UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS556)

RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S ADDITIONAL QUESTIONS TO THE PARTIES

September 22, 2020

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EC – Selected Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
Guatemala – Cement I (AB)	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998
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US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002

SHORT TITLE	**FULL CITATION**
US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Zeroing (Japan) (Article 21.5 – Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009

TABLE OF EXHIBITS

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U.S. First Written Submission	
US-1	Section 232 statute, 19 U.S.C. 1862
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
US-5	DOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19205 (Apr. 26, 2017)
US-6	DOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, 82 Fed. Reg. 21509 (May 9, 2017)
US-7	U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, 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 (Jan. 11, 2018)
US-8	U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, 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 (Jan. 17, 2018)
US-9	Presidential Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, 83 Fed. Reg. 11625 (Mar. 15, 2018)
US-10	Presidential Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, 83 Fed. Reg. 11619 (Mar. 15, 2018)

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US-11	Presidential Proclamation 9711 of March 22, 2018, Adjusting Imports of Steel into the United States, amending Proclamation 9705 of March 8, 2018, 83 Fed. Reg. 13361 (Mar. 27, 2018)
US-12	Presidential Proclamation 9710 of March 22, 2018, Adjusting Imports of Aluminum into the United States, amending Proclamation 9704 of March 8, 2018, 83 Fed. Reg. 13355 (Mar. 28, 2018)
US-13	Presidential Proclamation 9740 of April 30, 2018, Adjusting Imports of Steel into the United States, amending Proclamation 9705 of March 8, 2018, as amended by Proclamation 9711, 83 Fed. Reg. 20683 (May 7, 2018)
US-14	Presidential Proclamation 9739 of April 30, 2018, Adjusting Imports of Aluminum into the United States, amending Proclamation 9704 of March 8 2018, as amended by Proclamation 9710 of March 22, 2018, 83 Fed. Reg. 20677 (May 7, 2018)
US-15	Presidential Proclamation 9759 of May 31, 2018, Adjusting Imports of Steel into the United States, amending Proclamation 9705 of March 8, 2018, as amended by Proclamation 9711 of March 22, 2018 and Proclamation 9740 of April 20, 2018, 83 Fed. Reg. 25857 (June 5, 2018)
US-16	Presidential Proclamation 9758 of May 31, 2018, Adjusting Imports of Aluminum into the United States, amending Proclamation 9704 of March 8, 2018, as amended by Proclamation 9710 of March 22, 2018 and Proclamation 9739 of April 30, 2018, 83 Fed. Reg. 25849 (June 5, 2018)
US-17	Intentionally Omitted
US-18	Presidential Proclamation 9777 of Aug. 29, 2018, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 45025 (Sep. 4, 2018)
US-19	Presidential Proclamation 9776 of Aug. 29, 2018, Adjusting Imports of Aluminum Into the United States, 83 Fed. Reg. 45019 (Sep. 4, 2018)
US-20	Department of Commerce, Bureau of Industry and Security, 15 CFR Part 705, Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum", 83 Fed. Reg. 12106 (Mar. 19, 2018)
US-21	Department of Commerce, Bureau of Industry and Security, 15 CFR Part 705, Interim Final Rule, Submissions of Exclusion Requests and

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	Objections to Submitted Requests for Steel and Aluminum, 83 Fed. Reg. 46026 (Sep. 11, 2018)
US-22	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-23	*Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II
US-24	GATT Contracting Parties Third Session, Agenda (Revised 8th April), GATT/CP.3/2/Rev.2 (Apr. 8, 1949)
US-25	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-26	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 Item 14 of the Agenda, GATT/CP.3/38 (June 2, 1949)
US-27	Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22 (June 8, 1949) & Corrigendum to the Summary Record of the Twenty-Second Meeting, GATT/CP.3/SR.22/Corr.1 (June 20, 1949)
US-28	GATT, Decision of 8 June 1949, BISD vol. II at 28
US-29	Note by the Secretariat, Article XXI, Negotiating Group on GATT Articles, MTN/GNG/NG7/W/16 (Aug. 18, 1987)
US-30	Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edition (1984) (excerpt)
US-31	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
US-32	Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/W.5 (Oct. 31, 1946)
US-33	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-34	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/23 (May 6, 1947)
US-35	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/W/236 (July 4, 1947).

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US-36	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947)
US-37	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-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)
US-40	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-41	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)
US-42	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-43	United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), January 13, 1948, E/CONF.2/C.6/W.41 (Jan. 13, 1948)
US-44	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-45	Final Act of the United Nations Conference on Trade and Employment (excerpt)
US-46	United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Eighth Meeting (Article 94), E/CONF.2/C.6/W.123 (Feb. 28, 1948)
US-47	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)

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US-48	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 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-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
US-50	*Young Loan Arbitration,* (UK, US, France, Belgium and Switzerland v. Federal Republic of Germany), Arbitral Award of 16 May 1980, ILR 59 (1980)
US-51	Permanent Court of Arbitration, *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v, Netherlands*), 27 RIAA 35, (2005)
US-52	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-53	U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946)
US-54	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-55	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-56	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-57	Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961)

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US-58	Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970)
US-59	GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982)
US-60	Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982)
US-61	GATT Council, Minutes of Meeting, C/M/159 (Aug. 10, 1982)
US-62	Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982)
US-63	Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985)
US-64	Minutes of Meeting of March 12, 1986, C/M/196 & C/M/196/Corr.1(April 2, 1986)
US-65	GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*
US-66	Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986)
US-67	Tom Miles, *Adjudicator says any security defense of U.S. auto tariffs at WTO 'very difficult'*, REUTERS BUSINESS NEWS (May 27, 2019), https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX1I7
US-68	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-69	Black's Law Dictionary, ed. Bryan A. Garner, Eighth edition, 2004
First Panel Meeting	
US-70	Letter to the Chairman of the Panel on U.S. Trade Measures Affecting Nicaragua from the Office of the United States Trade Representative (June 4, 1986) (excerpt)
US-71	Intentionally Omitted
US-72	G20 Global Steel Forum Report (Nov. 30, 2017), https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt)
US-73	Intentionally Omitted
US-74	Intentionally Omitted

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US-75	Intentionally Omitted
US-76	Intentionally Omitted
US-77	Intentionally Omitted
US-78	Switzerland, Federal Department of Foreign Affairs, New Security-policy challenges, https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/security-policy/new-challenges.html
U.S. Responses to the Panel's First Set of Questions	
US-79	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-80	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),
US-81	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)
US-82	WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018)
US-83	U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018),
US-84	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 (excerpts)
US-85	WTO 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),
US-86	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-87	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)
US-88	*The Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007)
US-89	*The Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994)

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US-90	General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedure GATT/CP.2/3 Rev.1 (Aug. 16, 1948)
US-91	General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949)
US-92	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-93	ENGLISH GRAMMAR (Sydney Grenbaum ed., Oxford Univ. Press, 1996)
US-94	THE CLASSIC GUIDE TO BETTER WRITING (Ruldolf Flesch & A. H. Lass, HarperPerrenial, 1996)
US-95	MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 233 (1st edn. 1995) (excerpts)
US-96	HARPER'S ENGLISH GRAMMAR (Harper & Row, 1966) (excerpts)
US-97	Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edn (1984) (excerpt)
US-98	Analytical Index: Guide to GATT Law and Practice, Vol. 2 (Geneva, WTO, 1994)
US-99	Bradly J. Condon, *The Concordance of Multilingual Legal Texts at the WTO*, 33 Journal of Multilingual and Multicultural Development 6, App. 1 (2012)
US-100	WTO Analytical Index: Language incorporating the GATT 1947 and other instruments into GATT 1994, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_incorp_oth.pdf
US-101	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 Mar. 1965 (L/2424)
US-102	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. I (revised) (1955) (excerpt)
US-103	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)

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US-104	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. III (1958) (excerpt)
US-105	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. IV, 41 (1969) (excerpt)
US-106	ADVANCED FRENCH GRAMMAR 60 (Cambridge Univ. 1999) (excerpt)
US-107	OPPENHEIM'S INTERNATIONAL LAW, vol. I (excerpt)
US-108	Vienna Convention on the Law of Treaties
US-109	U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517
US-110	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-111	U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3
US-112	U.N. Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3
US-113	Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37
US-114	U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163
US-115	U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3
US-116	Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 1023 U.N.T.S. 15
US-117	U.N. Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 I.L.M. 1229
US-118	Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, 1511 U.N.T.S. 3
US-119	International Sugar Agreement, Mar. 20, 1992, 1703 U.N.T.S. 203
US-120	U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3

