

**In the World Trade Organization  
Panel Proceeding**

***US – STEEL AND ALUMINIUM PRODUCTS (EU)  
(DS548)***

**Replies of the European Union to the Questions from the Panel  
following First Substantive Meeting**

**Geneva, 14 February 2020**

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| <i>Brazil – Retreaded Tyres</i>                                       | Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , <a href="#">WT/DS332/AB/R</a> , adopted 17 December 2007, DSR 2007:IV, p. 1527  |
| <i>Chile – Price Band System</i>                                      | Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , <a href="#">WT/DS207/R</a> , adopted 23 October 2002, as modified by Appellate Body Report <a href="#">WT/DS207AB/R</a> , DSR 2002:VIII, p. 3127   |
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| <i>EC – Banana III</i>  | Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <a href="#">WT/DS27/AB/R</a> , adopted 25 September 1997, DSR 1997:II, p. 591  |
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| <i>Korea - Dairy</i>  | Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , <a href="#">WT/DS98/R</a> and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report <a href="#">WT/DS98/AB/R</a> , DSR 2000:I, p. 49                                    |
| <i>Korea – Various Measures on Beef</i>                                 | Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , <a href="#">WT/DS161/AB/R</a> , <a href="#">WT/DS169/AB/R</a> , adopted 10 January 2001, DSR 2001:I, p. 5   |
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| <i>US – Fur Felt Hats</i>   | <i>Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade</i> , GATT/CP/106, adopted 22 October 1951   |
| <i>US – Gasoline</i>  | Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , <a href="#">WT/DS2/AB/R</a> , adopted 20 May 1996, DSR 1996:I, p. 3   |
| <i>US – Lamb</i>  | Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , <a href="#">WT/DS177/AB/R</a> , <a href="#">WT/DS178/AB/R</a> , adopted 16 May 2001, DSR 2001:IX, p. 4051                             |
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| <i>US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6 – US)</i>    | Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Brazil – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , <a href="#">WT/DS217/ARB/BRA</a> , 31 August 2004, DSR 2004:IX, p. 4341 |

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| <i>US – Steel Safeguards</i>                          | Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , adopted 10 December 2003, DSR 2003:VII, p. 3117 |
| <i>US – Tuna II (Mexico)</i>                          | Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , <a href="#">WT/DS381/AB/R</a> , adopted 13 June 2012, DSR 2012:IV, p. 1837   |
| <i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>  | Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , <a href="#">WT/DS381/AB/RW</a> and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133   |
| <i>US – Upland Cotton<br/>(Article 21.5 – Brazil)</i> | Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , <a href="#">WT/DS267/AB/RW</a> , adopted 20 June 2008, DSR 2008:III, p. 809   |
| <i>US – Wheat Gluten</i>                              | Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , <a href="#">WT/DS166/AB/R</a> , adopted 19 January 2001, DSR 2001:II, p. 717  |
| <i>US-Wool Shirts and Blouses</i>                     | Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323   |

**TABLE OF ABBREVIATIONS**

| <b>Abbreviation</b> | <b>Full Name</b>   |
|---------------------|--|
| DSB                 | Dispute Settlement Body  |
| DSU                 | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| EU                  | European Union   |
| FWS                 | First Written Submission   |
| GATT 1994           | General Agreement on Tariffs and Trade 1994                                |
| ICJ                 | International Court of Justice   |
| ILC                 | International Law Commission   |
| ITO                 | Independent Transmission Operator  |
| Section 232         | Section 232 of the Trade Expansion Act of 1962                             |
| TBT Agreement       | Agreement on Technical Barriers to Trade                                   |
| UN Charter          | United Nations Charter   |
| USDOC               | United States Department of Commerce                                       |
| USITC               | United States International Trade Commission                               |
| VCLT                | Vienna Convention on the Law of Treaties                                   |
| VERs                | Voluntary Export Restraints  |
| WTO                 | World Trade Organization   |

**TABLE OF EXHIBITS**

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| <b>EU-70</b> | Proclamation 9980 of January 24, 2020, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, Federal Register vol. 85, no. 19, January 29, 2020   |
| <b>EU-71</b> | Twitter statement by President Trump, 2 December 2019   |
| <b>EU-72</b> | United States Department of Commerce, Office of Inspector General, Information Memorandum for Secretary Ross: "Management Alert: Certain Communications by Department Officials Suggest Improper Influence in the Section 232 Exclusion Request Review Process", Final Memorandum No. OIG-20-003-M, 28 October 2019 |
| <b>EU-73</b> | Proclamation 9772 of August 10, 2018, Adjusting Imports of Steel Into the United States, Federal Register vol. 158, no. 83, August 15, 2018   |
| <b>EU-74</b> | Presidential Proclamation 9888 of 17 May 2019, "Adjusting Imports of Automobiles and Automobile Parts Into the United States"   |
| <b>EU-75</b> | Joint Statement by the United States and Canada on Section 232 Duties on Steel and Aluminum   |
| <b>EU-76</b> | Joint Statement by the United States and Mexico on Section 232 Duties on Steel and Aluminum   |
| <b>EU-77</b> | Proclamation on Adjusting Imports of Steel into the United States, 19 May 2019  |
| <b>EU-78</b> | Proclamation on Adjusting Imports of Aluminum into the United States, 19 May 2019   |
| <b>EU-79</b> | Tokyo Round Understanding on Dispute Settlement (L4907)   |

## I. MEASURES AT ISSUE AND TERMS OF REFERENCE

### Question 1

Please succinctly identify and enumerate the measures at issue in this dispute, including the specific legal instruments corresponding to each measure.

- a. For each of these measures, please clarify whether they are being challenged independently or if they could be considered as parts of one single broader measure.
  - b. Please identify the exact language used in the complainant's panel request identifying each of the measures identified above as well as the specific legal instruments corresponding to each measure.
1. The EU will respond to the two sub-questions together.
  2. The EU refers, first of all, to para. 11 of its first written submission. It is challenging, first, the steel and aluminium measures. We define those two measures as import adjustments, that is to say the tariff and non-tariff treatment of steel and aluminium imports. Each of these two measures is challenged independently.
  3. The facts and evidence underlying the steel measure are set out in Section 2.5 of the EU's FWS. The facts and evidence underlying the aluminium measure are set out in Section 2.6 of the EU's FWS. In addition, Sections 2.1 – 2.4 of the EU's FWS set out facts and evidence relevant both to the steel and aluminium measures.
  4. The EU has thus far referred to the following legal instruments in connection to these two measures (corresponding to them, evidencing them, or otherwise related to them):
  5. In connection to both measures:
    - Section 232 of the Trade Expansion Act of 1962<sup>1</sup>
    - Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483) (Exhibit EU-41)
    - A number of official statements,<sup>2</sup> which could be regarded as legal instruments<sup>3</sup>

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<sup>1</sup> Section 232, "Safeguarding national security", 19 U.S.C. 1862 (Exhibit EU-1).

<sup>2</sup> Sections 2.2 and 2.3 of the EU's first written submission.

<sup>3</sup> In the US, the President's Twitter statements ('tweets') are treated as "official statements by the President of the United States". See, for example, CNN, "White House: Trump's tweets are 'official statements'", 6 July 2017 (<https://edition.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>) (Exhibit EU-4); US District Court for the District of Columbia, *James Madison project et al. v. Department of Justice*, Defendants' supplemental submission and further response to plaintiffs' post-briefing notices, preliminary statement (Exhibit EU-5), p. 4. ("The Court has asked, broadly, about the official status of the President's tweets. [...] In answer to the Court's question, the

- Memorandum for Secretary of Commerce, subject: “Response to Steel and Aluminium Policy Recommendations” (Exhibit EU-14)
- 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”, Federal Register Vol. 83, No. 53, March 19, 2018, pp. 12106-12112 (Exhibit EU-24) (March Interim Final Rule); Department of Commerce, Bureau of Industry and Security, 15 CFR Part 705, Interim Final Rule, “Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum”, Federal Register Vol. 83, No. 176, September 11, 2018, pp. 46026-46065, Exhibit EU-25 (September Interim Final Rule).

6. In connection to the steel measure:

- USDOC, Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, Federal Register, Vol. 82, No. 79, 26 April 2017, pp. 19205-19207 (Exhibit EU-60)
- 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 (19 U.S.C. 1862), U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, 11 January 2018 (the Steel Report, Exhibit EU-15)
- Proclamation 9705<sup>4</sup>
- Proclamation 9711
- Proclamation 9740
- Proclamation 9759
- Proclamation 9777.

7. In connection to the aluminium measure:

- USDOC, Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum, Federal Register, Vol. 82, No. 88, 9 May 2017, pp. 21509-21511 (Exhibit EU-61)
- 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”, 17 January 2018 (Exhibit EU-31)
- Proclamation 9704
- Proclamation 9710

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government is treating the President’s statements to which plaintiffs point – whether by tweet, speech or interview – as official statements of the President of the United States.”).

<sup>4</sup> For brevity, the EU will refer to the various presidential proclamations by number. Their full titles, references and exhibit numbers are provided in the EU’s Table of Exhibits.

- Proclamation 9739
  - Proclamation 9758
  - Proclamation 9776
8. The EU also refers to the following legal instruments published after the EU's first written submission, which are all connected to these two measures (corresponding to them, evidencing them, or otherwise related to them).
9. In connection to both measures:
- Proclamation 9980 of January 24, 2020, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, Federal Register vol. 85, no. 19, January 29, 2020 ("Proclamation 9980") (Exhibit EU-70). This Proclamation introduces further additional duties of 10 percent on certain derivative aluminium products, and 25 percent on certain derivative steel products.
  - A new official statement by President Trump, 2 December 2019: "Brazil and Argentina have been presiding over a massive devaluation of their currencies, which is not good for our farmers. Therefore, effective immediately, I will restore the Tariffs on all Steel & Aluminum that is shipped into the U.S. from those countries." (Exhibit EU-71)
  - United States Department of Commerce, Office of Inspector General, Information Memorandum for Secretary Ross: "Management Alert: Certain Communications by Department Officials Suggest Improper Influence in the Section 232 Exclusion Request Review Process", Final Memorandum No. OIG-20-003-M, 28 October 2019 (Exhibit EU-72). This document further shows that the product exclusion process is not uniform, impartial and reasonable, in support of the EU's claims under Article X of the GATT 1994.
10. In connection to the steel measure:
- Proclamation 9772 of August 10, 2018, Adjusting Imports of Steel Into the United States, Federal Register vol. 158, no. 83, August 15, 2018 ("Proclamation 9772") (Exhibit EU-73). This Proclamation increased the rate of duty for steel imports from Turkey.
11. With respect to the steel measure, as well as the legal instruments corresponding to it and evidencing it, the EU refers to the first ("the import adjustments that the US recently introduced on certain steel and aluminium products in the form of additional import duties and quantitative restrictions, as explained below, purportedly taken because of national security reasons"), third ("With respect to certain steel products, the measures at issue are the import adjustments on certain steel products...") fourth ("On 23 March 2018...") and seventh paragraph ("For each of these measures referred to above, this request also covers any further amendments...") of its Panel Request.

12. With respect to the aluminium measure, as well as the legal instruments corresponding to it and evidencing it, the EU refers to the first (“the import adjustments that the US recently introduced on certain steel and aluminium products in the form of additional import duties and quantitative restrictions, as explained below, purportedly taken because of national security reasons”), fifth (“With respect to certain aluminium products, the measures at issue are the import adjustments on certain aluminium products...”) sixth (“On 23 March 2018...”) and seventh paragraph (“For each of these measures referred to above, this request also covers any further amendments...”) of its Panel Request.
13. The EU next refers to section 5 of its FWS, starting with para. 577, containing the facts and evidence underlying the EU’s challenge against a distinct measure: Section 232 as interpreted. The EU defines this measure as the interpretation that has recently been followed, and is still being followed, by the US administration, providing for the United States’ authorities to impose trade-restrictive measures on the mere basis that certain imports cause or threaten injury to domestic commercial production facilities, which are therefore to be protected against competition from imports in order to ensure that they are economically viable.
14. The EU has thus far referred to the following legal instruments in connection to this measure (evidencing it or otherwise related to it):
- Section 232 of the Trade Expansion Act of 1962<sup>5</sup>
  - A number of official statements,<sup>6</sup> which could be regarded as legal instruments<sup>7</sup>
  - The legal instruments referred to in connection to the steel measure and the aluminium measure above<sup>8</sup>
  - The legal instruments connected to the Section 232 investigation into imports of automobiles and automobile parts, including the decision to initiate the investigation and the formal submission of the results of the investigation<sup>9</sup>, as well as Department of Commerce, Notice of Request for

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<sup>5</sup> Section 232, “Safeguarding national security”, 19 U.S.C. 1862 (Exhibit EU-1).

<sup>6</sup> Section 5.1.1.1 of the EU’s first written submission.

<sup>7</sup> In the United States, the President’s Twitter statements (‘tweets’) are treated as “official statements by the President of the United States”. See, for example, CNN, “White House: Trump’s tweets are ‘official statements’”, 6 July 2017 (<https://edition.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>) (Exhibit EU-4); US District Court for the District of Columbia, *James Madison project et al. v. Department of Justice*, Defendants’ supplemental submission and further response to plaintiffs’ post-briefing notices, preliminary statement (Exhibit EU-5), p. 4. (“The Court has asked, broadly, about the official status of the President’s tweets. [...] In answer to the Court’s question, the government is treating the President’s statements to which plaintiffs point – whether by tweet, speech or interview – as official statements of the President of the United States.”).

<sup>8</sup> EU’s first written submission, section 5.1.1.2.

<sup>9</sup> As evidenced in Press Release, “U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports”, 32 May 2018 (Exhibit EU-53); “Statement from the Department of Commerce on Submission of Automobiles and Automobile Parts Section 232 Report to the President”, 17 February 2019, (Exhibit EU-54).

Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts, Federal Register Vol. 83, No. 104, 30 May 2018 (Exhibit EU-55), and the official statements in Exhibits EU-56 and EU-57.

