

UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS
(DS548)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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US-86	<i>The New Shorter Oxford English Dictionary</i> , 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
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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
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

EXHIBIT	DESCRIPTION
US-122	James Crawford, <i>BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW</i> (8th ed. 2012)
US-123	UNIDIR, <i>The United Nations, Cyberspace and International Peace and Security: Responding to Complexity in the 21st Century</i> (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, <i>New Zealand’s cybersecurity strategy</i> (2019) (excerpt)
US-128	Australian Government, <i>Australia’s Cyber Security Strategy</i> (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, <i>National Cyber Security Strategy 2020</i> (2019)
US-132	India, <i>National Cyber Security Policy 2013</i>
US-133	The Ministry of Foreign Affairs of the Netherlands, <i>Working Worldwide for the Security of the Netherlands: An Integrated International Security Strategy 2018-2022</i> , at 19 (2018) (excerpt)
US-134	The Netherlands Government, <i>National Security Strategy</i> (2019)
US-135	Switzerland, <i>National Strategy for the Protection of Switzerland against Cyber Risks 2018-2022</i> , at 1 (Apr. 2018)
US-136	ENISA, <i>NCSS Good Practice Guide</i> (Nov. 2016) (excerpt)

EXHIBIT	DESCRIPTION
US-137	Canada’s National Cyber Security Action Plan 2019-2024 (2019) (excerpt)
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 35 th 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, 4 th 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).

EXHIBIT	DESCRIPTION
US-151	Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988)
US-152	Negotiating Group on GATT Articles, Communication from Nicaragua, MTN.GNG/NG7/W/34 (Nov. 12, 1987)
US-153	Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988)
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)

EXHIBIT	DESCRIPTION
US-165	Spain, The National Security Strategy, Sharing a Common Project (2013) (excerpt)
US-166	Turkey, Ministry of Foreign Affairs, Turkey’s Perspectives and Policies on Security Issues
US-167	Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987)
US-168	Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988)
US-169	<i>The Oxford Spanish Dictionary</i> , 2 st edn (revised), (Oxford University Press, 2001) (excerpt)
US-170	Ortografía 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)
US-173	Summary Record of the Twelfth Meeting, E/PC/T/A/SR/12 (June 12, 1947)
U.S. Second Written Submission	
US-174	Intentionally Omitted
US-175	Ian Sinclair, <i>The Vienna Convention on the Law of Treaties</i> , Manchester University Press, 2nd edn (1984) (excerpt)
US-176	<i>Merriam-Webster’s Guide to Punctuation and Style</i> 233 (1st edn. 1995) (excerpts)
US-177	THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE (1994)
US-178	<i>The Grammar Bible: Everything You Always Wanted to Know About Grammar but Didn’t Know Whom to Ask</i> 146-147 (2nd edn 2004)
US-179	Intentionally Omitted

EXHIBIT	DESCRIPTION
US-180	MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 222 (1st edn 1995)
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)
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)

EXHIBIT	DESCRIPTION
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)
US-202	Intentionally Omitted
US-203	Intentionally Omitted
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	<i>United States – Fur Felt Hats</i> (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)

EXHIBIT	DESCRIPTION
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)
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)

I. Introduction

1. In previous submissions, the United States explained that Article XXI(b) – as interpreted according to the customary rules of interpretation – is self-judging, meaning that each Member has the right to determine, for itself, what it considers necessary to protect its own essential security interests, and to take action accordingly. In this submission, the United States will focus on arguments made by the complainant in its oral statement at the First Substantive Meeting and its responses to the Panel’s Questions.

2. Section II demonstrates that the complainant’s argument that a Member’s invocation of Article XXI(b) is subject to testing by the Panel is contrary to the text and grammatical structure of the provision. In addition, supplementary means of interpretation – including negotiating history of the Uruguay Round – confirm that a Member’s exercise of its rights under Article XXI(b) is not subject to testing in the manner suggested by the complainant, and that Uruguay Round drafters understood that this provision was (and would remain) self-judging by the acting Member. Section II also explains that, contrary to the complainant’s argument, nothing in Article XXI(b) suggests that a Member invoking the provision is required to specifically identify the subparagraph with respect to which it is invoking the right reflected in Article XXI(b), or that the Member must furnish information supporting its invocation for the Panel’s review. In fact, the complainant’s argument should be rejected not only because it is not supported by the text of the provision but also because such an interpretation would undermine a responding Member’s rights under Article XXI(a).

3. The interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions, however, is not fully supported by the Spanish text of the subparagraphs. This means that, under Article 33 of the VCLT, the meaning that best reconciles the three authentic texts, having regard to the object and purpose of the treaty, must be adopted. Reconciling the texts changes the U.S. interpretation of the text of subparagraphs (i) and (ii) from modifying the term “interests” – the meaning most natural and consistent with rules of grammar and convention in English and French – to modifying the terms “any action which it considers” – a meaning that is also permitted in all three authentic texts. This interpretation does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase “which it considers” still modifies the entirety of the chapeau and the subparagraph endings. Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member’s essential security interests in the relevant circumstances to the judgment of that Member alone.

4. Section III explains that the function of a panel under DSU Article 11 to make an “objective assessment of the matter before it” does not render the Member’s determination under Article XXI(b) subject to testing by the Panel. Because the panel’s objective assessment of the text of Article XXI leads to the conclusion that the provision is self-judging and does not subject a Member’s invocation of Article XXI(b) to further review, the U.S. interpretation of Article XXI(b) as self-judging is consistent with the Panel’s terms of reference and the DSU. In this situation, the sole finding that the Panel can make is to note the U.S. invocation of Article

XXI(b). Furthermore, the type of review proposed by the complainant would necessarily require a panel to substitute its judgment for the judgment that Article XXI(b) reserved to the Member alone. The approach advanced by the United States is the only way to fulfil the Panel’s role under the DSU without substituting its judgment for that of the United States.

5. Section IV explains that, contrary to the arguments presented by the complainant, the U.S. measures at issue in this dispute are not safeguards. A necessary, condition precedent for the application of safeguards disciplines is that the acting Member invokes Article XIX as the legal basis for its action. Here, the United States has not invoked Article XIX as the basis for the measures at issue, and instead has repeatedly made clear that it has sought and taken these measures pursuant to Article XXI. Accordingly, the measures at issue are not safeguards and the safeguards disciplines do not apply to them.

6. Finally, Section V addresses the order of analysis that the Panel should adopt in this dispute. As the United States explains there, due to the self-judging nature of Article XXI(b), the sole finding that the Panel may make in this dispute is to note the Panel’s recognition that the United States has invoked its essential security interests. Accordingly, the United States suggest that the Panel should begin by addressing the United States’ invocation of GATT 1994 Article XXI(b).

II. Complainant’s Arguments Fail to Rebut the U.S. Interpretation of Article XXI

7. The United States has invoked Article XXI(b) in this dispute, and as discussed in Section II.A, this invocation applies to all of the complainant’s claims. Furthermore, the United States has shown that Article XXI(b), as interpreted according to the customary rules of interpretation, is self-judging, meaning that each Member has the right to determine, for itself, what it considers necessary to protect its own essential security interests, and to take action accordingly. This is because the phrase “which it considers” qualifies all of the terms in the single relative clause that follows the word “action”, including the terms in the chapeau and the subparagraph endings.

8. As discussed in Section II.B, the complainant dismisses the U.S. interpretation, arguing that “which it considers” does not qualify all of the elements in the chapeau and the subparagraph endings. The complainant’s argument artificially separates the single relative clause that follows the word “action” and is contrary to the text and grammatical structure of Article XXI(b). The complainant also asserts that the Panel can objectively determine existence of a “war or other emergency in international relations” within the meaning of Article XXI(b)(iii). Contrary to complainant’s argument, the text of subparagraph ending (iii) – particularly the terms “emergency” and “security”, which each Member may interpret differently – supports the interpretation that the applicability of Article XXI(b)(iii), like all of Article XXI(b), is self-judging. The complainant suggests that Article XXI(a) is not relevant to this dispute. Pointing to superficial similarities between Article XX and Article XXI(b), however, the complainant argues that the Panel should apply a two-step test the panel uses in reviewing Article XX invocation. Such an argument, however, ignores the important textual differences between the two provisions.

9. Furthermore, as set forth in Section II.C, the U.S. interpretation is confirmed by supplementary means of interpretation, including the negotiating history of Article XXI(b) and

negotiations that occurred during the Uruguay Round. Finally, as discussed in Section II.D, the customary rules of interpretation support adopting an interpretation of Article XXI(b) that best reconciles the English, Spanish, and French versions. Reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member’s essential security interests in the relevant circumstances to the judgment of that Member alone.

A. The United States Has Invoked Article XXI(b) With Respect To All Of Complainant’s Claims

10. The United States recalls that it has invoked Article XXI(b) of the GATT 1994 in relation to all claims raised in this dispute.¹ Therefore, the EU’s assertions to the contrary are in error, and the United States has invoked Article XXI(b) with respect to the EU’s claims on the Section 232 statute.

11. The EU argues that “Article XXI(b) does not ‘operate’ at all in the context” of its claims against Section 232 as interpreted.² Specifically, the EU argues that the Section 232 statute as interpreted “has led” the United States to take safeguards action that is necessarily not justified under Article XXI and that breaches the Agreement on Safeguards.³

12. Contrary to the EU’s arguments, the EU’s own assertions demonstrate that Article XXI is a defense to such claims. Article XXI(b) states that “Nothing in this Agreement shall be construed... to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests.” In essence, the EU’s claim related to Section 232 as interpreted – like the EU’s other claims – seeks to *prevent* the United States from taking action that the EU considers a safeguards action contrary to Article XXI.

13. Precisely this type of finding or assessment would be contrary to Article XXI and the sovereign right of a state that it reflects. As the United States explained in Section III.C of its First Written Submission and Section G of its Oral Opening Statement in the First Meeting of the Panel with the Parties, Article XXI applies to alleged breaches of the Agreement on Safeguards, as well as to alleged breaches of the GATT 1994.

¹ U.S. First Written Submission, para. 9; *See also* 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, at 18-19 (stating with respect to the EU’s panel request at WT/DS548/14 that “[b]ecause the United States has invoked Article XXI there is no basis for a WTO panel to review the claims of breach raised by the European Union.”) (US-84); Request for the establishment of a Panel by the European Union, WT/DS548/14 (setting forth the EU’s claims in this dispute, including its claim that “the EU considers that Section 232 . . . as repeatedly interpreted by the US’ administrative and judicial authorities in the above and other measures . . . is ‘as such’ inconsistent with the US’ obligations and rights set out in the WTO Agreement.”).

² EU’s Response to the Panel’s Question 73(c), para. 394.

³ EU’s Response to the Panel’s Question 3, para. 43 (“As the EU states in its responses to the Panel’s questions, Section 232 is “a measure taken by the United States which provides for (and has led to) the adoption of individual safeguard measures, and it is – in substantive terms – contrary to Articles 4.2, 5.1, 7.4, and 11.1(a) of the Agreement on Safeguards.”).

B. Ordinary Meaning of Article XXI(b) Establishes that Article XXI(b) is Self-Judging

14. As the United States has explained in prior submissions, the self-judging nature of Article XXI(b) of GATT 1994 is established by the text of that provision, in its context, and in the light of the treaty’s object and purpose. For the reasons below, none of complainant’s new arguments is supported by the text of Article XXI(b) or by customary rules of interpretation under public international law; therefore, complainant’s arguments fail to rebut the U.S. interpretation of Article XXI(b) as self-judging.

15. As discussed in Section II.B.1, the ordinary meaning of the terms of Article XXI(b) establishes that, contrary to the complainant’s arguments, the word “considers” qualifies all the terms in the chapeau and the subparagraph endings of Article XXI(b). Furthermore, as set forth in Section II.B.2, the complainant is wrong when it argues that a responding Member must identify a specific subparagraph of Article XXI(b) to invoke its right to take measures for the protection of its essential security interests. The text of subparagraph ending (iii), discussed in Section II.B.3, also supports the interpretation that the applicability of Article XXI(b)(iii), like all of Article XXI(b), is self-judging. Finally, as described in Section II.B.4, the context provided by Article XXI(a) and Article XX supports the interpretation of Article XXI(b) as self-judging.

1. Complainant’s Argument that “Considers” Does Not Qualify All of the Terms in the Chapeau and the Subparagraph Endings is Inconsistent with the Ordinary Meaning of the Terms of Article XXI(b)

16. The EU continues to argue in error that the term “considers” only qualifies the “necessity” of the Member’s action under Article XXI(b).⁴ Under this interpretation, while the “necessity” of the action is left to the Member’s judgment, the Panel must test whether the action is “for the protection of” and whether the interests being protected are in fact “security” interests that are “essential” to the Member. The EU further argues that the subparagraph endings modify “action” in the English text of Article XXI(b), and explains that its interpretation is clearly confirmed by the French and Spanish versions of Article XXI(b).

17. While the EU agrees with the United States that the term “consider” means “to regard in a certain light or aspect; to look up (as), think (to be), take for”; it argues that, because the verb is transitive, “interpreting the term as applying to the entirety of Article XXI(b), as the US proposes, would be – if not grammatically impossible – at the very least a poor fit with the ordinary meaning of the verbs (in all linguistic versions), because there would be no clear, specific object to which the verb applies.”⁵

⁴⁴ EU’s Response to the Panel’s Question 35, para. 191.

⁵ EU’s Response to the Panel’s Question 41, para. 216.

18. The EU’s argument artificially separates the terms in the single relative clause⁶, which begins with the phrase “which it considers necessary” and ends at the end of each subparagraph.⁷ The clause follows the word “action” and describes the situation which the Member “considers” to be present when it takes such an “action”. Because the relative clause describing the action begins with “which it considers”, the other elements of this clause are committed to the judgment of the Member taking the action.

19. Contrary to the EU’s argument, the fact that “consider” – as used in Article XXI(b) – is a transitive verb does not undermine the U.S. interpretation that “which it considers” qualifies all of the terms in the relative clause that follows “action”. A transitive verb acts upon a direct object⁸. Here, the phrase “which it considers necessary” can be written as “action it considers necessary”; the verb “consider” acts upon the word “action”. The transitive nature of the verb “consider” is consistent with the U.S. argument that the relative clause that begins with “which it considers” describes the situation which the Member considers to be present when it takes such an action.

20. The EU’s argument that the phrase “which it considers” only qualifies the “necessity” of the Member’s action under Article XXI(b) is also inconsistent with the ordinary meaning of the text of the provision. In Article XXI(b), the phrase “which it considers necessary” is followed by the word “for”.⁹ The relevant inquiry is not simply whether a Member considers any action “necessary”. Instead, it is whether a Member considers the action “necessary *for*” a purpose – namely, the protection of its essential security interests relating to subject matters in subparagraph endings (i) and (ii), or for the protection of its essential security interests in the temporal circumstance provided for in subparagraph ending (iii). Artificially separating the

⁶ ENGLISH GRAMMAR 631 (Sydney Grenbaum ed., Oxford Univ. Press, 1996) (“Relative clauses postmodify nouns (‘the house *that I own*’), pronouns (‘those *who trust me*’), and nominal adjectives (‘the elderly *who are sick*.’) (US-93); THE CLASSIC GUIDE TO BETTER WRITING 69 (Rudolf Flesch & A. H. Lass, HarperPerennial, 1996) (“**Who** and **which** are called *relative pronouns* and introduce *relative clauses*...The point is that by using **who** or **which** you have made an independent clause into a relative or dependent clause—a group of words that can’t stand by itself.”) (emphasis in the original) (US-94).

⁷ A clause is a group of words containing both a subject and a predicate (which includes a verb). MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 233 (1st edn 1995) (US-176). With respect to the single relative clause in Article XXI(b)(i), the subject is “it [the Member]” and the predicate is “considers necessary for the protection of its essential security interests relating to relating to fissionable materials or the materials from which they are derived”. With respect to the single relative clause in Article XXI(b)(ii), the subject is “it [the Member]” and the predicate is “considers necessary for the protection of its essential security interests relating to the traffic in arms, ammunition and implements of war . . .” With respect to the single relative clause in Article XXI(b)(iii), the subject is “it [the Member]” and the predicate is “considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.” There is nothing—neither punctuation nor coordinating conjunction—to indicate that there are multiple clauses.

⁸ MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 222 (1st edn 1995) (US-180) (“Verbs may be used transitively or intransitively. A transitive verb acts upon a direct object. She *contributed* money. He *ran* the store. An intransitive verb does not act upon a direct object. She *contributed* generously. He *ran* down the street.”)(emphasis in the original).

⁹ 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).

words “which it considers necessary” from the language that immediately follows and continues the clause – for the protection of – would erroneously interpret certain terms of Article XXI(b) in isolation.

21. The ordinary meaning of “its essential security interests” also undermines this suggested interpretation.¹⁰ Essential security interests are those things involving the “potential detriment or advantage” to the “essence” of a Member’s safety or “being protected from danger”.¹¹ And it is “its” essential security interests – the Member’s in question – that the action is taken for the protection of.

22. In addition, the EU’s argument that the word “considers” does not qualify the terms in the subparagraph endings is also not consistent with the overall grammatical structure of the provision. This argument appears to rely in part on the EU’s erroneous view that all three subparagraph endings modify the term “action”. Under the ordinary meaning of the English text of Article XXI(b), the subparagraph endings (i) and (ii) modify the phrase “essential security interests”; each relate to the kinds of interests for which the Member may consider its action necessary to protect. In this way, the subparagraph endings (i) and (ii) indicate the types of essential security interests to be implicated by the action taken.¹²

23. This is because, under English grammar rules, a participial phrase, which functions as an adjective¹³, normally follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.¹⁴ In fact, a common mistake in English grammar is the use of “misplaced

¹⁰ The word “interest” is defined as “[t]he relation of being involved or concerned as regards potential detriment or (esp.) advantage.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1393 (US-22). The term “security” refers to “[t]he condition of being protected from or not exposed to danger; safety.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2754 (US-22). The definitions of “essential” include “[t]hat is such in the absolute or highest sense” and “[a]ffecting the essence of anything; significant, important.” *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852 (US-22).

¹¹ U.S. Response to the Panel’s Question 36.

¹² Those subparagraphs provide that a Member may take any action it considers necessary for the protection of its essential security interests “relating to fissionable materials or the materials from which they are derived,” and its essential security interests “relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying for military establishment.”

¹³ MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) (“A participial phrase includes a participle and functions as an adjective.”) (US-95).

¹⁴ The Merriam-Webster’s Guide to Punctuation and Style provides that “[t]he adjective clause modifies a noun or pronoun and normally follows the word it modifies” and “[u]sage problems with phrases occur most often when a modifying phrase is not placed close enough to the word or words that it modifies.” MERRIAM-WEBSTER’S GUIDE TO PUNCTUATION AND STYLE 232, 233 (1st edn 1995) (US-95). The Harper’s English Grammar also provides that “adjectives and adverbial phrases, like adjectives and adverbs themselves should be placed as closely as possible to the words they modify.” HARPER’S ENGLISH GRAMMAR 186-187 (Harper & Row, 1966) (US-96).

modifier,” which is “a word, phrase, or clause that is placed incorrectly in a sentence, thus distorting the meaning.”¹⁵

24. The final subparagraph ending provides that a Member may take any action which it considers necessary for the protection of its essential security interests “taken in time of war or other emergency in international relations.” It does not speak to the nature of the security interests, but provides a temporal limitation related to the action taken. Although an adjectival phrase normally follows the word it modifies, it is “actions”—not “interests”—that are taken. In this case, the drafters departed from typical English usage in placing the modifier next to “its essential security interests” as opposed to “action.” However, this departure does not mean that subparagraphs (i) and (ii) should be read in a manner that is inconsistent with English grammar rules.

25. The EU also points to the Spanish and French versions of Article XXI(b) in support of its assertion that each subparagraph ending modifies “action”. While the French and Spanish versions of Article XXI(b) play a role in treaty interpretation under the VCLT, they do not and cannot alter the ordinary meaning of the English text of Article XXI(b). Rather, as discussed below in Section II.D.2, when a comparison of the authentic texts discloses a difference of meaning which the application of customary rules of interpretation does not remove, Article 33 of the VCLT requires that the interpreter adopt the meaning which best reconciles the texts, having regard to the object and purpose of the treaty.

2. A Responding Member Need Not Identify a Specific Subparagraph of Article XXI(b) to Invoke Its Right to Take Measures for the Protection of Its Essential Security Interests

26. The EU suggests, in error, that the U.S. did not properly invoke Article XXI(b) because “the invocation of Article XXI(b) cannot cover all three subparagraphs.”¹⁶ However, Article XXI(b) does not require a responding Member to invoke a specific subparagraph of the provision to invoke that Member’s right to take any action which it considers necessary for the protection of its essential security interests. The EU cites nothing in the text of Article XXI(b) to support its argument.