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US-121	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-122	James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th ed. 2012)
US-123	UNIDIR, The United Nations, Cyberspace and International Peace and Security: Responding to Complexity in the 21st Century (2017) (excerpt)
US-124	International Telecommunication Union (ITU), Definition of cybersecurity, https://www.itu.int/en/ITU-T/studygroups/com17/Pages/cybersecurity.aspx
US-125	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
US-126	United Nations General Assembly, Resolution adopted by the General Assembly on 5 December 2016, A/RES/71/28
US-127	New Zealand Government, New Zealand's cybersecurity strategy (2019) (excerpt)
US-128	Australian Government, Australia's Cyber Security Strategy (2016) (excerpt)
US-129	Turkey's National Cyber Security Strategy (2016)
US-130	National Cyber Security Strategy for Norway (2019) (excerpt)
US-131	India, Call for Comments, National Cyber Security Strategy 2020 (2019)
US-132	India, National Cyber Security Policy 2013
US-133	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) (excerpt)
US-134	The Netherlands Government, National Security Strategy (2019)
US-135	Switzerland, National Strategy for the Protection of Switzerland against Cyber Risks 2018-2022, at 1 (Apr. 2018)
US-136	ENISA, NCSS Good Practice Guide (Nov. 2016) (excerpt)
US-137	Canada's National Cyber Security Action Plan 2019-2024 (2019) (excerpt)

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US-138	National Security Law of the People's Republic of China (2015)
US-139	Cybersecurity Law of the People's Republic of China (2017)
US-140	Russian National Security Strategy (Dec. 2015)
US-141	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-142	National Security Strategy of the United States of America (Dec. 2017)
US-143	National Cyber Strategy of the United States of America (Sept. 2018)
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 35th meeting of Commission A, held on Monday 11 August 1947, E/PC/T/A/SR/35 (Aug. 12, 1947)
US-146	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)
US-147	Report of the Tariff Negotiations Working Party, General Agreement on Tariffs and Trade, E/PC/T/135 (July 24, 1947)
US-148	Second Session of the Preparatory Committee of the United Nations Conference on Trade And Employment, Verbatim Report, E/PC/T/EC/PV.2/22 (Aug. 22, 1947)
US-149	Negotiating Group on GATT Articles, Meeting of 3 March 1987, Note by the Secretariat, MTN.GNG/NG7/1/Rev.1 (Apr. 3, 1987)
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)

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

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US-168	Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988)
US-169	*The Oxford Spanish Dictionary*, 2st edn (revised), (Oxford University Press, 2001) (excerpt)
US-170	Ortografia Y Gramática, https://gramatica.celeberrima.com/
US-171	SIDE BY SIDE SPANISH & ENGLISH GRAMMAR (3rd edn. 2012) (excerpt)
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)
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US-174	Intentionally Omitted
US-175	Ian Sinclair, The Vienna Convention on the Law of Treaties, Manchester University Press, 2nd edn (1984) (excerpt)
US-176	Webster's Guide to Punctuation and Style 233 (1st edn. 1995) (excerpts)
US-177	THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE (1994)
US-178	The Grammar Bible: Everything You Always Wanted to Know About Grammar but Didn't Know Whom to Ask 146-147 (2nd edn 2004)
US-179	Intentionally Omitted
US-180	Intentionally Omitted
US-181	Treaty of Rome (excerpt)
US-182	Treaty on the Functioning of the European Union (excerpt)
US-183	Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990)
US-184	Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990)
US-185	Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989)

EXHIBIT	DESCRIPTION
US-186	Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990)
US-187	Communication from Japan, MTN.GNS/W/107 (July 10, 1990)
US-188	Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990)
US-189	Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) (excerpts)
US-190	Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991) (excerpts)
US-191	Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990)
US-192	Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987)
US-193	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987)
US-194	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr 29, 1988)
US-195	Negotiating Group on Dispute Settlement, Meeting of 25 June, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987)
US-196	Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988)
US-197	Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America (excerpt)
US-198	Tokyo Round Code on Government Procurement (1979) (excerpt)
US-199	Agreement on Government Procurement, Revised Text (1988) (excerpt)
US-200	Agreement on Government Procurement, Article XXIII (1994) (excerpt)
US-201	Agreement on Government Procurement (2012) (excerpt)

EXHIBIT	DESCRIPTION
US-202	Intentionally Omitted
US-203	Ortografia Y Gramática (excerpt)
US-204	Intentionally Omitted
US-205	The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993) (excerpts)
US-206	GATT Contracting Parties, Summary Record of the Fourteenth Meeting, GATT/CP.5/SR.14 (Nov. 30, 1950)
US-207	Schedule XX – United States, Withdrawal of Item 1526(a) under the Provisions of Article XIX, GATT/CP/83 (Oct. 19, 1950)
US-208	*United States – Fur Felt Hats* (GATT Panel)
US-209	Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report of the Seventh Meeting, E/PC/T/C.II/PV/7 (Nov. 1, 1946)
US-210	Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the Ninth Meeting, E/PC/T/C.II/RO/PV/9 (Nov. 9, 1946)
US-211	Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report of the Eleventh Meeting, E/PC/T/C .II/PRO/PV/11 (Nov. 14, 1946)
US-212	Preparatory Committee of the International Conference on Trade and Employment, Addition to Report of Sub-Committee Procedures, E/PC/T/C.II/57/Add.1 (Nov. 20, 1946)
US-213	Work Already Undertaken in the GATT on Safeguards, MTN.GNG/NG9/W/1, (Apr. 7, 1987),
US-214	Declaration of Ministers Approved at Tokyo on 14 September 1973
US-215	Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989)
US-216	Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1 (January 15, 1990)
US-217	Negotiating Group on Safeguards, Chairman's Report on Status of Work in the Negotiating Group, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990)

EXHIBIT	DESCRIPTION
US-218	Negotiating Group on Safeguards, Additional United States' Proposals on Safeguards, MTN.GNG/NG9/W/31 (Oct. 31, 1990)
US-219	Negotiating Group on Rule Making and Trade-Related Investment Measures, Safeguards, Note by the Secretariat MTN.GNG/RM/W/3 (June 6, 1991)
US-220	Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (Oct. 31, 1990)
US-221	Agreement on the European Economic Area (excerpt)
U.S. Responses to the Panel's Additional Questions	
US-222	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-223	Intentionally Omitted
US-224	Intentionally Omitted
US-225	Presidential Proclamation 9980 of January 24, 2020
US-226	WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 1999) (excerpt)
US-227	Kingdom of Saudi Arabia, Statement before the Dispute Settlement Body, *National Security in WTO dispute Settlement Proceeding DS567* (July 29, 2020)
US-228	UNITED STATES TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANISATION (Feb. 2020) (excerpt).

TO ALL

Question 82. In relation to the requirement under Article 6.2 of the DSU to "identify the specific measures at issue", is it sufficient to identify a legal instrument in a panel request without explaining the challenged substantive content of such legal instrument? Please respond with reference to the panel request in this dispute.

1. The United States responds to the Panel's Questions 82 and 83 together at Question 83, below.

Question 83. Does the requirement to "identify the specific measures at issue" in a panel request also encompass the identification of the elements/components/forms that constitute a broader/complex measure at issue? Please respond in light of due process considerations under Article 6.2 of the DSU.

2. Article 6.2 of the DSU provides in relevant part that a request for the establishment of a panel shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The ordinary meaning of the terms of the first requirement – that the panel request "identify the specific measures at issue" – may be understood to provide that the request for the establishment of a panel must establish the identity of the precise or exact measures at issue.[1] The context provided by DSU Article 4 indicates that the phrase "measures at issue" (which appears in both DSU Article 4.4 and Article 6.2) should be understood to mean "measures affecting the operation of any covered agreement" (a phrase used in Article 4.2, which is then referred to as the "measures at issue" in Article 4.4).

3. Thus, the requirement in Article 6.2 to "identify the specific measures at issue" obligates a complaining Member to establish the identity of the precise or exact measures which it alleges affect the operation of any covered agreement. Where a legal instrument sets out numerous different actions by a Member, merely naming the instrument without more (for example, without specifying the potential action of concern or without clarifying the complaint encompasses the entirety of the instrument) may not be sufficient to identify the "specific measure at issue." Similarly, if the measure a complainant seeks to challenge is not set out in a single legal instrument but consists of multiple elements or components, then identifying the precise scope and content of the measure may require a description of the measure and the various elements or components which the complainant considers to comprise the measure it challenges.

