

UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS548)

**RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S FIRST SET OF QUESTIONS TO THE PARTIES**

February 14, 2020

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US-2	Section 232 Regulations, 15 C.F.R., Part 705
US-3	U.S. President, “Memorandum on Steel Imports and Threats to National Security,” Weekly Compilation of Presidential Documents, April 20, 2017, https://www.govinfo.gov/content/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf
US-4	U.S. President, “Memorandum on Aluminum Imports and Threats to National Security,” Weekly Compilation of Presidential Documents, April 27, 2017, https://www.govinfo.gov/content/pkg/DCPD-201700284/pdf/DCPD-201700284.pdf
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US-21	Department of Commerce, Bureau of Industry and Security, 15 CFR Part 705, Interim Final Rule, Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum, 83 Fed. Reg. 46026 (Sep. 11, 2018)

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US-22	<i>The New Shorter Oxford English Dictionary</i> , 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-23	<i>Draft Articles on the Law of Treaties with Commentaries (1966)</i> , YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II
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US-38	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947)
US-39	United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947)
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US-49	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo
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US-65	GATT Panel Report, <i>United States – Trade Measures Affecting Nicaragua</i>
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US-67	Tom Miles, <i>Adjudicator says any security defense of U.S. auto tariffs at WTO ‘very difficult’</i> , REUTERS BUSINESS NEWS (May 27, 2019), https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX1I7
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US-71	Commissioner for Trade Cecilia Malmström, OECD High-Level Symposium on Steel (Apr. 18, 2016), https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154458.pdf
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US-127	New Zealand Government, New Zealand’s cybersecurity strategy (2019) (excerpt)
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US-129	Turkey’s National Cyber Security Strategy (2016)
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US-131	India, Call for Comments, National Cyber Security Strategy 2020 (2019)
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US-144	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947)
US-145	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 35 th meeting of Commission A, held on Monday 11 August 1947, E/PC/T/A/SR/35 (Aug. 12, 1947)
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US-150	Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988).
US-151	Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988)
US-152	Negotiating Group on GATT Articles, Communication from Nicaragua, MTN.GNG/NG7/W/34 (Nov. 12, 1987)
US-153	Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988)

EXHIBIT	DESCRIPTION
US-154	Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1-3)
US-155	WTO, A Handbook of the WTO Dispute Settlement System (2nd edn. 2017) (excerpt)
US-156	Summary Record of Thirty-Seventh Meeting, Aug. 8, 1949, GATT/CP.3/SR.37 (Aug. 8, 1949)
US-157	Austrian Security Strategy, Security in a new decade – Shaping security (2013) (excerpt)
US-158	Defence Ministry of the Republic of Indonesia, Defence White Paper (2015) (excerpt)
US-159	The Federal Government, White Paper on German Security Policy and the Future of the Bundeswehr (excerpt)
US-160	Japan, National Security Strategy (Dec. 17, 2013) (excerpt)
US-161	Netherlands Government, National Risk Profile 2016 (excerpt)
US-162	New Zealand Government, Strategic Defence Policy Statement 2018 (excerpt)
US-163	Setting the course for Norwegian foreign and security policy, Meld. St. 36 (2016-2017), Report to the Storting (white paper), Recommendation of 21 April 2017 from the Ministry of Foreign Affairs, approved in the Council of State the same day (White paper from the Solberg Government) (excerpts)
US-164	Opening Ceremony of the 12th Asia-Pacific Programme for Senior National Security Officers (APPSNO) - Speech by Mrs. Josephine Teo, Minister for Manpower and Second Minister for Home Affairs (May 7, 2018)
US-165	Spain, The National Security Strategy, Sharing a Common Project (2013) (excerpt)
US-166	Turkey, Ministry of Foreign Affairs, Turkey's Perspectives and Policies on Security Issues
US-167	Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987)
US-168	Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988)

EXHIBIT	DESCRIPTION
US-169	<i>The Oxford Spanish Dictionary</i> , 2 st edn (revised), (Oxford University Press, 2001)
US-170	Ortografía Y Gramática, https://gramatica.celeberrima.com/
US-171	SIDE BY SIDE SPANISH & ENGLISH GRAMMAR (3rd edn. 2012)
US-172	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/12 (June 12, 1947)
US-173	Summary Record of the Twelfth Meeting, E/PC/T/A/SR/12 (June 12, 1947)

1 MEASURES AT ISSUE AND TERMS OF REFERENCE

TO COMPLAINANT

Question 1. Please succinctly identify and enumerate the measures at issue in this dispute, including the specific legal instruments corresponding to each measure.

a. For each of these measures, please clarify whether they are being challenged independently or if they could be considered as parts of one single broader measure.

b. Please identify the exact language used in the complainant's panel request identifying each of the measures identified above as well as the specific legal instruments corresponding to each measure.

1. This question is addressed to the complainant.

Question 2. Without prejudice to the Panel's final determination of the measures at issue in this dispute, the Panel has preliminarily identified the following elements/measures from the complainant's panel request and first written submission: (1) additional import duties; (2) country exemptions; (3) import quotas; (4) product exclusions; (5) certain measures agreed between the United States and the countries exempted from the additional duties; (6) a possible administrative practice relating to the product exclusions; (7) Section 232 of the Trade Expansion Act of 1962 as repeatedly interpreted by the US authorities. Regarding these elements/measures:

a. To what extent should they be understood as *independent* elements/measures at issue in this dispute? If not, please clarify if they are parts of a broader measure(s) or under which status should the Panel take them into account.

b. Is the European Union bringing independent challenges to each of these elements?

c. With reference to the elements/measures identified in the preceding question, please fill out the table in Annex 1. In doing so, please add any other element/measure you deem appropriate together with a reference of where it can be found in the panel request.

d. Please clarify which are the precise "measures at issue" that the European Union is referring to in paragraph 515 of the European Union's first written submission, stating:

The European Union submits that the measures at issue are inconsistent with Article X:3(a) of the GATT 1994 in two respects: with regard to product exclusions and with respect to country exemptions.

e. The Panel notes that in its arguments in the first written submission in relation to Article X:3(a) of the GATT 1994, the European Union possibly challenges an administrative practice followed by the USDOC in applying the product exclusion

process. Such administrative *practice* seems to be different from the legal instruments that regulate the product exclusion process.

i. Is the Panel's understanding, as described above, correct? Please elaborate.

ii. If the answer is yes, where has this practice been identified in the European Union's panel request?

iii. If not, what is the specific administration that the European Union claims violates Article X:3(a) of the GATT 1994? In doing so, please refer to the measures identified in response to question No. 1 above.

f. Please comment on the extent to which the European Union is making a claim against the product exclusion procedure as a measure in itself (different from a possible administrative practice surrounding this element).

g. The Panel notes that, in its first written submission, the European Union makes arguments with regards to certain measures or "alternative means" agreed between the United States and certain countries, including but *not limited to* the quotas imposed towards South Korea, Argentina and Brazil. In this regard, please answer the following questions:

i. Other than the quotas, is the European Union also challenging any other type of agreements between the United States and the countries exempted from the additional duties?

ii. Please comment on the extent to which the European Union's panel request identifies these measures.

h. The Panel notes that in its panel request, the European Union states that Section 232 of the Trade Expansion Act of 1962 is "as such" inconsistent with the United States' WTO obligations. By contrast, in its first written submission, the European Union does not refer to a challenge "as such" and emphasises that it is not challenging Section 232 as a piece of legislation but rather the interpretation of Section 232 that has been followed by the US authorities. What conclusion should the Panel draw from these statements in relation to the European Union's challenge against Section 232?

i. Regarding the European Union's arguments on the product exclusions under Article X:3(a) GATT 1994:

i. Please comment on the extent to which the Panel should consider the product exclusions to be an independent measure at issue and not an element or aspect of one broader measure. In doing so, please refer to the measures identified in response to question No. 1 above.

ii. Please indicate where the product exclusion has been properly identified or mentioned in the panel request.

iii. Please explain how the panel request contains an identification of this measure with a brief summary of the legal basis of the complaint that is sufficient to present the problem clearly.

j. The Panel notes that in its first written submission, the European Union has not presented specific arguments on its claims of violation of Article XIX:2 of the GATT 1994. Please confirm if the European Union is still challenging this measure under this provision.

k. The Panel notes that in its first written submission, the European Union has only presented arguments on the inconsistency of Section 232 as interpreted with Articles II:1(a) and (b), XI:1 and XIX:1(a) of the GATT 1994, Articles 4.2, 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards and Article XVI:4 of the WTO Agreement. In contrast, in its panel request, the European Union had indicated that Section 232 as interpreted is inconsistent "with each of the provisions of the covered agreements set out above ... and ... Article XVI:4 of the WTO Agreement". Please confirm the extent to which the European Union is presenting claims regarding this measure under the rest of the provisions raised in its panel request.

2. This question is addressed to the complainant.

2 SCOPE OF APPLICATION OF THE AGREEMENT ON SAFEGUARDS

2.1 Legal characterization of measures as a safeguard measure

TO COMPLAINANT

Question 3. Which of the measures at issue, as identified in response to question No. 1, are being legally characterized as safeguard measures?

a. The Panel notes that in its first written submission, the European Union argues that Section 232 as interpreted falls within the scope of the Agreement on Safeguards because it *provides for the imposition of safeguard measures*. In this regard:

i. Is the European Union arguing that Section 232 as interpreted is a safeguard measure?

ii. Please elaborate as to how and why Section 232 as interpreted falls within the scope of the Agreement on Safeguards. Under which particular disciplines?

3. This question is addressed to the complainant.

TO ALL

Question 4. What are the implications for the present proceedings of the fact that there is no express definition of what a safeguard measure is in the covered agreements?

4. The United States understands that, for purposes of this question, the Panel is referring to those measures authorized under Article XIX of the GATT 1994 and the Agreement on Safeguards. The Panel’s question notes that there is no “express definition of what a safeguard measure is”. From the provisions of the GATT 1994 and the Agreement on Safeguards, one can discern that what is colloquially referred to as a “safeguard” consists of two actions. The first, and perhaps most common understanding, is the domestic action to restrict imports. For example, Article 2.1 refers to a Member applying “a safeguard measure to a product” and Article 7.5 refers to application of a measure “to the import of a product”. Article 5.1, entitled “Application of Safeguard Measures”, gives one concrete example as “a quantitative restriction”. Article 6 on “Provisional Safeguard Measures”, provides that such measures “should take the form of tariff increases”. Article 1 provides the link to Article XIX when it states: “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.”

5. Article XIX itself does not, however, refer to “measures” or “safeguards”. Rather, it speaks to a Member exercising a right (“shall be free”), under certain conditions, to suspend an obligation or withdraw or modify a concession. This is the “action pursuant to paragraph 1” that is referred to in Article XIX:2 and Article XIX:3(a), (b). It is the title of Article XIX that suggests the exercise of the right (“action”) under paragraph 1 permits the Member to take “Emergency Action *on Imports* of Particular Products” (emphasis added) that otherwise would be inconsistent with a Member’s obligation or concession. Thus, despite the lack of an express definition in these agreements, the text and structure of these provisions establish that it is not simply a measure that restricts imports to remedy serious injury that is a safeguard measure. Rather, a safeguard measure is one taken by a Member exercising a right pursuant to Article XIX, under certain conditions and following the prescribed procedure.

6. Article XIX of the GATT 1994 and the Agreement on Safeguards set out the right of Members to take safeguard measures. Article XIX establishes that “[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member 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.” Article XIX provides that, in this situation, a Member “shall be free” to “suspend the obligation in whole or in part or to withdraw the concession.” To avail itself of this right, Article XIX requires that, before taking an action pursuant to XIX:1, the Member “shall give notice in writing” and “shall afford the [Members] . . . an opportunity to consult with it in respect to the proposed action.” Where a Member has provided such notice and opportunity for consultation, a measure taken pursuant to Article XIX is a “safeguard measure” within the meaning of that provision.

7. The Agreement on Safeguards provides additional detail regarding Members’ right to take a safeguard measure, and therefore supports this understanding of what constitutes a safeguard measure under Article XIX. As provided in Article 1 of the Agreement on Safeguards, “[t]his 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.” This statement confirms that a “safeguard measure” exists where a Member has availed itself of the right to take a measure pursuant to Article XIX.

Question 5. With reference to the Appellate Body Report in *Indonesia – Iron or Steel Products*:

a. Are the two features identified in the mentioned Report the only necessary conditions for a measure to be legally characterized as a safeguard measure?

8. Article XIX and the Agreement on Safeguards do not define safeguard measures. Rather, Article XIX permits Members to take emergency action with respect to imports of particular products under certain conditions. Two of these conditions were discussed by the Appellate Body in its *Indonesia – Iron or Steel Products* report: (1) the measure “must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession,” and (2) “the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member’s domestic industry caused or threatened by increased imports of the subject product.”¹

9. While, in light of the text of Article XIX and the Agreement on Safeguards, these two features are necessary to establish that a safeguard measure exists, they are not – by themselves – sufficient to establish that a particular measure was taken pursuant to the authority provided by Article XIX. A fundamental, condition precedent for action under Article XIX is that the Member has invoked Article XIX as providing the legal right to take its measure by providing notice in writing and affording affected Members an opportunity to consult.

10. The requirement to invoke GATT 1994 Article XIX flows from its provisions that establish notice of a proposed action as condition precedent to action, and notification requirements are further elaborated in Article 12 of the Agreement on Safeguards. As stated in the first sentence of Article XIX:2, a Member “shall give notice in writing” of action under Article XIX “[b]efore” taking that action – so that Members may engage in consultation.² The role of giving notice is confirmed by the last sentence in Article XIX:2, which provides that “in critical circumstances” safeguards measures can be taken without prior consultation (if followed by immediate consultations) – but it does not state that a Member may proceed with the safeguard measure as described under paragraph 1 if the Member has not given notice of the proposed action.³ Thus, in terms of Article XIX:3, without notice of a proposed action, a Member “which proposes to take or continue the action shall [**not**] be free to do so.” That is, without invoking a right under Article XIX, a Member cannot take and has not taken action pursuant to Article XIX.

¹ *Indonesia – Iron or Steel Products* (AB), para. 5.60.

² The first sentence of Article XIX:2 reads in full: “Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action.”

³ The last sentence of Article XIX:2 reads in full: “In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.”

11. This requirement – that, for a safeguard measure to exist, a Member must have invoked Article XIX as the legal basis for its measure by providing notice – is also consistent with the fact that the imposition of safeguards measures may be regarded as a “right.” As explained further below in response to the Panel’s Questions 10 and 11, Article XIX may be seen as establishing the “right” to suspend obligations or modify or withdraw concessions in the sense that Article XIX permits a Member, under certain conditions, to take action that would otherwise be inconsistent with its WTO obligations.

12. The United States addresses the requirement to give notice under Article XIX and notification requirements under the Agreement on Safeguards in detail in its response to the Panel’s Question 9.

b. Did the Appellate Body in the mentioned case expressly affirm that these are the only two necessary conditions? Please refer to the precise statements in the Report that are relevant in this regard.

c. To what extent are the legal and factual circumstances of the present dispute:

i. Similar to those at issue in Indonesia – Iron or Steel Products?

ii. Distinct from those at issue in Indonesia – Iron or Steel Products?

d. What legal relevance, if any, should be given to the conclusions by the Appellate Body in the mentioned case given the similarities and differences identified in response to the preceding question?

13. As explained in response to subpart (a), the text of Article XIX and the Agreement on Safeguards establishes three necessary conditions for a safeguard measure to exist: (1) the acting Member invokes Article XIX as the legal basis for a safeguard measure by providing notice in writing and affording affected Members an opportunity to consult; (2) the measure must suspend an obligation in whole or in part or withdraw or modify a concession, and (3) this suspension, withdrawal, or modification is necessary to prevent or remedy serious injury to the Member’s domestic producers caused or threatened by increased imports of the subject product because the domestic safeguard measure would otherwise be contrary to the obligation or concession. That the Appellate Body may not have identified each of them in the context of a particular dispute cannot serve to alter the text of the relevant provisions.

14. In addition, and as the Panel’s question appears to anticipate, the Appellate Body in *Indonesia – Iron or Steel Products* does not state that the two “constituent features” it recited were the only two necessary conditions for establishing the existence of a safeguard measure.

15. In *Indonesia – Iron or Steel Products*, in contrast to the present dispute, Indonesia had provided notice that the measure at issue was a safeguard measure.⁴ Thus, because Indonesia

⁴ WTO Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, & G/SG/N/11/IDN/14 (July 28, 2014) (US-79); *Indonesia – Iron or Steel Products* (Panel), para. 2.2. & n. 12 (discussing the measures at issue and citing notices to the Committee on Safeguards).

had invoked Article XIX through such notice, neither the panel nor the Appellate Body in *Indonesia – Iron or Steel Products* had occasion to examine the role of giving notice in establishing that a given measure may constitute a safeguard within the meaning of Article XIX and the Agreement on Safeguards.

16. Instead, the issues presented in *Indonesia – Iron or Steel Products* arose because, among other things, Indonesia had no binding tariff obligation in its WTO Schedule of Concessions with respect to the product on which it had proposed to take a safeguard measure.⁵ In fact, the Appellate Body specifically noted the “limited” nature of its inquiry: “our task is limited to the question of whether a measure can constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards if: (i) it does not suspend a GATT obligation or withdraw or modify a tariff concession; or (ii) that suspension, withdrawal, or modification is not designed to prevent or remedy serious injury.”⁶

17. Here, by contrast, the United States did not provide notice that it intended to take action under Article XIX. Nor, in applying the duties in question, did the United States act pursuant to Article XIX. In fact, in numerous statements to WTO committees, the United States made clear that the measures challenged here are not safeguards, and instead that the United States took the action for the protection of its essential security interests pursuant to Article XXI. For example, on November 10, 2017 – before Section 232 tariffs were imposed – the United States stated in a meeting of the WTO Council for Trade in Goods that the purpose of the Section 232 investigations into steel and aluminum imports was to determine the effect of steel and aluminum imports on U.S. 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.⁷ In the March 23, 2018, Meeting of the Council for Trade in Goods, the United States provided additional information concerning the proclamations issued by the U.S. President pursuant to Section 232, and indicated that these proclamations were consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982.⁸

18. Thereafter, in a communication to the Committee on Safeguards dated April 4, 2018 – in response to a request for consultations from China under the Agreement on Safeguards with respect to the Section 232 tariffs on steel and aluminium – the United States emphasized

⁵ See *Indonesia – Iron or Steel Products (AB)*, paras. 5.20 & 5.62.

⁶ *Indonesia – Iron or Steel Products (AB)*, para. 5.60 n. 194.

⁷ WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27 (US-80).

⁸ WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27 (US-81).

that “[t]hese actions are not safeguard measures” and reiterated the national security basis for U.S. actions under Section 232 with respect to steel and aluminium products.⁹

19. In its statement at the WTO General Council, delivered on May 8, 2018, the United States referred to its statement on March 23, 2018, in the Council for Trade in Goods, and reiterated that this statement was provided consistent with the Decision Concerning Article XXI of the General Agreement taken by the GATT Council on 30 November 1982.¹⁰ The United States again observed in this WTO General Council statement that, in imposing the Section 232 tariffs on steel and aluminum, “[t]he 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.”¹¹

20. In DSB meetings in October, November, and December 2018, the United States cited Article XXI as the basis for the measures challenged here, in response to the complaining Member’s Request for the Establishment of a Panel in this dispute.¹² The United States also pointed to Article XXI of the GATT 1994 as the basis for measures challenged in this dispute in a September 2018 notice to the WTO Committee on Market Access.¹³ In that notice, the United States listed Article XXI as the WTO justification for import quotas on steel products from Korea, Argentina, and Brazil, and aluminum products from Argentina.¹⁴

21. Therefore, the issue in this dispute – whether a panel may deem a measure a safeguard under Article XIX when the acting Member has not invoked Article XIX through notice, and instead has provided notice that it is seeking to take action pursuant to another WTO provision – was simply not an issue before the panel or the Appellate Body in *Indonesia – Iron or Steel Products*, and the finding in those reports are therefore of limited utility to this Panel.

e. Are there any circumstances in which a measure can objectively present the two above-mentioned features but nevertheless fall outside the scope of the Agreement on Safeguards and/or Article XIX of the GATT 1994?

⁹ WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2 (US-82).

¹⁰ U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea’s Statement at the WTO General Council (May 8, 2018), at 3 (US-83).

¹¹ U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea’s Statement at the WTO General Council (May 8, 2018), at 3 (US-83).

¹² See Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (US-84).

¹³ 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 (Oct. 3, 2018), at 6 (US-85).

¹⁴ 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 (Oct. 3, 2018), at 6 (US-85).

f. To what extent could those features be considered to be present in measures such as, for example, other trade remedy measures or DSB-authorized countermeasures?

22. Yes, there are circumstances in which a measure can objectively present the two features discussed by the Appellate Body in *Indonesia – Iron or Steel Products* and nevertheless fall outside the scope of the Agreement on Safeguards and Article XIX of the GATT 1994. For example, countermeasures authorized under DSU Article 22 could also (1) “suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession,” and (2) “the suspension, withdrawal, or modification in question [may] be designed to prevent or remedy serious injury to the Member’s domestic industry caused or threatened by increased imports of the subject product.”

23. The situation would proceed as follows: Member A challenges Member B’s measure, and a panel finds that Member B’s measure breaches its obligations under the GATT 1994. Member B does not bring its measure into compliance within a reasonable period of time, however, and the parties are not able to develop satisfactory compensation under DSU Article 22.2. Member A requests authorization to suspend concessions as against Member B under DSU Article 22.2 – thus fulfilling one of the “features” mentioned in *Indonesia – Iron or Steel Products*. The concessions that Member A would suspend very well could be designed to protect the domestic industry of Member A from injury caused by imports – thus fulfilling the second “feature” stated in *Indonesia – Iron or Steel Products*.

24. As this example demonstrates, the two “features” described in *Indonesia – Iron or Steel Products* could be present in measures other than safeguard measures within the meaning of Article XIX. In this example, if these two “features” were by themselves sufficient to establish the existence of a safeguard within the meaning of Article XIX and the Agreement on Safeguards, Member A’s countermeasures very well could be deemed safeguard measures by Member B or a panel, and Member B could assert a right to rebalance under Article XIX:3 and Article 8 of the Agreement on Safeguards. Such a result would be nonsensical, and highlights the importance of the acting Member’s invocation of Article XIX through providing notice to Members in determining whether a Member has taken a safeguard measure.

TO THE UNITED STATES

Question 6. Has the United States, through the measures at issue, suspended in whole or in part a GATT obligation or withdrawn or modified a GATT concession within the meaning of Article XIX of the GATT 1994?

25. The United States responds to the Panel’s Questions 6 and 7 together at Question 7, below.

TO ALL

Question 7. To what extent are the terms "to suspend the obligation in whole or in part or to withdraw or modify the concession" synonymous with violations of the GATT 1994?

26. The United States responds to questions 6 and 7 together. The phrase “suspend the obligation in whole or in part or to withdraw or modify the concession” appears in Article XIX, while a violation of the GATT 1994 (or a breach of that agreement) typically refers to “the failure of a Member to carry out its obligations” as stated in Article XXIII:1(a).

27. Suspension or withdrawal of a Member’s obligation as referred to in Article XIX of the GATT 1994 is not synonymous with a breach of the GATT 1994. Once a Member has the right to suspend an obligation or withdraw or modify a concession under Article XIX, that Member no longer has to perform those obligations. In other words, the Member does not breach (or “fail to carry out”) its obligations within the meaning of Article XXIII:1(a) of the GATT 1994, if the Member’s nonfulfillment of those obligations occurs under the circumstances set forth in Article XIX and the Agreement on Safeguards. In that situation, the obligations are suspended, withdrawn, or modified – they are not breached.

28. In relation to the U.S. actions pursuant to Section 232, the United States has invoked GATT 1994 Article XXI. No obligation or concession may interfere with that right (“Nothing in this Agreement shall be construed ... to prevent...”). Accordingly, the United States has not “suspended in whole or in part a GATT obligation or withdrawn or modified a GATT concession” generally or within the meaning of Article XIX.

TO ALL

Question 8. Regarding Article XIX:2 of the GATT 1994, please compare the notification obligation in this provision with the one contained in Article 12 of the Agreement on Safeguards. In this regard:

a. Please identify the overlapping and distinct elements, if any, among these two sets of notification obligations.

b. Can a Member's compliance with one of these two sets of notification obligations render a Member in automatic compliance with the other?

c. To what extent have the notification obligations under Article XIX:2 of the GATT 1994 been subsumed by Article 12 of the Agreement on Safeguards?

29. In this dispute, the Panel need not compare the notice provisions in Article XIX:2 of the GATT 1994 with the notification provisions in Article 12 of the Agreement on Safeguards. This is because the measures at issue in this dispute were sought and taken pursuant to Article XXI of the GATT 1994, not Article XIX or the Agreement on Safeguards.

30. Regardless, as the United States has explained, a Member informs others of its intention to exercise a right pursuant to Article XIX by giving notice in writing. In the terms of Article XIX:2, “before ... tak[ing] action pursuant to the provisions of paragraph 1 of [Article XIX]”, the Member shall give notice in writing and afford the opportunity to consult.

31. The Agreement on Safeguards has elaborated procedural requirements to expand the scope of information a Member provides to other Members regarding that invocation and proposed action.

32. A Member that does not provide information consistent with the elaborated notification requirements of the Agreement on Safeguards in relation to a safeguard measure under its domestic safeguards authority would breach these procedural obligations. This does **not** mean, however, that – as stated in the Panel’s question – the notification obligations in Article 12 “subsume” the requirement to give notice in writing under Article XIX:2 of proposed action. It would appear, however, that compliance with the elaborated notification provisions of Article 12 would assist a Member in complying with the condition precedent to give notice in writing to the WTO of its intention to exercise its right pursuant to Article XIX to impose a safeguard measure.

Question 9. Regarding the notification requirements set out in Article XIX of the GATT 1994 and Article 12 of the Agreement on Safeguards:

a. Are notifications pursuant to either, or both, of these provisions a prerequisite to the applicability of safeguard disciplines to measures taken by WTO Members?

b. Which precise terms in Article XIX of the GATT 1994 and the Agreement on Safeguards, if any, indicate that formal notifications of safeguard action are a necessary condition or prerequisite for the applicability of safeguard disciplines?

c. To what extent do the provisions on notification of safeguard actions under Article XIX:2 of the GATT 1994 and Article 12 the Agreement on Safeguards relate to the consistency of measures with those provisions as opposed to the applicability of safeguard disciplines to measures? Do Article XIX:2 of the GATT 1994 and Article 12 the Agreement on Safeguards serve different functions in this regard?

d. Are there any other covered agreements, or provisions thereof, whose applicability depends on a Member's invocation or notification? To what extent are such other covered agreements, or provisions thereof, comparable to or distinguishable from Article XIX of the GATT 1994 and the Agreement on Safeguards?

33. The United States incorporates its response to Questions 5(a) and 8 in response to the Panel’s Question 9. As the United States has explained there, a condition precedent for applicability of the safeguards disciplines is that the Member taking action has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult. The requirement to invoke Article XIX before taking action flows from the text on providing notice of a proposed action in Article XIX:2.

34. The Agreement on Safeguards, at Article 12, has elaborated procedural requirements to expand the scope of information a Member provides to other Members regarding that proposed action. These elaborated requirements are generally procedural in nature, but also include notification of “taking a decision to apply ... a safeguard measure” and “proposing to apply ... a safeguard measure” (Articles 12.1, 12.2). Thus, notification under Article 12 relates to *both* the applicability of safeguard disciplines to those measures *and* the consistency of those measures with the safeguards disciplines.

35. Article XIX is not the only provision whose applicability depends on a Member’s invocation or notification. For certain measures taken under Article XVIII of the GATT

1994, notification serves a role similar to its role for measures taken under Article XIX. Like Article XIX, Article XVIII of the GATT 1994 sets forth certain circumstances in which a Member “shall be free” to take action that would otherwise be inconsistent with its trade obligations, provided that the Member notifies other Members of its action and the measure in question fulfills certain other requirements. Thus, like Article XIX, the applicability of Article XVIII depends in part on a Member’s notification or invocation of this provision.

36. In particular, Article XVIII(7)(a) provides that if a Member “considers it desirable, in order to promote the establishment of an industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein.”¹⁵

37. The Member proposing to take such action “shall be free to modify or withdraw” the concession if it reaches *agreement* with those parties, or if the CONTRACTING PARTIES concur in the proposed compensatory adjustment, or if the CONTRACTING PARTIES find the proposed adjustment inadequate but that every reasonable effort was made (in which case the other parties are themselves free to modify or withdraw substantially equivalent concessions).¹⁶

38. This notification and negotiation requirement affords Members the opportunity to reach agreement on compensation or permit the affected party to make a compensatory withdrawal. This process under Article XVIII(7) is similar to that under Article XIX:2 and XIX:3 for safeguard measures, which likewise affords Members an opportunity to consult with respect to the proposed action and reach agreement before the action is taken.

Question 10. Regarding Article XIX of the GATT 1994:

a. Please concisely enumerate the *rights* set out in this provision. To whom are these rights granted?

b. Please concisely enumerate the *obligations* set out in this provision. To whom are these obligations addressed?

39. The United States responds to the Panel’s Questions 10 and 11 together at Question 11, below.

Question 11. Is it necessary for a Member to *intend* to exercise the rights provided for under Article XIX of the GATT 1994 and the Agreement on Safeguards in order for the disciplines under that provision and agreement to apply? In this regard:

¹⁵ GATT 1994 Article XVIII:7(a).

¹⁶ See GATT 1994, Article XVIII:7(a), last sentence & Article XVIII:7(b).

a. What is the relevance of the fact that under Article XIX:1(a) of the GATT 1994 a Member "shall be free" to take the actions contemplated under that provision?

b. Which party in dispute settlement proceedings would be required to demonstrate such intention to exercise the rights provided for under Article XIX of the GATT 1994 and the Agreement on Safeguards?

c. To what extent could formal notification of safeguard action serve as evidence and/or be dispositive of such intent?