27. As explained in Section II.A.1, the single relative clause in Article XXI(b) that follows “action” begins with the phrase “which it considers necessary” and ends at the end of each subparagraph, and describes the situation which the Member “considers” to be present when it

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THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE 181 (1994) (US-177). The following example from a grammar book is informative: “A nine-year-old girl has been attacked by a pack of pit bulls returning home from school.” The author explains that “[t]he present participle phrase **returning home from school** appears to modify the noun **pack**. The sentence implies that the pit bulls were home from school, not the girl.” The author corrects the sentence by placing “returning home from school” closer to the noun it modifies: “A nine-year old girl returning home from school has been attacked by a pack of pit bulls.” The Grammar Bible: Everything You Always Wanted to Know About Grammar but Didn’t Know Whom to Ask 146-147 (2nd edn 2004)(emphasis in the original)(US-178).

¹⁶ EU’s Response to the Panel’s Question 50, para. 257.

takes such an “action”. Because the relative clause describing the action begins with “which it considers”, the other elements of this clause are committed to the judgment of the Member taking the action.

28. Therefore, the text of Article XXI(b) does not require the Member exercising its right under Article XXI(b) to identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant. Furthermore, nothing in the text of Article XXI(b) suggests that the subparagraphs are mutually exclusive. By invoking Article XXI(b), the Member is indicating that one or more of the subparagraphs is applicable.

29. Neither is there any text in Article XXI(b) that imposes a requirement to furnish reasons for or explanations of an action for which Article XXI(b) is invoked. This understanding is supported by the text of Article XXI(a), which confirms that Members are not required “to furnish any information the disclosure of which it considers contrary to its essential security interests.” It may be that a Member invoking Article XXI(b) nonetheless chooses to make information available to other Members. Indeed, the United States did make plentiful information available in relation to its challenged measures. While such publicly available information could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii), the text of Article XXI does not require a responding Member to provide details relating to its invocation of Article XXI, including by identifying a specific subparagraph.

3. *Contrary to Complainant’s Arguments, The Terms Of Article XXI(b)(iii) Support a Finding That Article XXI(b) Is Self-Judging*

30. The EU argues, citing the panel report in *Russia – Traffic in Transit*, that “[t]he terms ‘war’ and ‘other emergency in international relations’ refer to objective factual situations, the existence of which is independent from the assessment made by the invoking Member in each case and can be fully reviewed by panels.”¹⁷ In support of this assertion, the EU does not point to any of the terms of Article XXI(b)(iii), but instead recalls its own prior assertions that “as already mentioned, security exceptions are not open-ended but exhaustively listed in Article XXI(b),” and that the phrase “[i]t considers’ refers only to the necessity test and not to all the rest of Article XXI(b).”¹⁸

31. The EU acknowledges that it “could imagine that there may be situations other than a threat of war that may amount to ‘other emergencies in international relations’” such as “a massive cyber-attack from abroad, paralysing a whole country and its vital structures.”¹⁹ The EU stops short, however, of allowing that an “other emergency in international relations” could extend to an “‘emergency’ in commercial or trade relations”²⁰

32. Like the panel in *Russia – Traffic in Transit*, the EU is wrong that “[t]he terms ‘war’ and ‘other emergency in international relations’” can be characterized as “objective factual

¹⁷ EU’s Response to the Panel’s Question 51, para. 263 (citing *Russia – Traffic in Transit*, paras. 7.71 and 7.82).

¹⁸ EU’s Response to the Panel’s Question 51, para. 263.

¹⁹ EU’s Response to the Panel’s Question 51, para. 261.

²⁰ EU’s Response to the Panel’s Question 51, para. 258.

situations,” and that the applicability of Article XXI(b)(iii) “can be fully reviewed by panels.”²¹ To the contrary, the text of subparagraph ending (iii) supports the interpretation that the applicability of Article XXI(b)(iii), like all of Article XXI(b), is self-judging.

33. The term “emergency” can be defined as “a serious, unexpected, and often dangerous situation requiring action.”²² In addition to being modified by the phrase “which it considers,” whether a certain situation is “serious, unexpected, and . . . dangerous” is, also by nature, a subjective determination that involves consideration of numerous factors that will vary from Member to Member. Similarly, Members may vary – based on their own unique circumstances – in their determinations of whether they consider that a particular situation “requires action.” Just as a panel cannot determine – without substituting its judgment for that of the Member – which are the essential security interests of a Member, a panel cannot determine - without substituting its own judgment for that of the Member – whether a Member considers its action to be taking place “in time of war or other emergency in international relations.”

34. The United States agrees with the EU there may be situations other than a threat of war that may amount to an “other emergencies in international relations” within the meaning of Article XXI(b)(iii). So much is obvious. Therefore, it cannot follow, as the EU claims, that an emergency in commercial or trade relations is somehow excluded from the scope of the phrase “other emergency in international relations.” The EU cites nothing in the terms of Article XXI(b)(iii) to support this argument, which appears to be contradicted by the EU’s own assertions in the G20 Global Forum on Steel Excess Capacity – including the EU’s assertion that “[g]lobal overcapacity has reached a tipping point—it is so significant that it poses an existential threat that the EU will not accept”.²³ This statement by the EU supports that, contrary to the EU’s arguments in this dispute, a Member may consider commercial or trade matters to be a matter of *existential* importance – certainly something then that could constitute an emergency in international relations.

35. Nor is the EU’s position consistent with views of its member States. As the United States described more fully in response to the Panel’s Question 74(d)-(f), numerous WTO Members, including several EU member States, appear to include economic or commercial considerations in their own assessments of their security interests for purposes of domestic law and policy. These Members – including Austria, Germany, The Netherlands, and Spain – do not distinguish between commercial and trade relations and other types of security.

36. The EU seeks to distance itself from its own assertions in the G20 Global Forum on Steel Excess Capacity by arguing that the document “expresses a political opinion about certain economic matters,” and the statement was not made by the EU’s “duly authorized representatives in these proceedings.”²⁴ The EU’s position highlights the inappropriateness of such “political” issues being heard by a trade panel at the WTO. The document to which the United States referred presents an official statement from the EU in an international forum. The EU does not

²¹ EU’s Response to the Panel’s Question 51, para. 263 (citing *Russia – Traffic in Transit*, paras. 7.71 and 7.82).

²² The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806 (US-86).

²³ G20 Global Steel Forum Report (Nov. 30, 2017), at 39, <https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf> (excerpt) (US-72).

²⁴ EU’s Response to the Panel’s Question 51, para. 264.

deny its content. Yet the EU suggests that this Panel should understand the scope of security differently for purposes of a trade dispute; that on “economic matters” political statements are mere “opinion[s]” not to be given any weight. For the EU, apparently, an understanding of essential security at the WTO may be posited only by “duly authorized representatives in *these* proceedings.” The Panel should decline to insulate its interpretation of the WTO’s essential security exception from political realities.

37. As set forth in the U.S. Response to the Panel’s Questions 51 and 74(d)-(f), the terms “security” and “emergency” in Article XXI(b)(iii) are broad and could encompass matters of political or economic relations. The EU does not explain how its assertions in this dispute could be reconciled with the fact that several EU member States, who are also WTO Members, include economic or commercial considerations in their own assessments of their security interests for purposes of domestic law and policy. Accordingly, the narrow construction of Article XXI(b)(iii) asserted by the EU is not only inconsistent with the ordinary meaning of the terms of the provision, it is contradicted by the views of its own member States.

4. *The Context Provided By Article XXI(a) and Article XX of the GATT 1994 Supports an Understanding of Article XXI(b) as Self-judging*

a. Article XXI(a) Supports that Article XXI(b) is Self-Judging

38. The EU dismisses the U.S. argument that Article XXI(a) supports the U.S. interpretation of Article XXI(b) as self-judging, claiming that Article XXI(a) is “justiciable” and that “a Member cannot invoke Article XXI(a) in order to escape its burden of proof obligations.”²⁵ The EU further argues that “even if a Member is justified in not providing certain information pursuant to Article XXI(a), that would not discharge it from its burden of proof in relation to Article XXI(b).”²⁶

39. The United States is not arguing that Article XXI(a) could or should be used to “escape” any obligations. Instead, the United States properly recognizes that Article XXI(a) is the immediate context for understanding the ordinary meaning of Article XXI(b), and seeks to interpret Article XXI(b) in its context consistent with customary rules of interpretation.

40. Under the Vienna Convention, the Panel must interpret the terms of the GATT 1994 according to their ordinary meaning, in context and in light of the object and purpose of the GATT 1994. Article XXI(a) is immediate context for understanding the ordinary meaning of the terms of Article XXI(b). Article XXI(a) states that “[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.” That is, a Member need not provide any information—to a WTO panel or other Members—regarding its essential security measures or its underlying security interests. In this way, Article XXI(a) anticipates that there may not be facts on the record before a panel that could be used to “test” (as complainant urges) a Member’s invocation of Article XXI(b).

²⁵ EU’s Response to the Panel’s Question 53, para. 280.

²⁶ EU’s Response to the Panel’s Question 53, para. 281.

41. Article XXI(b) cannot be interpreted so as to undermine a responding Member’s rights under Article XXI(a). Interpreting Article XXI(b) as subjecting a Member’s security measures to review by a panel effectively requires that Member to furnish information concerning its essential security measure. This would mean that, at least in some instances, a Member exercising its rights under Article XXI(a) to withhold “information the disclosure of which it considers contrary to its essential security interests” may thereby not be able to demonstrate that its measure meets whatever standard is applied by a panel. In such a situation, a Member may be required to choose between exercising its rights under Article XXI(a) and Article XXI(b). While it may not be that such a conflict would arise in every instance, the Panel must avoid any interpretation of one provision that could undermine or even invalidate the effectiveness of another.²⁷

42. The United States also disagrees with the EU’s contention that a Member seeking to exercise its right under Article XXI(a) must “explain in sufficient detail why such information cannot be shared with the panel.”²⁸ The text of Article XXI(a) does not impose a requirement to furnish such information. An interpretation of Article XXI(a) that requires a Member to “explain in sufficient detail why such information cannot be shared with the panel”²⁹ would lead to the absurd result in which a member seeking to exercise its right under Article XXI(a) may only do so if it furnishes information about the very information it seeks to withhold. The drafters could have included text imposing such a requirement, as they have done in other provisions of the covered agreements.³⁰ GATS Article XIVbis(2), for example—the GATS equivalent of GATT 1994 Article XXI—adds a flexible requirement that the Council for Trade in Services be “informed to the fullest extent possible of measures taken under 1(b) and (c) and of their termination;” but such requirement does not apply to measures taken under 1(a). In Article XXI(a), by using the operative language “which it considers”, the drafters chose to reserve to the Member acting under Article XXI(a) the determination as to whether disclosure of certain information would be “contrary to its [the Member’s] essential security interests”. As with Article XXI(b), this is not a determination that a Panel can make –not without substituting its own judgement for that of the Member.

b. Article XX Supports that Article XXI(b) is Self-Judging

43. Pointing to certain similarities between Article XX and Article XXI(b), the EU argues that a panel reviewing the provisions “should follow a two-stage analysis, starting from the

²⁷ As scholars have noted, “the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable.” Ian Sinclair, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, Manchester University Press, 2nd edn (1984), at 120 (US-175).

²⁸ EU’s Response to the Panel’s Question 53, para. 281.

²⁹ EU’s Response to the Panel’s Question 53, para. 281.

³⁰ Article 5(8) of the SPS Agreement provides that “[w]hen a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards...an explanation of the reasons for such sanitary or phytosanitary measure may be requested and *shall be provided by the Member maintaining the measure*” (emphasis added).

specific subparagraph (i) to (iii) and then verifying if the conditions in the chapeau are met.”³¹ The EU also argues that both Article XX and Article XXI(b) are “affirmative defences” and “it is up to the party invoking the exception to demonstrate that the conditions are set out in that provision are met.”³² The EU’s argument ignores important textual differences between Article XX and Article XXI(b).

44. In both Article XX and Article XXI, the sentence begins in the chapeau and ends at the end of each subparagraph ending. But while there may be surface-level similarities between Article XX and Article XXI, there are numerous important textual differences between the provisions.

45. In Article XX, for example, the subparagraphs themselves – not the chapeau – contain the operative language regarding the relation between the measure taken and the Member’s objective; namely, the measure must be, for example, “necessary to,” “relating to,” or “essential to” the relevant objective. The exception provided in Article XX(a) therefore reads: (from the chapeau) “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...” (from the subparagraph) “necessary to protect public morals.” In this way, it is the subparagraph that indicates on what basis a Member may avail itself of the exception – when the measure in question is “necessary to protect public morals.”

46. The chapeau of Article XX includes an additional non-discrimination requirement, which subjects a Member’s action to additional scrutiny based on the particular factual circumstances. Specifically, the chapeau states that “*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent...*”³³ Under Article XX(a), then, a Member: 1) may take a measure that is necessary to protect public morals, *but only if* 2) that measure does not arbitrarily or unjustifiably discriminate or constitute a disguised restriction on trade. It was these two substantive obligations set out in the text, therefore – not the mere presence of a chapeau followed by subparagraphs – that led the Appellate Body to its statement that the “structure and logic of Article XX” suggests a two-step analysis.³⁴ That the analysis began with the requirement set out in the subparagraphs and then moved to the requirement set out in the chapeau is coincidental.

47. By contrast, in Article XXI(b), the operative language regarding the relationship between the measure and the objective is in the chapeau —“any action which it considers necessary for the protection of its essential security interests.” As the United States has explained, the requirement for applicability of the exception is that the Member taking the action must consider that action necessary for the protection of its essential security interests. The subparagraphs of Article XXI(b), rather than identifying the obligation itself, modify the nature of the security interests involved, or in the case of subparagraph (iii), provide a temporal requirement regarding

³¹ EU’s Response to the Panel’s Question 52, para. 274.

³² EU’s Response to the Panel’s Question 52, para. 267.

³³ Emphasis added.

³⁴ *US – Shrimp (AB)*, para. 119.

when the measure would be taken. This key difference explains why, although a panel examining an Article XX defense might look to the relationship between the measures and the objectives set out in the subparagraph endings of Article XX first, it would make no sense for a panel examining an Article XXI defense to first determine applicability of the subparagraphs. The fundamental structure and logic of Article XXI(b) is simply different, and the Appellate Body’s finding based on the structure and logic of Article XX of the GATT 1994 is therefore not applicable.

48. Regarding the EU’s claim that the United States must satisfy “the burden of proof” because Article XXI(b) “is in the nature of an affirmative defence”, the United States recalls that neither the term “affirmative defence” nor “burden of proof” are legal terms reflected in the DSU or any other covered agreement.³⁵ These are useful concepts employed by panels and the Appellate Body to explain the legal approach taken in a particular case; they do not impose a particular order of analysis or method of evaluation on panels. Moreover, with respect to Article XXI(b), the self-judging nature of the provision is not a function of standard of review, or some general concept of discretion or deference. The self-judging nature of this exception is reflected in the text of Article XXI(b) itself. As the United States explained in the U.S. Response to the Panel’s Question 52, what is required of the party exercising its right under Article XXI(b) is that the Member consider one or more of the circumstances set forth in Article XXI(b) to be present. The invoking Member’s burden is discharged once the Member indicates, in the context of dispute settlement, that it has made such a determination.³⁶ Complainant’s characterization of Article XXI(b) as an “affirmative defense” does not change the ordinary meaning or function of its terms.

C. Supplementary Means of Interpretation – Including Uruguay Round Negotiating History – Confirm that Actions Under Article XXI are not Subject to Review

49. Although not necessary in this dispute, supplementary means of interpretation – including negotiating history of the Uruguay Round – confirms that Article XXI(b) is self-judging. First, Uruguay Round drafters retained the text of Article XXI(b) – unchanged and in its entirety – when that provision was incorporated into the GATT 1994. Uruguay Round drafters also incorporated security exceptions with the same self-judging terms into GATS and TRIPS. In addition, Uruguay Round negotiators of the DSU discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable.

50. These decisions by Uruguay Round negotiators are notable, particularly in light of the alternative approaches to security exceptions that had been incorporated into other treaties between 1947 and 1994. While some treaties simply incorporated by reference Article XXI or used very similar terms, other treaties offered significantly different approaches to when security exceptions would apply and the extent to which action taken pursuant to such exceptions could be reviewable. By retaining Article XXI unchanged in the GATT 1994, incorporating the same text into the GATS and TRIPS security exceptions, and by not including in the DSU specific

³⁵ EU’s Response to the Panel’s Question 52, para. 268-69; U.S. Response to the Panel’s Question 52.

³⁶ U.S. Response to the Panel’s Question 52.

terms that would have diverged from the longstanding interpretation of Article XXI(b), the Uruguay Round drafters indicated that they were well aware of the manner in which Article XXI had been interpreted since its drafting, and were comfortable continuing with that interpretation.

51. As the United States has explained, the drafting history of Article XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). Numerous statements by the drafters of the text that became Article XXI(b) confirm that negotiators intended for this provision to be self-judging by the acting Member, and that the appropriate remedy for such measures is a non-violation, nullification or impairment claim.³⁷ For example, in a meeting of July 24, 1947, Australia withdrew an objection to the essential security provision after receiving assurance that a Member affected by essential security actions would have redress pursuant to then-Article 35(2) of the draft ITO Charter.³⁸ At that time, Article 35(2) permitted consultations concerning the application of any measure which nullified or impaired any object of the ITO charter, “whether or not it conflicts with the terms of this Charter.”³⁹

52. In the same meeting, the Chairman asked whether actions taken pursuant to the essential security exception “should not provide for any possibility of redress.”⁴⁰ The U.S. delegate responded that such actions “could not be challenged in the sense that it could not be claimed that the Member was **violating** the Charter,” although “redress **of some kind** under Article 35” would be available.⁴¹ The record reveals no disagreement with the U.S. delegate, and in fact the Australian delegate expressed appreciation for this assurance. The exchange demonstrates that the delegates were referring to a non-violation claim – not an alleged violation of the Charter – when discussing the redress available to Members affected by essential security actions.⁴²

53. The EU challenges the relevance of these and other statements in the negotiating history of Article XXI(b) and states that this negotiating history is “several steps removed from the current covered agreements.”⁴³ According to the EU, “First, there is a difference between the

³⁷ See U.S. Responses to the Panel’s Questions 59 and 62; U.S. Oral Opening Statement, Part D; U.S. First Written Submission of the United States of America, Section III.A.3.

³⁸ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26-30 (US-41).

³⁹ 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), Chapter V, General Commercial Provisions, Most-Favoured-Nation Treatment, Section H, General Exceptions, Article 35, Consultation—Nullification or impairment, at 30 (US-33).

⁴⁰ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26 (US-41).

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), at 26—27 (emphases added) (US-41).

⁴² Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947), at 26—27 (emphases added) (US-41) & Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947) (US-92).

⁴³ EU’s Response to the Panel’s Question 58, para. 291.

Havana Charter and the GATT 1947. Second, there is a difference between the GATT 1947 and the GATT 1994. Third, there is a difference between the GATT 1994, notably the dispute settlement rules in Articles XXII and XXIII, and the DSU.”⁴⁴ The EU notes that, “[p]reparatory work should normally pertain to the treaty in question, not simply to an earlier, related treaty,” and suggests that the United States must explain “why its view still stands after the evolution to the GATT 1947, and then to the GATT 1994 and the DSU.”⁴⁵

54. As an initial matter, the complainant’s arguments fail because the interpretive value of the negotiating history of Article XXI is not diminished merely because negotiations took place in 1947.⁴⁶ On the contrary, the text of Article XXI was retained – unchanged and in its entirety – when incorporated into the GATT 1994; moreover, statements by the original negotiators of Article XXI were publicly available for *decades* before the Uruguay Round negotiators made the specific decision to retain Article XXI in the GATT 1994, as discussed in Section II.C.1 below.

55. Furthermore, with knowledge of the statements by the original negotiators of the terms of Article XXI, Uruguay Round negotiators also decided to incorporate security exceptions with the same self-judging terms in GATS and TRIPS, as discussed in Section II.C.2 below. That is, in addition to retaining this language in the GATT 1994, all of which remained unchanged, Uruguay Round negotiators also chose to retain the original GATT 1947 language in new covered agreements, the language of which was drafted at that time. Had Uruguay Round negotiators disagreed with their predecessors regarding the proper interpretation of this language, it seems surprising that they would have repeated that language verbatim in two other agreements concluded during that round. In addition, as discussed in Section II.C.3 below, Uruguay Round negotiators of the DSU also discussed the reviewability of Article XXI, and decided *not* to include in the DSU specific terms that would have diverged from the longstanding understanding that actions taken pursuant to Article XXI are not reviewable.

