel Report concerning global excess capacity in connection with the existence of an "emergency in international relations" under Article XXI(b)(iii).⁵⁶⁷ In addition, the United States has referred to the G20 Global Steel Forum Report of 2017 noting that excess capacity is a "global challenge" which risks "the viability of an industry that produces a material which is vital for the functioning of economies and societies".⁵⁶⁸ The G20 Global Steel Forum Report of 2017 cited by the United States also describes the situation of excess steelmaking capacity as "particularly acute since 2015" and addresses the outlook of global steelmaking capacity.⁵⁶⁹ 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.⁵⁷⁰

7.154. 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 above⁵⁷¹, the Panel's assessment will be based on an

⁵⁶¹ United States' response to Panel question No. 92, para. 43.

⁵⁶² United States' response to Panel question No. 92, para. 50.

⁵⁶³ United States' closing statement at the second meeting, para. 45. (emphasis original)

⁵⁶⁴ United States' closing statement at the second meeting, paras. 48-49.

⁵⁶⁵ United States' closing statement at the second meeting, para. 51.

⁵⁶⁶ United States' closing statement at the second meeting, para. 52. The United States cited the following passages in G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72): "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).

⁵⁶⁷ See United States' response to Panel question No. 92, para. 46 (referring to Steel Report, (Exhibit CHE-2 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).

⁵⁶⁸ United States' opening statement of the first meeting of the Panel, para. 57.

⁵⁶⁹ See G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72); United States' closing statement at the second meeting of the Panel, para. 52.

⁵⁷⁰ 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. 53.

⁵⁷¹ See section 7.9.2 above.

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.

7.155. 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".⁵⁷² 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"⁵⁷³, while the term "international" may be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations".⁵⁷⁴ The phrase "international relations" may thus be understood to mean interactions between nations or national governments.⁵⁷⁵ 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).

7.156. 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 forces against a foreign power, or against an opposing party in the state".⁵⁷⁶ 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.⁵⁷⁷

7.157. 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

⁵⁷² Shorter Oxford English Dictionary, 5th Edition (Oxford University Press, 2003), p. 814. See also Switzerland's response to Panel question No. 51; second written submission, para. 277; and 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).

⁵⁷³ 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).

⁵⁷⁴ 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).

⁵⁷⁵ 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").

⁵⁷⁶ Oxford English Dictionary Online (Oxford University Press, March 2022).

⁵⁷⁷ 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)).

international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations.

7.158. 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.

7.159. 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.⁵⁷⁸

7.160. 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".⁵⁷⁹ 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 capacity in steel and aluminium.⁵⁸⁰ 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 States⁵⁸¹, while the third focuses on a global aspect of the situation.

7.161. 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

⁵⁷⁸ See paras. 7.142 and 7.143 above.

⁵⁷⁹ 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 CHE-2 and USA-7), pp. 13-15; Aluminium Report, (Exhibit CHE-5 and USA-8), pp. 12-14 (referring to Section 232(d))).

⁵⁸⁰ Steel Report, (Exhibit CHE-2 and USA-7), p. 16; Aluminium Report, (Exhibit CHE-5 and USA-8), p. 15.

⁵⁸¹ See e.g. Steel Report, (Exhibit CHE-2 and USA-7), sections V.B.4-10 and V.C; Aluminium Report, (Exhibit CHE-5 and USA-8), sections VI.H and VI.C.

particular, its references to an international situation of global excess capacity in steel and aluminium.⁵⁸²

7.162. 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.⁵⁸³ 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 aluminium 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'."⁵⁸⁴ 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)".⁵⁸⁵

7.163. 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.⁵⁸⁶ 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.

7.164. 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 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.⁵⁸⁷ 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.

7.165. 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.⁵⁸⁸ 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

⁵⁸² United States' response to Panel question No. 92, para. 46 (referring to Steel Report, (Exhibit CHE-2 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); see also United States' closing statement at the second meeting, paras. 48-49.

⁵⁸³ See Steel Report, (Exhibit CHE-2 and USA-7), section VI; Aluminium Report, (Exhibit CHE-5 and USA-8), section VII.

⁵⁸⁴ United States' response to Panel question No. 92, para. 43.

⁵⁸⁵ United States' closing statement at the second meeting, para. 46.

⁵⁸⁶ See para. 7.146 above.

⁵⁸⁷ See e.g. United States' closing statement at the second meeting, para. 18. (stating that "the measures challenged were on steel and aluminum (key sources for 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. 7.101, 7.106-7.109, and 7.116-7.117 above.

⁵⁸⁸ See e.g. G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72); Remarks dated 18 April 2016 of C. Malmström, "Way ahead for the global steel industry", OECD High-Level Symposium on Steel, (Exhibit USA-240).

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.

7.166. 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).⁵⁸⁹ For example, the G20 Global Steel Forum Report "focuses on the steel sector and provides concrete policy solutions to reduce steel excess capacity".⁵⁹⁰ 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".⁵⁹¹ 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.⁵⁹² In the Panel's view, however, 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, 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 dispute⁵⁹³ 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.

7.9.4 Conclusion

7.167. 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, II:1, and XI: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 Switzerland'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;

⁵⁸⁹ 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).

⁵⁹⁰ G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72), p. 2.

⁵⁹¹ G20, *Global Forum on Steel Excess Capacity Report* (30 November 2017), (Exhibit USA-72), 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).

⁵⁹² 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 Symposium on Steel, (Exhibit USA-240)).

⁵⁹³ See section 7.1 above.

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- 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 Switzerland'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;
 - ii. the country exemptions for steel and aluminium products confer an advantage to products from 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; and
 - iii. 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 Switzerland's claims under Article XI:1 of the GATT 1994, by imposing import quotas on steel and aluminium products from Argentina, Brazil, and the Republic of Korea, the United States has instituted prohibitions or restrictions other than duties, taxes or other charges on the importation of those products of the territory of those Members, inconsistently with Article XI:1 of the GATT 1994.
- d. Regarding Switzerland's claims under Article X of the GATT 1994, the Panel does not consider it necessary to make findings on Switzerland's claims relating to the administration of the processes for excluding certain countries or products from measures that have already been found inconsistent with other obligations under the GATT 1994. The Panel therefore declines to make findings regarding the claims under Article X:3(a) of the GATT 1994.
- e. Regarding Switzerland'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.
- f. 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, II:1, and XI: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 Switzerland 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.