4. This requirement ensures that the responding Member and potential third parties are provided clear notification of the specific measures at issue, as it is not for the responding Member, or the panel, to have to guess the scope and content of the measures are at issue. To challenge legally distinct measures, a Member must identify specifically each measure in its

[1] The term "identify" can be defined as "[e]stablish the identity of; establish who or what a given person or thing is; recognize." The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1304 (US-222). The word "specific" can be defined as "[c]learly or explicitly defined; precise, exact; definite." The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2972 (US-222).

consultation and panel requests. Thus, a general reference to an indeterminate number of measures does not satisfy the requirement of Article 6.2 of the DSU that a panel request "identify the *specific measures* at issue" (emphasis added).

> **a. To Switzerland: Is the Panel's understanding correct that Switzerland is challenging two complex measures (the import adjustments on both steel and aluminium products as one measure and Section 232 as repeatedly interpreted by US authorities as the other measure)?**

5. This question is addressed to the complainant.

Question 84. How does the characterisation of various actions and/or omissions as either (i) elements/components of a single complex measure, or as (ii) separate measures affect the Panel's assessment or its findings and recommendations to the DSB?

6. Under DSU Article 7.1, the standard terms of reference, the DSB has tasked the Panel: (1) "[t]o examine" the "matter referred to the DSB" – that is, to "[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests"[2]; 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 a panel. Article 11 of the DSU states that the "function of panels" is to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements," and "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

7. Under Article 6.2, the request for the establishment of a panel must identify "the specific measures at issue" and provide "a brief summary of the legal basis for the complaint." It is these elements in the panel request that are the "matter referred to the DSB" as described in Article 7.1. Consequently, under the plain meaning of the DSU, the measures within a panel's terms of reference are those "specific measures" identified in the panel request; no other measures are properly within the panel's terms of reference. If a complainant has identified actions as a single, complex measure in its request for the establishment of a panel, then the panel can make findings on that single, complex measure; the panel would need to conclude that the various actions do, in fact, comprise a single, complex measure as alleged in order to make findings under the claims asserted by the complainant. If the panel were to find that the various action do *not* comprise a single, complex measure, the complainant would have failed to establish the key fact in the dispute – the existence (scope and content) of the challenged "measure", and the panel would have no need to go on to examine the legal claims asserted. If a complainant has not identified actions as a single, complex measure in its request for the establishment of a panel, however, then the panel cannot make findings on a "single, complex measure". Similarly, the panel can make findings on separate measures if the complainant has identified separate measures as subject to its particular claims in its request for the establishment of a panel. The panel

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

cannot make such findings, however, if the complainant has not identified separate measures as subject to its particular claims in its request for the establishment of a panel.

8. As an initial matter, if a complainant has failed to "identify the specific measure at issue and provide a brief summary of the legal basis of the complaint," the Panel's analysis as to that matter is at an end. If a complainant has met the requirement of Article 6.2, however, the Panel's terms of reference call on it to investigate the nature, condition, or qualities of the measures at issue – whether characterized as elements or components of a single, complex measure, or as separate measures – as part of its objective assessment of the facts (the existence and content of the challenged measure being the core fact in any dispute). If the measure is found to exist as alleged, the Panel would then examine the claims and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreement.

9. The United States recalls that it has invoked Article XXI(b) in relation to all claims raised in this dispute. In light of the U.S. invocation of Article XXI(b) and the self-judging nature of that provision, the sole finding that the Panel may make in its report regarding claims that satisfy the requirements of Article 6.2 – consistent with its terms of reference and the DSU – is to note the Panel's understanding of Article XXI and that the United States has invoked Article XXI. Put differently, if the Panel objectively examines Article XXI and agrees this provision is self-judging, there is no finding in relation to any claim by the complainant that would assist the DSB in making a recommendation. That is, whatever the arguments brought forward in relation to such a claim, the Panel would find that Article XXI serves as an exception to that claim. There is no basis under the Panel's terms of reference to make a findings on such a claim that could not lead to a recommendation.

Question 85. In relation to the requirement under Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", is it sufficient to indicate the relevant legal provisions and reproduce their terms after separate identification of the measures at issue? Please respond with reference to the panel request in this dispute and bearing in mind the distinction between claims and arguments in WTO dispute settlement.

10. Article 6.2 requires that the request for the establishment of a panel include "a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Thus, what is required under Article 6.2 is not a full explication of the legal basis, but rather a "summary" that presents the problem clearly. That summary of the legal basis is found in the provisions of the covered agreements alleged to be breached. Those provisions set out the foundation for a complaint (basis) in the (legal) rights or obligations of a Member.

11. Identifying the aspect of the provisions of the covered agreements alleged to be breached by a measure presents the problem clearly. That is, the panel request would then provide the relevant covered agreement, the commitment of a Member under that covered agreement, and the relevant aspect of that commitment, to the extent the provision may contain more than one obligation.

12. Arguments, in contrast to claims, are "statements put forth by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified

treaty provision."[3] DSU Article 6.2, however, does not prohibit a party from including in its panel request statements "that foreshadow its arguments in substantiating the claim" if the complainant so chooses, but the presence of such arguments does not, under the DSU, narrow the scope of the claims.[4] As some prior reports have correctly observed, "Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly."[5]

TO COMPLAINANT

Question 86. With respect to any challenges against (i) potential amendments, modifications or replacements of a measure identified in the panel request, (ii) any other measures following the establishment of the Panel, and/or (iii) measures that have lapsed since the establishment of the Panel, please complete the following table to the extent relevant to the claims in this dispute.

	Description of the Measure	**Challenged independently or as an element/component of an existing measure?**	**Relevant language in the panel request**
Amended, modified or replaced measures			
Any other measures following the establishment of the Panel			
Lapsed measures			

13. This question is addressed to the complainant.

TO ALL

Question 87. In dealing with amended, new, and/or lapsed measures, panels and the Appellate Body have previously used considerations such as (i) whether the "essence" of an identified measure has been altered , (ii) the "close connection" between measures identified and those not expressly mentioned in a panel request , and (iii) considerations regarding providing a positive resolution to the dispute. Please comment on the validity and applicability of these considerations in this dispute. In doing so, please comment on

[3] *China – HP-SSST* (AB), para. 5.14.

[4] *EC – Selected Customs Matters* (AB), para. 153.

[5] *EC – Selected Customs Matters* (AB), para. 153.

the differences and similarities across these considerations and whether there are any other relevant considerations in this dispute.

14. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Specifically, when the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint."[6] As the Appellate Body recognized in *EC – Chicken Cuts*, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[7] A claim alleges an inconsistency of a measure with a WTO provision at a particular point in time. The DSB tasks the panel with examining that legal situation – that is, the measure and the claim as of the point in time the DSB is requested to and does establish the panel.

15. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the precise question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "*at the time of establishment of the Panel.*"[8] It is thus the challenged measures, as they existed at the time of the Panel's establishment, when the "matter" was referred to the Panel, that are properly within the Panel's terms of reference and on which the Panel should make findings.

16. This means that, under the DSU, "lapsed" measures – that existed at the time of the Panel's establishment and identified in the panel request but are no longer in effect – are properly within the Panel's terms of reference, and the Panel should make findings with respect to those measures. The subsequent expiry of the measure does not alter the scope of the panel's terms of reference or the panel's mandate under the DSU. Under Article 19.1 of the DSU, where a panel "concludes that a measure is inconsistent with a covered agreement, it *shall* recommend that the Member concerned bring the measure into conformity with that

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[6] *See US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

[7] *EC – Chicken Cuts (AB)*, para. 156.

[8] *See, e.g.*, *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel")(emphasis added); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also China – Raw Materials (AB)*, para. 264; *EC – Approval and Marketing of Biotech Products*, para. 7.456.

agreement."[9] Thus the panel is required to make a recommendation on any measure within its terms of reference that it has found to be inconsistent with a Member's obligations.[10]

17. In contrast, subsequent measures, such as "amended" or "new" measures, that did not exist at the time of the panel request could not have been identified in the panel request and are not within the Panel's terms of reference. The Panel need not and should not make findings on those measures. However, to the extent that the Panel finds that subsequent measures are useful evidence concerning the challenged measures as they existed at that time, the Panel could cite to such legal instruments. Pursuant to Article 11 of the DSU, the Panel can examine any evidence that it considers is relevant to making an objective assessment of the matter referred to it, namely, whether the challenged measures breach the United States' WTO obligations as of the date of the Panel's establishment. As the panel and Appellate Body in *EC – Selected Customs Matters* explained, this evidence can include legal instruments enacted after a panel's establishment, where, for example, such instruments are relevant to determining the content and operation of the challenged measures at the time the panel was established and its terms of reference were fixed.[11]

18. Defining the scope of a dispute based on the measures as they existed at the time of panel establishment – and requiring a recommendation to be made thereon – is not only consistent with the requirements of the DSU, it also benefits the parties by balancing the interests of complainants and respondents. Just as a complainant may not obtain findings on substantively new measures introduced after the establishment of a panel, so too the respondent may not avoid findings and recommendations by altering or revoking its measures after the date of panel establishment. A complainant therefore may obtain a recommendation that is prospective, and can be invoked both with respect to unchanged measures and with respect to any later-in-time measures a responding party may impose – whether they are imposed after the adoption of panel and Appellate Body reports, or simply after the establishment of a panel.

