

UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS548)

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

October 28, 2020

TABLE OF CONTENTS

QUESTION 82. 1
QUESTION 83. 1
QUESTION 84. 3
QUESTION 85. 3
QUESTION 86. 3
QUESTION 87. 4
QUESTION 88. 8
QUESTION 89. 8
QUESTION 90. 10
QUESTION 91. 10
QUESTION 92. 11
QUESTION 93. 14
QUESTION 94. 16

TABLE OF REPORTS

SHORT TITLE	FULL CITATION
<i>Mexico – Corn Syrup (Article 21.5 – US) (AB)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001
<i>Saudi Arabia – Protection of IPR</i>	Panel Report, <i>Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights</i> , WT/DS567/R, circulated 16 June 2020
<i>US – 1916 Act (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000

TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
U.S. First Written Submission	
US-1	Section 232 statute, 19 U.S.C. 1862
US-2	Section 232 Regulations, 15 C.F.R., Part 705
US-3	U.S. President, “Memorandum on Steel Imports and Threats to National Security,” Weekly Compilation of Presidential Documents, April 20, 2017, https://www.govinfo.gov/content/pkg/DCPD-201700259/pdf/DCPD-201700259.pdf
US-4	U.S. President, “Memorandum on Aluminum Imports and Threats to National Security,” Weekly Compilation of Presidential Documents, April 27, 2017, https://www.govinfo.gov/content/pkg/DCPD-201700284/pdf/DCPD-201700284.pdf
US-5	DOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19205 (Apr. 26, 2017)
US-6	DOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, 82 Fed. Reg. 21509 (May 9, 2017)
US-7	U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, The Effect of Imports of Steel on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended (Jan. 11, 2018)
US-8	U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, The Effect of Imports of Aluminum On the National Security, An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended (Jan. 17, 2018)
US-9	Presidential Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, 83 Fed. Reg. 11625 (Mar. 15, 2018)
US-10	Presidential Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States, 83 Fed. Reg. 11619 (Mar. 15, 2018)

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

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

EXHIBIT	DESCRIPTION
US-36	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Committee on Chapters I, II and VIII, E/PC/T/139 (July 31, 1947)
US-37	Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/180 (Aug. 19, 1947)
US-38	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, (Draft) General Agreement on Tariffs and Trade, E/PC/T/189 (Aug. 30, 1947)
US-39	United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947)
US-40	Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33 (July 24, 1947)
US-41	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947)
US-42	United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30, at 2 (Jan 9, 1948)
US-43	United Nations Conference on Trade & Employment, Sixth Committee: Organization, Sub-Committee on Chapter VIII (Settlement of Differences – Interpretation), January 13, 1948, E/CONF.2/C.6/W.41 (Jan. 13, 1948)
US-44	United Nations Conference on Trade & Employment, Sixth Committee: Organization, Amendment to Article 94 Proposed by the United Kingdom Delegation, E/CONF.2/C.6/W.48 (Jan. 16, 1948)
US-45	Final Act of the United Nations Conference on Trade and Employment (excerpt)
US-46	United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Eighth Meeting (Article 94), E/CONF.2/C.6/W.123 (Feb. 28, 1948)
US-47	United Nations Conference on Trade & Employment, Sixth Committee, Notes of the Fourth Meeting (Article 94), E/CONF.2/C.6/W.60 & E/CONF.2/C.6/W.60/Corr.1 (Jan. 20, 1948)

EXHIBIT	DESCRIPTION
US-48	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 2, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 - July 30, 1947.” – 8:00 p.m. meeting – July 2, 1947
US-49	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Memorandum from Seymour J. Rubin dated July 14, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 14, 1947, Memo from Seymour J. Rubin, Legal Advisor of US Delegation, regarding Thorp and Neff Memo
US-50	<i>Young Loan Arbitration</i> , (UK, US, France, Belgium and Switzerland v. Federal Republic of Germany), Arbitral Award of 16 May 1980, ILR 59 (1980)
US-51	Permanent Court of Arbitration, <i>Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v. Netherlands)</i> , 27 RIAA 35, (2005)
US-52	U.S. Delegation (Internal), Department of State, Memorandum of Conversation, “Security Exceptions to Proposed ITO Charter” June 17, 1946, NARA, Record Group 43, International Trade Files, In Folder “ITO Charter – Security” (June 17, 1946)
US-53	U.S. Delegation (Internal), Services Economic Disarmament Argument Draft (1946)
US-54	U.S. Delegation (Internal), Letter from Coppock to Wilcox, “National Security Provisions in the Draft Charter” July 3, 1946, NARA, Record Group 43, International Trade Files, Box 13, In Folder “ITO Charter – Security” July, 3 1946
US-55	Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - Draft Charter, E/PC/T/A/SR/186 (Sep. 10, 1947)
US-56	U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked “Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947.” – July 4, 1947, at 2