- Presidential Proclamation of 17 May 2019, “Adjusting Imports of Automobiles and Automobile Parts Into the United States”<sup>10</sup> (Exhibit EU-74)

15. The EU also refers to the following legal instrument, which provides further evidence and is related to this measure: a new official statement by President Trump, 2 December 2019: “Brazil and Argentina have been presiding over a massive devaluation of their currencies. which is not good for our farmers. Therefore, effective immediately, I will restore the Tariffs on all Steel & Aluminum that is shipped into the U.S. from those countries” (Exhibit EU-71).
16. With respect to Section 232 as interpreted, as well as the legal instruments evidencing it, the EU refers to the ninth paragraph of its Panel Request (“In addition, the EU considers that Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. §1862), as repeatedly interpreted by the US' administrative and judicial authorities in the above and other measures...”).

## **Question 2**

*Without prejudice to the Panel's final determination of the measures at issue in this dispute, the Panel has preliminarily identified the following elements/measures from the complainant's panel request and first written submission: (1) additional import duties; (2) country exemptions; (3) import quotas; (4) product exclusions; (5) certain measures agreed between the United States and the countries exempted from the additional duties; (6) a possible administrative practice relating to the product exclusions; (7) Section 232 of the Trade Expansion Act of 1962 as repeatedly interpreted by the US authorities. Regarding these elements/measures:*

- a. To what extent should they be understood as independent elements/measures at issue in this dispute? If not, please clarify if they are parts of a broader measure(s) or under which status should the Panel take them into account.*
- b. Is the European Union bringing independent challenges to each of these elements?*

17. The EU will address sub-questions (a) and (b) together.
18. The elements (1) – (5) identified by the Panel are aspects of the steel measure and of the aluminium measure. The EU recalls that the steel measure is defined as

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<sup>10</sup> EU's opening statement at the first substantive meeting, para. 37.

import adjustments, that is to say the tariff *and* non-tariff treatment of steel imports. Likewise, the aluminium measure is defined as import adjustments, that is to say the tariff *and* non-tariff treatment of aluminium imports. Thus, the steel measure imposes (1) additional import duties, provides for (2) country exemptions, imposes (3) import quotas, provides for (4) product exclusions, provides for and is connected to (5) various measures agreed between the United States and the countries exempted from the additional duties (among which are, notably, import quotas). The same is true of the aluminium measure.

19. With respect to element (6), the EU has not used the terms “administrative practice” in connection with the product exclusions, either as an aspect of the steel and aluminium measures or as an independent measure. The EU has, however, claimed that the steel and aluminium measures are each inconsistent with, *inter alia*, Article X:3(a) of the GATT 1994 because the administration of the product exclusions and country exemptions by the United States is not uniform, impartial or reasonable.<sup>11</sup>
20. With respect to element (7), as already explained, the EU has challenged Section 232 as interpreted, as a distinct measure at issue. This means that this is an independent measure challenged by the EU. However, describing the measure as “independent” should not be taken to mean that the facts and evidence pertaining to the steel and aluminium measure can be disregarded. The EU has argued that the steel and aluminium measures, as a whole, evidence the existence and content of that measure.<sup>12</sup>

*c. With reference to the elements/measures identified in the preceding question, please fill out the table in Annex 1. In doing so, please add any other element/measure you deem appropriate together with a reference of where it can be found in the panel request.*

21. See Annex 1.

*d. Please clarify which are the precise “measures at issue” that the European Union is referring to in paragraph 515 of the European Union’s first written submission, stating:*

*The European Union submits that the measures at issue are inconsistent with Article X:3(a) of the GATT 1994 in two respects: with regard to product exclusions and with respect to country exemptions.*

22. This paragraph refers to the two measures at issue discussed up to that point of the EU’s first written submission: the steel measure and the aluminium measure.

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<sup>11</sup> EU’s first written submission, section 4.1.4.

<sup>12</sup> EU’s first written submission, section 5.1.1.2.

With respect to the definition and content of those two measures, the EU refers to its responses to Panel Questions 1, 2(a) and 2(b).

*e. The Panel notes that in its arguments in the first written submission in relation to Article X:3(a) of the GATT 1994, the European Union possibly challenges an administrative practice followed by the USDOC in applying the product exclusion process. Such administrative practice seems to be different from the legal instruments that regulate the product exclusion process.<sup>13</sup> Such administrative practice seems to be different from the legal instruments that regulate the product exclusion process.*

*i. Is the Panel's understanding, as described above, correct? Please elaborate.*

*ii. If the answer is yes, where has this practice been identified in the European Union's panel request?*

*iii. If not, what is the specific administration that the European Union claims violates Article X:3(a) of the GATT 1994? In doing so, please refer to the measures identified in response to question No. 1 above.*

*f. Please comment on the extent to which the European Union is making a claim against the product exclusion procedure as a measure in itself (different from a possible administrative practice surrounding this element).*

23. The EU will respond to sub-questions (e) and (f) together.

24. The EU refers to its response to sub-questions (a) and (b). The EU recalls once again that it challenges, first, a steel measure and, second, an aluminium measure. Each of those two measures is evidenced by and connected to a number of legal instruments. Each of them contains a number of different provisions and has a number of different effects. Both of them provide for certain rules on product exclusion, and there is evidence on the practical application (or non-application) of those rules.

25. The EU is not claiming that there is a separate measure called, or described as, "administrative practice". Indeed, the EU is not challenging either the rules on product exclusions or the practice of their administration as a separate, independent measure. However, both the rules on product exclusion and the practical application of those rules are aspects of the steel and aluminium measures respectively. The EU has submitted evidence both on those rules and their practical application.

26. The EU recalls that Article X:3(a) of the GATT 1994 requires uniform, impartial and reasonable administration of, inter alia, *laws and regulations* described in

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<sup>13</sup> European Union's first written submission, para.523.

Article X:1. It is not necessary to define or challenge a measure as an “administrative practice” in order to succeed with a claim under Article X:3(a).<sup>14</sup> Instead, Article X:3(a) allows a challenge against a *law or regulation* that is not administered in a uniform, impartial and reasonable manner. In this case, the EU has argued that the steel and aluminium measures, and in particular the Presidential Proclamations and other rules on product exclusion<sup>15</sup>, are the “laws or regulations” of the kind described in Article X:1. It has then referred to facts and evidence showing that those “laws or regulations” have not been administered in accordance with the requirements of Article X:3(a).<sup>16</sup> To put it simply, the *measures* are the steel measure and the aluminium measure; the *claim* is that those measures have not been administered in accordance with Article X:3(a); the *evidence* for that claim are various reports demonstrating, *inter alia*, the delays, arbitrariness, and lack of transparency in the administration of product exclusions.

27. Both the measures and the claim are clearly identified in the EU’s Panel Request. With respect to the measures, the EU has provided all the references in its response to Question 1. With respect to the claim, the EU refers to the eighth paragraph, third indent, stating: “Each of the measures listed above appears to be inconsistent with the US’ obligations under the following provisions of the covered agreements: [...] Article X:3(a) of the GATT 1994, because the US has failed to administer its laws, regulations, decisions and rulings in relation to the measures at issue in a uniform, impartial and reasonable manner.” As for the evidence, there was no requirement to identify it in the Panel Request.

*g. The Panel notes that, in its first written submission, the European Union makes arguments with regards to certain measures or “alternative means” agreed between the United States and certain countries, including but not limited to the quotas imposed towards South Korea, Argentina and Brazil.<sup>17</sup> In this regard, please answer the following questions:*

- i. Other than the quotas, is the European Union also challenging any other type of agreements between the United States and the countries exempted from the additional duties?*
- ii. Please comment on the extent to which the European Union’s panel request identifies these measures.*

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<sup>14</sup> See, for example, Appellate Body Report, *EC – Bananas III*, para. 203 (“Article X:3(a) of the GATT 1994 applies to all “laws, regulations, decisions and rulings of the kind described in paragraph 1” of Article X, which includes those, *inter alia*, “pertaining to ... requirements, restrictions or prohibitions on imports ...”); Panel Reports, *US – COOL*, para. 7.812 (“To establish a violation of Article X:3(a), a complaining party must show that the responding Member administers the *legal instruments* of the kind described in Article X:1 in a manner that does not meet the standard...”, *emphasis added*).

<sup>15</sup> EU’s first written submission, paras. 517 – 519.

<sup>16</sup> EU’s first written submission, paras. 523 - 524.

<sup>17</sup> EU’s first written submission, para. 181.

28. In the section pointed to by the Panel, the EU argues that the *steel and aluminium* measures (defined, as explained above, as the tariff *and* non-tariff treatment of the relevant steel and aluminium products respectively, i.e. including quota treatment) are, and give effect to, among other things, voluntary export restraints and/or "measures" "which afford protection" similar to the measures referred to in Article 11.1(b) and footnote 4 of the Agreement on Safeguards, and are caught by that provision. The *reason* for making that argument is, indeed, that certain measures or "alternative means" have been agreed between the United States and certain countries. In that respect, in its first written submission the EU has pointed to the "agreements, arrangements and understandings" between the United States and South Korea, Argentina, Australia and Brazil (with respect to the steel measure), and Argentina and Australia (with respect to the aluminium measure). In the meantime, similar "agreements, arrangements and understandings" have also been reached with Canada and Mexico.<sup>18</sup>
29. These "agreements, arrangements and understandings" are, and are given effect by, aspects of the steel and aluminium measures, as the EU has defined them (i.e. the tariff *and* non-tariff treatment of the relevant steel and aluminium products respectively). They are not challenged as separate measures. They are aspects of, and given effect by, the steel and aluminium measures which make the steel and aluminium measures WTO-inconsistent (notably, with Article 11.1(b) of the Agreement on Safeguards and with Articles I:1 and XI:1 of the GATT 1994).
30. In this sense, the EU's claims under Article 11.1(b) of the Agreement on Safeguards cover all of the above-mentioned "agreements, arrangements and understandings", and the means by which they are given effect (as aspects of the steel and aluminium measures). As the EU has clearly explained in section 3.2.9 of its first written submission, whether or not they involve a quota, all of them are voluntary export restraints or similar measures. Even the agreements with Australia which do not appear to prescribe an explicit quota are voluntary export restraints or similar measures, because they are designed to reduce or limit import "surges", reduce "excess" production and capacity, and – literally – "restrain" exports of steel and aluminium from Australia to the United States.<sup>19</sup>

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<sup>18</sup> Joint Statement by the United States and Canada on Section 232 Duties on Steel and Aluminum (Exhibit EU-75); Joint Statement by the United States and Mexico on Section 232 Duties on Steel and Aluminum (Exhibit EU-76); Proclamation on Adjusting Imports of Steel into the United States, 19 May 2019 (Exhibit EU-77); Proclamation on Adjusting Imports of Aluminum into the United States, 19 May 2019 (Exhibit EU-78).

<sup>19</sup> EU's first written submission, paras. 438-441.

31. Similarly, the more recent agreements with Canada and Mexico are designed to monitor and prevent import “surges” of steel and aluminium products from those countries to the US<sup>20</sup>, which may lead to the imposition of additional duties. Thus, they also demonstrate that the US is seeking and maintaining voluntary export restraints or similar measures.
32. The EU’s claims against the steel and aluminium measures under Article I:1 of the GATT 1994 are also connected to these “agreements, arrangements and understandings”. The EU has argued that country exemptions, which are a consequence of these agreements, arrangements and understandings, lead to a violation of the MFN principle.<sup>21</sup> It could be added, however, that an advantage is conferred whether or not those agreements involve a quota. Indeed, this is all the more true when there is no explicit quota (as in the case of Australia, Canada and Mexico), since it is clear that imports that are subject neither to an explicit quota or to an additional duty obtain an advantage which is not extended to like products of other WTO Members.
33. For similar reasons, all of the country exemptions linked to such “agreements, arrangements and understandings” are relevant in order to show a violation of Article 2.2 of the Agreement on Safeguards.<sup>22</sup>
34. The EU’s claims against the steel and aluminium measures under Article XI:1 of the GATT 1994 are also directed at all of the “agreements, arrangements and understandings” mentioned above, as aspects of the measures, as well as the means by which such agreements, arrangements and understandings are given effect, as all of them – even those that do not prescribe an explicit quota, i.e. those with Australia, Canada and Mexico - constitute prohibitions or restrictions on imports or exports, which have limiting effects.<sup>23</sup>
35. The steel and aluminium measures, and the relevant legal instruments, are clearly set out in the EU’s Panel Request, as explained in response to Question 1. Both the steel and aluminium measure are defined as “the import adjustments... in the form of additional import duties and quantitative restrictions”.<sup>24</sup> The legal instruments, of which those measures consist and which evidence those measures, include the Proclamations published up until that time which lay down

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<sup>20</sup> Joint Statements (Exhibits EU-75 and EU-76), paras. 4-5.

<sup>21</sup> EU’s first written submission, section 4.1.3.

<sup>22</sup> EU’s first written submission, section 3.2.2.

<sup>23</sup> EU’s first written submission, section 4.1.2.

<sup>24</sup> Third and fifth paragraphs.

the country exemptions and describe the agreements connected to those exemptions.<sup>25</sup> Furthermore, the Panel Request clearly sets out all of the country exemptions known up until that time, including the ones for Australia, and clearly lists those countries for which the United States explicitly introduced a quota.<sup>26</sup> Finally, the agreements and country exemptions for Canada and Mexico are covered by the seventh paragraph of the EU's Panel Request, as they clearly fall within "further amendments, supplements, replacements, extensions, implementing measures or other related measures, including any adjustments as between tariffs, tariff quotas or quotas."

*h. The Panel notes that in its panel request, the European Union states that Section 232 of the Trade Expansion Act of 1962 is "as such" inconsistent with the United States' WTO obligations.<sup>27</sup> By contrast, in its first written submission, the European Union does not refer to a challenge "as such" and emphasises that it is not challenging Section 232 as a piece of legislation but rather the interpretation of Section 232 that has been followed by the US authorities.<sup>28</sup> What conclusion should the Panel draw from these statements in relation to the European Union's challenge against Section 232?*

36. Throughout this dispute, there has been no inconsistency in the EU's approach to this measure. The Panel Request clearly challenges Section 232 "as repeatedly interpreted by the US' administrative and judicial authorities". It does not challenge Section 232 as a piece of legislation. The EU recalls that the terms "as such" are, at best, a convenient analytical tool. They are not treaty terms and there is no requirement to use them in a particular way. The EU uses this term not to indicate a challenge to the Section 232 legislation, but simply to distinguish its challenge to Section 232 as interpreted from its challenges to the individual measures adopted as part of, or on the basis of the interpretation that is being challenged (including the steel and aluminium measures). Thus, it is the interpretation that is being challenged "as such", i.e. as an interpretation.