40. The United States responds to Questions 10 and 11 together. Under Article XIX a Member “shall be free” to take the actions authorized under that provision only after it has invoked that provision by providing notice in writing. Article XIX may be seen as establishing a “right” – the “right” to suspend obligations or modify or withdraw concessions – in the sense that Article XIX permits a Member, when it has invoked that provision and under certain conditions, to take action that would otherwise be inconsistent with its WTO obligations.

41. If a Member seeks to take action under Article XIX, that Member must (1) provide notice of its proposed action and (2) consult with other Members in respect of that action. As set forth in Article XIX:2, the notice provided by a Member seeking to take action under Article XIX must be given “in writing”, “[b]efore” the Member takes action under Article XIX, and “as far in advance as may be practicable.” The Member must consult with Members having a substantial interest in exports of the product concerned.

42. Because a Member “shall give notice in writing” and “shall afford” an opportunity to consult “[b]efore it shall take action pursuant to the provisions of paragraph 1” of Article XIX to suspend obligations or modify or withdraw concessions, notification and consultation are obligatory conditions for the exercise of a right under Article XIX. A Member chooses whether to undertake the “obligations” of notice and consultation, however, because these obligatory conditions attach only when a Member seeks to take action pursuant to Article XIX. If a Member has not given notice in writing of proposed action under Article XIX, it is not seeking to exercise a right pursuant to Article XIX. In that case, having not fulfilled the obligatory condition to give notice in writing, the Member is not free to suspend obligations or withdraw or modify concessions pursuant to Article XIX.

43. The United States understands the Panel’s reference to a Member’s “inten[t] to exercise the rights provided for under Article XIX” as referring to a Member’s invocation of that provision, *i.e.*, a Member’s giving notice in writing that it proposes to take action pursuant to Article XIX. In this sense, it could be said that it is necessary for a Member to *intend* to exercise the rights provided for under Article XIX, as the Panel’s question states – because the acting Member’s notice is a condition precedent to the application of Article XIX and the Agreement on Safeguards.

44. This understanding of the role of intent in the invocation of Article XIX is consistent with Article 11.1(c) of the Agreement on Safeguards. This provision, which is discussed in more detail in response to the Panel’s Question 20, states in relevant part that the Agreement on Safeguards “does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX.” The word “sought” can be

defined as “[t]ry or attempt to do.”¹⁷ “Taken” can be defined as “[h]ave an intended result; succeed, be effective, take effect.”¹⁸ “Maintained” can be defined as “[c]ause to continue (a state of affairs, a condition, an activity, etc.).”¹⁹

45. A Member cannot “try or attempt” to do something that it does not intend to do, nor can a Member “have an intended result” or “cause to continue” an action that it did not intend to take. Accordingly, this language of Article 11.1(c) is consistent with an understanding that a Member must *intend* to exercise the rights provided for under Article XIX of the GATT 1994 and the Agreement on Safeguards in order for the disciplines under that provision and agreement to apply invoke Article XIX.

TO COMPLAINANT

Question 12. Bearing in mind the conclusions of the Appellate Body in *Indonesia – Iron or Steel Products*, how do the country exemptions or the product exclusions relate to the objective of preventing or remedying serious injury to the domestic industry?

46. This question is addressed to the complainant.

TO UNITED STATES

Question 13. The complainant has referred to the USDOC Reports on Steel and Aluminium as well as the Presidential Proclamations in characterizing the measures at issue as safeguards. Please comment on the relevance of these references to the USDOC Reports and Presidential Proclamations to the characterization of the measures at issue as safeguards, and in particular to whether the measures at issue present the two features identified by the Appellate Body in *Indonesia – Iron or Steel Products*.

47. As the United States has explained more fully in response to the Panel’s Question 5(a), the two “constituent” features identified in the *Indonesia – Iron or Steel Products* report are not the only necessary conditions for a measure to be legally characterized as a safeguard measure within the meaning of Article XIX of the GATT 1994.²⁰ While these two features are necessary to establish that a safeguard measure exists, they are not by themselves sufficient to establish the existence of a safeguard measure. A fundamental, condition precedent for a Member to take safeguard action is that the Member invokes Article XIX as the legal basis for its measure by providing written notice and affording affected Members an opportunity to consult. Where a Member has not invoked Article XIX through such notice, it is not seeking to exercise a right and cannot act pursuant to Article XIX or the Agreement on

¹⁷ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 2758 (US-86).

¹⁸ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 3206 (US-86).

¹⁹ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 1669 (US-86).

²⁰ *Indonesia – Iron or Steel Products (AB)*, para. 5.60.

Safeguards. Accordingly, the disciplines of those provisions would also not apply to any action that Member might take.

48. With respect to the measures at issue in this dispute, the United States has not invoked Article XIX by providing notice that it has sought or taken these measures pursuant to Article XIX. Instead, the United States has repeatedly stated that the challenged measures have been sought and taken for national security purposes pursuant to Article XXI.²¹ Therefore, and consistent with Article 11(c) of the Agreement on Safeguards, the safeguards disciplines do not apply to the U.S. measures.

49. The DOC reports and the Presidential Proclamations do not affect the legal characterization of the U.S. measures under the covered agreements. In addition, those documents support the U.S. argument that the measures at issue in this dispute are based on national security concerns.

50. The Secretary of Commerce’s report on the effect of imports of steel on the national security²² summarized the findings of the investigation conducted pursuant to Section 232. In that report, the Secretary stated that “[g]lobal excess steel capacity is a circumstance that contributes to the ‘weakening of our internal economy’ that ‘threaten[s] to impair’ the national security.”²³ The report further stated, “The displacement of domestic steel by imports has the serious effect of putting the United States at risk of being unable [to] meet the national security requirements.”²⁴ The Secretary concluded that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.²⁵

51. The Secretary’s report on the effects of imports of aluminum on the national security made similar findings.²⁶ The aluminum report noted that “[a] major factor contributing to the decline in domestic aluminum production and loss of domestic production capacity has been excess production and capacity in China, which now accounts for over half of global

²¹ Please see U.S. response to Panel’s Question 5 for the list of such statements.

²² U.S. Department of Commerce, “The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 11, 2018 (US-7).

²³ U.S. Department of Commerce, “The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 11, 2018, at 55 (US-7).

²⁴ U.S. Department of Commerce, “The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 11, 2018, at 57 (US-7).

²⁵ U.S. Department of Commerce, “The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 11, 2018, at 55 (US-7).

²⁶ U.S. Department of Commerce, “The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 17, 2018 (US-8).

aluminum production.”²⁷ The report raised concerns about the ability of U.S. producers—given the circumstance—to remain “financially viable and competitive and able to invest in research and development of the latest technologies” to support defense and other applications.²⁸ The Secretary found that aluminum articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.²⁹

52. In his March 8, 2018, proclamations, the President concurred with the Secretary’s findings and made adjustments to the imports of steel and aluminum articles.³⁰ Thus, with these and other statements, the DOC reports and the Presidential Proclamations confirm that the measures at issue in this dispute were taken for the protection of U.S. essential security interests as repeatedly stated by the United States at the WTO.

Question 14. In its first written submission, the complainant has referred to various public statements by US officials. With reference to these statements:

- a. How should the Panel take them into account in its assessment, if at all?**
- b. What legal value, if any, should the Panel attribute to these statements?**
- c. Does the United States agree with the proposition that such statements may be relevant to the assessment of whether the measures at issue can be legally characterized as safeguard measures?**
- d. What conclusions should the Panel draw from such statements?**

53. As the United States explains in response to the Panel’s Question 29 and previously in this dispute, once a Member invokes Article XXI, this invocation is sufficient to establish the application of this provision. A panel may not second guess a Member’s consideration of its own essential security interests. Therefore, statements identified by complainants are not relevant to the Panel’s assessment under Article XXI. Rather, based on the ordinary meaning of the terms of that provision, and consistent with its function under the DSU, the Panel may note in its report the fact of the U.S. invocation of Article XXI(b).

²⁷ U.S. Department of Commerce, “The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 17, 2018, at 104 (US-8).

²⁸ U.S. Department of Commerce, “The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 17, 2018, at 105 (US-8).

²⁹ U.S. Department of Commerce, “The Effect of Imports of Aluminum on the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended”, January 17, 2018, at 104 (US-8).

³⁰ Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US-10); Presidential Proclamation 9711 of March 22, 2018 (US-11).

TO COMPLAINANT

Question 15. With regard to the complainant's references to the USDOC Reports on Steel and Aluminium as well as the Presidential Proclamations as evidence that the measures at issue are safeguards, how do these references relate to the characterization of the measures at issue as safeguards as opposed to their consistency with safeguard disciplines?

54. This question is addressed to the complainant.

Question 16. Please comment on the relevance, if any, of the fact that the steel and aluminium investigations subject to this dispute were conducted by the USDOC under Section 232 of the Trade Expansion Act of 1962, and not by USITC under Section 201 of the Trade Act of 1974.

55. This question is addressed to the complainant.

2.2 Article 11.1(b) of the Agreement on Safeguards

TO COMPLAINANT

Question 17. Which measure(s) at issue, or elements of such measure(s), as identified in response to question No. 1 above, are being legally characterized as voluntary export restraints, orderly marketing arrangements or similar measures falling under Article 11.1(b)?

a. In addition, please clarify the contention in paragraphs 184-188 of the European Union's first written submission that the additional duties at issue are "similar measures" falling under Article 11.1(b) of the Agreement on Safeguards.

56. This question is addressed to the complainant.

TO ALL

Question 18. Please comment on the defining elements, if any, of measures falling under Article 11.1(b). In this regard:

a. What is the meaning of the term "similar measures" in Article 11.1(b)? What feature(s) of VERs and OMAs does the required "similarity" pertain to?

b. What conclusions may be drawn about the nature of Article 11.1(b) measures from the examples of "similar measures" cited in footnote 4 of the Agreement ?

c. What is the meaning of "which afford protection" in footnote 4 of the Agreement on Safeguards? Is this the defining feature of measures subject to Article 11.1(b) or is it merely one of the elements of such measures?

d. In its first written submission, the European Union has referred to, *inter alia*, a 1987 GATT Secretariat Background Note titled "Grey-Area" Measures. How and on what basis should the Panel take this Background Note into account in its analysis of Article 11.1(b)?

57. The United States responds to the Panel's Questions 18 and 19 together at Question 19, below.

Question 19. What is the relationship between safeguard measures under Article 1 of the Agreement on Safeguards and "voluntary export restraints, orderly marketing arrangements or any other similar measures" under Article 11.1(b) of the Agreement on Safeguards? In this regard:

a. Are these mutually exclusive or overlapping categories of measures? Can measures be legally characterized, at the same time, as safeguards and "voluntary export restraints, orderly marketing arrangements or any other similar measures"?

b. To the extent they are overlapping categories, what is the relevance of the fact that measures under Article 11.1(b) of the Agreement on Safeguards are prohibited, while Members are permitted to take measures under Article 1 of the Agreement on Safeguards subject to safeguard disciplines?

c. How do the measures under Articles 1 and 11.1(b) of the Agreement on Safeguards differ in terms of the rights and obligations relating to each type of measure?

d. Is it the European Union's position that the additional duties are both safeguards and measures falling under Article 11.1(b) or are these alternative claims? In case of the former, what is the difference between the two categories of measures?

58. The United States responds to the Panel's Questions 18 and 19 together.

59. The first sentence of Article 11.1(b) provides that, "[f]urthermore, 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." Footnote 4 of the Agreement on Safeguard provides that "[e]xamples 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."

60. The measures referred to in Article 11.1(b) of the Agreement on Safeguards, including the measures referred to in footnote 4, are related to the other measures addressed in the Agreement on Safeguards. This is evident because Article 11.1(b) begins with the word "[f]urthermore." Use of this word indicates that Article 11.1(b) simply continues the disciplines set forth in Article 11.1(a) for safeguard measures. These provisions seek to ensure that safeguard measures adopt certain forms, are taken pursuant to specified procedures, and satisfy certain conditions.

61. This view of the scope of Article 11.1(b) is consistent with a 1987 Background Note by the GATT Secretariat that discusses the place of Article XIX in the GATT.³¹ That note describes Article XIX as “one of a number of safeguards provisions in the General Agreement” and states that “[i]n recent years, the relative use of Article XIX has declined as more safeguard actions are taken without reference to GATT rules and frequently in contravention of those rules.”³² In light of this statement by the GATT Secretariat, Article 11.1(b) appears aimed at such actions “taken without reference to GATT rules.”

62. There could be some overlap in the scope of measures covered by Article XIX of the GATT 1994, Article 11.1(b) of the Agreement on Safeguards, and other provisions. For example, there could be some overlap in the scope of measures covered by Articles II or XI of GATT 1994 and those covered by Article XIX, or between measures covered by Article XI of the GATT 1994 and measures covered by Article 11.1(b) of the Agreement on Safeguards.

63. Article 11.1(b) does not identify the specific characteristics of the various measures that must be “similar,” and if a complainant raises claims under Article 11.1(b), it is for the complainant to demonstrate that the measures it has challenged fall within the scope of Article 11.1(b).

64. In this dispute, the Panel need not consider these issues. The United States has sought and taken the measures challenged in this dispute pursuant to Article XXI(b). The United States has not taken action pursuant to Article XIX, by providing notice in writing of its proposed action and affording affected Members an opportunity to consult. And consistent with Article 11.1(c) of the Agreement on Safeguards, when a Member has sought, taken, or maintained a measure pursuant to a GATT 1994 provision other than Article XIX, the Agreement on Safeguards – including Article 11.1(b) – “does not apply.”

2.2 Article 11.1(c) of the Agreement on Safeguards

To All

Question 20. Please comment on the meaning of "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX" in Article 11.1(c). In this regard:

a. Please elaborate on the meaning of, and any differences between, the terms "sought, taken or maintained" in this provision.

b. Please elaborate on the meaning of measures "pursuant to provisions of GATT 1994 other than Article XIX" and in particular whether this refers to measures that

³¹ Negotiating Group on Safeguards, Drafting History of Article XIX and Its Place in The GATT: Background Note by the Secretariat, MTN.GNG/NG9/W/7 (Sep. 16, 1987), paras. 9-11 (US-87).

³² Negotiating Group on Safeguards, Drafting History of Article XIX and Its Place in The GATT: Background Note by the Secretariat, MTN.GNG/NG9/W/7 (Sep. 16, 1987), paras. 9-11 (US-87).

are taken in conformity with, or meeting the requirements of, provisions of GATT 1994 other than Article XIX.

c. What guidance, if any, do the Spanish and French versions of Article 11.1(c) provide in relation to the interpretation of this provision?

d. **To European Union:** The Panel notes that in Section 3.1.6 of its first written submission, the European Union has stated that "the measures at issue are not measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX". In paragraph 194, the European Union specifies that "[t]he measures at issue were not taken 'pursuant to' Article XXI of the GATT 1994, but rather 'pursuant to' Section 232, which is a domestic US measure." This proves, according to the European Union, that the measures fall within the scope of the Agreement on Safeguards. In this regard, please answer the following questions:

i. Is the European Union referring to Article 11.1(c) by making these statements?

ii. What does the European Union understand to be the meaning of "pursuant to" as used in Article 11.1(c)?

iii. The European Union argues that the measures were not taken pursuant to Article XXI. However, Article 11.1(c) also refers to measures sought pursuant to GATT provisions. Could the measures at issue have been sought by the United States pursuant to Article XXI?

e. **To United States:** According to the European Union, the measures at issue are not measures taken "pursuant to" Article XXI of the GATT 1994, but rather "pursuant to" Section 232, which is a domestic US measure. The European Union further contends that Article XXI of the GATT 1994 is the only alleged justification (affirmative defence) that the United States has invoked. Please comment on these arguments.

65. Article 11.1(c) of the Agreement on Safeguards – which provides in relevant part that the Agreement on Safeguards “does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX” – must be interpreted in accordance with the customary rules of interpretation. That is, Article 11.1(c) must be interpreted based on the ordinary meaning of its terms, in their context, and in the light of the object and purpose of the Agreement on Safeguards.

66. The words “sought, taken or maintained” modify the word “measures” in Article 11.1(c). “Sought” is the past tense and past participle of the verb “seek,” which can be

defined as “[t]ry or attempt *to do*.”³³ “Taken” is the past participle of the verb “take,” which can be defined as “[h]ave an intended result; succeed, be effective, take effect.”³⁴ “Maintained” is the past tense and past participle of the verb “maintain,” which can be defined as “[c]ause to continue (a state of affairs, a condition, an activity, etc.).”³⁵ Definitions of the word “pursuant” – used as an adverb in Article 11.1(c) – include “[w]ith *to*: in consequence of, in accordance with.”³⁶

67. With these definitions in mind, the ordinary meaning of the terms in Article 11.1(c) can be understood as “measures [that a Member has] tried to do, succeeded in doing or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX.” The ordinary meaning of these terms establishes that Article 11.1(c) is triggered – and the Agreement on Safeguards “does not apply” – when a Member acts (by seeking, taking or maintaining a measure) pursuant to a provision of the GATT 1994 other than Article XIX.

68. With these terms, Article 11.1(c) directs the Panel to the other GATT 1994 provision pursuant to which the measure in question was sought, taken, or maintained. Here, the United States has expressly invoked a provision of GATT 1994 other than Article XIX – namely, Article XXI. This is clear from U.S. statements in these proceedings, as well as in numerous U.S. statements in WTO committees. Accordingly, Article 11.1(c) establishes that the Agreement on Safeguards “does not apply.”

69. The French and Spanish texts of the Agreement on Safeguards support this interpretation of Article 11.1(c). In French, the relevant text of Article 11.1(c) reads “Le présent accord ne s'applique pas aux mesures qu'un Membre cherchera à prendre, prendra ou maintiendra en vertu de dispositions du GATT de 1994 autres que l'article XIX.” The verb “chercher” can be translated as “to try”, while the verb “prendre” means “to take,” and the verb “maintenir” can be translated as “to maintain [*situation, équilibre, privilege*].”³⁷ The phrase “en vertu de” can be translated as “by virtue of, pursuant to [*article, loi, ordonnance*].”³⁸

70. In the French text, the first verb in the series (“cherchera à prendre”) is explicitly an attempt to carry out the second verb in the series (“prendra”). Thus, consistent with the

³³ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2758 (US-86).

³⁴ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 3206 (US-86).

³⁵ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1669 (US-86).

³⁶ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2422 (US-86).

³⁷ *The Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 148, 507, & 666-67 (emphasis added) (US-88).

³⁸ *The Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 890 (emphasis added) (US-88).

English text, the ordinary meaning of the French text of Article 11.1(c) provides that the Agreement on Safeguards “does not apply” when a Member *attempts* or *tries* to *take* a measure pursuant to a provision of the GATT 1994 other than Article XIX, or when the Member is successful in taking such a measure or causes such a measure to continue.

71. The Spanish text also confirms this point. In Spanish, the relevant text of Article 11.1(c) reads, “El presente Acuerdo no es aplicable a las medidas que un Miembro trate de adoptar, adopte o mantenga de conformidad con otras disposiciones del GATT de 1994, aparte del artículo XIX.” The verb “trate” comes from “tratar”, which translates as “to try,”³⁹ while the verb “adoptar” can be translated as “(actitud/costumbre) to adopt; <decision> to take.”⁴⁰ The verb “mantener” can be translated as “(conserver, perservar); to keep.”⁴¹ The phrase “de conformidad con” can be translated as “in accordance with (frml)”⁴²

72. In the Spanish text, as in the French, the first verb in the series (“trate de adoptar”) is explicitly an attempt to carry out the second verb in the series (“adopte”). This text makes clear that Article 11.1(c) is triggered when a Member *attempts* to *take* a measure pursuant to a provision of the GATT 1994 other than Article XIX, or when the Member is successful in taking such a measure or causes such a measure to continue.

73. This understanding of the French and Spanish texts supports the U.S. argument that the word “sought” in Article 11.1(c) should be interpreted as “to try or attempt” to take certain action. In addition, like the English phrase “pursuant to,” the ordinary meaning of the French phrase “en vertu de dispositions” and the Spanish phrase “de conformidad con” – like the English text “pursuant to” – direct the Panel to the other GATT 1994 provision pursuant to which the measure in question was attempted or tried.

74. With this understanding in mind, it is clear that, under Article 11.1(c), the Agreement on Safeguards “does not apply” when a Member has attempted or tried to take a measure in accordance with provisions of the GATT 1994 other than Article XIX, or when the Member has succeeded in taking such a measure or caused such a measure to continue. Here, the United States has attempted to take – and succeeded in taking – the challenged measures in accordance with Article XXI of the GATT 1994, and accordingly under Article 11.1(c) the Agreement on Safeguards “does not apply.”

75. The EU’s argument – that the measures at issue are not measures taken “pursuant to” Article XXI, but rather “pursuant to” Section 232 – is not a serious one. Article 11.1(c)’s reference to measures sought, taken, or maintained “pursuant to” provisions of the GATT 1994 other than Article XIX refers to the WTO basis for a Member’s domestic measure. That is, a Member takes a measure pursuant to some domestic legal authority and also, in many cases, pursuant to some legal basis in the WTO Agreement. Indeed, unless a WTO

³⁹ *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 757 (US-89).

⁴⁰ *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 18 (US-89).

⁴¹ *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 479-80 (US-89).

⁴² *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 183 (US-89).

Member has no domestic law and has simply given its WTO obligations direct effect in its domestic legal order, every measure should be pursuant to some domestic legal authority.

76. Here, for purposes of U.S. domestic law, the United States has sought and taken the measures at issue pursuant to Section 232. For purposes of the covered agreements, however, the United States has sought and taken the measures at issue pursuant to Article XXI.

3 ORDER OF ANALYSIS

TO ALL

Question 21. With which of the complainants' claims under the covered agreements should the Panel begin its analysis? Those under the Agreement on Safeguards or the GATT 1994?

77. The United States responds to the Panel’s Questions 21, 22 and 23 together at Question 23, below.

Question 22. Should the Panel start its analysis by examining whether the measures fall within Article XXI of the GATT 1994? Please respond taking into account Article 11.1(c) of the Agreement on Safeguards. Does this provision exclude measures sought, taken or maintained pursuant to Article XXI of the GATT from the scope of the Agreement on Safeguards?

78. The United States responds to the Panel’s Questions 21, 22 and 23 together at Question 23, below.

TO UNITED STATES

Question 23. Does the United States accept that, for purposes of the order of analysis, Article XXI of the GATT 1994 should be considered as an affirmative defence?

79. The United States responds to the Panel’s Questions 21, 22 and 23 together.

80. With respect to the Panel’s order of analysis, the Panel should begin by addressing the United States’ invocation of GATT 1994 Article XXI(b). This order of analysis is consistent with the Panel’s terms of reference and the function of panels as set forth in the DSU.

81. Under DSU Article 7.1, the standard terms of reference, the Panel’s functions are: (1) “[t]o examine” the matter – that is, to “[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests”⁴³; and (2) to “make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for” in the covered agreement. DSU Article 11 confirms this dual function of panels.

82. Article 19.1 provides that these “recommendations” are issued “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement” and are

⁴³ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870 (US-86).

recommendations “that the Member concerned bring the measure into conformity with the agreement.” DSU Article 19.2 clarifies that “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement.”

83. The text of GATT 1994 Article XXI(b) establishes that it is for a responding Member to determine whether the action taken is one “*which it considers necessary* for the protection of its essential security interests.” Consistent with the text of Article XXI(b), a panel may not second-guess a Member’s consideration with respect to these matters.

84. Accordingly, when a Member has invoked its essential security interests as the basis for its measure, for example, in defense to claims asserted against that measure, beyond the acknowledgement of such invocation, a panel may make no findings that will assist the DSB in making recommendations or giving rulings as to a complaining Member’s claims within the meaning of DSU Articles 7.1 and 11.

85. This result is consistent with DSU Article 19 because an essential security action cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement, and because it would diminish a Member’s “right” to take action it considers necessary for the protection of its essential security interests if a panel or the Appellate Body purported to do so.

86. Under these circumstances, because the United States has invoked Article XXI(b) as to the measures challenged, the appropriate findings under the DSU would be to note in the Panel’s report a recognition that the United States has invoked its essential security interests. No additional findings concerning the claims raised by the complaining Member in its submissions would be consistent with the DSU, in light of Article XXI(b).

87. Even where it is claimed that Article XXI is not a defense to claims under the Agreement on Safeguards – which the United States disagrees with – addressing Article XXI first also leads to the conclusion under the Agreement on Safeguards that the Agreement on Safeguards is not applicable to the challenged measures. This is because Article 11.1(c) of the Agreement on Safeguards makes clear that the Agreement on Safeguards “does not apply” to a measure sought, taken, or maintained “pursuant to” Article XXI of GATT 1994, such as the measures at issue in this dispute.

88. The term “affirmative defense” is not a legal term reflected in the DSU or any other covered agreement. In the context of dispute settlement, to the extent the Panel defines an “affirmative defense” as a provision that a Member invokes in response to a claimed breach of its obligations under the covered agreement—such as imposing duties above its bound rates—the United States agrees that Article XXI is an “affirmative defence.” However, categorizing Article XXI as an “affirmative defense” does not have any implications for the Panel’s order of analysis.

4 ARTICLE XXI OF THE GATT 1994

4.1 General interpretive questions

TO ALL

Question 24. On what basis could the Panel consider materials or sources provided as evidence of the proper interpretation of Article XXI(b) of the GATT 1994? In particular, is it necessary that such materials or sources constitute either: (1) interpretive elements under the Vienna Convention; (2) incorporation into the GATT 1994; or (3) guidance pursuant to Article XVI:1 of the WTO Agreement? Is there any other basis upon which the Panel could consider such materials and sources?

89. Under DSU Article 3.2, the Panel should apply customary rules of interpretation of public international law in interpreting the relevant provisions of the covered agreements. Apart from this provision, the DSU does not limit the scope of materials that the Panel may take into account when making findings in a particular dispute.

90. Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT or “Vienna Convention”) – which reflect the customary rules of interpretation of public international law – refer to a range of materials relevant to the interpretation of treaty terms, including supplementary means of interpretation. As relevant here, under Article 32 recourse may be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31. The supplementary means of interpretation referred to in Article 32 are not limited to negotiating history.

91. Furthermore, Article XVI:1 of the WTO Agreement states that – except as otherwise provided in the DSU – the WTO shall be guided by the decisions, procedures, and customary practices followed by CONTRACTING PARTIES. The same would apply to WTO panels, which assist the DSB and serve as an integral part of the WTO.

Question 25. With respect to the standard of review to be applied to an invocation of Article XXI(b) in dispute settlement proceedings, are there any relevant:

a. "decisions of the CONTRACTING PARTIES to GATT 1947 ... that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement", pursuant to paragraph 1(b)(iv) of the GATT 1994?

b. "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947", pursuant to Article XVI:1 of the WTO Agreement?

92. The phrase “standard of review” does not appear in the DSU.

93. As discussed in response to Question 23, under DSU Article 7.1, the Panel’s terms of reference call on the Panel “[t]o examine” the matter referred to the DSB by the Member and

“to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements].”⁴⁴

94. This dual function of panels is confirmed in DSU Article 11, which states that the “function of panels” is to make “an objective assessment of the matter before it” and “such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Under Article 3.2 of the DSU, the provisions of the GATT 1994 are to be interpreted “in accordance with the customary rules of interpretation of public international law.” In this dispute, 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.

95. In making that assessment, there are relevant “decisions” within the meaning of paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement which the Panel may find to be relevant context. The Decision Concerning Article XXI of The General Agreement, adopted by the Contracting Parties in 1982, is a decision under both provisions.⁴⁵ In 1982, the European Communities (EC) and its member states, Canada, and Australia invoked Article XXI to justify their application of certain measures against Argentina in light of Argentina’s actions in the Falkland Islands.⁴⁶ The matter was discussed in two GATT Council meetings, and the Contracting Parties ultimately adopted a decision concerning Article XXI in connection with these discussions.⁴⁷

96. That decision calls for the Contracting Parties to inform each other “to the fullest extent possible” of measures taken under Article XXI and states that when such measures are taken, all contracting parties affected by such action retain their full rights under the GATT.⁴⁸ Notably, the preamble to this decision twice acknowledges the self-judging nature of Article XXI. First, using language that mirrors the pivotal self-judging phrase of Article XXI, the text emphasizes Article XXI’s importance in safeguarding contracting parties’ rights “when they consider” that security issues are involved.⁴⁹ Second, the decision recognizes that “in taking action in terms of the exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected.” With this phrasing, the Contracting Parties acknowledged that the decision of

⁴⁴ The word “examine” means “[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 806 (US-86).

⁴⁵ Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-62).

⁴⁶ GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982) (US-59); Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) (US-60).

⁴⁷ Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-62).

⁴⁸ Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-62).

⁴⁹ Decision Concerning Article XXI of The General Agreement, L/5426 (Dec. 2, 1982), at 1 (US-62).

whether to take essential security measures, and what measures to take, is within the authority of each contracting party.

97. The GATT Council decision in *United States Export Restrictions* is also one of the “decisions” within the meaning of paragraph 1(b)(iv) of the GATT 1994 and Article XVI:1 of the WTO Agreement. In *United States Export Restrictions*, Czechoslovakia requested that the GATT Council decide under Article XXIII whether the United States had failed to carry out its GATT obligations through its administration of export licenses. In response, the United States invoked Article XXI and proposed that Czechoslovakia’s request be dismissed.

98. In discussing the decision to be made in that meeting, the Chairman opined that the question of whether U.S. measures conformed to GATT Article I “was not appropriately put” because the United States had defended its actions under Article XXI, which “embodied exceptions” to Article I.⁵⁰ Instead, the Chairman stated, the question should be whether the United States “had failed to carry out its obligations” under the GATT 1947. The Chairman’s statement indicates that the relevant question is a broader one—whether the United States has any obligations under the GATT 1947 given its invocation of Article XXI. After discussing the matter, without establishing a Working Party as requested by Czechoslovakia, the CONTRACTING PARTIES held (by a vote of 17-1)—that the United States had not failed to carry out its obligations under the GATT.⁵¹ This decision by the CONTRACTING PARTIES in accordance with the rules that existed at the time⁵² reflects the interpretation of Article XXI(b) as self-judging. It was not a recommendation by a panel or a Working Party that was later adopted by the parties.⁵³

99. Therefore, in interpreting the terms of Article XXI(b), the Panel may consider the two decisions to be relevant context to support a finding that that provision is self-judging.

⁵⁰ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

⁵¹ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).