EXHIBIT	DESCRIPTION
US-57	Summary Record of the Twelfth Session, SR.19/12 (Dec. 21, 1961)
US-58	Report by the Working Party on Accession of the United Arab Republic, L/3362 (Feb. 25, 1970)
US-59	GATT Council, Minutes of Meeting, C/M/157 (June 22, 1982)
US-60	Communication to the Members of the GATT Council, L/5319/Rev.1 (May 15, 1982)
US-61	GATT Council, Minutes of Meeting, C/M/159 (Aug. 10, 1982)
US-62	Decision Concerning Article XXI Of The General Agreement, L/5426 (Dec. 2, 1982)
US-63	Minutes of Meeting of May 29, 1985, C/M/188 (June 28, 1985)
US-64	Minutes of Meeting of March 12, 1986, C/M/196 & C/M/196/Corr.1(April 2, 1986)
US-65	GATT Panel Report, <i>United States – Trade Measures Affecting Nicaragua</i>
US-66	Minutes of Meeting of November 5-6, 1986, C/M/204 (Nov. 19, 1986)
US-67	Tom Miles, <i>Adjudicator says any security defense of U.S. auto tariffs at WTO 'very difficult'</i> , REUTERS BUSINESS NEWS (May 27, 2019), https://www.reuters.com/article/us-usa-trade-autos-wto-idUSKCN1SX1I7
US-68	<i>The New Shorter Oxford English Dictionary</i> , 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)
US-69	Black's Law Dictionary, ed. Bryan A. Garner, Eighth edition, 2004
First Panel Meeting	
US-70	Letter to the Chairman of the Panel on U.S. Trade Measures Affecting Nicaragua from the Office of the United States Trade Representative (June 4, 1986) (excerpt)
US-71	Commissioner for Trade Cecilia Malmström, OECD High-Level Symposium on Steel (Apr. 18, 2016), https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154458.pdf

EXHIBIT	DESCRIPTION
US-72	G20 Global Steel Forum Report (Nov. 30, 2017), https://www.ghy.com/images/uploads/default/Global-Steel-Forum-Report-Nov2017.pdf (excerpt)
US-73	Intentionally Omitted
US-74	Intentionally Omitted
US-75	Intentionally Omitted
US-76	Intentionally omitted
US-77	Intentionally Omitted
US-78	Intentionally Omitted
U.S. Responses to the Panel's First Set of Questions	
US-79	WTO Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports, G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, & G/SG/N/11/IDN/14 (July 28, 2014)
US-80	WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018),
US-81	WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018)
US-82	WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018)
US-83	U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018),
US-84	Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (excerpts)
US-85	WTO Committee on Market Access, Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions (G/L/59/Rev.1), G/MA/QR/N/USA/4 (Oct. 3, 2018),
US-86	<i>The New Shorter Oxford English Dictionary</i> , 4th edn, L. Brown (ed.) (Clarendon Press, 1993) (excerpts)

EXHIBIT	DESCRIPTION
US-87	Negotiating Group on Safeguards, Drafting History of Article XIX and Its Place in The GATT: Background Note by the Secretariat, MTN.GNG/NG9/W/7 (Sep. 16, 1987)
US-88	<i>The Oxford French Dictionary</i> , 4 th edn, (Oxford University Press, 2007)
US-89	<i>The Oxford Spanish Dictionary</i> , 1 st edn, (Oxford University Press, 1994)
US-90	General Agreement on Tariffs and Trade Second Session of the Contracting Parties, Rules of Procedure GATT/CP.2/3 Rev.1 (Aug. 16, 1948)
US-91	General Agreement on Tariffs and Trade Rules of Procedure for Sessions of the Contracting Parties GATT/CP/30 (Sept. 6, 1949)
US-92	Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report, E/PC/T/A/PV/33.Corr.3 (July 30, 1947)
US-93	ENGLISH GRAMMAR (Sydney Grenbaum ed., Oxford Univ. Press, 1996)
US-94	THE CLASSIC GUIDE TO BETTER WRITING (Ruldolf Flesch & A. H. Lass, HarperPerrenial, 1996)
US-95	MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 233 (1st edn. 1995) (excerpts)
US-96	HARPER'S ENGLISH GRAMMAR (Harper & Row, 1966) (excerpts)
US-97	Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES, Manchester University Press, 2nd edn (1984) (excerpt)
US-98	Analytical Index: Guide to GATT Law and Practice, Vol. 2 (Geneva, WTO, 1994)
US-99	Bradly J. Condon, <i>The Concordance of Multilingual Legal Texts at the WTO</i> , 33 Journal of Multilingual and Multicultural Development 6, App. 1 (2012)
US-100	WTO Analytical Index: Language incorporating the GATT 1947 and other instruments into GATT 1994, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_incorp_oth.pdf
US-101	General Agreement on Tariffs and Trade, Protocol Amending the General Agreement to Introduce a Part IV on Trade and Development:

EXHIBIT	DESCRIPTION
	Establishment of Authentic Text in Spanish, Decision of 22 Mar. 1965 (L/2424)
US-102	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. I (revised) (1955) (excerpt)
US-103	Decision of the Trade Negotiations Committee (TNC) on “Corrections to be Introduced in the General Agreement on Tariffs and Trade” MTN.TNC/41 (Mar 30, 1994)
US-104	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. III (1958) (excerpt)
US-105	Instrumentos Básicos y Documentos Diversos (IBDD), Vol. IV, 41 (1969) (excerpt)
US-106	ADVANCED FRENCH GRAMMAR 60 (Cambridge Univ. 1999) (excerpt)
US-107	OPPENHEIM’S INTERNATIONAL LAW, vol. I (excerpt)
US-108	Vienna Convention on the Law of Treaties
US-109	U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517
US-110	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137
US-111	U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3
US-112	U.N. Convention on the Use of Electronic Communications in International Contracts, Nov. 23, 2005, 2898 U.N.T.S. 3
US-113	Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37
US-114	U.N. Convention on Independent Guarantees and Stand-By Letters of Credit, Dec. 11, 1995, 2169 U.N.T.S. 163
US-115	U.N. Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3
US-116	Convention on Registration of Objects Launched into Outer Space, Nov. 12, 1974, 1023 U.N.T.S. 15

EXHIBIT	DESCRIPTION
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
US-122	James Crawford, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th ed. 2012)
US-123	UNIDIR, The United Nations, Cyberspace and International Peace and Security: Responding to Complexity in the 21st Century (2017) (excerpt)
US-124	International Telecommunication Union (ITU), Definition of cybersecurity, https://www.itu.int/en/ITU-T/studygroups/com17/Pages/cybersecurity.aspx
US-125	United Nations General Assembly, Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (July 30, 2010) A/65/201
US-126	United Nations General Assembly, Resolution adopted by the General Assembly on 5 December 2016, A/RES/71/28
US-127	New Zealand Government, New Zealand's cybersecurity strategy (2019) (excerpt)
US-128	Australian Government, Australia's Cyber Security Strategy (2016) (excerpt)
US-129	Turkey's National Cyber Security Strategy (2016)
US-130	National Cyber Security Strategy for Norway (2019) (excerpt)
US-131	India, Call for Comments, National Cyber Security Strategy 2020 (2019)
US-132	India, National Cyber Security Policy 2013

EXHIBIT	DESCRIPTION
US-133	The Ministry of Foreign Affairs of the Netherlands, Working Worldwide for the Security of the Netherlands: An Integrated International Security Strategy 2018-2022, at 19 (2018) (excerpt)
US-134	The Netherlands Government, National Security Strategy (2019)
US-135	Switzerland, National Strategy for the Protection of Switzerland against Cyber Risks 2018-2022, at 1 (Apr. 2018)
US-136	ENISA, NCSS Good Practice Guide (Nov. 2016) (excerpt)
US-137	Canada's National Cyber Security Action Plan 2019-2024 (2019) (excerpt)
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)

EXHIBIT	DESCRIPTION
US-148	Second Session of the Preparatory Committee of the United Nations Conference on Trade And Employment, Verbatim Report, E/PC/T/EC/PV.2/22 (Aug. 22, 1947)
US-149	Negotiating Group on GATT Articles, Meeting of 3 March 1987, Note by the Secretariat, MTN.GNG/NG7/1/Rev.1 (Apr. 3, 1987)
US-150	Negotiating Group on GATT Articles, Article XXI Proposal by Nicaragua, MTN.GNG/NG7/W/48 (June 18, 1988).
US-151	Negotiating Group on GATT Articles, Communication from Argentina, MTN.GNG/NG7/W/44 (Feb. 19, 1988)
US-152	Negotiating Group on GATT Articles, Communication from Nicaragua, MTN.GNG/NG7/W/34 (Nov. 12, 1987)
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