56. These decisions by the Uruguay Round negotiators are striking, particularly considering that, as discussed in Section II.C.4, some trade agreements negotiated between 1947 and the Uruguay Round, including agreements negotiated by GATT contracting parties, had in fact developed security exceptions that differed in important ways from the GATT 1947. That Uruguay Round negotiators also decided not to follow the approach of these intervening trade agreements, however – neither in the GATT 1994, nor in GATS or TRIPS, nor in the DSU – reflects that the Uruguay Round negotiators, by retaining the unchanged text of Article XXI, did not intend to depart from their predecessors regarding the interpretation of Article XXI. These intentions of the drafters – including the Uruguay Round drafters – must be given effect in this dispute.

⁴⁴ EU’s Response to the Panel’s Question 58, para. 291.

⁴⁵ EU’s Response to the Panel’s Question 58, para. 293.

⁴⁶ In fact, the Appellate Body and numerous WTO panels have consulted the negotiating history of the ITO charter in prior disputes. *See, e.g. Japan – Alcoholic Beverages II (AB)*, para. 51 and note 52; *Canada – Periodicals (AB)*, at 34; *United States – Welded Carbon Quality Line Pipe (AB)*, para. 175 & note 171; *EC – Commercial Vessels (Panel)*, para. 7.67 & note 205; *EU- Poultry Meat (China)*, para. 7.357; *Indonesia – Autos*, para. 5.164.

1. Uruguay Round Negotiators Rejected Proposals to Alter the Terms of Article XXI

57. Uruguay Round discussions indicate that these negotiators in fact *agreed* with the statements made by their predecessors in 1947. As discussed in the U.S. Response to the Panel’s Question 62, during the Uruguay Round the Negotiating Group on GATT Articles rejected proposals by Nicaragua and Argentina to amend Article XXI in a manner that would have limited Members’ discretion when taking action under that provision.⁴⁷ In these discussions – which took place in June 1988 – some delegates emphasized the sensitivity of issues presented under Article XXI and the need to preserve Members’ discretion with respect to such issues.⁴⁸ These Members further suggested that “it was unrealistic to think of a GATT body placing conditions on [Article XXI’s] use since only the individual contracting party concerned was ultimately in a position to judge what its security interests were.”⁴⁹ Another delegation opined that “since the GATT has no competence in the determination of questions of security or of a political nature, it seemed doubtfully useful to set up any institutional test to determine whether a matter was security-related or political.”⁵⁰

58. With these statements, negotiators during the Uruguay Round expressed views consistent with those expressed by the negotiators of Article XXI – namely, that matters of essential security under Article XXI are left to the judgment of the invoking Member. In fact, even those delegations that agreed with Nicaragua and Argentina acknowledged this meaning of the existing text of Article XXI. Meeting minutes indicate that some delegations “shared the view that there was a danger of [Article XXI] being abused if governments were not cautious in its invocation.”⁵¹ As such statements indicate, Uruguay Round negotiators did not intend to alter the self-judging nature of Article XXI, and they rejected proposals that would have done so.

2. Uruguay Round Negotiators Decided to Repeat the Pivotal Language of Article XXI in the Security Exceptions of GATS and TRIPS

59. Uruguay Round negotiators also decided to include, in GATS and TRIPS, security exceptions that mirror Article XXI in relevant part. Specifically, like Article XXI, the security exceptions in GATS and TRIPS refer to actions that a Member “considers necessary”; security exceptions are separate from general exceptions for public morals, health, and other matters; and

⁴⁷ See Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988) (US-150); Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988) (US-151).

⁴⁸ Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2 (US-153).

⁴⁹ Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2 (US-153).

⁵⁰ Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 2–3 (US-153).

⁵¹ Negotiating Group on GATT Articles, Note on Meeting of 27-30 June 1988, MTN.GNG/NG7/8 (July 21, 1988), at 3 (US-153).

general exceptions – but not security exceptions – are explicitly subject to review. The Uruguay Round drafters’ decision to use, in the GATS and TRIPS security exceptions, the same text as was used in Article XXI further confirms that Uruguay Round drafters were aware of the self-judging nature of this exception and did not intend to alter it.

60. The negotiating history of the GATS demonstrates the deliberate choice of Uruguay Round negotiators to repeat these crucial aspects of Article XXI. During GATS negotiations, some Members suggested draft security exceptions that would have diverged from the text of Article XXI by merging the security exceptions with general exceptions, omitting the pivotal “it considers” language from the security exceptions, and subjecting essential security measures to review for non-discrimination.⁵²

61. For example, in its GATS proposal of June 1990, Switzerland included a provision called “Exceptions for Public Order and National Security” which referred to “measures that are necessary to protect” certain interests, rather than using Article XXI’s pivotal “it considers” language.⁵³ Switzerland’s proposal also would have treated in the same manner both measures necessary to protect “essential national security interests” and measures necessary to protect “public morals, public order, safety, health, or the environment,” and required that “measures necessary to protect” these interests “shall not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between PARTIES, a disguised restriction on trade in services, or a means of circumventing the objectives of the Agreement.”⁵⁴

62. Similarly, a joint proposal by Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago, and Uruguay, included an exception for “measures consistent with international law that are . . . necessary,”⁵⁵ and did not include the pivotal “it considers” language from Article XXI. This joint proposal also would have treated in the same manner measures “[n]ecessary to protect national security” as measures “necessary to protect public morals, cultural and social values, public order, safety or health.”⁵⁶ Finally, similar to the Swiss proposal, this joint proposal required that “[s]uch measures [including national security measures] shall not be used as a means to circumvent the objectives, principles and disciplines of this Framework nor as disguised restrictions on international trade in services.”⁵⁷

⁵² See Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-102); Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-183).

⁵³ See Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-183).

⁵⁴ See Communication from Switzerland, MTN.GNS/W/102 (June 7, 1990), at 10 (US-183).

⁵⁵ Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-184).

⁵⁶ Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-184).

⁵⁷ Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago and Uruguay, MTN.GNS/W/95 (Feb. 26, 1990), at 9 (US-184).

63. By contrast, the security exceptions in GATS proposals put forward by the United States (in October 1989), the EC (in June 1990), and Japan (in July 1990) mirrored Article XXI in relevant part.⁵⁸ Specifically:

- First, all three proposals used the pivotal language from Article XXI and referred to action that a Member “considers necessary” for the protection of its essential security interests.⁵⁹
- Second, all three proposals also separated the exceptions for essential security matters from the exceptions for public morals, health, and other matters.
- Third, all three proposals included a non-discrimination requirement in the exception for public morals, health, and similar matters – but did not include such a requirement in the essential security exception.⁶⁰
- Fourth, the GATS proposals from the United States, Japan, and the EC also repeated the language of Article XXI(b)(iii) referring to action “taken in time of war or other emergency in international relations.”⁶¹ The repetition of this language in these three proposals (and in the final version of the agreement) is particularly notable in light of the existence of alternative approaches, as discussed in Section II.C.4 below.

64. Notably, the EC’s GATS proposal appears to acknowledge the self-judging nature of essential security actions by including the following text at the end of its proposed sub-paragraph on security exceptions: “In taking action under this paragraph, *parties* shall take into consideration the interests of third parties which may be affected.”⁶² By stating that “parties shall take into consideration” the interests of third parties, the EC acknowledged that it was the parties – now Members – that would be choosing whether to take action under this provision. The EC also acknowledged the 1982 Decision Concerning Article XXI by providing in its proposal that “All parties affected by action under this Article retain their full rights under this

⁵⁸ See Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187).

⁵⁹ See Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187).

⁶⁰ See Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187).

⁶¹ Communication from the United States, MTN.GNS/W/75 (Oct. 17, 1989), at 12 (US-185); Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (US-186); Communication from Japan, MTN.GNS/W/107 (July 10, 1990), at 12 (US-187).

⁶² Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (emphasis added) (US-186).

Agreement.”⁶³ This language indicates that the EC was mindful of the 1982 Decision when it prepared its draft GATS text – and yet retained the self-judging reference to actions a Member “considers necessary for the protection of its essential security interests.”

65. In the GATS draft prepared by the chairman of the negotiating group in late July 1990, the security exceptions provision reflected in relevant part the proposals by the United States, Japan, and the EC.⁶⁴ Specifically, in this July 1990 chairman’s draft, the security and general exceptions were separate sub-paragraphs of the exceptions provision at Article XIV, and the sub-paragraph on security exceptions lacked a non-discrimination proviso while permitting measures that a Member “considers necessary” to protect its essential security interests.⁶⁵ This deliberate choice of exceptions language demonstrates that the GATS drafters—like the drafters of the GATT 1947 (and the GATT 1994)—intended to distinguish security exceptions from general exceptions, and that security exceptions were to be self-judging and not subject to review for non-discrimination.

66. These aspects of the draft GATS exceptions text remained in the December 1990 draft of the agreement.⁶⁶ The December 1991 draft GATS text further distinguished security exceptions from general exceptions, as the general exceptions remained in Article XIV while the security exceptions were placed into a new article, Article XIVbis.⁶⁷ This adjustment further confirms that the GATS essential security exception that was finally incorporated at GATS Article XIVbis(2)(b) is self-judging, and unlike the general exceptions that remained in the final Article XIV, this provision is not subject to review for non-discrimination.

67. The TRIPS negotiations similarly show that the drafters intended to incorporate into that agreement a security exception that would mirror the self-judging security exception at GATT Article XXI(b) and that would not be subject to review for non-discrimination. In fact, a July 1990 draft TRIPS agreement would have explicitly incorporated GATT exceptions by providing that “[o]ther provisions of the [GATT] shall apply to the extent that [TRIPS] does not provide for more specific rights, obligations and exceptions thereof.”⁶⁸ By December 1991, however, this reference to GATT had been replaced in relevant part by language that mirrored GATT 1994 Article XXI(b),⁶⁹ and this language remained in the final TRIPS text.

⁶³ Proposal by the European Community, MTN.GNS/W/105 (June 18, 1990), at 13 (using language similar to the Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982) (US-62)) (US-186).

⁶⁴ See Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990), at 11—12 (US-188).

⁶⁵ See Draft Multilateral Framework for Trade in Services, MTN.GNS/35 (July 23, 1990), at 11—12 (US-188).

⁶⁶ See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/35/rev.1 (Dec. 3, 1990), at 347—48 (US-189).

⁶⁷ Draft Final Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC.W.FA (Dec. 20, 1991), at Annex II, pp. 17—19 (US-190)).

⁶⁸ See 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), at 78 (US-191).

⁶⁹ Draft Final Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991), at 90 (setting forth Article 73: Security Exceptions in the draft TRIPS Agreement) (US-190).

68. Thus, presented again with the choice of whether to diverge from the language of Article XXI—and the discretion it bestows upon a Member taking action it considers necessary for the protection of its essential security interests—Uruguay Round negotiators again decided to use the language of Article XXI in the security exceptions at TRIPS Article 73 and GATS Article XIVbis. This decision by the Uruguay Round negotiators confirms that these negotiators were well aware of the manner in which this provision had been interpreted, and were comfortable continuing with that interpretation.

3. *Uruguay Round Negotiators Declined to Include Language in the DSU that Would Alter the Longstanding Interpretation of Article XXI*

69. Finally, Uruguay Round negotiators discussed the potential reviewability of Article XXI in the context of dispute settlement negotiations and decided *not* to include in the DSU language that would alter the longstanding interpretation of Article XXI as self-judging.

70. In a November 1987 communication to the Negotiating Group on Dispute Settlement, Nicaragua described its “disappointing” experiences with dispute settlement under the GATT 1947, including its 1985 dispute with the United States in which the United States invoked Article XXI.⁷⁰ Nicaragua proposed, among other things, that when a panel had been established to resolve a dispute, “[n]o contracting party may oppose examination of the applicability of GATT provisions and compliance with them” and that “[a]ny panel must reach a clear conclusion regarding nullification and impairment of benefits.”⁷¹

71. At a meeting shortly after Nicaragua made this proposal, negotiators of the DSU discussed a variety of topics, including “GATT Article XXI and its review by a GATT panel.”⁷² Minutes from that meeting suggest that negotiators did not discuss Nicaragua’s proposal in a substantive way. Certainly nothing in the record of this meeting indicates that negotiators intended that the DSU would alter the manner in which Article XXI had been interpreted during the previous four decades. In an addendum to the minutes of that meeting, Chile agreed with some portions of Nicaragua’s statement, but disagreed with other portions, including the lack of any reference to Article XXI, which it described as “fully valid.”⁷³ Nicaragua’s proposal was not incorporated into the DSU.

72. Numerous statements by the drafters of the DSU further confirm that the DSU does not alter the ordinary meaning of the terms of the covered agreements. For example, in a meeting of the Negotiating Group on Dispute Settlement on June 25, 1987, negotiators “expressed the view

⁷⁰ Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (US-192).

⁷¹ Negotiating Group on Dispute Settlement, Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987), at 2, 8 (US-192).

⁷² Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987), at 3 (US-193).

⁷³ Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr. 29, 1988), at 2 (US-194).

that the GATT dispute settlement procedures should not be used to create, by constructive interpretation, obligations which were not established in the text of the General Agreement.”⁷⁴ Instead, these negotiators opined that “[p]anelists should merely interpret and apply existing GATT rules to the particular sets of circumstances in the disputes before them without purporting to create new obligations.”⁷⁵ Similarly, during the group’s discussions of developing countries and dispute settlement, one delegation “noted that the Group’s mandate did not include the negotiation of new substantive rights for contracting parties.”⁷⁶

73. In sum, numerous decisions of the Uruguay Round negotiators – their rejection of proposed changes to Article XXI, their repetition of Article XXI’s pivotal language in the GATS and TRIPS security exceptions, and their decision not to include language in the DSU that would alter the interpretation of Article XXI – confirm that these Uruguay Round negotiators were well aware of the existing interpretation of Article XXI, and that they agreed with that interpretation. This Uruguay Round negotiating history further confirms the interpretation of Article XXI. Notably, other GATT and WTO agreements also used language similar to that of Article XXI and maintained the same self-judging approach to essential security exceptions.⁷⁷

4. Uruguay Round Negotiators Made These Decisions Despite the Existence of Other Approaches to Security Exceptions at that Time

74. These decisions by Uruguay Round negotiators are particularly notable in light of the various approaches to security exceptions that had been included in trade agreements since 1947. Some post-1947 agreements, such as the 1985 Agreement on the Establishment of a Free Trade Area between Israel and the United States, simply incorporated by reference Article XX and Article XXI of the GATT 1947.⁷⁸ Other agreements, such as the Treaty of Rome and Agreement

⁷⁴ Negotiating Group on Dispute Settlement, Meeting of June 25, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987), at 5 (US-195).

⁷⁵ Negotiating Group on Dispute Settlement, Meeting of June 25, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15 1987), at 5 (US-195).

⁷⁶ Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988) (US-196).

⁷⁷ Specifically the Tokyo Round Agreement on Government Procurement retained the distinction between security exceptions and general exceptions and mirrored the pivotal “it considers” language of Article XXI in the security exception. *See* Tokyo Round Code on Government Procurement (1979), Article VIII (US-198). By doing so, the Tokyo Round GPA– consistent with Article XX and Article XXI – ensured that a party would judge for itself whether it considers action necessary for the protection of its essential security interests while measures sought to be justified under the general exceptions would be subject to review for necessity and non-discriminatory application. *See* Tokyo Round Code on Government Procurement (1979), Article VIII (US-198). The text of this provision remained largely unchanged as the GPA was revised in 1988, 1994, and 2012. *See* Agreement on Government Procurement, Revised Text (1988), Article VIII (US-199) (same as Article VIII 1979 GPA); Agreement on Government Procurement, Article XXIII (1994) (same as Article VIII of 1979 GPA except adding a colon in Article VIII(2) as follows “imposing or enforcing measures; necessary to protect public morals”) (emphasis added) (US-200); Agreement on Government Procurement, Article III (same as Article XXIII of the 1994 GPA, except dividing the text of subparagraph 2 into sub-paragraphs) (US-201).

⁷⁸ *See* Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, Article 7 (“[GENERAL AND SECURITY EXCEPTIONS] Article XX and XXI of the GATT are hereby incorporated into and made a part of this Agreement.”) (US-197).

on the European Economic Area (EEA Agreement), reflect significant deviations from the text of Article XXI, including by expressly providing for the review of measures taken by a government for essential security purposes.

Treaty of Rome

75. The Treaty of Rome, now known as the Treaty on the Functioning of the European Union (TFEU) was signed on March 25, 1957 by representatives of Belgium, Germany, France, Italy, Luxembourg, and The Netherlands. Since that time, other EU Member States have joined the agreement and it has been renamed the TFEU and its provisions renumbered. The security exceptions remain the same as they were in 1957, however, and these provisions are very different from those present in the GATT 1947. As the relevant Treaty of Rome (and TFEU) provisions state:

ARTICLE 223 [now TFEU Article 346]

1. The provisions of this Treaty shall not preclude the application of the following rules:

(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. During the first year after the entry into force of this Treaty, the Council shall, acting unanimously, draw up a list of products to which the provisions of paragraph 1(b) shall apply. 3. The Council may, acting unanimously on a proposal from the Commission, make changes in this list.

ARTICLE 224 [now TFEU Article 347]

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

ARTICLE 225 [now TFEU Article 348]

If measures taken in the circumstances referred to in Articles 223 and 224 have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these

measures can be adjusted to the rules laid down in this Treaty. By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 223 and 224. The Court of Justice shall give its ruling in camera.⁷⁹

76. With the terms of these provisions, the drafters of the Treaty of Rome – writing just 10 years after the GATT 1947 – approached security matters differently from the drafters of the GATT 1947. Article 223 of the Treaty of Rome – similar to Article XXI(b) – refers to “measures as it [a Member State] considers necessary for the protection of the essential interests of its security.” Slightly different language appears in Article 224 of the Treaty of Rome, however, which refers to “measures which a Member State may be called upon to take” and requires Member States to “consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected” in the circumstances described in that article.⁸⁰

77. Notably, the Treaty of Rome drafters included *additional* language in Article 225 which would explicitly subject such measures to review in certain circumstances. Specifically, Article 225 imposes Commission review of “measures taken in the circumstances referred to in Articles 223 and 224” when such measures have “the effect of distorting the conditions of competition in the common market.” Article 225 further describes the manner in which this review shall occur, and states that “the Commission shall, together with the state concerned, examine how these measures can be adjusted to the rules laid down in this treaty.” Article 225 further permits involvement by the European Court of Justice, and states that “the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 223 and 224. The Court of Justice shall give its ruling in camera.”

78. Thus, in Article 225, the Treaty of Rome drafters provided specific instructions that permit review of action that a Member State “considers necessary” in certain circumstances. Their decision to add a specific provision permitting review – and specifying the manner in which this review should occur – indicates that they felt additional language was necessary to ensure that actions taken pursuant to Article 223 and Article 224 would be subject to review. Put differently, the Treaty of Rome drafters apparently concluded that the reference in Article 223 to “measures as it [a Member State] considers necessary”, by itself, was not necessarily subject to review.

79. Furthermore, the Treaty of Rome refers to measures taken “in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war [or] serious international tension constituting a threat of war.”⁸¹ This language is significantly different from the reference in Article XXI(b)(iii) to “in time of war or other emergency in international

⁷⁹ Treaty of Rome, Articles 223-225 (US-181)

⁸⁰ Treaty of Rome, Article 224 (US-181).

⁸¹ Treaty of Rome, Article 224 (US-181).

relations.” Specifically, the Treaty of Rome only permits action if the “serious international tension” in question “constitut[es] a threat of war,” while the GATT 1947 (and the GATT 1994) Article XX(b)(iii) permits a Member to take action it considers necessary for the protection of its essential security interests in time of an “other emergency in international relations” – without requiring that this “other emergency” constitute a threat of war. In addition, the Treaty of Rome refers to “the event of” certain situations, while the GATT 1994 simply refers to “time of war or other emergency in international relations.”

Agreement on the European Economic Area

80. Another approach to security exceptions can be seen in the EEA Agreement, which was established in 1992 and which has been ratified by the EU Member States, Norway, Iceland, and Liechtenstein. The security exception in that agreement provides:

Article 123

Nothing in this Agreement shall prevent a Contracting Party from taking any measures:

- (a) which it considers necessary to prevent the disclosure of information contrary to its essential security interests;
- (b) which relate to the production of, or trade in, arms, munitions and war materials or other products indispensable for defence purposes or to research, development or production indispensable for defence purposes, provided that such measures do not impair the conditions of competition in respect of products not intended for specifically military purposes;
- (c) which it considers essential to its own security in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.⁸²

81. Similar to the Treaty of Rome, this provision of the EEA Agreement refers to “serious internal disturbances affecting the maintenance of law and order” and “war or serious international tension constituting threat of war”, rather than using the language of Article XXI(b)(iii), “war or other emergency in international relations.” Thus, like the Treaty of Rome – but unlike the GATT 1994 – the EEA Agreement permits action only if the “serious international tension” in question “constitut[es] a threat of war,” while the GATT 1947 (and the GATT 1994) Article XX(b)(iii) permits a Member to take action it considers necessary for the protection of its essential security interests in time of an “other emergency in international relations” – without requiring that this “other emergency” constitute a threat of war.

