UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS544)

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

October 28, 2020

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US-193	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987)
US-194	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr 29, 1988)
US-195	Negotiating Group on Dispute Settlement, Meeting of 25 June, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987)
US-196	Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988)

EXHIBIT	DESCRIPTION
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	Ortografia Y Gramática (excerpt)
US-204	Intentionally Omitted
US-205	The New Shorter Oxford English Dictionary, 4th edn., L. Brown (ed.) (Clarendon Press, Oxford, 1993) (excerpts)
US-206	GATT Contracting Parties, Summary Record of the Fourteenth Meeting, GATT/CP.5/SR.14 (Nov. 30, 1950)
US-207	Schedule XX – United States, Withdrawal of Item 1526(a) under the Provisions of Article XIX, GATT/CP/83 (Oct. 19, 1950)
US-208	*United States – Fur Felt Hats* (GATT Panel)
US-209	Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report of the Seventh Meeting, E/PC/T/C.II/PV/7 (Nov. 1, 1946)
US-210	Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report of the Ninth Meeting, E/PC/T/C.II/RO/PV/9 (Nov. 9, 1946)
US-211	Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report of the Eleventh Meeting, E/PC/T/C .II/PRO/PV/11 (Nov. 14, 1946)
US-212	Preparatory Committee of the International Conference on Trade and Employment, Addition to Report of Sub-Committee Procedures, E/PC/T/C.II/57/Add.1 (Nov. 20, 1946)
US-213	Work Already Undertaken in the GATT on Safeguards, MTN.GNG/NG9/W/1, (Apr. 7, 1987),

EXHIBIT	DESCRIPTION
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)
U.S. Responses to the Panel's Additional Questions	
US-222	*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-223	Intentionally Omitted
US-224	Intentionally Omitted
US-225	Presidential Proclamation 9980 of January 24, 2020
US-226	WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 1999) (excerpt)
US-227	Kingdom of Saudi Arabia, Statement before the Dispute Settlement Body, *National Security in WTO dispute Settlement Proceeding DS567* (July 29, 2020)
US-228	UNITED STATES TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (Feb. 2020) (excerpt).
U.S. Comments on Complainant's Responses to the Panel's Additional Questions	
US-229	Intentionally Omitted

EXHIBIT	DESCRIPTION
US-230	Intentionally Omitted
US-231	Intentionally Omitted
US-232	Intentionally Omitted
US-233	Intentionally Omitted
US-234	Intentionally Omitted
US-235	Intentionally Omitted
US-236	The Grammar Bible: Everything You Always Wanted to Know About Grammar but Didn't Know Whom to Ask 30 (2nd edn 2004)
US-237	Intentionally Omitted
US-238	Intentionally Omitted

1. The United States comments below on the complainant's responses to the Panel's additional questions. The absence of a comment on any particular answer or argument by the complainant should not be construed as agreement with the complainant's arguments.

TO ALL

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

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

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

3. The United States responds to the Panel's Questions 82 and 83 together.

4. Before responding to the Panel's Question 82, China expresses "concern" regarding the Panel's having raised questions about Article 6.2 at this point in the proceedings, and suggests that these questions are not "relevant" because the United States has not suggested "that the measures at issue require further exposition, let alone challenged the sufficiency of China's panel request under Article 6.2."[1] China's concern is misplaced. The terms of reference in a dispute establish the scope of a panel's legal authority under the DSU, the examination and confirmation of which is thus a threshold issue, distinct from the merits of a claim. Under Article 6.2, the request for the establishment of a panel must identify "the specific measures at issue" and provide "a brief summary of the legal basis for the complaint." It is these elements in the panel request that are the "matter referred to the DSB" as described in Article 7.1. Therefore, a panel not only may raise questions regarding these issues, but must do so if its authority with respect to a particular claim is in doubt.

5. Regardless of whether a respondent has expressed concerns under Article 6.2, when in the course of a proceeding these concerns arise, or whether the respondent is perceived to understand the claims brought against it, the Panel may only address "the matter" contained in the panel request, pursuant to the standard terms of reference established by the DSB pursuant to DSU Article 7.1. Therefore, the Panel may appropriately raise questions regarding compliance with Article 6.2 if it perceives those issues are presented in a particular dispute. This understanding of the plain text of Articles 6.2 and 7.1 of the DSU is reflected in the findings of previous reports addressing this issue.[2] Under Article 7.1, the DSB charges

[1] China's Response to the Panel's Question 82, para. 1. *See also* China's Response to the Panel's Question 83, para. 12.

[2] *US – 1916 Act (AB)*, n.30; *see Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 36.

the panel with terms of reference "to examine the matter;" the DSB does not charge the panel with terms of reference "to examine the matter and other matters, provided the responding party is not prejudiced." A complainant must comply with the terms of Article 6.2 in its request for the establishment of a Panel, and those terms remain the same, whether or not a respondent raises arguments under Article 6.2.

a. To China: Specifically regarding China's claim under Article X:3(a) of the GATT 1994, is the relevant measure the manner of administration of the product exclusion process? If yes, please explain how the panel request in this dispute adequately identifies this element or otherwise identifies the relevant measure.