19. The Appellate Body has found that, under certain circumstances, panels can make findings concerning legal instruments that came into effect after the panel was established when those instruments "did not change the essence of the regime."[12] The Appellate Body

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[9] Emphasis added.

[10] *See* UNITED STATES TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANISATION 64-68 (Feb. 2020) (US-228). The report discusses the Appellate Body's failure to adhere to the rule in Article 19.1 in Section II.F titled "The Appellate Body Has Violated Article 19.1 of the Dispute Settlement Understanding by Failing to Make Recommendation Required in Instances Where a Measure Has Expired after Panel Establishment."

[11] *EC – Selected Customs Matters (AB)*, para. 188 ("While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.").

[12] *Brazil – Aircraft (AB)*, paras. 130-133 (finding that, because the "regulatory instruments that came into effect . . . after the consultations had taken place . . . did not change the essence of the regime," Brazil's export subsidies for regional aircraft, "including the regulatory instruments that came into effect after consultations were held . . .

has also found that, under certain circumstances, "closely connected" subsequent measures may fall within the panel's terms of reference.[13] However, as explained above, there is nothing in the text of the DSU that supports these assertions. And aside from the lack of foundation in the DSU, making findings on "related" measures which post-date the establishment of the panel is not necessary to resolve the dispute. A recommendation to bring a measure that existed as of panel establishment into compliance with WTO rules would apply to a closely related measure in place at the end of a compliance period, where such measure bears on whether the responding Member has implemented the DSB's recommendations, whether or not the panel had specifically made findings upon it. Therefore, where a later-in-time measure in fact does not change the essence of (or is closely connected to) a measure properly within the panel's terms of reference, it is not necessary for a panel to make additional findings with respect to that measure. This approach properly takes into consideration the dispute settlement's aim of providing a positive resolution to the dispute.

20. In its responses to the Panel's Question 1, Switzerland states that it "challenges the import adjustment measures imposed by the United States on imports of steel and aluminium products."[14] It also states that Switzerland also challenges "Section 232 as repeatedly interpreted by the US authorities and, in the alternative, the ongoing use of Section 232 by the US authorities."[15] In the table setting out the measures at issue, Switzerland adds the following footnote to "import adjustments on steel" and "import adjustments on aluminium," respectively:

> This element also covers the additional import duties on the derivatives of steel and aluminium products imposed by Presidential Proclamation 9980 of 24 January 2020 on Adjusting Imports of Derivative Aluminium Articles and Derivative Steel Articles Into the United States published in Federal Register Vol. 85, No. 19, 29 January 2020, pp. 5281-

were properly before the panel."); *Chile – Price Band System (AB)*, para. 139 (finding that the measure before it included a law enacted after the panel's establishment because the law "amend[ed] Chile's price band system without changing its essence.").

[13] *US – Zeroing (Japan) (Article 21.5 – Japan) (AB),* paras. 123-124.

[14] Switzerland's Response to the Panel's Question 1, para. 2. In its request for the establishment of a panel, Switzerland describes the measures at issue as "import adjustments on certain steel products and certain aluminium products" which "consist of the additional import duties and quotas as well as the exemptions and exclusions from such duties and quotas." United States – Certain Measures on Steel and Aluminum Products, Request for the Establishment of a Panel by Switzerland, WT/DS556/15 (Nov. 9, 2018), p. 2. Switzerland further states that these measures "have been imposed by and are evidenced by the following documents, considered alone and in any combination" and thereafter lists 15 documents. United States – Certain Measures on Steel and Aluminum Products, Request for the Establishment of a Panel by Switzerland, WT/DS556/15 (Nov. 9, 2018), p. 2. It also states that the request "also covers any additional measures, superseding, supplementing, updating, extending, replacing or implementing the measures referred to above as well as any exemptions or exclusions applied." United States – Certain Measures on Steel and Aluminum Products, Request for the Establishment of a Panel by Switzerland, WT/DS556/15 (Nov. 9, 2018), p. 3.

[15] Switzerland's Response to the Panel's Question 1, para. 3.

> 5293, Exhibit CHE-72. Switzerland reserves its right to further address this issue in its second written submission.[16]

21. In its Second Written Submission, Switzerland again refers to Proclamation 9980, stating that "Presidential Proclamation 9980 of 24 January 2020[,] extended the additional import duties on steel and aluminium products to the derivatives of steel and aluminium products as described in Annexes I and II to that proclamation."[17] Although Switzerland has failed to clearly articulate an argument with respect to these duties, to the extent Switzerland may attempt to include Proclamation 9980 and the new additional duties imposed on steel and aluminum derivative products within the Panel's terms of reference, that attempt must fail.

22. Proclamation 9980 was issued on January 24, 2020, more than a year after the establishment of the panel and after the completion of the first panel meeting. The duties on the derivative products, therefore, did not exist at the time of the panel's establishment and could not have been identified in the complainant's panel request. Thus, such duties, and any exclusion and exemption concerning these duties, cannot be within the Panel's terms of reference.

TO COMPLAINANT

Question 88. Please confirm if the Panel's understanding of your characterisation of the measures under the Agreement on Safeguards, as depicted in the diagram at the end of this document, is correct. In this regard, please clarify the precise scope of the elements/measures challenged under Article 11.1(b) of the Agreement on Safeguards and whether these are also challenged as a safeguard measure.

23. This question is addressed to the complainant.

> **a. Please indicate how the panel request in this dispute adequately identifies the elements/measures challenged under Article 11.1(b) of the Agreement on Safeguards, especially those depicted in green text in the diagram.**

24. This question is addressed to the complainant.

Question 89. Please clarify how the measures "suspend the obligation in whole or in part" or "withdraw or modify the concession" within the meaning of Article XIX taking into account the distinction between these actions under Article XIX and violations of the GATT 1994. In doing so, please address the United States' response to Panel question No. 7.

25. This question is addressed to the complainant.

TO ALL

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[16] Switzerland's Response to the Panel's Question 1, para. 4, footnotes 3 and 4.

[17] Switzerland's Second Written Submission, para. 9.

Question 90. Please comment on the grammatical structure and composition of Article XXI(b). In doing so, please identify the distinct grammatical elements (e.g. clauses and phrases) in the provision and the grammatical relationship (e.g. qualification and modification) between such elements. The parties are invited to use the table below should it be of assistance.

<table>
<tr><td rowspan="3">Article XXI</td><td colspan="6" rowspan="3">(b)</td><td>(i)</td><td>relating to fissionable materials …</td></tr>
<tr><td>(ii)</td><td>relating to the traffic in arms …</td></tr>
<tr><td rowspan="2">(iii)</td><td rowspan="2">taken in time of war or other emergency in international relations</td></tr>
<tr><td rowspan="2">Nothing in this Agreement shall be construed</td><td rowspan="2">to prevent any [Member] from taking</td><td rowspan="2">any action</td><td rowspan="2">which it considers</td><td rowspan="2">necessary for the protection of</td><td rowspan="2">its essential security interests</td></tr>
<tr><td colspan="3">Independent Clause</td><td colspan="4">Dependent/Relative Clause</td></tr>
<tr><td>(1)</td><td>(2)</td><td>(3)</td><td>(4)</td><td>(5)</td><td>(6)</td><td></td><td>(7)</td></tr>
</table>

26. As evident from the text added in italic in the chart above, Article XXI(b) is comprised of an independent clause and a dependent clause. A "clause" is "a group of words containing both a subject and a predicate (which includes a verb)."[18] An "independent clause" is "[a] group of words with a subject and verb that can stand alone as a sentence."[19]

27. The independent clause in Article XXI(b) is comprised of a subject – "Nothing" – and a predicate – "shall be construed to prevent any Member from taking any action." Through this language, Article XXI(b) creates an exception to the obligations in the Agreement.

28. The independent clause is followed by a dependent clause, which begins with "which it considers" and ends at the end of each subparagraph ending. It is comprised of the subject "it" and the predicate[20], which begins with "considers" and ends at the ends of each

[18] MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 233 (1st edn 1995) (US-176).