EXHIBIT	DESCRIPTION
	Council of State the same day (White paper from the Solberg Government) (excerpts)
US-164	Opening Ceremony of the 12th Asia-Pacific Programme for Senior National Security Officers (APPSNO) - Speech by Mrs. Josephine Teo, Minister for Manpower and Second Minister for Home Affairs (May 7, 2018)
US-165	Spain, The National Security Strategy, Sharing a Common Project (2013) (excerpt)
US-166	Turkey, Ministry of Foreign Affairs, Turkey's Perspectives and Policies on Security Issues
US-167	Negotiating Group on Safeguards, Communication from Switzerland, MTN.GNG/NG9/W/10 (Oct. 5, 1987)
US-168	Negotiating Group on Safeguards, Communication by the Nordic Countries, MTN.GNG/NG9/W/16 (May 30, 1988)
US-169	<i>The Oxford Spanish Dictionary</i> , 2 nd 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	Merriam-Webster's Guide to Punctuation and Style 233 (1st edn. 1995) (excerpts)
US-177	THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE (1994)

EXHIBIT	DESCRIPTION
US-178	The Grammar Bible: Everything You Always Wanted to Know About Grammar but Didn't Know Whom to Ask 146-147 (2nd edn 2004)
US-179	Intentionally Omitted
US-180	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)

EXHIBIT	DESCRIPTION
US-194	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr 29, 1988)
US-195	Negotiating Group on Dispute Settlement, Meeting of 25 June, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987)
US-196	Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988)
US-197	Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America (excerpt)
US-198	Tokyo Round Code on Government Procurement (1979) (excerpt)
US-199	Agreement on Government Procurement, Revised Text (1988) (excerpt)
US-200	Agreement on Government Procurement, Article XXIII (1994) (excerpt)
US-201	Agreement on Government Procurement (2012) (excerpt)
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)
U.S. Responses to the Panel's Additional Questions	
US-222	<i>The New Shorter Oxford English Dictionary</i> , 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, <i>THE ELEMENTS OF STYLE</i> (4th ed. 1999) (excerpt)

EXHIBIT	DESCRIPTION
US-227	Kingdom of Saudi Arabia, Statement before the Dispute Settlement Body, <i>National Security in WTO dispute Settlement Proceeding DS567</i> (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	Presidential Proclamation 9772 of August 10, 2018
US-230	Intentionally Omitted
US-231	Presidential Proclamation 9888 of May 17, 2019
US-232	Presidential Proclamation 9893 of May 19, 2019
US-233	Presidential Proclamation 9894 of May 19, 2019
US-234	Intentionally Omitted
US-235	Intentionally Omitted
US-236	Intentionally Omitted
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. Responding to the "additional clarification to the Panel's questions" of September 8, 2020 – which invited the parties "to indicate whether (and why) any aspect of the questions may not be relevant to the measures and the claims at issue" – the EU calls the Panel's questions related to Article 6.2 "misconceived and unnecessary." The EU further suggests that these questions "raise[] in the minds of the European Union a concern that the Panel or those advising it might be contemplating ways to avoid outcomes that would be inconvenient for the present US administration."¹ It is the EU's allegations against the Panel that are "misconceived and unnecessary," however. As the EU is aware, Panels can, and frequently do, investigate their terms of reference on their own initiative in order to ascertain the scope of their legal authority under the DSU.

5. The EU's calling into question this Panel's motives is therefore grossly inappropriate. If the EU believes that it has "justifiable doubts" as to whether the panelists, or any Secretariat staff assisting the Panel, are properly performing their duties or fulfilling their obligations to be "independent and impartial," the EU is entitled to and should bring its concerns forward under the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*.² If the EU does not initiate that procedure, however, it

¹ EU's Response to the Panel's Question 82, para. 7.

² See, e.g., WT/DSB/RC/1 (11 December 1996), para. III:2 ("Pursuant to the Governing Principle, each covered person, shall be independent and impartial, and shall maintain confidentiality. Moreover, such persons shall consider only issues raised in, and necessary to fulfil their responsibilities within, the dispute settlement proceeding and shall not delegate this responsibility to any other person. Such person shall not incur any obligation or accept any benefit that would in anyway interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person's dispute settlement duties.").

does not have such justifiable doubts, and it should therefore refrain from defaming, and impugning the integrity of, the panelists and the Secretariat.

6. With respect to Article 6.2, the EU suggests – incorrectly – that “[t]here is no doubt that the panel request in this case complies with that obligation.”³ The EU also asserts that the Panel has raised questions regarding Article 6.2 “at a late stage of these proceedings,”⁴ and suggests that “the panel’s own Working Procedures require the US to make any request for a preliminary ruling as soon as possible and at the latest in its First Written Submission.”⁵

7. Contrary to the EU’s assertions, however, the consistency of a complainant’s panel request with Article 6.2 does not depend on when or whether a particular party raises an objection to the panel. 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.

8. 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.⁶ Under Article 7.1, the DSB charges 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.