6. China confirms that it is challenging the manner of administration of the product exclusion process in its claim under Article X:3(a), and suggests that this measure is identified in its panel request through the following references:

> In addition, the United States has also provided for and implemented **the exclusion of certain products from certain sources, upon applications, from the additional import duties.**
>
> The measures at issue include, but are not limited to, the following instruments of the United States in relation to the above-referenced actions on the importation of certain steel products and aluminum products:
>
> …
>
> Interim Final Rule regarding Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum (U.S. Department of Commerce)
>
> Interim Final Rule regarding Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum (the Bureau of Industry and Security, U.S. Department of Commerce)
>
> Multiple BIS Decision Document – Steel Duty Exclusion Request and BIS Decision Document – Aluminum Duty Exclusion Request in response to various exclusion requests submitted to the Bureau of Industry and Security (the Bureau of Industry and Security, U.S. Department of Commerce)[.][3]

7. Article X:3(a) relates to the administration of particular laws or other measures, however, and not to the content of substantive laws themselves. Therefore, general statements such as those provided by China in its panel request do not adequately identify a measure governing (or failing to govern) administration such as that China now seeks to

[3] China's Response to the Panel's Question 83, para 13 (emphasis in original).

challenge under Article X:3(a). Accordingly, China's claim under Article X:3(a) falls outside the Panel's terms of reference.

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

8. In its response to Question 84, China "reiterate[s] that the United States has not contested China's characterization of the measures at issue."[4] Regardless of whether the United States has contested China's characterization of the measures at issue, however, under the plain meaning of the DSU, the measures within a panel's terms of reference are those "specific measures" identified in the panel request; no other measures are properly within the panel's authority. In this respect, the United States refers the Panel to its own response to the Panel's Question 84.

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

9. The United States refers the Panel to its own response to the Panel's Question 85.

TO COMPLAINANT

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

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

[4] China's Response to the Panel's Question 84, para. 18.

Lapsed measures			

10. The United States addresses the complainant's response to the Panel's Questions 86 and 87 together at Question 87, below.

TO ALL

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

11. The United States comments on the complainant's response to Questions 86 and 87 together. Pointing to the language "any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures" in its panel request, China argues that the duties on steel and aluminum derivative products are amendments that fall within the Panel's terms of reference.[5] While noting that a more detailed analysis is unnecessary, China also argues that the new duties "did not affect or change the 'essence' of the initial import duties," and that the new duties are "indisputably closely connected to the initial duties."[6]

12. As the United States explained in its response to Question 87, under the DSU, subsequent measures, such as "amended" or "new" measures, that did not exist at the time of the panel request could not have been identified in the panel request and are not within the Panel's terms of reference. Thus, the Panel lacks the authority to make findings on those measures.

13. There is nothing in the text of the DSU[7] that supports the assertions in certain reports that panels can make findings concerning legal instruments that came into effect after the panel was established when those instruments "did not change the essence of the regime" and that, under certain circumstances, "closely connected" subsequent measures may fall within the panel's terms of reference. Rather, the DSU requires that a complaining party identify in its panel request "the specific measures at issue"[8] – not *non-specific* or hypothetical measures

[5] China's Response to the Panel's Question 87, para. 24.

[6] China's Response to the Panel's Question 87, para. 25.

[7] U.S. Response to the Panel's Question 87, para. 20.

[8] DSU Art. 6.2.

not yet at issue – and the DSB establishes a panel's terms of reference "to examine … the matter" in the panel request,[9] which includes only those "specific measures at issue."

14. In addition to the lack of foundation in the DSU, making findings on a measure of the same "essence", or a "closely connected" measure, which post-dates the establishment of the panel would not be necessary to resolve a dispute. A recommendation to bring a measure that existed as of panel establishment into compliance with WTO rules would apply to any measure of the same "essence" in place at the end of a compliance period, where such measure bears on whether the responding Member has implemented the DSB's recommendations, whether or not the panel had specifically made findings upon it. If the measure in place at the end of the compliance period is *essentially the same* as the measure that formed the basis of the recommendation, then the respondent will not have complied with the recommendation to bring its measures into conformity with its WTO obligations.

15. As explained in the U.S. Response to the Panel's Question 87, Proclamation 9980[10] imposing duties on derivative products was issued on January 24, 2020, more than a year after the establishment of the panel and after the completion of the first panel meeting. The new duties on derivative products therefore were not in place at the time of the panel's establishment and were not (and could not have been) identified in China's panel request. Thus, consistent with the terms of the DSU, they cannot be within the Panel's terms of reference.