[19] WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 91 (4th ed. 1999) (US-226).

[20] WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 93 (4th ed. 1999) (defining "predicate" as "[t[]he verb and its related words in a clause or sentence. The predicate expresses what the subject odes, experiences, or is" and provides the following example, "The partygoers *celebrated wildly for a long time*.") (emphasis in the original) (US-226); See also ENGLISH GRAMMAR 629 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) ("Sentences and clauses are often divided into the subject and the predicate. The predicate

subparagraph ending. A "dependent clause" is "[a] group of words that includes a subject and verb but is subordinate to an independent clause in a sentence."[21] Furthermore, "[d]ependent clauses begin with either a subordinating conjunction, such as *if*, *because*, *since*, or a relative pronoun, such as *who*, *which*, *that*."[22]

29. Because the dependent clause begins with a relative pronoun – "which" – this dependent clause is also called a relative clause.[23] Relative clauses "postmodify nouns ('the house that I own'), pronouns ('those who trust me'), and nominal adjectives ('the elderly who are sick)."[24] Thus, here, the dependent/relative clause modifies the noun "action." The dependent clause therefore describes what action the Member may take regardless of the obligations under the Agreement: for instance, "any action which it considers necessary for the protection of its essential security interests relating to fissionable materials or the materials from which they are derived."

30. Put differently, as we explained in the U.S. Response to Panel Question 35 and the U.S. Second Written Submission, 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 ending. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, and are thus each left to the determination of the Member.

31. As noted above, the operative language "it considers" (subject and verb of the clause) in the single relative clause, which describes the action a Member may take, reserves for the Member to decide what action it considers "necessary for" the protection of its essential security interests and which circumstance is present.[25] In that sense, the phrase "which it

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consists of the verb and its **complements** and **adverbials** that are functions as **adjuncts**. In the sentence *I met a girl on the train today*, *I* is the subject and the rest of the sentence is the predicate.") (emphasis in the original).

[21] WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 91 (4th ed. 1999) (US-226).

[22] WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 91 (4th ed. 1999) (US-226).

[23] THE CLASSIC GUIDE TO BETTER WRITING 69 (Ruldolf Flesch & A. H. Lass, HarperPerrenial, 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); WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 94 (4th ed. 1999) (defining "relative clause" as "[a] clause introduced by a relative pronoun, such as *who*, *which*, *that*, or by a relative adverb, such as *where*, *when*, *why*.")(emphasis in the original) (US-226).

[24] ENGLISH GRAMMAR 631 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) (US-93).

[25] *See* U.S. Response to Question 34 ("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.").

considers" "qualifies" all of the elements in the relative clause, including the subparagraph endings. To further assist the Panel, each subcolumn in the chart above is analyzed below.

Column (1): The phrase "Nothing in this Agreement shall be construed" (chapeau of Article XXI) begins the independent clause in Article XXI(b).

Column (2): The phrase "to prevent any [Member] from taking" (in the main text of Article XXI(b)) is part of the independent clause in Article XXI(b).

Column (3): The noun phrase[26] "any action" (in the main text of Article XXI(b)) ends the independent clause in Article XXI(b). The noun "action" is modified by the single relative clause that begins with "which it considers necessary" and ends at the end of each subparagraph ending.

Column (4): The phrase "which it considers" (in the main text of Article XXI(b)) begins the single relative clause that follows the word "action." The relative pronoun "which" indicates that the function of the clause is to modify the word "action." This phrase contains the subject ("it") and verb ("considers") of the relative clause, and this operative language ("it considers") qualifies the rest of the terms in the clause.

Column (5): The phrase "necessary for the protection of" (in the main text of Article XXI(b)) is part of the single relative clause that follows the word "action." Because the word "necessary" is followed by the word "for"[27], 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).

Column (6): The noun phrase "its essential security interests" (in the main text of Article XXI(b)) is part of the single relative clause that follows the word "action." Consistent with English grammar rules, the noun phrase is modified by subparagraph ending (i) and (ii). For additional analysis of this noun phrase, please see U.S. Response to the Panel's Question 36.

Column (7): Each subparagraph ending completes the single relative clause that begins with the phrase "which it considers."

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[26] MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) ("A *noun phrase* consists of a noun and its modifiers. *The second warehouse* is huge.") (emphasis in the original) (US-176).

[27] 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).

Subparagraph ending (i) ("relating to fissionable materials …") and subparagraph ending (ii) ("relating to the traffic in arms …") are participle phrases[28] as they begin with "relating" (the present participle of "relate"). They function as adjectives so they can also be characterized as adjectival phrases.[29] Under English grammar rules, an adjectival phrase normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.[30] Thus, under the rules, subparagraph endings (i) and (ii) modify the noun phrase they follow – "its essential security interests."

Suparagraph ending (iii) is also a participle phrase as it begins with "taken" (a past participle of "take"), but it does not speak to the nature of the security interests. Instead, it provides a temporal limitation related to the action taken. It functions as an adjective so it can also be characterized as an adjectival phrase. Although an adjectival phrase normally follows the word it modifies, in this case, the drafters departed from typical English usage in placing the modifier next to "its essential security interests" as opposed to "action." It is clear that "taken" modifies "action", however, because it is "actions" – not "interests" – that are taken.

It is also important to note that the subparagraph endings of Article XXI(b) are *not* connected by a conjunction, such as "and" or "or", that would suggest they modify the same term in the chapeau. Rather, the text used in this provision suggests that the drafters saw each subparagraph ending as having a different meaning, and structured them accordingly.

Question 91. Please comment on the appropriate terminology to refer to the various parts of Article XXI(b), including the following possibilities:

a. "chapeau" and "subparagraph" (as used in relation to Article XX) and, accounting for the additional layer of indentation in Article XXI, "subparagraph endings";

b. "clauses" and "phrases" in the text of Article XXI(b) including variations such as an "introductory" or "adjectival/relative/dependent" clause/phrase or "subclauses".

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[28] MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) ("A participial phrase includes a participle and functions as an adjective.")(US-176).

[29] MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) ("A participial phrase includes a participle and functions as an adjective.") (US-176).

[30] 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-176). 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).

32. Please see the U.S. response to Panel's Question 90. The United States used the terminology it considers appropriate – and provided citations and definitions for that terminology – in describing the grammatical structure and composition of Article XXI(b) in response to the Panel's Question 90.

33. The United States considers that the interpretation of Article XXI(b) does not turn on the terminology used, however. Therefore, if the Panel were to ascribe a different grammatical function to any of the terms the United States uses above, that would not alter the interpretation the United States has submitted. Instead, Article XXI(b) must be interpreted in accordance with the customary rules of interpretation – that is, based on the ordinary meaning of its terms in their context. This includes understanding the text in light of the relevant grammatical structure, regardless of the terminology used to describe that structure.

Question 92. Regarding evidence on the Panel record concerning the measures at issue, please comment on:

> **a. "national security" as used in the Section 232 legislation (as well as the Department of Commerce Reports and Presidential Proclamations on steel and aluminium) in relation to the terms "its essential security interests" in Article XXI(b); and**

34. While the Section 232 statute does not provide a definition of the term "national security," the statute requires the President and the Secretary to consider a range of non-exclusive factors when making the requisite national security determination.[31] Specifically, the statute requires the President and the Secretary to examine the effect of imports on "national security requirements":

> domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as

[31] *See* 19 U.S.C. § 1862(b)(3) (US-1) ("[T]he Secretary shall submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under this section. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.").

> those affect such industries and the capacity of the United States to meet national security requirements.[32]

Recognizing "the close relation of the economic welfare of the nation to national security," the statute also requires the President and Secretary to consider the following factors "in determining whether such weakening of our internal economy may impair the national security":

> 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.[33]

The statute reflects that a range of factors may affect our nation's security, and its intention to allow the President the flexibility necessary to achieve the statutory purpose – to protect the U.S. national security. This approach is consistent with that of many WTO members that appear to construe national security broadly, as explained in detail in U.S. response to the Panel's Question 74(d)-(f).[34]

35. Consistent with the statutory language, both the steel and aluminum reports state "that 'national security' for purposes of Section 232 includes the 'general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government.'"[35] In the steel report, the Secretary determined that "the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global excess capacity in steel, are 'weakening our internal economy' and *therefore 'threaten to impair' the national security as defined in Section 232*."[36] The report's conclusion notes that "[t]he continued rising levels of imports of foreign steel *threaten to impair the national security* by placing the U.S. steel industry at substantial risk of displacing the basic oxygen furnace and other steelmaking capacity, and the related supply chain *needed to produce steel for critical infrastructure and*

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[32] *See* 19 U.S.C. § 1862(c)(1) (US-1)("Within 90 days after receiving a report…the President shall – (i) determine whether the President concurs with the finding of the Secretary, and (ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.").