82. The EEA Agreement also refers to measures “which [a party] considers essential to its own security”, as opposed to the GATT 1994’s reference to action that a Member “considers

⁸² Agreement on the European Economic Area, Art. 123 (US-221).

necessary for the protection of its essential security interests.” Notable here is the EEA Agreement’s use of the word “essential” rather than “necessary”, and the EEA Agreements reference to “measures” which a party considers “essential to its own security”, as opposed to as “action” that a Member “considers necessary for the protection of its essential security interests.”

83. Neither Article XXI(b) of the GATT 1994 – nor the analogous security exceptions in GATS or TRIPS, nor the DSU – reflects the approaches taken in the Treaty of Rome or the EEA Agreement. None of these agreements include a provision along the lines of Article 225 of the Treaty of Rome that would explicitly provide for review of measures that a Member “considers necessary”, set out the circumstances in which this review could occur, and the manner in which review should take place. None of these agreements – particularly the DSU – contains a provision stating that any body “shall” examine a Member’s national security measures. Had the Uruguay Round drafters intended to make actions taken under Article XXI(b) reviewable in some manner, they could have adopted this language of the Treaty of Rome.

84. Furthermore, none of these agreements limits a Member’s action to action “in the event of war [or] serious international tension constituting a threat of war,” as stated in the Treaty of Rome or “in time of war or serious international tension constituting threat of war” as stated in the EEA Agreement. Nor did the Uruguay Round drafters incorporate into Article XXI any reference to “the maintenance of law and order” despite the existence of such language in both the Treaty of Rome and the EEA Agreement. Had the Uruguay Round drafters intended to limit the scope of the reference to “other emergency in international relations” to “events” that constitute a “threat of war” or refer to “the maintenance of law and order”, they could have done so by adopting this language of the Treaty of Rome and the EEA Agreement. These decisions by the drafters should be given effect.

85. In sum, the existence of alternative approaches to security exceptions makes the decisions of the Uruguay Round negotiators even more striking. With knowledge of these alternative approaches to security exceptions, Uruguay Round negotiators not only *rejected* proposals to change the terms of Article XXI, but they also incorporated into the GATS and TRIPS security exceptions language identical to Article XXI and declined to include in the DSU text that would require a change to the longstanding approach to Article XXI as self-judging. In other words, Uruguay Round negotiators were aware of the possibility that essential security actions *could* be subject to review – and they chose not to incorporate into the text modifications or additional language providing for such review.

86. Among the errors of in the analysis of the panel in *Russia – Traffic in Transit* was that it interpreted Article XXI(b)(iii) on the basis of text found in other treaties, even though that text is *not* reflected in the GATT 1994. That panel suggested, “[a]n emergency in international relations” within the meaning of Article XXI(b)(iii) “appear[s] to refer generally to a situation of armed conflict, or latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.”⁸³ In reaching its erroneous interpretation of the phrase “other emergency in international relations” in Article XXI(b)(iii), the *Russia – Traffic in Transit* panel relied on a provision in the Covenant of the League of Nations that refers to “[a]ny

⁸³ *Russia – Traffic in Transit*, para. 7.76.

war or threat of war,” terms are significantly different from those in Article XXI(b)(iii) – but terms that appear in both the Treaty of Rome and the EEA Agreement.⁸⁴ Thus, the *Russia – Traffic in Transit* panel appears to have deliberately inserted a meaning drawn from other treaties with different essential security text in place of the actual text used in Article XXI. This Panel should not repeat such an error, particularly in light of the numerous decisions by Uruguay Round negotiators that indicate they did not intend to diverge from the longstanding interpretation of Article XXI.

5. Internal Documents of the U.S. Delegation Do Not Reflect Negotiating History And Are Not Circumstances Of the Conclusion of the GATT 1947

87. The European Union defends the *Russia – Traffic in Transit* panel’s reliance on the U.S. internal documents and states that “even if such material was not in itself *travaux préparatoires*, it would constitute the circumstances of the conclusion of the GATT 1947, or other supplementary means of interpretation.”⁸⁵ The EU continues that “[i]n any event, even if the material was not covered by Article 32 VCLT, it is well within a panel’s discretion to choose to rely on publicly available facts and evidence, especially in order to confirm or support a conclusion that could be reached even independently of those facts and evidence.”⁸⁶

88. As an initial matter, the EU fails to respond to the questions put forward by the Panel – whether the documents in question were in the public domain during the negotiations of the ITO Charter; and how, if these documents were not in the public domain, those documents could be considered relevant to establishing the common intention of the parties or provide evidence of the circumstances of the conclusion of the GATT 1947. To be clear, those documents were *not* publicly available, and they do not constitute negotiating history, nor do they constitute circumstances of the conclusion of the GATT 1947.

89. Furthermore, as the United States explained in its First Written Submission, these U.S. internal documents—when viewed as a whole and in context—confirm that Article XXI(b) was understood by the majority of the U.S. delegation to be self-judging as then currently drafted, both as to whether certain action was “necessary” and as to the appropriate relationship between the action and other elements of the provision.⁸⁷ The final conclusion of an internal U.S. memorandum discussing these competing views was that under the then-existing text “the U.S. can justify such security measures *as it may contemplate as ‘relating to’* one of the listed subjects.”⁸⁸

⁸⁴ *Russia – Traffic in Transit*, para. 7.76 & note 153. As the United States explained in its response to the Panel’s Question 51, the correct understanding of the phrase “other emergency in international relations” in Article XXI(b)(iii) is as a category that includes “war” as well as other circumstances that may or may not be similar to war.

⁸⁵ EU’s Response to the Panel’s Question, 63, para. 341.

⁸⁶ EU’s Response to the Panel’s Question, 63, para. 341.

⁸⁷ See U.S. First Written Submission, Section III.A.3.b.

⁸⁸ 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

90. Finally, after these internal discussions occurred, the text of the essential security exception was revised in two ways to emphasize its self-judging nature. First the United States proposed a subsequent revision of the text, in which the original language was changed from “action which it may consider necessary” to the more strongly self-judging formulation—also the current GATT formulation—“action which it considers necessary for the protection of its essential security interests.”⁸⁹ In addition, the reference to a Member’s action “relating to the protection of its essential security interests” was removed from the third subparagraph of the exception, such that action taken “[i]n time of war or other emergency in international relations” was presumed to implicate the Member’s essential security interests.⁹⁰ With these changes, the essential security provision was included as a separate article, in a new final chapter in the September 1947 draft of the ITO Charter.⁹¹

91. Thus, the EU has not provided any basis upon which the Panel may rely on these internal U.S. documents in interpreting Article XXI of the GATT 1994. Moreover, to the extent that the Panel chooses to review documents internal to the U.S. delegation in reaching its conclusions in this dispute – despite the fact that these documents do not constitute negotiating history or reflect the circumstances of the conclusion of the GATT 1947 – these documents support rather than rebut an interpretation of Article XXI(b) as self-judging..

D. Article 33 of the VCLT Supports Adopting an Interpretation that Best Reconciles the English, Spanish and French versions of Article XXI(b)

Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memos, at 1–3 (emphasis added) (US-49).

⁸⁹ 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), at 25–26 (US-36). *See also* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (retaining “it considers” language at ITO draft charter provision on essential security) (US-37). The GATT Article XX text proposed in March 1947 was likewise revised in August 1947 to reflect the current operative language of GATT Article XXI(b). *See* 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), at 47 (US-38).

⁹⁰ *Compare* 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), at 25–26 (US-36) (stating that “[n]othing in this Charter shall be construed . . . to prevent any Member from taking any action which it may consider to be necessary to such interests: . . . (c) In time of war or other emergency in international relations, relating to the protection of its essential security interests.”) *with* Report of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947), at 178 (stating that “[n]othing in this Charter shall be construed . . . to prevent any member from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations”) (US-37).

⁹¹ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Commission A, E/PC/T/A/SR/33 July 24, 1947 (US-41); 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 September 10, 1947, article 94, at 56 (providing at article 94, paragraph (b) that “[n]othing in this Charter shall be construed . . . to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests” relating to particular enumerated categories) (US-55).

92. As discussed in Section II.B, the ordinary meaning of the English text of Article XXI(b) establishes that the provision is self-judging. As discussed in Section II.D.1 below, however, the interpretation that emerges based on the ordinary meaning of the text of the subparagraphs in the English and French language versions, however, is not fully supported by the Spanish text of the subparagraphs. Specifically, the Spanish text of the three subparagraphs indicates that they must be read to modify the term “actions” in the chapeau of Article XXI(b); whereas the ordinary meaning of subparagraphs (i) and (ii) in the English and French versions is most naturally read to modify the term “interests” in the chapeau. Thus, as discussed in Section II.D.2 below, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, must be adopted under Article 33 of the VCLT.

93. Reconciling the texts leads to the interpretation that all of the subparagraphs modify the terms “any action which it considers” in the chapeau, because this reading is consistent with the Spanish text, and also – while less in line with rules of grammar and conventions – permitted by the English and French texts. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase “which it considers” still modifies the entirety of the chapeau and the subparagraph endings. Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member’s essential security interests in the relevant circumstances to the judgment of that Member alone.

1. Idiosyncrasies in the Spanish Text Do Not Warrant Interpreting the English Text of Article XXI(b) in a Manner Inconsistent with the Ordinary Meaning of the Text

94. The EU argues, in error, that idiosyncrasies in the Spanish text—the existence of a comma before “relativas” in the chapeau, and the fact that “relativas” is feminine plural and therefore cannot modify the masculine plural noun “intereses”—demonstrate that the subparagraphs modify the word “action”/“medidas”.⁹² Despite this reliance on the Spanish text, however, the EU fails to address other differences in that text which deviate significantly from the English and French versions of the text. By avoiding addressing these differences, the EU fails to assist the Panel in grappling with serious flaws in the Spanish text, such as the inclusion of “relativas” followed by a colon in the chapeau and the addition of “a las” in subparagraph ending (iii).

95. As the United States explained in detail in the U.S. Response to the Panel’s Question 41, the inclusion of “relativas” preceded by a comma (and resulting addition of “a las” in subparagraph (iii)) is likely a translation error, resulting from over-reliance on the Spanish translation of the essential security exception in the ITO Charter. The flaws in the Spanish text of Article XXI(b) become especially clear when Article XXI(b)(iii) is examined.

96. The Spanish text of Article XXI(b)(iii) is “No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que: . . . b) impida a una parte contratante la adopción de

⁹² EU’s Response to the Panel’s Question 41, para. 225 & Question 42, para. 228.

todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad, relativas: . . . iii) a las aplicadas en tiempos de guerra o en caso de grave tensión internacional”. This text reads as if the action (“medidas”) referred to in the chapeau must relate to (“relativas a”) *another* set of measures (“las [medidas] aplicadas”), those that are applied in the temporal circumstance set forth in subparagraph (b)(iii). This reference to another set of measures does not appear in either the English or the French texts of Article XXI(b)(iii). For a chart comparing Article XXI(b) of the GATT 1994 in English, French and Spanish, please see Annex 1.

97. The comparison of the Spanish text of Article XXI(b) against the Spanish text of the security exceptions in Article XIVbis(b) of GATS and Article 73(b) of TRIPS supports the understanding that the Spanish text of Article XXI(b) is idiosyncratic. First, the inclusion of “relativas” preceded by a comma appears to be a translation error. In the Spanish Article XIVbis(b) of GATS and Article 73(b) of TRIPS, the word “relativas” is not in the main text (chapeau) but instead appears in the subparagraph endings (i) and (ii) (just as in the English and French). Second, the comma that precedes “relativas” in Article XXI(b) is also absent from the main text in the Spanish Article XIVbis(b) of GATS and Article 73(b) of TRIPS. Third, the “a las” in subparagraph (iii) of Article XXI(b) is also absent from the Spanish GATS and TRIPS texts. For a chart comparing Article XXI(b) of the GATT, Article XIVbis(b) of GATS and Article 73(b) of TRIPS, please see Annex 2.

98. Given this context, the Spanish text of Article XXI(b) should be understood as conveying the same meaning as the Spanish Article XIVbis(b) of GATS and Article 73(b) of TRIPS. There is no reason to consider that these GATT 1994, GATS, and TRIPS exceptions, that are written almost identically in three languages, were meant to be understood according to one, slightly different language version of one agreement. Rather, it is logical not to attach a difference in meaning to the inclusion of a comma, placement of “relativas”, and addition of the confusing “a las” in the Spanish text of the GATT Article XXI(b)(iii).

99. Regarding the gender of the word “relativas” in the Spanish text of Article XXI(b), the United States recognizes that the feminine plural term “relativas” cannot modify the masculine plural noun “intereses”. This reveals a difference in meaning between the English and French versions on one hand and the Spanish version on the other.

100. The ordinary meaning of the English text of Article XXI(b) establishes that the subject matters in subparagraphs (i) and (ii) modify “its essential security interests” while the temporal limitation in subparagraph (iii) relates to “action”. As the United States explained in its Response to the Panel’s Question 40 and again in Section II.B.1 of this submission, English grammar dictates such a reading. Similarly, the ordinary meaning of the French text of Article XXI(b) establishes that the subject matters in subparagraphs (i) and (ii) modify “des intérêts essentiels de sa sécurité” while the temporal limitation in subparagraph (iii) relates to “action”/ “mesures”. Therefore, the English and French versions are in accord.

101. In contrast, under the Spanish text of Article XXI(b), each subparagraph modifies “medidas” and cannot modify “intereses”. Under Article 33 of the VCLT, this means that the interpreter—rather than interpreting the English and French texts according to the grammar and structure of the Spanish text and thereby interpreting them *inconsistently* with their ordinary

meaning as the EU would have the Panel do—should adopt a meaning that best reconciles the texts, as explained in Section II.D.2.

2. *Reconciling the English, Spanish and French Versions of Article XXI(b) Leads To An Interpretation That Is Fundamentally The Same As That Presented By The United States*

102. The EU’s application of Article 33 of the VCLT to the text of Article XXI(b) is flawed. The EU argues that “[t]here are no grammatical or structure differences among the three linguistic versions” and that “[t]he US interpretation of the English version cannot be accepted, as it conflicts with the Spanish and the French versions.”⁹³ In other words, the EU discerns no difference in meaning between the English, French and Spanish texts.

103. As the United States explained above, there is a difference in meaning between the English and French texts of Article XXI(b) and the Spanish text of Article XXI(b). The EU seems to recognize this difference—stemming from the fact that “relativas” cannot modify “intereses”—but attempts to address this difference by rejecting the ordinary meaning of the English text of Article XXI(b) offered by the United States. In rejecting the U.S. interpretation, the EU fails to cite any relevant English linguistic sources; its assertion is neither supported by English usage nor grammar. In order to address the difference, the EU is changing the ordinary meaning of the English text of Article XXI(b) in order to conform its meaning to the Spanish text of Article XXI(b).

104. Article 33(4) of the VCLT provides that “when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”⁹⁴ In applying this rule, the Appellate Body has found that it is not appropriate to use two language versions to adopt a meaning different from the ordinary meaning of the third language version rather than reconciling them.⁹⁵ This approach is consistent with the ILC’s commentary: “The existence of more than one authentic text clearly introduces a new element—comparison of the texts—into the interpretation of the treaty. But it does not involve a

⁹³ EU’s Response to the Panel’s Question 43, para. 230.

⁹⁴ Vienna Convention, Article 33(4).

⁹⁵ Finding error in the panel’s interpretation of one provision, the Appellate Body in *Chile – Price Bands System* stated:

Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term ‘ordinary customs duty’ to mean something *different* from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4) of the Vienna Convention whereby ‘when a comparison of the authentic texts discloses a difference of meaning ..., the meaning which best *reconciles* the texts...shall be adopted.’

Chile – Price Band System (AB), para. 271 (emphasis in the report).

different system of interpretation.”⁹⁶ The ILC instructed: “the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules of interpretation of treaties.”⁹⁷ It further explained:

The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, travaux préparatoires, the surrounding circumstances, subsequent practice, etc. On the contrary, *the equality of the texts means that every reasonable effort should first be made to reconcile the texts* and to ascertain the intention of the parties by recourse to the normal means of interpretation.⁹⁸

105. Article 33(4) does not say, as the EU suggests, that a panel shall adopt the meaning which best reconciles the text only when the presumption that the terms of the treaty have the same meaning is “rebutted.”⁹⁹ Rather, in reconciling the texts, an interpreter is acting consistently with this presumption. In addressing the VCLT provision¹⁰⁰ which at the time combined Article 33(3) and Article 33(4), the ILC explained:

(8) Paragraph 3 therefore provides, first, that the terms of a treaty are presumed to have the same meaning in each authentic text. Then it adds that—apart from cases where the parties have agreed upon the priority of a particular text—in the event of a divergence between authentic texts a meaning which so far as possible reconciles the different texts shall be adopted.¹⁰¹

106. As the United States explained in its Response to the Panel’s Question 43, the most appropriate way to reconcile the textual differences between the English and French subparagraph texts on one hand, and the Spanish subparagraph text on the other—specifically the different relationship between the subparagraph endings and the chapeau terms—is to interpret Article XXI(b) such that all three subparagraph endings refer back to “any action which it

⁹⁶ *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

⁹⁷ *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

⁹⁸ *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (emphasis added) (US-23).

⁹⁹ EU’s Response to the Panel’s Question 43, paras. 236-37.

¹⁰⁰ This provision provided: “The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning, which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.”

¹⁰¹ *Draft Articles on the Law of Treaties with Commentaries (1966)*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 225 (US-23).

considers”. This reading is consistent with the Spanish text; and also – while less in line with rules of grammar and conventions – is a reading permitted by the English and French texts.

107. This reading of the text of the subparagraphs does not alter the plain meaning of the chapeau or the overall structure of Article XXI(b), however. The terms of the provision still form a single relative clause that begins in the chapeau and ends with each subparagraph, and therefore the phrase “which it considers” still modifies the entirety of the chapeau and the subparagraph endings. Thus, an invocation of Article XXI(b) would reflect that a Member considers two elements to exist with respect to its action. First, the action is one “which it considers necessary for the protection of its essential security interests”. Second, the action is one “which it considers” relates to the subject matters in subparagraph endings (i) or (ii) or “taken in time of war or other emergency in international relations” as set forth in subparagraph ending (iii). Therefore, reconciling the three authentic texts leads to the same fundamental meaning the United States has presented, committing the determination of whether an action is necessary for the protection of a Member’s essential security interests in the relevant circumstances to the judgment of that Member alone.

III. The U.S. Interpretation is Consistent with the DSU and the Panel’s Terms of Reference

108. As the United States has described in Section II, the United States has invoked Article XXI(b) with respect to all of complainant’s claims. As interpreted according to the customary rules of interpretation, Article XXI(b) is self-judging. In light of the self-judging nature of Article XXI(b), the sole finding that the Panel can make in this dispute is to note the U.S. invocation of that provision.

109. As discussed in Section III.A. below, this result is consistent with the Panel’s role under the DSU, including the Panel’s function to make an “objective assessment” of the matter before it. Indeed, it would not be consistent with making an “objective assessment” to read Article XXI contrary to its text as permitting a review of the action a Member considers necessary for the protection of its essential security interests. As discussed in Section III.B, the complainant’s own arguments demonstrate that the Panel cannot test a Member’s determination under Article XXI(b) without substituting the Panel’s judgment for that of the Member.

A. The U.S. Interpretation is Consistent with the Panel’s Role under the DSU, including the Panel’s Function to Make an “Objective Assessment”

110. The EU suggests that the U.S. interpretation of Article XXI(b) as self-judging or non-justiciable is inconsistent with the DSU, including Article 11 of the DSU, and would essentially strip the Panel of its jurisdiction to decide the dispute.”¹⁰² The EU fails to properly understand the Panel’s terms of reference from the DSB and its role in the broader context of the WTO dispute settlement system. Contrary to EU’s argument, the U.S. interpretation is consistent with the Panel’s terms of reference and the DSU, including DSU Article 11. The EU simply asserts that “objective assessment” requires some degree of substantive review, but an “objective

¹⁰² EU’s Opening Statement at the First Substantive Meeting with the Panel, paras. 72-73.

assessment” of Article XXI(b) demonstrates that this provision is self-judging, and drawing this conclusion is necessarily consistent with the Panel fulfilling the function assigned to it.

111. Under DSU Article 7.1, the standard terms of reference, the DSB has tasked the Panel: (1) “[t]o *examine*” the matter – that is, to “[i]nvestigate the nature, condition or qualities of (something) by close inspection or tests”¹⁰³; 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.

112. 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.”