16. In addition, contrary to China's argument, it cannot be said that the new duties on derivatives products "did not affect or change the 'essence'"[11] of, or "are indisputably closely connected"[12] to, the additional duties on steel and aluminum imports identified in China's panel request when the new duties concern an entirely separate set of products with different HTS headings.[13] Put differently, there is a substantive difference between the measures listed

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[9] DSU Art. 7.1.

[10] Proclamation 9980 of January 24, 2020 (US-225).

[11] China's Response to the Panel's Question 87, para. 25.

[12] China's Response to the Panel's Question 87, para. 25.

[13] Proclamation 9704 and subsequent amendments concern "aluminum articles" defined in HTS as: (a) unwrought aluminum (HTS 7601); (b) aluminum bars, rods, and profiles (HTS 7604); (c) aluminum wire (HTS 7605); (d) aluminum plate, sheet, strip, and foil (flat rolled products) (HTS 7606 and 7607); (e) aluminum tubes and pipes and tube and pipe fitting (HTS 7608 and 7609); and (f) aluminum castings and forgings (HTS 7616.99.51.60 and 7616.99.51.70). *See* Presidential Proclamation 9704 of March 8, 2018 (US-10). In contrast, Proclamation 9980 imposed additional duties on the following "derivative aluminium products": (a) stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and with steel core, not electrically insulated; the foregoing fitted with fittings or made up into articles (described in subheading 7614.10.50); (b) stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing comprising electrical conductors, not fitted with fittings or made up into articles (described in subheading 7614.90.20); (c) stranded wire, cables, plaited bands and the like, including slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing not comprising electrical conductors, not fitted with fittings or made up into articles (described in subheading 7614.90.40); (d) stranded wire, cables, plaited bands and the like, including

in China's request for the establishment of a panel, imposing the duties on steel and aluminum imports, and Proclamation 9980, which imposes new duties on derivative steel and aluminum articles – a separate and distinct group of products not covered by prior proclamations. Therefore, even under China's own misplaced arguments, neither Proclamation 9980 nor the duties imposed pursuant to that proclamation on derivative steel and aluminum articles fall within the Panel's terms of reference.

TO COMPLAINANT

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

17. The United States recalls that China did not include Article 11.1(b) as a legal basis for the complaint in its Request for a Panel in this dispute.[14]

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slings and similar articles, of aluminum and not with steel core, not electrically insulated; the foregoing fitted with fittings or made up into articles (described in subheading 7614.90.50); (e) bumper stampings of aluminum, the foregoing comprising parts and accessories of the motor vehicles of headings 8701 to 8705 (described in subheading 8708.10.30); and (f) body stampings of aluminum, for tractors suitable for agricultural use (described in subheading 8708.29.21). *See* Presidential Proclamation 9980 of January 24, 2020 (US-225).

Proclamation 9705 and subsequent amendments concern "steel articles" consisting of: (i) flat-rolled products provided for in headings 7208, 7209, 7210, 7211, 7212, 7225 or 7226; (ii) bars and rods provided for in headings 7213, 7214, 7215, 7227, or 7228, angles, shapes and sections of 7216 (except subheadings 7216.61.00, 7216.69.00 or 7216.91.00); wire provided for in headings 7217 or 7229; sheet piling provided for in subheading 7301.1 0.00; rails provided for in subheading 7302.10; fish plates and sole plates provided for in subheading 7302.40.00; and other products of iron or steel provided for in subheading 7302.90.00; (iii) tubes, pipes and hollow profiles provided for in heading 7304, or 7306; tubes and pipes provided for in heading 7305; (iv) ingots, other primary forms and semi-finished products provided for in heading 7206, 7207 or 7224; and (v) products of stainless steel provided for in heading 7218, 7219,7220, 7221, 7222 or 7223. *See* Presidential Proclamation 9705 of March 8, 2018 (US-9). In contrast, Proclamation 9980 imposed additional duties on the following "derivative iron or steel products": (a) nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar articles, of iron or steel, whether or not with heads of other material (excluding such articles with heads of copper), suitable for use in powder-actuated handtools, threaded (described in subheading 7317.00.30); (b) nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar articles, of iron or steel, whether or not with heads of other material (excluding such articles with heads of copper), of one piece construction, whether or not made of round wire; the foregoing described in statistical reporting numbers 7317.00.5503, 7317.00.5505, 7317.00.5507, 7317.00.5560, 7317.00.5580 or 7317.00.6560 only and not in other statistical reporting numbers of subheadings 7317.00.55 and 73,17. 00. 65; (c) bumper stampings of steel, the foregoing comprising parts and accessories of the motor vehicles of headings 8701 to 8705 (described in subheading 8708.10.30); and (d) body stampings of steel, for tractors suitable for agricultural use (described in subheading 8708.29.21). *See* Presidential Proclamation 9980 of January 24, 2020 (US-225).