9. The EU also asserts that “[t]here is no obligation to identify the ‘specific elements/components/forms that constitute a broader/complex measure at issue.’”⁷ However, whether or not a particular complex measure has been properly identified will depend on the particular measure at issue. Article 6.2 does require that a complaining Member establish the identity of the precise or exact measures which it alleges affect the operation of any covered

³ EU’s Response to the Panel’s Question 82, para. 1.

⁴ EU’s Response to the Panel’s Question 82, para. 1.

⁵ EU’s Response to the Panel’s Question 82, para. 1.

⁶ *US – 1916 Act (AB)*, n.30; see *Mexico – Corn Syrup (Article 21.5 – US) (AB)*, para. 36.

⁷ EU’s Response to the Panel’s Question 83, para. 9.

agreement. As the United States explained in response to the Panel's Question 83, if the measure a complainant seeks to challenge is not set out in a single legal instrument but consists of multiple elements or components, then identifying the precise scope and content of the measure may require a description of the measure and the various elements or components which the complainant considers to comprise the measure it challenges. Therefore, whether a particular measure has been sufficiently identified in a panel request must be determined on a case-by-case basis.

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?

10. The EU has argued that “the panel request identified three measures: one for steel, one for aluminium, and the distinct measure Section 232 as interpreted” and states that “[t]he Panel must take the measures as the European Union has identified them, and then consider whether or not each measure (for example, the measure with respect to steel) is inconsistent with the obligations we have referred to.”⁸ As the United States explained in its response to the Panel's Question 84, 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. If a complainant has not challenged a complex measure, for example, but several separate measures, then each separate measure must be examined under the relevant provisions separately. Were it to do so, the Panel would be examining measures and claims not put before it in the complainant's request for the establishment of a panel and therefore outside its terms of reference. The Panel may not, of its own accord, or at the later request of a party, combine the measures and assess them collectively.

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.

11. 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.

⁸ EU's Response to the Panel's Question 84, para. 12.

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

12. 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.

13. The United States comments on the complainant’s response to Questions 86 and 87 together. The EU argues that certain proclamations⁹ that did not exist at the time of the panel establishment fall within the Panel’s terms of reference.¹⁰ The EU’s argument is deeply flawed.

14. As the United States explained in its response to the Panel’s 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

⁹ Proclamation 9772 of August 10, 2018 (US-229); Proclamation 9980 of January 24, 2020 (US-225); Proclamation 9888 of May 17, 2019 (US-231); Proclamation 9893 of May 19, 2019 (US-232); and Proclamation 9894 of May 19 2019 (US-233).

¹⁰ EU’s Response to the Panel’s Question 86 and 87, paras. 23-30.

within the Panel's terms of reference. Thus, the Panel lacks the authority to make findings on those measures.

15. There is nothing in the text of the DSU¹¹ 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”¹² – not *non-specific* or hypothetical measures *not yet* at issue – and the DSB establishes a panel's terms of reference “to examine ... the matter” in the panel request,¹³ which includes only those “specific measures at issue.”

16. 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.

17. The EU's efforts to bring certain proclamations that did not exist at the time of the panel's establishment within the Panel's terms of reference are misguided. The United States addresses each subsequent proclamation that did not exist at the time of the panel's establishment but the EU argues is within the Panel's terms of reference.

18. Proclamation 9893 and Proclamation 9894 exempted imports from Canada and Mexico from the Sec. 232 duties on steel and aluminum imports, respectively.¹⁴ These proclamations did not exist at the time of the panel establishment and were not included in the EU's panel request. As explained in the U.S. Response to Panel's Question 87, a measure that did not exist at the time of panel establishment cannot fall within the Panel's term of reference.

19. The EU appears to request that the Panel also make findings on Proclamation 9888¹⁵ addressing imports of automobiles and automobile parts as part of its Section 232 as interpreted measure. However, Proclamation 9888 did not exist at the time of panel's establishment and cannot therefore form part of a measure in effect at the time of the EU's

¹¹ U.S. Response to the Panel's Question 87, para. 20.

¹² DSU Art. 6.2.

¹³ DSU Art. 7.1.

¹⁴ Proclamation 9893 of May 19, 2019 (US-232); Proclamation 9894 of May 19 2019 (US-233)

¹⁵ Proclamation 9888 of May 17, 2019 (US-231).

panel request. The EU argues that Proclamation 9888 “did not alter the essence of the Section 232 as interpreted measure” and that “there is a close connection between the Section 232 as interpreted measure ... and [Proclamation 9888]”, but given that the EU does not request findings on Proclamation 9888 as a measure at issue itself, it is not clear what relevance these arguments would even have.¹⁶ Nor is it correct in any event to say that Proclamation 9888 is of the “same essence” as the Section 232 as interpreted measure. The EU identified the Section 232 as interpreted measure in its panel request as Section 232 “as repeatedly interpreted by the US’ administrative and judicial authorities.”¹⁷ Proclamation 9888 does not reflect repeated interpretation by administrative and judicial authorities; it is a single instance of application of Section 232. Therefore, neither the DSU nor the EU’s flawed “essence” argument would allow the Panel to make findings on this proclamation as, or as part of, a measure at issue.