113. In this dispute, the Panel has been tasked by the DSB to examine the matter and to make such findings as may lead to a recommendation to bring a WTO-inconsistent measure into conformity with the WTO Agreement. Article 11 reflects this function of examination and making such findings. To make the “objective assessment” that may lead a panel to make findings to assist the DSB to make recommendations, the Panel is to make “an objective assessment of the facts of the case” and “of the applicability of and conformity with the relevant covered agreements”. In the context of this dispute, such an assessment begins with interpreting Article XXI(b) in accordance with the customary rules of interpretation. And that objective assessment of Article XXI(b) leads to the understanding that the sole finding that the Panel may make is to recognize the Member’s invocation of Article XXI(b).

114. The Panel objectively assesses the facts of the case by noting that the responding Member has invoked Article XXI(b). The Panel objectively assesses the applicability of and conformity with the relevant covered agreements by first interpreting Article XXI(b) in accordance with the customary rules of interpretation, and – once it has done so and determined Article XXI(b) to be self-judging – finding Article XXI(b) applicable. Nothing in the DSU – including Article 11 of the DSU – requires otherwise.

115. This result is consistent with DSU Article 19. Article 19.1 provides that “recommendations” are issued “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement” and are recommendations “that the Member concerned bring the measure into conformity with the agreement.” DSU Article 19.2 clarifies that “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreement.”

116. Invocation of Article XXI(b) means that an essential security action cannot be found by a panel or the Appellate Body to be inconsistent with a covered agreement. It would diminish a Member’s “right” to take action it considers necessary for the protection of its essential security interests if a panel or the Appellate Body purported to find such an action inconsistent with Article XXI(b). Thus, the sole finding that the Panel may make – consistent with its terms of

¹⁰³ *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 870 (US-86).

reference and the DSU – is to note in the Panel’s report that the United States has invoked its essential security interests. No additional findings concerning the claims raised by the complaining Member in its submissions would be consistent with the DSU, in light of the text of Article XXI(b).

B. Complainant’s Interpretation Would Require the Panel To Substitute Its Own Judgment For That of a Responding Member On Matters of Essential Security

117. In response to the Panel’s Question 45 (“How can objective assessment of a Member’s invocation of Article XXI avoid substituting a panel’s judgment for the judgment that is reserved to a Member’s discretion?”), the EU offers two types of review: (1) “whether it is plausible or more likely than not that the United States considers the measures ‘necessary’ within the meaning of Article XXI(b)”; and (2) “with respect to the other elements of Article XXI(b), the Panel has to consider whether it is plausible or more likely than not that the United States has made its case.”¹⁰⁴

118. While the EU argues that the term “consider” qualifies the “necessity” of the action but not the rest of the terms in the chapeau and the subparagraphs, the EU offers the same standard “plausible or more likely than not” for assessing both “necessity” and the rest of the chapeau and subparagraph terms. Therefore, the standard that the EU offers is difficult to square with its own purported interpretation of Article XXI(b), much less the text of Article XXI(b).

119. Under the EU’s approach, a panel might decide that it is “unlikely” – or that there is a less than 50% chance – that the United States *considers the action necessary* for the protection of the Member’s essential security interests and reject the Member’s invocation of Article XXI(b) on that basis. A panel could not make a judgment based on the EU’s interpretation without determining, based on the panel’s own review of the evidence, what constitutes a Member’s “essential security interests” and what a panel would consider “necessary for the protection of [those] interests”. The suggestion that such an assessment would not result in the Panel substituting its judgment for that of the United States is not credible.

120. Given the sensitive nature of essential security matters, the EU’s proposal that the Panel assess whether it is plausible or more likely than not that the United States has made its case under the other elements of Article XXI(b), such as applicability of the subparagraphs, is also unavailing. A panel that determines that a challenged action is not “taken in time of war or other emergency in international relations” is making a judgment about what constitutes, *for that Member*, a war or an “emergency in international relations.” Such an analysis necessarily puts the Panel in a position where it must undertake the type of analysis – for example, of the political and security relationships between Members, of the geopolitical situation involved, and other issues – a trade expert sitting on a WTO panel is not suited to undertake.

121. The approach suggested by the United States, consistent with the long-standing approach to Article XXI in the GATT and WTO, does permit the Panel to objectively assess the matter before it without substituting its judgment on a Member’s essential security interests for the judgment of that Member. The Panel can objectively assess the facts of the case by noting that

¹⁰⁴ EU’s Response to the Panel’s Question 45, paras 247-48.

the Member has invoked Article XXI(b). The Panel can objectively assess the applicability of and conformity with the relevant covered agreements by first interpreting Article XXI(b) in accordance with the customary rules of interpretation, and – once it determines Article XXI(b) is self-judging – finding Article XXI(b) applicable. And the Panel can then assess that there are no findings that can be made in relation to the challenged essential security action that could lead the DSB to make a recommendation. The approach advanced by the United States is the only way to fulfil the Panel’s role under the DSU – consistent with its terms of reference – without substituting its judgment for that of the United States, inconsistent with the text of Article XXI(b)

IV. The Measures at Issue are Not Safeguards Measures and the Agreement on Safeguards Does Not Apply

122. Article XIX of GATT 1994 establishes a right for a Member to deviate from its WTO obligations under certain conditions. In order to exercise that right to apply a safeguard measure, a Member must comply with those conditions precedent set out in Article XIX. One of those key conditions precedent is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult.¹⁰⁵ The measures at issue in this dispute are not safeguard measures because the United States has not invoked Article XIX as the legal basis for this measure; instead, the United States has (explicitly and repeatedly) invoked Article XXI. Accordingly, the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply.

123. The EU has essentially presented no new arguments beyond those already argued – and rebutted by the United States – at the first Panel meeting. Relying on the Appellate Body’s report in *Indonesia – Iron or Steel Products*, the EU argues – incorrectly – that the measures at issue here are safeguard measures because they have the two “constituent features” identified in that report, failing to recognize even that this report did not purport to identify all of the conditions precedent for application of a safeguard measure.

124. The EU denies that invocation is a necessary precondition to a Member’s exercise of its right to take action under Article XIX,¹⁰⁶ and opines that the opposite conclusion “would, of course, make large swaths of WTO law completely ineffective, because any number of WTO obligations . . . could be sidestepped by simply asserting that the measure is something other than what it actually, objectively, is”¹⁰⁷ – erroneously ignoring that the Member remains subject to WTO obligations applicable to that action, or to potential consequences for invocation of a right such as Article XXI. The EU also suggests – incorrectly – that the U.S. measures at issue are safeguards measures taken pursuant to Article XIX, and the EU accuses the United States of

¹⁰⁵ See U.S. Response to the Panel’s Question 5.

¹⁰⁶ EU’s Responses to the Panel’s Question 9, para. 81 (“[N]otifications are not prerequisites for the applicability of safeguard disciplines.”).

¹⁰⁷ EU’s Response to the Panel’s Question 9, para. 83.

“attempt[ing] to disguise [these measures] in order to escape the disciplines of the Agreement on Safeguards.”¹⁰⁸

125. As an initial matter, the Appellate Body’s report in *Indonesia – Iron or Steel Products* does not even purport to identify features of safeguard measures that, by themselves, are sufficient to establish the existence of safeguard measures. Instead, the Appellate Body identified “certain constituent features, *absent which* [a measure] could not be considered a safeguard measure.”¹⁰⁹

126. In addition, the EU is wrong to deny the importance of invocation through notice as a condition precedent to the application of safeguards disciplines. As discussed in Section IV.A, the text of Article XIX, as interpreted according to the customary rules of interpretation, establishes that invocation through notice is a fundamental, condition precedent for a Member’s safeguards action and the consequent application of safeguards rules to that action. This conclusion is also supported by the context provided by the Agreement on Safeguards, as well as the object and purpose of the Agreement on Safeguards and the negotiating history of that agreement, as described in Section IV.B.

127. As this discussion establishes, permitting a Member to exercise a right through invocation does not, as the EU alleges, make large swaths of WTO law completely ineffective; instead, this structure is specifically provided for in Article XIX – as discussed by the drafters of that provision – and resembles the structure employed in numerous other WTO disciplines.

128. Contrary to the EU’s arguments, the U.S. measures at issue here are not safeguards measures taken pursuant to Article XIX, and the United States has not invoked Article XXI(b) in an attempt to disguise these measures. The U.S. measures at issue are national security measures that were sought and taken pursuant to Article XXI, as the United States has stated in numerous communications to WTO committees.¹¹⁰ The United States has *not* invoked Article XIX as the legal basis of the measures at issue in this dispute and accordingly, the United States is not seeking or taking action pursuant to Article XIX. The Agreement on Safeguards reflects

¹⁰⁸ EU’s response to the Panel’s Question 24, para. 160 (“The European Union considers that, given the facts and evidence, it is very clear that the measures at issue cannot be consider to have been “sought, taken or maintained” pursuant only to provisions “other than” Article XIX of the GATT 1994. This is particularly clear when one considers the manner in which the measures are also caught by the provisions of Article 11.1(b) of the Agreement on Safeguards.”); EU’s Response to the Panel’s Question 76, para. 419 (“In light of the arguments abundantly presented in our submissions, the EU has demonstrated that the measures at issue are only safeguards measures, and that the US has attempted to disguise them as essential security interests measures in order to escape the disciplines of the Agreement on Safeguards.”)

¹⁰⁹ *Indonesia – Iron or Steel Products (AB)*, para. 5.60 (emphasis added).

¹¹⁰ See U.S. Response to the Panel’s Question 5(b)-(d) (citing and discussing U.S. statements in the WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27 (US-80), WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27 (US-81), WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2 (US-82), U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea’s Statement at the WTO General Council (May 8, 2018), at 3 (US-83), and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (US-84)).

precisely this understanding that it is for a Member to decide to invoke its right to take an action under a particular provision. As established in Article 11.1(c) of the Agreement on Safeguards, a Member may decide to seek, take, or maintain a measure pursuant to other provisions of the GATT 1994, such as Article XXI, and in such a case, the Agreement on Safeguards does not apply. As set forth in Section IV.B, this conclusion is supported by the terms of Article 11.1(c), as well as the object and purpose of the Agreement on Safeguards and the negotiating history of Article 11.1(c).

A. Article XIX Makes Clear That Invocation Through Notice is a Fundamental, Condition Precedent For a Member’s Exercise of its Right to Take Action under Article XIX and the Application of Safeguards Rules to that Action

129. Interpreting Article XIX according to the customary rules of interpretation makes clear that invocation is a fundamental, condition precedent for a Member’s exercise of its right to take action under that provision and for the application of safeguards rules to that action. The invocation requirement in Article XIX to apply a safeguard measure stems from the provisions of Article XIX requiring a Member to provide notice of a proposed action. Absent this invocation, a Member is not free to exercise its right to take safeguard measure and that measure cannot fall under the WTO’s safeguard disciplines. This interpretation is clear from the text of Article XIX.

130. The EU attempts to argue that invocation is not required, relying on the Appellate Body’s report in *Indonesia – Iron or Steel Products*, which found that “in order to constitute one of the ‘measures provided for in Article XIX’, a measure must present certain constituent features, absent which it could not be considered a safeguard measure.”¹¹¹ The EU asserts that “[a]part from the two constituent features clearly identified by the Appellate Body, there are no other necessary elements that each and every measure must have in order to be considered a safeguard.”¹¹²

131. As an initial matter, contrary to complainant’s representations, the Appellate Body’s report in *Indonesia – Iron or Steel Products* does not support the assertion that the two “constituent features” named there are, by themselves, sufficient to establish the existence of a safeguard measure. Rather, the Appellate Body noted that “to constitute one of the ‘measures provided for in Article XIX’, a measure must present certain constituent features, *absent which* it could not be considered a safeguard measure.”¹¹³ In other words, the Appellate Body’s reasoning only identifies certain “necessary” features.¹¹⁴ Importantly, the Appellate Body did *not* say that a measure presenting both (to use the terms used by the Appellate Body) “constituent features” automatically or necessarily qualifies as a safeguard measure. Indeed, by recognizing that “whether a particular measure constitutes a safeguard measure for purposes of WTO law can

¹¹¹ *Indonesia – Iron or Steel Products (AB)*, para. 5.60.

¹¹² EU’s Response to the Panels’ Questions 5(a)-(b), para. 50.

¹¹³ *Indonesia – Iron or Steel Products (AB)*, para. 5.60 (emphasis added).

¹¹⁴ See also *The New Shorter Oxford English Dictionary*, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 488 (defining “constituent” as “A constituent part (of); an element of a complex whole”) (US-205).

be determined only on a case-by-case basis,”¹¹⁵ the Appellate Body alluded to *other* conditions that might need to be met.

132. The Appellate Body in *Indonesia – Iron or Steel Products* did not discuss, for example, the GATT 1947 Working Party report in *Fur Felt Hats*, and the Working Party’s reasoning in that report that “*three sets of conditions* have to be fulfilled” to meet the requirements of Article XIX.¹¹⁶ As discussed further detail in Section IV.A.4, among the “three sets of conditions” discussed in this GATT 1947 Working Party report was the condition that:

the contracting party taking action under Article XIX **must give notice** in writing to the CONTRACTING PARTIES **before taking action**. It must also give an opportunity to contracting parties substantially interested and to the Contracting Parties to consult with it. As a rule, consultation should take place before the action is taken, but, in critical circumstances, consultation may take place immediately after the measure is taken provisionally.¹¹⁷

133. With this statement, the *Fur Felt Hats* Working Party report confirms the U.S. understanding, based on the ordinary meaning of the terms of Article XIX, that invocation of Article XIX through notice is a precondition to applying a safeguard measure.

134. In addition, the complainant’s proffered interpretation of what constitutes a safeguard measure is not consistent with Article XIX as interpreted based on customary rules of interpretation. As discussed in Section IV.A.1 below, the text of Article XIX, including the title of that provision and each paragraph, leads to the conclusion that notice is a condition precedent to taking action under Article XIX. The context of Article XIX also supports this interpretation, and reveals that numerous other WTO provisions contemplate a Member exercising a right through invocation and contain structural similarities to Article XIX, as discussed in Section IV.A.2. The object and purpose of the GATT 1994, as discussed in Section IV.A.3, also supports that invocation is a condition precedent for a Member’s exercise of its right to take action under Article XIX. The adopted GATT 1947 Working Party Report – in the 1950 *Fur Felt Hats* dispute also confirms this understanding, as discussed in Section IV.A.4. Finally, although not necessary in this dispute, as discussed in Section IV.A.5, the drafting history of Article XIX confirms this interpretation of Article XIX.

1. The Ordinary Meaning of Article XIX Establishes That Invocation Is A Necessary Precondition for a Member’s exercise of its right to take action under Article XIX and To The Application Of Safeguards Rules to that Action

135. In order to exercise that right to apply a safeguard measure under Article XIX, a Member must comply with those conditions precedent set out in Article XIX. That invocation through notice of a proposed measure to other Members is a necessary, condition precedent is established

¹¹⁵ *Indonesia – Iron or Steel Products (AB)*, para. 5.57.

¹¹⁶ *US – Fur Felt Hats (GATT Panel)*, para 4 (emphasis added) (US-208).

¹¹⁷ *US – Fur Felt Hats (GATT Panel)*, para 4 (emphasis added) (US-208).

by the ordinary meaning of the terms of Article XIX, including the title of Article XIX and each of its paragraphs.

a. The Terms of Article XIX:2 Support This Interpretation

136. The text of Article XIX:2 explicitly sets out a requirement to invoke the provision through notice as a condition precedent to action under Article XIX:1. The first sentence of Article XIX:2 provides:

Before any contracting party shall **take action pursuant to** the provisions of paragraph 1 of this Article, it shall **give notice in writing** to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the **proposed** action. (emphasis added)

137. The ordinary meaning of the terms in the first sentence of Article XIX:2 show that invocation is a precondition to the exercise of a Member's right to take safeguard action. The term "before" is defined as "preceding an event."¹¹⁸ The term "pursuant" means "in accordance with".¹¹⁹ And the term "propose" means to "[p]ut forward or present for consideration" or "discussion".¹²⁰ Thus, invocation through a notice from the Member *proposing* to take action must "precede" (come before) action "in accordance with" (pursuant to) paragraph 1. Without such notice, a Member is not seeking legal authority pursuant to Article XIX to suspend an obligation or to withdraw or modify a concession and may not take the proposed action "in accordance with" that provision.

138. The third sentence of Article XIX:2 also supports the interpretation that invocation is a condition precedent for action under Article XIX. It states:

In critical circumstances, where delay would cause damage which it would be difficult to repair, *action* under paragraph 1 of this Article *may be taken* provisionally *without prior consultation*, on the condition that consultation shall be effected immediately after taking such action.

139. With this text, the third sentence of Article XIX:2 provides a *limited exception* to the consultation requirement. Notably, this exception does *not* permit Members to take action without providing "notice." This exception to the consultation requirement – but not the notice

¹¹⁸ See The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 205 (defining "before" as "Earlier in time; previously" and "preceding an event") (US-205)

¹¹⁹ See The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 2,422 (defining the term "pursuant" as "in accordance with") (US-86).

¹²⁰ See The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993), at 2,381 (defining the term "propose" as "Put forward or present for consideration, discussion") (US-205).

requirement – establishes that Article XIX requires a Member to invoke through notice its right to take a safeguard action as a condition precedent to action under that provision.

b. The Terms of Article XIX:1 Support This Interpretation

140. That invocation is a precondition for a Member’s exercise of its right to take action under Article XIX and to the consequent application of safeguards rules to that action is also confirmed by paragraph 1 of Article XIX.¹²¹ Article XIX:1(a) establishes a right – the right to suspend obligations or modify or withdraw concessions – in the sense that Article XIX:1 permits a Member, when it has invoked this provision and under certain conditions, to take action that would otherwise be inconsistent with its WTO obligations.

141. Article XIX:1(a) first sets out the following conditions that, if present, would give a Member the right to apply a safeguard: “[i]f, as a result of unforeseen developments and the effect of the obligations incurred by a contracting party under this Agreement . . . any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products.”

142. Article XIX:1(a) also establishes that, where those conditions are met, the Member has the right (“shall be free”) to apply a safeguard, subject to certain requirements. Namely, Article XIX:1(a) provides that the Member shall be free “to suspend the obligation in whole or in part or to withdraw or modify the [GATT] concession” with “respect” to the “like or directly competitive product” that meets the circumstances and conditions of the first part of Article XIX:1(a), and to “the extent and for such time as may be necessary to prevent or remedy such injury”.

143. By setting out conditions that, when met, permit a Member to apply a safeguard, Article XIX:1(a) supports interpreting Article XIX to require invocation as a necessary, condition precedent for a Member’s exercise of its right to take action under Article XIX and to the application of safeguards rules to that action. That is, a Member determines that developments are “unforeseen” and whether importation is occurring under “conditions as to cause or threaten serious injury” and – as set forth in Article XIX:2, discussed in Section IV.A.1.c – invokes its right to take action under Article XIX. Accordingly, the existence of these conditions supports interpreting Article XIX to require invocation through notice as a condition precedent for taking action under Article XIX.

c. The Terms of Article XIX:3 Support This Interpretation

¹²¹ As this provision states in full:

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

144. The terms of Article XIX:3 of the GATT 1994 also show that invocation is a precondition for a Member’s exercise of its right to take action under Article XIX and to the application of safeguards rules to that action. As Article XIX:3(a) provides:

If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which **proposes to take or continue** the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which **written notice** of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1(b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

145. Under this provision, if the consultations envisioned by Article XIX:2 fail to address the concerns of affected Members, affected Members can suspend substantially equivalent concessions or other obligations. These envisioned consultations are triggered by the invocation and notice provision under Article XIX:2, however, underscoring that invocation through notice is a condition precedent to action under Article XIX. Put in the terms of Article XIX:3(a), *without notice* of a proposed action, a Member “which proposes to take or continue the action shall [*not*] be free to do so.” That is, *without invocation*, a Member cannot take (and has not taken) action pursuant to Article XIX.

146. Accordingly, the text of Article XIX – including the title and all three paragraphs – clearly provides that, absent invocation of the right to take action pursuant to Article XIX of the GATT, a measure cannot be characterized as a safeguard measure and the safeguards disciplines do not apply.

d. The Title of Article XIX Supports This Interpretation

147. The title of Article XIX, “Emergency Action on Imports of Particular Products,” supports the conclusion that invocation is a condition precedent to taking action under Article XIX. In particular, the words “Emergency *Action on Imports* of Particular Products” indicate that Article XIX sets out rules for how a Member may choose to take “action” that would otherwise be inconsistent with obligations under the GATT 1994 affecting imports of particular products. Notably, the title does *not* focus on any particular type of measure or refer to any type of obligation.