[14] *See* United States – Certain Measures on Steel and Aluminum Products, Request for the Establishment of a Panel by China, WT/DS544/8 (Oct. 19, 2018).

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

18. China appears to agree with the United States that suspension or withdrawal of a Member's obligation as referred to in Article XIX of the GATT 1994 is not synonymous with a breach of the GATT 1994. Rather than responding to the Panel's question, however – which refers to "*how* the measures [at issue] 'suspend the obligation in whole or in part' or 'withdraw or modify the concession' within the meaning of Article XIX taking into account the distinction between these actions under Article XIX and violations of the GATT 1994" (emphasis added) – China makes a circular argument based on its assertions that "in all cases, the nature of a measure must be determined objectively"[15] and that "[i]f a measure has the objective characteristics of a safeguard measure, including the suspension of an obligation or the withdrawal/modification of a concession, then the measure is governed by Article XIX."[16] In essence, China's argument appears to be that a measure suspends an obligation or withdraws or modifies a concession if the measure suspends an obligation or withdraws or modifies a concession.

19. China's response therefore fails to acknowledge the difference between the suspension of an obligation or the withdrawal or modification of a concession, and the breach of an obligation under the GATT 1994. The phrase "suspend the obligation in whole or in part or to withdraw or modify the concession" appears in Article XIX, while a breach of the GATT 1994 typically refers to "the failure of a Member to carry out its obligations" as stated in Article XXIII:1(a).

20. Suspension or withdrawal of a Member's obligation as referred to in Article XIX of the GATT 1994 is thus not synonymous with a breach of the GATT 1994. Once a Member has the right to suspend an obligation or withdraw or modify a concession under Article XIX (including by invoking Article XIX through notice of a proposed measure to other Members), that Member no longer has to perform those obligations. In other words, the Member does not breach (or "fail to carry out") its obligations within the meaning of Article XXIII:1(a) of the GATT 1994, if the Member's nonfulfillment of those obligations occurs under the circumstances set forth in Article XIX and the Agreement on Safeguards. In that situation, the obligations are suspended, or the relevant concessions are withdrawn or modified – there is no breach.

21. Complainant's argument fails to address the Panel's question of "*how* the measures [at issue] 'suspend the obligation in whole or in part' or 'withdraw or modify the concession' within the meaning of Article XIX." (emphasis added) A measure does not itself suspend an obligation or withdraw or modify a concession; instead, a Member must claim an obligation

[15] China's Response to Panel Question 89, para. 33.

[16] China's Response to the Panel's Question 89, para. 34.

is suspended (or a concession is withdrawn or modified) to justify taking particular action. If the Member does not make such a claim, the Member would simply breach another commitment (*e.g.*, Article II), unless it has a basis to take the action.

22. In relation to the measures at issue, the United States has explicitly and repeatedly invoked GATT 1994 Article XXI.[17] No obligation or concession may supersede the right to take action under that provision, as the text of Article XXI confirms that "[n]othing in this Agreement shall be construed … to prevent" a Member "from taking any action which it considers necessary for the protection of its essential security interests." Accordingly, in taking action under Section 232, the United States has acted consistently with its existing rights under the covered agreements, and has not "suspended in whole or in part a GATT obligation or withdrawn or modified a GATT concession" within the meaning of Article XIX.

23. The circular nature of China's argument therefore highlights the fundamental importance of invocation through notice of a proposed measure to other Members as a condition precedent to a Member's exercise of its right to take action under Article XIX and for the application of safeguards rules to that action, as discussed in Section IV of the U.S. Second Written Submission.[18] As the United States explains there, the ordinary meaning of the text of Article XIX, including the title of Article XIX and each of its paragraphs, establishes that such invocation is a necessary, condition precedent to the right to "suspend [an] obligation in whole or in part or . . . withdraw or modify [a] concession" under Article XIX.

TO ALL

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

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[17] *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)).

[18] Invocation of Article XXI, therefore, also does not entail a breach of an obligation under the WTO Agreement. In this respect, a Member's invocation of Article XXI parallels that of a Member properly exercising its right to invoke Article XIX. The reason is that neither invoking Member has "failed to carry out" its obligations. The similarities between Article XIX and Article XXI, however, end here because an invocation of Article XXI does not entail a suspension of an obligation. Instead, the obligation does not apply when a Member invokes Article XXI with respect to a measure it implements.

24. In response to this question, China notes that the clause that begins with "which it considers" is a single relative clause but argues that the clause ends with "its essential security interests."[19] It argues that the rest of the words that follow "its essential security interests" relate back the word "any action" to form a noun phrase.[20] China's argument is unsupported by the text and the grammatical structure of Article XXI(b).