⁵² General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedure GATT/CP.2/3/Rev.1 (Aug. 16, 1948) (Rule 27 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”) (US-90); General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949) (Rule 28 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”) (US-91).

⁵³ In *Japan-Alcoholic Beverages II*, the Appellate Body correctly observed that panel reports adopted under the GATT 1947 do not constitute “decisions of the CONTRACTING PARTIES to GATT 1947” under paragraph 1(b)(iv) of the GATT 1994 or “decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947” within Article XVI:1 of the WTO Agreement as a different procedure under Article XXV had been developed in GATT practice. See *Japan – Alcoholic Beverages II (AB)*, at 14.

4.2 Standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings

TO ALL

Question 26. Which provisions in the DSU, if any, support a distinction between "justiciable" and "non-justiciable" matters in WTO dispute settlement proceedings? What guidance do these provide in relation to the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?

100. The United States responds to Questions 26, 27, 28, and 29 together at Question 29, below.

Question 27. What is the difference between jurisdiction and justiciability in terms of the role of a panel established to make such findings as will assist the DSB in making recommendations or in giving rulings?

101. The United States responds to the Panel's Questions 27, 28, and 29 together at Question 29, below.

Question 28. Regarding review of an invocation of Article XXI in dispute settlement proceedings:

a. What is the significance of the fact that Article 1.1 of the DSU provides that "[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements in Appendix 1", which includes the GATT 1994?

b. What is the significance of the fact that Appendix 2 containing "special or additional rules and procedures contained in the covered agreements" does not refer to the GATT 1994 or, more specifically, Articles XXI, XXII, or XXIII thereof?

c. What is the significance of the fact that the "objective assessment" panels should make in accordance with Article 11 of the DSU includes "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements"?

102. The United States responds to the Panel's Questions 27, 28, and 29 together at Question 29, below.

Question 29. Regarding Article 3.1 of the DSU, does Members' affirmation of "their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947", provide any relevant guidance for the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?

103. The United States responds to Questions 26, 27, 28, and 29 together. The term "jurisdiction" in this context can be defined as the extent of power of the Panel under the

DSU to exercise its judicial authority or decide a particular case.⁵⁴ The word “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.⁵⁵

104. As the United States has explained in response to the Panel’s Question 25, the DSU does not contain the phrase “standard of review”. Instead, the DSU (Article 7.1) sets out the standard terms of reference the DSB sets for a panel that defines and circumscribes the Panel’s task. The DSU (Article 11) further confirms that, consistent with these terms of reference, the function of a panel is to make “an objective assessment of the matter before it” and “such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Therefore, although the Panel has jurisdiction over this dispute – because the DSB has established the Panel to examine the matter set out in the panel request – the dispute presents an issue that is not justiciable, meaning that, beyond noting the U.S. invocation, the Panel cannot make findings of WTO-inconsistency that would assist the DSB in making a recommendation on the matter.

105. The DSU does not make a matter justiciable or not. That is determined by the relevant provisions themselves. In this dispute, it is the text of Article XXI(b) that makes the issues presented in this dispute non-justiciable, as that text is interpreted according to the customary rules of interpretation.

106. As the United States explained, in light of the self-judging nature of GATT 1994 Article XXI(b), the sole finding that the Panel may make consistent with its terms of reference under DSU Article 7.1 is to note the U.S. invocation of Article XXI. In other words, consistent with the DSU, the proper resolution of a dispute in which a complaining party alleges the breach of an obligation, and the responding party invokes Article XXI, is for the panel to *examine* the matter, *find* that Article XXI has been invoked, and in light of the text of that provision, *report* to the DSB that the invocation was made and no finding of breach or recommendation may be made.

107. As relevant here, the ordinary meaning of the terms in Article XXI(b) provide that it is for each Member to determine what it considers necessary for the protection of its essential security interests and to take action accordingly. Under these terms, the only fact for a panel to review is whether the Member has invoked Article XXI(b). If it has, there is nothing left under Article XXI(b) for a panel to review.

⁵⁴ See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1465 (US-68) (defining “jurisdiction” as “[1] Exercise of judicial authority, or of the functions of a judge or legal tribunal; power of administering law or justice. Also, power or authority in general; administration, control; and [2] The extent or range of judicial or administrative power; the territory over which such power extends”); *Black’s Law Dictionary*, 8th edn., Bryan A. Garner (ed.), (2004), at 867 (defining “jurisdiction” as “[a] government’s general power to exercise authority over all persons and things within its territory” or “[a] court’s power to decide a case or issue a decree”) (US-69).

⁵⁵ See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1466 (US-68) (defining “justiciable” as “[l]iable to be tried in a court of justice; subject to jurisdiction”); *Black’s Law Dictionary*, 8th edn, Bryan A. Garner (ed.), (2004), at 882 (defining “justiciability” as “[t]he quality or state of being appropriate or suitable for adjudication by a court.”) (US-69).

108. Therefore, the United States is not requesting that the Panel refrain from applying the rules and procedures of the DSU. Nor does the United States argue that special or additional rules must apply. To the contrary, the U.S. 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.

Question 30. What is the relevance, if any, of Article 23 of the DSU to the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings? In this regard, is there any relevant distinction between, on the one hand, determinations of WTO violations and nullification or impairment by measure(s) of another Member and, on the other hand, determinations of WTO-consistency and justification of a Member’s own measure(s)?

109. The United States understands that the Panel’s question focuses on DSU Article 23.1 and Article 23.2(a). Article 23.1 provides that “[w]hen Members *seek redress* of a violation of obligations or other nullification or impairment of benefits under the covered agreements . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding” (emphasis added). DSU Article 23.2(a) states that “Members shall . . . not make a determination to the effect that *a violation* has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of the understanding” (emphasis added).

110. Nothing in the terms of DSU Article 23.1 or Article 23.2(a) prevents a Member from exercising its rights under Article XXI(b) of the GATT 1994. Article 23.2(a) prohibits determinations that another WTO Member has, *inter alia*, breached its WTO obligations unless DSU rules and procedures have been followed. These provisions do not address a Member’s exercise of its rights under Article XXI(b), or any other WTO provision not addressed to seeking redress for a violation or other nullification or impairment.

Question 31. What relevance, if any, does the principle of good faith have for the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?

111. The United States responds to the Panel’s Questions 31 and 32 together at Question 32, below.

Question 32. Is there an obligation to interpret and apply treaty provisions in good faith that is itself subject to review under the DSU? If so, what implications does this have for the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?

112. The United States responds to the Panel’s Questions 31 and 32 together. Any principle of good faith is not relevant to whether a Member’s judgment under Article XXI(b) is reviewable by a panel in dispute settlement proceedings. This is because a claim in WTO dispute settlement must be based in the provisions of the covered agreements, interpreted in accordance with the customary rules of interpretation.

113. DSU Article 3.2 provides that the terms of the covered agreements must be interpreted in accordance with customary rules of interpretation—that is, they must be

“interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁵⁶ Nothing in the DSU otherwise provides for the application by a panel of a “principle of good faith”.

114. Here, the United States has invoked the security exception under Article XXI(b). As the United States has explained, Article XXI(b), when interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose⁵⁷, reserves to the Member the judgment of what it considers necessary to protect its essential security interests under Article XXI(b), such that the Panel cannot second-guess the Member’s determination.

115. The complainant has not argued that the United States sets out this interpretation in bad faith. Nor could such a thing plausibly be argued. As the United States has demonstrated, the U.S. interpretation of Article XXI in this dispute reflects the consistent interpretation of the United States for over 70 years. This interpretation also is consistent with the statements of numerous other WTO Members throughout the history of the GATT and WTO.⁵⁸ Therefore, the Panel would have no basis to find that the U.S. interpretation is not made in good faith.

Question 33. Is Article XXI correctly characterized as an "affirmative defence"? If so, what implications does this have for what is required of a party invoking Article XXI? If not, how should the provision properly be characterized?

116. The term “affirmative defense” is not a legal term reflected in the DSU or any other covered agreement. In the context of dispute settlement, if the Panel considers an “affirmative defense” as a provision that a Member invokes in response to a claimed breach of its obligations under a covered agreement—such as imposing duties above its bound rates—the United States agrees that Article XXI is an “affirmative defence”.

117. Whether Article XXI “is characterized” as an affirmative defense, however, does not itself have implications as to what is required of a party invoking that defense. The DSU calls on the Panel to interpret Article XXI in accordance with customary rules of interpretation. The ordinary meaning of the terms of Article XXI, in their context and in the light of the treaty’s object and purpose, establishes that Article XXI is a self-judging exception to obligations. As the United States has explained, once the United States invokes Article XXI(b), the sole finding that the panel may make – consistent with its terms of reference and the DSU – is to note the U.S. invocation of Article XXI. Any characterization of Article XXI cannot change the ordinary meaning of Article XXI, such that the invoking party must make a legal or evidentiary showing not required by the text.

⁵⁶ Vienna Convention, Article 31(1).

⁵⁷ Vienna Convention, Article 31(1).

⁵⁸ See First Written Submission of the United States of America, *Certain Measures on Steel and Aluminum Products*, Part III.A.4.

118. Based on the ordinary meaning of Article XXI, 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).

TO UNITED STATES

Question 34. Under the United States' view that Article XXI of the GATT 1994 is "self-judging", is there any possible scenario in which this provision might be abused, and if so how would this be addressed?

119. As the United States has explained, Article XXI(b) reserves for each Member to determine what is necessary for the protection of its essential security interests and to take action accordingly. That said, the text of Article XXI(b) serves to guide a Member's exercise of its rights, including its exercise of self-restraint where the Member determines that invocation of the exception is not appropriate. Specifically, the main text and subparagraphs of Article XXI(b) establish three circumstances in which the Member may act: (1) when a Member takes action it considers necessary for the protection of its essential security interests relating to fissionable materials or the materials from which they are derived; (2) when a Member takes action it considers necessary for the protection of its essential security interests relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; and (3) when a Member takes action it considers necessary for its essential security interests in time of war or other emergency in international relations.

120. Under Article XXI(b), a Member considers that one or more of the circumstances set forth in Article XXI(b) exist, it may act accordingly. While the text of Article XXI does not permit a Panel to review the Member's determination, there are consequences to a Member's invocation of that provision. For example, other WTO Members can take reciprocal actions themselves under a similar understanding of their inherent right to take action they consider necessary for the protection of their essential security interests. Indeed, Members frequently respond in this way to the imposition of economic sanctions they perceive to be unwarranted. Members affected by essential security actions could also seek recourse under the DSU, such as bringing non-violation, nullification and impairment claims or pursuing good offices, conciliation and mediation. Such consequences could serve to address perceived abuses of Article XXI(b) (such as when it seems implausible to another Member that a Member invoking Article XXI(b) considers that one or more of the circumstances set forth in Article XXI(b) are present).

121. The drafting history of Article XXI(b) is consistent with this understanding of Article XXI and reflects the balance struck in the GATT 1947 (which was incorporated verbatim into the GATT 1994). Members undertook commitments to substantially reduce tariffs and other barriers to trade and to apply agreed rules while retaining fundamental sovereign rights, including the ability to take action which a Member considers necessary for the protection of its essential security interests. In discussing the text that would become Article XXI, the negotiators addressed the issue of abuse directly. Specifically, during the July 1947 meeting of the ITO negotiating committee, the delegate from the Netherlands requested clarification on the meaning of a Member's "essential security interests," and

suggested that this reference could represent “a very big loophole” in the ITO charter.⁵⁹ The U.S. delegate responded that the exception would not “permit anything under the sun,” but suggested that there must be some latitude for security measures.⁶⁰ The U.S. delegate further observed that in situations such as times of war, “no one would question the need of a Member, or the right of a Member, to take action relating to its security interests in time of war and to determine for itself—which I think we cannot deny—what its security interests are.”⁶¹

122. In those discussions, the Chairman made a statement “in defence of the text,” and recalled the context of the essential security exception as part of the ITO charter.⁶² As the Chairman observed, when the ITO was in operation “the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind” raised by the Netherlands delegate.⁶³ That is, the parties would serve to police each other’s use of the essential security exception, through a culture of self-restraint and through responsive, reciprocal actions taken outside the context of dispute settlement where such restraint is not possible, as we have seen throughout the history of the GATT and the WTO.

123. The Chairman’s statement directly addresses the Panel’s question regarding how to address potential abuses of Article XXI. The drafters recognized that Article XXI(b), given its self-judging nature, could be perceived by another Member to be unwarranted (abused) in a given situation and understood that the “culture” of the organization as “the only efficient guarantee” against abuses of the provision. Such limitation was part of the bargain struck by the Members, and the Panel should respect this bargain.

4.3 Ordinary meaning of terms of Article XXI(b)

⁵⁹ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 19 (US-41); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-92).

⁶⁰ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-41); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-92).

⁶¹ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 20 (US-41); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-92).

⁶² Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-41); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-92).

⁶³ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 21 (US-41); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-92).

To All

Question 35. Which elements of the chapeau and/or subparagraphs of Article XXI(b) are qualified by the phrase "which it considers"?

124. Fundamentally, Article XXI(b) is about a Member taking “any action which it considers necessary.” The relative clause that follows the word “action” describes the situation which the Member “considers” to be present when it takes such an “action.” The clause begins with “which it considers” and ends at the end of each subparagraph.

125. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, and they are left to the determination of the Member. Specifically, because the operative language is “it considers,” Article XXI(b) reserves for the Member to decide what action it considers “necessary for” the protection of its essential security interests and which circumstances is present. In that sense, the phrase “which it considers” “qualifies” all of the elements in the relative clause, including the subparagraph endings.

Question 36. Is the phrase "any action which it considers necessary for the protection of its essential security interests" a single integral clause or, conversely, does it contain multiple distinct elements that can be separately assessed? In this regard, please comment on views provided on this question by third parties.

126. Yes, the phrase “any action which it considers necessary for the protection of its essential security interests” is a single integral clause.⁶⁴ The relative clause⁶⁵ that follows the word “action” describes the situation which the Member “considers” to be present when it takes such an “action.” The clause begins with “which it considers necessary” and ends at the end of each subparagraph. Because 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.

127. The complainant and certain third parties propose various interpretations of the chapeau that would have the Panel atomize this single relative clause such that only one or some parts are qualified by the phrase “which it considers necessary.” In this way, they would seek to subject certain aspects of the Member’s determination to the Panel’s review. They, however, disagree on how this single clause should be broken up and which elements should be subject to the Panel’s review.

⁶⁴ The term “integral clause” is not a term used in English grammar. However, the United States understands the term to mean a clause that is necessary to complete a full sentence.

⁶⁵ ENGLISH GRAMMAR 631 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) (“Relative clauses postmodify nouns (‘the house *that I own*’), pronouns (‘those *who trust me*’), and nominal adjectives (‘the elderly *who are sick*.’) (US-93); THE CLASSIC GUIDE TO BETTER WRITING 69 (Rudolf Flesch & A. H. Lass, HarperPerennial, 1996) (“**Who** and **which** are called *relative pronouns* and introduce *relative clauses*... The point is that by using **who** or **which** you have made an independent clause into a relative or dependent clause—a group of words that can’t stand by itself.”) (emphasis in the original) (US-94).

128. One interpretation offered by the EU and certain third parties is that the term “considers” only qualifies the “necessity” of the Member’s action under Article XXI(b). Under this interpretation, while the “necessity” of the action is left to the Member’s judgment, the Panel must test whether the action is “for the protection of” and whether the interests being protected are in fact “security” interests that are “essential” to the Member.

129. This interpretation ignores the ordinary meaning of the text. In Article XXI(b), the phrase “which it considers necessary” is followed by the word “for”.⁶⁶ The relevant inquiry is not simply whether a Member considers any action “necessary”. Instead, it is whether a Member considers the action “necessary for” a purpose – namely, the protection of its essential security interests relating to subject matters in subparagraph endings (i) and (ii), or for the protection of its essential security interests in the temporal circumstance provided for in subparagraph ending (iii). Artificially 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.

130. The ordinary meaning of “its essential security interests” also undermines this suggested interpretation.⁶⁷ Essential security interests are those things involving the “potential detriment or advantage” to the “essence” of a Member’s safety or “being protected from danger”.

131. And it is “its” essential security interests – the Member’s in question – that the action is taken for the protection of. The language of the provision does not contemplate that there might be a single set of essential security interests common to all Members. If this were the case, those interests could have been identified.

132. Rather, this inquiry raises questions that can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those circumstances: whether certain action involves “its interests,” that is, potential detriments or advantages from the perspective of that Member; whether a situation implicates its “security” interests (not being exposed to danger); whether the interests at stake are “essential,” that is, significant or important, in the absolute or highest sense. No WTO Member or WTO panel can substitute its views for those of a Member on such matters.

⁶⁶ The word “for” can be defined as “[w]ith the object and purpose of; with a view to; as preparatory to, in anticipation of; conducive to; leading to, giving rise to, with the result or effect of.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 996 (US-86).

⁶⁷ The word “interest” is defined as “[t]he relation of being involved or concerned as regards potential detriment or (esp.) advantage.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1393 (US-22). The term “security” refers to “[t]he condition of being protected from or not exposed to danger; safety.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22). The definitions of “essential” include “[t]hat is such in the absolute or highest sense” and “[a]ffecting the essence of anything; significant, important.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852 (US-22).

133. Another proffered interpretation, which the EU appears to disagree with, is that the word “considers” qualifies all of the terms in the chapeau but not the terms in the subparagraph endings. This argument also artificially separates the terms in a single clause so that, instead of being interpreted in their context, they are interpreted in isolation and in a way inconsistent with the overall grammatical structure of the provision.

134. For instance, a Member’s assessment under Article XXI(b)(i) is whether “it considers any action necessary for the protection of its essential security interests relating to fissionable materials or the materials from which they are derived.” Rather than identifying aspects or circumstances distinct from the Member’s consideration as described in the main text, the subparagraph ending here serves to further modify the type of interests at stake for the Member.⁶⁸ That is, the Member must consider the action necessary for the protection of “its essential security interest relating to fissionable materials or the materials from which they are derived.” Just as a Panel cannot determine for itself which are the essential security interests of a Member, a Panel cannot determine for itself which are the essential security interests of a Member “relating to fissionable materials or the materials from which they are derived.” The same is true for the Member’s assessment under Article XXI(b)(ii).

135. The parties advancing the proffered interpretation are attempting to read into subparagraph endings (i) and (ii) the phrase “and which relates to,” such that the provision reads, in relevant part, “any action which it considers necessary for the protection of its essential security interests *and which relates to . . .*” However, that phrase is not part of the terms of subparagraph endings (i) and (ii). (For an interpretation that best reconciles the Spanish text of Article XXI(b) with the French and English texts of Article XXI(b), under which subparagraph endings (i) and (ii) refer back to “any action which it considers”, please see the U.S. Responses to Questions 40 and 41.)

136. Under Article XXI(b)(iii), the Member’s “necessity” assessment takes place in the context of a temporal circumstance—“in time of war or other emergency in international relations.” The Member’s assessment therefore cannot take place in isolation from the Member’s appreciation of whether there is a “war or other emergency in international relations.” As discussed above, the relative clause⁶⁹ that follows the word “action” begins with “which it considers” and ends with “taken in time of war or other emergency in international relations.” There are no words before subparagraph ending (iii) to indicate a break in the single relative clause or to introduce a separate condition. The relevant question is therefore whether the Member considers the action to be “taken in time of war or other emergency in international relations.” The parties advancing the proffered interpretation are ignoring the provision’s grammatical construction and reading into the beginning of subparagraph ending (iii) the phrase “and which is,” such that the provision reads, in relevant

⁶⁸ For an interpretation that best reconciles the Spanish, French and English texts of Article XXI(b), under which all subparagraph endings refer back to “any action which it considers”, please see the U.S. Responses to Questions 40 and 41.

⁶⁹ MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 233 (1st edn. 1995) (“The *adjective clause* modifies a noun or pronoun and normally follows the word it modifies.”) (US-95).

parts, “any action *which* it considers necessary for the protection of its essential security interests *and which is taken* in time of war or other emergency in international relations.” Again, that phrase is not part of the text of the subparagraph ending (iii).

137. The term “emergency” in subparagraph ending (iii) supports this interpretation. The term “emergency” can be defined as “a serious, unexpected, and often dangerous situation requiring action,”⁷⁰ and whether there is an emergency is a subjective determination by nature. Just as a Panel cannot determine for itself which are the essential security interests of a Member, a Panel cannot determine for itself whether a Member considers its action to be taking place “in time of war or other emergency in international relations.”

138. As is evident from the discussions above, each of the parties’ arguments for how the single relative clause under Article XXI(b) should be separated fails to respect the language and grammatical structure of the provision as a whole. The result is that, rather than authorize an action that a *Member* considers necessary, Article XXI would authorize the action that some other evaluator (here, the Panel) considers necessary, pursuant to that evaluator’s assessment of a Member’s security interests and judgments. As the United States has explained, review of a Member’s essential security interests and action is not an appropriate task for a WTO panel, and is a task expressly precluded under Article XXI(b) based on the ordinary meaning of its terms, in their context.

Question 37. What is the legal effect of being qualified by the phrase "which it considers" in terms of the discretion accorded to Members and the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?

139. As explained in the U.S. response to the Panel’s Question 35, all of the elements in the single relative clause modifying “action” are qualified by the phrase “which it considers,” the legal effect of which is that the provision is self-judging in its entirety. In other words, the text of Article XXI(b) reserves for the Member the determination of what it considers necessary for the protection of its essential security interests in the circumstances set forth.

140. The term “standard of review,” as used in the Panel’s question, does not appear in the DSU. But the DSU does set out the purpose of dispute settlement and the functions of a panel in resolving such disputes.

141. Under DSU Article 7.1, the Panel’s terms of reference call on the Panel “[t]o examine” the matter referred to the DSB by the Member and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements].”

142. This dual function of panels is confirmed in DSU Article 11, which states that the “function of panels” is to make “an objective assessment of the matter before it” and “such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Under Article 3.2 of the DSU, the provisions of the

⁷⁰ The word “examine” means “[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 806 (US-86).

GATT 1994 are to be interpreted “in accordance with the customary rules of interpretation of public international law,” that is, according to the ordinary meaning of the terms in their context and in light of the agreement’s object and purpose. The DSU, therefore, makes clear that it is the text of the relevant agreement(s) that determines how a panel should assess a Member’s invocation of Article XXI(b).

143. The ordinary meaning of the terms of Article XXI, in their context, establishes that it is for a responding Member to determine what action it considers necessary for the protection of its essential security interests. That is, the self-judging nature of the provision is not a function of standard of review, or some general concept of discretion or deference, but rather the text of Article XXI(b) itself. Because the text provides that the Agreement shall not preclude any action which a Member considers necessary for the protection of its essential security interests, once a Member has invoked this provision, a panel may not second-guess that Member’s determination. Nor, given the overall grammatical structure of the provision, may a panel 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.

Question 38. Is it possible for an element of Article XXI(b) to be qualified by the phrase “which it considers” while requiring some explanation or production of evidence in dispute settlement proceedings, including as to *how/why* the invoking Member considers a particular element of Article XXI(b) to apply?

144. Because of the ordinary meaning of the words in the phrase “which it considers,” Article XXI(b) does not require any explanation or production of evidence in dispute settlement proceedings, including as to how/why the invoking Member considers a particular element of Article XXI(b) to apply.

145. The ordinary meaning of “considers” is “[r]egard in a certain light or aspect; look upon as” or “think or take to be.”⁷¹ Under Article XXI(b), the relevant “light” or “aspect” in which to regard the action is whether that action is necessary for the protection of the acting Member’s essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member (“which it”) that must regard (“consider[.]”) the action as having the aspect of being necessary for the protection of that Member’s essential security interests.

146. The text of Article XXI(b) does not include any language requiring the invoking Member to provide an explanation or produce evidence. The text does not indicate the Member must notify the circumstances underlying the invocation, explain the action, or provide advance notice – as exists in other parts of the WTO Agreement.⁷²

⁷¹ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 485 (US-22).

⁷² See, e.g., Article XIX:2 of the GATT 1994 (“Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, *it shall give notice in writing* to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of

147. Instead, Article XXI(a) provides that “Nothing in this Agreement shall be construed to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.” Imposing a requirement for a Member invoking Article XXI(b) to explain its action it considers necessary for the protection of its essential security interests would be inconsistent with its right under Article XXI(a) and contrary to the text of Article XXI(b).

Question 39. Are the subparagraphs to Article XXI(b) exhaustive of the types of circumstances covered by the provision, or are they illustrative? In this regard, what is the relevance of the lack of an introductory clause before, or conjunction between, the three subparagraphs?

148. The United States responds to the Panel’s Questions 39 and 40 together at Question 40, below.

Question 40. How do each of the subparagraphs of Article XXI(b) relate to the terms in the chapeau of Article XXI(b)? In this regard:

a. Do the phrases "relating to" and "taken in time of" signify a required nexus between a particular subparagraph and the challenged measure and/or security interests in question?

b. Which specific terms or elements of the chapeau of Article XXI(b) are modified by each of the subparagraphs of Article XXI(b)?

c. Regarding the United States' view that Article XXI(b) consists of a "single" relative clause following the word "action"⁷³, would it follow from this premise that such "single" clause (consisting of the remaining terms of Article XXI(b) and each of its subparagraphs) relates to the term "action"?

149. The United States responds to the Panel’s Questions 39 and 40 together.

the proposed action.”) (emphasis added); Article 2.5 of the Agreement on Technical Barriers (“A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4.”); Article XVIII:7(a) of the GATT 1994 (“If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, *it shall notify* the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein.”) (emphasis added); Article XII:4(a) of the GATT 1994 (“Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article *shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES* as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.”) (emphasis added).

150. The United States’ interpretation that Article XXI is self-judging through its use of a single relative clause is supported by the text of the provision, including the lack of a different introductory clause before the three subparagraph endings. The drafters could have added an introductory clause before the subparagraph endings to indicate that these were intended to be conditions separate from the “which it considers” clause. Indeed, the drafters *did* add such a clause in other provisions, such as Article XX(i) and Article XX(j), which use the phrase “provided that.” Such a clause is absent from Article XXI(b), however, indicating that the text should be read as a single clause and not as introducing separate conditions.

151. The lack of any conjunction to separate the three subparagraph endings also supports this interpretation. The subparagraphs are not separated by the coordinating conjunction “or”, to demonstrate alternatives, or the conjunction “and”, to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

152. Subparagraph endings (i) and (ii) of Article XXI(b) both begin with the phrase “relating to” and directly follow the phrase “essential security interests” in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraph endings (i) and (ii) modify the phrase “essential security interests”. This is because, under English grammar rules, a participial phrase, which functions as an adjective⁷⁴, normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.⁷⁵

153. The first two subparagraph endings, therefore, each relate to the kinds of interests for which the Member may consider its action necessary to protect. In this way, the subparagraph endings (i) and (ii) indicate the types of essential security interests to be implicated by the action taken.⁷⁶ Given the phrase “relating to” connecting the subject matters in the subparagraph endings (i) and (ii) and the term “essential security interests,” the relevant question is whether the Member considers such a connection to exist. That is, it is a Member that considers those interests to be “essential security interests”.

154. The final subparagraph provides that a Member may take any action which it considers necessary for the protection of its essential security interests “taken in time of war or other emergency in international relations.” It does not speak to the nature of the security

⁷⁴ MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) (“A participial phrase includes a participle and functions as an adjective.”) (US-95).

⁷⁵ The Merriam-Webster’s Guide to Punctuation and Style provides that “[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.” MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232, 233 (1st edn 1995) (US-95). The Harper’s English Grammar also provides that “adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify.” HARPER’S ENGLISH GRAMMAR 186-187 (Harper & Row, 1966) (US-96).

⁷⁶ Those subparagraphs provide that a Member may take any action it considers necessary for the protection of its essential security interests “relating to fissionable materials or the materials from which they are derived,” and its essential security interests “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying for military establishment.”

interests, but provides a temporal limitation related to the action taken. Although an adjective phrase normally follows the word it modifies, it is “actions”—not “interests”—that are taken. Given this text, it is the Member that considers the action to be “taken in time of war or other emergency in international relations.”

155. The subparagraph endings thus 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: (1) when a Member takes action it considers necessary for the protection of its essential security interests “relating to fissionable materials or the materials from which they are derived”; (2) when a Member takes action it considers necessary for the protection of its essential security interests “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”; and (3) when a Member takes action it considers necessary for its essential security interests taken in time of war or other emergency in international relations.

156. The fact that these circumstances are exhaustive, however, does not mean that the Member’s invocation of Article XXI(b) is subject to review. 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.

157. This understanding remains valid even under an interpretation that best reconciles the idiosyncratic Spanish text with the English and French texts – that is, interpreting Article XXI(b) so that all three subparagraph endings refer to “any action which it considers.” Under this interpretation, discussed in more detail in the U.S. response to the Panel’s Questions 41 through 43, an invocation of Article XXI(b) would reflect that a Member considers two elements to exist with respect to its action. First, the action is one “which it considers necessary for the protection of its essential security interests”. Second, the action is one “which it considers” relate to the subject matters in subparagraph endings (i) and (ii) or “taken in time of war or other emergency in international relations” as set forth in subparagraph ending (iii). Under this interpretation, these considerations are still left to the judgment of the Member under the ordinary meaning of the terms of Article XXI(b) and are not subject to review by a WTO panel.