148. Use of the word “emergency” in the title of Article XIX supports interpreting Article XIX to require invocation by the acting Member as a condition precedent to action under that provision. An “emergency” can be understood as a situation “that arises unexpectedly and

requires urgent action.”¹²² Only the Member in question will know whether a situation has arisen that it did not expect and whether that Member considers the situation to require urgent action be taken under Article XIX. This circumstance is reflected in the text of Article XIX that requires affirmative invocation through notification to other Members of a proposed action under Article XIX in response to that unexpected situation.

2. The Context of Article XIX Supports This Interpretation

149. The context provided by other provisions of the WTO Agreement supports interpreting Article XIX as establishing a right – the right to impose a safeguard measure – that must be invoked in order for the safeguards disciplines to apply. Although the requirements vary, numerous other WTO provisions contemplate a Member exercising a right through invocation and contain structural features that are similar to Article XIX. For example:

- *GATT 1994 Article XXVIII* permits Members – when certain conditions are met – to modify or withdraw tariff concessions reflected in their Schedules of Concessions through negotiation and agreement with certain other Members. The structures of Article XXVIII and Article XIX are similar in that they both allow a Member to exercise a right after invoking the provision to propose action.¹²³ Also like Article XIX, the proposed modification or withdrawal under Article XXVIII triggers discussions between the invoking Member and certain other Members.¹²⁴
- *GATT 1994 Article XXIV* states that, if, in the formation of a customs union or a free-trade area, a Member proposes to increase a duty rate above the bound rate, the renegotiation procedures in Article XXVIII shall apply.¹²⁵ Thus, a Member seeking to exercise its right under Article XXIV must follow the same procedures detailed above with respect to Article XXVIII and, as such, the parallels to Article XIX are equally applicable.

¹²² See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 806 (defining “emergency” as “1 A situation, esp. of danger or conflict, that arises unexpectedly and requires urgent action”) (US-86).

¹²³ See Article XXVIII:3(a) (authorizing a Member proposing to “modify or withdraw” a tariff concession to implement the proposed modification even if no agreement is reached between the importing Member and the affected Member); Article XIX:3(a) (allowing an importing Member proposing to take a safeguard measure to implement the proposed measure even if no agreement is reached between the importing Member and the affected Members).

¹²⁴ See GATT 1994 Art. XIX:2 (providing that the invoking Member “shall afford the [Members] and those [Members] having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action”); GATT 1994 Art. XXVIII:1 (providing for “negotiation and agreement” with a defined set of Members and “consultation” with other substantially interested Members).

¹²⁵ GATT 1994 Art. XXIV:6 (If, in the formation of a customs union or a free-trade area, a Member “...proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.”). See also *Understanding on the Interpretation of Article XXIV of the GATT 1994* (affirming that the procedure must be commenced before the proposed modification or withdrawal).

- *GATT 1994 Article XVIII* permits certain developing Members to renegotiate tariff concessions (Article XVIII:A) or to implement an otherwise inconsistent measure in order to promote the establishment of a particular domestic industry (Article XVIII:C). Subject to certain requirements, Article XVIII provides that qualifying developing Members seeking recourse to these provisions “**shall be free** to deviate temporarily from the provisions of the other Articles of this Agreement.”¹²⁶ Both Sections A and C require the Member seeking modification to invoke these provisions by notifying Members,¹²⁷ and in certain circumstances permit implementation of the proposed measure even absent agreement.¹²⁸ Affected Members may withdraw substantially equivalent concessions.¹²⁹
- *GATT 1994 Article II:5* provides for consultations and negotiations for compensatory adjustment in the event that a domestic court ruling on classification does not accord the treatment required by a negotiated concession. Although renegotiation takes place *after* the change resulting from a domestic ruling, Article II:5 must still be invoked by the Member making the ruling, who “declares that such treatment cannot be accorded” because of the domestic ruling. Like Article XIX, Article II:5 contemplates negotiations with affected Members for compensatory adjustment.
- *GATT 1994 Article XXVII* permits withholding or withdrawal of a concession made during negotiations with respect to a government which has not become a Member or has ceased to be a Member of the GATT 1994. Like Article XIX, Article XXVII requires invocation by a Member through notice to and consultations with concerned Members upon request.¹³⁰
- *GATS Article XXI* is the services equivalent of GATT 1994 Article XXVIII, permitting modification or withdrawal of a commitment in a Member’s Schedule. GATS Article XXI affords a Member the right to modify or withdraw a commitment at any time in accordance

¹²⁶ GATT 1994 Art. XVII:4(a) (emphasis added).

¹²⁷ GATT 1994 Art. XVIII:7(a) (providing that the Member seeking modification under Section A “shall notify [Members]” of a proposed modification or withdrawal); GATT 1994, Article XVIII:14 (providing that a Member seeking modification under Section C “shall notify [Members] of the special difficulties which it meets ...and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties”).

¹²⁸ Under Section A, even where negotiations do not result in agreement, the Member seeking modification “shall be free” to modify or withdraw concessions where there is a multilateral determination that the compensatory adjustment offered is adequate, or that the Member made every reasonable effort to offer adequate compensation. GATT 1994 Article XVIII:7(a) and (b). Section C also allows the possibility for the modifying Member to introduce the proposed measure where agreement is not reached after informing the Members. GATT 1994 Article XVIII:17.

¹²⁹ GATT 1994 Art. XVIII:7(b) and 21. Drafters expressly revised Article XVIII:A to correspond to Article XXVIII:4(d). *GATT Report of the Review Working Party II on Tariffs, Schedules and Customs Administration*, L/329, February 24, 1955, paras. 22-23.

¹³⁰ GATT 1994 Art. Article XXVII (stating that “Any [Member] shall at any time be free to withhold or to withdraw in whole or in part any concession...in respect of which such [Member] determines that it was initially negotiated with a government which has not become, or has ceased to be, a [Member]. A [Member] taking such action shall notify the [Members] and, upon request, consult with [Members] which may have a substantial interest in the product concerned.”).

with certain time frames and procedures.¹³¹ The modifying Member invokes this provision by “notify[ing] its intent to modify or withdraw” prior to implementation¹³² and entering into negotiations for compensation with affected Members upon request.¹³³

- *Agreement on Agriculture Article 5* sets out a safeguard mechanism for agricultural product. Members have the right to impose an additional duty temporarily, subject to certain requirements.¹³⁴ Although Article 5 differs from the safeguard mechanisms in Article XIX in other respects, Article 5 – like Article XIX – contemplates invocation through advance notice in writing and consultations with interested Members.¹³⁵
- *Agreement on Textiles and Clothing Article 6* includes a transitional safeguard mechanism that reflects the same features of invocation through notice and consultations with affected Members. Indeed, the text refers explicitly to the Member “invoking the action.”¹³⁶ As such, the key feature of invocation by a Member is evident in this context as well.

150. This context demonstrates that Article XIX is one of numerous provisions of the GATT 1994 and other covered agreements that require invocation as a condition precedent for taking action pursuant to certain provisions. Granting Members the right to take particular action when certain conditions are met – should the acting Member invoke its right to do so – is therefore an ordinary part of the WTO Agreement. Under such provisions, as in Article XIX, it is only when a Member has invoked its right to take action pursuant to such a provision that the relevant disciplines apply.

3. The Object and Purpose of the GATT 1994 Supports This Interpretation

151. The object and purpose of the GATT 1994, as set out in its Preamble, also support that invocation is a precondition for a Member’s exercise of its right to take action under Article XIX. The GATT 1994 Preamble provides, among other things, that the GATT 1994 sets forth “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce”.¹³⁷

¹³¹ GATS Art. XXI:1(a) (“A Member...may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.”). As in the goods context, services schedule modifications are subject to certification procedures. See *Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) (Modification of Schedules)*, S/L/80, adopted October 29, 1999.

¹³² GATS Art. XXI:1(b).

¹³³ GATS Art. XXI:2(a).

¹³⁴ *Agreement on Agriculture Article 5*(1).

¹³⁵ *Agreement on Agriculture Article 5*(7).

¹³⁶ *Agreement on Textiles and Clothing Article 6*(7) (The Agreement terminated January 1, 2005).

¹³⁷ GATT 1994, pmb. (emphasis added).

152. The ability to diverge from obligations under certain circumstances, including those set forth in Article XIX, is among the “reciprocal and mutually advantageous arrangements” to which Members agreed, and which permits Members to negotiate “substantial reductions” in tariffs. In fact, the United States explained this point in *US – Fur Felt Hats*, the first dispute under the GATT 1947 concerning Article XIX (discussed in more detail in Section IV.A.4 below). As the United States observed in that dispute, “Article XIX [was] inserted into the Agreement as a safety valve, because it was impossible to be sure that rates of duty agreed at one time might not have to be changed in unforeseen circumstances.”¹³⁸ In this way, the Contracting Parties acknowledged that Article XIX “contributed to a larger measure of tariff reduction than would have been the case.”¹³⁹

153. Consistent with the language of its Preamble, the provisions of the GATT 1994 are part of a single undertaking in which it is contemplated that Members will make use of GATT 1994 provisions consistent with their text. As discussed above at Section IV.A, the text of Article XIX establishes that invocation is a precondition a Member’s exercise of its right to take action under Article XIX. Accordingly, the object and purpose of the GATT 1994, as set forth in the agreement’s Preamble, supports that invocation is a precondition to applying a safeguard.

154. In sum, the text of GATT 1994 Article XIX, in context and in the light of the agreement’s object and purpose, establishes that invocation is a precondition to applying a safeguard.

4. An Adopted GATT 1947 Working Party Report Confirms This Interpretation

155. That invocation is a precondition for a Member’s exercise of its right to take action under Article XIX and to the consequent application of safeguards rules to that action is also confirmed by the Working Party’s report in *US – Fur Felt Hats*, a 1950 dispute between the United States and Czechoslovakia. There, the United States invoked Article XIX with respect to a proposal to withdraw a tariff concession concerning certain hats.¹⁴⁰ After notifying the CONTRACTING PARTIES, the United States entered into consultations with Czechoslovakia and other affected

¹³⁸ GATT Contracting Parties, Summary Record of the Fourteenth Meeting, GATT/CP.5/SR.14 (Nov. 30, 1950), at 2 (US-206).

¹³⁹ GATT Contracting Parties, Summary Record of the Fourteenth Meeting, GATT/CP.5/SR.14 (Nov. 30, 1950), at 2 (emphasis added) (US-206).

¹⁴⁰ See Schedule XX – United States, Withdrawal of Item 1526(a) under the Provisions of Article XIX, GATT/CP/83 (Oct. 19, 1950) (noting that in accordance with the findings of the U.S. Tariff Commission – the predecessor agency to the U.S. International Trade Commission – and “pursuant to the provisions of Article XIX of the General Agreement, the Government of the United States finds it necessary to withdraw the concessions on” certain hats. The U.S. communication also provides that the proposed “action is being taken in accordance with the provisions of the last sentence of paragraph 2 of Article XIX” and that the U.S. “Government is prepared to afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it immediately in respect of the proposed action.”), (US-207).

Contracting Parties.¹⁴¹ The United States reached agreement with the affected Contracting Parties except Czechoslovakia.

156. Czechoslovakia then initiated a complaint, which was discussed by the CONTRACTING PARTIES and referred to a “specially appointed working party for detailed study.”¹⁴² In its complaint, Czechoslovakia argued that the United States “has not proven the conditions of Article XIX have been fulfilled” and suggested “that the United States Government revoke its intention” to apply a safeguard.¹⁴³

157. The Working Party’s report set out the requirements of Article XIX, and stated that in “attempting to appraise whether the requirements of Article XIX had been fulfilled,” it “examined separately each of the *conditions* which *qualify* the exercise of the right to suspend an obligation or to withdraw or modify a concession” under Article XIX.¹⁴⁴ The Working Party reasoned that “*three sets of conditions* have to be fulfilled” – including a requirement of notice – to meet the requirements of Article XIX.¹⁴⁵ As the Working Party stated:

(a) There should be an abnormal development in the imports of the product in question in the sense that:

(i) the product in question must be imported in increased quantities;

(ii) the increased imports must be the result of unforeseen developments and of the effect of the tariff concession;

(iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

(b) The suspension of an obligation or the withdrawal or modification of a concession must be limited to the extent and the time necessary to prevent or remedy the injury caused or threatened.

(c) The contracting party taking action under Article XIX **must give notice** in writing to the CONTRACTING PARTIES **before**

¹⁴¹ See *US – Fur Felt Hats (GATT Panel)*, preface (US-208)

¹⁴² *US – Fur Felt Hats (GATT Panel)*, preface (US-208).

¹⁴³ Memorandum by the Czechoslovak Delegation (Nov. 7, 1950), *US – Fur Felt Hats (GATT Panel)*, Appendix B, at 23-24 (US-208).

¹⁴⁴ *US – Fur Felt Hats (GATT Panel)*, para. 3 (emphasis added) (US-208).

¹⁴⁵ *US – Fur Felt Hats (GATT Panel)*, para 4 (emphasis added) (US-208).

taking action. It must also give an opportunity to contracting parties substantially interested and to the Contracting Parties to consult with it. As a rule, consultation should take place before the action is taken, but, in critical circumstances, consultation may take place immediately after the measure is taken provisionally.¹⁴⁶

158. The Working Party’s reasoning on the requirements of Article XIX:2 is relevant in this dispute. In particular, the Working Party observed that the U.S. “notification was sent to the CONTRACTING PARTIES” before the U.S. took action and that while “the United States Government *invoked* the second procedure” of Article XIX:2, “by giving notice more than a month before” taking action the U.S. “enabled exporting countries to enter into consultation[s] before the duties were actually raised.”¹⁴⁷

159. Although Czechoslovakia did not agree with the conclusions of the Working Party’s report, it was approved by the CONTRACTING PARTIES “as embodying their collective view” and, because of its value in relation to the interpretation of Article XIX, the CONTRACTING PARTIES published it.¹⁴⁸

160. As the Working Party explained, the notification requirement of Article XIX is one of the “conditions” that qualifies the exercise “of the right to suspend an obligation or to withdraw or modify a concession” under Article XIX.¹⁴⁹ This interpretation by the Working Party of Article XIX confirms the U.S. understanding, based on the plain text, that invocation of Article XIX through notice is a precondition to applying a safeguard measure.

5. Supplementary Means of Interpretation, Including the Drafting History of Article XIX, Confirm This Interpretation

161. Although the meaning of Article XIX is clear from the text, the Panel may have recourse to supplementary means of interpretation to confirm this meaning.¹⁵⁰ Supplementary means of interpretation, including the drafting history of Article XIX of the GATT 1994, confirm that notice under Article XIX:2 is a fundamental, condition precedent to a Member’s exercise of its right to take action under Article XIX and the application of safeguards disciplines.

162. In particular, the statements of drafters regarding the text that became Article XIX:2, first sentence, confirm the interpretation of Article XIX as requiring invocation as a condition precedent for a Member’s exercise of its right to take action under Article XIX. As with Article XXI, the drafting history of Article XIX of the GATT 1994 dates back to negotiations to

¹⁴⁶ *US – Fur Felt Hats (GATT Panel)*, para 4 (emphasis added) (US-208).

¹⁴⁷ *US – Fur Felt Hats (GATT Panel)*, para. 42 (US-208).

¹⁴⁸ *US – Fur Felt Hats (GATT Panel)*, preface (US-208).

¹⁴⁹ *US – Fur Felt Hats (GATT Panel)*, para. 3 (US-208).

¹⁵⁰ See Vienna Convention on the Law of Treaties, Article 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.”).

establish the International Trade Organization of the United Nations (ITO). In 1946, the United States proposed a draft charter for the ITO, which included the following provision:

Article 29 (Emergency Action on Imports of Particular Products):

1. If, as a result of unforeseen developments and the effect of the obligations incurred under this Chapter, including the tariff concessions granted pursuant to Article 18, any product is being imported into the territory of any Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar products, the Member shall be free to withdraw the concession, or suspend the obligation, in respect of such product, in whole or in part, or to modify the concession to the extent and for such time as may be necessary to prevent such injury.

2. **Before** any Member shall take action **pursuant to** the provisions of paragraph 1 of this Article, it **shall give notice** in writing to the Organization as far in advance as may be practicable and shall afford the Organization, and other Members having a substantial interest as exporters of the product concerned, an opportunity to consult with it in respect of the proposed action. If agreement among the interested Members with respect to the proposed action is not reached, the Member which proposes to take action shall, nevertheless, be free to do so, and if such action is taken the other affected Members shall then be free, within sixty days after such action is taken, to suspend on sixty day's written notice to the Organization the application to the trade of the Member taking such action, of any of the obligations or concessions under this Chapter the suspension of which the Organization does not recommend against.¹⁵¹

163. As this text shows, the predecessor to Article XIX included an invocation requirement as originally drafted. This original draft Article XIX stated, among other things, that a Member “shall give notice in writing” before taking action under this provision. Although removal of this requirement was discussed as the ITO and GATT 1947 negotiations proceeded, the drafters ultimately decided to retain it.

164. When this draft was first discussed in November 1946, the United States – upon an invitation from the Chairman – outlined its view of the notification requirement as follows:

The purpose of the Article, generally speaking, is to give some flexibility to the commitments undertaken in Chapter IV. Some provision of this kind seems necessary in order that countries will not find themselves in such a rigid position that they could not deal with situations of an emergency character. Therefore, the Article would provide for a modification of commitments to meet such temporary situation. In order to safeguard the right given and in order to prevent abuse of it, the Article would provide that **before** any action is taken under an exception, the

¹⁵¹ 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-31).

member concerned would have to **notify** the organization and consult with them, and with other interested members.

It provides, further, that, if no agreement were reached on the proposed action, any Member who was decisive could take compensatory action by withdrawing concessions from the Member that had **invoked** the clause.¹⁵²

165. During the same meeting, the United Kingdom expressed concerns with the timing of the notification requirement and asserted:

[W]e have doubts about the provision for **prior notice** of the emergency measures to be taken. It is precisely in the case of sudden influxes of imports, such as those which are envisaged by this Article, that **prior notice** and procedural delays would be most difficult to contemplate. Not only is almost immediate action likely to be needed in such cases, but any prior publicity with regard to the intended action would be likely to lead to forestalling and an accelerated rate of importation, and so would tend to defeat the object of the action. We do not, of course, oppose the requirement of notification, nor that of consultation, nor the arrangement for possible subsequent measures to deal with unjustified use of this procedure. But we think that it may fairly often be necessary for the notification to be simultaneous with, and **not prior**, to the taking of action under this Article.¹⁵³

166. In response to the U.K.’s concerns, the United States asserted that while “the draft as it is now framed does provide for prior notice”, it “does not stipulate that it should be very long.”¹⁵⁴ The issue remained unresolved, and the drafters met a few days later to discuss this and other issues.¹⁵⁵ At the beginning of that meeting, India raised concerns with the requirements of both prior notice and prior consultation and suggested amending Article 29. In India’s view, a safeguard action would have to be taken “quickly” to avoid “threatened injury to domestic interests”. Thus, India suggested:

would it not be better if we so re-wrote the section as to require the member concerned to **inform** the Organisation and to start this process of consultation

¹⁵² First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PV/7 (Nov. 1, 1946), at 3-4 (US-209).

¹⁵³ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PV/7 (Nov. 1, 1946), at 7—8 (emphasis added) (US-209).

¹⁵⁴ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PV/7 (Nov. 1, 1946), at 16 (emphasis added) (US-209).

¹⁵⁵ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946) (US-210).

after taking the action which is needed if the circumstances are so urgent as to make that course necessary?¹⁵⁶

167. The Chairman noted that the point raised by India was outstanding from their previous meeting, and suggested that the drafters “see whether in certain circumstances only notice **after** a measure had been taken should be needed.”¹⁵⁷ To address the comments from India and the Chairman, the United States observed that:

The Article as drafted provides for the fact that **before** action is taken notice shall be given as far in advance as may be practicable. . . . In essence, what the Article provides is that there ought to be advance notice and as long advance notice as a country can give in all the circumstances. It seems to me it is a desirable principle to retain.¹⁵⁸

168. In response, India observed that “it is not merely the prior notice that is involved here but also the consultation that members affect in respect of the proposed action”.¹⁵⁹ Thus, India suggested that the procedure to invoke the safeguard provision “should be a little more elastic” and that in certain circumstances:

the procedure should be that the members should be permitted to take action subject to consultation which may take place a little later, and the notice should be issued at once.¹⁶⁰

169. To address the point raised by India, the Chairman suggested a compromise. Specifically, the Chairman suggested that the drafters agree to require **prior notice**, but suggested that to address “exceptional cases” the drafters “try to find a formula” that “gives the right in very exceptional cases” to “take immediate action” without prior consultation.¹⁶¹ The United States agreed with the Chairman, noting that “the Chairman’s suggestion that there might be provision made for quicker action in exceptional cases is sound.”¹⁶² After the drafters discussed the compromise, the Chairman wrapped up the discussion on Article 29 by observing

¹⁵⁶ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 5 (emphasis added) (US-210).