[33] *See* 19 U.S.C. § 1862 (US-1).

[34] See U.S. Response to Panel's Question 74(d)-(f) (discussing, among other things, China's National Security Law and the national security strategy of the Netherlands, Japan, Singapore, Russia and Spain).

[35] 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 1 (US-7).

[36] 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 56-57 (US-7) (emphasis added).

national defense."[37] The steel report explains why a broader approach to assessing national security is needed: "Since defense and critical infrastructure requirements alone are not sufficient to support a robust steel industry, U.S. steel producers must be financially viable and competitive in the commercial market to be available to produce the needed steel output in a timely and cost efficient manner."[38] The report emphasizes, "In fact, it is the ability to quickly shift production capacity used for commercial products to defense and critical infrastructure production that provides the United States a surge capability *that is vital to national security*, especially in an unexpected or extended conflict or national emergency."[39] It adds, "It is that capability which is now at serious risk," noting that "[steel] producers are in danger of falling below minimum viable scale."[40]

36. The aluminum report made similar findings, concluding that the "present quantities and circumstances of aluminum imports are 'weakening our internal economy' and *threaten to impair the national security as defined in Section 232*."[41] The report states that "[i]f no action is taken, the United States is in danger of losing the capability to smelt primary aluminum altogether" and emphasizes the need to "increase and stabilize U.S. production of aluminum at the minimal level needed to meet *current and future national security needs*"[42]

37. Similarly, as explained in the U.S. response to the Panel's Question 51, the phrase "its essential security interests" could encompass a broad range of security interests considered by the invoking Member to be "essential." The term "security" refers to "[t]he condition of being protected from or not exposed to danger; safety."[43] 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.[44] The term does not specify a particular subject matter – only the importance that the Member attaches to the security interest.

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[37] 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 56-57 (US-7) (emphasis added).

[38] 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 56-57 (US-7).

[39] 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 56-57 (US-7) (emphasis added).

[40] 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 56-57 (US-7).

[41] 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 104-105 (US-8) (emphasis added).

[42] 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 104-105 (US-8) (emphasis added).

[43] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852, 2754 (US-22).

[44] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852, 2754 (US-22).

38. 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." Importantly, it is "its" essential security interests – those of the acting Member – that the action is taken for the protection of. With this language, Article XXI(b) acknowledges that the essential security interests at issue are those as determined by the acting Member, and reflects that these interests might change over time and across Members.

39. In short, the term "national security" – as used in the context of Section 232 and the steel and aluminum reports – squarely falls within the scope of "[a Member's] essential security interests" under Article XXI.

b. "imports" of products "in such quantities or under such circumstances as to threaten to impair the national security" in the Section 232 legislation (as well as the Department of Commerce Reports and Presidential Proclamations on steel and aluminium) in relation to the terms "other emergency in international relations" in Article XXI(b)(iii).

40. As the United States explained in response to the Panel's Questions 35 to 38, 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 ending.

41. 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. Thus, as relevant to the Panel's present question, whether a Member considers such action to be "taken in time of war or other emergency in international relations" within the meaning of in Article XXI(b)(iii), is left to the determination of the Member invoking that provision.

42. The text of Article XXI(b) does not include any language requiring the invoking Member to provide an explanation or produce evidence to justify its invocation. The text does not indicate the Member must notify the circumstances underlying the invocation, explain the action, or provide advance notice – as it might under other provisions of the WTO Agreement.

43. It may be, however, that a Member invoking Article XXI nonetheless chooses to make information available to other Members. Indeed, the United States made extensive information available in relation to its actions under Section 232 through the steel and aluminum reports and Presidential Proclamations. While the United States does not consider that the Panel may undertake its own assessment of the U.S. invocation of Article XXI(b), the extensive findings in the steel and aluminum reports are consistent with the United States considering the measures at issue to be taken "in time of war or other emergency in international relations."

44. For example, the steel report observes that "steel is important to U.S. national security," that "[d]omestic steel production is essential for national security applications" and that

"[d]omestic steel production depends on a healthy and competitive U.S. industry."[45] Regarding the circumstances under which steel was being imported into the United States, the steel report observed that "global excess steel capacity is a circumstance that contributes to the weakening of the domestic economy."[46] Based on OECD analyses, the report noted the gap between global steel production capacity and global demand for steel.[47] As the report explained, "the world's nominal crude steelmaking capacity reached about 2.4 billion metric tons in 2016, an increase of 127 percent compared to the 2000 level," while world steel demand had contracted sharply after the 2008 financial crisis and – after rising only slowly between 2008 and 2013 – had again flattened, leading to a capacity/demand gap that reached over 700 million metric tons in 2015.[48]

45. The report further explained that "free markets globally are adversely affected by substantial chronic global excess steel production led by China," and that global excess steel capacity had affected the United States: "While U.S. steel production capacity has remained flat since 2001, other steel producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined."[49] The report then identified a relationship between imports, the circumstance of global excess capacity, and U.S. national security, and stated that "[t]he 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."[50]

46. At Appendix L, the steel report discussed the global nature of steel excess capacity, and described previous efforts to address it. As observed in Appendix L to the steel report, "[t]he excess capacity situation for steel is a global problem, and steel-producing nations have

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[45] 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 2-3 & 23-25 (US-7).

[46] 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 4, 51 (US-7).

[47] 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 4, 51 (US-7).

[48] 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 4, 51 (US-7).

[49] 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 4, 55 (US-7).

[50] 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 3-4 (US-7).

committed, in principle to work together on possible solutions."[51] In particular, the report noted the work of the G20 economies and interested Organization for Economic Cooperation and Development (OECD) members in the Global Forum on Steel Excess Capacity ("Global Forum"), including policy recommendations contained in the Global Forum's report of November 30, 2017.[52] The steel report also observed the limits of the Global Forum's work, however, stating that the Global Forum's report "provides helpful policy prescriptions, but it does not highlight the lack of true market reforms in the steel sector."[53] The steel report also suggested that the adjustments proposed in the Global Forum's report would not address the overcapacity crisis, and observed:

> The setting of capacity reduction targets is not a long-term response to the crisis. Meaningful progress can only be achieved by removing subsidies and other forms of government support so that markets can function properly. In addition, state-owned enterprises and private steelmakers should be treated equally.[54]

47. Ultimately the steel report concluded, consistent with the language from the Section 232 statute, that "the displacement of domestic steel by excessive imports and the consequent adverse impact of those quantities of steel imports on the economic welfare of the domestic steel industry, along with the circumstance of global excess capacity in steel, are 'weakening our internal economy' and therefore 'threaten to impair' the national security as defined in Section 232."[55] Similar findings are reflected in the Secretary of Commerce's report on the effect of imports of aluminum on the national security.[56] In his March 8, 2018 proclamations,

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[51] 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 Appendix L, p. 1 (US-7).

[52] 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 Appendix L, pp. 1-2 (US-7).

[53] 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 Appendix L, p. 2 (US-7).

[54] 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 Appendix L, p. 2 (US-7).

[55] 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 (emphases added) (US-7).

[56] *See* 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 11, 2018, at 15 (observing "the presence of massive foreign excess capacity for producing aluminum" and stating that "[t]his excess capacity results in aluminum imports occurring 'under such circumstances' that they threaten to impair the national security") (US-8); 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 11, 2018, at 104 (stating 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 aluminum production" and "[b]ased on these findings, the

the President concurred with the Secretary's findings and made adjustments to the imports of steel and aluminum articles.[57]

48. As the United States explained in response to the Panel's Question 51, the ordinary meaning of the phrase "other emergency in international relations" in Article XXI(b)(iii) is broad. Definitions of "emergency" include "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention."[58] A broad understanding of the term "emergency" in Article XXI(b)(iii) is supported by the context provided by other provisions of the GATT 1994 and other covered agreements.[59]

49. The phrase "international relations" can be understood as referring to a broad range of matters. The term "relations" can be defined as "[t]he various ways by which a country, State, etc., maintains political or economic contact with another,"[60] while the term "international" can be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations."[61] With these definitions in mind, an "other emergency in international relations" can be understood as referring to a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.

50. As reflected in the steel and aluminum reports, the findings cited above relating to the threatened impairment of national security by steel and aluminum imports, and the global crisis circumstances under which such importations were occurring, are consistent with the United States considering that an "other emergency in international relations" exists – that is, a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention.