*i. Regarding the European Union's arguments on the product exclusions under Article X:3(a) GATT 1994<sup>29</sup>:*

*i. Please comment on the extent to which the Panel should consider the product exclusions to be an independent measure at issue and not an element or aspect of one broader measure.*

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<sup>25</sup> Third and fifth paragraphs.

<sup>26</sup> Fourth and sixth paragraphs.

<sup>27</sup> Request for the establishment of a panel by the European Union, WT/DS548, p. 4.

<sup>28</sup> European Union's first written submission, para. 579.

<sup>29</sup> European Union's first written submission, paras. 515-525.

*In doing so, please refer to the measures identified in response to question No. 1 above.*

- ii. Please indicate where the product exclusion has been properly identified or mentioned in the panel request.*
- iii. Please explain how the panel request contains an identification of this measure with a brief summary of the legal basis of the complaint that is sufficient to present the problem clearly.*

37. The EU refers to its response to sub-questions (e) and (f).

- j. The Panel notes that in its first written submission, the European Union has not presented specific arguments on its claims of violation of Article XIX:2 of the GATT 1994. Please confirm if the European Union is still challenging this measure under this provision.*

38. The EU has set out the substance of this claim in the context of its claims under Articles 12.1, 12.2 and 12.3 of the Agreement on Safeguards.<sup>30</sup> Those same facts and arguments are relevant for the claim under Article XIX:2 of the GATT 1994, which the EU maintains on a consequential basis.

- k. The Panel notes that in its first written submission, the European Union has only presented arguments on the inconsistency of Section 232 as interpreted with Articles II:1(a) and (b), XI:1 and XIX:1(a) of the GATT 1994, Articles 4.2, 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards and Article XVI:4 of the WTO Agreement. In contrast, in its panel request, the European Union had indicated that Section 232 as interpreted is inconsistent "with each of the provisions of the covered agreements set out above ... and ... Article XVI:4 of the WTO Agreement".<sup>31</sup> Please confirm the extent to which the European Union is presenting claims regarding this measure under the rest of the provisions raised in its panel request.*

39. The EU is only making those claims against Section 232 as interpreted that have been presented in its first written submission.

## **II. SCOPE OF APPLICATION OF THE AGREEMENT ON SAFEGUARDS**

### **II.1 Legal characterization of measures as a safeguard measure**

#### **Question 3**

*Which of the measures at issue, as identified in response to question No. 1, are being legally characterized as safeguard measures?*

- a. The Panel notes that in its first written submission, the European Union argues that Section 232 as interpreted falls within the scope of the Agreement on*

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<sup>30</sup> EU's first written submission, section 3.2.10.

<sup>31</sup> Request for the establishment of a panel by the European Union, WT/DS548, p. 4. The provisions listed in the European Union's panel request are: Articles I:1, II:1(a) and (b), X:3(a), XI:1, XIX:1(a) and XIX:2 of the GATT 1994 and Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 7, 9.1, 11.1(a), 11.1(b), 12.1, 12.2 and 12.3 of the Agreement on Safeguards.

*Safeguards because it provides for the imposition of safeguard measures.<sup>32</sup> In this regard:*

- i. Is the European Union arguing that Section 232 as interpreted is a safeguard measure?*
- ii. Please elaborate as to how and why Section 232 as interpreted falls within the scope of the Agreement on Safeguards. Under which particular disciplines?*

40. The EU refers to its response to Question 1. The steel and aluminium measures are being legally characterised as safeguard measures. They also fall within the scope of the Agreement on Safeguards because they are voluntary export restraints and/or "measures" "which afford protection" similar to the measures referred to in Article 11.1(b) and footnote 4 of the Agreement on Safeguards, and are caught by that provision.
41. Section 232 as interpreted, indeed, falls within the scope of the Agreement on Safeguards because it provides for the imposition of safeguard measures. It is a central aspect, and a defining characteristic of Section 232 as interpreted, that it provides for the imposition of *safeguard* measures in certain circumstances and to certain ends.<sup>33</sup>
42. Presumably, the Panel would have no difficulty finding that a piece of legislation which explicitly directs the US authorities to take safeguard action in certain circumstances and to certain ends falls within the scope of the Agreement on Safeguards, and that it could be challenged under various provisions of that agreement. If that is the case, there is no reason why the same kind of challenge could not be made against an unwritten measure, or a composite measure, or against a measure that does not explicitly state that it provides for the adoption of safeguard measures.
43. The EU is not arguing that Section 232 as interpreted is an individual safeguard measure. It is, however, a measure taken by the United States which provides for (and has led to) the adoption of individual safeguard measures, and it is – in substantive terms – contrary to Articles 4.2, 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards.
44. Article 1 of the Agreement on Safeguards provides that that agreement "establishes rules for the application of safeguard measures". A piece of legislation, or an unwritten measure, or any other kind of measure, that is

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<sup>32</sup> EU's first written submission, para. 628.

<sup>33</sup> EU's first written submission, para. 628.

inconsistent with those rules, is therefore within the scope of that agreement, whether or not it is itself an individual safeguard measure within the terms of Article XIX of the GATT 1994. Articles 11.1(a) and 11.1(b) further demonstrate that measures which are not themselves individual safeguard measures within the terms of Article XIX of the GATT 1994 can be covered by the Agreement on Safeguards and violate its provisions.

45. This is confirmed by the well-established principle that legislation, and in particular legislation on trade remedies, can be challenged as such and not merely as applied in WTO dispute settlement.<sup>34</sup> In order for these challenges to be addressed, it is not necessary that a provision of the relevant agreement specifically deals with such legislation; rather, such legislation can simply be assessed for consistency with the substantive provisions of the agreement. Such an assessment might show no inconsistency, but this would not mean that the legislation does not fall within the scope of the agreement. In the EU's view, the same must be true when a claim is addressed against a more general measure that is not simply a piece of legislation. The question is whether the inconsistency has been established, not whether a valid claim has been made under the Agreement on Safeguards.

#### **Question 4**

*What are the implications for the present proceedings of the fact that there is no express definition of what a safeguard measure is in the covered agreements?*

46. A panel must begin its analysis with the threshold question regarding the determination of the applicable WTO obligations.
47. As there is no express definition of a safeguard measure in the covered agreements (that is, language that provides that: "a safeguard measure is defined as ..."), the Panel should start by noting that Article 1 of the Agreement on Safeguards sets forth that this Agreement applies to measures of the type "provided for" in Article XIX of the GATT 1994. Whilst this provision may not be expressly framed as a "definition", it nevertheless describes something to which the Agreement on Safeguards applies.
48. In that respect, the Appellate Body has provided useful guidance in *Indonesia - Iron or Steel Products*, where it has discerned the two defining features of a safeguard measure on the basis of the text of Article XIX of the GATT 1994.

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<sup>34</sup> Appellate Body Report, *US – 1916 Act*, para. 61. *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

49. Thus, the Panel should assess whether the US measures at issue present the objective features of safeguard measures.

**Question 5**

*With reference to the Appellate Body Report in Indonesia – Iron or Steel Products:*

- a. Are the two features identified in the mentioned Report the only necessary conditions for a measure to be legally characterized as a safeguard measure?<sup>35</sup>*
- b. Did the Appellate Body in the mentioned case expressly affirm that these are the only two necessary conditions? Please refer to the precise statements in the Report that are relevant in this regard.*
50. Apart from the two constituent features clearly identified by the Appellate Body, there are no other necessary elements that each and every measure must have in order to be considered a safeguard. Certainly, elements that are under the sole control of the adopting Member, such as the choice of domestic legal bases or procedures, or the choice to notify or not notify, cannot be determinative in that sense.
51. A panel should consider in its analysis elements such as the manner in which a measure was adopted and its characterization in the respective Member's municipal law. However, a panel may not base its conclusions solely or predominantly on those elements, which are subjective by their very nature, not dispositive, and may allow Members to evade the disciplines of the Agreement on Safeguards and in particular the provisions allowing, under certain conditions, for re-balancing.
- c. To what extent are the legal and factual circumstances of the present dispute:*
- i. Similar to those at issue in Indonesia – Iron or Steel Products?*
- ii. Distinct from those at issue in Indonesia – Iron or Steel Products?*
52. In *Indonesia – Iron or Steel Products* both complainants and the respondent agreed that the measure at issue was a safeguard measure. The measure at issue was taken pursuant to Indonesia's domestic safeguards law and following those proceedings. However, on the basis of the objective characteristics of the measure

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<sup>35</sup> See Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

at issue (Indonesia has no tariff binding on galvalume in its WTO Schedule of Concessions), the panel and the Appellate Body have found that the measure at issue cannot be objectively characterized as a safeguard measure (the imposition of the specific duty did not suspend any of Indonesia's GATT obligations, nor did it withdraw or modify any of Indonesia's GATT concessions).<sup>36</sup>

*d. What legal relevance, if any, should be given to the conclusions by the Appellate Body in the mentioned case given the similarities and differences identified in response to the preceding question?*

53. If the conclusions reached by the Appellate Body in *Indonesia – Iron or Steel Products* hold true, then also the reverse should be true: even if a Member denies that the measure at issue is a safeguard measure (because it has adopted it, for instance, pursuant to its national security legislation), a panel may nevertheless find to the contrary, on the basis of an objective assessment.
54. Thus, the Appellate Body's report in *Indonesia – Iron or Steel Products* is highly relevant to the Panel's analysis in the present proceedings.

*e. Are there any circumstances in which a measure can objectively present the two above-mentioned features but nevertheless fall outside the scope of the Agreement on Safeguards and/or Article XIX of the GATT 1994?*

*f. To what extent could those features be considered to be present in measures such as, for example, other trade remedy measures or DSB-authorized countermeasures?*

55. In *Indonesia – Iron or Steel Products*, the Appellate Body identified the “constituent features” of a safeguard measure on the basis of the terms of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994.
56. The wording of those provisions does not provide for additional constituent features of a safeguard measure. Importantly, the Appellate Body distinguished between the “features that determine whether a measure can properly be characterized as a safeguard” and the “conditions that must be met in order for the measure to be consistent” with the safeguards disciplines.
57. The two “constituent features” identified by the Appellate Body in *Indonesia – Iron or Steel Products* distinguish safeguard measures from other trade remedies measures or from DSB-authorized countermeasures.

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<sup>36</sup> See e.g. Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.65.

58. The two “constituent features” of a safeguards measure are: (i) the measure suspends, withdraws, or modifies a GATT 1994 obligation or concession; and (ii) the suspension is designed to prevent or remedy serious injury to a domestic industry caused or threatened by increased imports.
59. There are several differences between a safeguard measure and an antidumping or countervailing measure. While safeguard measures are designed to impose restrictions on imports generally, antidumping and countervailing measures are designed to impose restrictions on imports from particular Members, whose products are dumped or subsidised. At the same time, safeguard measures are applied to “fair” trade, while antidumping and countervailing measures address what is often referred to as “unfair” trade (injurious dumping and injurious subsidization)
60. Thus, the three different types of trade remedy measures (antidumping, countervailing and safeguard measures) address three different types of imports: dumped, subsidised, and increased. A safeguard measure is designed to protect a domestic industry from an increase in “fairly” traded imports, as opposed to “unfairly” dumped or subsidised injurious imports.
61. Similarly, there are differences between safeguard measures and DSB-authorized countermeasures. The objective of countermeasures is not to protect the domestic industry from an increase in “fairly” traded imports, but to induce compliance with the relevant DSB recommendations and rulings.

### **Question 7**

*To what extent are the terms “to suspend the obligation in whole or in part or to withdraw or modify the concession” synonymous with violations of the GATT 1994?*

62. Whether a measure “suspends” an obligation or concession and whether it “violates” an obligation are distinct questions which may, but need not necessarily, be answered in the same way.
63. To suspend a concession with respect to another Member or Members means to suspend a promise, or commitment, to act or refrain from acting in a certain way towards that Member or Members. To take the example of duties, to suspend a concession in a Member’s Schedule means to suspend the “promise” (towards one or more other Members) not to exceed the bound duty rate.
64. Whether the same Member actually exceeds the duty rate in question is a separate issue. It is possible, for example, that the Member suspends a

- concession but does not actually increase the relevant duty (or not yet). In this scenario, there would be a suspension, but there would not be any violation of Article II:1(b), because the bound duty would not have been exceeded.
65. Indeed, to take one example, the European Union's rebalancing measure responding to the US safeguard measures at issue in this dispute suspended concessions in a separate prior step, including with respect to a number of tariff lines for which the duty rates have not yet been increased.
66. On the other hand, a measure could suspend a concession while at the same time, in a single step, effecting an action that constitutes a violation of a GATT obligation, such as a duty in excess of a bound rate. Thus, the underlying US safeguard measures have, in the EU's view, suspended the concessions of the United States and (among other things) imposed duties in excess of bound rates, at the same time.
67. There is, however, one very important caveat, and a further distinction between suspensions and violations. A valid suspension, i.e. a suspension taken in compliance with the applicable provisions of the covered agreements, such as a WTO-consistent modification of a schedule under Article XXVIII of the GATT 1994, a WTO-consistent safeguard measure, or a WTO-consistent rebalancing measure under Article 8.2 of the Agreement on Safeguards, does not amount to or create any violation of the covered agreements, not even a *prima facie* violation which would then presumably need to be justified. A valid suspension means that, at least temporarily, the suspending Member does not violate the covered agreements. In the EU's view, the United States' safeguard measures on steel and aluminium suspend concessions, but not *validly*, because they are WTO-inconsistent for a number of reasons.

### **Question 8**

*Regarding Article XIX:2 of the GATT 1994, please compare the notification obligation in this provision with the one contained in Article 12 of the Agreement on Safeguards. In this regard:*

- a. Please identify the overlapping and distinct elements, if any, among these two sets of notification obligations.*
  - b. Can a Member's compliance with one of these two sets of notification obligations render a Member in automatic compliance with the other?*
  - c. To what extent have the notification obligations under Article XIX:2 of the GATT 1994 been subsumed by Article 12 of the Agreement on Safeguards?*
68. The EU will respond to the sub-questions together.