General Comment of the United States on Questions 41 to 43

158. The GATT 1947 was negotiated in English and French.⁷⁷ The text of Parts I through III of the GATT 1947 was authentic in English and French only, while Part IV—which was

⁷⁷ Analytical Index: Guide to GATT Law and Practice, Vol. 2 (Geneva, WTO, 1994) at 915 (“The negotiation of the Havana Charter and the General Agreement was conducted in English and French, and since that time these two languages were the working languages of ICITO and the GATT.”) (US-98); Bradley J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development*

added in 1965—was authentic in English, French and Spanish.⁷⁸ The WTO Analytical Index provides that the Secretariat prepared and published on its own responsibility a Spanish translation of the text of the GATT 1947, as in force on March 1, 1969, in Volume IV of the Basic Instruments and Selected Documents Series.⁷⁹ However, it appears that the Spanish translation of Parts I through III of the GATT 1947 existed since the 1950s. The Instrumentos Básicos y Documentos Diversos (IBDD) Vol. 1 (revised) contains the Spanish text of Parts I through III, and its preface provides that the GATT Secretariat prepared the translation and submitted it to a committee composed of representatives of Spanish-speaking countries that are contracting parties to the GATT 1947.⁸⁰ However, Parts I through III of the Spanish-language text of the GATT 1947 had no formal status.⁸¹

159. During the Uruguay Round, some of the negotiators sought to establish an authentic Spanish text of Parts I through III of the GATT 1947.⁸² Around the same time, the negotiators raised concerns about the lack of concordance between the English, French, and Spanish texts of the GATT 1947, among other issues.⁸³ The negotiators agreed to conform the French and Spanish texts of the GATT 1947 to the linguistic usage reflected in the English language text and in the Uruguay Round Agreements.⁸⁴ The Secretariat Translation and Documentation Division proposed corrections to the French and Spanish texts of Parts I through III of the GATT 1947, and they were incorporated in the French and Spanish

6, App. 1 (2012) (“The French was authentic as a whole and from the beginning. Some of the provisions of the GATT 1947 were even negotiated in French, as noted elsewhere.”) (US-99).

⁷⁸ WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-100); General Agreement on Tariffs and Trade, Protocol Amending the General Agreement to Introduce a Part IV on Trade and Development: Establishment of Authentic Text in Spanish, Decision of 22 March 1965 (L/2424) (US-101).

⁷⁹ WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-100).

⁸⁰ Instrumentos Básicos y Documentos Diversos (IBDD), Vol. I (revised), Preface (1955) (US-102).

⁸¹ WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-100).

⁸² WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-100).

⁸³ WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-100).

⁸⁴ WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-100).

language texts of the GATT 1994 published by the Secretariat.⁸⁵ The GATT 1994 is authentic in English, French, and Spanish.⁸⁶

160. The Spanish text of Article XXI(b) has remained almost identical since it first appeared as an informal translation in 1955 in IBDD Vol. 1(revised).⁸⁷ The only change is the correction made during the Uruguay Round replacing “desintegrables” with “fisionables”.⁸⁸

161. However, it appears that the rectification process in 1994 did not address all of the concerns about the quality of the Spanish translation and that those concerns remain to date.⁸⁹ In 2011, the WTO Secretariat held a Workshop on the Concordance of Multilingual Legal Texts, which was followed by subsequent meetings between WTO Members and the WTO Language Services and Documentation Division (LSDD). These discussions highlighted the fact that issues with the translation of the covered agreements, and in particular with the Spanish-language version of the GATT 1994, continue to exist, including with respect to “simple errors” and “different placement of words.”⁹⁰ To correct these and other errors, the Secretariat staff in LSDD proposed procedures for correcting errors in legal texts.⁹¹

162. LSDD’s proposal is noteworthy. It begins with recognition that there are “linguistic discrepancies between the English text and the Spanish and/or French versions of the Agreements contained in the Uruguay Round Final Act” and that “[t]hese discrepancies are exclusively the result of translation problems.”⁹² It further provides that “[t]he UN procedure

⁸⁵ WTO Analytical Index: Language Incorporating the GATT 1947 and Other Instruments into GATT 1994, para. 1.3.2 (US-100). The list of corrections are in the Decision of the Trade Negotiations Committee (TNC) on “Corrections to be Introduced in the General Agreement on Tariffs and Trade” MTN.TNC/41 (Mar 30, 1994), Annexure (US-103). The only correction to the Spanish text of the GATT 1994 Article XXI(b) is replacing “desintegrables” with “fisionables”.

⁸⁶ An Explanatory Note to the GATT 1994 provides that “[t]he text of GATT 1994 shall be authentic in English, French and Spanish.”

⁸⁷ Instrumentos Básicos y Documentos Diversos (IBDD), Vol. I (revised) 48-49 (1955) (US-102); Instrumentos Básicos y Documentos Diversos (IBDD), Vol. III, 48-49 (1958) (US-104); Instrumentos Básicos y Documentos Diversos (IBDD), Vol. IV, 41 (1969) (US-105).

⁸⁸ The only correction to the Spanish text of the GATT 1994 Article XXI(b) is replacing “desintegrables” with “fisionables”. Decision of the Trade Negotiations Committee (TNC) on “Corrections to be Introduced in the General Agreement on Tariffs and Trade” MTN.TNC/41 (Mar 30, 1994), Annexure (US-103).

⁸⁹ Bradley J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at 525 (2012) (US-99).

⁹⁰ It is noteworthy that all three examples of “simple errors” involve Spanish text that is not congruent with the English and French texts. Bradley J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at 531-535 (2012) (US-99).

⁹¹ Bradley J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, at App. 1 (2012) (US-99).

⁹² Bradley J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, App. 1 (2012) (US-99).

for the rectification of errors could be employed, as was agreed should be done in 1994 for the correction of the linguistic discrepancies in the French and Spanish texts of the GATT 1947” and that “[i]t should be noted that those texts too were authentic and that nevertheless on pragmatic grounds it was agreed that the original (or in any case, the reference text) was the English.”⁹³ The statement is accompanied by the following footnote: “*The Spanish version of Parts I-III of the GATT 1947, which was translated subsequently, is not authentic, but was taken virtually entirely from the Havana Charter, of which an authentic version in Spanish did exist.*”⁹⁴

163. A comparison of the Spanish text of Article XXI(b) against the Spanish text of the security exception in Article XIVbis(b) of GATS and Article 73(b) of TRIPS also reveals discrepancies that cast doubt on the accuracy of the Spanish text of Article XXI(b). As discussed in detail in the U.S. response to Panel Question 42, in the GATS and TRIPS essential security exception texts, the word “relativas” is not in the main text but instead appears in the subparagraph endings (i) and (ii). It is therefore not part of the subparagraph ending (iii), and the phrase “a las” is absent from the subparagraph ending (iii). The comma that preceded “relativas” is also absent from the main text (chapeau). The negotiators may have adopted a different Spanish text of the security exception in GATS and TRIPS that more closely reflects the English and French versions of Article XXI of the GATT 1994 to better avoid the obvious discrepancies presented by the Spanish text of Article XXI. The U.S. interpretation of Article XXI(b) is based on the English language version of the text and reflects the most natural reading of its terms and grammatical structure.

164. The text and structure of the French version of Article XXI(b) is consistent with the English version. Specifically, the chapeau ends with “intérêts essentiels de sa sécurité” and the subparagraph endings (i) and (ii) each begins with “se rapportant”. The most natural and ordinary reading of this construction is that the phrase “se rapportant”—and therefore the subject matters in subparagraph endings (i) and (ii)—modifies “intérêts essentiels de sa sécurité”. The subparagraph ending (iii) begins with the phrase “appliquées en temps,” which refers back to the word “mesures”.

165. As discussed above, the Spanish text is structurally different from both the English and French texts of Article XXI(b), and it has been suggested that this indicates a potential difference in meaning. First, the term “relativas” is in the chapeau and not in subparagraphs (i) and (ii), such that “relativas” forms part of the clause that concludes in Article XXI(b)(iii)—which is not the case in the English and French texts. Second, the chapeau contains a comma, which is absent in the English or the French text. Third, the phrase “a las” precedes “applicadas” in subparagraph ending (iii), which also is absent in the English and French texts.

166. Lastly, the word “relativas” appears in a feminine plural construction. Therefore, it cannot modify the masculine plural noun “intereses” but must modify the feminine plural

⁹³ Bradley J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, App. 1 (2012) (US-99).

⁹⁴ Bradley J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 *Journal of Multilingual and Multicultural Development* 6, 531-532 (2012) (emphasis added) (US-99).

noun “medidas” —the word corresponding to “action” in the English text and “mesures” in the French text.

167. Under Article 33 of the VCLT, “[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language” and the “terms of the treaty are presumed to have the same meaning in each authentic text.” Article 33(4), however, recognizes that a difference in meaning may emerge from comparing two or more authentic texts and that application of the rules of treaty interpretation in Articles 31 and 32 may not remove such a difference. In such instance, Article 33(4) provides that “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.” However, the scholars have pointed to jurisprudence that “supports the view that account must be taken, by way of priority, of the language version or versions in which the disputed provision of the treaty was originally drafted.”⁹⁵

168. The Spanish text can be understood in a manner consistent with the English and French texts. The most appropriate way to reconcile the textual differences between them—specifically the different relationship between the subparagraph endings and the chapeau terms—is to interpret Article XXI(b) such that all three subparagraph endings refer back to “any action which it considers”. Thus, an invocation of Article XXI(b) would reflect that a Member considers two elements to exist with respect to its action. First, the action is one “which it considers necessary for the protection of its essential security interests”. Second, the action is one “which it considers” relate to the subject matters in subparagraph endings (i) or (ii) or “taken in time of war or other emergency in international relations” as set forth in subparagraph ending (iii). Reconciling the three authentic texts in this manner gives effect to the ordinary meaning of the terms of Article XXI(b) and the intention of the parties that, given the extremely sensitive nature of a Member’s essential security interests, the determination as to whether to take action under Article XXI(b) would be reserved for the acting Member. The chart below (Figure A) illustrates how each authentic text can be read under this interpretation:

	English	French	Spanish
GATT 1994 Art. XXI(b)	Nothing in this Agreement shall be construed ... to prevent any contracting party from taking any action which it considers (1) necessary for the protection of its essential security interests (2)(i) relating to fissionable materials or the materials from which they are derived;	Aucune disposition du présent Accord ne sera interprétée ... ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera (1) nécessaires à la protection des intérêts essentiels de sa sécurité: (2)(i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;	No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que: ... impida a una parte contratante la adopción de todas las medidas que estime (1) necesarias para la protección de los intereses esenciales de su seguridad, relativas :

⁹⁵ Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edn (1984), at 152 (US-97).

	English	French	Spanish
	<p>(2)(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;</p> <p>(2)(iii) taken in time of war or other emergency in international relations; or</p>	<p>(2)(ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>(2)(iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>(2)(i) relativas a las materias fisionables o a aquellas que sirvan para su fabricación;</p> <p>(2)(ii) relativas al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas;</p> <p>(2)(iii) a las aplicadas en tiempos de guerra o en caso de grave tension internacional;</p>

Note: The addition of (1) and (2), in red (bolded), is to reflect the relationship between the chapeau and the subparagraph endings under the interpretation reconciling the three versions of Article XXI(b). The other additions and deletions, in red, in the last column reflect the efforts to conform the structure of the Spanish text of the GATT 1994 Article XXI(b) to the structure of the essential security exception in the GATS and TRIPS.

Question 41. Regarding the Spanish and French versions of Article XXI(b) of the GATT 1994:

- a. What is the ordinary meaning of the verbs *estimar* (ESP) and *estimer* (FR)?
- b. Please compare the meaning of the verbs *to consider* (ENG), *estimar* (ESP) and *estimer* (FR).

169. The United States responds to Questions 41(a) and (b) together.

170. The ordinary meaning of the English word “considers” as used in Article XXI(b) is “[r]egard in a certain light or aspect; look upon as” or “think or take to be.”⁹⁶

171. The Spanish word “estimar” has the following English translations: (1) (a) “to respect, hold” and (b) “to value”; (2) “to **consider**, deem”; and (3) “to estimate”.⁹⁷ The most appropriate translation for purposes of Article XXI is the second as shown from the following examples: “no estimo necesario que se tomen esas medidas” (translated “I do not consider it

⁹⁶ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 485 (US-22).

⁹⁷ *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 327 (emphasis added) (US-89).

necessary to take those measures”) and “estimé conveniente que otra persona lo sustituyese” (translated “I considered it advisable for someone else to replace him”).⁹⁸

172. The French word “estimer” has the following English translations: (1) “to feel ” or “to **consider**”; (2) “to think highly of”; (3) “to value” or “to assess”; (4) “to estimate”; and (5) “to reckon”.⁹⁹ The most appropriate translation is the first one, as demonstrated from the following examples: “elle a estimé indispensable/prematuré de faire” (translated “she felt it essential/too early to do”); “~nécessaire de fair” (translated “to consider...it necessary to do”); and “ces mesures, estime l’opposition, sont insuffisantes” (translated “the opposition considers these measures to be inadequate”).¹⁰⁰

173. Consistent with the English text, both the Spanish and French terms confirm that the word “consider” refers to the subjective opinion held by a person or, in this case, a Member. Furthermore, the use of the subjunctive in Spanish (“estime”) and the future with an implied subjunctive mood in French (“estimera”) supports the view that the action taken reflects the belief of the WTO Member.¹⁰¹

174. The use of the Spanish term “estimar” and French term “estimer” in the Spanish and French texts further confirms this ordinary meaning of the English word.

c. What is the grammatical function of the punctuation ":" as it appears in each language version of the texts of Article XXI(b)? Please cite any appropriate linguistic sources that may provide relevant guidance.

d. What is the legal relevance, if any, of the fact that the chapeau of Article XXI(b) ends with the punctuation ":" in the Spanish and French versions?

175. The United States responds to Questions 41(c) and (d) together.

176. While chapeau in the English text of the GATT Article XXI(b) does not contain any punctuation, the chapeau in the Spanish and French texts of Article XXI(b) ends with a colon. The presence of a colon is used to introduce a list and to indicate parallel endings.¹⁰² The examples in Oxford’s English Grammar indicate that when a colon follows an introductory clause in a list, a colon indicates a continuation of the sentence that began in the introductory

⁹⁸ *The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 327 (emphasis added) (US-89).

⁹⁹ *The Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 331 (emphasis added) (US-88).

¹⁰⁰ *The Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 331 (emphasis added) (US-88).

¹⁰¹ In Spanish, the subjunctive is used to show that what is being said is (1) potentially (but not actually true); (2) colored by emotion (which often distorts facts); (3) expressing an attitude toward something (rather than the actual facts); or (4) doubtful, probably nonexistence, or not true. *SIDE BY SIDE SPANISH & ENGLISH GRAMMAR* (3rd edn. 2012), at 119 (US-171).

¹⁰² *MERRIAM WEBSTER’S GUIDE TO PUNCTUATION AND STYLE* (1st edn. 1995), at 7-8 (“The colon is a mark of introduction. It indicates that what follows it—whether a clause, a phrase, or even a single word—is tightly linked with some element that precedes it.”) (US-95).

clause.¹⁰³ A colon operates in a similar manner in Spanish and French.¹⁰⁴ Therefore, the presence, or not, of a colon before the subparagraphs does not have any legal significance for the Panel's interpretation of the provision.

e. What is the relevance, both grammatical and legal, of the fact that in the Spanish version the chapeau has a comma before the word "relativas"?

177. Please see the U.S. response to Question 42 below.

Question 42. Please discuss the meaning of the following phrases, particularly in terms of the relationship between the chapeau and subparagraph (iii) of Article XXI(b):

a. "las medidas que estime necesarias ..., relativas: ... a las aplicadas en ..."; and

b. "toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité ... appliquées en ..."

178. The United States responds to Questions 41(e) and 42 together.

179. As noted above, the GATT 1994 is equally authentic in English, French and Spanish.¹⁰⁵ However, a close examination of the Spanish text of Article XXI—first, against the English and French text of Article XXI and second, against the Spanish text of the

¹⁰³ The Oxford English Grammar also provides examples of an itemized list following a colon.

To install the application:

1. Put the OECD2 compact disc in the CD drive.
2. Run Windows.
3. Put the floppy disk distributed with the package in your floppy-disk drive.

....

You can choose to pay:

- the whole amount on 3rd May
- two instalments on 3rd May and 3rd November
- eight monthly instalments from 3rd May to 3rd November

...

ENGLISH GRAMMAR 524-526 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) (US-93).

¹⁰⁴ ADVANCED FRENCH GRAMMAR 60 (Cambridge Univ. 1999) ("The colon establishes a semantic relation between what precedes and what follows. This relation can be: — the introduction of a list of examples: Ex: Tout le monde était là: Paul, Catherine, Anne-Marie et Françoise.") (US-106); Ortografía Y Gramática, <https://gramatica.celeberrima.com/dos-puntos-uso-reglas-y-ejemplos/> ("Los dos puntos se escriben para llamar la atención sobre lo que se escribe a continuación. Después de los dos puntos se prefiere escribir minúscula cuando el texto continúa en la misma línea, y mayúscula cuando el texto continúa en otra línea.") (US- 170).

¹⁰⁵ An Explanatory Note to the GATT 1994 provides that "[t]he text of GATT 1994 shall be authentic in English, French and Spanish."

security exception in GATS and TRIPS—reveals idiosyncrasies in the Spanish text. These differences do not themselves permit a coherent reading of Article XXI, and the existence of a comma and “relativas” in the chapeau must therefore be understood in the context of the English and French versions to produce the best understanding of these texts.

180. The chart below (Figure B) shows the text of Article XXI(b) in all three languages. An examination of the Spanish text of Article XXI against the English and French texts of Article XXI demonstrates that the Spanish text diverges from these other two versions in many respects, including the inclusion of “relativas” preceded by a comma in the main text and confusing addition of “a las” in subparagraph (iii).

	English	French	Spanish
GATT 1994 Art. XXI(b)	<p>Nothing in this Agreement shall be construed</p> <p>...</p> <p>(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(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;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>	<p>Aucune disposition du présent Accord ne sera interprétée</p> <p>...</p> <p>b) ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>(i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;</p> <p>ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que:</p> <p>...</p> <p>b) impida a una parte contratante la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad, relativas:</p> <p>i) a las materias fisionables o a aquellas que sirvan para su fabricación;</p> <p>ii) al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas;</p> <p>iii) a las aplicadas en tiempos de guerra o en caso de grave tensión internacional;</p>

181. While the chapeau of Article XXI(b) ends with the term “of its essential security interests” in the English text and “des intérêts essentiels de sa sécurité” in the French text, the chapeau in the Spanish text ends with “de los intereses esenciales de su seguridad, **relativas**”. The chapeau of the Spanish text therefore includes “relativas” preceded by a comma, when neither the corresponding word nor the comma appears in the chapeau in the English and

French texts.¹⁰⁶ Instead, “relating to” and “se rapportant” appear in the subparagraph endings (i) and (ii) of the English and French texts, respectively.

182. As a result of this construction, the word “relativas” becomes part of Article XXI(b)(iii) in the Spanish text. However, “relating to” is not part of the English version of Article XXI(b)(iii) and “se rapportant” is not part of the French version of Article XXI(b)(iii).

183. In addition, perhaps to account for the inclusion of “relativas” in Article XXI(b)(iii), the phrase “a las” appears before “aplicadas.” The Spanish text of Article XXI(b)(iii) therefore reads as if the action (“medidas”) referred to in the chapeau must relate to (“relativas a”) another set of measures (“las [medidas] aplicadas”), those that are applied in the temporal circumstance set forth in subparagraph (b)(iii): “(b) impida a una parte contratante la adopción de *todas las medidas* que estime necesarias para la protección de los intereses esenciales de su seguridad, *relativas: ... (iii) a las [medidas] aplicadas en tiempos de guerra o en caso de grave tensión internacional.*” This text could be translated in English as: “Nothing in this Agreement shall be construed to: prevent any contracting party from taking all measures which it considers necessary for the protection of its essential security interests, *relating: to those applied in times of war or in case of grave international tension.*” This reference to another set of measures does not appear in either the English or the French texts of Article XXI(b)(iii).

184. The corresponding French provision reads: “(b) ou comme empêchant une partie contractante de prendre *toutes mesures* qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité ... (iii) *appliquées en temps de guerre ou en cas de grave tension internationale*”. This text can be translated in English as: “(b) or to prevent any contracting party from taking *all measures* which it considers necessary for the protection of its essential security interests: ... (iii) *applied in times of war or in case of grave international tension.*” There is therefore no reference to another set of measures—“relating to those”—as in the Spanish text. Rather, the French and English texts of Article XXI(b)(iii) concord.

185. An examination of the Spanish text of the essential security exception in the GATT 1994, GATS and TRIPS confirms that the inclusion of a comma and “relativas” in the chapeau may be a translation error. The chart below (Figure C) shows the English, French, and Spanish texts of the essential security exception in the GATT 1994, GATS, and TRIPS. The Spanish text of Article XXI(b) of the GATT 1994 also appears to diverge from the Spanish text of the essential security exception in the GATS and TRIPS. Furthermore, it is striking that of the nine versions of the essential security exception, only one version-- the Spanish text of Article XXI(b)-- has a comma and a term that corresponds to “relating to” at the end of the chapeau.

	GATT 1994, Art. XXI	GATS, Art. XIVbis	TRIPS Agreement, Art. 73
EN	Nothing in this Agreement shall be construed	Nothing in this Agreement shall be construed:	Nothing in this Agreement shall be construed:

¹⁰⁶ The Spanish word “relativas” is a feminine plural of a phrasal verb “relativo”. Typically, it is used in conjunction with “a”—“relativo a”—to mean “relating to something.” *The Oxford Spanish Dictionary*, 2st edn (revised), (Oxford University Press, 2001), at 637 (US-169).

	GATT 1994, Art. XXI	GATS, Art. XIVbis	TRIPS Agreement, Art. 73
	<p>(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(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;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>	<p>(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:</p> <p>(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;</p> <p>(ii) relating to fissionable and fusionable materials or the materials from which they are derived;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>	<p>(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(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;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>
FR	<p>Aucune disposition du présent Accord ne sera interprétée</p> <p>...</p> <p>b) ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;</p> <p>ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>Aucune disposition du présent accord ne sera interprétée:</p> <p>...</p> <p>b) ou comme empêchant un Membre de prendre toutes mesures qu'il estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) se rapportant à la fourniture de services destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>ii) se rapportant aux matières fissiles et fusionables ou aux matières qui servent à leur fabrication;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>Aucune disposition du présent accord ne sera interprétée:</p> <p>...</p> <p>b) ou comme empêchant un Membre de prendre toutes mesures qu'il estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;</p> <p>ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>
SP	<p>No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que:</p> <p>...</p> <p>b) impida a una parte contratante la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad, relativas:</p> <p>i) a las materias fisionables o a aquellas que sirvan para su fabricación;</p>	<p>Ninguna disposición del presente Acuerdo se interpretará en el sentido de que:</p> <p>...</p> <p>b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad:</p> <p>i) relativas al suministro de servicios destinados directa o indirectamente a asegurar el</p>	<p>Ninguna disposición del presente Acuerdo se interpretará en el sentido de que:</p> <p>...</p> <p>b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad:</p>

	GATT 1994, Art. XXI	GATS, Art. XIVbis	TRIPS Agreement, Art. 73
	ii) al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas; iii) a las aplicadas en tiempos de guerra o en caso de grave tensión internacional;	abastecimiento de las fuerzas armadas; ii) relativas a las materias fisionables o fusionables o a aquellas que sirvan para su fabricación; iii) aplicadas en tiempos de guerra o en caso de grave tensión internacional; o	i) relativas a las materias fisionables o a aquellas que sirvan para su fabricación; ii) relativas al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas; iii) aplicadas en tiempos de guerra o en caso de grave tensión internacional;

186. As evident in the chart above, the English text of the essential security exception in the GATT 1994, GATS, and TRIPS are largely consistent. Other than the replacement of “any contracting party” with “any member” and the addition of a colon in the GATS and a semicolon in the TRIPS, the chapeau of the exception in the GATT 1994, GATS and TRIPS remained the same. The subparagraph endings in the GATT 1994 and TRIPS are identical. The subparagraph endings in GATS largely remained the same as in the GATT 1994, with some changes to reflect that GATS addresses trade in services, along with the addition of “fusionable” in subparagraph ending (ii).

187. Similarly, other than “un membre” replacing “une partie contractante,” the chapeau in the French text of the essential security exception in GATT 1994, GATS, and TRIPS remained identical. The subparagraph endings largely remained the same: the subparagraph endings in the GATT 1994 and TRIPS are identical, and changes in the French text of the GATS essential security exception correspond to the English text of the exception in GATS.

188. Unlike the English and French texts, however, there are numerous differences in the Spanish versions of the essential security exception in the GATT 1994, GATS, and TRIPS. In the GATS and TRIPS texts, the word “relativas” is not in the chapeau and instead placed in the subparagraph endings (i) and (ii). It is therefore not part of the subparagraph ending (iii), and the phrase “a las” is also omitted from the subparagraph ending (iii). The comma that preceded “relativas” is also absent from the chapeau. As a result, both Article XIVbis(b)(iii) of GATS and Article 73(b)(iii) of TRIPS read: “Ninguna disposición del presente Acuerdo se interpretará en el sentido de que: ... (b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad: ... (iii) *aplicadas en* tiempos de guerra o en caso de grave tensión internacional.” (Emphasis added.)

189. This text can be translated in English as: “Nothing in this Agreement shall be construed to prevent: ... (b) any contracting party from taking all measures which it considers necessary for the protection of its essential security interests: ... (iii) *applied in times of war or in case of grave international tension.*” The Spanish texts of Article XIVbis(b)(iii) of GATS and Article 73(b)(iii) of TRIPS therefore do not have a reference to *another* set of

measures that appears in the Spanish text of Article XXI(b), and are more consistent with the English and French texts of Article XXI(b).

190. The Spanish text of Article XIVbis(b) of GATS and Article 73(b) of TRIPS provides an immediate context for understanding the ordinary meaning of the Spanish text of the GATT 1994 Article XXI(b). Given this context, the Panel should understand the Spanish text of Article XXI(b) as written in Article XIVbis(b)(iii) of GATS and Article 73 of TRIPS. The Panel should not attach any significance to the inclusion of a comma, placement of “relativas”, and addition of the confusing “a las” in the Spanish text of the GATT Article XXI(b)(iii).

Question 43. With reference to Article 33 of the Vienna Convention:

a. What is the significance for this dispute of the fact that "the text is equally authoritative in each language" of the three versions of the covered agreements (EN, ESP, FR)?

b. What does the presumption that the terms of the treaty have the same meaning in each authentic text (Article 33(3)) imply for the interpretation of Article XXI(b) of the GATT 1994, particularly in light of any grammatical or structural differences in the three language versions of Article XXI(b)?

c. Please comment on whether this presumption can be rebutted and how such rebuttal may relate to the interpretation of Article XXI(b) of the GATT 1994 in the present dispute.

d. Article 33(4) provides that the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

i. What precise "object and purpose of the treaty" should the Panel take into account for this purpose of reconciling the texts?

ii. Should the reference to "the treaty" in this context be understood as the GATT 1994, GATT 1947, or the Marrakesh Agreement? Or to all of these agreements?

191. The United States responds to the Panel’s Questions 43(a)-(d) together.

192. Article 33 of the VCLT provides that “[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language” and that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text.” The ILC expounded on this presumption in its commentary:

Plurilingual in expression, the treaty remains a single treaty with a single set of terms the interpretation of which is governed by the rules set out in articles 27 and 28. The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of

authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another.¹⁰⁷

193. As discussed earlier, the GATT 1994 is authentic in English, French and Spanish. The three texts are therefore, in principle, equally authoritative and are presumed to have the same meaning.¹⁰⁸ While this presumption imposes upon negotiators the task of ensuring that the several language texts of the treaty are in concordance with another, even the ILC recognized that it may not always be possible to fulfill this task adequately:

Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius [sic] of the languages, the absence of a complete consensus ad idem, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts. In that event the plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty.¹⁰⁹

194. Article 33(4) of the VCLT provides that “when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”¹¹⁰ Consistent with the VCLT, the Appellate Body has taken the view that “the treaty interpreter should seek the meaning that gives effect, simultaneously to all the terms of the treaty, as they are used in each authentic language” but to make an effort to find a meaning that best reconciles any apparent differences.¹¹¹

195. This approach is consistent with the ILC’s caution that: “The existence of more than one authentic text clearly introduces a new element—comparison of the texts—into the

¹⁰⁷ *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

¹⁰⁸ An Explanatory Note to the GATT 1994 provides that “[t]he text of GATT 1994 shall be authentic in English, French and Spanish.”

¹⁰⁹ Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edn. (1984), at 148 (US-30); *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

¹¹⁰ Vienna Convention, Article 33(4).

¹¹¹ *US – Softwood Lumber IV (AB)*, para 59. See also *Chile – Price Band System (AB)*, para 271 (“Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term ‘ordinary customs duty’ to mean something different from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4) of the Vienna Convention whereby ‘when a comparison of the authentic texts discloses a difference of meaning . . . , the meaning which best reconciles the texts . . . shall be adopted.’”).

interpretation of the treaty. But it does not involve a different system of interpretation.”¹¹² The ILC instructed: “the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules of interpretation of treaties.” It further explained:

The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, travaux préparatoires, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation.¹¹³

196. Here, the presumption under Article 33(3) that the terms of the treaty have the same meaning in each authentic text may be confirmed. While there is a difference in meaning that may emerge from the comparison of the English and French texts and the Spanish text of Article XXI(b)¹¹⁴, as discussed above, the English, French and the Spanish texts can be reconciled. The meaning that emerges is largely consistent with the understanding of the English text that the United States has presented in this dispute and consistently espoused.

197. The Spanish text can be understood in a manner consistent with the English and French texts. The most appropriate way to reconcile the textual differences between them—specifically the different relationship between the subparagraph endings and the chapeau terms—is to interpret Article XXI(b) such that all three subparagraph endings refer back to “any action which it considers”. Thus, an invocation of Article XXI(b) would reflect that a Member considers two elements to exist with respect to its action. First, the action is one “which it considers necessary for the protection of its essential security interests”. Second, the action is one “which it considers” relate to the subject matters in subparagraph endings (i) or (ii) or “taken in time of war or other emergency in international relations” as set forth in subparagraph ending (iii). Reconciling the three authentic texts in this manner gives effect to the ordinary meaning of the terms of Article XXI(b) and the intention of the parties that, given the extremely sensitive nature of a Member’s essential security interests, the determination as to whether to take action under Article XXI(b) would be reserved for the acting Member.

¹¹² *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

¹¹³ *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

¹¹⁴ The word “relativas” is a feminine plural and therefore cannot modify “intereses esenciales de su seguridad” but must modify “medidas.” Under the ordinary meaning of the Spanish text of Article XXI(b), the subparagraph endings relate back to “medidas”—the word corresponding to “action” in the English text.