20. In its Second Written Submission, the EU cites to Proclamation 9980 as “further evidence of the existence and content of all three measures at issue” and separately cites Proclamation 9980 as “an amendment, supplement, replacement, extension, implementing measure or other relate measures, with respect to the steel and aluminium measures respectively, with the consequence that Panel findings of WTO-inconsistency should explicitly extend to it as well.”¹⁸ In its response to the Panel’s Question 87, the EU further argues that Proclamation 9980 did not alter the essence of the steel and aluminum measures identified in its panel request, and that there is a “close connection” between Proclamation 9980 and the steel and aluminum measures identified in its panel request.¹⁹

21. As stated in U.S. Response to the Panel’s Question 87, Proclamation 9980 was issued on January 24, 2020, more than a year after the establishment of the panel and after the completion of the first panel meeting. The duties on derivative products, therefore, did not exist at the time of the panel’s establishment and were not (and could not have been) identified in EU’s panel request, and thus, they cannot be within the Panel’s terms of reference.

22. In addition, contrary to the EU’s argument, it cannot be said that the new duties on derivative products “did not alter the essence of,”²⁰ or are “closely connect[ed]”²¹ to, the additional duties on steel and aluminum imports identified in the EU’s panel request when the

¹⁶ The EU’s Response to the Panel’s Question 87, para. 29.

¹⁷ United States – Certain Measures on Steel and Aluminum Products, Request for the Establishment of a Panel by the European Union, WT/DS548/14 (Oct. 19, 2018).

¹⁸ The Second Written Submission of the European Union, paras. 20-22.

¹⁹ EU’s Response to the Panel’s Question 82, para. 28.

²⁰ EU’s Response to the Panel’s Question 87, para. 28.

²¹ EU’s Response to the Panel’s Question 82, para. 28.

²¹ EU’s Response to the Panel’s Question 82, para. 28.

new duties concern an entirely separate set of products with different HTS headings.²² Put differently, there is a substantive difference between the measures listed in the EU'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 the EU's own misplaced argument, 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.

²² 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 aluminum 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 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).

TO COMPLAINANT

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

23. The United States has no comments on complainant's response at this time.

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.

24. The EU appears to agree with the United States that the suspension or withdrawal of a Member's obligations as referred to in Article XIX of the GATT 1994 is not synonymous with a breach of the GATT 1994.²³ 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) – the EU begins its Question 89 response by suggesting that the United States has not properly "invoked" Article XXI because it has not "m[et] the burden of proof."²⁴

25. The EU's argument finds no support in the terms of Article XXI. Instead, as explained in Section II.B.4.b of the U.S. Second Written Submission, the terms of Article XXI(b) make clear that what is required of a party exercising its right under that provision 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.

26. The EU thereafter recites the Appellate Body's findings in *Indonesia – Iron or Steel Products* (which the United States has already rebutted²⁵), and attempts to distract the Panel with musings on the possibility that a Member could "suspend a concession but [] not actually increase the relevant duty (or not yet)" and discussions of the EU's alleged "rebalancing" measures.²⁶ The EU then suggests the possibility that a Member could suspend a concession "while at the same time, in a single step, effecting an action that would normally

²³ EU's Response to the Panel's Question 89, paras. 35-38.

²⁴ EU's Response to the Panel's Question 89, para. 36.

²⁵ See U.S. Response to the Panel's Question 5; U.S. Second Written Submission, Section IV.

²⁶ EU's Response to the Panel's Question 89, paras. 40-41.

constitute a violation of a GATT obligation, such as a duty increase in excess of a bound rate.”²⁷ The EU concludes: “[t]hus, the underlying US safeguard measures have, in the European Union’s view, suspended the concessions of the US and (among other things) imposed duties in excess of the bound rates, at the same time.”²⁸

27. As the United States explained in response to the Panel’s Question 7, 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. 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). 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.

28. 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 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.

29. In relation to the measures at issue, the United States has explicitly and repeatedly invoked GATT 1994 Article XXI.²⁹ 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

²⁷ EU’s Response to the Panel’s Question 89, para. 42.

²⁸ EU’s Response to the Panel’s Question 89, para. 42.