69. The EU will compare the two provisions, restricting itself to the notification obligation, as requested in the question. It should, however, be noted that the provisions include other obligations, notably the obligation to afford adequate opportunities for consultations. The EU will not address safeguard actions with respect to “concessions with respect to a preference” under Article XIX:1(b) and the corresponding part of Article XIX:2 (second sentence), which do not seem pertinent in this dispute.
70. Both provisions require Members to notify the Membership before taking a safeguard measure. Article XIX:2 refers simply to action “pursuant to” Article XIX:1, i.e. safeguard action. Article 12.1, on the other hand, provides a list of such actions that require notification: initiation of an investigation, an injury or threat of injury finding, and a decision to apply or extend a safeguard measure.
71. Both provisions allow for the possibility to take provisional measures and require prior notification of such measures (last sentence of Article XIX:2 and Article 12.4).
72. Unlike Article 12 (see, in particular, Article 12.2, referring to “all pertinent information” and providing a non-exhaustive list of such information) Article XIX:2 does not directly regulate the information that must be provided when making the notification. However, even the Article XIX:2 obligation to afford an opportunity to consult should be read as requiring the provision of adequate information.
73. Article 12 is more precise, and indeed more demanding, with respect to the timing of notifications. Thus, while Article XIX:2 merely requires notification of safeguard actions “as far in advance as may be practicable”, Article 12.1 requires notification “immediately” upon the events in subparagraphs (a) – (c). Similarly, Article 12.5 requires “immediate” notification, Article 12.6 requires “prompt” notification”, and Article 12.7 requires notification “not later than 60 days” after the relevant measure’s entry into force.
74. Furthermore, Articles 12.5, 12.6 and 12.7 provide for a set of notification obligations that are not covered by Article XIX:2, whereas Articles 12.8 and 12.9 provide for notification possibilities not covered by Article XIX:2 (but certainly not precluded by Article XIX:2 either).
75. Unlike Article XIX:2, Article 12 provides for notifications to be made to the Committee on Safeguards (see in particular Article 12.10). This notification will be circulated to the Membership, which in practice corresponds to the Article XIX:2 obligation to notify the Contracting Parties.

76. Finally, unlike Article XIX:2, Article 12.11 deals with certain circumstances in which notification is not required (confidential information).
77. Keeping these differences in mind, the EU considers that the notification obligations in Article 12 are more extensive and more detailed than those in Article XIX:2.<sup>37</sup> In other words, a violation of the notification obligations in Article XIX:2 would typically also entail a violation of the notification obligations in Article 12. For example, a failure to notify a decision to apply a safeguard measure, such as in this case, would be inconsistent both with Article XIX:2 and with Article 12.1. On the other hand, certain actions would be inconsistent with Article 12 without being inconsistent with Article XIX:2. For example, a failure to notify the results of the consultations would be inconsistent with Article 12.5, but not with Article XIX:2.
78. The jurisprudence has explained that the two provisions should be interpreted together, i.e. in a way that gives meaning to all of their terms, because these provisions are both “linked to the obligations to notify and give Members the opportunity to hold consultations”.<sup>38</sup> This is, moreover, consistent with the more general notion that “Article XIX of the GATT 1994 and the Agreement on Safeguards constitute an inseparable set of rights and disciplines that have to be addressed simultaneously”.<sup>39</sup> This does not, however, mean that one is “subsumed” into the other, or that one becomes irrelevant. To the contrary, “the obligation on Members to notify their safeguard measures is based both on Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards.”<sup>40</sup> As the Appellate Body explained, it precisely follows from the notion of a single undertaking that “all WTO obligations are generally *cumulative* and Members must comply with all of them *simultaneously*” (emphasis added).<sup>41</sup>
79. Keeping all this in mind, the EU does not consider that compliance with the notification obligations in Article XIX:2, or with those in Article 12, would lead to “automatic” compliance with the other provision. This would clearly not be the case when there is compliance with Article XIX:2, because the obligations in Article 12 are more extensive. Even with a finding of “compliance” with Article 12

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<sup>37</sup> See, along those lines, *Panel Report, Dominican Republic – Safeguard Measures*, paras. 7.428 and 7.432.

<sup>38</sup> *Panel Report, Dominican Republic – Safeguard Measures*, para. 7.419.

<sup>39</sup> *Panel Report, Dominican Republic – Safeguard Measures*, paras. 7.66 and 7.418, citing Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 16; *Korea – Dairy Products*, para. 74; and *Argentina – Footwear (EC)*, para. 81.

<sup>40</sup> *Panel Report, Dominican Republic – Safeguard Measures*, para. 7.417.

<sup>41</sup> Appellate Body Report, *Korea – Dairy Products*, para. 74;

(keeping in mind of course, that there is no such thing as a finding of compliance in original proceedings, merely a finding that no WTO-inconsistency has been shown), however, there would be no “automaticity”. A panel could, at best, refer to the findings made under Article 12 and reach the same conclusion. It should also be added that, if a complainant raises claims under Article XIX:2 only, or under Article 12 only, the panel would of course be required to address those claims. It could not conclude that, because claims under one provision have not been made, compliance can be presumed.

80. Furthermore, the EU would not describe Article XIX:2 as “subsumed” by Article 12. While both provisions should be taken into account when assessing a claim of inconsistency with the notification obligations, both sets of obligations continue to apply concurrently, and findings can be made under either, or both. The fact that the Article XIX:2 notification obligations are also covered by Article 12 does not change that conclusion.

### **Question 9**

*Regarding the notification requirements set out in Article XIX of the GATT 1994 and Article 12 of the Agreement on Safeguards:*

- a. *Are notifications pursuant to either, or both, of these provisions a prerequisite to the applicability of safeguard disciplines to measures taken by WTO Members?*
  - b. *Which precise terms in Article XIX of the GATT 1994 and the Agreement on Safeguards, if any, indicate that formal notifications of safeguard action are a necessary condition or prerequisite for the applicability of safeguard disciplines?*
  - c. *To what extent do the provisions on notification of safeguard actions under Article XIX:2 of the GATT 1994 and Article 12 the Agreement on Safeguards relate to the consistency of measures with those provisions as opposed to the applicability of safeguard disciplines to measures? Do Article XIX:2 of the GATT 1994 and Article 12 the Agreement on Safeguards serve different functions in this regard?*
81. Before giving a more detailed explanation, the EU will first briefly respond to the sub-questions (a) – (c). The EU will then address sub-question (d) separately. Thus:
- (a) notifications are not prerequisites for the applicability of safeguard disciplines;
  - (b) none of the terms of those provisions indicate any such thing;
  - (c) both of those provisions relate to consistency, and not to the applicability of safeguard disciplines (although a notification pursuant to those provisions could

- be used as *further*, or *confirming* evidence of the fact that a measure is a safeguard).
82. Contrary to what the United States is attempting to argue in the *Additional Duties* disputes,<sup>42</sup> the fulfilment of the requirements in Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards is emphatically a question of consistency, and not a question that decides the applicability of the Agreement on Safeguards. If a Member decides to take a measure that is objectively a safeguard without notifying it, the conclusion is not that Article XIX of the GATT 1994 and the Agreement on Safeguards do not apply. The conclusion is that the measure is WTO-inconsistent.
83. Thus, the US' unilateral decision to breach the obligation to properly notify its safeguard measure<sup>43</sup> cannot mean that the Agreement on Safeguards does not apply. Accepting the US' view would, of course, make large swaths of WTO law completely ineffective, because any number of WTO obligations, including notably those on safeguards, anti-dumping and anti-subsidy measures, could be sidestepped by simply asserting that the measure is something other than what it actually, objectively, is.
84. The Appellate Body has made clear that the notification of a safeguard measure is an obligation, i.e. a condition qualifying the exercise of the right to impose a safeguard measure, rather than a "constituent feature"<sup>44</sup> of a safeguard measure. That obligation, or condition, is imposed by Article XIX of the GATT 1994 and by the Agreement on Safeguards. Specifically, the Appellate Body found that Article 12.1 of the Agreement on Safeguards "sets out three separate obligations to make notification to the Committee on Safeguards, each of which is triggered "upon" the occurrence of an event specified in one of the three subparagraphs".<sup>45</sup>

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<sup>42</sup> See, for example, the US' first written submissions in DS561 (<https://ustr.gov/sites/default/files/enforcement/DS/Sub1.fin.%28Public%29.pdf>) and DS566 ([https://ustr.gov/sites/default/files/enforcement/DS/Sub1.fin.%28public%29\\_0.pdf](https://ustr.gov/sites/default/files/enforcement/DS/Sub1.fin.%28public%29_0.pdf)), section VI.

<sup>43</sup> See, for example, the US' first written submission in DS561 (<https://ustr.gov/sites/default/files/enforcement/DS/Sub1.fin.%28Public%29.pdf>), para. 57 ("The United States has not invoked the Safeguard Agreement in connection with this dispute, and the Safeguard Agreement simply does not apply"), as well as the US' opening oral statement in that dispute (<https://ustr.gov/sites/default/files/enforcement/DS/US.Pnl.Mtg1.Open.Stmt.%28As.Delivered%29.fin.%28Public%29.pdf>), paras. 26 ("without invocation, and without notification of that invocation, a Member has not taken and is not "free" to "take action pursuant" to Article XIX"); 41 ("if the first step of invocation and notification does not take place, the measure is not a measure taken pursuant to Article XIX") and 45 ("The United States has not notified the WTO Committee on Safeguards of any relevant safeguard because the United States did not invoke Article XIX of the GATT 1994.").

<sup>44</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60 ("any relevant notifications to the WTO Committee on Safeguards").

<sup>45</sup> Appellate Body Report, *US – Wheat Gluten*, para. 102.

85. Notification is a “prerequisite” for taking a safeguard because it is a legal obligation that must be complied with before a safeguard measure may be applied in conformity with the Agreement on Safeguards.<sup>46</sup> In other words, notification is a prerequisite of *consistency* with the Agreement on Safeguards, and not a prerequisite for its *applicability*. In precisely the same way, it is a “condition which qualifies the exercise of the right” to take a safeguard measure.<sup>47</sup> As a GATT panel cited by the United States in the *Additional Duties* disputes confirms explicitly, “the contracting party taking action under Article XIX must give notice in writing to the Contracting Parties before taking action.”<sup>48</sup> This is a straightforward obligation under Article XIX and the Agreement on Safeguards, nothing more and nothing less. A Member proposing to apply a safeguard measure must first notify it, then consult on it, and only then may it apply it, assuming the other applicable conditions have been met. There is no basis whatsoever to claim that these obligations only apply to measures which the imposing Member has benevolently decided to call safeguards.
86. In this respect, the EU would add that a measure is a safeguard if and when it has the objective characteristics of a safeguard, as set out by the Appellate Body in the *Indonesia – Iron or Steel Products* report. The timing of the notification of the measure, or indeed the very existence (or not) of a notification, does not decide whether or not the measure is a safeguard.
87. It is clear from the Agreement on Safeguards and from the jurisprudence that a measure can indeed be a safeguard even before notification. This further disproves the US claim that the measure’s characterization as a safeguard hinges on the existence or absence of a notification.
88. Article 12.1(c) of the Agreement on Safeguards requires Members to immediately notify the Committee on Safeguards upon “taking a decision to apply... a safeguard measure.” A “decision to apply” a safeguard measure typically precedes the measure’s actual application, sometimes by several months. In particular cases, panels have considered claims on whether a delay of several days, weeks or months between adoption and notification complies with the requirement of “immediate” notification.<sup>49</sup> In each of those cases, however, it was clear that the measure was subject to the Agreement on Safeguards, including the disciplines of

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<sup>46</sup> US’ first written submission, para. 66.

<sup>47</sup> US’ first written submission, para. 67.

<sup>48</sup> GATT Working Party Report, *US – Fur Felt Hats*, GATT/CP/106, paras. 3-4.

<sup>49</sup> For example, Panel Reports, *Ukraine – Passenger Cars*, para. 7.494 (referring to Article 12.1(b), which makes no material difference); *Korea- Dairy*, para. 7.145.

Article 12, immediately upon adoption, i.e. *before* notification. It is also clear that the measure that must be notified under Article 12.1(c) is a *safeguard* measure.<sup>50</sup>

89. Thus, the measure's characterization as a safeguard precedes the obligation to notify both logically (because only safeguard measures are required to be notified under Article 12.1(c)) and temporally (because the obligation to notify is triggered after the decision to apply a safeguard measure is taken<sup>51</sup>).
90. Indeed, holding that notification is a necessary prerequisite for the *existence* of a safeguard would render the *obligation* to notify pointless. Under that interpretation, if a measure was not notified, it would not be subject to the obligation because it would not be a safeguard measure in the first place. If it was notified and *therefore* a safeguard, then there could be no violation of the obligation. Hence, that interpretation reduces the notification obligations in Article 12 to inutility, contrary to the well-established rule of effectiveness in treaty interpretation.<sup>52</sup>
91. This view is also supported by the 1993 Decision on Notification Procedures,<sup>53</sup> a binding decision taken by the Ministerial Conference and annexed to the Uruguay Round agreements. That Decision, first, confirms in several places that notification, including the notification of safeguard measures and actions, is an obligation, i.e. not a constituent feature of a safeguard measure.
92. Second, it states expressly that notification is "without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the Multilateral Trade Agreements..." This strongly suggests that, in the view of the Membership, the presence or absence of a notification is not determinative of whether the rights and obligations under the Agreement on Safeguards are relevant, i.e. of whether that agreement applies.

d. *Are there any other covered agreements, or provisions thereof, whose applicability depends on a Member's invocation or notification? To what extent are such other covered agreements, or provisions thereof,*

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<sup>50</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.417 (referring to the "obligation on Members to notify their safeguard measures" based on Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards).

<sup>51</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.433 ("Article XIX:2 of the GATT 1994, therefore, read in conjunction with Article 12.1(c) of the Agreement on Safeguards, determines the obligation to notify a definitive measure before it is applied but not necessarily before it is adopted.").