25. China's unsupported and convoluted explanation stands in stark contrast to the U.S. explanation that is well supported by English grammar. The diagrams below illustrate the contrasting explanations:

U.S. construction of Article XXI(b)(i):

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 (i) relating to fissionable materials or the materials from which they are derived;

Single Relative Clause (modifying "action")

China's construction of Article XXI(b)(i):

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 (i) relating to fissionable materials or the materials from which they are derived;

Relative Clause (modifying "action")

Noun Phase

26. As explained in detail in Section II.B. of the U.S. Second Written Submission, China's argument artificially separates the terms in the single relative clause, which begins with the phrase "which it considers necessary" and ends at the end of each subparagraph ending. Furthermore, under China's construction, the noun phrase, which consists of a noun and its modifier, is separated such that the noun ("action") and its modifier ("relating to fissionable materials or the materials from which they are derived") are separated by a relative clause

[19] China's Response to the Panel's Question 90, paras. 36-37.

[20] China's Response to the Panel's Question 90, para. 38. See examples of "noun phrase" in grammar sources. MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 232 (1st edn 1995) ("A noun phrase consists of a noun and its modifiers. *The second warehouse* is huge.") (emphasis in the original) (US-176); The Grammar Bible: Everything You Always Wanted to Know About Grammar but Didn't Know Whom to Ask 30 (2nd edn 2004) ("My shopping cart hit **that expensive Mercedes**." "**My poor kitty** has a cold.") (emphasis in the original) (US-236).

consisting of twelve words. China's construction ignores numerous grammar rules, including a rule that a modifier follows the word it modifies or is otherwise placed as closely as possible to the word it modifies.[21] In fact, a common mistake in English grammar is the use of "misplaced modifier," which is "a word, phrase, or clause that is placed incorrectly in a sentence, thus distorting the meaning."[22]

27. It is notable that, to illustrate its position, China is forced to rewrite Article XXI(b) in a manner consistent with its proposed interpretation.

> …to prevent any contracting party from taking any action:
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; or
>
> (iii) in time of war or other emergency in international relations;
>
> which it considers necessary for the protection of its essential security interests.[23]

28. China's rewrite transforms the structure of Article XXI(b) – removing a portion of the relative clause from the main text of Article XXI(b) and placing it after the subparagraph endings as opposed to before the subparagraph endings. It also omits "taken" from the subparagraph ending (iii). With this rewrite, China appears to acknowledge that its own interpretation of Article XXI(b) does not reflect the English text *as written*. Rather than

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[21] 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).

[22] 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).

[23] China's Response to the Panel's Question 43, para. 127.

supporting its interpretation, then, China's arguments serve only to highlight its nontextual basis.

29. In contrast, the U.S. interpretation of Article XXI(b) is based on the ordinary meaning of Article XXI(b) as it is written. As the United States has explained in prior submissions[24], the self-judging nature of Article XXI(b) is established by the text of that provision, in its context, and in the light of the treaty's object and purpose. The grammatical construction of Article XXI(b) informs this understanding of the text of Article XXI(b).

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

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

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

> **a. "chapeau" and "subparagraph" (as used in relation to Article XX) and, accounting for the additional layer of indentation in Article XXI, "subparagraph endings";**
>
> **b. "clauses" and "phrases" in the text of Article XXI(b) including variations such as an "introductory" or "adjectival/relative/dependent" clause/phrase or "subclauses".**

32. In response to the Panel's question, China states that the nomenclature used to describe the structure of Article XXI(b) is not important.[25] As the United States explained in its own response to this question, while the interpretation of Article XXI(b) does not turn on the particular terminology used, the United States considers that the following terms most accurately capture the structure of Article XXI(b): chapeau of Article XXI, main text of Article XXI(b), and subparagraph endings of Article XXI(b). Furthermore, the United States considers that the following terms most accurately capture the grammatical structure of Article XXI(b): independent clause ("Nothing in this Agreement shall be construed to prevent any [Member] from taking any action"); relative/dependent clause (from "which it considers"

[24] *See e.g.*, Second Written Submission of the United States, Section II.B; U.S. Response to the Panel's Questions 34-37, paras. 123-142.

[25] China's Response to the Panel's Question 91, para. 40.

to the end of each subparagraph ending); and participial phrase (each subparagraph ending). The United States refers the Panel back to its response to the Panel's Questions 90 and 91.

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

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

33. In response to the Panel's question, China argues the United States has not sought to establish a *prima facie* case that the measures at issue are justified under Article XXI(b), claiming that the United States has not identified which of the subparagraphs of Article XXI(b) it considers applicable and has not presented evidence and legal argument in support of that identification.[26] China also notes that the United States has not "sought to demonstrate that the United States concluded in good faith that an action encompassed by one or more of the subparagraphs was necessary for the protection of its essential security interests."[27]

34. China's arguments are deeply flawed. As the United States will explain, nothing in the text of Article XXI(b) suggests that the responding member must specify a subparagraph ending or furnish reasons for or explanations of an action for which Article XXI(b) is invoked. China's narrow interpretation of Article XXI(b) also ignores the ordinary meaning of the text of Article XXI(b). Furthermore, China's argument that the Panel must undertake a review of "good faith" in invoking Article XXI is inconsistent with customary rules of interpretation.