198. The object and purpose of the GATT 1994 as set out in its Preamble supports this interpretation reconciling the three texts. That Preamble provides, among other things, that the GATT 1994 set forth “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.”¹¹⁵ Particularly with these references to arrangements that are “mutually advantageous” and tariff reductions that are “substantial” (rather than complete), the contracting parties (now Members) acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions at Article XXI. Consistent with this language, the obligations and exceptions of the GATT 1994 are part of a single undertaking, in which it is specifically contemplated that Members will make use of exceptions, consistent with their text. The drafters of Article XXI(b) of the GATT 1947 understood the sensitive nature of a national security determination and reserves for each Member to determine what is necessary for the protection of its essential security interests and to take action accordingly.

199. Scholars have warned that “automatic and unthinking reliance on the principle of equal authenticity of texts can lead to a failure to give effect to the common intentions of the parties” and have urged tribunals to take into consideration the language in which the treaty provision was originally drafted and “the circumstances in which the various language versions of the disputed clause were drawn up.”¹¹⁶ The interpretation offered above reconciles the Spanish text with the French and English texts of Article XXI(b) in a manner that respects the ordinary meaning of Article XXI(b), taking into account the circumstances in which the Spanish text was developed and the context in which the Spanish text of Article XXI(b) must be understood.

Question 44. The Panel notes that the parties have made extensive reference to several documents to support their legal interpretation of Article XXI of the GATT 1994. In this regard, and in order to understand the legal value the parties assign to each of these documents, please fill out the table in Annex 2, as succinctly as possible.

200. The United States’ interpretation of Article XXI(b) is established by the ordinary meaning of the text of the provision in its context and in light of the object and purpose of the GATT 1994. To establish the ordinary meaning of the terms of the treaty in their context, the United States has cited to numerous linguistic sources, dictionaries, and provisions of the WTO agreements. The United States does not understand this question to request listing of such sources and references in Annex 2. The United States has included in Annex 2 those documents containing sources that confirm the U.S. interpretation.

201. Annex 2 is attached to this document. The United States has deleted columns for which we have not included any documents.

TO COMPLAINANT

¹¹⁵ GATT 1994, pmb1.

¹¹⁶ Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edn (1984), at 152 (US-97).

Question 45. How can objective assessment of a Member's invocation of Article XXI avoid substituting a panel's judgment for the judgment that is reserved to a Member's discretion?

202. This question is addressed to the complainant.

Question 46. In accordance with Article 11 of the DSU and assuming *arguendo* that the language "which it considers" in Article XXI of the GATT 1994 introduces an element of subjective discretion into this provision, how is the Panel to conduct an objective assessment of a provision that contains elements of subjective discretion?

203. This question is addressed to the complainant.

TO UNITED STATES

Question 47. The Panel notes the United States' view that the subparagraphs of Article XXI(b) serve to "guide a Member's exercise of its rights under this provision". If the subparagraphs are not subject to an objectively reviewable obligation to act within the scope of those subparagraphs:

a. How do the subparagraphs provide meaningful guidance, in a manner consistent with the principle of effective treaty interpretation, as to a WTO-consistent invocation of Article XXI(b)?

b. What purpose do the subparagraphs serve in terms of the balance of rights and obligations resulting from Article XXI(b)?

204. As discussed in the United States' response to the Panel's Question 40, the subparagraphs 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: (1) when a Member takes action it considers necessary for the protection of its essential security interests "relating to fissionable materials or the materials from which they are derived"; (2) when a Member takes action it considers necessary for the protection of its essential security interests "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment"; and (3) when a Member takes action it considers necessary for its essential security interests in time of war or other emergency in international relations. In this way, the subparagraphs, along with the chapeau, help guide a Member's exercise of its rights under Article XXI(b) by identifying the circumstances in which it is appropriate for a Member to invoke those rights.

205. The principle of effective treaty interpretation is expressed in the maxim *ut res magis valeat quam pereat*, meaning "parties are assumed to intend the provisions of a treaty to have

a certain effect, and not to be meaningless.”¹¹⁷ The Appellate Body has previously articulated the principle as “treaty interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹¹⁸

206. This principle is embodied in the general rule of interpretation in Article 31 of the VCLT. In preparing Article 31, the ILC recognized that in certain circumstances recourse to this principle may be appropriate. However, the ILC cautioned against applying it in a manner that would result in adopting an interpretation that diverges from to the ordinary meaning of the treaty text.¹¹⁹ In fact, it appears that the ILC deliberately did not include a separate provision on the principle of effective treaty interpretation out of concern that it would be applied in a manner inconsistent with the general rules of treaty interpretation.¹²⁰

Properly limited and applied, the maxim 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. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of “effective interpretation”.¹²¹

207. The ILC further discussed, citing an ICJ opinion that “the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which...would be contrary to their letter and spirit” and “emphasized that

¹¹⁷ OPPENHEIM’S INTERNATIONAL LAW, vol. I at 1280-1281 (Robert Jennings & Arthur Watts eds, 9th edn. 1992) (US-107).

¹¹⁸ *US – Gasoline* (AB), at 23.

¹¹⁹ *Draft Articles on the Law of Treaties with Commentaries* (1966), YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (US-23) (“The Commission, however, took the view that, in so far as the maxim *Ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its objects and purposes*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”).

¹²⁰ OPPENHEIM’S INTERNATIONAL LAW, vol. I at 1280-1281 (Robert Jennings & Arthur Watts eds, 9th ed. 1992) (“[T]he absence of a full measure of effectiveness may be the direct result of the inability of the parties to reach agreement on fully effective provisions; in such a case the court cannot invoke the need for effectiveness in order in effect to revise the treaty to make good the parties’ omission. The doctrine of effectiveness is thus not to be thought of as justifying a liberal interpretation going beyond what the text of the treaty justifies.”) (US-107).

¹²¹ *Draft Articles on the Law of Treaties with Commentaries* (1966), YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (US-23).

to adopt an *interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty.*"¹²² The ILC concluded: "The draft articles do not therefore contain any separate provision regarding the principle of "effective interpretation."

208. Nothing in the VCLT would suggest that parties cannot adopt a treaty provision that is self-judging. To the contrary, the VCLT contains general rules for interpreting a treaty obligation based on the ordinary meaning of its terms. Where the ordinary meaning makes plain the self-judging nature of an obligation, the VCLT requires that that meaning be respected by an interpreter.

209. The VCLT also provides for rules governing the conclusion and adoption of treaties between states.¹²³ The VCLT does not, however, suggest that whether a party enters into binding treaty obligations is dependent on that party agreeing to formal dispute settlement. In fact, many – if not most – international obligations are undertaken without being subject to review by an arbitral body.¹²⁴ The question of whether a state consents to undertake a particular obligation in international law is simply separate from whether a state consents to dispute settlement in respect of that obligation.

210. This point is confirmed in Brownlie's Principles of Public International Law, which states that "[t]he judicial settlement of international disputes is only one facet of the enormous problem of the maintenance of international peace and security."¹²⁵ Formal

¹²² *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 229 (Mar. 30)) (emphasis added) (US-23).

¹²³ Several articles in the VCLT address treaty formation: Article 9 (Adoption of the text); Article 11 (Means of expressing consent to be bound by a treaty); Article 12 (Consent to be bound by a treaty expressed by signature); Article 13 (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty); Article 14 (Consent to be bound by a treaty expressed by ratification, acceptance or approval); Article 15 (Consent to be bound by a treaty expressed by accession); Article 16 (Exchange or deposit of instruments of ratification, acceptance or accession); Article 17 (Consent to be bound by part of a treaty and choice of differing provisions); and Article 24 (Entry into force) (US-108).

¹²⁴ See e.g., U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (US-109); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (US-110); U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (US-111); U.N. Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3 (US-112); Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37 (US-113); U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163 (US-114); U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 (US-115); Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 1023 U.N.T.S. 15 (US-116); U.N. Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229 (US-117); Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, 1511 U.N.T.S. 3 (US-118); International Sugar Agreement, Mar. 20, 1992, 1703 U.N.T.S. 203 (US-119); U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (US-120); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 (US-121).

¹²⁵ James Crawford, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* at 718 (8th ed. 2012) (US-122).

dispute settlement in international law – such as WTO panel procedures as established in the DSU – are consensual in character, and “there is no obligation in general international law to *settle* disputes.”¹²⁶ Furthermore, even when dispute settlement mechanisms are created, the underlying treaty terms still determine whether such mechanisms have authority over particular disputes.¹²⁷

211. Therefore, the fact that the terms of a particular provision are drafted to be self-judging, such that a panel may not second-guess or determine for itself whether the circumstances identified have occurred, does not somehow render that provision moot or no longer binding. If a State consents to a provision, it must abide by that provision. But it does not follow that each provision imposes an obligation, or conditions for the exercise of a right, that is reviewable under a dispute settlement mechanism.

212. As relevant in this dispute, the text of Article XXI(b) establishes that it is for each Member to determine what action it considers necessary for the protection of its essential security interests relating to the items set forth in subparagraph endings (i) and (ii), or in time of war or other emergency in international relations as set forth in subparagraph ending (iii). This interpretation is established by the ordinary meaning of Article XXI(b) consistent with the customary rules of interpretation. The argument that the principle of effective interpretation requires the Panel to review the Member's judgment under Article XXI(b) despite the self-judging language of the provision is an attempt to read into Article XXI(b) meaning not reflected in the text of the provision. It is contrary to the general rules of interpretation and an attempt to extend the meaning of treaty provisions illegitimately—precisely the type of misuse the ILC commentary warned against.

Question 48. Regarding the United States' view of the guidance to be provided by the subparagraphs of Article XXI(b), please compare the following provisions (with emphasis added) of the covered agreements in relation to the guidance of Members' judgment and the standard of review to be applied in dispute settlement proceedings when such provisions are raised:

a. Article 22.3 of the DSU allowing suspension of concessions or obligations under other sectors or covered agreements if a "party *considers* that it is not practicable or effective" to suspend under the same sectors or covered agreement as a WTO violation, and Article 22.3(d) providing that a "party *shall take into account*" certain factors in applying this;

¹²⁶ James Crawford, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* at 718 (8th ed. 2012) (US-122). Original emphasis.

¹²⁷ In addition to Article XXI of the GATT 1994, Annex A(5) of the SPS Agreement is another example of an obligation that is not subject to Panel review in a sense that the Panel can test the Member's determination: the provision defines “appropriate level of sanitary or phytosanitary protection” as “[t]he level of protection *deemed appropriate by the Member* establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.”

b. Article 3.7 of the DSU providing that "Before bringing a case, a Member *shall exercise its judgement* as to whether action under these procedures would be fruitful";

c. Annex A(5) to the SPS Agreement defining the "appropriate level of sanitary or phytosanitary protection" as "[t]he level of protection *deemed appropriate by the Member* establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory"; and

d. Article 5.4 of the SPS Agreement providing that "Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects."

213. As the United States has explained in more detail in response to the Panel’s Question 34, the text of Article XXI(b) serves to guide a Member’s exercise of its rights, including its exercise of self-restraint where the Member determines that invocation of the exception is not appropriate. Specifically, the Article XXI chapeau and the subparagraph endings (i), (ii) and (iii) establish three circumstances in which the Member may act under Article XXI(b). The terms of the provisions mentioned at parts (a) to (d) of the Panel’s Question 48 differ from the terms of Article XXI(b), and accordingly the interpretation of these other provisions under to the customary rules of interpretation will likewise differ.

214. In its question, the Panel refers to DSU Article 22.3 and its reference to certain factors that a Member “shall take into account” as it “considers” sectors in which to suspend concessions or obligations provides certain limits on the discretion of a Member. Applying the customary rules of interpretation to this provision establishes that Article 22.3 permits an arbitrator to examine whether the complaining party in the case, on the basis of the necessary facts, could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension with respect to the same sector within the same agreement.¹²⁸ However, among other notable differences between the terms of DSU Article 22.3 and Article XXI(b), DSU Article 22.3 contains a mandatory phrase regarding factors that a Member “shall take into account.” Such language is absent from Article XXI.

215. DSU Article 3.7 provides an example of a provision that imposes an obligation on a Member, and – similar to Article XXI(b) – does not permit a panel to look behind a Member’s decision. DSU Article 3.7 provides “[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful.” There is no basis for a panel to opine on whether or not a Member has exercised its judgment “before bringing a case.” Once a dispute has been brought, the Member has exercised its judgment, and the provision imposes no ongoing obligation.

216. Thus DSU Article 3.7 shows that for certain obligations, the drafters chose to impose obligations but did not permit a panel to look behind the decision of a Member in carrying out that obligation. As the Appellate Body also has observed, a Member is “expected to be

¹²⁸ *US – Gambling (Article 22.6 – US)*, para. 4.27.

largely self-regulating in deciding whether any such action would be ‘fruitful.’¹²⁹ A Member should be presumed to have asserted a claim in good faith, “having duly exercised its judgment as to whether recourse to that panel would be ‘fruitful.’” Article 3.7 neither requires nor authorizes a panel to look behind that Member’s decision and to question its exercise of judgment.¹³⁰

217. The Panel’s question also refers to Annex A(5) of the SPS Agreement – and its reference to “[t]he level of protection *deemed appropriate* by the Member.” By its terms, this provision establishes a self-judging standard. And although the text of this provision differs from the text of Article XXI(b), Annex A(5) may be seen as another example of a matter that is left to the discretion of a Member.

218. The final provision referred to in the Panel’s question, Article 5.4 of the SPS Agreement, does not impose a binding obligation. Article 5.4 states: “Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.” This provision, by its terms, does not impose an affirmative obligation on a Member. First, the operative verb form is “should”, which expresses exhortation and not obligation, and not “shall”. Second, the operative verb is “take into account” which relates to a consideration and not an outcome of that consideration. Third, what “should” be “take[n] into account” is an “objective”, which indicates a goal or aim, not an outcome.

219. In sum, the provisions identified at parts (a) to (d) of this question show that Members have agreed to text to empower an adjudicator to decide, for example as in the case of DSU Article 22.3, whether a party, on the basis of the facts, could plausibly arrive at a certain conclusion. Members have not done so through the text in other provisions, like Article XXI. Given that text, an adjudicator cannot assume for itself the authority to second-guess the determination of a Member as to the necessity of its action for the protection of its essential security interests.

TO ALL

Question 49. Do the distinct subparagraphs (i) to (iii) inform each other as to the overall subject matter and scope of applicability of Article XXI(b)?

220. The subparagraphs (i) to (ii) are not separated by the coordinating conjunction “or”, to demonstrate alternatives, or the conjunction “and”, to suggest cumulative situations. Accordingly, each subparagraph is integrated with the main text of Article XXI(b), but would contain different subject matter and scope in relation to the other subparagraphs. As discussed in greater detail in the U.S. response to Question 40, based on the ordinary meaning of the English text of Article XXI(b), the subparagraph ending (i) and subparagraph ending (ii) each relate to the kinds of interests for which the Member may consider its action necessary to protect. For an interpretation that best reconciles the Spanish, French and

¹²⁹*Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 73 (quoting *EC – Bananas III (AB)*, para. 135) (emphasis in *Mexico – Corn Syrup (Article 21.5 – US) (AB)*).

¹³⁰ *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 74.

English texts of Article XXI(b), under which all subparagraph endings refer back to “any action which it considers”, please see the U.S. Responses to Questions 40 and 41. Those subparagraphs provide that a Member may take any action it considers necessary for the protection of its essential security interests “relating to fissionable materials or the materials from which they are derived,” and its essential security interests “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying for military establishment.” In this way, the subparagraph endings (i) and (ii) indicate the particular types of essential security interests a Member considers to be implicated by the action taken.

221. By contrast, the subparagraph ending (iii) does not speak to the nature of the security interests at all, but provides a temporal limitation related to the action taken. That subparagraph provides that a Member may take any action which it considers necessary for the protection of its essential security interests “taken in time of war or other emergency in international relations.” Subparagraph (iii) contains no limitation on the type or nature of the essential security interests involved. This reflects an understanding that there may be a wide range of interests that become essential to a Member’s security when it considers a war or other emergency in international relations exists.

222. The term “security” refers to “[t]he condition of being protected from or not exposed to danger; safety.”¹³¹ As this definition indicates, the term “security” is broad and could encompass many types of security interests that are critical to a Member. The term “essential” refers to significant or important, in the absolute or highest sense.¹³² The term does not specify a particular subject matter—only the importance that the Member attaches to the security interest. This means that, as discussed in detail in response to Question 51, action taken pursuant to Article XXI(b)(iii) could implicate a broad range of security interests considered by the invoking Member to be “essential.”

223. Limiting the scope of interests for which a security action may be taken under subparagraph (iii) also would not reflect the scope of interests identified by WTO Members and the United Nations as having a significant relationship to national and international security more generally. That these interests might change over time and across Members supports an interpretation that it is for the Member itself to determine whether the circumstances in which it acts give rise to an emergency in international relations.

224. Cybersecurity is an example of a “security interest” that is not addressed in the subject matters in subparagraph endings (i) and (ii), but that a Member may consider “essential” within the meaning of Article XXI. The term “cybersecurity” has been defined as the protection of information communications technology (ICT) from unauthorized access or

¹³¹ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22).

¹³² *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22).

attempted access affecting confidentiality, integrity, and accessibility of ICT.¹³³ The 2010 Report of the Group of Governmental Experts established by the United Nations highlights the importance of cybersecurity to protecting public safety, national security, and international peace.

Existing and potential threats in the sphere of information security are among the most serious challenges of the twenty-first century. Threats emanate from a wide variety of sources and manifest themselves in disruptive activities that target individuals, businesses, national infrastructure and Governments alike. Their effects carry significant risk for public safety, the security of nations and the stability of the globally linked international community as a whole.¹³⁴

In fact, the United Nations General Assembly (UNGA) has long recognized the importance of cybersecurity to maintaining international stability and security, and to states’ protection of their security interests in both civil and military fields. In 2016, the UNGA adopted a resolution titled “Developments in the field of information and telecommunications in the context of international security.” The resolution expressed concern

that these technologies and means can potentially be used for purposes that are inconsistent with the objectives of maintaining international stability and security and may adversely affect the integrity of the infrastructure of States to the detriment of their security in both civil and military fields[.]

The resolution further called upon Member States to promote “the consideration of existing and potential threats in the field of information security, as well as possible strategies to address the threats emerging in this field,” and to inform the Secretary General of their views of “possible measures that could be taken by the international community to strengthen information security at the global level.”¹³⁵ Similarly, many WTO Members recognize

¹³³ UNIDIR, *The United Nations, Cyberspace and International Peace and Security: Responding to Complexity in the 21st Century*, at 7 (2017) (US-123). Similarly, the International Telecommunication Union (ITU), the United Nations specialized agency for information and communication technologies, defines cybersecurity as “the collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber environment and organization and user’s assets.” International Telecommunications Union, *Definition of cybersecurity* (US-124).

¹³⁴ United Nations General Assembly, *Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security* (July 30, 2010) A/65/201, at 2 (US-125).

¹³⁵ United Nations General Assembly, *Resolution adopted by the General Assembly on 5 December 2016, A/RES/71/28* (US-126).

cybersecurity as an essential security interest, protection of which is fundamental to a sovereign state's rights and responsibilities.

225. For example, **New Zealand's** Cyber Security Strategy provides, "Cyber threats to New Zealand – particularly state-sponsored espionage, cyber terrorism, theft of intellectual property from government and critical infrastructures – are national security risks."¹³⁶ **Australia's** Cyber Security Strategy provides that "[s]trong cyber security... is also vital for our national security."¹³⁷ **Turkey's** National Cyber Security Strategy (2016-2019) lists "integration of cyber security to the national security" as one of its strategic cyber security objectives and actions."¹³⁸

226. In its Cyber Security Strategy, **Norway** also recognizes the interrelationship between cybersecurity and national security: "[C]yber security challenges in the civilian sector are also of significance to Norway's ability to handle security-political crises and to carry out military operations. In a worst-case scenario, cyber attacks on civilian infrastructure may challenge Norway's ability to safeguard national security."¹³⁹ Recognizing the importance of international cooperation in this area, the strategy states that "cyber crime and cyber attacks from both state and non-state actors constitute extremely serious threats to national security and economy."¹⁴⁰ **India** too acknowledges this relationship in the call for comments for the National Cyber Security Strategy 2020, stating that "[c]yber intrusions and attacks have increased in scope and sophistication targeting sensitive personal and business data, and critical information infrastructure, with impact on national economy and security."¹⁴¹ The **Netherlands's** Integrated National Security Strategy 2018-2022 lists cyberthreats among "the most urgent security threats."¹⁴² Its National Security Strategy provides, "As national security can also be affected via cyberspace, cybersecurity has been interwoven into all of the other national security interests. In addition, the integrity of cyberspace has been added as an

¹³⁶ New Zealand Government, New Zealand's cybersecurity strategy, at 9 (2019) (US-127).

¹³⁷ Australian Government, Australia's Cyber Security Strategy, at 4 (2016) (US-128).

¹³⁸ Turkey's National Cyber Security Strategy, para 4.5 (2016) ("4.5 **Integration of Cyber Security to the National Security** Realization of actions towards reducing the loss incurred by attacks performed by well-organized threat actors that may affect state and national economy, critical infrastructures and society is planned within the scope of this strategic action.") (US-129).

¹³⁹ National Cyber Security Strategy for Norway, at 9 (2019) (US-130).

¹⁴⁰ National Cyber Security Strategy for Norway, at 10 (2019) (US-130).

¹⁴¹ India, Call for Comments: National Cyber Security Strategy 2020 (2019) (US-131); India, National Cyber Security Policy - 2013, at 3-4 (2013) ("Large-scale cyber incidents may overwhelm the government, public and private sector resources and services by disrupting functioning of critical information systems. Complications from disruptions of such a magnitude may threaten lives, economy and national security.") (US-132).

¹⁴² The Ministry of Foreign Affairs of The Netherlands, Working Worldwide for the Security of the Netherlands: An Integrated International Security Strategy 2018-2022, at 19 (2018) (US-133).

aspect of territorial security, which includes the availability, confidentiality and integrity of essential information services.”¹⁴³

227. In its National Strategy for the Protection of Switzerland against Cyber Risks 2018-2022, **Switzerland** emphasizes the importance of taking measures “to safeguard the independence and security of the country from emerging or intensifying threats and dangers in cyberspace.”¹⁴⁴ It also raises alarm about the many ways in which threats in the cyberspace can jeopardize public safety and destabilize societies: “Rampant cybercrime, the accumulation of espionage activities with the help of cyber attacks, cases of cyber sabotage against critical infrastructures such as hospitals and energy providers, the spread of stolen or manipulated information for the purpose of disinformation and propaganda, and the increase in hybrid forms of conflict in which cyber attacks are used to destabilise states and societies make clear how diverse these threats are and how rapidly they are developing.”¹⁴⁵ In its National Cyber Security Action Plan 2019-2024, **Canada** notes that “[a]s more of Canada’s critical infrastructure can be controlled remotely and essential services are managed online, cyber incidents have the potential to compromise national security and public safety.”¹⁴⁶

228. Certain WTO Members have even promoted the idea of “cyberspace sovereignty.” For example, **China**’s National Security Law provides that China “improves network and information security protection capability” and “maintains the state’s cyberspace sovereignty,” among other things.¹⁴⁷ National security concerns also permeate China’s Cybersecurity Law, which was formulated in order to “ensure cybersecurity, safeguard cyberspace sovereignty and national security,” among other things. The law includes specific provisions governing the operations of “critical information infrastructure,” and creates a “national security review” for “critical information infrastructure operators purchasing network products and services that might impact national security.”¹⁴⁸

229. **Russia**’s National Security Strategy of December 2015 discusses threats in the cyberspace extensively. Under the heading “main threats to state and public security,” Russia’s strategy lists “the activities of terrorist and extremist organizations aimed at...attacking and disruption the continuous operation of the Russian Federation’s vital IT

¹⁴³ The Netherlands Government, National Security Strategy, at 12 (2019) (US-134).

¹⁴⁴ Switzerland, National Strategy for the Protection of Switzerland against Cyber Risks 2018-2022, at 1 (Apr. 2018) (US-135). The European Network and Information Security Agency (ENISA), which is charged with supporting EU Member States’ efforts to develop, implement and update NCSS, issued an NCSS Good Practice Guide: Designing and Implementing National Cyber Security Strategies, which advises that “cyber security is/should be part of an overall national security policy work.” ENISA, NCSS Good Practice Guide (Nov. 2016), at 16 (US-136).

¹⁴⁵ Switzerland, National Strategy for the Protection of Switzerland against Cyber Risks 2018-2022, at 1 (Apr. 2018) (US-135).

¹⁴⁶ Canada’s National Cyber Security Action Plan 2019-2024, at 5 (2019) (US-137).

¹⁴⁷ National Security Law of the People’s Republic of China (2015), art. 25 (US-138).

¹⁴⁸ Cybersecurity Law of the People’s Republic of China (2017), art. 35 (US-139).

infrastructure.”¹⁴⁹ It further notes that “[o]ne of the main areas for ensuring national security in the spheres of science, technologies and education is the raising of the level of technological security, including in the information sphere.”¹⁵⁰ Russian officials have publicly indicated that the Internet Sovereignty Law, which enables Russia to disconnect its internet from the rest of world and tighten control over the country’s internet, is necessary for security reasons, allegedly to protect Russia from “cyber attacks” carried out from the United States.¹⁵¹

230. Like other WTO Members, the **United States** recognizes cybersecurity as an essential security interest that is integral to its national security. The United States’ National Security Strategy discusses cybersecurity extensively, including in the section titled “Keep America Safe in the Cyber Era” under “Pillar 1: Protect the American People, the Homeland, and the American Way of Life,” along with discussions about threats from weapons of mass destruction, biotreats and terrorism:¹⁵² The United States’ National Cyber Strategy, which builds on its National Security Strategy, recognizes that “challenges to United States security and economic interests, from nation states and other groups, which have long existed in the offline world are now increasingly occurring in cyberspace,” and states that “cyberspace will no longer be treated as a separate category of policy or activity disjointed from other elements of power.”¹⁵³

231. Cybersecurity is just one example of a security interest—whether as part of its national security or as a separate but closely related security interest—that many Members appear to consider “essential”, but which is not necessarily related to subject matters in subparagraph endings (i) and (ii). As this example demonstrates, however, the text of Article XXI(b) does not curtail the scope of action a Member may consider necessary in the circumstances of subparagraph (iii).

Question 50. Could the subparagraphs of Article XXI(b) be considered cumulative in nature, such that the invocation of Article XXI(b) covers all three subparagraphs together?

232. As explained in response to Question 40, above, an invocation of Article XXI(b) indicates that a Member considers that any or all of the three circumstances described in the subparagraphs are present. It is entirely possible that a Member considers that all three

¹⁴⁹ Russian National Security Strategy (Dec. 2015), para 43 (US-140).

¹⁵⁰ Russian National Security Strategy (Dec. 2015), para 69 (US-140).

¹⁵¹ Tass.com (Russian News Agency), Kremlin says cyber attacks against Russia perpetually initiated from US territory (Feb. 27, 2019), <https://tass.com/world/1046641> (US-141).

¹⁵² National Security Strategy of the United States of America (Dec. 2017), at 7-14 (US-142).

¹⁵³ National Cyber Strategy of the United States of America (Sept. 2018), at 3 & 13 (“ This National Cyber Strategy outlines how we will (1) defend the homeland by protecting networks, systems, functions, and data; (2) promote American prosperity by nurturing a secure, thriving digital economy and fostering strong domestic innovation; (3) preserve peace and security by strengthening the United States’ ability — in concert with allies and partners — to deter and if necessary punish those who use cyber tools for malicious purposes; and (4) expand American influence abroad to extend the key tenets of an open, interoperable, reliable, and secure Internet.”) (US-143).

subparagraphs are relevant to its action. However, the subparagraphs of Article XXI(b) are not cumulative in nature, such that a Member must consider all three circumstances to exist in order to exercise its authority under Article XXI(b).

Question 51. Regarding the meaning of "other emergency in international relations" in subparagraph (iii) of Article XXI(b) and the security interests referred to in the chapeau of Article XXI(b):

- a. Could this phrase extend to an "emergency" in commercial or trade relations?**
- b. What is the relevance of the fact that the provision does not refer to "other similar" emergencies?**
- c. To what extent does the existence of such an "other emergency in international relations" depend on the judgment of a Member invoking Article XXI(b)?**

233. As the United States has explained in its First Written Submission and in response to the Panel's Question 74(d)-(f), the word "security" in Article XXI(b) is broad, and this term could encompass what one might consider commercial or trade relations. The word "emergency" in Article XXI(b)(iii) is likewise broad. Definitions of "emergency" include "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention."¹⁵⁴ Commercial or trade relations may amount to a situation that arises unexpectedly and requires urgent attention, including a situation of danger or conflict. Accordingly, the term "emergency" could encompass what one might consider commercial or trade relations, just as the phrase "essential security interests" could encompass what one might describe as "economic security."

234. The Panel's question observes that Article XXI(b)(iii) refers to "other emergency in international relations," not "other similar emergencies." This language in Article XXI(b)(iii) makes clear that war is just one example of an emergency in international relations, and that these other circumstances need not be similar to war. Thus, contrary to statements by the panel in *Russia – Traffic in Transit*,¹⁵⁵ nothing in the text somehow limits an "other emergency in international relations" under Article XXI(b)(iii) to an emergency similar to "war". In reaching its erroneous interpretation of the phrase "other emergency in international relations" that panel also relied on a provision in the Covenant of the League of Nations that refers to "[a]ny war or threat of war," terms are significantly different from those in Article XXI(b)(iii).¹⁵⁶

235. The U.S. interpretation of the phrase "other emergency in international relations" – as encompassing what one might consider commercial or trade relations – is also supported by

¹⁵⁴ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806 (US-86).

¹⁵⁵ *Russia – Traffic in Transit*, para. 7.71-7.76.