²⁹ 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)).

obligation or withdrawn or modified a GATT concession” within the meaning of Article XIX.

30. The EU’s argument also ignores 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.³⁰ 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 apply a safeguard measure under Article XIX.

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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.

31. In response to this question, the EU merely reasserts its interpretation of Article XXI(b) – without reference to the grammatical terms identified in the Panel’s request.³¹ This being the case, the United States refers the Panel to its own previous submissions, in which the United States has explained in detail the flaws of the EU’s interpretive approach.³²

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".

³⁰ 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

³¹ EU’s Response to the Panel’s Question 90, paras. 44-45.

³² Second Written Submission of the United States, Section II.B.1; U.S. Response to the Panel’s Questions 35, 36 and 40, paras. 124-138 and 149-157.

32. In response to the Panel's question, the EU states that it "does not attach any particular significance to the grammatical terms one uses when referring to the different parts of Article XXI, as long as they reflect accurately the structure of the treaty language and are in line with conventional definitions, to be understandable to everyone."³³ The EU also appears to support the use of the terms "chapeau," "subparagraphs," and "subparagraph endings".³⁴

33. 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" 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).

34. In response to the Panel's question, pointing to the fact that Section 232 provides a range of factors to be considered by the President when making the national security determination, the EU argues that the concept of "national security" as defined in Section 232 "goes significantly beyond what the GATT provides for in Article XXI."³⁵ The EU also argues that the "Section 232 legislation may be understood as acknowledging a link, in certain limited circumstances, between national security and a specific and substantiated security of supply issue" but that "if a panel finds that a measure seeks to protect a domestic industry as an end in itself...as opposed to doing so as a means to security objective, then the

³³ EU's Response to the Panel's Question 91, para. 47.

³⁴ EU's Response to the Panel's Question 91, para. 48.

³⁵ EU's Response to the Panel's Question 92, para. 53.

panel must find that the measure is controlled by the safeguards disciplines.”³⁶ In the EU’s view, Section 232 statute’s language “in such quantities or under such circumstances” “clearly supports the fact that the measures at issue are safeguard measures and not essential security interest measures.”³⁷

35. The EU’s argument is not consistent with the self-judging nature of Article XXI and the broad range of security interests that could be encompassed by the phrase “its essential security interests.” 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.

36. 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.

37. 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.”³⁸ 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.³⁹ The term does not specify a particular subject matter – only the importance that the Member attaches to the security interest.

38. This means that, as discussed in detail in response to Question 51, action taken pursuant to Article XXI(b)(iii) could implicate a broad range of security interests considered by the invoking Member to be “essential.” Importantly, it is “its” essential security interests – those of the acting Member – that the action is taken for the protection of. With this language, Article XXI(b) acknowledges that the essential security interests at issue are those as determined by the acting Member, and reflects that these interests might change over time and across Members.

³⁶ EU’s Response to the Panel’s Question 92, paras. 56-57.

³⁷ EU’s Response to the Panel’s Question 92, paras. 58-60.

³⁸ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852, 2754 (US-22).

³⁹ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), at 852, 2754 (US-22).

39. 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."⁴⁰ 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.⁴¹

40. 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,"⁴² while the term "international" can be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations."⁴³ 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 urgent attention by a Member is a judgment that can only be exercised by that Member for itself.

41. 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." While the United States does not consider that the Panel may undertake its own assessment of the U.S. invocation of Article XXI(b), the extensive findings in the steel and aluminum reports are consistent with the United States considering the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations." That the EU disagrees with the U.S. assessment of U.S. national security needs is not relevant for the purpose of Article XXI(b).

42. The EU arguments also misread Section 232 and its application under U.S. law. The statute addresses imports "in such quantities or under such circumstances," as the EU states, but continues with the terms "*as to threaten to impair the national security.*" The challenged measures do not seek to protect the steel and aluminum industries as an end in itself. The United States imposed these measures pursuant to Section 232, and not pursuant to U.S. safeguards legislation, as it would had the measures been safeguards; and the United States has cited Article XXI as the basis for the measures challenged on many occasions, indicating that it considers one or more of the circumstances set forth in Article XXI(b) are present.

⁴⁰ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 806 (US-86).

⁴¹ 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.

⁴² The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 2534 (US-222).

⁴³ The New Shorter Oxford English Dictionary, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), 1397 (US-222).

Therefore, the European Union is simply wrong that the U.S. measures are not essential security measures.

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.