¹⁵⁷ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 5 (emphasis added) (US-210).

¹⁵⁸ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 5 (emphasis added) (US-210).

¹⁵⁹ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 6 (emphasis added) (US-210).

¹⁶⁰ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 6 (emphasis added) (US-210).

¹⁶¹ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 7 (emphasis added) (US-210).

¹⁶² First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 8 (emphasis added) (US-210).

that, if he saw the remarks of the drafters clearly, that there “**will be** prior consultation unless exceptional circumstances make it impracticable.”¹⁶³ The drafters agreed with pausing the discussion on Article 29 until a new draft was presented by the rapporteur.¹⁶⁴

170. On November 14, 1946, the drafters discussed a revised version of Article 29. At the beginning of the discussion on Article 29, the rapporteur observed with respect to the notice requirement that:

It seemed to be **agreed** that prior or simultaneous **notice should in all cases be given**, but that with respect to consultation there should be some leeway in critical cases for the action to be taken first and the consultation should follow upon it immediately. It is believed that the draft as it originally stood permitted short notice. In other words, under the original language of the draft it reads

Before any Member shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the Organisation as far in advance as may be practicable.

It seems to me that would permit of short notice; it could a[l]most be simultaneous. Therefore, I did not think that any change was needed in that.¹⁶⁵

171. Regarding prior consultation, the rapporteur noted that new text had been added to Article 29 that would allow action without prior consultation in exceptional circumstances.¹⁶⁶ After the rapporteur finished going over Article 29, the United Kingdom once again expressed concerns with the *prior notice* requirement of Article 29.¹⁶⁷ Specifically, the U.K. asserted that “it is difficult to insist that there must always be prior notice.”¹⁶⁸ In the view of the U.K., for some countries it would “be extremely difficult to give prior notice” under certain conditions.¹⁶⁹ Thus, the U.K. suggested amending Article 29 so that “there might be an obligation on a country

¹⁶³ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 12 (emphasis added) (US-210).

¹⁶⁴ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/9 (Nov. 9, 1946), at 12 (emphasis added) (US-210).

¹⁶⁵ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 9 (US-210).

¹⁶⁶ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 9 (US-211).

¹⁶⁷ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 13 (US-211).

¹⁶⁸ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 13 (US-211).

¹⁶⁹ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 13 (US-211).

which acts *without giving notice* to agree to immediate consultation on request.”¹⁷⁰ Further, if a country took action without giving notice, the U.K. suggested that:

If countries ask for consultation, that country [*i.e.*, country taking action without providing prior notice] should be under an obligation to enter into consultation immediately. It might be worthwhile to insert a clause to this effect to the draft.¹⁷¹

172. After a discussion among the drafters on the U.K.’s suggestion, Canada suggested that it would be helpful for the drafters to hear from the United States since Article 29 was based on a safeguard provision used by the United States in U.S. trade agreements.¹⁷² In response, the United States observed that the United States had “been including clauses similar to this in agreements for a long time” and that, in the United States, “they have almost never been **invoked**, but they have been there in case the emergency should arise, which gives some assurance to the people concerned.”¹⁷³ The U.K.’s suggestion on striking the prior notice requirement of Article 29 was not supported by drafters, and ultimately the U.K. withdrew its amendment.¹⁷⁴

173. On November 20, 1946, the drafters issued a report that included a revised Article 29 that retained the prior notice requirement.¹⁷⁵ This version of Article 29 was included in the London Report and it became Article 34 in the draft Charter of the ITO.¹⁷⁶ While the drafters made further revisions to Article 34 during the discussions in New York, Geneva, and Havana, the prior notice requirement was retained by the drafters and is reflected in Article XIX of the GATT 1994.

174. Accordingly, although not necessary in this dispute, supplemental means of interpretation – specifically the drafting history of Article XIX – supports the interpretation of Article XIX according to the customary rules of interpretation. The ordinary meaning of the terms, in context and in the light of the object and purpose of the GATT 1994, establishes that invocation through notice is a fundamental, condition precedent to a Member’s exercise of its right to take action

¹⁷⁰ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (Nov. 14, 1946), at 13 (emphasis added) (US-211).

¹⁷¹ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (Nov. 14, 1946), at 13 (emphasis added) (211).

¹⁷² First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 15-16 (US-211).

¹⁷³ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (Nov. 14, 1946), at 17 (US-211).

¹⁷⁴ First Session of the Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report, E/PC/T/C.II/PRO/PV/11, (emphasis added) (November 14, 1946), at 16-28 (US-211).

¹⁷⁵ First Session of the Preparatory Committee of the International Conference on Trade and Employment, E/PC/T/C.II/57, Add.1, (November 20, 1946), at 1 (US-212).

¹⁷⁶ First Session of the Preparatory Committee of the International Conference on Trade and Employment, at 33 E/PC/T/33, at 33 (US-31).

under Article XIX. As discussed below in Section IV.B, this conclusion is also supported by the Agreement on Safeguards.

B. The Agreement on Safeguards Confirms that Invocation Through Notice is a Condition Precedent for a Member’s exercise of its right to take action under Article XIX and the Consequent Application of Safeguards Rules to that Action, and that the Ability to Take Action Pursuant to Article XIX Does Not Constrain Members’ Ability to Act Pursuant to Other Provisions of the GATT 1994

175. The Agreement on Safeguards, which provides context for Article XIX of the GATT 1994, also supports that invocation of Article XIX through written notice is a condition precedent to a Member’s exercise of its right to take action under Article XIX. As explained in Section IV.B.1, Article 11.1(c) supports this conclusion because a Member cannot seek, take, or maintain a measure “pursuant to” Article XIX without invoking that provision as set forth in Article XIX:2. In addition, contrary to the complainant’s assertions, Article 11.1(c) of the Agreement on Safeguards, establishes that a Member may decide to seek, take, or maintain a measure pursuant to other provisions of the GATT 1994, such as Article XXI, and in such a case, the Agreement on Safeguards does not apply.

176. The requirement of invocation as a condition precedent to taking action under Article XIX is also supported by other provisions of the Agreement on Safeguards, as discussed in Section IV.B.2. Specifically, Article 1 and Article 11.1(a) support the requirement of invocation through notice by referring to Article XIX in its entirety, including the notice requirement set forth at Article XIX:2. Article 12 of the Agreement on Safeguards provides additional procedural requirements related to notification, but these requirements do not purport to limit the right of a Member to take safeguards action following “notice in writing” pursuant to Article XIX:2.

177. As described in Section IV.B.3, these conclusions are supported by the object and purpose of the Agreement on Safeguards, as set forth in its Preamble, to clarify and reinforce the obligations of Article XIX of the GATT 1994, including its notice requirement.

178. Although not necessary in this dispute, the Panel may have recourse to supplementary means of interpretation, including the drafting history of Articles 1 and 11 of the Agreement on Safeguards. As explained in Section IV.B.4, the drafting history of these provisions confirms that the invocation is a condition precedent to a Member’s exercise of its right to take action under Article XIX, and a Member’s ability to seek, take, or maintain safeguards measures does not constrain its ability to take such action pursuant to Article XXI.

1. Article 11.1(c) Supports That Invocation is a Condition Precedent for the a Member’s exercise of its right to take action under Article XIX and Application of Safeguards Rules and that the Agreement on Safeguards Does Not Apply to a Measures Pursuant To Article XXI

179. Article 11.1(c) of the Agreement on Safeguards supports that invocation of Article XIX through written notice is a necessary precondition to a Member’s exercise of its right to take action under Article XIX and the application of safeguards rules to that action. This provision

states in relevant part that the Agreement on Safeguards “does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX.” Because a measure cannot be sought, taken or maintained “pursuant to” Article XIX:1 without the acting Member giving notice as set forth in Article XIX:2, Article 11.1(c) confirms that invocation is a condition precedent to the application of safeguards disciplines.

180. Furthermore, Article 11.1(c) establishes that a Member’s ability to seek, take, or maintain safeguard measures does not constrain a Member’s ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI. As Article 11.1(c) states the Agreement on Safeguards “does not apply” to such measures. Because the measures at issue in this dispute were sought, taken, and maintained pursuant to Article XXI, rather than Article XIX, this language excludes the application of the Agreement on Safeguards to the measures at issue here.

181. In attempting to argue that Article 11.1(c) does not preclude the application of the Agreement on Safeguards to the measures at issue, the EU asserts that Article 11.1(c) “is only mirroring” statements by the Appellate Body. As the EU states, citing *Indonesia – Iron or Steel Products*:

182. Article 11.1(c) of the Agreement on Safeguards is only mirroring the case law of the Appellate Body concerning safeguard measures. While that case law identifies the defining features of a safeguard measure, Article 11.1(c) tells us which measures are not safeguard measures. They are two sides of the same coin.

Thus, logically, the Panel should first ascertain whether the measures at issue are safeguard measures and then it may have recourse to Article 11.1(c) in order to simply confirm that.¹⁷⁷

183. In stating that Safeguards Agreement text only “mirrors” an interpretation in in *Indonesia – Iron or Steel Products*, the EU reveals its elevation of Appellate Body reports over WTO Agreement text, contrary to DSU Articles 3.2 and 19.2. The EU downplays the terms of Article 11.1(c) in favor of the Appellate Body’s report by stating that “Article 11.1(c) becomes relevant only if a measure does not meet the two constituent features of a safeguard measure (features explained by the Appellate Body in *Indonesia – Iron or Steel Products*)” and that “Article 11.1(c) of the Agreement on Safeguards is no more than the logical corollary of the process of identifying objective [sic] what falls within the scope of the Agreement on Safeguards.”¹⁷⁸

184. In addition, the EU suggests an understanding of the terms “sought, taken or maintained” that is limited to the temporal aspects of these terms only.¹⁷⁹ As the EU argues:

185. The use of these terms [“sought, taken or maintained”] suggests that Article 11.1(c) refers to three categories of measures: (i) measures that have not yet been

¹⁷⁷ EU’s Response to the Panel’s Question 22, para. 157-58 (footnote omitted).

¹⁷⁸ EU’s Response to the Panel’s Question 74(c), paras. 407-408

¹⁷⁹ EU’s Response to the Panel’s Question 20, para. 137.

imposed, but are “sought” by a Member; (ii) measures that have already been adopted, “taken” by a Member; and (iii) measures that have been adopted and continue to apply, as they are “maintained” by a Member.¹⁸⁰

186. The EU further argues – without citation – that the word “sought” in Article 11.1(c) refers to “the process (e.g. administrative investigation) which precedes the taking of a measure” and states that it “does not consider that ‘sought’ is relevant for this dispute, as the US measures at issue have already been in place for about 2 years.”¹⁸¹ The EU then suggests that the Panel simply ignore the word “sought” in Article 11.1(c), stating that “the relevant words for the purpose of the present proceedings are ‘taken’ and ‘maintained.’”¹⁸²

187. Furthermore, relying on its own incorrect characterization of the U.S. measures at issue,¹⁸³ the EU also admonishes the Panel to “pay very close attention to the terms ‘other than’” in Article 11.1(c) and suggests “[t]hese terms mean that, in order to conclude that the Agreement on Safeguards does not apply, the measure would have to be entirely and exclusively ‘sought, taken or maintained’ pursuant only to other provisions of the GATT 1994, that is, provisions ‘other than’ Article XIX.”¹⁸⁴

188. Contrary to the EU’s arguments, Article 11.1(c) is not “only mirroring” statements by the Appellate Body, such that the Panel’s analysis under Article 11.1(c) should consist of simply “confirm[ing]” the EU’s proffered non-textual analysis – based on the Appellate Body’s findings in *Indonesia – Iron or Steel Products* – of whether the measures at issue are safeguards measures. Article 11.1(c) is relevant from the beginning of the Panel’s analysis under the Agreement on Safeguards, not simply – as the EU would have it – “only if a measure does not meet the two constituent features of a safeguard measure” as identified by the Appellate Body.

189. Furthermore, as the United States has explained, the measures at issue were taken pursuant to Article XXI, and not pursuant to Article XIX, as the United States has repeatedly made clear, including in communications to WTO committees and in connection with this

¹⁸⁰ EU’s Response to the Panel’s Question 20, para. 137.

¹⁸¹ EU’s Response to the Panel’s Question 20, paras. 138-39.

¹⁸² EU’s Response to the Panel’s Question 20, paras. 138-39.

¹⁸³ EU’s response to the Panel’s Question 24, para. 160 (“The European Union considers that, given the facts and evidence, it is very clear that the measures at issue cannot be considered to have been “sought, taken or maintained” pursuant only to provisions “other than” Article XIX of the GATT 1994. This is particularly clear when one considers the manner in which the measures are also caught by the provisions of Article 11.1(b) of the Agreement on Safeguards.”); EU’s Response to the Panel’s Question 76, para. 419 (“In light of the arguments abundantly presented in our submissions, the EU has demonstrated that the measures at issue are only safeguards measures, and that the US has attempted to disguise them as essential security interests measures in order to escape the disciplines of the Agreement on Safeguards.”)

¹⁸⁴ EU’s Response to the Panel’s Question 22, para. 159.

dispute.¹⁸⁵ Thus, the EU’s emphasis on the words “other than” in Article 11.1(c) comes to nothing.

190. In addition, the EU is not correct that the word “sought” is not relevant in this dispute. Contrary to the EU’s argument, the terms “sought, taken or maintained” are not simply temporal in nature, but rather these terms confirm that the Agreement on Safeguards does not constrain a Member’s ability to take action – or to seek to take action, or to maintain action – pursuant to provisions of the GATT 1994 other than Article XIX, such as Article XXI.

191. Specifically the words “sought, taken or maintained” modify the word “measures” in Article 11.1(c). “Sought” is the past tense and past participle of the verb “seek,” which can be defined as “[t]ry or attempt to do.”¹⁸⁶ “Taken” is the past participle of the verb “take,” which can be defined as “[h]ave an intended result; succeed, be effective, take effect.”¹⁸⁷ “Maintained” is the past tense and past participle of the verb “maintain,” which can be defined as “[c]ause to continue (a state of affairs, a condition, an activity, etc.).”¹⁸⁸ Definitions of the word “pursuant” – used as an adverb in Article 11.1(c) – include “[w]ith to: in consequence of, in accordance with.”¹⁸⁹

192. With these definitions in mind, the ordinary meaning of the terms in Article 11.1(c) can be understood as “measures [that a Member has] tried or attempted to do, succeeded in doing, or caused to continue in accordance with provisions of the GATT 1994 other than Article XIX.” The ordinary meaning of these terms establishes that Article 11.1(c) is triggered – and the Agreement on Safeguards “does not apply” – when a Member acts (by seeking, taking or maintaining a measure) pursuant to a provision of the GATT 1994 other than Article XIX. Put differently, when a Member tries or attempts to take, succeeds in taking, or continues to take an action pursuant to Article XXI, as the United States has done with respect to the measures at issue in this dispute, the Agreement on Safeguards does not constrain a Member’s ability to seek, take, or maintain that measure.

193. The French and Spanish texts of the Agreement on Safeguards support this understanding of Article 11.1(c). In French, the relevant text of Article 11.1(c) reads “Le présent accord ne s'applique pas aux mesures qu'un Membre cherchera à prendre, prendra ou maintiendra en vertu

¹⁸⁵ See U.S. Response to the Panel’s Question 5(b)-(d) (citing and discussing U.S. statements in the WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27 (US-80), WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27 (US-81), WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2 (US-82), U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea’s Statement at the WTO General Council (May 8, 2018), at 3 (US-83), and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (US-84)).

¹⁸⁶ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2758 (US-86).

¹⁸⁷ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 3206 (US-86).

¹⁸⁸ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 1669 (US-86).

¹⁸⁹ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 2422 (US-86).

de dispositions du GATT de 1994 autres que l'article XIX.” The verb “chercher” can be translated as “to try”, while the verb “prendre” means “to take,” and the verb “maintenir” can be translated as “to maintain [*situation, équilibre, privilege*].”¹⁹⁰ The phrase “en vertu de” can be translated as “by virtue of, pursuant to [*article, loi, ordonnance*].”¹⁹¹

194. In the French text, the first verb in the series (“cherchera à prendre”) is explicitly an attempt to carry out the second verb in the series (“prendra”). Thus, consistent with the English text, the ordinary meaning of the French text of Article 11.1(c) provides that the Agreement on Safeguards “does not apply” when a Member *attempts* or *tries* to *take* a measure pursuant to a provision of the GATT 1994 other than Article XIX, or when the Member is successful in taking such a measure or causes such a measure to continue. In that situation – when a Member’s action is “pursuant to” a provision of the GATT 1994 other than Article XIX – the Agreement on Safeguards does not constrain a Member’s ability to act.

195. The Spanish text also confirms this point. In Spanish, the relevant text of Article 11.1(c) reads, “El presente Acuerdo no es aplicable a las medidas que un Miembro trate de adoptar, adopte o mantenga de conformidad con otras disposiciones del GATT de 1994, aparte del artículo XIX.” The verb “trate” comes from “tratar”, which translates as “to try,”¹⁹² and the verb “adoptar” can be translated as “(*actitud/costumbre*) to adopt; <*decision*> to take.”¹⁹³ The verb “mantener” can be translated as “(conserver, preservar); to keep.”¹⁹⁴ The phrase “de conformidad con” can be translated as “in accordance with (frml)”¹⁹⁵

196. In the Spanish text, as in the French, the first verb in the series (“trate de adoptar”) is explicitly an attempt to carry out the second verb in the series (“adopte”). This text makes clear that Article 11.1(c) is triggered when a Member *attempts* to *take* a measure pursuant to a provision of the GATT 1994 other than Article XIX, or when the Member is successful in taking such a measure or causes such a measure to continue. Like the English and French texts, when a Member’s action is “pursuant to” a provision of the GATT 1994 other than Article XIX, the Agreement on Safeguards does not apply, and those rules would not constrain a Member’s ability to act.

2. Other Provisions of the Agreement on Safeguards Also Support that Notice is a Condition Precedent for Action Under Article XIX

197. In addition to Article 11.1(c), other provisions of the Agreement on Safeguards also support that invocation is a condition precedent for action under Article XIX. Both Article 1 and Article 11.1(a) refer to Article XIX in its entirety in describing, respectively, the scope of

¹⁹⁰ The *Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 148, 507, & 666-67 (emphasis added) (US-88).

¹⁹¹ The *Oxford French Dictionary*, 4th edn, (Oxford University Press, 2007), at 890 (emphasis added) (US-88).

¹⁹² The *Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 757 (US-89).

¹⁹³ The *Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 18 (US-89).

¹⁹⁴ The *Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 479-80 (US-89).

¹⁹⁵ The *Oxford Spanish Dictionary*, 1st edn, (Oxford University Press, 1994), at 183 (US-89).

application for the rules established in the Agreement on Safeguards and when a Member may take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994. By referring to Article XIX in its entirety – including the requirement of invocation through notice set forth at Article XIX:2 – Article 1 and Article 11.1(a) of the Agreement on Safeguards support that invocation through written notice is a condition precedent to a Member’s exercise of its right to take action under Article XIX and the application of safeguards rules to that action. Article 12 of the Agreement on Safeguards sets forth procedural requirements to expand the *scope* of information a Member provides to other Members regarding its invocation of Article XIX and proposed action. Importantly, however, invocation through notice permits the exercise of a Member’s right under Article XIX, and Article 12 does not purport to alter this right.

198. In its interpretation of these provisions, the EU relies on its own incorrect construction of Article XIX and the Appellate Body’s report in *Indonesia – Iron or Steel*.¹⁹⁶ In its assertions regarding Article 11.1(a), for example, the EU selectively quotes that provision and asserts that “Article 11.1(a) of the Agreement on Safeguards provides that emergency actions on imports must conform with Article XIX of the GATT 1994 and the Agreement on Safeguards”¹⁹⁷ The EU’s arguments regarding Article 1 and Article 11.1(a) fail for the same reasons set forth in Section IV.A, and are not consistent with the terms of these provisions.

199. As Article 1 states, “[t]his Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.” As set forth at Section IV.A, an integral feature of the right set out in Article XIX is the requirement of invocation as a precondition to taking action pursuant to that provision. By referring to Article XIX in its entirety in describing what should be “understood to mean” the “safeguard measures” for which the Agreement on Safeguards “establishes rules”, Article 1 incorporates the invocation requirement set forth in Article XIX.

200. Article 11.1(a) also refers to Article XIX in its entirety, and states, “[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.” By referring to Article XIX in its entirety – rather than referring to certain characteristics of the measure, or referring to only Article XIX:1(a) – Article 11.1(a) supports that invocation through written notice is a condition precedent to the application of safeguards disciplines.