¹⁵⁶ *Russia – Traffic in Transit*, para. 7.76 & note 153.

the context provided in other provisions of the GATT 1994 and other covered agreements, which enumerate certain items on a list and thereafter refer to “similar” items. For example:

- GATT 1994 Article XII – on balance of payments restrictions – provides that Members applying restrictions under this article undertake “not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copyright, *or similar procedures*.”¹⁵⁷
- Article 11.1(b) of the Agreement on Safeguards refers to “voluntary exports restraints, orderly marketing arrangements *or any other similar measures on the export or the import side*.”¹⁵⁸ A footnote to this provision further elaborates certain “[e]xamples of *similar measures*.”¹⁵⁹
- Article 4.2 of the Agreement on Agriculture places limits on “any measures of the kind which have been required to be converted into ordinary customs duties,” and further provides in a footnote that, among other things “[t]hese measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, *and similar border measures* other than ordinary customs duties.”¹⁶⁰

236. Such uses of “other similar” and “similar” in lists of items demonstrates that, WTO Members could have required that items falling later in a list be similar to the first-enumerated items, but in Article XXI(b)(iii) they did not. The fact that such language was *not* used in Article XXI(b)(iii) – and that this provision refers to “war or other emergency in international relations” rather than “war or other similar emergency in international relations” – should be given effect. Accordingly, the correct understanding of the phrase “other emergency in international relations” is as a category that includes “war” as well as other circumstances that may or may not be similar to war.

d. Exhibit USA-72 submitted by the United States during the first substantive meeting consists of a Report by the G20 Global Forum on Steel Excess Capacity, in which the European Union describes global steel overcapacity as posing an "existential threat" (p. 39).

i. What is the legal relevance, if any, of such documents for the purposes of this dispute?

ii. To what extent can this inform the Panel's understanding of the terms "essential security interests" in Article XXI(b)?

¹⁵⁷ GATT 1994 Article XII(3)(c)(iii) (emphasis added).

¹⁵⁸ Agreement on Safeguards, Art. 11.1(b) (emphasis added).

¹⁵⁹ Agreement on Safeguards, Art. 4.2 & footnote 1 (emphasis added).

¹⁶⁰ Agreement on Agriculture, footnote 1 (emphasis added).

iii. To what extent can this, and similar statements made by Members in international fora, inform the Panel's understanding of the terms "essential security interests" and/or "emergency in international relations" in Article XXI(b)?

237. As the United States more fully explains in response to Question 74(d)-(f), the documents submitted by the United States demonstrate that the complainant appears to have a broad understanding of the term “security,” which could encompass what one might describe as economic security.

4.4 Context of Article XXI

To All

Question 52. With respect to any contextual guidance provided by Article XX of the GATT 1994:

a. Does the parallel language in Articles XX and XXI(b) ("nothing in this Agreement shall be construed to prevent") indicate that both provisions are affirmative defences?

238. The United States responds to the Panel’s Questions 52(a) and 52(c) together.

239. The term “affirmative defense” is not a legal term reflected in the DSU or any other covered agreement. To the extent the Panel defines an “affirmative defense” as a provision that a Member invokes in response to a claimed breach of its obligations under the covered agreement—such as imposing duties above its bound rates—the United States agrees that both Article XX and Article XXI are “affirmative defences.” There are various ways to express that a particular provision may be invoked in response to a breach claim, including the phrase “nothing in this Agreement shall be construed to prevent.”

240. Similarly, the term “burden of proof” – as used in subpart (c) of this question – is not a legal term reflected in the DSU or any other covered agreement. In this context, the United States understands the Panel to be asking about what the Member invoking Article XXI must do to exercise its rights under Article XXI(b) or, in other words, take advantage of the Article XXI(b) defense.

241. What is required of the party exercising its right under Article XXI is set forth in the terms of Article XXI itself—that the Member consider one or more of the circumstances set forth in Article XXI(b) to be present. The invoking Member’s burden is discharged once the Member indicates, in the context of dispute settlement, that it has made such a determination.

b. What is the significance of Articles XX and XXI(b) being structured as a chapeau with subparagraphs, particularly in terms of the role of specific subparagraphs for the applicability of the provision?

242. In both Article XX and Article XXI, the sentence begins in the chapeau and ends at the end of each subparagraph ending. But while there may be surface-level similarities

between Article XX and Article XXI, there are numerous important textual differences between the provisions.

243. In Article XX, for example, the subparagraphs themselves contain operative language comprising the Member’s obligation—the measure must be “necessary to,” “relating to,” “undertaken in,” “involving restrictions,” and “essential to.” By contrast, in Article XXI, the relevant operative language is in the main text (chapeau)—“which it considers necessary for the protection of its essential security interests.” Rather than identifying the obligation itself, the subparagraphs modify the nature of the security interests involved, or in the case of subparagraph (iii), provide a temporal requirement regarding when the measure would be taken. This key difference explains why a panel examining an Article XX defense looks to the relationship between the measures and the objectives set out in the subparagraph endings of Article XX while a panel examining an Article XXI defense may only note the Member’s invocation (that is, that it considers an action necessary).

244. The chapeau of Article XX also includes a non-discrimination requirement, which subjects a Member’s action to additional scrutiny based on the particular factual circumstances. This language, and this requirement, is wholly absent from the main text of Article XXI.

245. Therefore, the surface-level similarities highlighted in the Panel’s question do not mean that the two provisions should be interpreted in the same manner because there are other, more relevant differences in the texts. An examination of the differences in the text and structures of Article XX and Article XXI supports the United States’ interpretation of Article XXI as self-judging, and as not requiring a similar showing to a defense raised under Article XX.

c. Are there any implications for the burden of proof in dispute settlement proceedings stemming from the similar wording in the chapeau (“nothing in this Agreement shall be construed to prevent”) and listing of distinct subparagraphs in both Article XX and Article XXI(b)?

231. Please see U.S. response to the Panel’s Question 52(a).

Question 53. Please comment on the relevance of Article XXI(a) to whether and how an invocation of Article XXI(b) should be objectively reviewed under the DSU.

246. Article XXI(a) is the immediate context for understanding the ordinary meaning of Article XXI(b). Article XXI(a) states that “[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.”

247. Under this language, a Member need not provide any information—to a WTO panel or other Members—regarding essential security measures or the Member’s underlying security interests. In this way, Article XXI(a) anticipates that there may not be facts on the record before a panel to permit any review of a Member’s invocation of Article XXI.

248. The context provided by Article XXI(a) and the DSU provisions on the role of the panel support an interpretation that Article XXI(b) is self-judging, such that when a Member

invokes the essential security exception, the panel may not second-guess that Member's determination as to the necessity of its actions for the protection of its essential security interests.

TO UNITED STATES

Question 54. Article 2.2 of the TBT Agreement provides that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective" including "national security requirements". Does this provision, especially due to its use of the word "shall", make reviewable by a panel the matter of whether a measure has been taken for national security purposes? Please comment on this provision in light of the United States' position that questions under Article XXI(b) "are political in nature" and not appropriate for adjudication by a WTO panel.

249. Article 2.2 of the TBT Agreement provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

250. As this text shows, technical regulations are subject to certain scrutiny under the TBT Agreement, and Article 2.2 recognizes that national security as a "legitimate objective" of technical regulations.

251. The text of Article XXI(b), however, is markedly different from that of Article 2.2 of the TBT Agreement. The issues presented under Article XXI(b) include "whether a situation implicates 'its security interests,' and whether the interests at stake are 'essential' to that Member." The text of Article XXI(b) makes clear that these questions can only be answered by the Member in question. Thus, 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. It is the text of Article XXI(b) that establishes its self-judging nature. The fact that the text of Article XXI(b) raises political questions, however, helps us understand why the Members drafted Article XXI in the way they did, and is why the United States has maintained that such issues should not be brought before a dispute settlement panel.

4.5 OBJECT AND PURPOSE

TO ALL

Question 55. Regarding compatibility with the object and purpose of the relevant agreements:

a. What is the relevance of the precise scope of the review (i.e. which distinct elements of Article XXI are subject to objective review in dispute settlement proceedings)?

252. ¹⁶¹As discussed in response to Question 23, under DSU Article 7.1, the Panel’s terms of reference call on the Panel “[t]o examine” the matter referred to the DSB by the Member and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements].” This dual function of panels is confirmed in DSU Article 11, which states that the “function of panels” is to make “an objective assessment of the matter before it” and “such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”

253. Under Article 3.2 of the DSU, the provisions of the GATT 1994 are to be interpreted “in accordance the customary rules of interpretation of public international law.” In this dispute, the Panel’s function is to objectively assess the matter before it by examining the ordinary meaning of Article XXI(b) of the GATT 1994 in their context and in the light of the treaty’s object and purpose. The objective assessment of Article XXI leads to the conclusion Article XXI is self-judging.

254. As discussed in Question 35, the relative clause that follows the word “action” in Article XXI(b) describes the circumstances which the Member “considers” to be present when it takes such an “action.” The clause begins with “which it considers necessary” and ends at the end of each subparagraph. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, such that the provision reserves for the Member to decide what it considers necessary for the protection of its essential security interests. Consistent with the text of that provision, a panel may not second-guess a Member’s consideration. Under these circumstances, the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security interests under GATT 1994 Article XXI(b).

255. The object and purpose of the GATT 1994 supports an interpretation of Article XXI(b) as self-judging. The object and purpose of the GATT 1994 is set out in the agreement’s Preamble. That Preamble provides, among other things, that the GATT 1994 set forth “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.”¹⁶² Particularly with these references to arrangements that are “mutually advantageous” and tariff reductions that are “substantial” (rather than complete), the contracting parties (now Members) acknowledged that the GATT

¹⁶¹ The word “examine” means “[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 806 (US-86).

¹⁶² GATT 1994, pmb1.

contained both obligations and exceptions, including the essential security exceptions at Article XXI.

256. Consistent with this language, the obligations and exceptions of the GATT 1994 are part of a single undertaking, in which it is specifically contemplated that Members will make use of exceptions, consistent with their text. As discussed in the U.S. First Written Submission, the text of Article XXI establishes that the invocation of this exception is self-judging by the Member taking action. And the GATT 1994 makes available a claim through which an affected Member may seek to maintain the level of reciprocal arrangements—namely, a non-violation, nullification and impairment claim. Accordingly, the object and purpose of the GATT 1994, as set forth in the agreement’s Preamble, further supports an interpretation of Article XXI(b) as self-judging.

b. What is the relevance of the precise standard of review (i.e. degree of deference) applied to elements that could be subject to objective review in dispute settlement proceedings?

257. The phrase “standard of review” does not appear in the DSU. In WTO dispute settlement, the DSU exists for disputes brought under the covered agreements (Article 1.1), “to preserve the rights and obligations of Member under the covered agreements” (Article 3.2), and not to “add to or diminish the rights and obligations provided in the covered agreements” (Articles 3.2, 19.2).

258. Under DSU Article 7.1, the Panel’s terms of reference call on the Panel to examine the matter referred to the DSB by the Member and “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [the covered agreements].” As this text establishes, the Panel has two functions: (1) to “examine” the matter – that is, to “[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests”¹⁶³; and (2) to “make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for” in the covered agreement.

259. This dual function of panels is confirmed in DSU Article 11, which states that the “function of panels” is to make “an objective assessment of the matter before it” and “such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Under Article 3.2 of the DSU, the provisions of the GATT 1994 are to be interpreted “in accordance the customary rules of interpretation of public international law.” In this dispute, the Panel’s function is to objectively assess the matter before it by examining the ordinary meaning of Article XXI(b) of the GATT 1994.

260. Article 31 of the VCLT provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in in the light of its object and purpose.” The DSU, therefore, makes clear that it is the text of the relevant agreement(s) that determines how a panel should assess a Member’s invocation of Article XXI(b).

¹⁶³ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870 (US-86).

261. The ordinary meaning of the terms of Article XXI(b), in their context, establishes that it is for a responding Member to determine what actions are necessary for the protection of its own essential security interests. That is, the self-judging nature of the provision is not a function of standard of review, or some general concept of discretion or deference. Rather, the self-judging nature of the provision is reflected in the text of Article XXI(b) itself. Because the text permits any action which a Member considers necessary for the protection of its essential security interests, once a Member has indicated that it has made such a determination, a panel may not second-guess that Member’s determination. Nor, given the overall grammatical structure of the provision, may a panel 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.

262. Instead, in making an objective assessment of the matter, including by interpreting Article XXI(b) according to the customary rules of interpretation under international law and without adding to or diminishing the rights and obligations of the Members, the Panel must limit its findings to an acknowledgement that the United States has invoked its rights under Article XXI(b). Because that provision is self-judging in its entirety, no additional findings will assist the DSB in resolving this dispute.

4.6 Negotiating history of Article XXI

To All

Question 56. With regard to recourse to supplementary means of interpretation under Article 32 of the Vienna Convention:

- a. Do the parties consider that interpretation according to Article 31 of the Vienna Convention leaves the meaning of Article XXI(b) ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable?**
- b. To what extent does the disagreement in the present proceedings on the interpretation of Article XXI(b) reflect ambiguity as to its meaning?**
- c. Would supplementary means of interpretation in this case only serve to confirm the meaning that results from Article 31?**

263. The meaning of Article XXI(b) is clear when that provision is interpreted in accordance with the customary rules of interpretation of public international law, as set forth in Article 31 of the Vienna Convention. As the United States has explained, so interpreted, Article XXI provides that it is for each Member to determine, for itself, what it considers necessary for the protection of its essential security interests. The disagreement in the present proceedings does not reflect ambiguity as to the meaning of Article XXI(b). The only interpretation of Article XXI(b) that is supported by the customary rules is the interpretation offered by the United States.

264. As the United States discusses in response to the Panel’s Question 69, in this dispute a number of Members have expressed views of Article XXI(b) that differ from their previous

statements in other circumstances. The text of Article XXI(b) has not changed since these statements were made. To the extent that certain Members suggest interpretations of Article XXI(b) in this dispute that differ from their prior statements, the United States can only assume that such differences are due to a difference in policy preferences and interests under the current circumstances. For their own reasons, these Members disapprove of the U.S. measures at issue in this dispute, and they wish to deprive the United States of its rights under Article XXI(b).

265. Consistent with the customary rules of interpretation, because the meaning of Article XXI(b) is clear as that provision is interpreted based on Article 31 of the Vienna Convention, supplementary means of interpretation serve only to confirm the meaning that results from the application of Article 31. As the United States has explained, supplementary means of interpretation – particularly the negotiating history of Article XXI(b) – confirm that under this provision it is for each Member to determine what it considers necessary for the protection of its essential security interests and to take action accordingly.

Question 57. What is the interpretive relevance of the negotiating history and materials relating to the GATT 1947 or Havana Charter to the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings under the DSU and the WTO Agreement?

266. The United States responds to the Panel’s Questions 57 and 58 together at Question 58, below.

Question 58. To what extent should reference to such negotiating history account for the evolution of dispute settlement from the GATT to the WTO and the specificity of the terms in the DSU?

267. The United States responds to the Panel’s Questions 57 and 58 together.

268. The fact that the elements of Article XXI(b) are not subject to review in WTO dispute settlement is clear from the text of Article XXI(b), as explained in the U.S. First Written Submission and in response to the Panel’s Questions 35 to 40. This interpretation of Article XXI(b) is confirmed by the negotiating history of the provision, and nothing in the DSU alters either the ordinary meaning of the terms of Article XXI, or the provision’s negotiating history.

269. This is especially so as the DSU provides that WTO dispute settlement serves “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.”¹⁶⁴ The DSU also makes clear that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”¹⁶⁵ Such provisions make clear that it is the text of the relevant covered

¹⁶⁴ DSU Art. 3.2.

¹⁶⁵ DSU Art. 3.3. *See also* DSU Art. 19.2.

agreement that determines the extent to which the issues presented are subject to review in WTO dispute settlement.

270. The ordinary meaning of the terms of Article XXI, in context, establish that it is for each Member to determine for itself what action is necessary for the protection of its essential security interests. As discussed in detail in response to the Panel's Question 62, numerous statements in the negotiating history of Article XXI confirm this interpretation of Article XXI.

Question 59. Regarding the recourse to non-violation claims:

a. What is the relevance of the fact that negotiating drafts did not appear to distinguish between violation and non-violation claims? (See Article 35(2) of Exhibit USA-33)

b. When specific provision was made for "the failure of another contracting party to carry out its obligations under this Agreement", is there evidence of any intended distinction in the scope of coverage or procedures to be followed based on whether a measure fell under subparagraph (a) or (b) of Article XXIII of the GATT 1947?

271. The draft ITO Charter introduced by the United States in September 1946 included a provision called "Consultation – Nullification or Impairment" that required Members to afford sympathetic consideration to claims regarding "any measure, whether or not it conflicts with the terms of this Charter . . . which has the effect of nullifying or impairing any object of [the commercial policy chapter of the draft ITO Charter]." ¹⁶⁶ If the parties were unable to resolve the matter, it could be referred to the ITO, which in turn could make recommendations, including the suspension of obligations or concessions. ¹⁶⁷

272. A distinction between what are now known as breach claims and non-violation claims was introduced into the negotiations by Australia in June 1947. Specifically, like the text that became GATT 1994 Article XXIII(1), Australia's June 1947 proposal permitted Members to seek redress for (a) "the failure of another Member to carry out its obligations under this Charter", (b) "the application by another Member of any measure, whether or not it conflicts with the provisions of this Charter", or (c) "the existence of any other situation." ¹⁶⁸

¹⁶⁶ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Article 30 (US-31).

¹⁶⁷ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Article 30 (US-31).

¹⁶⁸ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 1–2 (US-144).

273. In introducing its proposal, Australia set out several “main purposes” of the revised text.¹⁶⁹ These purposes included “to set out more clearly the circumstances in which a Member may make a complaint and seek to be released from obligations undertaken or concessions granted by it,” and “to provide for the fact that in some cases a complaining Member’s difficulties might not be due to any act or failure of another Member to whom complaint could appropriately be made, while retaining the provision that when another Member is clearly involved, consultation and conciliation between the Members should be attempted before the Matter is referred to the Organisation.”¹⁷⁰ After discussion in an ITO drafting sub-committee,¹⁷¹ a revised version of Australia’s proposal was incorporated into a draft of the GATT 1947 on July 24, 1947.¹⁷² This text was adopted into the draft ITO Charter on August 22, 1947.¹⁷³

274. As the United States has explained elsewhere, numerous statements by negotiators – including statements after the distinction was made between breach claims and non-violation claims – indicate that non-violation claims are the appropriate recourse for a Member affected by actions that another Member considers necessary for the protection of its essential security interests. For example, in a meeting of ITO Charter drafters on July 24, 1947 – after Australia had proposed distinguishing between breach claims and non-violation claims, but

¹⁶⁹ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 2 (US-144).

¹⁷⁰ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 2 (US-144); *see also* Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/12 (June 12, 1947), at 22 (quoting the Australian representative as stating that the reference to “the application by another Member of any measure, whether or not it conflicts with the provisions of Charter” was “taken over automatically from a standard clause in the old type of Trade Agreement and was designed, I presume, to deal primarily with possible attempts to evade obligations accepted in an exchange of tariff concessions”) (US-172).

¹⁷¹ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Summary Record of the 35th meeting of Commission A, held on Monday 11 August 1947, E/PC/T/A/SR/35 (Aug. 12, 1947), at 3 (discussing the transfer of Article 35(2) to Chapter VIII) (US-145); Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Chapter V, Articles 34, 35 and 38, Report by the Sub-Committee for submission to Commission A on Monday, 4th August, 1947, E/PC/T/146 (July 31, 1947), at 2 (stating that the sub-committee was unanimously in favor of transferring Article 35(2) to Chapter VIII) (US-146); Summary Record of the Twelfth Meeting, E/PC/T/A/SR/12 (June 12, 1947), at 1-7 (summarizing discussion of potential transfer of Article 35(2) to Chapter VIII) (US-173).

¹⁷² *See* Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135 (July 24, 1947), at 2 & 55 (including the revised text at Article XXI (the on “Nullification or Impairment”) and noting that the draft text appears in its “latest form” sometimes based on “texts prepared by sub-committees and Commissions of this Conference”) (US-147).

¹⁷³ *See* Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 166 (with “breach” language at Article 89 and NVNI language transposed from former Article 35) (US-37); Verbatim Report, Second Session of the Preparatory Committee of the United Nations Conference on Trade & Development, Twenty-Second Meeting In Executive Session, E/PC/T/EC/PV.2/2 (Aug. 22, 1947), at 47-48 (examining and approving Article 89 as reflected in report of August 19, 1947) (US-148).

before that proposal was adopted into the ITO Charter – the Chairman asked whether the drafters agreed that actions taken pursuant to the then-existing essential security exception “should not provide for any possibility of redress.”¹⁷⁴ In response, the U.S. delegate stated that actions that a Member considered necessary to protect its essential security interests “**could not be challenged** in the sense **that it could not be claimed** that the Member was **violating the Charter**”¹⁷⁵ – indicating the view that essential security actions could not be found to **breach** the Charter. The U.S. delegate also stated, however, that “redress **of some kind** under Article 35” would be available.¹⁷⁶

275. Neither the Chairman nor any representative disagreed with the U.S. delegate’s statement. In fact, immediately after the U.S. delegate’s explanation, the Australian delegate expressed appreciation for the United States’ assurance that “Member’s rights under Article 35(2) are not in any way impinged upon.”¹⁷⁷ The exchange demonstrates that in July 1947 the U.S. and other delegates were referring to a non-violation claim – as opposed to an alleged violation of the Charter – when referring to the redress available under Article 35(2) to Members affected by essential security actions.

276. In early 1948 – after the distinction between breach claims and non-violation claims had been adopted into the ITO Charter (as well as the GATT 1947) – drafters again confirmed that non-violation claims, rather than breach claims, were the appropriate redress for Members affected by essential security actions. For example, as stated in their report of January 9, 1948, a Working Party of representatives from Australia, India, Mexico, and the United States had “extensive discussions” of the provision on “Consultation between Members,” particularly subparagraph (b) of that provision, for claims based on the application of a measure “whether or not it conflicts with the provisions of the Charter.”¹⁷⁸ At this time, the “Consultation between Members” provision set out non-violation claims in subparagraph (b), while subparagraph (a) related to breach claims.¹⁷⁹

277. This Working Party “considered that [subparagraph (b) of the “Consultation between Members” provision] would apply to the situation of action taken by a Member such as

¹⁷⁴ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26 (US-41).

¹⁷⁵ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26–27 (emphases added) (US-41).

¹⁷⁶ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 27 (emphasis added) (US-41).

¹⁷⁷ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 27 (US-41).

¹⁷⁸ United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

¹⁷⁹ United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

action pursuant to Article 94 of the Charter [then the essential security exception].”¹⁸⁰ The explanation of the Working Party is worth considering in full:

Such action, for example, in the interest of national security in time of war or other international emergency would be entirely consistent with the Charter, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member.*¹⁸¹

278. This conclusion by the Working Party confirms that – after the distinction between non-violation claims and breach claims was adopted – the drafters continued to believe that non-violation claims, and not breach claims, are the appropriate recourse for Members affected by essential security actions.

279. Australia's statements in proposing the distinction between breach claims and non-violation claims – particularly its reference to cases in which “a complaining Member's difficulties might not be due to any act or failure of another Member *to whom complaint could appropriately be made*”¹⁸² – are consistent with these other statements of negotiators. Accordingly, that early negotiating drafts did not appear to distinguish between violation and non-violation claims does not alter the fact that negotiators viewed non-violation claims as the appropriate recourse for Members affected by actions another Member considered necessary for the protection of its essential security interests.

Question 60. Please comment on Japan's third-party oral statement and non-violation claims, particularly paragraph 9 below, in connection with the United States' view that non-violation complaints are the intended redress for matters involving essential security interests:

... Given that Members agreed that security measures taken under Article XXI(b) are permissible, they clearly contemplated the possibility and thus may reasonably expect that Members would have recourse to such an exception. As a consequence, Japan is of the view that Members cannot expect

¹⁸⁰ United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

¹⁸¹ United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-42).

¹⁸² Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947), at 2 (emphasis added) (US-144).

that other Members will never rely on Article XXI(b) to justify measures otherwise inconsistent with GATT obligations.

280. As the United States has explained,¹⁸³ numerous statements in the drafting history of Article XXI make clear that the negotiators viewed non-violation, nullification or impairment claims as the appropriate recourse for Members affected by essential security actions of another Member. That Members may have contemplated the possibility of other Members taking actions pursuant to Article XXI(b) at some point in the future, as Japan suggests, does not change the potential availability of non-violation claims for Members affected by essential security actions. Whether or not that relief is available in a particular circumstance would be assessed based on the particular factual circumstances of each case.

Question 61. What is the significance, if any, of the reference to "justiciable" issues in earlier draft versions of the ITO Charter and the absence of this reference in the agreed final texts?

281. In the September 1946 draft ITO charter, the ITO Conference—made up of representatives of ITO Members—was charged with interpreting the Charter.¹⁸⁴ ITO members could seek review by the International Court of Justice (ICJ), however, of “[a]ny justiciable issue” arising out of a decision of the Conference with respect to essential security and other national security-related exceptions.¹⁸⁵ That 1946 draft charter also included a single exceptions provision that covered both security-related exceptions as well as public health and other general exceptions, and the security-related exceptions lacked the pivotal phrase “it considers.”¹⁸⁶

282. In 1947, the draft ITO Charter was revised (1) to limit the ICJ’s role to issuing advisory opinions, (2) to separate essential security exceptions from general commercial exceptions, and (3) to make essential security exceptions both explicitly self-judging and

¹⁸³ See First Written Submission of the United States of America, *Certain Measures on Steel and Aluminum Products*, Part III.A.3.

¹⁸⁴ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter VII Organization, Section C, The Conference, Article 52 & 53, at 64 (stating that the Conference shall consist of the representatives of the Members of the ITO, each Member shall have one representative, and each Member shall have one vote in the Conference) (US-31).

¹⁸⁵ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter VII, Organization, Section G, Miscellaneous Provisions, Article 76. Interpretation and Settlement of Legal Questions, at 67 (“Any justiciable issue arising out of ruling of the Conference with respect to the interpretation of subparagraphs (c), (d), (e) or (k) of Article 32 or of Paragraph 2 of Article 49 may be submitted by any Party to the dispute to the International Court of Justice, and any justiciable issue arising out of any other ruling of the Conference may, if the Conference consents, be submitted by any Party to the dispute to the International Court of Justice.”) (US-31).

¹⁸⁶ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter, Chapter IV General Commercial Policy, Section I, General Exceptions, Article 32, General Exceptions to Chapter IV, at 60 (US-31).

applicable to the entire Charter. Changes to the ICJ’s role in the ITO arose out of suggestions that it would be improper for the ICJ to review decisions by the ITO Conference,¹⁸⁷ and that “[t]he distinction between ‘justiciable’ and other issues”—in the dispute settlement provisions relating to essential security matters—was “untenable and unworkable.”¹⁸⁸ Thereafter the security exceptions were also revised in various ways, including the addition of the pivotal phrase “it considers,” the separation of the security exceptions from the public health and other general exceptions that would become GATT 1994 Article XX, and the movement of the security exception to the final chapter of the ITO Charter so that it would be applicable to the entire agreement.¹⁸⁹

283. As the United States explains more fully in response to the Panel’s Question 29, the non-justiciable nature of the issues presented in this dispute is based on the terms of Article XXI(b), which leave to the Member the determination as to the necessity of a measure for the protection of that Member’s essential security interests. The reference to “justiciable” issues in early drafts of the ITO Charter could be seen as an indication that the drafters recognized from the beginning that at least some issues related to essential security would not be justiciable – i.e., were not appropriate or suitable for adjudication by a court.¹⁹⁰ The omission of the reference from the final text – particularly when viewed alongside the changes to the terms of the essential security exception itself to add the phrase “it considers” – acknowledges that all such issues are non-justiciable in that they must be left to the judgment of each Member.

284. In any event, the presence of this word in an early draft of the ITO Charter does not change the ordinary meaning of the terms of Article XXI(b), which themselves establish the non-justiciable nature of this text.

Question 62. To what extent is the negotiating history of Article XXI clear or definitive on the question of the standard and scope of review to be applied to an invocation of Article XXI in dispute settlement proceedings under the DSU? What implications does this have for the Panel's objective assessment under Article 11 of the DSU and its overall analysis in this dispute?

285. As the United States explained in response to the Panel’s Questions 57 and 58, the ordinary meaning of the terms of Article XXI(b), in context, establish that it is for each

¹⁸⁷ Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 (US-33).

¹⁸⁸ Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947), at 51 (US-33).

¹⁸⁹ See Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development, E/PC/T/W/236, at Annex A (July 4, 1947) (including an essential security exception with the “it considers” language) (US-35).

¹⁹⁰ See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1466 (US-68) (defining “justiciable” as “[I]iable to be tried in a court of justice; subject to jurisdiction); *Black’s Law Dictionary*, 8th edn, Bryan A. Garner (ed.), (2004), at 882 (defining “justiciability” as “[t]he quality or state of being appropriate or suitable for adjudication by a court.”) (US-69).

Member to determine for itself what action is necessary for the protection of its essential security interests, and that exercise of this right is not subject to review in WTO dispute settlement. The negotiating history of Article XXI(b) confirms this interpretation of the provision, and nothing in the DSU changes either the terms of Article XXI or the negotiating history of this provision.

286. As the United States has discussed elsewhere, numerous statements in the negotiating history of Article XXI confirm the interpretation of Article XXI(b) as self-judging.¹⁹¹ For example, the U.S. delegate stated in July 1947, actions that a Member considered necessary to protect its essential security interests “**could not be challenged** in the sense **that it could not be claimed** that the Member was **violating the Charter**.”¹⁹²

287. Similarly, in early 1948, a Working Party of representatives from Australia, India, Mexico, and the United States had “extensive discussions” of the provision on “Consultation between Members,” particularly subparagraph (b) of that provision, for claims based on the application of a measure “whether or not it conflicts with the provisions of the Charter.”¹⁹³ As stated in its report, the Working Party “considered that [subparagraph (b) of the “Consultation between Members” provision] would apply to the situation of action taken by a Member such as action pursuant to Article 94 of the Charter [then the essential security exception].”¹⁹⁴ As the Working Party explained:

Such action, for example, in the interest of national security in time of war or other international emergency **would be entirely consistent with the Charter**, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have the right to bring the matter before the Organization, **not on the ground that the measure taken was inconsistent with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member**.¹⁹⁵

¹⁹¹ See *United States – Certain Measures on Steel and Aluminum Products*, First Written Submission of the United States, Part III.A.3; *United States – Certain Measures on Steel and Aluminum Products*, Opening Oral Statement of the United States, Part D.

¹⁹² Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26–27 (emphases added) (US-41).