Question 93. Please comment on the analysis and findings of the panel in Saudi Arabia – Protection of IPRs in relation to the legal standard under Article XXI(b), including the panel's application of Article XXI(b) to the position taken by the respondent in that dispute.

51. In *Saudi Arabia – Measures Concerning the Protection of IPRs*, the panel found that Saudi Arabia had breached its obligations under the TRIPS Agreement, and evaluated Saudi

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Secretary of Commerce concludes that the present quantities and circumstance of aluminum imports (wrought and unwrought) are 'weakening our internal economy' and threaten to impair the national security as defined in Section 232.") (US-8).

[57] Presidential Proclamation 9705 of March 8, 2018 (US-9); Presidential Proclamation 9704 of March 8, 2018 (US10); Presidential Proclamation 9711 of March 22, 2018 (US-11).

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

[59] *See* GATT 1994 Article XII, Agreement on Safeguards Article 11.1(b), and Agreement on Agriculture Article 4.2, discussed more fully in the U.S. response to Question 51.

[60] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 2534 (US-222).

[61] The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 1397 (US-222).

Arabia's arguments under Article 73(b)(iii). Notably, that panel did not engage in its own analysis of Article 73, but rather "transposed" the *Russia – Traffic in Transit* panel's analysis, based on "agreement" by the parties and some third parties.[62]

52. The panel reasoned that TRIPS Article 73(b)(iii) is "identical" to GATT 1994 Article XXI(b)(iii), and that Article XXI had been recently interpreted by the *Russia – Traffic in Transit* panel.[63] The *Saudi Arabia – Measures Concerning the Protection of IPRs* panel observed that both parties to the dispute before it had interpreted Article 73(b)(iii) "by reference to, and consistently with, the interpretation of" Article XXI by the *Russia – Traffic in Transit* panel;[64] and the parties and "multiple third parties" had "each express[ed] agreement with the general interpretation and analytical framework enunciated" by the *Russia – Traffic in Transit* panel.[65] On this basis, the *Saudi Arabia – Measures Concerning the Protection of IPRs* Panel found "agreement" that the "general interpretation and analytical framework" of the *Russia – Traffic in Transit* panel report "can be transposed" to Article 73(b)(iii) and applied in the dispute before it.[66]

53. Simply transposing the approach of a prior panel – even if based on the agreement of the parties – is not consistent with the function of panels as set out in the DSU. Article 11 of the DSU stipulates that "[t]he function of panels is to assist the DSB in discharging its responsibilities" under the DSU and the covered agreements. In exercising this function, a panel is to conduct "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Thus, an objective assessment requires that a panel interpret the relevant provisions of the covered agreements to determine how they apply to the measures at issue and whether those measures conform with a Member's commitments. Neither Article 11 of the DSU nor any other provision links a panel's objective assessment to prior interpretations by the Appellate Body or another panel. Accordingly, the *Saudi Arabia – Protection of IPRs*'s decision to "transpose" the approach of a prior panel was not consistent with the DSU.

54. The United States participated as a third party in *Saudi Arabia – Protection of IPRs* and argued – consistent with its expressed position in *Russia – Traffic in Transit* and in this dispute – that the text of TRIPS Article 73(b)(iii) establishes that this provision is self-judging and therefore not subject to review by a WTO panel. Although the panel in *Saudi Arabia – Protection of IPRs* acknowledged the general U.S. position, it did not engage the arguments and evidence provided by the United States in support of this position, including

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[62] *Saudi Arabia – Protection of IPR*, para. 7.243.

[63] *Saudi Arabia – Protection of IPR*, para. 7.241.

[64] *Saudi Arabia – Protection of IPR*, para. 7.231.

[65] *Saudi Arabia – Protection of IPR*, para. 7.243.

[66] *Saudi Arabia – Protection of IPR*, para. 7.243.

arguments and evidence (also presented in this dispute) that were in addition to those presented by the United States as a third party in *Russia – Traffic in Transit*.

55. Moreover, when applying its interpretation of Article 73(b)(iii), the *Saudi Arabia – Protection of IPRs* panel was deferential to Saudi Arabia, apparently diverging from the *Russia – Traffic in Transit* approach that it had "transposed." As to two of Qatar's claims – concerning measures preventing a Qatari entity from obtaining legal counsel to enforce its IP rights in Saudi Arabia – the Panel found that Saudi Arabia had met the requirements of Article 73(b)(iii) because these measures met a "minimum requirement of plausibility" in relation to the essential security interests Saudi Arabia had articulated.[67]

56. With respect to Qatar's third claim – concerning Saudi Arabia's non-prosecution of a Saudi entity infringing third-party intellectual property rights (e.g., the soccer broadcasting rights a Qatari broadcaster had obtained) – the Panel found that Saudi Arabia had not met this "minimum requirement of plausibility."[68] At the DSB meeting following the circulation of the panel report, however, Saudi Arabia indicated that had not invoked Article XXI(b) with respect to this claim. Saudi Arabia stated that it would appeal the panel report and opined that "[b]ased on the prevailing emergency in international relations, the Panel found that Saudi Arabia's invocation of the *Security Exception* under Article 73 of the TRIPS Agreement in the dispute was justified where it was invoked by Saudi Arabia."[69] Saudi Arabia further stated that "[t]he Panel clearly acknowledged Saudi Arabia's confirmation that it did **not** invoke the *Security Exception* with respect to its protection of intellectual property rights."[70]

57. Therefore, the report in *Saudi Arabia – Protection of IPRs* would not appear to provide any additional relevant guidance to the Panel in this dispute. That panel did not engage in any interpretive effort of the TRIPS essential security provision that could be examined by the Panel for assistance in its own interpretive exercise. The panel's interpretation was simply transposed from the *Russia – Traffic in Transit* report and is erroneous for the same reasons, as the United States explained in its First Written Submission.[71]

Question 94. Please comment on the effect of Article 11.1(c) of the Agreement on Safeguards in relation to measures that fall under Article 11.1(b) but are not "measures provided for in Article XIX of GATT 1994" or an "emergency action on imports of particular products as set forth in Article XIX of GATT 1994" under Articles 1 and 11.1(a) of the Agreement on Safeguards.

58. Article 11.1(c) provides in relevant part: "This Agreement [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." By referring to "[t]his Agreement", the

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[67] *Saudi Arabia – Protection of IPR*, paras. 7.286-7.288.

[68] *Saudi Arabia – Protection of IPR*, paras. 7.289-7.293.

[69] Kingdom of Saudi Arabia, Statement before the Dispute Settlement Body, *National Security in WTO dispute Settlement Proceeding DS567* (July 29, 2020) (emphasis in original) (US-227).

[70] Kingdom of Saudi Arabia, Statement before the Dispute Settlement Body, *National Security in WTO dispute Settlement Proceeding DS567* (July 29, 2020) (emphasis in original) (US-227).

[71] *See* First Written Submission of the United States of America, Section III.B.

Agreement on Safeguards in its entirety, Article 11.1(c) makes clear that nothing in the Agreement on Safeguards – including Article 11.1(b) – applies to measures sought, taken, or maintained pursuant to provisions of the GATT 1994 other than Article XIX.

59. If a measure *could* be understood to fall under Article 11.1(b) – but was "sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX " – Article 11.1(c) provides that the Agreement on Safeguards "does not apply" to such a measure.

60. If the measure at issue is *not* "sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX", however, then Article 11.1(a) "does [] apply" and sets out that "[a] Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement."

61. Similarly, if the measure at issue is *not* "sought, taken or maintained pursuant to provisions of GATT 1994 other than Article XIX", then Article 11.1(b) "does []apply" and provides, among other things, 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."

62. The negotiating history of the Agreement on Safeguards confirms this result. Specifically, after the text that became Article 11.1(c) was first introduced into the draft Agreement on Safeguards, in July 1990, the text was reordered and revised to make explicit that Article 11.1(c) applied to *all* the provisions of the Agreement on Safeguards, including Article 11.1(b). The evolution of the text that became Article 11.1(b) and Article 11.1(c) is reflected in Annex 1, with the text that became Article 11.1(b) marked with *stars* and the text that became Article 11.1(c) marked with ■squares■.