<sup>52</sup> Appellate Body Report, *US - Gasoline*, para. 21.

<sup>53</sup> Decision on Notification Procedures, adopted by the Committee on Trade Negotiations on 15 December 1993, as annexed to the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, done at Marrakesh on 15 April 1994.

*comparable to or distinguishable from Article XIX of the GATT 1994 and the Agreement on Safeguards?*

93. To the EU's knowledge, there are no such agreements, because the applicability of a covered agreement is an objective question. Indeed, extensive jurisprudence confirms that the applicability of the covered agreements, and of their provisions, is an objective question.<sup>54</sup>
94. However, the question of applicability should be distinguished from the question of reliance on particular provisions in disputes. Thus, a finding of WTO-inconsistency requires a claim to be made under a particular provision. The absence of a claim under a provision does not mean that – outside the context of the dispute – the provision does not apply. Nevertheless, findings of WTO-inconsistency cannot be made. Similarly, an affirmative defence like Article XX of the GATT 1994 can only be applied by a panel if a Member invokes it. But this kind of "invocation" also does not affect the question of whether or not, objectively, a measure falls within a certain category of measures. It could merely affect the outcome of a dispute. In any event, Article XIX of the GATT 1994 is not an affirmative defence, and neither is the Agreement on Safeguards.

### **Question 10**

*Regarding Article XIX of the GATT 1994:*

*a. Please concisely enumerate the rights set out in this provision. To whom are these rights granted?*

95. The rights and obligations in Article XIX of the GATT 1994 do not exist in isolation from each other. Indeed, the right to take a safeguard measure depends on the compliance with the obligations that qualify the exercise of that right.
96. Article XIX:1(a) is exceptional in nature, as it provides for the right to impose import restrictions on products of fair trade. Such products are not dumped or subsidised.
97. Because of the particularities of the right in Article XIX:1(a), Article XIX:3(a) provides for the right to impose rebalancing measures in response to a safeguard measure. This right is also exceptional under the covered agreements.
98. Both rights mentioned (to apply a safeguard measure in first place and then for the affected Members to apply rebalancing measures) are conditioned by the respect of certain obligations.

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<sup>54</sup> EU's first written submission, section 3.1.1.

*b. Please concisely enumerate the obligations set out in this provision. To whom are these obligations addressed?*

99. Article XIX provides for different obligations regarding the adoption and application of safeguard measures, as well as with regard to rebalancing measures.
100. With regard to the adoption of safeguard measures, the EU briefly mentions the obligation to base measures on determinations of increased imports of the product concerned; the existence of unforeseen developments; serious injury to the domestic industry producing the like or directly competitive product. With respect to the application of safeguard measures, the obligations include the obligation to notify safeguard measures to WTO Members in accordance with Article XIX:2 etc. These two obligations are addressed to the Members adopting and applying safeguard measures.
101. Finally, with regard to rebalancing measures, there is an obligation that the measure shall reflect substantially equivalent concessions. This obligation is addressed to the Members adopting rebalancing measures.

### **Question 11**

*Is it necessary for a Member to intend to exercise the rights provided for under Article XIX of the GATT 1994 and the Agreement on Safeguards in order for the disciplines under that provision and agreement to apply? In this regard:*

- a. What is the relevance of the fact that under Article XIX:1(a) of the GATT 1994 a Member "shall be free" to take the actions contemplated under that provision?*
- b. Which party in dispute settlement proceedings would be required to demonstrate such intention to exercise the rights provided for under Article XIX of the GATT 1994 and the Agreement on Safeguards?*

102. The EU will address sub-questions (a) and (b) together.
103. A measure is a safeguard if and when it has the objective characteristics of a safeguard, as set out by the Appellate Body in the *Indonesia – Iron or Steel Products* report. The assessment has to be objective, i.e. based on the objective characteristics of the measures as opposed to their unilateral characterisation by the adopting Member. An objective assessment also means that the legal

characterisation of a measure cannot depend on the purely subjective intent of the adopting Member.

104. On the other hand, an objective assessment may entail taking into account the measure's regulatory objective(s), as part of the assessment of the measure's "design, structure, and expected operation".<sup>55</sup> For example, when assessing the US' safeguard measure, it is relevant that the objective of the measure is to remedy the injury caused to domestic industry by allegedly increasing imports.
105. However, it is not possible for a single Member to state, or even demonstrate, its subjective intention and thereby avoid scrutiny under the (objectively) applicable agreements. A measure can be a safeguard even when the adopting Member expressly intends otherwise. Indeed, the Appellate Body has already confirmed that it is possible for a measure *not* to be a safeguard even when the adopting Member expressly intends otherwise.<sup>56</sup> The opposite must be true as well. Thus, it is not required or needed for any party to demonstrate an intention to exercise the rights in Article XIX and the Agreement on Safeguards, whether in order to decide on the applicability of those provisions, or in order to decide on the WTO-consistency of the measure with those provisions. Depending on all the facts, a measure could be a WTO-consistent safeguard, a WTO-inconsistent safeguard, a WTO-consistent non-safeguard, or a WTO-inconsistent non-safeguard, whatever the underlying "intentions" of any party.
106. The terms "shall be free" indicate, simply, that there is a right to take a safeguard measure, conditioned upon the fulfilment of the obligations in Article XIX and the Agreement on Safeguards. If all the conditions are met, the Member shall be free to take a safeguard measure. The Member is not free to decide for itself whether those provisions apply.

*c. To what extent could formal notification of safeguard action serve as evidence and/or be dispositive of such intent?*

107. As already indicated, formal notification or absence thereof cannot decide the question of the applicability of Article XIX and the Agreement on Safeguards. A notification could serve as evidence of the intent to exercise the rights under Article XIX and the Agreement on Safeguards. In that sense, it could be used as *further*, or *confirming* evidence of the fact that a measure is a safeguard. However, the notification in itself, or even such an intent in itself, could not

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<sup>55</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. See also the response to Question 10.

<sup>56</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.65.

demonstrate that those provisions apply, as the Appellate Body has explained.<sup>57</sup> Likewise, the *absence* of such notification or of such intent could not demonstrate that those provisions *do not* apply.

## **Question 12**

*Bearing in mind the conclusions of the Appellate Body in Indonesia – Iron or Steel Products, how do the country exemptions or the product exclusions relate to the objective of preventing or remedying serious injury to the domestic industry?*

108. First of all, it is not necessary for each and every aspect of a measure to have the objective of “preventing or remedying serious injury to the domestic industry” in order for that measure to be a safeguard. It suffices that this is one objective of the measure. Thus, with or without the product exclusions, and with or without the country exemptions, the steel and aluminium measures would still be safeguards.
109. In any event, both the country exemptions and the product exclusions are designed to achieve that objective. Thus, they provide further support to the EU’s argument that the steel and aluminium measures, of which they are aspects, are safeguards.
110. First, the country exemptions are closely connected to the additional duties imposed by the steel and aluminium measures. They are put in place if, and only if, an alternative arrangement of equivalent effect is agreed or otherwise put in place by the United States and the country concerned. In most cases, this arrangement involves an explicit numerical quota on imports. In some cases, it involves a monitoring system for imports with the possibility of imposing duties. Either way, the arrangements are designed to restrain imports of steel and aluminium in order to protect the relevant domestic industry, i.e. improve its situation and help it recover from the alleged injury caused by imports. It is clear from the various Proclamations cited in the EU’s first written submission and in these responses that the United States invited all Members with which it has a “security relationship” to discuss these alternative arrangements, as a condition for a country exemption.<sup>58</sup>

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<sup>57</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.60, 5.65 and 5.92 (confirming that Indonesia made a notification to the Committee on Safeguards).

<sup>58</sup> See response to Question 2(g), as well as sections 3.1.5, 3.2.9, 4.1.3 and 4.1.5 of the EU’s first written submission.

111. Regarding the product exclusions,<sup>59</sup> they are designed to remedy any adverse effects of the steel and aluminium measures on various constituencies in the United States, including various domestic industries, and including the very same domestic industry that is protected by the steel and aluminium measures. In particular, product exclusions can be requested to shield upstream steel and aluminium products that serve as inputs in downstream production from any duties or quotas (because product exclusions are possible also for imports covered by country exemptions). Indeed, this is explicitly confirmed by the September Interim Final Rule (Exhibit EU-25), p. 46028:

The Department understands that and is taking steps to ensure the exclusion process is efficient enough to fill the void to avoid any unintended economic impact to downstream U.S. industries. The changes made in today's rule will improve the efficiency of the process and address these comments. The Department will be monitoring the domestic aluminum and steel industries, as well as industries consuming steel and aluminum, to regularly evaluate the competitiveness of U.S. industry. The exclusion process is available to individuals and companies to ensure that they can obtain adequate supply of steel and aluminum products of size, shape, and function that are not available in the United States in adequate quantity or quality.

### **Question 15**

*With regard to the complainant's references to the USDOC Reports on Steel and Aluminium as well as the Presidential Proclamations as evidence that the measures at issue are safeguards, how do these references relate to the characterization of the measures at issue as safeguards<sup>60</sup> as opposed to their consistency with safeguard disciplines?*

112. The EU understands that the Panel is referring, in essence, to sections 2.5.3-2.5.5, 2.6.3-2.6.5, 3.1.3 and 3.1.4 of the EU's first written submission.

113. First, sections 2.5.3-2.5.5 and 2.6.3-2.6.5 are part of the factual section of the submission, simply describing the steel and aluminium measures in turn. They demonstrate the content and features of those measures. Sections 2.5.3 and 2.6.3 demonstrate, based on numerous elements on the record, that those measures are designed to prevent or remedy serious injury to the US steel industry, allegedly caused or threatened by imports. In that sense, those measures have the objective characteristics of safeguards. Section 3.1.3 is part of the EU's legal arguments. Based on the factual elements set out, notably, in

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<sup>59</sup> EU's first written submission, paras. 40-41, 91-92 and section 4.1.4 of the EU's first written submission.

<sup>60</sup> See EU's first written submission, paras. 43-76, 94-136, 156-166 and 169-176.

sections 2.5.3 and 2.6.3<sup>61</sup>, that section demonstrates that the measures have "a demonstrable link to the objective of preventing or remedying injury" to the US domestic industries, which is a constituent feature of a safeguard measure.

114. Sections 2.5.4 and 2.6.4, also in the factual section, demonstrate that the steel and aluminium measures purport to be based on a consideration of whether steel products are imported into the US territory in increased quantities, and in such conditions as to cause or threaten serious injury, which is a consideration typical to a safeguard measure. Sections 2.5.5 and 2.6.5, also in the factual section, demonstrate that the steel and aluminium measures refer to precedents which include safeguard and other trade remedy measures, or are otherwise placed in the context of other trade remedy measures. In section 3.1.4, which is part of the EU's legal arguments, the EU explains that these aspects of the measures provides further support for the conclusion that the measures at issue are safeguards, going beyond the two required "constituent features" explained by the Appellate Body in *Indonesia – Iron or Steel Products*.<sup>62</sup>

### **Question 16**

*Please comment on the relevance, if any, of the fact that the steel and aluminium investigations subject to this dispute were conducted by the USDOC under Section 232 of the Trade Expansion Act of 1962, and not by USITC under Section 201 of the Trade Act of 1974.*

115. The Panel is, of course, entitled to take into account any pertinent facts, including the domestic procedures used to adopt the measures. However, it is clear from the Appellate Body report in *Indonesia – Iron or Steel Products* that the domestic substantive legal provisions and procedures that were used cannot determine the applicability of the Agreement on Safeguards.<sup>63</sup> Indeed, it is clear from that Report that a measure may not be a safeguard even though it was adopted under domestic safeguard legislation; the opposite must be true as well.
116. More broadly, concluding that the measures are not safeguards because the US chose not to use domestic safeguard procedures would amount to making the US the judge of whether or not the Agreement on Safeguards applies to its measures.

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<sup>61</sup> EU's first written submission, para. 156 and fn 325.

<sup>62</sup> EU's first written submission, para. 167 - 169 (in connection with sections 2.5.4 and 2.6.4); 167, 168 and 174 (in connection with sections 2.5.5 and 2.6.5).

<sup>63</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60: ("However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.").

Which domestic legislation is invoked, and which domestic procedure is followed, depends entirely on the unilateral choices of the US. Because such choices are self-serving and aimed at avoiding legal scrutiny, they can in no circumstances be allowed to determine the applicability of the covered agreements.

117. This common-sense principle is confirmed by the rule of customary international law,<sup>64</sup> as set out in Article 27 of the VCLT and Article 32 of the ILC Articles on State Responsibility, that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.<sup>65</sup> Claiming that, because of the particularities of US domestic law, the relevant treaty does not even *apply* would be equally inconsistent with customary international law. As the International Court of Justice stated:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.<sup>66</sup>

118. Hence, either the US simply failed to comply with its domestic laws and procedures for taking safeguard actions (which cannot justify its WTO-inconsistent action), or the United States applied certain domestic laws and procedures instead of others, trying to escape scrutiny under the Agreement on Safeguards (which also cannot justify its WTO-inconsistent action).

## **II.2 Article 11.1(b) of the Agreement on Safeguards**

### **Question 17**

*Which measure(s) at issue, or elements of such measure(s), as identified in response to question No. 1 above, are being legally characterized as voluntary export restraints, orderly marketing arrangements or similar measures falling under Article 11.1(b)?*

119. The EU refers to section 3.1.5 of its first written submission. The steel measure and the aluminium measure are legally characterized as voluntary export restraints, and/or "measures" "which afford protection" similar to the measures referred to in Article 11.1(b) and footnote 4 of the Agreement on Safeguards. This is the case because of the "agreements, arrangements and understandings"

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<sup>64</sup> ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ, Rep 177, para. 124.

<sup>65</sup> ILC Articles on State Responsibility (UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83).

<sup>66</sup> ICJ, *Elettronica Sicula S.p.A. (ELSI) (United States v Italy)* [1989] ICJ Rep 15, para. 73.

between the US and certain other countries<sup>67</sup>, to which the EU also adds the more recent "agreements, arrangements and understandings" with Canada and Mexico<sup>68</sup>, and the manner in which they are given effect; second, the increased duties, i.e. the tariff treatment of steel and aluminium products.