35. As the United States explained in its response to the Panel Question 32, any principle of good faith is not relevant to whether a Member's judgment under Article XXI(b) is reviewable by a panel in dispute settlement proceedings. Furthermore, China's suggestion – that the panel must review whether the Member has invoked Article XXI(b) in good faith – would rewrite Article XXI(b) to insert the text and impose the requirements of the chapeau of Article XX.

36. The chapeau of Article XX sets out additional requirements for a measure falling within a general exception set out in the subparagraphs. The chapeau states that a measure shall not be applied in a manner which constitutes a means of "arbitrary or unjustifiable

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[26] China's Response to the Panel's Question 92, paras. 42-43.

[27] China's Response to the Panel's Question 92, paras. 42-43.

discrimination" or a "disguised restriction on international trade". As one report examining these additional requirements in the chapeau stated:

> 'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that 'disguised restriction' includes disguised discrimination in international trade. It is equally clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction.' We consider that 'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. *The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.*[28]

Thus, both concepts aim to address applying a measure inconsistently with good faith – that is, "avoiding abuse or illegitimate use" of a general exception.

37. Article XX and its chapeau is immediate context for Article XXI. It is striking, and highly relevant, that Article XXI does not contain the Article XX chapeau language relating to "arbitrary or unjustifiable discrimination" or a "disguised restriction". China, in seeking review of "good faith" in invoking Article XXI, effectively asks the Panel to read into Article XXI text from the chapeau of Article XX. Interpreting Article XXI as though it contains the terms in Article XX's chapeau would be inconsistent with customary rules of interpretation, including the principle of effective treaty interpretation.

38. With respect to China's argument that the United States failed to specify a subparagraph ending, as the United States has explained in its response to the Panel Questions 35-38 and 92(b), Article XXI(b) does not require the responding member to specify a subparagraph ending or to furnish reasons for or explanations of an action for which Article XXI(b) is invoked. 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. China's

[28] *US – Gasoline (AB)*, p. 25.

effort to impose such requirements on the invoking Member is inconsistent with the text of the provision.

39. Next, citing the panel report in *Russia – Traffic in Transit*, China argues that the invoking Member's essential security interests at issue must "relate to the 'protection of its territory and its population from external threats, and the maintenance of law and public order internally.'"[29] In its view, the term "national security" as used in the Section 232 statute and relevant reports and proclamations "is insufficient, without more, to meet this requirement."[30]

40. Neither China's argument, nor the panel report in *Russia – Traffic in Transit*, is consistent with the self-judging nature of the text of Article XXI and the broad range of security interests that could be encompassed by the phrase "its essential security interests."[31] Fundamentally, Article XXI(b) is about a Member taking "any action which it considers necessary." The relative clause that follows the word "action" describes the situation which the Member "considers" to be present when it takes such an "action." The clause begins with "which it considers" and ends at the end of each subparagraph ending.

41. All of the elements in the text, including each subparagraph ending, are therefore part of a single relative clause, and they are left to the determination of the Member. Thus, as relevant to the Panel's present question, whether a Member considers its action necessary for the protection of its essential security interests and whether the Member considers such action to be "taken in time of war or other emergency in international relations" within the meaning of in Article XXI(b)(iii), are left to the determination of the Member invoking that provision.

42. The ordinary meaning of "its essential security interests" supports this understanding. As explained in the U.S. response to the Panel's Question 51, the phrase "its essential security interests" could encompass a broad range of security interests considered by the invoking Member to be "essential." The term "security" refers to "[t]he condition of being protected from or not exposed to danger; safety."[32] As this definition indicates, the term "security" is broad and could encompass many types of security interests that are critical to a Member. The term "essential" refers to significant or important, in the absolute or highest sense.[33] The term does not specify a particular subject matter – only the importance that the Member attaches to the security interest.

43. This means that, as discussed in detail in response to Question 51, action taken pursuant to Article XXI(b)(iii) could implicate a broad range of security interests considered by the

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[29] China's Response to the Panel's Question 92, para. 45.

[30] China's Response to the Panel's Question 92, para. 45.

[31] See First Written Submission of the United States, Section III.B.

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

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

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

44. Finally, China argues that the facts and circumstances identified by the USDOC in the Section 232 reports represent nothing more than "political or economic differences between Members."[34] Again citing the panel report in *Russia – Traffic in Transit*, China contends that such differences "do not constitute an 'other emergency in international relations' 'unless they give rise to defence and military interests, or maintenance of law and public order interests.'"[35] As the United States explained in detail in the U.S. First Written Submission, the *Russia-Traffic in Transit* panel's interpretation of Article XXI(b) ignored the ordinary meaning of the terms of Article XXI(b).[36] China's reference to such flawed interpretation is unavailing.

