UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS564)

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-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
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US-191	Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Status of Work in the Negotiating Group, Chairman's Report to the GNG, MTN.GNG/NG11/W/76 (July 23, 1990)
US-192	Communication from Nicaragua, MTN.GNG/NG13/W/15 (Nov. 6, 1987)
US-193	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, MTN.GNG/NG13/5 (Dec. 7, 1987)
US-194	Negotiating Group on Dispute Settlement, Meeting of November 20, 1987, Note by the Secretariat, Addendum, MTN.GNG/NG13/5/Add.1 (Apr 29, 1988)
US-195	Negotiating Group on Dispute Settlement, Meeting of 25 June, 1987, Note by the Secretariat, MTN.GNG/NG13/2 (July 15, 1987)
US-196	Negotiating Group on Dispute Settlement, Meeting of July 11, 1988, Note by the Secretariat, MTN.GNG/NG13/9, para. 7 (July 21, 1988)

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	Presidential Proclamation 9886 of May 16, 2019
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	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. Turkey appears to suggest that the Panel cannot find its panel request deficient under Article 6.2 of the DSU unless the United States was prejudiced in preparing its defense. In that regard, Turkey suggests that "[t]he United States' understanding of Turkey's case cannot be seriously questioned (and indeed the United States has not done so)" and notes that "[i]n any event, the measures at issue had attracted global publicity and cannot have been misunderstood by the United States."[1] Turkey's arguments are 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

[1] Turkey's Response to the Panel's Question 82, para. 1.4. *See also* Turkey's Response to the Panel's Question 83, para. 1.21.

the findings of previous reports addressing this issue.[2] 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.

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

6. Although Turkey acknowledges that "it falls on the complainant to present the matter, including the identification of the specific measures at issue, in its panel request," Turkey appears to downplay the effect of the complainant's characterization of the actions or omissions as elements or components of a single complex measure, or as separate measures, on the Panel's assessment or its findings and recommendations, and suggests that any such effect "would be purely presentational."[3] Turkey's suggestion is incorrect. 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. The Panel may not, of its own accord, combine the measures and assess them collectively. 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 same would be true if a complainant has challenged a single, complex measure. The Panel may not, of its own accord, isolate certain aspects of that measure and assess them separately. In this respect, the United States also 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.

7. 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

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

[3] Turkey's Response to the Panel's Question 84, paras. 1.24-1.25.

since the establishment of the Panel, please complete the following table to the extent relevant to the claims in this dispute.

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

8. 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.

9. The United States comments on the complainant's response to Questions 86 and 87 together. Turkey errs in arguing that the duties on derivative steel and aluminum products are within the Panel's terms of reference.

10. 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.

11. There is nothing in the text of the DSU[4] that supports the assertions in certain reports that panels can make findings concerning legal instruments that came into effect after the

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

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"[5] – 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,[6] which includes only those "specific measures at issue."

12. 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 the 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.

13. As explained in U.S. Response to the Panel's Question 87, Proclamation 9980[7] 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 duties on the 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 the complainant's panel request. Thus, consistent with the terms of the DSU, such duties, and any exclusion and exemption concerning these duties, cannot be within the Panel's terms of reference.

14. In addition, Turkey's response is deeply flawed in arguing that the new duties on derivative products did not change the "essence" of the measures identified in its panel request, and that the new duties on derivative products and the measures identified in its panel request are "closely connected, when the new duties concern an entirely separate set of products with different HTS headings.[8] Put differently, there is a substantive difference between the measures listed in Turkey'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.[9] Therefore, even under Turkey's own misplaced arguments, neither Proclamation 9980 nor the new duties imposed pursuant to that proclamation fall within the Panel's terms of reference.

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[5] DSU Art. 6.2.

[6] DSU Art. 7.1.

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

[8] Turkey's Response to the Panel's Question 87, paras. 1.39.

[9] See U.S. Response to the Panel's Question 87, para. 21.

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.

15. 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.

16. Turkey 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.[10] Relying on the Appellate Body's Report in *Indonesia – Iron or Steel Products*, Turkey suggests – erroneously – that "whether a measure results in a 'suspension of concessions' (through a safeguard measure) or, instead, a violation of GATT rules (by increasing ordinary customs duties above the bound rate) should be assessed by analysing holistically the design, structure, and intended operation of the measure, including whether it was designed to remedy or prevent serious injury within the meaning of the WTO safeguard regime."[11] Turkey also suggests – without citation – that "the Panel should assess the *raison d'être* of these measures, i.e. whether they are merely GATT-inconsistent measures, or whether they were designed to remedy or prevent serious injury to the United States' steel and aluminium industries caused by increased imports."[12]

17. The terms of Article XIX do not support Turkey's argument. Rather, the terms "suspend [an] obligation in whole or in part or . . . withdraw or modify [a] concession" identify a release under the Agreement on Safeguards that gives a Member legal authority to take otherwise prohibited action. Put differently, the terms "suspend [an] obligation in whole or in part or . . . withdraw or modify [a] concession" describe what a Member is permitted to do if it meets the conditions of Article XIX and the Agreement on Safeguards. These terms do not serve to define or other identify a measure as a "safeguard measure" where such a measure is not taken pursuant to the Agreement on Safeguards. As the United States has explained in its response to the Panel's Question 19, the scope of measures that may be taken pursuant to Article XIX and other provisions may overlap. Therefore, the text of the covered agreements does not support an interpretation whereby the "design, structure or intended

[10] Turkey's Response to the Panel's Question 89, para 1.58 ("Turkey agrees that the concepts of 'suspension' and 'violation' are not the same.").