*a. In addition, please clarify the contention in paragraphs 184-188 of the European Union's first written submission that the additional duties at issue are "similar measures" falling under Article 11.1(b) of the Agreement on Safeguards.*

120. The "agreements, arrangements and understandings" between the US and certain other countries demonstrate that the steel and aluminium measures are voluntary export restraints. In addition, the additional duties themselves further show that the steel and aluminium measures can be characterised as measures *similar* to voluntary export restraints. This is because the duties are a unilateral measure of the importing Member, imposing a tariff increase, and have a protective design and effect; because they apply to imports from particular sources; because the US has asserted that the steel and aluminium measures are not subject to multilateral control; and, most importantly, because the increased duties are closely connected to the country exemptions, which in turn constitute voluntary export restraints (i.e. increased duties are explicitly put in place in order to incentivise other Members to agree voluntary export restraints).<sup>69</sup>

### **Question 18**

*Please comment on the defining elements, if any, of measures falling under Article 11.1(b). In this regard:*

- a. What is the meaning of the term "similar measures" in Article 11.1(b)? What feature(s) of VERs and OMA does the required "similarity" pertain to?*
- b. What conclusions may be drawn about the nature of Article 11.1(b) measures from the examples of "similar measures" cited in footnote 4 of the Agreement ?*
- c. What is the meaning of "which afford protection" in footnote 4 of the Agreement on Safeguards? Is this the defining feature of measures subject to Article 11.1(b) or is it merely one of the elements of such measures?*

121. The EU will respond to sub-questions (a) - (c) together.

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<sup>67</sup> EU's first written submission, paras. 179 – 183.

<sup>68</sup> Response to Question 2(g).

<sup>69</sup> EU's first written submission, paras. 184 – 193.

122. Footnote 4 lists a number of examples of “similar measures”: export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, “any of which afford protection”. This makes clear that the central defining feature of VERs and “similar measures” is that they “afford protection” to the industry of the importing Member. The broad prohibition of such measures reflects the overarching objective of re-establishing multilateral control over safeguards and eliminating measures that escape such control, referred to in the preamble to the Agreement on Safeguards.
123. Thus, the central feature of VERs that the similarity pertains to is their protective effect: those measures are similar to VERs insofar as they afford protection by restraining imports or exports.
124. Protective effect is not, however, the only defining feature of measures subject to Article 11.1(b). The definition of “similar” measures is connected to the definition of “voluntary export restraints”. Such a definition is not explicitly provided in the Agreement on Safeguards. As the EU has explained,<sup>70</sup> the term “voluntary export restraints” refers to restraints on exports, whether in the form of a duty, quota, or any other type of restraint, that is sought, taken or maintained on a voluntary basis, for example on the basis of an explicit or tacit agreement between the exporting and importing Members, or even imposed unilaterally by either Member. The prohibition of such measures was introduced in order to prevent Members from agreeing, often tacitly or covertly, on measures restraining imports or exports that may have escaped multilateral control under Article XIX of the GATT 1994. The concept of “similar measures” should be understood in the context of the same objective, and in light of the fact that Article 11.1(b) measures can take a variety of forms, and are not necessarily formalised in a binding agreement between Members. Thus, both for voluntary export restraints and for other similar measures, it may be relevant (although not necessarily determinative in all cases) that they are designed to circumvent control under the disciplines of the covered agreements.

*d. In its first written submission, the European Union has referred to, inter alia, a 1987 GATT Secretariat Background Note titled “Grey-Area” Measures. How and on what basis should the Panel take this Background Note into account in its analysis of Article 11.1(b)?*

125. The Note in question was prepared by request of the Negotiating Group on Safeguards in the context of the Uruguay Round negotiations, collecting the views

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<sup>70</sup> EU’s first written submission, para. 429.

and experience of GATT Contracting Parties on the nature of so-called grey-area measures, the reasons for their adoption and acceptance by other Contracting Parties, the reasons why they were taken *instead* of measures under Article XIX of the GATT 1994, their effects, and how they could be phased out.

126. The reference in the preamble of the Agreement on Safeguards to the need to “eliminate measures that escape” multilateral control should be understood as referring precisely to these “grey-area” measures. The operative provision for eliminating such measures is precisely Article 11.1(b).

127. Therefore, in the EU’s view, the Note should be seen as part of the preparatory work of the Agreement on Safeguards, or at least of the circumstances of its conclusion or other supplementary means of interpretation. Alternatively, given the clear connection between the notion of “grey-area” measures and the measures in Article 11.1(b), it could in any event serve as useful informal guidance for the Panel.

### **Question 19**

*What is the relationship between safeguard measures under Article 1 of the Agreement on Safeguards and "voluntary export restraints, orderly marketing arrangements or any other similar measures" under Article 11.1(b) of the Agreement on Safeguards? In this regard:*

*a. Are these mutually exclusive or overlapping categories of measures? Can measures be legally characterized, at the same time, as safeguards and "voluntary export restraints, orderly marketing arrangements or any other similar measures"?*

*b. To the extent they are overlapping categories, what is the relevance of the fact that measures under Article 11.1(b) of the Agreement on Safeguards are prohibited, while Members are permitted to take measures under Article 1 of the Agreement on Safeguards subject to safeguard disciplines?*

128. The EU will respond to sub-questions (a) and (b) together.

129. The EU agrees that, in normal circumstances, safeguard measures are distinct from voluntary export restraints. The fact that voluntary export restraints are prohibited whereas safeguards are permitted under certain conditions suggests that these are distinct categories of measures.

130. Nevertheless, it is possible for a single measure to exhibit the characteristics both of a safeguard and of an Article 11.1(b) measure, especially when the measure is complex or has several different aspects.

131. Thus, a single measure could be a safeguard measure because it suspends a GATT obligation (for example, the obligation not to exceed a rate of duty) and because it is taken in order to prevent or remedy injury to the domestic industry, allegedly caused by increased imports. The same measure could, however, have a distinct provision, or set of provisions, that provides for a voluntary export restraint. The country exemptions in the steel and aluminium measures (including the provisions of various presidential proclamations) are a very good example of a Member seeking, taking and/or maintaining voluntary export restraints in the context of a measure that is otherwise a safeguard.

132. In that respect, the EU recalls that it defines the steel and aluminium measures in terms of the tariff and non-tariff treatment accorded to the relevant steel and aluminium products. This definition encompasses a number of aspects, including the country exemptions and the associated quotas.

*c. How do the measures under Articles 1 and 11.1(b) of the Agreement on Safeguards differ in terms of the rights and obligations relating to each type of measure?*

133. The EU refers to its response to sub-questions (a) and (b), as well as to Question 18.

*d. Is it the European Union's position that the additional duties are both safeguards and measures falling under Article 11.1(b) or are these alternative claims? In case of the former, what is the difference between the two categories of measures?*

134. The EU's position is that the measures at issue are voluntary export restraints and/or "measures" "which afford protection" similar to the measures referred to in Article 11.1(b) and footnote 4 of the Agreement on Safeguards, and are caught by that provision, independently of whether or not they are safeguards.<sup>71</sup> No part of the EU's arguments under Article 11.1(b) depends on, or conflicts with, the prior characterisation of the steel and aluminium measures as safeguards.

135. Nevertheless, if the Panel agrees with the EU that the steel and aluminium measures are safeguards, the EU proposes that the Panel exercise judicial economy with respect to the claim against the additional *duties* under Article 11.1(b) (but not with respect to the remainder of the claim under Article 11.1(b), notably with respect to the restrictions that accompany the country exemptions).

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<sup>71</sup> EU's first written submission, para. 178.

### II.3 Article 11.1 (c ) of the Agreement on Safeguards

#### Question 20

Please comment on the meaning of "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX" in Article 11.1(c). In this regard:

*a. Please elaborate on the meaning of, and any differences between, the terms "sought, taken or maintained" in this provision.*

136. These words are used elsewhere in Article 11. Article 11.1(b), for instance, provides that a Member "shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side".

137. The use of these terms suggests that Article 11.1(c) refers to three categories of measures: (i) measures that have not yet been imposed, but are "sought" by a Member; (ii) measures that have already been adopted, "taken" by a Member; and (iii) measures that have been adopted and continue to apply, as they are "maintained" by a Member.

138. The US alleges that "once a Member invokes Article XXI(b) of the GATT 1994, the Agreement on Safeguards is not applicable".<sup>72</sup> The EU disagrees. The word "sought" in Article 11.1(c) does not relate to the subjective invocation of a specific provision e.g. security exceptions. It refers to the process (e.g. administrative investigation) which precedes the taking of a measure.

139. The EU does not consider that "sought" is relevant for this dispute, as the US measures at issue have already been in place for about 2 years. Thus, the relevant words for the purpose of the present proceedings are "taken" and "maintained".

*b. Please elaborate on the meaning of measures "pursuant to provisions of GATT 1994 other than Article XIX" and in particular whether this refers to measures that are taken in conformity with, or meeting the requirements of, provisions of GATT 1994 other than Article XIX.*

140. The words "pursuant to" in Article 11.1(c) mean that a measure is "within the scope" of one of the relevant provisions. Whether a measure is taken or maintained "pursuant to" a certain GATT 1994 provision is an objective question.

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<sup>72</sup> US' opening oral statement, para. 63.

141. Thus, it cannot be that the US measures at issue are taken “pursuant to” Article XXI. The US measures at issue are taken pursuant to the US domestic legislation, which is not dispositive of their legal characterization under WTO law. Otherwise, by simply invoking a certain provision in the GATT 1994 (e.g. the security exceptions) a Member may unilaterally take out of the scope of the Agreement on Safeguards certain measures.

142. As explained elsewhere in our submissions, it is clear from the terms “other than” that it would only be measures that are *exclusively* taken on the basis of other provisions of the GATT that would fall outside the scope of the Agreement on Safeguards. Measures taken pursuant to both Article XIX and some other provision are clearly caught, because they are not taken pursuant to provisions “other than” Article XIX.

*c. What guidance, if any, do the Spanish and French versions of Article 11.1(c) provide in relation to the interpretation of this provision?*

143. The EU notes that the French version uses the term “en vertu de”, which means “according to”. The Spanish version uses the term “de conformidad”, which also means “in accordance with”. Thus, all three linguistic versions converge, as “pursuant to” is synonym with “according to”.

144. Thus, the three linguistic versions should be understood as meaning “within the scope”, as explained above.

*d. To European Union: The Panel notes that in Section 3.1.6 of its first written submission, the European Union has stated that “the measures at issue are not measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX”. In paragraph 194, the European Union specifies that “[t]he measures at issue were not taken ‘pursuant to’ Article XXI of the GATT 1994, but rather ‘pursuant to’ Section 232, which is a domestic US measure.” This proves, according to the European Union, that the measures fall within the scope of the Agreement on Safeguards. In this regard, please answer the following questions:*

*i. Is the European Union referring to Article 11.1(c) by making these statements?*

145. Yes.

*ii. What does the European Union understand to be the meaning of “pursuant to” as used in Article 11.1(c)?*

146. The EU refers to the explanations provided above. “Pursuant to” means “within the scope”. This is not a matter of unilateral determination by the Member

adopting the measure at issue, but rather an objective question, which can and should be assessed by a panel.

147. Furthermore, the term “other than” makes it clear that it would only be measures that are *exclusively* taken on the basis of other provisions of the GATT that would fall outside the scope of the Agreement on Safeguards. Measures taken pursuant to both Article XIX and some other provision are clearly caught, because they are not taken pursuant to provisions “other than” Article XIX.

*iii. The European Union argues that the measures were not taken pursuant to Article XXI. However, Article 11.1(c) also refers to measures sought pursuant to GATT provisions. Could the measures at issue have been sought by the United States pursuant to Article XXI?*

148. No. The EU refers to its explanations above. “Sought” is part of a temporal logical progression, as suggested by the following terms, “taken” and “maintained”.

149. The measures at issue in the present proceedings have been in force for around 2 years and they were certainly in force at the date of the panel establishment. So it cannot be said that the US is seeking to adopt certain measures, but the measures are already adopted and in force.

150. “Sought” refers to administrative proceedings (e.g. investigation) which are prior to the adoption of a measure. The Agreement on Safeguards prescribes certain obligations on Members even at that early stage (e.g. notification obligations).

### **III. ORDER OF ANALYSIS**

#### **Question 21**

*With which of the complainants' claims under the covered agreements should the Panel begin its analysis? Those under the Agreement on Safeguards or the GATT 1994?*

151. Panels enjoy a certain margin with regard to the order of analysis, as long as that does not lead to unreasonable results.

152. For the import tariffs and import quotas the EU brings claims both under the Agreement on Safeguards and under the GATT, while for certain measures the EU puts forward only GATT claims (country-wide tariff exemptions and product exclusions).

153. The EU considers that for the import tariffs and import quotas the Panel should begin its analysis under the Agreement on Safeguards. This is the only path that offers the prospect of judicial economy. If the measures at issue are safeguard measures and comply with the relevant provisions of the Agreement on Safeguards, then Articles II and XI of the GATT 1994 do not apply to them. And if the measures do not comply with the relevant provisions of the Agreement on Safeguards (which is the case), then the Panel does not need to go any further, as Article XXI is not available to violations of the Agreement on Safeguards.
154. To the contrary, if the Panel starts its assessment with the GATT claims, even were the Panel to find that the measures at issue are justified under Article XXI (which is not the case), it will still need to make an assessment under the Agreement on Safeguards (to which Article XXI is not available).

## **Question 22**

*Should the Panel start its analysis by examining whether the measures fall within Article XXI of the GATT 1994? Please respond taking into account Article 11.1(c) of the Agreement on Safeguards. Does this provision exclude measures sought, taken or maintained pursuant to Article XXI of the GATT from the scope of the Agreement on Safeguards?*

155. No, the Panel should not start its analysis by examining whether the measures fall within Article XXI of the GATT 1994.
156. The Panel should begin its analysis under the Agreement on Safeguards. Then, if proceeding under the GATT 1994, it should first analyse the EU's claims and only then proceed to the US' possible justification under Article XXI(b).
157. Article 11.1(c) of the Agreement on Safeguards is only mirroring the case law of the Appellate Body concerning safeguard measures. While that case law identifies the defining features of a safeguard measure,<sup>73</sup> Article 11.1(c) tells us which measures are not safeguard measures. They are two sides of the same coin.
158. Thus, logically, the Panel should first ascertain whether the measures at issue are safeguard measures and then it may have recourse to Article 11.1(c) in order to simply confirm that. Starting with Article XXI is like putting the cart before the horse.
159. Furthermore, the Panel should pay very close attention to the terms "other than" in Article 11.1(c). These terms mean that, in order to conclude that the

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<sup>73</sup> Appellate Body Report, *Indonesia - Iron or Steel Products*, para. 5.60.