45. As the United States explained in response to the Panel's Question 51, the ordinary meaning of the phrase "other emergency in international relations" in Article XXI(b)(iii) is broad. Definitions of "emergency" include "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention."[37] A broad understanding of the term "emergency" in Article XXI(b)(iii) is supported by the context provided by other provisions of the GATT 1994 and other covered agreements.[38]

46. The phrase "international relations" can be understood as referring to a broad range of matters. The term "relations" can be defined as "[t]he various ways by which a country, State, etc., maintains political or economic contact with another,"[39] while the term "international" can be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations."[40] With these definitions in mind, an "other emergency in international relations" can be understood as referring to a situation of danger or conflict, concerning political or economic contact occurring between nations, which arises unexpectedly and requires urgent attention. As the United States has explained, what those situations are arising between nations that require

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[34] China's Response to the Panel's Question 92, para. 49.

[35] China's Response to the Panel's Question 92, para. 49.

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

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

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

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

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

urgent attention by a Member is a judgment that can only be exercised by that Member for itself.

47. In short, the text of Article XXI(b) establishes that it is for the invoking Member to consider whether any action is "necessary for the protection of its essential security interests" "taken in time of war or other emergency in international relations." The extensive findings in the steel and aluminum reports are consistent with the United States considering the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations."

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

48. China suggests it is "most noteworthy" that the parties in *Saudi Arabia – Measures Concerning the Protection of IPRs* "interpreted Article 73(b)(iii) of the TRIPS Agreement by reference to, and consistently with, the interpretation of Article XXI(b)(iii) of the GATT 1994 developed by the panel in *Russia – Traffic in Transit*."[41] China also makes much of the evidence presented by Saudi Arabia in support of its invocation of Article 73(b)(iii) of TRIPS, although suggesting that some aspects of the evidence presented was "less complete" than other aspects.[42] However, that both parties to a dispute may have erroneously based their arguments on a prior panel report does not affect the meaning of the provisions in question. Nor does a party's presentation of evidence in one dispute affect the burden of proof in another. As set forth in Article 3.2 of the DSU, the relevant provisions of the covered agreements must be interpreted in accordance with the customary rules of interpretation of public international law.

49. As the United States explained in its response to the Panel's Question 93, the panel in *Saudi Arabia – Measures Concerning the Protection of IPRs* merely "transposed" the *Russia – Traffic in Transit* panel's analysis. Simply transposing the approach of a prior panel, however, is not consistent with the function of panels as set out in the DSU. Moreover, as the United States has explained in Section III.B. of its First Written Submission, there were numerous errors in the analysis of *Russia – Traffic in Transit* panel report. The *Saudi Arabia – Measures Concerning the Protection of IPRs* panel report is erroneous for the same reasons, and that report therefore does not appear to provide any additional relevant guidance to the Panel in this dispute with respect to the interpretation of Article XXI(b).

50. As the United States explained in response to the Panel's Questions 35 to 38 and 92(b), the text of Article XXI(b) does not include any language requiring the invoking Member to provide an explanation or produce evidence to justify its invocation. The text does not indicate the Member must notify the circumstances underlying the invocation, explain the action, or provide advance notice – as it might under other provisions of the WTO

[41] China's Response to the Panel's Question 93, para. 52 (quoting *Saudi Arabia –Protection of IPRs*, para. 7.231).

[42] China's Response to the Panel's Question 93, para. 55.

Agreement. It may be that a Member invoking Article XXI nonetheless chooses to make information available to other Members, and the United States has made plentiful information available in relation to its actions under Section 232. Neither the U.S. decision to make this information available, nor evidence that Saudi Arabia may have presented in its own dispute, changes the terms of Article XXI(b).

51. The United States also notes the findings of the panel in *Saudi Arabia – Measures Concerning the Protection of IPRs* regarding DSU Article 3.7. Article 3.7 provides, among other things, that "[b]efore bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful." In *Saudi Arabia – Measures Concerning the Protection of IPRs*, Saudi Arabia argued that Qatar "had not exercised sound judgment in taking action under Article 3.7 of the DSU" due to "the comprehensiveness of the diplomatic and economic measures imposed by Saudi Arabia and other Members in the region, and the underlying rationale for those measures."[43] The panel in that dispute rejected Saudi Arabia's argument, however, based on the discretion granted to Qatar under Article 3.7. As that panel explained, "[g]iven the discretion granted to complainants in deciding whether to bring a dispute under the DSU, the Panel does not consider that Qatar failed to exercise its judgment within the meaning of Article 3.7 in bringing this case."