[11] Turkey's Response to the Panel's Question 89, para. 1.58.

[12] Turkey's Response to the Panel's Question 89, para. 1.61.

operation" or the "*raison d'être*" of the measure itself dictates or limits a respondent's defense of that measure.

18. 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.

19. 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.

20. In relation to the measures at issue, the United States has explicitly and repeatedly invoked GATT 1994 Article XXI.[13] 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.

21. Turkey also ignores 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

[13] *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)).

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.[14] 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.

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.

22. In response to the Panel's question, Turkey argues that Article XXI(b) is comprised of two relative clauses: one beginning with "which it considers" and ends with "its essential security interests" and another beginning with "relating to" or "taken" and ends at the end of each subparagraph ending.[15] Turkey also argues that "[b]oth clauses…provide 'extra information' and 'qualify' the noun 'any action.'"[16]

23. Regardless of whether each subparagraph ending is characterized as a participial phrase that is part of a single relative clause or as a "reduced" relative clause, both Turkey and the United States seem to agree that each subparagraph ending is a "modifier" that modifies a noun.[17] Under English grammar rules[18], the modifier is placed as closely as possible to the

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[14] Invocation of Article XXI, therefore, 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. Accordingly, the measures at issue cannot be considered safeguards because they do not suspend an obligation or withdraw or modify a concession under the WTO Agreement.

[15] Turkey's Response to the Panel's Question 90, para. 1.66-1.69.

[16] Turkey's Response to the Panel's Question 90, paras. 1.66 and 1.85.

[17] Turkey's Response to the Panel's Question 90, para. 1.69.

[18] 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). 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." *See* 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

noun it modifies.[19] Thus, the most natural reading is that subparagraph endings (i) and (ii) modify the noun "interests" and not "action."

24. The flaws in Turkey's interpretation are clearly illustrated by a provision that Turkey itself cites. The provision below highlights how Article XXI(b) would have been drafted had the drafters intended the interpretation that Turkey advances. For instance, in the example, drafters have added "and which" and "or which" to create two separate relative clauses.

> Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of **all subject matter existing** at the date of application of this Agreement for the Member in question, **and which is protected** in that Member on the said date, **or which meets or comes subsequently to meet** the criteria for protection under the terms of this Agreement.[20]

25. Similarly, if the drafters of Article XXI(b) intended the interpretation that Turkey advances, they could have done so by beginning subparagraph endings (i) and (ii) with "and which relates to" instead of "relating to" and beginning subparagraph (iii) with "and which is taken" instead of "taken." If drafted that way, each subparagraph ending would form a separate relative clause that is not qualified by "which it considers." However, that is not how Article XXI(b) is written; that is not the text that the Panel is interpreting in accordance with the customary rules of interpretation. The United States addressed this precise issue in the U.S. Response to the Panel's Question 36.

> The parties advancing the proffered interpretation are attempting to read into subparagraph endings (i) and (ii) the phrase "and which relates to," such that the provision reads, in relevant part, "any action which it considers necessary for the protection of its essential security interests *and which relates* to . . . ." However, that phrase is not part of the terms of subparagraph endings (i) and (ii).
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> …

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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).

[19] Turkey does not seem to deny the applicability of this rule. This rule is evident even in the hypothetical example that Turkey itself has come up with: "The person [that is] **standing next to the table** is my colleague." See Turkey's Response to the Panel's Question 90, para. 1.72.

[20] Turkey's Response to the Panel's Question 90, para. 1.75 (emphasis in the response).

> The parties advancing the proffered interpretation are ignoring the provision's grammatical construction and reading into the beginning of subparagraph ending (iii) the phrase "and which is," such that the provision reads, in relevant parts, "any action which it considers necessary for the protection of its essential security interests and which is taken in time of war or other emergency in international relations." Again, that phrase is not part of the text of the subparagraph ending (iii).[21]

26. The text of Article XXI(b) – particularly, the absence of the language "and which relates to" in subparagraph ending (i) and (ii) and "and which is taken" in subparagraph ending (iii) and the fact that, therefore, each subparagraph ending does not constitute a separate relative clause – supports the alternative interpretation put forth by the United States.[22] The interpretation that results from the application of Article 33 of the VCLT – the meaning that best reconciles the English and French texts on one hand and the Spanish text on the other – is that the subparagraph endings modify the terms "any action which it considers" in the main text of Article XXI(b). Under this reading, the terms of the provision still form a single relative clause that begins in the main text and ends with each subparagraph ending, and therefore the phrase "which it considers" still modifies the entirety of the main text and the subparagraph endings. Therefore, the determination of whether an action is necessary for the protection of a Member's essential security interests in the relevant circumstances is committed to the judgment of that Member alone.