Agreement on Safeguards does not apply, the measure would have to be entirely and exclusively “sought, taken or maintained” pursuant only to other provisions of the GATT 1994, that is, provisions “other than” Article XIX. This means that, if the Panel concludes that the measures at issue are “sought, taken or maintained”, in any respect or to any degree, pursuant to Article XIX, then the Agreement on Safeguards applies. In other words, if the measures at issue are considered to have been “sought, taken or maintained” pursuant to both Article XIX and some other provisions, then they cannot be said to have been “sought, taken or maintained” pursuant to provisions “other than” Article XIX, and the Agreement on Safeguards therefore applies.

160. The European Union considers that, given the facts and evidence, it is very clear that the measures at issue cannot be considered to have been “sought, taken or maintained” pursuant only to provisions “other than” Article XIX of the GATT 1994. This is particularly clear when one considers the manner in which the measures are also caught by the provisions of Article 11.1(b) of the Agreement on Safeguards.

#### **IV. ARTICLE XXI OF THE GATT 1994**

##### **IV.1 General interpretive questions**

###### **Question 24**

*On what basis could the Panel consider materials or sources provided as evidence of the proper interpretation of Article XXI(b) of the GATT 1994? In particular, is it necessary that such materials or sources constitute either: (1) interpretive elements under the Vienna Convention; (2) incorporation into the GATT 1994; or (3) guidance pursuant to Article XVI:1 of the WTO Agreement? Is there any other basis upon which the Panel could consider such materials and sources?*

161. The Panel may consider any materials or sources it finds useful and helpful, as long as it accurately represents those materials or sources for what they are, and does not give them weight that is undue. In order to be simply considered or taken into account in the Panel’s reasoning, it is not necessary for such materials or sources to fall within any of those three categories.
162. Thus, in the EU’s view, there are in principle no *ex ante* limits on the Panel’s ability to consider any materials. Indeed, it may be especially useful or even required to consider materials that are *relevant* to the three categories of elements or guidance listed in the Question, even if they do not themselves *constitute* such elements or guidance.

163. This point can be illustrated on the example of the VCLT. The EU recalls that panels are required to interpret the covered agreements in accordance with customary rules of interpretation of public international law, which are expressed notably in Articles 31 and 32 of the VCLT.<sup>74</sup> This is presumably what the Panel has in mind as “interpretive elements under the Vienna Convention”.
164. Article 31 provides, among other things, that a treaty shall be interpreted in accordance with the ordinary meaning to be given to its terms, in their context and in the light of its object and purpose. This suggests that any materials or sources capable of shedding light on the ordinary meaning, context, object and purpose of a treaty can and should be considered. Thus, for example, panels and the Appellate Body frequently refer to dictionaries when discussing the ordinary meaning of a term. This does not mean that some special legal status is conferred on dictionaries, or that they “constitute” ordinary meaning. It simply means that dictionaries are helpful materials in determining the ordinary meaning of terms, as part of the interpretative process.
165. In *EC – Chicken Cuts*, the Appellate Body explained that “interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components”. This means, for example, that various elements can be considered as “factual context” in order to complement the analysis of ordinary meaning based on dictionary definitions of a treaty term.<sup>75</sup> This is one example of a flexible approach to the “materials and sources” that can be considered as part of a panel’s interpretative task.
166. The same logic would hold, by extension, for all other elements of Articles 31 and 32 of the VCLT. Even if a particular document does not *constitute*, for example, an agreement relating to the treaty, an instrument related to the treaty, a subsequent agreement, a subsequent practice, preparatory works or circumstances of conclusion, it could still be *considered* as relevant to any of those elements.
167. That said, for the specific purpose of “clarifying” (that is, interpreting) the relevant terms of the treaty, the Panel should focus on the customary rules of interpretation of public international law, which are generally understood to be

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<sup>74</sup> For example, in the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999, 1045, the ICJ applied Article 31 of the VLT inasmuch as it reflects customary international law, even though Botswana and Namibia were not parties to the VCLT. In its judgment on the *Arbitral Award of 31 July 1989*, ICJ Reports 1991, pp. 69-70, para. 48, the ICJ found that Articles 31 and 32 of the VCLT “...may in many respects be considered as a codification of existing customary international law...”.

<sup>75</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 176.

codified, at least in part, in Articles 31 to 33 of the Vienna Convention. According to Article 31(1): a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. These elements should therefore constitute the focus of the Panel's analysis.

### **Question 25**

*With respect to the standard of review to be applied to an invocation of Article XXI(b) in dispute settlement proceedings, are there any relevant:*

- a. "decisions of the CONTRACTING PARTIES to GATT 1947 ... that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement", pursuant to paragraph 1(b)(iv) of the GATT 1994?*

168. The EU refers to the GATT Contracting Parties' Decision Concerning Article XXI of the General Agreement of 30 November 1982. The central feature of this Decision is the procedural requirement to notify measures taken under Article XXI. Nevertheless, the Decision does touch upon the question of standard of review insofar as it expressly confirms that "when action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement." The "full rights under the [GATT]" includes also the right to challenge a measure on the basis of what is now Article XXIII:1(a) of the GATT 1994, i.e. in a "violation" complaint. Thus, contrary to the arguments of the United States, the 1982 Decision confirms the EU's view that Article XXI does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of GATT 1994, and that unilateral invocations do not prevent panels from objectively reviewing whether the conditions in Article XXI are met.<sup>76</sup>

- b. "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947", pursuant to Article XVI:1 of the WTO Agreement?*

169. Other than the 1982 Decision, the EU is unaware of any such decisions, procedures and customary practices.

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<sup>76</sup> EU's first written submission, para. 558 and fn 626.

## IV.2 Standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings

### **Question 26**

*Which provisions in the DSU, if any, support a distinction between "justiciable" and "non-justiciable" matters in WTO dispute settlement proceedings? What guidance do these provide in relation to the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?*

170. The words "justiciable" and "justiciability" are not treaty terms. The EU has used them as a consequence of the US' repeated use of those terms. In section 4.2.1 of its first written submission the EU refers to the Panel's jurisdiction.
171. The US used the word "justiciability" in the present proceedings not in relation to the Panel's jurisdiction (the US seems to believe that the Panel has jurisdiction to simply take note of the US invocation of the security exceptions), but to refer to the Panel's standard of review.
172. The standard of review pertains to the level and the intensity of the scrutiny that a panel should exercise in assessing the matter before it. The US alleges that the security exceptions are self-judging.
173. The EU disagrees. The EU welcomes the analysis of the panel in *Russia- Traffic in Transit*, which rejected the argument that Article XXI(b) is "non-justiciable", in so far as US relied on the alleged totally "self-judging" nature of the provision.<sup>77</sup>

### **Question 27**

*What is the difference between jurisdiction and justiciability in terms of the role of a panel established to make such findings as will assist the DSB in making recommendations or in giving rulings?*

174. The EU refers to its response to the previous question as well as to its first written submission.<sup>78</sup>

### **Question 28**

*Regarding review of an invocation of Article XXI in dispute settlement proceedings:*

- a. What is the significance of the fact that Article 1.1 of the DSU provides that "[t]he rules and procedures of this Understanding shall apply to disputes*

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<sup>77</sup> Panel Report, *Russia- Traffic in Transit*, para. 7.103.

<sup>78</sup> EU's first written submission, paras. 551 – 569.

*brought pursuant to the consultation and dispute settlement provisions of the agreements in Appendix 1", which includes the GATT 1994?*

175. The significance of Article 1.1 is that the provisions of the DSU apply to this dispute. The Agreement on Safeguards and the GATT 1994, under which this dispute is brought by the EU, are both covered agreements.

*b. What is the significance of the fact that Appendix 2 containing "special or additional rules and procedures contained in the covered agreements" does not refer to the GATT 1994 or, more specifically, Articles XXI, XXII, or XXIII thereof?*

176. The significance of the fact that the Appendix 2, containing "special or additional rules and procedures contained in the covered agreements", does not refer to the GATT 1994 or, more specifically, Article XXI is that the provisions of the DSU apply to this dispute. Article XXI is not carved out of DSU proceedings and is not subject to any special or additional rules.

*c. What is the significance of the fact that the "objective assessment" panels should make in accordance with Article 11 of the DSU includes "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements"?*

177. As the EU has repeatedly explained, the Panel in the present case should make an objective assessment of the matter before it, including of the applicability of the covered agreements. That includes Article XXI of the GATT 1994.

### **Question 29**

*Regarding Article 3.1 of the DSU, does Members' affirmation of "their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947", provide any relevant guidance for the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?*

178. Yes, Article 3.1 of the DSU provides that the Members confirm that a panel must make an objective assessment of the matter before it (Article 11 of the DSU), including of any invocation of Article XXI(b) of the GATT 1994.

179. Articles XXII and XXIII set out rules and procedures for dispute settlement under the GATT 1947. They were codified in the Tokyo Round DSU, where the GATT dispute settlement system applied to any dispute under the GATT 1947, including

disputes under Article XXI(b).<sup>79</sup> Panels were required in all disputes to make an objective assessment of the law and the facts and there was no exception or special treatment envisaged for Article XXI(b) of the GATT 1947.

180. The EU also refers to its response to Question 25.

### **Question 30**

*What is the relevance, if any, of Article 23 of the DSU to the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings? In this regard, is there any relevant distinction between, on the one hand, determinations of WTO violations and nullification or impairment by measure(s) of another Member and, on the other hand, determinations of WTO-consistency and justification of a Member's own measure(s)?*

181. Article 23 of the DSU provides for a prohibition of self-help. By maintaining that the security exceptions are self-judging, the US is precisely contradicting Article 23, as it wants to reserve to its exclusive unilateral determination whether the measures at issue comply with the conditions under Article XXI(b) of the GATT 1994.

182. Instead, all WTO Members, including the US, have agreed to a compulsory dispute settlement mechanism, where disputes shall be solved by recourse to the WTO dispute settlement proceedings. While Article 23 of the DSU refers to complainants, the obligations therein apply *mutatis mutandis* to respondents as well.

### **Question 31**

*What relevance, if any, does the principle of good faith have for the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?*

183. Article 31(1) of the VCLT provides that:

A treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty, read in their context and in light of their object and purpose.

184. Every treaty obligation should be interpreted in good faith, including Article XXI. Panels may “determine, in an appropriate case, whether a Member had acted in good faith”.<sup>80</sup> A panel’s objective assessment under Article 11 of the DSU includes

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<sup>79</sup> Tokyo Round Understanding on dispute settlement (Exhibit EU-79).

<sup>80</sup> Appellate Body Report, *US – Offset Act*, paras. 297-298.

its assessment of the respondent's compliance with its obligation to interpret and apply the covered agreements in good faith.

185. Thus, the standard of review should take into account the principle of good faith. However, while it may very well do so, the Panel does not need to find that the US acted in bad faith in order to dismiss its defence under Article XXI. Instead, the Panel should simply take note that the US has not met its burden of making a *prima facie* case. Should the Panel consider that the US has met its burden of proof, then the Panel may easily dismiss the US alleged justification on the basis of an objective assessment of the matter.

### **Question 32**

*Is there an obligation to interpret and apply treaty provisions in good faith that is itself subject to review under the DSU? If so, what implications does this have for the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?*

186. The EU refers to its response to the previous question.

### **Question 33**

*Is Article XXI correctly characterized as an "affirmative defence"? If so, what implications does this have for what is required of a party invoking Article XXI? If not, how should the provision properly be characterized?*

187. Yes, Article XXI, like Article XX, is in the nature of an affirmative defence. The titles of both articles refer to "exceptions".<sup>81</sup>

188. The fact that Article XXI is in the nature of an affirmative defence has several legal consequences, concerning (i) the order of analysis, (ii) the burden of proof and (iii) the mechanics of the justification.

189. In practice, like under Article XX, a panel's analysis works in two stages: first, the complainant has to make a *prima facie* case of a possible violation, and only then the respondent has the burden of proving that the respective action is justified by recourse to one of the available exceptions.<sup>82</sup>

190. Finally, it is the WTO-inconsistent aspect of the measure (and not the measure as a whole) that must be justified under an affirmative defence. Logically, for a panel

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<sup>81</sup> The Appellate Body has used the expression "affirmative defence" in connection with exceptions, notably Article XX. Appellate Body Report, *EC – Hormones*, para. 104.

<sup>82</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

to identify the WTO-inconsistent aspects of a measure, it needs first to examine the claims of violation.<sup>83</sup>

### **IV.3 Ordinary meaning of terms of Article XXI(b)**

#### **Question 35**

*Which elements of the chapeau and/or subparagraphs of Article XXI(b) are qualified by the phrase "which it considers"?*

191. The phrase "which it considers" refers only to the necessity test and not to any other provisions.
192. First, the panel in *Russia- Traffic in Transit* has already correctly found that the words "which it considers" do not qualify the three subparagraphs of Article XXI(b).<sup>84</sup>
193. Second, the EU submits that the other elements in the chapeau of Article XXI(b) are equally not qualified by "which it considers": what are the "security" interests, whether such interests are "essential" and whether a measure is adopted "for the protection of" such interests. For instance, the panel in *Russia – Traffic in Transit* has already explained that "essential security interests" is "a narrower concept than 'security interests'".<sup>85</sup>
194. The EU refers to its detailed explanations in the opening oral statement at the first substantive meeting.<sup>86</sup>

#### **Question 36**

*Is the phrase "any action which it considers necessary for the protection of its essential security interests" a single integral clause or, conversely, does it contain multiple distinct elements that can be separately assessed? In this regard, please comment on views provided on this question by third parties.*<sup>87</sup>

195. The phrase "any action which it considers necessary for the protection of its essential security interests" contains multiple distinct elements that can be

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<sup>83</sup> Appellate Body Report, *US – Gasoline*, pp. 13-14.