52. This finding is consistent with the U.S. view of Article 3.7, as expressed in response to the Panel's Question 48. As the United States observed there, the terms of Article 3.7 provide no basis for a panel to opine on whether or not a Member has exercised its judgment "before bringing a case." Once a dispute has been brought, the Member has exercised its judgment, and the provision imposes no ongoing obligation. DSU Article 3.7 shows that for certain obligations, the drafters chose to impose obligations but did not permit a panel to look behind the decision of a Member in carrying out that obligation. Similarly, given the terms of Article XXI, an adjudicator cannot assume for itself the authority to second-guess the determination of a Member as to the necessity of its action for the protection of its essential security interests.

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

53. The United States recalls that China did not include Article 11.1(b) as a legal basis for the complaint in its Request for a Panel in this dispute.[44] Should the Panel wish to consider Article 11.1(b) in the context of the legal bases for the complaint that China did include in its Request for a Panel, the United States offers the following comments.

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[43] *Saudi Arabia – Protection of IPRs*, para. 7.19.

[44] *See* United States – Certain Measures on Steel and Aluminum Products, Request for the Establishment of a Panel by China, WT/DS544/8 (Oct. 19, 2018).

54. In its response to Question 94, China argues that if a measure is "objectively" a voluntary export restraint or other measure referred to in Article 11.1(b), then that measure is prohibited by Article 11.1(b) and cannot be "revived" by Article 11.1(c).[45] China's interpretation of these provisions is untenable, however, as it would reduce Article 11.1(c) to inutility, particularly with respect to measures that could be understood to fall within Article 11.1(b) but which were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX.

55. China's argument also ignores that there could be some overlap in the scope of measures covered by Article XIX of the GATT 1994, Article 11.1(b) of the Agreement on Safeguards, and other provisions. As the United States explained in response to the Panel's Question 19, there could be some overlap in the scope of measures covered by Articles II or XI of GATT 1994 and those covered by Article XIX, or between measures covered by Article XI of the GATT 1994 and measures covered by Article 11.1(b) of the Agreement on Safeguards. A "voluntary export restraint[], orderly marketing arrangement[] or . . . other similar measure" under Article 11.1(b), for example, *could* take the form of a quantitative restriction. A quantitative restriction might be a measure sought, taken, or maintained pursuant to a number of WTO provisions (e.g., Articles XI, XII, XVIII, XX, XXI). If so, Article 11.1(c) provides that the Agreement on Safeguards – including Article 11.1(b) – "does not apply" to such a measure. Therefore, the fact that the measure takes the form of, or operates as, a quantitative restriction is not determinative of its legal characterization under the covered agreements.

56. Under China's interpretation, however, these measures would be governed by Article 11.1(b) if they were "objectively" a voluntary export restraint or other measure referred to in that provision, regardless of whether they were actually sought, taken, or maintained pursuant to another provision. This result is inconsistent with the terms of Article 11.1(c).

57. Contrary to China's assertion, Article 11.1(c) would not operate to "revive" measures that could be understood as falling under Article 11.1(b) but which are "sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX." Instead, Article 11.1(c) simply provides that the Agreement on Safeguards "does not apply" to such measures. China invokes the principle of effective treaty interpretation to support its argument, but the principle in fact undermines China's argument.[46] Under China's interpretation the Agreement on Safeguards would still "apply" to a measure sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX – despite the terms of Article 11.1(c) – so long as that measure was "objectively" a voluntary export restraint or other measure referred to in Article 11.1(b). This reading of the provisions is inconsistent with their meaning as interpreted according to the customary rules of interpretation, and is not supported by the principle of effective treaty interpretation. As the United States explained in response to the Panel's Question 47, the ILC declined to include a

[45] China's Response to the Panel's Additional Question 94, para. 59.

[46] China's Response to the Panel's Additional Question 94, para. 59.

separate provision on the principle of effective treaty interpretation precisely to avoid this result.[47]

58. As the United States has explained, the ordinary meaning of the terms of Article 11.1(c) – particularly the reference to "this Agreement" – establish that nothing in the Agreement on Safeguards, including Article 11.1(b), applies to measures that are sought, taken, or maintained by a Member pursuant to provisions of the GATT 1994 other than Article XIX.[48] Accordingly, if a measure could be understood to fall under Article 11.1(b) – but was "sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX " – Article 11.1(c) provides that the Agreement on Safeguards "does not apply". This result is confirmed by the negotiating history of the Agreement on Safeguards, as discussed in the U.S. response to the Panel's Question 94 and in the U.S. Second Written Submission at Section IV.B.

59. The terms of Article 11.1(c) direct the Panel to the other GATT 1994 provision pursuant to which the measure in question was sought, taken, or maintained. Here, the United States has expressly invoked a provision of GATT 1994 other than Article XIX – namely, Article XXI – and therefore, application of Article 11.1(c) confirms that the Agreement on Safeguards "does not apply."

[47] Draft Articles on the Law of Treaties with Commentaries (1966), YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, vol. II, at 219 (US-23) ("Properly limited and applied, the maxim does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover, to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of 'effective interpretation'.")

[48] *See* U.S. Response to the Panel's Questions 20 and 94.