63. As discussed in Section IV.B.4.b of the U.S. Second Written Submission, early drafts of the Agreement on Safeguards would have limited the right to apply a safeguard measure to situations in which certain other provisions of the GATT 1994 were not available.[72] By July 1990, however, negotiators had abandoned this approach, and made clear in paragraph 2 of the July 1990 draft that the definition of a safeguard measure at paragraph 1 of that draft did not prejudice a Member's ability to take action pursuant to provisions of the GATT 1994 other than Article XIX. The relevant text from the July 1990 draft – which would ultimately become Article 11.1(c) – is shown in Annex 1 at column A, and provides:

> GENERAL
> . . . .
> 2. *The provisions of paragraph 1* above do not prejudice the rights and obligations of contracting parties regarding trade-restrictive measures

[72] Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), para. 4 (US-215); Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1 (January 15, 1990), para. 4 (US-216).

> taken in conformity with specific provisions of the General Agreement other than Article XIX, protocols, and agreements and arrangements negotiated under the auspices of GATT.[73]

64. The July 1990 draft Agreement on Safeguards also included text similar to what would become the third sentence of Article 11.1(b), requiring that certain measures would be phased out or brought into conformity with the Agreement on Safeguards. This text (also shown in Annex 1 at column A) reads as follows:

> ELIMINATION OF CERTAIN MEASURES
>
> 22. Contracting parties agree to phase out, or bring into conformity with this Agreement, all trade-restrictive border measures referred to in paragraph 1 above, taken in violation of the conditions and procedures set out in this Agreement.[74]

65. Notably, this text appeared at paragraph 22, toward the *end* of the draft agreement and *after* the text in paragraph 2 that would become Article 11.1(c). This placement of the provisions, and the reference in paragraph 2 limiting its application to the definition set forth in paragraph 1, could have been understood to require that *all* measures described in paragraph 1 – even those that were taken in conformity with provisions of the GATT 1994 other than Article XIX, as described in paragraph 2 – would be subject to the requirement in paragraph 22 that they be either phased out or brought into conformity with Article XIX.

66. In the October 1990 draft, these provisions were combined and placed in paragraph 24. This text (also shown in column B of Annex 1) provided as follows – with the text that became Article 11.1(b) in **bold** and the text that became Article 11.1(c) underlined:

> PROHIBITION AND ELIMINATION OF CERTAIN MEASURES
>
> [24. No trade-restrictive measure shall be sought or taken by a contracting party unless it conforms with the provisions of Article XIX as interpreted by the provisions of this agreement, or is consistent with other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement. **These include actions taken by a single contracting party as well as actions under agreements, arrangements and understandings entered into by two or more contracting parties. *Any such measure* in effect at the time of entry into force of this agreement shall either be brought into**

[73] Negotiating Group on Safeguards, Chairman's Report on Status of Work in the Negotiating Group, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990) (emphasis added) (US-217).

[74] Negotiating Group on Safeguards, Chairman's Report on Status of Work in the Negotiating Group, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990) (US-217).

> **conformity with the provisions of Article XIX and this agreement or phased out in accordance with paragraph 25 below**.][75]

67. In the October 1990 draft, the text that would become Article 11.1(b) – in **bold** above – still appeared *after* the text that would become Article 11.1(c) – underlined above. In addition, the Article 11.1(c) text still did not explicitly state that it applied to the *entire* agreement. Thus, the October 1990 draft – like the July 1990 draft – could have been understood to require measures "consistent with other provisions of the General Agreement [other than Article XIX]" (as referred to in the first sentence of paragraph 24, and later in Article 11.1(c)) to be among the "[a]ny such measure[s]" which must be "either brought into conformity with the provisions of Article XIX and this agreement or phased out" (as referred to in the third sentence of paragraph 24, and later in Article 11.1(b)).

68. By December 1991, however, the drafters had revised this approach. The provision was divided into subparagraphs, reordered, and rephrased as follows (and shown in column C of Annex 1):

> PROHIBITION AND ELIMINATION OF CERTAIN MEASURES
>
> 22. . . . .
>
> (b) Furthermore, a contracting party 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. These include actions taken by a single contracting party as well as actions under agreements, arrangements and understandings entered into by two or more contracting parties. Any such measure in effect at the time of entry into force of this agreement shall be brought into conformity with this provision or phased out, in accordance with paragraph 23 below.
>
> (c) Measures sought, taken or maintained by a contracting party pursuant to other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement are not included in the scope of *this agreement.*[76]

69. As this excerpt shows, in the December 1991 draft, the text that would become Article 11.1(c) was revised to explicitly refer to the scope of "this agreement," and that text was moved so that it appeared *after* the text that would become Article 11.1(b). With these two changes, the December 1991 draft made explicit that the prohibition of certain measures at subparagraph (b) is – like the rest of the Agreement on Safeguards – is subject to the text at

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[75] Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (Oct. 31, 1990) (emphases added) (US-220). The text remained the same in the December 1990 draft Agreement on Safeguards. *See* Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990) (US-189).

[76] Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991) (US-190)

subparagraph (c) that preserves Members' ability to seek, take, or maintain measures pursuant to provisions of the GATT 1994 other than Article XIX.

70. The final text of the Agreement on Safeguards retained both the reference to "this Agreement" in Article 11.1(c) and the placement of Article 11.1(c) *after* Article 11.1(b). As this text provides (also reflected column D of Annex 1):

> Article 11: Prohibition and Elimination of Certain Measures
>
> . . . .
>
> (b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.
>
> (c) *This Agreement* does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.[77]

71. In fact, by placing the reference to "This Agreement" at the beginning of Article 11.1(c), this final text makes even clearer that the text of Article 11.1(c) applies to the entire Agreement on Safeguards, including Article 11.1(b). Accordingly, the drafting history of Article 11.1 confirms that nothing in the Agreement on Safeguards – including Article 11.1(b) – applies to "measures sought, taken or maintained pursuant to provisions of the GATT 1994 other than Article XIX."

[77] Agreement on Safeguards, Article 11.1 (emphasis added).

Annex 1: Drafting History of Article 11.1(b) & Article 11.1(c) of the Agreement on Safeguards

Text that became Article 11.1(b) is set off by *stars*; text that became Article 11.1(c) is set off by ■ squares ■.

Column A	Column B	Column C	Column D
Negotiating Group on Safeguards, Chairman's Report on Status of Work in the Negotiating Group, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990) (emphasis added) (US-217)	Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (Oct. 31, 1990) (emphasis added) (US-220)	Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991) (footnotes omitted) (US-190)	Agreement on Safeguards (footnotes omitted) (emphasis added)
GENERAL 1. For the purposes of this Agreement, a safeguard measure shall be understood to mean a border measure entailing the suspension, in whole or in part, of obligations or the withdrawal or modification of concessions under the General Agreement, with respect to a product, that is found necessary under the conditions and procedures provided for below, to prevent or remedy serious injury to a domestic industry and to facilitate adjustment. Any trade-restrictive border measure taken in violation of the said conditions and procedures shall not be deemed to be a legitimate safeguard measure. ■ 2. *The provisions of paragraph 1* above do not prejudice the rights and obligations of contracting parties regarding trade-restrictive measures taken in conformity with specific provisions of the General Agreement other than Article XIX, protocols, and agreements and arrangements negotiated under the auspices of GATT. ■ . . . . . * ELIMINATION OF CERTAIN MEASURES 22. Contracting parties agree to phase out, or bring into conformity with this Agreement, all trade-restrictive border measures referred to in paragraph 1 above, taken in violation of the conditions and procedures set out in this Agreement.*	PROHIBITION AND ELIMINATION OF CERTAIN MEASURES ■[24. No trade-restrictive measure shall be sought or taken by a contracting party unless it■ conforms with the provisions of Article XIX as interpreted by the provisions of this agreement, or ■is consistent with other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement.■ *These include actions taken by a single contracting party as well as actions under agreements, arrangements and understandings entered into by two or more contracting parties. *Any such measure* in effect at the time of entry into force of this agreement shall either be brought into conformity with the provisions of Article XIX and this agreement or phased out in accordance with paragraph 25 below.]*	PROHIBITION AND ELIMINATION OF CERTAIN MEASURES 22. (a) A contracting party shall not take or seek any emergency action on imports of particular products as set forth in Article XIX unless such action conforms with the provisions of Article XIX of the General Agreement applied in accordance with this agreement. *(b) Furthermore, a contracting party 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. These include actions taken by a single contracting party as well as actions under agreements, arrangements and understandings entered into by two or more contracting parties. Any such measure in effect at the time of entry into force of this agreement shall be brought into conformity with this provision or phased out, in accordance with paragraph 23 below.* ■(c) Measures sought, taken or maintained by a contracting party pursuant to other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement are not included in the scope of *this agreement.* ■	Article 11: Prohibition and Elimination of Certain Measures 1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement. *(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.* ■(c) *This Agreement* does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.■