¹⁹³ United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

¹⁹⁴ United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (US-42).

¹⁹⁵ United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30 (Jan. 9, 1948), at 2 (emphasis added) (US-42).

288. These and other statements by negotiators during the negotiation of the text that became Article XXI(b) confirm the self-judging nature of that provision, as established by the ordinary meaning of the terms of the provision, in context.

289. Negotiators’ discussions during the Uruguay Round also confirm this interpretation of Article XXI(b). In Uruguay Round negotiations on the GATT 1947, Article XXI was initially among the provisions proposed for review,¹⁹⁶ and amendments were proposed.¹⁹⁷ Negotiators declined to revise Article XXI, however, and the provision was left unchanged in the GATT 1994.

290. In a November 1987 communication to the Negotiating Group on GATT Articles, Nicaragua requested the inclusion of Article XXI among the GATT 1947 articles to be reviewed by the negotiating group.¹⁹⁸ A few months later, Argentina expressed concern regarding prior invocations of Article XXI in a communication to the negotiating group, and stated that, “[e]xperience has shown that there is no restriction on the unilateral interpretation of the contracting party invoking [Article XXI], which creates a legal gap that will have to be studied and resolved during the current Round of Negotiations.”¹⁹⁹ Argentina suggested, among other things, that the negotiating group interpret terms of Article XXI – including protection of essential security interests and time of war or other emergency in international relations – “to limit possible arbitrariness.”²⁰⁰ Argentina also suggested that negotiators ensure “suitable legal protection for developing or commercially weaker contracting parties,” who could be left without “any effective retaliation” when affected by Article XXI actions.²⁰¹

291. Thereafter, Nicaragua proposed two interpretive notes for Article XXI and the addition of a provision to benefit developing country Members affected by essential security actions. Nicaragua’s first proposed note would interpret “which it considers” to require that “[a]ny invocation of this provision must be in good faith” and to require Members taking essential security actions to first pursue bilateral negotiations and appeals to the United

¹⁹⁶ Negotiating Group on GATT Articles, Meeting of 3 March 1987, Note by the Secretariat, MTN.GNG/NG7/1/Rev.1 (Apr. 3, 1987), at 3 (US-149).

¹⁹⁷ Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-150); Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988) (US-151).

¹⁹⁸ Negotiating Group on GATT Articles, Communication from Nicaragua, MTN.GNG/NG7/W/34 (Nov. 12, 1987), at 1 (US-152).

¹⁹⁹ Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988), at 1 (US-151).

²⁰⁰ Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988), at 3 (US-151).

²⁰¹ Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988), at 3 (US-151).

Nations or “other appropriate inter-governmental organisation.”²⁰² Nicaragua’s second proposed note would interpret “emergency in international relations” to “refer only to situations which in the opinion of the CONTRACTING PARTIES threaten international peace and security and which the party invoking the Article has first sought to resolve by appealing to the appropriate body of the United Nations or other appropriate inter-governmental organisation that deals with peace and security issues.”²⁰³

292. Finally, Nicaragua proposed the adoption of an additional provision to Article XXI that would require the CONTRACTING PARTIES to make “obligatory” recommendations to compensate developing country Members whose rights or benefits were nullified or impaired by another Member’s actions under Article XXI under certain circumstances. As Nicaragua’s third proposal stated:

The CONTRACTING PARTIES shall make recommendations, which shall be obligatory, with a view to compensating in full any developing country whose rights or benefits under the General Agreement have been nullified or impaired by the actions taken by another contracting party under Article XXI, provided that in the opinion of the CONTRACTING PARTIES the acts cited by the contracting party invoking Article XXI as the basis for such invocation do not constitute acts taken in time of war or other emergency in international relations or a violation of international law.²⁰⁴

293. Other negotiators disagreed with these proposals. Some delegates emphasized the sensitivity of issues presented under Article XXI and the need to preserve Members’ discretion with respect to such issues.²⁰⁵ These Members further suggested that “it was unrealistic to think of a GATT body placing conditions on [Article XXI’s] use since only the individual contracting party concerned was ultimately in a position to judge what its security interests were.”²⁰⁶ Another delegation opined that “since the GATT has no competence in the determination of questions of security or of a political nature, it seemed doubtfully useful to set up any institutional test to determine whether a matter was security-related or political.”²⁰⁷ With these statements, negotiators during the Uruguay Round expressed views

²⁰² Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988), at 1 (US-150).

²⁰³ Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988), at 1 (US-150).

²⁰⁴ Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988), at 1 (US-150).

²⁰⁵ Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2 (US-153).

²⁰⁶ Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2 (US-153).

²⁰⁷ Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2—3 (US-153).

in support of the U.S. position in this dispute as to the meaning of the GATT text – namely, that matters of essential security under Article XXI are left to the judgment of Members.

294. Even those delegations that agreed with Nicaragua and Argentina acknowledged this meaning of the existing text of Article XXI. Meeting minutes indicated that some delegations “shared the view that there was a danger of [Article XXI] being abused if governments were not cautious in its invocation.”²⁰⁸ Ultimately, the text of Article XXI was not changed.

295. In arguing that Article XXI(b) is self-judging, however, the United States does not suggest that the Panel should not make an objective assessment of the matter within the meaning of DSU Article 11. To the contrary, the Panel should fulfil its functions under the DSU and make an objective assessment of the matter, including by interpreting Article XXI(b) according to the customary rules of interpretation under international law and without adding to or diminishing the rights and obligations of the Members. As described in response to the Panel's Question 37, in this objective assessment, the Panel must limit its findings to an acknowledgement that the United States has invoked its rights under Article XXI(b). Because that provision is self-judging in its entirety, no additional findings will assist the DSB in resolving this dispute.

4.7 Internal documents of the US negotiating delegation

To All

Question 63. Is it correct that the documents referred to by the United States were not in the public domain, and were inaccessible to other parties, during the negotiations to which they relate? If so, how may they be considered relevant to:

a. establishing the common intention of the parties to the treaty?

b. providing evidence of "the circumstances of [a treaty's] conclusion" within the meaning of Article 32 of the Vienna Convention?

296. The documents included at Exhibits US-48, US-49, US-52, US-53, US-54 were indeed not in the public domain and were not accessible to other parties during the negotiations to which they relate. As such, they are not relevant to establishing the common intention of the parties to the treaty. Nor do these documents provide historical context against which the treaty was negotiated,²⁰⁹ as the documents include only internal discussions

²⁰⁸ Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 3 (US-153).

²⁰⁹ See Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edn (1984), at 141 (excerpt) (“[T]he reference in Article 32 of the Convention to the circumstances of the conclusion of a treaty may have some value in emphasising the need for the interpreter to bear constantly in mind the historical background against which the treaty has been negotiated.”) (US-30); Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/167 and Add.1-3), at 59 para. 22 (noting that a reference to “the circumstances surrounding the conclusion of the treaty” in a draft of the Vienna Convention “is intended to cover both the contemporary circumstances and the historical context in which the treaty was concluded.”) (US-154).

of one delegation. Accordingly, these documents do not provide evidence of the circumstances of the treaty's conclusion.

4.8 1949 GATT Council Decision

TO ALL

Question 64. Must a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention be one that "clearly expresses a common understanding, and an acceptance of that understanding among Members"?

297. The United States responds to the Panel's Questions 64 and 67 together.

298. Article 31(3)(a) of the VCLT provides that, together with context, a "subsequent agreement between the parties regarding the interpretation of the treaty" "shall be taken into account." That subsequent agreement should express a common understanding on the interpretation or application of a treaty. Accordingly, the Panel should take into account the subsequent agreement reflected in the GATT *United States Export Restrictions* decision by the CONTRACTING PARTIES regarding the self-judging nature of Article XXI(b), which is entirely consistent with the ordinary meaning set out above.

299. In *United States Export Restrictions*, Czechoslovakia requested that the GATT Council decide under Article XXIII whether the United States had failed to carry out its GATT obligations through its administration of export licenses. In explaining its request, Czechoslovakia claimed that the United States had engaged in discrimination in violation of Article I by withholding certain export licenses. In the GATT Council meeting discussing Czechoslovakia's request, various parties expressed the view that Article XXI is self-judging. In discussing the decision to be made in that meeting, the Chairman opined that the question of whether U.S. measures conformed to GATT Article I "was not appropriately put" because the United States had defended its actions under Article XXI, which "embodied exceptions" to Article I.²¹⁰ Instead, the Chairman stated, the question should be whether the United States "had failed to carry out its obligations" under the GATT 1947. The Chairman's statement indicates that the relevant question is a broader one—whether the United States has any obligations under the GATT 1947 given its invocation of Article XXI. After discussing the matter, 17 contracting parties held—with only Czechoslovakia dissenting—that the United States had not failed to carry out its obligations under the GATT.²¹¹

²¹⁰ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27).

²¹¹ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).

300. The rules of procedure existing at that time provided that “decisions shall be taken by a majority of the representatives present and voting.”²¹² The rules neither restricted the contracting parties’ ability to interpret the provisions of GATT 1947 nor provided special procedures for adopting an interpretation of the provisions. It is in this context that the CONTRACTING PARTIES came to their decision regarding the United States’ invocation of Article XXI, and under Article 31(3)(a) of the Vienna Convention the Panel should take this decision into account.

301. After the vote, the representative of Czechoslovakia inquired “whether the decision could not be communicated to all members of the Interim Commission of the International Trade Organization, so that they would be informed of the *interpretation* given by the CONTRACTING PARTIES of the provisions of the Havana Charter”.²¹³ No Contracting Party disagreed with that statement. The Appellate Body in *US-Clove Cigarettes* noted that the term agreement in Article 31(3)(a) of the Vienna Convention refers, fundamentally, to substance rather than to form. From the discussions in the *United States Export Restrictions* emerges a clear interpretation of Article XXI(b) as self-judging. The decision thus “clearly expresses a common understanding, and an acceptance of that understanding among Members” with regard to the self-judging nature of Article XXI(b).

Question 65. Can a non-consensus decision be considered to express an "agreement" within the meaning of Article 31(3)(a) of the Vienna Convention?

302. Article 31(3)(a) of the Vienna Convention does not require a subsequent agreement on interpretation to be adopted by consensus of all the parties to an agreement. The text of Article 31 of the Vienna Convention demonstrates this point. Article 31(2)(a) refers to “all the parties.” By contrast, Article 31(3)(a) refers to “the parties.” What is relevant, therefore, is whether the parties have reached agreement pursuant to the decision-making rules that they have agreed for purposes of that agreement.

303. As discussed above, the interpretation in *United States Export Restrictions* was adopted by the GATT Council in accordance with the rules in place at that time, which required a majority vote of representatives present and voting at the GATT Council meeting.

²¹² General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedure GATT/CP.2/3 Rev.1 (Aug. 16, 1948) (Rule 27 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”) (US-90); General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949) (Rule 28 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”) (US-91).

²¹³ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27) (emphasis added).

²¹⁴ Therefore, the fact that Czechoslovakia dissented from the decision does not undermine the import of the interpretation reflected in the decision.

Question 66. In view of the interpretive question raised in these proceedings, must a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention be "subsequent" to the WTO Agreement, DSU, and GATT 1994 (rather than the GATT 1947)?

304. The United States responds to the Panel's Questions 66 and 68 together. The Panel should take into account the subsequent agreement reflected in the *United States Export Restrictions* decision regarding the self-judging nature of Article XXI(b). The context in which the interpretation was adopted by the GATT Council supports the United States' argument.

305. Under the GATT 1947, Article XXIII:2 provided that the CONTRACTING PARTIES themselves, acting jointly, had to deal with any dispute between individual contracting parties. The disputes in the very early years of GATT 1947 were decided by rulings of the Chairman of the GATT Council.²¹⁵ Later, they were referred to working parties composed of representatives from all interested contracting parties.²¹⁶ These working parties were soon replaced by panels made up of three or five independent experts.²¹⁷

306. It is in the context of Article XXIII that Czechoslovakia sought an interpretation of Article XXI. Specifically, Czechoslovakia requested that the GATT Council decide under Article XXIII whether the United States had failed to carry out its GATT obligations through its administration of export licenses. As discussed further in the U.S. response to Question 64, various parties expressed the view that Article XXI(b) is self-judging, and the GATT Council held that, in light of the U.S. invocation of Article XXI, the United States had not failed to carry out its obligations under the GATT.²¹⁸

²¹⁴ General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedure GATT/CP.2/3 Rev.1 (Aug. 16, 1948) (Rule 27 provided, "Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.") (US-90); General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949) (Rule 28 provided, "Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.") (US-91).

²¹⁵ WTO, *A Handbook of the WTO Dispute Settlement System*, at 327 (2nd edn. 2017) (US-155).

²¹⁶ WTO, *A Handbook of the WTO Dispute Settlement System*, at 327 (2nd edn. 2017) (US-155).

²¹⁷ WTO, *A Handbook of the WTO Dispute Settlement System*, at 327 (2nd edn. 2017) (US-155).

²¹⁸ Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949), at 9 & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949) (US-27). Those voting in favor of this position were Australia, Belgium, Brazil, Canada, Ceylon, Chile, China, Cuba, France, The Netherlands, New Zealand, Norway, Pakistan, S. Rhodesia, South Africa, the United Kingdom, and

307. The rules of procedure existing at that time provided that “decisions shall be taken by a majority of the representatives present and voting.”²¹⁹ The rules neither restricted the contracting parties’ ability to interpret the provisions of GATT 1947 nor provided special procedures for adopting an interpretation of the provisions. While the contracting parties subsequently adopted a practice of adopting interpretations of the GATT 1947 through joint actions under Article XXV of the GATT 1947, that practice had not yet developed when the *United States Export Restrictions* decision was made.²²⁰

308. Given that the GATT 1947 was incorporated verbatim into the GATT 1994 with any modifications or deviations set out in separate provisions, and the text of Article XXI of the GATT 1947 is identical to the text of Article XXI of the GATT 1994, the interpretation reflected in the *United States Export Restrictions* decision is also a subsequent agreement for purposes of the interpretation of Article XXI of the GATT 1994.

Question 67. Did the decision of 8 June 1949 by GATT CONTRACTING PARTIES (the Czechoslovakia Decision) address the general interpretive question of the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings? If not, what significance would this have for characterizing the decision as a "subsequent agreement" under Article 31(3)(a) in relation to the question at issue?

309. The United States has responded to Panel Question 67 in its response to Question 64, above.

Question 68. What is the relevance of the fact that the Czechoslovakia Decision related to consideration of an Article XXI invocation by the GATT Council, rather than a panel established in accordance with the DSU?

the United States. Three parties abstained (India, Lebanon, and Syria), and two parties were absent (Burma and Luxembourg).

²¹⁹ General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedure GATT/CP.2/3/Rev.1 (Aug. 16, 1948) (Rule 27 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”) (US-90); General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949) (Rule 28 provided, “Except as otherwise specified in the General Agreement on Tariffs and Trade, decisions shall be taken by a majority of the representatives present and voting.”) (US-91).

²²⁰ Such a practice developed from the Chairman’s statement during the August 8, 1949 meeting of the Contracting Parties. At the meeting, the Chairman interpreted the Article XXV’s phrase “with a view to facilitating the operation and furthering the objectives of this Agreement” as “enabling the CONTRACTING PARTIES acting jointly to interpret the Agreement whenever they saw fit.” Summary Record of Thirty-Seventh Meeting, Aug. 8, 1949, GATT/CP.3/SR.37 (Aug. 8, 1949) at 5 (US-156). Since then, the Contracting Parties took actions under Article XXV of the GATT 1947 to provide interpretations of the agreement. However, the *United States Export Restrictions* decision took place in June 1949, two months prior to the Chairman’s statement that led to the development of such practice.

310. The United States has responded to Panel Question 68 in its response to Question 66, above.

4.9 VIEWS OF GATT CONTRACTING PARTIES

TO ALL

Question 69. What is the interpretive relevance and value of views expressed by GATT contracting parties prior to the entry into force of the WTO Agreement, particularly in light of whether they reflect a consensus position? For example, do they constitute:

- a. interpretive elements under the Vienna Convention?**
- b. part of the GATT 1994 by virtue of paragraph (1)(b)(iv) of the GATT 1994?**
- c. guidance pursuant to Article XVI:1 of the WTO Agreement?**

311. The United States responds to Questions 69 and 70 together at Question 70, below.

Question 70. Do these views reflect a consensus position of the GATT contracting parties that invocations of Article XXI are not subject to review by a dispute settlement panel?

- a. If not, how could the Panel rely upon such views to the extent they reflect a difference of views on this question?**
- b. If so, what is the relevance of the different institutional setting in which such views were expressed, namely in the absence of compulsory dispute settlement as provided for under the DSU?**

312. The United States responds to Questions 69 and 70 together. The U.S. interpretation of Article XXI – based on the customary rules of interpretation – is supported by views repeatedly expressed by GATT Contracting Parties in connection with prior invocations of their essential security interests. As the United States has explained, every Member invoking Article XXI has taken its view that the provision is self-judging. The United States has also explained that its own interpretation of Article XXI(b) has been consistent for more than 70 years. That some Contracting Parties (now Members) may have disagreed with these interpretations of Article XXI(b) does not change the meaning of Article XXI, as interpreted according to customary rules of interpretation of public international law, or the balance struck during the negotiation of the GATT 1947.

313. Such previously expressed views of Members do not have particular status under Articles 31 and 32 of the Vienna Convention on the law of treaties, however, nor are these views part of the GATT 1994 by virtue of paragraph (1)(b)(iv), or guidance pursuant to Article XVI:1 of the WTO Agreement. As discussed above in response to Question 24, the DSB calls on the Panel to apply customary rules of interpretation, but does not otherwise limit the scope of materials that the Panel may take into account when making findings in a particular dispute. Thus, such statements can inform or support the meaning of Article XXI as interpreted according to the customary rules of public international law and the Panel may find it instructive to consider such statements.

314. The United States observes that in the context of this dispute a number of Members have expressed views of Article XXI(b) that differ from their previous statements. For example, the European Union – in contrast to its statements in this dispute – previously stated, among other things, that “[t]he exercise of these rights [in Article XXI] constituted a general exception, and required *neither notification, justification, nor approval*, a procedure confirmed by thirty-five years of implementation of the General Agreement.”²²¹ The European Union expressed these views in 1982 when it – along with Australia and Canada – invoked Article XXI to justify the application of certain measures against Argentina in light of Argentina’s actions in the Falkland Islands.²²² The European Union also made similar statements in 1985, after Nicaragua asked the GATT Council to condemn a U.S. embargo and to request that the United States revoke these measures immediately.²²³

315. Russia has taken a different view of Article XXI in this dispute than the one it asserted in 2018, in a dispute in which Russia was the respondent and invoke Article XXI(b). There, Russia argued that this provision was “self-judging,” meaning that only the acting Member could determine what action it considered necessary for the protection of its essential security interests.²²⁴ As Russia explained in this prior dispute:

[T]he WTO is not in a position to determine what essential security interests of a Member are, what actions are necessary for protection of such essential security interests, disclosure of what information may be contrary to the essential security interests of a Member, what constitutes an emergency in international relations, and whether such emergency exists in a particular case.²²⁵

316. Russia also argued in that dispute that the Panel, and the WTO more generally, “being trade mechanisms are not in a position to determine whether sovereign states are at war. Similar logic applies to ‘other emergency in international relations’. Only sovereign states may declare the status of their relations with other sovereign states.”²²⁶ Moreover, Russia argued there that a Member’s assessment of such matters cannot be “doubted or re-evaluated by any other party.”²²⁷

²²¹ GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982), at 10 (US-59) (italics added).

²²² See GATT Council, Minutes of Meeting on May 7, 1982, C/M/157 (June 22, 1982) (US-59); Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) (US-60).

²²³ See Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985), at 2, 13 (US-63).

²²⁴ Russia’s closing statement at the first meeting of the Panel, para. 11 (quoted in *Russia – Traffic in Transit*, para 7.29 and note 69).

²²⁵ Russia’s closing statement at the first meeting of the Panel, para. 6. (quoted in *Russia – Traffic in Transit*, para. 7.28).

²²⁶ Russia’s closing statement at the first meeting of the Panel, para. 13 (quoted in *Russia – Traffic in Transit*, para. 7.28 & note 67).

²²⁷ Russia’s opening statement at the second meeting of the Panel, para. 23 (quoted in *Russia – Traffic in Transit*, para. 7.29).

317. The text of Article XXI(b) has not changed since such statements were made. To the extent that these or other Members offer interpretations in this dispute that differ from their prior statements regarding Article XXI(b), the United States suggests that such differences may be due to their differing policy preferences and interests.

318. Regarding the Panel's reference to the "institutional setting in which such views were expressed, namely the absence of compulsory dispute settlement as provided for under the DSU": As the United States has explained in response to Questions 26 and 27, nothing in the DSU alters the ordinary meaning of the terms of Article XXI(b), which establishes that it is for each Member to determine for itself what it considers necessary for the protection of its essential security interests. This is the interpretation of Article XXI(b) that has been asserted by Members invoking Article XXI for more than 70 years and the interpretation that the United States has maintained since the GATT 1947 entered into force and maintains in this dispute.

4.10 Other considerations under Article XXI

TO COMPLAINANT

Question 71. Please clarify the legal standard of review you contend should be applied by the Panel under Article XXI(b) with reference to the measures at issue (including the USDOC Reports and Presidential Proclamations). In particular, please explain how your proposed standard of review should be applied in determining the (in)applicability or (non-)fulfilment of the terms of Article XXI(b) and which aspects of the measures at issue would be relevant for this purpose, for example regarding:

- a. The existence of "essential security interests";
- b. Whether the action is taken "for the protection of" such interests; and
- c. The existence of conditions or circumstances provided in the subparagraphs of Article XXI(b)?

319. This question is addressed to the complainant.

Question 72. Are the circumstances described in the subparagraphs of Article XXI(b) equally susceptible to review as part of a panel's objective assessment? For example, is a panel capable of objectively reviewing whether there is an "emergency in international relations" in the same way as it is capable of objectively reviewing whether certain products are "fissionable materials"?

320. This question is addressed to the complainant.

TO ALL

Question 73. What would be the legal relevance of factual evidence that is submitted in dispute settlement proceedings calling into question or factually contradicting the fulfilment of the requirements of Article XXI(b), and particularly the conditions provided in the subparagraphs thereof?

a. To United States: In its first written submission, the European Union has submitted evidence, including information derived from the USDOC Section 232 Reports, indicating that the adverse economic consequences suffered by the US steel and aluminium industries have been limited to a single, poorly performing segment of each industry, namely BOF steel producers and primary aluminium producers respectively. By contrast, other, and larger, segments of the US industry, for example the secondary aluminium segment, have been thriving. Please respond to these arguments in relation to the requirements of Article XXI(b) of the GATT 1994 and the United States' position that the measures taken in relation to steel and aluminium are considered necessary for the protection of its essential security interests.

b. To United States: The European Union has referred to a Memorandum by the US Department of Defence (Exhibit EU-14), according to which "the U.S. military requirements for steel and aluminium each only represent about three percent of U.S. production. Therefore, DoD does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminium necessary to meet national defense requirements." How does this statement affect the United States' position that the measures at issue are considered necessary for the protection of its essential security interests?

321. The United States responds to the Panel's Questions 73(a) and (b) together. As the United States has explained in response to the Panel's Question 29 and previously in this dispute, once a Member invokes Article XXI, this invocation is sufficient to establish the application of this provision. Nothing in Article XXI imposes a requirement to furnish reasons for or explanations of an action for which Article XXI is invoked. In the absence of language imposing such a requirement, no such obligation may be imposed on a Member through dispute settlement.

322. The European Union's arguments regarding BOF steel producers and primary aluminium producers come to nothing. The European Union's argument and the evidence it offers do not address whether *the United States considers* the action necessary for the protection of its essential security interests in one or more of the circumstances set forth in Article XXI(b). As the Section 232 Presidential Proclamations evidence, the duly empowered U.S. actor has made findings concerning, and exercised domestic legal authority to protect, the national security of the United States. Instead, the European Union is attempting to argue that, in its own view, the challenged measures are not necessary for the protection of the United States' essential security interests.

323. Similarly, the communication of the U.S. Department of Defense does not indicate that the United States does not consider the measures at issue to have been necessary. These statements represent just one piece of information that the Secretary of Commerce considered in finding that the steel and aluminium imports threaten to impair the national security of the

United States,²²⁸ and just one piece of information that the President considered in deciding to concur with the Secretary’s findings.

c. To All: How does Article XXI(b) operate in the context of the European Union's claims against Section 232 as interpreted?

324. The United States has invoked Article XXI(b) as a basis for the challenged measures. The challenged measures are therefore justified under Article XXI(b).

5 RELATIONSHIP BETWEEN ARTICLES XXI AND XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS

TO ALL

Question 74. Are safeguards disciplines and Article XXI of the GATT 1994 mutually exclusive in terms of the scope of the measures covered and subject matter addressed? In this regard:

a. What is the relevance of Article 11.1(c) of the Agreement on Safeguards to the mutual exclusivity of safeguards disciplines and Article XXI of the GATT 1994?

b. What is the relevance of the principle of cumulative application of WTO obligations to the mutual exclusivity of safeguard disciplines and Article XXI of the GATT 1994?

c. Please comment on the circumstances, if any, where measures that have been sought, taken or maintained pursuant to Article XXI of the GATT 1994 would fall outside the scope of the Agreement on Safeguards by virtue of Article 11.1(c).

325. The authority under which a Member acts – and any disciplines that apply – are mutually exclusive in the context presented in this dispute. This is established by the terms of the relevant provisions, especially Article 11.1(c) of the Agreement on Safeguards. Article 11.1(c) states that the Agreement on Safeguards “does not apply to measures sought, taken or maintained by a Member pursuant to provision of GATT 1994 other than Article XIX.” Under this provision, the Agreement on Safeguards and GATT 1994 Article XXI are mutually exclusive in terms of their application in a particular case. In other words, the ordinary meaning of Article 11.1(c) precludes the cumulative application of the Agreement

²²⁸ Section 232 statute provides that, “[i]n the course of any investigation conducted under this subsection, the Secretary shall—(i) consult with the Secretary of Defense regarding the methodological and policy questions raised in any investigation initiated under paragraph (1), (ii) seek information and advice from, and consult with, appropriate officers of the United States, and (iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.” Section 232 statute, 19 U.S.C. 1862(b)(2)(A) (US-1). The statute also sets forth a list of relevant factors that the Secretary of Commerce and the President must consider. The list includes “the impact of foreign competition on the economic welfare of individual domestic industries; and 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.” Section 232 statute, 19 U.S.C. 1862(d) (US-1).

on Safeguards and Article XXI of the GATT 1994 where the measure at issue has been sought, taken, or maintained under the latter provision.

326. This result is consistent with Article 1 of the Agreement on Safeguards, which states that “[t]his 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.” Here, just as the United States has not “sought, taken, or maintained” a measure pursuant to Article XIX within the meaning of Article 11.1(c), the United States has also not “applied” a measure “provided for” in Article XIX within the meaning of Article 1. Instead, the U.S. measure at issue here was taken pursuant to Article XXI of the GATT 1994. Thus, consistent with Article 1, the Agreement on Safeguards does not “establish[] rules” for the measures at issue in this dispute.

327. There may be some overlap, however, between – as the Panel’s question states – “the scope of the measures covered and subject matter addressed” by Article XXI and Article XIX. That is, the types of measures and the circumstances in which a Member may take action which it considers necessary for the protection of its essential interests under Article XXI may or may not overlap with the types of measures and the circumstances in which a Member may take action under Article XIX and the Agreement on Safeguards. In other words, the same measure could fall within Article XIX *or* Article XXI, depending on the legal basis in the covered agreements pursuant which the Member takes its action, including whether the Member provides notice of its measure as a safeguard and affords affected Members an opportunity to consult in accordance with Article XIX.

328. Under the ordinary meaning of the terms in Article 11.1(c) of the Agreement on Safeguards, whenever a Member has sought, taken, or maintained the measures in question pursuant to a provision of the GATT 1994 *other than* Article XIX – for example, Article XXI – those measures will fall outside the scope of the Agreement on Safeguards. Therefore, although the same circumstance or factual situation could lead a Member to take action pursuant to Article XXI *or* Article XIX, when the Member *has* sought or taken an action pursuant to Article XXI, Article 11.1(c) makes clear that the Agreement on Safeguards “does not apply.”

d. Does the requirement in Article 11.1(a) of the Agreement on Safeguards indicate that Article XIX of the GATT 1994 and the Agreement on Safeguards are the only applicable provisions to economic emergency actions as set forth in Article XIX of the GATT 1994?

e. Does the subject matter of the paragraphs of Article XXI, and the subparagraphs of Article XXI(b), indicate that "essential security interests" within the meaning of that provision are distinct from, or narrower than, economic security interests?

f. What is the relevance of the fact that both Articles XIX and XXI refer to responses to "emergency" situations?

329. Article 11.1(a) of the Agreement on Safeguards does not indicate that Article XIX and the Agreement on Safeguards are the only applicable provisions to economic emergency actions. A Member could take any number of actions in response to what it might consider economic emergencies, such as raising its ordinary customs duty. As discussed in the U.S.

response to parts (a) to (c) of Question 74, there may be some overlap in the scope of measures potentially covered by both the Agreement on Safeguards and Article XXI. Whether the Agreement on Safeguards, Article XXI, or another provision applies, however, depends on the legal basis pursuant to which the Member takes the relevant action.

330. Article 11.1(a) refers to “emergency action on imports . . . as set forth in Article XIX” – this language means a safeguard action for which a Member has invoked Article XIX. Thus, Article 11.1(a) provides that when a Member takes or seeks emergency action on imports “as set forth in Article XIX”, it must comply with Article XIX and the Agreement on Safeguards.

331. However, a Member may take what might be referred to as “emergency action” under a number of different provisions, including Article XXI. Article 11.1(a) of the Agreement on Safeguards does not limit a Member’s choice of action. As provided in Article 11.1(c) of the Agreement on Safeguards, when a Member has “sought, taken or maintained” actions pursuant to provisions of the GATT 1994 or the WTO Agreement other than Article XIX, the Agreement on Safeguards “does not apply”.