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".**

27. In response to the Panel's question, citing *Russia – Traffic in Transit* and *Saudi Arabia – IP*, Turkey notes that it would be "more convenient if the Panel could use the same terminology as the previous panels, in order to ensure greater comparability and consistency with those two panel reports."[23] The United States disagrees. Instead, the Panel should base its interpretation on the text and grammatical structure of Article XXI(b) itself.

28. 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

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[21] U.S. Response to the Panel's Question 36, paras. 133-134.

[22] Second Written Submission of the United States, Section II.D; see also U.S. Response to the Panel's Questions 41-43, para. 166.

[23] Turkey's Response to the Panel's Question 91, para. 1.97.

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).**

29. In response to the Panel's question, Turkey argues that term "national security" as used in the Section 232 statute and related reports and proclamations "covers a much broader range of circumstances and scenarios than Article XXI(b) of the GATT 1994."[24] Turkey refers to the *Russia – Traffic in Transit* panel's interpretation for support of this argument. However, as the United States explained in detail in Section III.B. of its First Written Submission, that panel's interpretation suffered fatal flaws, including ignoring the ordinary meaning of the terms of Article XXI(b).[25] Turkey's reference to such flawed interpretation is therefore unavailing.

30. In addition, Turkey'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.

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. 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

[24] Turkey's Response to the Panel's Question 92, paras. 1.101-1.103.

[25] First Written Submission of the United States of America, Section III.B.

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.

32. The ordinary meaning of "its essential security interests" supports the U.S. interpretation. 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."[26] 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.[27] The term does not specify a particular subject matter – only the importance that the Member attaches to the security interest.

33. 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.

34. Turkey also argues that the circumstances identified in Section 232 and related reports and proclamations "do not point to anything even remotely qualifying as a 'war or other emergency in international relations' within the meaning of Article XXI(b)(iii)."[28] Turkey's narrow construction of the phrase "other emergency in international relations" is not consistent with the meaning of those terms, as interpreted according to the customary rules.

35. 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."[29] 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.[30]

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

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

[28] Turkey's Response to the Panel's Question 92, para. 1.104.

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

[30] *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.

36. 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,"[31] while the term "international" can be defined as "[e]xisting, occurring, or carried on between nations; pertaining to relations, communications, travel, etc., between nations."[32] 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.

37. 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." That Turkey disagrees with the U.S. assessment of U.S. national security needs is not relevant for the purpose of Article XXI(b).

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.

38. Turkey notes that the panel report in *Saudi Arabia – Measures Concerning the Protection of IPRs*, "fully endorsed the prior interpretation of Article XXI(b) by the panel in *Russia — Traffic in Transit*" and that "the disputing parties and multiple third parties agreed with this legal standard under Article XXI(b)(iii)."[33] That both parties and certain third 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, however. 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.

39. 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

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

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

[33] Turkey's Response to the Panel's Question 93, paras. 1.107-1.108.

report therefore does not provide any additional relevant guidance to the Panel in this dispute with respect to the interpretation of Article XXI(b).

40. 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."[34] 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."

41. 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.

42. In its response to the Panel's Question 94, Turkey attempts to rewrite Article 11.1(c) and incorporate concepts not supported by the terms of that provision. Turkey asserts that "Article 11.1(c) was added in order to clarify that Article 11.1(b) in no way encroaches upon WTO Members' rights to take non-safeguard measures set out in the GATT 1994, that is, measures taken for policy purposes other than the policy purposes spelled out in Article XIX."[35]

43. Turkey's argument fails, however, because Article 11.1(c) does not refer to "non-safeguard measures" or "measures taken for policy purposes other than the policy purposes spelled out in Article XIX." Instead, Article 11.1(c) refers to measures "sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX," and

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

[35] Turkey's Response to the Panel's Question 94, para. 1.118.

states that the Agreement on Safeguards, including Article 11.1(b), "does not apply" to such measures.

44. The measures at issue were taken pursuant to Article XXI, and not pursuant to Article XIX, as the United States has repeatedly made clear, including in communications to WTO committees and in connection with this dispute.[36] Accordingly, Article 11.1(c) – as interpreted according to the customary rules of interpretation – provides that the Agreement on Safeguards, including Article 11.1(b), "does not apply" to the measures at issue in this dispute. As the United States explained in response to the Panel's Question 94, this result is confirmed by the negotiating history of Article 11.1(b) and Article 11.1(c).

45. Turkey'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.

46. Under Turkey's interpretation, the Agreement on Safeguards would apply to a measure that could be understood to fall under Article 11.1(b), even if that measure was taken pursuant to by another provision of the GATT 1994, such as Article XI. This result would render Article 11.1(c) *inutile*, because the Agreement on Safeguards would apply even to measures that were "sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX."

[36] 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)).