201. Article 12 further supports this conclusion by identifying certain notification requirements that apply at different temporal stages of a safeguard investigation. Article 12.1, for example requires a Member to “immediately” notify the Committee on Safeguards upon (1) initiating an investigatory process relating to serious injury or threat, (2) making a finding of

¹⁹⁶ EU’s Response to the Panel’s Question 4, paras. 47-49 (noting that “there is no express definition of a safeguard measure in the covered agreements,” suggesting that Article 1 “describes something to which the Agreement on Safeguards applies,” and stating that “the Appellate Body has provided useful guidance in *Indonesia - Iron or Steel Products*, where it has discerned the two defining features of a safeguard measure on the basis of the text of Article XIX of the GATT 1994.”).

¹⁹⁷ EU’s Response to the Panel’s Question 74(c), para. 405.

serious injury or threat caused by increased imports, and (3) taking a decision to apply or extend a safeguard measure. Article 12 sets procedural requirements to expand the *scope* of information a Member provides to other Members regarding its invocation of Article XIX and proposed action. Importantly, however, invocation through notice permits the exercise of a Member’s right under Article XIX, and Article 12 does not purport to alter this right.

3. The Object And Purpose Of The Agreement On Safeguards Supports This Interpretation

202. The object and purpose of the Agreement on Safeguards, as set out in its Preamble, also supports that invocation is a precondition to a Member’s exercise of its right to take action under Article XIX. As the Preamble states, the drafters had “in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994[.]” In particular, the drafters recognized “the need to *clarify and reinforce* the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control” (emphasis added).

203. Consistent with this language, the Agreement on Safeguards clarified and reinforced the disciplines of the GATT 1994, specifically those of Article XIX. Among the aspects of Article XIX that was so clarified and reinforced is the precondition in Article XIX that invocation is necessary such that a Member “shall be free” to exercise its rights and apply a measure that departs from its obligations and commitments.

204. Furthermore, “improv[ing] and strengthen[ing] the international trading system based on GATT 1994” requires giving effect to *all* provisions of the GATT 1994, including both obligations and exceptions. With this reference to the trading system as a whole, the object and purpose of the Agreement on Safeguards – as expressed in its preamble – confirms that a Member’s ability to seek, take, or maintain safeguard measures does not constrain a Member’s ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI.

4. The Drafting History of the Agreement On Safeguards Confirms That Invocation Through Notice is a Precondition to a Member’s exercise of its right to take action under Article XIX and that the Agreement on Safeguards Does Not Constrain a Member’s Ability to Act Pursuant to Article XXI(b)

205. The drafting history of the Agreement on Safeguards also confirms that invocation is a condition precedent to a Member’s exercise of its right to take action under Article XIX and the consequent application of safeguards rules to that action. The importance of invocation was highlighted during Tokyo Round discussions, and can be seen in the continued development of the text that became Article 1 and Article 11 of the Agreement on Safeguards after the Uruguay Round.

206. During the Tokyo Round negotiations, contracting parties perceived a need to clarify and strengthen the provisions of Article XIX.¹⁹⁸ In particular, certain contracting parties “affected by Article XIX measures wanted its provisions to be clarified and re-inforced” and “stressed the need for *more precise criteria for invocation of the safeguard clause*”.¹⁹⁹ The Tokyo Declaration, adopted in September 1973, stated that negotiations should examine “the adequacy of the multilateral safeguard system, considering particularly the modalities of application of Article XIX, with a view to furthering trade liberalization and preserving its results.”²⁰⁰

207. Although negotiations reached an impasse at the end of the Tokyo Round in April 1979 and no new text was agreed to, Members continued discussing these issues in the Uruguay Round negotiations. In particular, in preparing the text that became Article 1 and Article 11.1 of the Agreement on Safeguards, Uruguay Round drafters abandoned their early attempts to include a definition for what would constitute safeguard measures, and instead included only a reference to the provisions of Article XIX. This decision by the Uruguay Round drafters confirms that it is the terms of Article XIX – including its invocation requirement – that define what constitutes safeguard measures under the Agreement on Safeguards and under Article XIX.

208. Furthermore, Uruguay Round drafters also abandoned their early proposals that could have been seen as limiting Members’ ability to take action pursuant to provisions of the GATT 1994 other than Article XIX. This decision by drafters confirms that nothing in the Agreement on Safeguards constrains a Member’s ability to take action pursuant to Article XXI.

a. Negotiators Abandoned Draft Text That Defined Safeguard Measures Based Characteristics, Rather Than By Reference To Article XIX

209. In early Uruguay Round drafts of the Agreement on Safeguards, the “General Provisions” section included language that would have defined “safeguards” based on certain characteristics that those measures might exhibit, rather than by a general reference to Article XIX. For example, the first draft of the Agreement on Safeguards, produced in June 1989 by the Negotiating Group on Safeguards provided in relevant part:

GENERAL PROVISIONS

1. *This agreement covers all safeguard measures designed to give protection to domestic industries in the circumstances specified below.*

¹⁹⁸ *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (Apr. 7, 1987), page 4, para. 14 (“During the preparatory stage before the Ministerial meeting in Tokyo, the question of the adequacy or otherwise of the existing multilateral safeguard system acquired increased importance as an issue for the negotiations.”) (US-213).

¹⁹⁹ *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (Apr. 7, 1987), para. 14 (emphasis added) (US-213)

²⁰⁰ *Work Already Undertaken in the GATT on Safeguards*, MTN.GNG/NG9/W/1, (Apr. 7, 1987), para. 15 (US-213); see also Declaration of Ministers Approved at Tokyo on 14 September 1973, reprinted in GATT, BISD 20th Supp. at 19, 21 (1974) (US-214).

*2. Safeguards consist of import relief measures that entail the suspension, in whole or in part, of obligations, including concessions under the GATT, and are designed to prevent or remedy certain emergency situations and to facilitate structural adjustment of domestic industries or the reallocation of resources, as provided for in Section II below.*²⁰¹

210. This June 1989 draft therefore would have defined safeguard measures at paragraph 1 as comprising “all safeguard measures designed to give protection to domestic industries in the circumstances specified below.” Paragraph 2 would then have gone on to identify the circumstances in which such measures could be taken, the characteristics they would entail, and the purpose for which they would have been taken.²⁰² Without an express reference to Article XIX, this text could be understood to refer to measures other than those taken pursuant to Article XIX. In other words, under these draft provisions, the Agreement on Safeguards could have been construed to apply to measures for which a Member had *not* invoked its right to take action under Article XIX – so long as the measure in question otherwise reflected the identified characteristics.

211. Although the January 1990 and July 1990 drafts of the Agreement on Safeguards contained the same provisions as the July 1989 draft (defining safeguards based on characteristics of the measure, rather than based on a reference to Article XIX),²⁰³ negotiators abandoned this approach by October 1990. The October 1990 draft agreement stated in relevant part:

GENERAL

1. This agreement establishes rules for the application of safeguard measures *which shall be understood to mean those measures provided for in Article XIX of the General Agreement.*

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²⁰¹ Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), paras. 1 & 2 (US-215).

²⁰² Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), para. 2 (US-215).

²⁰³ As the January 1990 text stated, “Safeguard measures consist of import relief measures that entail the suspension, in whole or in part, of obligations, or the withdrawal or modification of concessions under the General Agreement, adopted to prevent or remedy certain emergency situations. . .”. Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.1 (Jan. 15, 1990), para. 2 (US-216). As the July 1990 draft stated, “[f]or 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 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.” Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990), para. 1 (US-217).

2. A contracting party may apply a safeguard measure to a product only if the importing contracting party has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.²⁰⁴

212. As this text shows, in the October 1990 draft of the Agreement on Safeguards, the “general” provision at paragraph 1 was revised to define safeguard measures by reference to Article XIX. These two provisions of the Agreement on Safeguard were retained in the further drafts of the Agreement on Safeguards of December 1990,²⁰⁵ June 1991,²⁰⁶ and December 1991,²⁰⁷ and became the final text of Article 1 of the Agreement on Safeguards.

213. Negotiators’ decision to define safeguards measures as those measures “provided for in Article XIX” – as opposed to defining safeguards based on the characteristics of such measures, as the June 1989 and January 1990 drafts had done – indicates that the drafters intended for the provisions of Article XIX to be determinative as to whether a particular measure was a safeguard measure for purposes of the Agreement on Safeguards. Because the measures “provided for” in Article XIX are measures for which a Member proposing to take action has provided notice in writing as required in Article XIX:2, this decision by the drafters of the Agreement on Safeguards confirms that invocation through notice is a fundamental, condition precedent for a measure to be a “safeguard measure” subject to the safeguards disciplines contained in that Agreement.

b. Negotiators Abandoned Draft Text That Purported To Limit Members’ Ability To Take Action Pursuant to Provisions Of The GATT 1994 Other than Article XIX

214. The negotiating history of the Agreement on Safeguards also confirms that nothing in the Agreement on Safeguards affects a Member’s ability to take action under Article XXI or another provision of the GATT 1994 other than Article XIX.

215. As discussed above at Section IV.B.4.a., the June 1989 draft of the Agreement on Safeguards defined safeguards measures based on certain characteristics they might exhibit, rather than through reference to Article XIX. Regarding a Member’s ability to invoke the Article XIX, the June 1989 draft would have limited this right to situations in which certain other provisions of the GATT 1994 were not available:

²⁰⁴ Negotiating Group on Safeguards, Additional United States’ Proposals on Safeguards, MTN.GNG.NG9/W/31 (Oct. 31, 1990), at 2 (emphasis added) (US-218); Agreement on Safeguards, art. 1.

²⁰⁵ 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), at 184 (US-189).

²⁰⁶ Negotiating Group on Rule Making and Trade-Related Investment Measures, Safeguards, Note by the Secretariat MTN.GNG/RM/W/3 (June 6, 1991), at 4 (US-219)

²⁰⁷ Trade Negotiations Committee, Draft Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 20, 1991), at M.1 (US-190).

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4. A contracting party [or a customs union] may apply safeguard measures to a product being imported into its territory, *only in a situation in which other GATT provisions do not provide specific remedies (e.g. Articles VI, XVI or XXVIII)*, and on the conditions that:

(a) there has been an unforeseen, sharp and substantial increase in the quantity of such product being imported;

(b) the competent national authorities of the importing contracting party have established that such increase is causing serious injury to domestic producers of like or directly competitive products; and

(c) the measures are applied to products from all sources.²⁰⁸

216. The January 1990 draft of the Agreement on Safeguards broadened this constraint by omitting the reference to Articles VI, XVI or XXVIII; accordingly, safeguard action would only have been permissible if *no other* provision of GATT 1994 were available. As the January 1990 draft text stated:

4. A contracting party [or a customs union] may apply safeguard measures to a product being imported into its territory, *only in a situation in which other GATT provisions do not provide specific remedies*, and on the conditions that...²⁰⁹

217. By July 1990, however, negotiators of the Agreement on Safeguards had abandoned this approach. While the July 1990 draft still defined safeguards based on their characteristics, it now made clear that this definition would not prejudice a Member's ability to take action pursuant to provisions of the GATT 1994 other than Article XIX:

2. The provisions of paragraph 1 [defining a safeguard measure] 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.*²¹⁰

218. Although the phrasing and placement of this provision changed as the negotiations went along, negotiators' underlying intent to prevent the terms of the Agreement on Safeguards from prejudicing Members' rights under other GATT provisions continued to be reflected in the text.

²⁰⁸ Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), para. 4 (US-215).

²⁰⁹ Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25 (June 27, 1989), para. 4 (US-215).

²¹⁰ Negotiating Group on Safeguards, Draft Text by the Chairman, MTN.GNG/NG9/W/25/Rev.2 (July 13, 1990), para. 2 (emphasis added) (US-217).

219. The October 1990 draft Agreement on Safeguards, the text regarding the relationship between safeguard measures and other possible bases for action under the GATT 1994 was rephrased and moved to paragraph 24, which stated:

*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.*²¹¹

220. With this text, the October 1990 draft continues to make clear – like the July 1990 draft – that the availability of Article XIX as a release from obligations does not constrain a Member’s ability to take action pursuant to other provisions of the GATT 1994. So much is clear based on the use of the word “*or*” in the draft paragraph 24 quoted above, which confirms that that Members could seek or take trade-restrictive measures that were *either* in conformity with Article XIX *or* consistent with other provisions of the General Agreement (including Article XXI).

221. In the December 1991 draft Agreement on Safeguards, this provision was moved to paragraph 22, rephrased, and divided into parts, to read as follows:

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.

....

(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.²¹²

222. Paragraph 22(a) mirrors Article 11.1(a) of the Agreement on Safeguards, and confirms that “emergency action on imports of particular products as set forth in Article XIX” – including the invocation requirement in Article XIX – must conform with the provisions of both Article XIX and the Agreement on Safeguards.

223. Paragraph 22(c) is similar to Article 11.1(c), particularly its reference to measures “sought, taken or maintained . . . pursuant to” other provisions of the General Agreement. In the final text of the Agreement on Safeguards, paragraph 22(c) of this draft was again rephrased to

²¹¹ Negotiating Group on Safeguards, Draft Text of an Agreement, MTN.GNG/NG9/W/25/Rev.3 (Oct. 31, 1990), at (emphases added) (US-220).

²¹² Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (Dec. 1991), at M.6 (US-190).

emphasize this point. Specifically, the January 1991 draft language stating that measures sought, taken, or maintained pursuant to other provisions of the GATT 1994 “are not included in the scope of” the Agreement on Safeguards was replaced with a more definite statement that the Agreement on Safeguards “does not apply” to such measures.²¹³

224. By stating that the Agreement “does not apply” to such measures, this final text makes even clearer that a Member’s ability to seek, take, or maintain safeguard measures does not constrain a Member’s ability to take such action pursuant to other provisions of the GATT 1994, such as Article XXI. And that where a Member has sought, taken or maintained action pursuant to an “*other* provision of the GATT 1994,” as the United States has explained, the Agreement on Safeguards “does not apply.”

V. The Panel Should Begin Its Analysis By Addressing the United States’ Invocation of Article XXI

225. The DSU does not specify the order of analysis that a panel must adopt, and instead leaves this matter up to the Panel’s determination. Therefore, the Panel may consider the issues presented in any order that it sees fit. Whatever the Panel’s *internal* ordering of its analysis, as the United States has explained in Section III, 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 – consistent with its terms of reference and the DSU – is to note its understanding of Article XXI and that the United States has invoked Article XXI. No additional findings concerning the claims raised by the complaining Member in its submissions would be consistent with the DSU, in light of the text of Article XXI(b). Accordingly, the Panel should begin by addressing the United States’ invocation of GATT 1994 Article XXI(b).

226. The EU acknowledges that panels enjoy “a certain margin of discretion with regard to the order of analysis” but suggests that a panel’s chosen order cannot “lead to unreasonable results.”²¹⁴ The EU opines that “the only path that offers the prospect of judicial economy” is for the Panel to begin its analysis with the EU’s claims under the Agreement on Safeguards.²¹⁵ The EU repeats its incorrect view that Article XXI is not available as a defense to claims under the Agreement on Safeguards, and suggests – contrary to the language of the provision itself – that Article 11.1(c) of the Agreement on Safeguards “is only mirroring the case law [sic] of the Appellate Body concerning safeguard measures.”²¹⁶

227. As an initial matter, the EU’s proffered interpretation of Article 11.1(c) of the Agreement on Safeguards is erroneous. As the United States has explained more fully in Part IV.B, the EU’s interpretation is inconsistent with the customary rules of interpretation, as Article 11.1(c)

²¹³ As the final text of Article 11.1(c) provides in relevant part, “This Agreement does not apply to measure sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX.” Agreement on Safeguards, art. 11.1(c).

²¹⁴ EU’s Response to the Panel’s Question 21, para. 151.

²¹⁵ EU’s Response to the Panel’s Question 21, para. 153.

²¹⁶ EU’s Response to the Panel’s Question 22, para. 157.

establishes that the Agreement on Safeguards “does not apply” to measures sought, taken, or maintained under GATT 1994 Article XXI, such as the measures at issue in this dispute.

228. It is not correct to argue that the Panel must first determine whether the measures challenged breach the GATT 1994 or the Agreement on Safeguards before assessing the U.S. invocation of Article XXI. This is because Article XXI is a defense to claims under both the Agreement on Safeguards and the GATT 1994, and the United States has invoked Article XXI as to *all* aspects of *all* the measures challenged. Thus, if the Panel determines that Article XXI(b) is self-judging, consistent with the text, or that Article XXI in any event applies under another interpretation, there would be no need to review any of the complainant’s claims.

229. Nor does characterizing Article XXI as an “affirmative defense” or an “exception” require the Panel to begin its analysis with the complainant’s claims. The DSU does not use these terms, and instead calls on the Panel to interpret Article XXI in accordance with customary rules of interpretation. As interpreted according to these customary rules, Article XXI is a self-judging exception to a Member’s obligations, both under the GATT 1994 and the Agreement on Safeguards. Once the United States invokes Article XXI(b), the sole finding that the Panel may make – consistent with its terms of reference and the DSU – is to note the U.S. invocation of Article XXI. Any characterization of Article XXI as an affirmative defense or other kind of exception cannot change the ordinary meaning of Article XXI, such that the invoking party must make a legal or evidentiary showing not required by the text.

230. Even where it is claimed that Article XXI is not a defense to claims under the Agreement on Safeguards – which the United States disagrees with – addressing Article XXI first also leads to the conclusion under Article 11.1(c) of the Agreement on Safeguards that the Agreement on Safeguards is not applicable to the challenged measures. This is because – as explained further in Part IV.B. and in the U.S. Response to the Panel’s Question 20 – Article 11.1(c) of the Agreement on Safeguards makes clear that that agreement “does not apply” to a measure sought, taken, or maintained pursuant to Article XXI of GATT 1994, such as the measures at issue in this dispute.

231. In sum, as the United States has explained, under the terms of reference set by the DSB for the Panel, the Panel is to examine the matter and to make such findings as will assist the DSB in making recommendations to bring a WTO-inconsistent measure into conformity with the covered agreements. 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 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 a claim that could not lead to a recommendation. For purposes of its report, therefore, the Panel should start its analysis with Article XXI.

VI. Conclusion

232. For the foregoing reasons, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB.

Annex I: Comparison of the English, French and Spanish Texts of Article XXI(b) of the GATT 1994

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

Annex 2: Comparison of the Spanish text of the Security Exception in the GATT 1994, GATS and TRIPS

	GATT 1994, Art. XXI	GATS, Art. XIVbis	TRIPS Agreement, Art. 73
EN	<p>Nothing in this Agreement shall be construed</p> <p>(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>	<p>Nothing in this Agreement shall be construed:</p> <p>(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:</p> <p>(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;</p> <p>(ii) relating to fissionable and fusionable materials or the materials from which they are derived;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>	<p>Nothing in this Agreement shall be construed:</p> <p>(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;</p> <p>(i) relating to fissionable materials or the materials from which they are derived;</p> <p>(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;</p> <p>(iii) taken in time of war or other emergency in international relations; or</p>
FR	<p>Aucune disposition du présent Accord ne sera interprétée</p> <p>...</p> <p>b) ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;</p> <p>ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>Aucune disposition du présent accord ne sera interprétée:</p> <p>...</p> <p>b) ou comme empêchant un Membre de prendre toutes mesures qu'il estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) se rapportant à la fourniture de services destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>ii) se rapportant aux matières fissiles et fusionables ou aux matières qui servent à leur fabrication;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>	<p>Aucune disposition du présent accord ne sera interprétée:</p> <p>...</p> <p>b) ou comme empêchant un Membre de prendre toutes mesures qu'il estimera nécessaires à la protection des intérêts essentiels de sa sécurité:</p> <p>i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication;</p> <p>ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées;</p> <p>iii) appliquées en temps de guerre ou en cas de grave tension internationale;</p>
SP	<p>No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que:</p> <p>...</p> <p>b) impida a una parte contratante la adopción de todas las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad, relativas:</p> <p>i) a las materias fisionables o a aquellas que sirvan para su fabricación;</p> <p>ii) al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas;</p> <p>iii) a las aplicadas en tiempos de guerra o en caso de grave tensión internacional;</p>	<p>Ninguna disposición del presente Acuerdo se interpretará en el sentido de que:</p> <p>...</p> <p>b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad:</p> <p>i) relativas al suministro de servicios destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas;</p> <p>ii) relativas a las materias fisionables o fusionables o a aquellas que sirvan para su fabricación;</p> <p>iii) aplicadas en tiempos de guerra o en caso de grave tensión internacional; o</p>	<p>Ninguna disposición del presente Acuerdo se interpretará en el sentido de que:</p> <p>...</p> <p>b) impida a un Miembro la adopción de las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad:</p> <p>i) relativas a las materias fisionables o a aquellas que sirvan para su fabricación;</p> <p>ii) relativas al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas;</p> <p>iii) aplicadas en tiempos de guerra o en caso de grave tensión internacional;</p>