43. The EU recognizes that the *Saudi Arabia – Measures Concerning the Protection of IPRs* panel report is “the first time in 73 years of GATT/WTO when a defence based on essential security interests is rejected by a panel,” but suggests – illogically – that this significant development is “a sign of normality in the WTO.”⁴⁴ Contrary to the EU’s suggestion, there is nothing “normal” about a WTO trade panel second-guessing a Member’s invocation of its sovereign essential security rights as set forth in Article XXI, contrary to the ordinary meaning of the terms of that provision. Instead, the panel’s report represents a significant departure from what had been the consistent and longstanding understanding of Article XXI(b), including the EU’s own understanding, such as when actions by it (or its member States) were challenged. The EU’s interpretation of Article XXI(b) in this dispute represents a similar significant departure. By contrast, the text of Article XXI – and the U.S. interpretation of it – has remained the same for the last 73 years.⁴⁵

44. Although the EU acknowledges that the panel in *Saudi Arabia – Measures Concerning the Protection of IPRs* “followed in the footsteps” of the panel report in *Russia – Traffic in Transit*,⁴⁶ the EU fails to acknowledge or address the panel’s failure to engage in its own analysis of the relevant provisions. As the United States explained in its response to the Panel’s Question 93, simply transposing the approach of a prior panel 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 set forth in the U.S. First Written Submission, and that report therefore does not provide any additional relevant guidance to the Panel in this dispute with respect to the interpretation of Article XXI(b).

45. The EU also makes much of the arguments put forth by Saudi Arabia to support its invocation of Article 73(b)(iii), although the EU also suggests that Saudi Arabia may not have “met its burden of proof” in certain areas.⁴⁷ That a Member may have chosen to present evidence to support certain arguments does not change whether evidence is required by the provision in question, as interpreted according to the customary rules of interpretation of public international law.

46. 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

⁴⁴ EU’s Response to the Panel’s Question 93, para. 63.

⁴⁵ See U.S. Oral Opening Statement (DS548), paras. 5-10.

⁴⁶ Russia’s Response to the Panel’s Question 93, para. 82.

⁴⁷ EU’s Response to the Panel’s Question 93, para 68, 81-82.

provide an explanation or produce evidence to justify its invocation. The text does not indicate the Member must notify the circumstances underlying the invocation, explain the action, or provide advance notice – as it might under other provisions of the WTO Agreement. 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).

47. Furthermore, as the United States explained in its 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.

48. The EU also emphasizes the order of analysis adopted by the panel in *Saudi Arabia – Measures Concerning the Protection of IPRs*.⁴⁸ As the United States explained in Section V of its Second Written Submission, however, the DSU does not specify the order of analysis that a panel must adopt and the Panel may consider the issues presented in any order that it sees fit. Whatever the Panel's *internal* ordering of its analysis, 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).

49. 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.”⁴⁹ 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.”

50. 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

⁴⁸ EU's Response to the Panel's Question 93, para. 65.

⁴⁹ *Saudi Arabia – Protection of IPRs*, para. 7.19.

“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.

51. In the first sentence of its three-sentence response to the Panel’s Question 94, the EU attempts to redraft Article 11.1(c) and incorporate concepts not supported by the terms of that provision. According to the EU, Article 11.1(c) “carves out from the scope of application of the Agreement on Safeguards all measures that are sought, taken or maintained by a Member ‘pursuant to’ provisions other than those related to safeguard measures.”⁵⁰ The EU does not explain how it defines provisions “related to safeguard measures” or what conclusions it might draw from distinguishing measures sought, taken, or maintained pursuant to provisions “related to safeguard measures” and or other provisions. Regardless, the EU’s assertion comes to nothing because Article 11.1(c) does not use this phrase.

52. Instead, Article 11.1(c) refers to “provisions of GATT 1994 other than Article XIX”, and provides that the Agreement on Safeguards “does not apply” to measures sought, taken, or maintained by a Member pursuant to those provisions, i.e., provisions of the GATT 1994 other than Article XIX. Accordingly, under the ordinary meaning of the terms of Article 11.1(c), the Agreement on Safeguards – including Article 11.1(b) – “does not apply” to measures such as those at issue here, which were taken pursuant to Article XXI.

53. The last two sentences of the EU’s response to the Panel’s Question 94 states that “[m]easures that 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’ are ‘grey area’ measures” and “such measures are not sought, taken or maintained . . . pursuant to provisions of GATT 1994 other than Article XIX.”⁵¹

54. The EU’s argument ignores, however, 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

⁵⁰ EU’s Response to the Panel’s Question 94, para. 83.

⁵¹ EU’s Response to the Panel’s Question 94, para. 84.

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.

55. Under the EU’s interpretation, Article 11.1(b) would apply to the exclusion of Article 11.1(c), even if that measure was taken pursuant to by another provision of the GATT 1994, rendering the text of Article 11.1(c) *inutile*. Such an interpretation is not consistent with the text of the Agreement on Safeguards and should be rejected.