332. Similarly, the subject matter of the paragraphs of Article XXI, and the subparagraphs of Article XXI(b), do *not* indicate that “essential security interests” within the meaning of Article XXI are distinct from, or narrower than, “economic security” interests. The term “security” refers to “[t]he condition of being protected from or not exposed to danger.”²²⁹ As this definition indicates, the term “security” is broad and could encompass what one might describe as “economic security.” Furthermore, nothing in Article XXI(b) would prevent a Member from considering interests of this type to be “essential” – defined as “[t]hat is such in the absolute or highest sense” and “[a]ffecting the essence of anything; significant, important.”²³⁰ And where a Member does so consider, those interests would be “essential security interests” under Article XXI(b).

333. Consistent with this understanding of what may constitute “essential security interests” under Article XXI(b), a number of WTO Members appear to include economic considerations in their own assessment of their security interests for purposes of domestic law and policy, and do not clearly distinguish between what might be regarded as “economic security” and other “types” of security. For example, in its most recent national security strategy, **Austria** (a WTO Member that is also an EU member State) stated:

Comprehensive security policy means that external and internal aspects of security are inextricably interlinked, as are civil and military aspects. It extends beyond the purview of the ministries and departments traditionally in charge of security and encompasses instruments from policy areas, like economy and social affairs, integration, development, environment,

²²⁹ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22).

²³⁰ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852, 2754 (US-22).

agriculture, finance, transport and infrastructure, education, information and communication, as well as health.”²³¹

334. The definition of “national security” provided in **China’s** National Security Law of 2015 similarly includes economic issues. As that definition states “[n]ational security” means a state in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally, and there is the ability to ensure that a state of security is maintained.”²³²

335. In its 2015 Defence White Paper, **Indonesia** included “[a]chieving economic independence by accelerating the strategic sectors of the domestic economy” among the considerations relevant to the development of national defence priorities.²³³ Similarly, as part of its “non-military defence posture,” Indonesia emphasized the importance of ensuring that the “[n]ational economy is developed to reach the level of adequate growth, competitiveness, and [to] increase the welfare of the people. Economic enterprises should be able to achieve independence and to ensure certainty in the provision of sustainable basic needs, which became the backbone of defence interests.”²³⁴

336. In its 2016 White Paper, **Germany** (a WTO Member that is also an EU member State) observed that its security policy interests are “decisively determined” by, among other things “[its] economic strength.”²³⁵ The security interests of Germany listed in the same document include “ensuring prosperity for [German] citizens through a strong German economy as well as free and unimpeded world trade.”²³⁶

337. The National Security Strategy of **Japan** likewise discusses economic issues as an aspect of security. In a discussion of its “National Interests and National Security Objectives” this document provides that Japan’s national interests include “achiev[ing] the prosperity of Japan and its nationals through economic development, thereby consolidating its peace and security.”²³⁷

338. Among the “six categories” of national security interests listed in its 2019 National Security Strategy, **The Netherlands** (a WTO Member that is also an EU member State) includes “economic security,” a term it defines as “[t]he unimpeded functioning of the Dutch

²³¹ Austrian Security Strategy, Security in a new decade – Shaping security (2013), at 4 (US-157).

²³² National Security Law of the People’s Republic of China (2015), art. 2 (US-138).

²³³ Defence Ministry of the Republic of Indonesia, Defence White Paper (2015) at 39 (US-158).

²³⁴ Defence Ministry of the Republic of Indonesia, Defence White Paper (2015) at 115 (US-158).

²³⁵ The Federal Government, White Paper on German Security Policy and the Future of the Bundeswehr, at 24 (US-159).

²³⁶ The Federal Government, White Paper on German Security Policy and the Future of the Bundeswehr, at 25 (US-159).

²³⁷ Japan, National Security Strategy (Dec. 17, 2013), at 4 (US-160).

economy in an effective and efficient manner.”²³⁸ In its “Integrated International Security Strategy” for 2018 to 2022, The Netherlands similarly discusses “[s]afeguarding economic security” among its goals,²³⁹ and it identified risks to economic security as one of “[t]he five national security interests” in its 2016 National Risk Profile.²⁴⁰

339. In its 2018 Defence Policy Statement, **New Zealand** describes national security broadly, as “the condition that permits New Zealand citizens to go about their daily business confidently, free from fear and able to make the most of opportunities to advance their way of life.”²⁴¹ In this document, New Zealand also includes “[s]ustaining economic prosperity” among its “seven overarching national security objectives.”²⁴²

340. In a document called “Setting the course for Norwegian foreign and security policy,” **Norway** has written: “The importance of a strong economy for a country’s security *cannot be overstated*. Economic strength enhances resilience in the face of difficult situations and makes it possible to give priority to defence and promote national interests.”²⁴³ Norway also appears to acknowledge in this paper that understandings of security may differ. As Norway states, “[t]his white paper focuses on security policy from the perspective of Norway. In other parts of the world, *the security landscape looks different*.”²⁴⁴

341. **Russia’s** 2015 National Security Strategy discusses “economic growth” as part of the country’s national security, and states that “[t]he strategic objectives of ensuring national security are the development of the country’s economy, the safeguarding of economic security, and the creation of the conditions for the development of the individual, the transition of the economy to a new level of technological development, Russia’s entry into the ranks of leading countries in terms of the volume of gross domestic product, and the successful countering of the influence of internal and external threats.”²⁴⁵ Russia’s National Security Strategy also explains that “[t]he safeguarding of economic security is ensured through” among other factors “the

²³⁸ Netherlands National Coordinator for Security and Counterterrorism, Ministry of Justice and Security, National Security Strategy (2019), at 4, 12 (US-134).

²³⁹ Netherlands Ministry of Foreign Affairs, Working Worldwide for the Security of the Netherlands: An Integrated International Security Strategy 2018-2022, at 35 (US-133).

²⁴⁰ Netherlands Government, National Risk Profile 2016, at 9, 12-13 (US-161).

²⁴¹ New Zealand Government, Strategic Defence Policy Statement 2018, at 10 (US-162).

²⁴² New Zealand Government, Strategic Defence Policy Statement 2018, at 10 (US-162).

²⁴³ Setting the course for Norwegian foreign and security policy, Meld. St. 36 (2016-2017), Report to the Storting (white paper), Recommendation of 21 April 2017 from the Ministry of Foreign Affairs, approved in the Council of State the same day (White paper from the Solberg Government), at 19 (US-163) (italics added).

²⁴⁴ Setting the course for Norwegian foreign and security policy, Meld. St. 36 (2016-2017), Report to the Storting (white paper), Recommendation of 21 April 2017 from the Ministry of Foreign Affairs, approved in the Council of State the same day (White paper from the Solberg Government), at 44 (US-163) (italics added).

²⁴⁵ Russian National Security Strategy (Dec. 2015), para. 55 (US-140).

development of the industrial and technological base and the national innovations system, [and] the modernization and development of priority sectors of the national economy.”²⁴⁶

342. **Singapore** has also recognized economic security as part of national security. As Singapore’s Minister for Manpower and Second Minister for Home Affairs explained during the Opening Ceremony of the 12th Asia-Pacific Programme for Senior National Security Officers in May 2018:

National security has traditionally been focused on military and homeland security, to ensure the safety and security of citizens as well as a country’s sovereignty and territorial integrity. But the definition of national security has evolved. *We can no longer view national security independent of other dimensions such as economic and energy security.*²⁴⁷

343. In its national security strategy, **Spain** (a WTO Member that is also an EU member State) lists “economic and financial security” among the twelve areas of action required to preserve its national security.²⁴⁸ Within this area, Spain’s objective is framed as “[t]o promote sustainable economic development, mitigate market imbalances, combat criminal activities, enhance Spain’s international economic presence and guarantee the resilience of essential economic and financial services.”²⁴⁹

344. In a document outlining its “perspectives and policies on security issues,” **Turkey** also appears to include economic security as part of national security.²⁵⁰ Turkey observed that “security can no longer be achieved solely through military means and policies” and that the country “need[s] to be able to employ a broader combination of military, economic, social and political policies in a better coordination to confront contemporary security challenges.”²⁵¹

345. The United States does not purport to identify or define the scope of these Members’ security interests, but rather simply observes that the security interests of numerous WTO Members – based on these Members’ own documents – appear to encompass what could be described as “economic security interests.” The same is true for the United States, as the measures at issue in this dispute confirm. Accordingly, considerations that could be described as “economic security interests” cannot be divorced from essential security interests under Article XXI(b).

²⁴⁶ Russian National Security Strategy (Dec. 2015), para. 58 (US-140).

²⁴⁷ Opening Ceremony of the 12th Asia-Pacific Programme for Senior National Security Officers (APPSNO) - Speech by Mrs. Josephine Teo, Minister for Manpower and Second Minister for Home Affairs (May 7, 2018), para. 5 (emphasis added) (US-164).

²⁴⁸ Spain, The National Security Strategy, Sharing a Common Project (2013), at 38 (US-165).

²⁴⁹ Spain, The National Security Strategy, Sharing a Common Project (2013), at 44 (US-165).

²⁵⁰ Turkey, Ministry of Foreign Affairs, Turkey’s Perspectives and Policies on Security Issues (US-166).

²⁵¹ Turkey, Ministry of Foreign Affairs, Turkey’s Perspectives and Policies on Security Issues (US-166).

Question 75. Can a measure be found to fall within the scope of both Articles XIX and XXI of the GATT 1994? For example, can Article XXI(b)(iii) cover essential security interests involving an "emergency" that concerns injury to domestic industry, or threat thereof, caused by increased imports?

346. As noted above in response to Panel Question 74(a)-(c), measures that a Member considers necessary (and seeks or takes) for the protection of its essential interests under Article XXI may or may not overlap with the types of measures and the circumstances that could lead to action under Article XIX and the Agreement on Safeguards. Put differently, the same measure could fall within Article XIX *or* Article XXI, or perhaps yet another WTO provision. The relevant provision for justification of the measure would depend on the circumstances in which it was imposed, including whether the acting Member has provided notice that it seeks to take a safeguard measure pursuant to Article XIX.

347. The GATT 1994 does not define the terms “essential” or “security,” and the dictionary definitions of these terms are broad. The term “security” refers to “[t]he condition of being protected from or not exposed to danger; safety” and definitions of “essential” include “[t]hat is such in the absolute or highest sense” and “[a]ffecting the essence of anything; significant, important.”²⁵² These definitions are broad and could encompass an emergency that concerns injury to domestic industry, or threat thereof, caused by increased imports. In this sense Article XXI(b)(iii) can be seen as covering action taken for the protection of essential security interests involving an emergency that concerns injury to domestic industry or threat thereof, caused by increased imports.

348. That said the measures at issue in this dispute cannot “be found” to fall within the scope of both Article XIX and Article XXI of the GATT 1994. This is because when a Member has invoked Article XXI(b) as the basis for its action – as the United States has done here – the sole finding that the Panel may make is to note this invocation. In this situation, the measures cannot “be found” to fall within the scope of Article XIX. This is also the case because Article 11.1(c), as explained in response to Question 20 above, precludes the application of the Agreement on Safeguards to any measure “sought, taken or maintained” under a provision of the GATT 1994 *other than* Article XIX. As the United States has taken the measures at issue pursuant to Article XXI, the Agreement on Safeguards “does not apply.”

Question 76. How should the Panel evaluate the measures at issue in these proceedings if it concludes that they have multiple objectives, namely both a safeguard and an essential security objective?

349. Because the United States has invoked Article XXI(b) with respect to the measures at issue in this dispute, that is the end of the matter. This remains the case even if the measures at issue *might* have been justified as a safeguard measure under Article XIX, or even under another WTO provision. The United States did not invoke Article XIX by providing notice that it was seeking to take action pursuant to that provision and affording Members an opportunity to consult, and accordingly the United States cannot have recourse to Article XIX

²⁵² *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852, 2754 (US-22).

as the legal basis for its measures. Because the United States is not seeking to exercise a right under Article XIX, neither are its measures subject to the obligations in Article XIX or the Agreement on Safeguards for the exercise of that right.

350. As the negotiators of the Agreement on Safeguards themselves understood,²⁵³ a number of different measures might involve features of a safeguard measure, or be said to have a “safeguard... objective.” For example, in the face of increased imports causing injury, a Member might increase its ordinary customs duty consistent with Article II of the GATT 1994; a Member might impose an antidumping or countervailing duty if dumping or subsidization is also present; or a Member might impose an SPS measure if the measure is also necessary to protect human, animal, or plant life or health. But if the Member has not chosen to act under Article XIX, any safeguard objective the measure might be thought to have does not have independent relevance to the rights and obligations implicated by that measure.

Question 77. Regarding the legal relationship between Articles XIX and XXI within the GATT 1994:

a. What is the significance of the phrase "Nothing in this Agreement shall be construed to prevent" in Article XXI(b) in relation to the disciplines under Article XIX?

351. Article XXI is one basis for a Member to take action that is otherwise inconsistent with its obligations under GATT 1994. Article XIX is another basis for the Member to do so.

352. “Nothing in this Agreement” in Article XXI refers to the GATT 1994 in its entirety, which includes Article XIX of the GATT 1994. This means that, based on the text, Article XXI is an exception to Article XIX of the GATT 1994.

353. In practice, however, where Article XXI is invoked, Article XIX will simply not be relevant as it provides separate, different basis for a Member to take action. If a Member has exercised its right to take a measure on the basis of Article XXI, it would not also invoke its right to take a measure under Article XIX.

b. Is there any relevant difference between Articles XIX and XXI in terms of how they permit Members to depart from their GATT obligations, including whether they operate as affirmative defences or another form of exception to GATT rules?

354. The texts of Article XIX and Article XXI establish two bases upon which a Member may depart from its GATT obligations. As discussed in the U.S. response to Question 10, under Article XIX a Member “shall be free” to take the actions authorized under that provision only after it has invoked that provision by providing notice in writing. Article XIX may be seen as establishing a “right” – the “right” to suspend obligations or modify or withdraw concessions – in the sense that Article XIX permits a Member, when it has invoked

²⁵³ See response to Question 81, below, for additional discussion of relevant negotiating history of the Agreement on Safeguards.

that provision and under certain conditions, to take action that would otherwise be inconsistent with its WTO obligations.

355. Article XXI ensures that a Member is free to take action it considers necessary to protect its essential security interests. The phrase “Nothing in this agreement” indicates that Article XXI is an exception to the obligations in GATT 1994. To the extent the Panel defines an “affirmative defense” as a provision that a Member invokes in response to a claimed breach of its obligations under the covered agreement in the context of dispute settlement, the United States agrees that Article XXI is an “affirmative defence.” However, neither the term “exception” nor “affirmative defense” dictates how the Panel should review a Member’s invocation of Article XXI.

356. Instead, as the United States has explained in its First Written Submission and in response to Questions 23 above, it is the text of Article XXI, interpreted in accordance with the customary rules of treaty interpretation, that determines how the Panel should review such invocation. That text establishes that Article XXI is self-judging, and a panel’s findings should be limited to noting the fact of that Member’s invocation.

Question 78. Regarding the applicability of Article XXI of the GATT 1994 to the Agreement on Safeguards:

- a. What is the relevance of the lack of an explicit reference to Article XXI of the GATT 1994, or any other GATT exception, in the Agreement on Safeguards? (Compare Article 1.10 of the Import Licensing Agreement and Article 73 of the TRIPS Agreement on "Security Exceptions")**
- b. What is the relevance of the reference in Article XXI of the GATT 1994 to "this Agreement" and to what extent does this define the applicability of Article XXI to other covered agreements?**
- c. What is the relevance of Article 11.1(c) to the applicability of Article XXI of the GATT 1994 to the Agreement on Safeguards?**
- d. Would Article XXI apply to violations of provisions of the Agreement on Safeguards for which there is no comparable provision in Article XIX of the GATT 1994 (e.g. regarding investigation, publication of findings, and application of safeguard measures)?**

357. The United States responds to Panel Questions 78(a)-(d) and 79 together. The term “this Agreement” in Article XXI refers to the GATT 1994 in its entirety, which includes Article XIX of the GATT 1994. The reference to “this Agreement” in Article XXI of the GATT 1994, however, does not by itself exclude the applicability of Article XXI to other covered agreements.

358. The lack of any explicit reference to Article XXI of the GATT 1994 in the Agreement on Safeguards is not determinative.²⁵⁴ The Agreement on Safeguards contains 14 references to the GATT 1994, and language in the Agreement on Safeguards establishes an express, textual link between the GATT 1994 and obligation under the Agreement on Safeguards.

359. Specifically, Article 1 of the Agreement on Safeguards makes clear that the Agreement “establishes rules for the application of safeguard measures” under Article XIX of GATT 1994. In theory, therefore, Article XXI(b) of the GATT 1994 may serve as an exception to obligations both under Article XIX and under the Agreement on Safeguards.

360. In practice, however, where Article XXI has been invoked, Article XIX and the Agreement on Safeguard are simply not relevant. As explained in response to Question 77(a), if a Member has invoked its right to take action pursuant to Article XXI, it would not also invoke its right to take a measure under Article XIX and the Agreement on Safeguards. In addition, as explained in response to Question 20, Article 11.1(c) of the Agreement on Safeguards provides that the agreement “does not apply” to measures “sought, taken or maintained” under provisions of the GATT 1994 other than Article XIX, which would include Article XXI.

Question 79. Do the references in the Agreement on Safeguards to the GATT 1994 serve to establish “an objective link” between Article XXI of the GATT 1994 and the disciplines in the Agreement on Safeguards? In particular, do references to Article XIX in the preamble and Articles 1 and 11.1(a) of the Agreement on Safeguards provide a basis to apply Article XXI of the GATT 1994 as an exception to the Agreement on Safeguards?

361. Please see the United States’ response to the Panel’s Question 78.

Question 80. What is the relevance of the General Interpretive Note to Annex 1A to the applicability of Article XXI of the GATT 1994 to the Agreement on Safeguards? In particular, would justification of a measure under Article XXI that would otherwise be prohibited under the Agreement on Safeguards give rise to a “conflict” within the meaning of the General Interpretive Note?

362. This General Interpretative Note does not affect the applicability of Article XXI to obligations under the Agreement on Safeguards because there is no conflict between the GATT 1994 and the Agreement on Safeguards regarding the applicability of Article XXI.

363. Where a Member has invoked Article XXI as the basis for its action which a Member considers necessary for the protection of its essential security interests, the Agreement on Safeguards simply “does not apply”. This is explicitly confirmed by Article 11.1(c).

²⁵⁴ As the Panel’s question notes, Article 1.10 of the Import Licensing Agreement provides, “With regard to security exceptions, the provisions of Article XXI of GATT 1994 apply” and Article 73 of the TRIPS Agreement contains an essential security exception. Given the explicit link between the Agreement on Safeguards and the GATT 1994, particularly Article XIX, the lack of explicit reference to Article XXI of the GATT 1994, is not determinative.

Question 81. Is there any relevant negotiating history or other interpretive material, including in relation to the Agreement on Safeguards and negotiations during the Uruguay Round, that may inform whether Articles XIX and XXI are mutually exclusive or if they may concurrently apply to the same measure?

364. As discussed in the U.S. response to Question 74(a)-(c), there may be some overlap in the subject matter of the measures that may be covered by Article XXI, Article XIX, and other WTO provisions. As established in Article 11.1(c) of the Agreement on Safeguards, however, the disciplines of Article XXI on one hand, and the Agreement on Safeguards on the other, are mutually exclusive. This provision makes imminent sense, as these provisions each supply an independent basis for a Member to take action. If a Member has exercised its right to take a measure on the basis of Article XXI, it would not also invoke its right to take a measure under Article XIX.

365. The negotiating history of the Agreement on Safeguards confirms the mutually exclusive nature of these disciplines, as established by the ordinary meaning of the terms of Article 11.1(c), in their context. For example, in a communication of October 5, 1987 to the Negotiating Group on Safeguards, Switzerland opined that “[t]he General Agreement distinguishes between several categories of safeguards, according to the type of interests at stake and/or the scope of the measures provided for.”²⁵⁵ Although Switzerland included Article XXI among these “categories of safeguards,” it indicated that it did not feel Article XXI was of concern to the work of the Committee on Safeguards. As Switzerland stated, “[t]he provisions relating to health, security etc. in Articles XX and XXI protect interests situated at other levels than purely economic and trade interests. The specific reasons for their existence *do not directly concern the object of our work in the present context.*”²⁵⁶

366. A communication by the Nordic countries dated May 30, 1988, similarly appears to distinguish between the “several articles and provisions of a safeguard nature,” including Article XXI, and the work of the Committee on Safeguards.²⁵⁷ As the Nordic Countries wrote:

1. The General Agreement contains several articles and provisions of a safeguard nature (Articles XII, XVIII, XX, XXI and others), *the point of departure of which is based on fundamentally different considerations - as are the responses offered by the respective provisions.*
2. As the issue of safeguards affects the very balance of rights and obligations of contracting parties under the General Agreement, linkages can be made to

²⁵⁵ Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987), at 1 (US-167).

²⁵⁶ Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987), at 1 (US-167).

²⁵⁷ Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168).

virtually any GATT provision. *There is thus a need to distinguish between the scope of the issue as such, and the scope of the issue to be negotiated in the Negotiating Group on Safeguards. The latter should be confined to the rules and disciplines applicable for the withdrawal of GATT concessions in an emergency situation as stipulated by the current Article XIX.* The linkages to other topics and negotiating groups are real and highly important, but in a negotiating context these linkages can best be addressed by seeking mutually reinforcing solutions in the respective fora.²⁵⁸

367. With this statement, the Nordic countries recognized the differing “point of departure” for actions taken under Article XXI (or other provisions that might be seen as part of safeguards “as such”), as opposed to under Article XIX or other provisions.²⁵⁹ The Nordic Countries also emphasized that the issue to be negotiated by the Committee on Safeguards was limited to “the rules and disciplines applicable for the withdrawal of GATT concessions in an emergency situation as stipulated by the current Article XIX.”²⁶⁰ This statement from the Nordic countries, like the earlier communication from Switzerland, confirms that – although there may be some overlap in the subject matter of the measures that may be covered – the disciplines of Article XXI on one hand, and Article XIX and the Agreement on Safeguards on the other hand are mutually exclusive.

368. This relationship between Article XIX and Article XXI is consistent with a 1987 Background Note by the GATT Secretariat. This note describes Article XIX as “one of a number of safeguard provisions in the General Agreement which permit contracting parties, subject to specific conditions, to re-impose trade barriers otherwise prohibited by the Agreement.”²⁶¹ The note goes on to describe Article XXI among the “[o]ther safeguard clauses” included in the General Agreement, and states that Article XXI “permits action to safeguard essential security interests.”²⁶²

²⁵⁸ Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168) (emphases added).

²⁵⁹ Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168).

²⁶⁰ Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988), paras. 1-2 (US-168).

²⁶¹ Negotiating Group on Safeguards, Drafting History of Article XIX and Its Place in The GATT: Background Note by the Secretariat, MTN.GNG/NG9/W/7 (Sep. 16, 1987), para. 9 (US-87).

²⁶² Negotiating Group on Safeguards, Drafting History of Article XIX and Its Place in The GATT: Background Note by the Secretariat, MTN.GNG/NG9/W/7 (Sep. 16, 1987), para. 10 (US-87).

**ANNEX 2
LEGAL STATUS OF DOCUMENTS AND INSTRUMENTS ACCORDING TO THE PARTIES**

*Please fill the table below with all of the documents and instruments used in support of the party's interpretation of Article XXI of the GATT 1994 together with a **brief** explanation of the legal status of such document/instrument (no more than 60 words). If any party desires to expand more fully on its reasons, please use a separate document to do so.*

	Article 31 of the VCLT [The United States has deleted columns for which the United States has not included any documents]	Article 32 of the VCLT [The United States has deleted columns for which the United States has not included any documents]		Article XVI of the Marrakesh Agreement [The United States will understand this column as: Paragraph 1(b)(iv) of the GATT 1994]	Article XVI of the Marrakesh Agreement	Other
	Subsequent Agreement	Preparatory work of the treaty	Circumstances of its conclusion	Decisions of the CONTRACTING PARTIES to GATT 1947 ... that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement", pursuant to paragraph 1(b)(iv) of the GATT 1994	Decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947	
Document or Instrument						

<p>GATT Contracting Parties Third Session, Agenda (Revised 8th April), GATT/CP.3/2/Rev.2 (Apr. 8, 1949) (US-24)</p>	<p>Subsequent Agreement</p>					
<p>Statement by the Head of the Czechoslovak Delegation, Mr. Zdeněk Augenthaler to Item 14 of the Agenda, GATT/CP.3/33 (May 30, 1949) (US-25)</p>	<p>Subsequent Agreement</p>					
<p>Reply by the Vice-Chairman of the United States Delegation, Mr. John W. Evans, to the Speech by the Head of the Czechoslovak Delegation under</p>	<p>Subsequent Agreement</p>					

<p>Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949) (US-26)</p>						
<p>Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.2 2 (June 8, 1949) & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.2 2/Corr.1 (June 20, 1949) (US-27)</p>	<p>Subsequent Agreement</p>			<p>Decision within the scope of paragraph 1(b)(iv) of the GATT 1994</p>	<p>Decision within the scope of paragraph Article XVI of the Marrakesh Agreement</p>	
<p>GATT, Decision of 8 June 1949, BISD vol. II at 28 (US-28)</p>	<p>Subsequent Agreement</p>			<p>Decision within the scope of paragraph 1(b)(iv) of the GATT 1994</p>	<p>Decision within the scope of paragraph Article XVI of the Marrakesh Agreement</p>	
<p>Report of the First Session of the Preparatory Committee of the United Nations</p>		<p>Negotiating history</p>				

<p>Conference on Trade and Employment, E/PC/T/33 (Oct. 31, 1946), Annexure 11, United States Draft Charter (US-31)</p>						
<p>Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946) (US-32)</p>		<p>Negotiating history</p>				
<p>Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34 (Mar. 5, 1947) (US-33)</p>		<p>Negotiating history</p>				

<p>Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23 (May 6, 1947). (US-34)</p>		<p>Negotiating history</p>				
<p>Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/236 (July 4, 1947). (US-35)</p>		<p>Negotiating history</p>				
<p>Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on</p>		<p>Negotiating history</p>				

<p>Chapters I, II and VIII, E/PC/T/139 (July 31, 1947). (US-36)</p>						
<p>Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947). (US-37)</p>		<p>Negotiating history</p>				
<p>Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947). (US-38)</p>		<p>Negotiating history</p>				

<p>United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947). (US-39)</p>		<p>Negotiating history</p>				
<p>Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33 (July 24, 1947) (US-40)</p>		<p>Negotiating history</p>				
<p>Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33</p>		<p>Negotiating history</p>				

(July 24, 1947). (US-41)						
United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30, at 2 (Jan 9, 1948). (US-42)		Negotiating history				
United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), January 13, 1948,		Negotiating history				

E/CONF.2/C.6/W.41 (Jan. 13, 1948). (US-43)						
United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948). (US-44)		Negotiating history				
Final Act of the United Nations Conference on Trade and Employment (excerpt). (US-45)		Negotiating history				
United Nations Conference on Trade & Employment, Sixth Committee,		Negotiating history				

Notes of the Eighth Meeting (Article 94), E/CONF.2/C.6/W.123 (Feb. 28, 1948) (US-46)						
United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948) (US-47)		Negotiating history				
U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development						Internal USG Document

Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947. (US-48)						
U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J.						Internal USG Document.

Rubin dated July 14, 1947, (US-49)						
U.S. Delegation (Internal), Department of State, Memorandum of Conversation, “Security Exceptions to Proposed ITO Charter” June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder “ITO Charter – Security” (June 17, 1946) (US-52)						Internal USG Document.
U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946) (US-53)						Internal USG Document

<p>U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946 (US-54)</p>						<p>Internal USG Document</p>
<p>Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947) (US-55)</p>		<p>Negotiating history</p>				

<p>U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 4, 1947, at 2 (US-56)</p>						<p>Internal USG Document</p>
<p>Summary Record of the Twelfth Session, SR.19/12 (Dec.</p>						<p>Views expressed in connection with prior invocation</p>

21, 1961) (US-57)						s of Article XXI.
Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970) (US-58)						Views expressed in connection with prior invocations of Article XXI.
GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982) (US-59)						Views expressed in connection with prior invocations of Article XXI.
Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982) GATT Council, Minutes of Meeting, C/M/159 (Aug.						Views expressed in connection with prior invocations of Article XXI.

10, 1982) (US-61)						
GATT Council, Minutes of Meeting, C/M/159 (Aug. 10, 1982)(US-61)						Views expressed in connection with prior invocations of Article XXI.
Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982)(US-62)				Decision within the scope of paragraph 1(b)(iv) of the GATT 1994	Decision within the scope of paragraph Article XVI of the Marrakesh Agreement	
Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985)(US-63)						Views expressed in connection with prior invocations of Article XXI.
Minutes of Meeting of March 12, 1986,						Views expressed in

C/M/196 & C/M/196/Corr.1(April 2, 1986) (US-64)						connection with prior invocations of Article XXI.
GATT Panel Report, <i>United States – Trade Measures Affecting Nicaragua</i> (US-65)						Views expressed in connection with prior invocations of Article XXI.
Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986) (US-66)						Views expressed in connection with prior invocations of Article XXI.
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<p>Verbatim Report, E/PC/T/A/PV/33. Corr.3 (July 30, 1947) (US-92)</p>						
<p>Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Amendment Proposed by the Australian Delegation, Article 35 – paragraph 2, E/PC/T/W/170 (June 6, 1947) (US-144)</p>		<p>Negotiating history</p>				
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22 (Aug. 22, 1947) (US-148)						
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<p>Committee for submission to Commission A on Monday, 4th August, 1947, E/PC/T/146 (July 31, 1947) (US-146)</p>						
<p>Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135 (July 24, 1947) (US-147)</p>		<p>Negotiating history</p>				
<p>Negotiating Group on GATT Articles, Meeting of 3 March 1987, Note by the Secretariat, MTN.GNG/NG7/1/Rev.1 (Apr. 3, 1987) (US-149)</p>		<p>Negotiating history</p>				

<p>Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-150)</p>		<p>Negotiating history</p>				
<p>Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988) (US-151)</p>		<p>Negotiating history</p>				
<p>Negotiating Group on GATT Articles, Communication from Nicaragua, MTN.GNG/NG7/W/34 (Nov. 12, 1987) (US-152)</p>		<p>Negotiating history</p>				
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MTN.GNG/NG7/ 8 (July 21, 1988) (US-153)						
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