<sup>84</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.65.

<sup>85</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.130.

<sup>86</sup> EU's opening oral statement, paras. 120 – 132.

<sup>87</sup> See Switzerland's third-party submission, paras. 49-50; Turkey's third-party submission, paras. 3.11-3.12 and 3.53; Russia's third-party submission, para. 17; Brazil's third-party submission, para. 12; Hong Kong's third-party submission, paras. 22-23; New Zealand's third-party submission, paras. 5-7.

separately assessed. Such elements, not qualified by the words “which it considers”, are what are the “security” interests, whether such interests are “essential” and whether a measure is adopted “for the protection of” such interests.

196. The EU agrees with the views expressed by the third parties and refers to its detailed explanations in the opening oral statement at the first substantive meeting.<sup>88</sup>

### **Question 37**

*What is the legal effect of being qualified by the phrase “which it considers” in terms of the discretion accorded to Members and the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings?*

197. The necessity test in Article XXI(b) is not a classic one, like in Article XX, but rather a weaker test. The use of the words “which it considers” qualifying “necessary” means that the Member adopting the measure at issue enjoys a certain degree of discretion.

198. This discretion is translated into the fact that it is not required to make a comparison of the action with a less trade restrictive alternative capable of achieving equivalent results. In other words, if the only argument that a complainant has is that there was allegedly an alternative measure available that would have been less trade restrictive but make at least an equivalent contribution to the objective, then the complainant will not prevail, provided that the respondent satisfies the panel, with evidence, that “it considers” the measure to be “necessary”.

199. However, this in no way negates the very text of Article XXI(b), which uses the words “for the protection of”. Therefore, if the evidence objectively demonstrates that the measure is not “for” a security objective, because it is in fact for some other objective, then the respondent will fail. If there is no relationship between the measure and the alleged security objective, then the measure cannot be, comparatively, the best available option on any view, including that of the respondent.

200. The standard of review with regard to Article XXI(b) is that provided in Article 11 of the DSU, which refers to an objective assessment of the matter before it by a panel.

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<sup>88</sup> EU’s opening oral statement, paras. 120 – 132.

### **Question 38**

*Is it possible for an element of Article XXI(b) to be qualified by the phrase "which it considers" while requiring some explanation or production of evidence in dispute settlement proceedings, including as to how/why the invoking Member considers a particular element of Article XXI(b) to apply?*

201. Yes, the fact that an element ("necessary") is qualified by the phrase "which it considers" does not mean that it is not reviewable by a panel. The US must provide an explanation as to how/why it considers that its measures are "necessary" for the protection of its essential security interests and that explanation should be plausible.

### **Question 39**

*Are the subparagraphs to Article XXI(b) exhaustive of the types of circumstances covered by the provision, or are they illustrative? In this regard, what is the relevance of the lack of an introductory clause before, or conjunction between, the three subparagraphs?*

202. The subparagraphs to Article XXI(b) are exhaustive of the types of circumstances covered by the provision. The lack of conjunction between these subparagraphs does not mean that the circumstances identified in those three subparagraphs are only illustrative and that it is an open list. Indeed, Article XX of the GATT 1994, entitled "general exceptions" also contains a list of subparagraphs not linked by conjunctions and there is abundant case law confirming that paragraphs (a) to (j) do not contain an open list of circumstances.<sup>89</sup>

203. When treaty drafters wanted to leave a certain list of legitimate regulatory distinctions open, they did so, like in the case of the circumstances in Article 2.2 of the TBT Agreement ("such legitimate objectives are, *inter alia*...").<sup>90</sup> *A contrario*, such language is not to be found in Articles XX and XXI of the GATT 1994.

204. Furthermore, the drafters could have easily stopped after the *chapeau* of Article XXI(b), without providing details as to the type of goods or circumstances to which the measure should relate. The reading suggested by the US deprives of meaning the circumstances enumerated in (i) to (iii), as it cannot be that everything under the sun can be covered by that provision. Moreover, the EU points out that, however much it would like Article XXI(b) to be self-judging, even

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<sup>89</sup> E.g. Appellate Body Report, *Brazil — Retreaded Tyres*, para. 139.

<sup>90</sup> Appellate Body Report, *US – COOL*, para. 370.

the US conceded, during the first substantive meeting, that the “circumstances” listed in the three subparagraphs are *exhaustive*.<sup>91</sup>

#### **Question 40**

*How do each of the subparagraphs of Article XXI(b) relate to the terms in the chapeau of Article XXI(b)? In this regard:*

*a. Do the phrases “relating to” and “taken in time of” signify a required nexus between a particular subparagraph and the challenged measure and/or security interests in question?*

205. The connection between the measures and the essential security interests is found in two elements in Article XXI(b): the necessity test, subject to good faith (“it considers necessary”) and the objective “for the protection of”.

206. For instance, as glasses are “for” reading and pens “for” writing, in the same way it cannot be argued that a prohibition on placing on the market of products resulting from the inhumane killing of seals is “for” the protection of essential security interests.

207. “Relating to” does not add anything to the words in the chapeau of Article XXI(b) pertaining to the connection between the measure and the essential security interests. They are words simply linking each subparagraph to the word “action” in the chapeau.

208. It might be argued that the terms “in time of” only require that the action is taken during a period of time in which the “war” or “other emergency” exists. However, such an interpretation would be untenable, as it would allow for the adoption of measures unrelated in fact to the war/emergency, but disguised as security measures, for the simple reason that they are adopted during that period of time. For this reason, the European Union is of the view that the terms “in time” (“en cas” and “en caso” in the French and Spanish versions, respectively, as regards emergencies) require a sufficient nexus between the action taken by the invoking Member and the situation of war or emergency in international relations, also in temporal terms. This interpretation confirms that the use of the term “protection” in the *chapeau* of Article XXI(b) implies the existence of a specific threat or event to which the action of the invoking Member responds.

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<sup>91</sup> US’ opening statement at the first substantive meeting, para. 21.

*b. Which specific terms or elements of the chapeau of Article XXI(b) are modified by each of the subparagraphs of Article XXI(b)?*

209. The European Union has already explained that each of the subparagraphs (i) to (iii) relates only to the word "action" in the chapeau. This interpretation is clearly confirmed by the French and Spanish versions of Article XXI(b).

*c. Regarding the United States' view that Article XXI(b) consists of a "single" relative clause following the word "action"<sup>92</sup>, would it follow from this premise that such "single" clause (consisting of the remaining terms of Article XXI(b) and each of its subparagraphs) relates to the term "action"?*

210. The European Union expects more clarifications from the US with regard to its position. The European Union considers that each subparagraph provides for distinct circumstances which can be objectively assessed. That said, the proposition in the question would indeed appear to be consistent with the US position. However, it is not in dispute that the sub-paragraphs of Article XXI(b) relate to the term "action". One does not need to posit that the chapeau consists of a single relative clause in order to reach that conclusion.

#### **Question 41**

*Regarding the Spanish and French versions of Article XXI(b) of the GATT 1994:*

*a. What is the ordinary meaning of the verbs *estimar* (ESP) and *estimer* (FR)?*

*b. Please compare the meaning of the verbs to consider (ENG), *estimar* (ESP) and *estimer* (FR).*

211. The EU will respond to sub-questions (a) and (b) together.

212. According to the dictionary definition, the Spanish verb "estimar" means, relevantly, « creer o considerar algo a partir de los datos que se tienen" or "creer o considerar que algo es de una determinada manera",<sup>93</sup> i.e. to consider something on the basis of the available data, or to consider that something is in a certain way.

213. Similarly, the relevant dictionary definition of the French verb "estimer" is «attribuer telle valeur, telle importance à quelqu'un, à quelque chose ; juger, apprécier » or «considérer après réflexion que, émettre l'opinion que, regarder

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<sup>92</sup> US' opening statement at the first meeting of the Panel, para. 17.

<sup>93</sup> REAL ACADEMIA ESPAÑOLA: Diccionario de la lengua española, 23.<sup>a</sup> ed., [versión 23.3 en línea]. <<https://dle.rae.es>>

quelqu'un ou quelque chose comme ; considérer, croire »<sup>94</sup>, i.e. to attribute a certain value or importance to a thing, to regard or consider it, upon reflection, in a certain way.

214. This largely corresponds to the dictionary definition of the verb "consider": "to regard in a certain light or aspect; to look upon (as), think (to be), take for"; "To think, be of opinion, suppose".<sup>95</sup>
215. There are two important aspects of the ordinary meaning of these terms, in all linguistic versions.
216. First, the verbs are transitive. In the meaning outlined above, they only make sense when applied to a certain object. There are certain non-transitive uses of the verb "consider" (for example, "to look attentively"), but they are irrelevant in the context of Article XXI; indeed, the United States does not even refer to them.<sup>96</sup> Thus, in the case of Article XXI(b), as the EU has explained, the terms "it considers" qualifies only necessity, which is its object ("considers necessary"), and cannot be understood to refer to the entirety of Article XXI(b) of the GATT 1994. Interpreting it as applying to the entirety of Article XXI(b), as the US proposes, would be – if not grammatically impossible<sup>97</sup> – at the very least a poor fit with the ordinary meaning of the verbs (in all linguistic versions), because there would be no clear, specific object to which the verb applies.
217. Second, all three verbs imply a process of consideration, reflection, or attribution of value, on the basis of data. This is especially clear from the dictionary definitions of the Spanish and French terms, as outlined above. Thus, one considers or estimates something in a certain way on the basis of data, facts and reason. This is not the same as merely declaring something to be in a certain way or "invoking" something.
218. The EU also recalls that the panel in *Russia – Traffic in Transit* explained that the ordinary meaning of Article XXI(b) is that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in the subparagraphs.<sup>98</sup>

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<sup>94</sup> Larousse, Dictionnaire de Français, <https://www.larousse.fr/dictionnaires/francais>.

<sup>95</sup> "consider, v.". OED Online. December 2019. Oxford University Press. <https://www.oed.com/view/Entry/39593?redirectedFrom=consider> (accessed February 11, 2020).

<sup>96</sup> US' opening statement at the first substantive meeting, para. 15.

<sup>97</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.65.

<sup>98</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.82.

c. *What is the grammatical function of the punctuation ":" as it appears in each language version of the texts of Article XXI(b)? Please cite any appropriate linguistic sources that may provide relevant guidance.*

d. *What is the legal relevance, if any, of the fact that the chapeau of Article XXI(b) ends with the punctuation ":" in the Spanish and French versions?*

219. The EU will respond to sub-questions (c) and (d) together.

220. There is a colon at the end of the chapeau of Article XXI(b) in the French and Spanish versions, and no colon at the end of the English version.

221. In the EU's view, the colon simply indicates an enumeration. What is enumerated are the three enumerated subparagraphs following the chapeau. These subparagraphs are limitative qualifying clauses, i.e. they qualify and limit the exercise of the discretion (such as exists) which is accorded to Members under the *chapeau* to these three circumstances.<sup>99</sup> The enumeration suggests simply that there is a closed list of circumstances, and the colon suggests that those circumstances will be listed after the colon.

222. The EU fails to see the legal significance of the absence of a colon in the English text. Even if a colon was there, the provision would read exactly in the same way.

223. In that respect, the EU would point out that there is no colon at the end of the *chapeau* of Article XXI (Nothing in this Agreement shall be construed) in the English and French versions, but there is one in the Spanish version. The EU fails to see the legal significance of this.

224. The EU also recalls the analysis of the ordinary meaning of the provision in the *Russia – Traffic in Transit* report.<sup>100</sup>

e. *What is the relevance, both grammatical and legal, of the fact that in the Spanish version the chapeau has a comma before the word "relativas"?*

225. The comma suggests a grammatical, logical, and legal separation between the clause "las medidas que estime necesarias para la protección de los intereses esenciales de su seguridad", and the adjective "relativas" which introduces and is connected to each of the three enumerated subparagraphs.

226. This separation is fully in line with the EU's reading of the provision: the term "it considers/estime" only qualifies the term "necessary/necesarias", and certainly not the subparagraphs. Thus, the comma in the Spanish version provides further

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<sup>99</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.65.

<sup>100</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.65 – 7.68 and 7.82.

support for what is, in the EU's view, the best and most coherent reading of all three linguistic versions.

227. The separation is, however, clearly at odds with the United States' reading that the term "it considers/estime" qualifies the provision as a whole, including the three sub-paragraphs.

#### **Question 42**

*Please discuss the meaning of the following phrases, particularly in terms of the relationship between the chapeau and subparagraph (iii) of Article XXI(b):*

- a. "las medidas que estime necesarias ..., relativas: ... a las aplicadas en ...";  
and*
- b. "toutes mesures qu'elle estimera nécessaires à la protection des intérêts essentiels de sa sécurité ... appliquées en ..."*

228. The European Union has already explained that the Spanish and the French versions confirm that the references in subparagraphs (i) to (iii) are to actions/ measures. This clearly follows from the use of the feminine plural. Thus, "relativas" and "appliquées" can refer only to "medidas" and "mesures".

229. Accordingly, "it considers necessary" does not mean that the invoking Member may consider pigs as fissionable materials for the purposes of Article XXI(b)(i). Each of the subparagraphs (i) to (iii) contain objective elements, which can be adjudicated before a panel, as confirmed by the panel in *Russia- Traffic in Transit*.

#### **Question 43**

*With reference to Article 33 of the Vienna Convention:*

- a. What is the significance for this dispute of the fact that "the text is equally authoritative in each language" of the three versions of the covered agreements (EN, ESP, FR)?*

230. The US' interpretation of Article XXI(b) in its English version is inconsistent with the proper interpretation of that provision pursuant to Article 31 of the VCLT. The Spanish and French versions confirm that subparagraphs (i) to (iii) refer to actions (measures) and not to the necessity test.

231. Indeed, Article 33(1) of the VCLT provides that "the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail". The WTO Agreement mentions that "the English, French and Spanish languages, each [are] authentic".

232. Thus, the three linguistic versions harmoniously confirm only one possible reading, that advanced by the European Union.

b. *What does the presumption that the terms of the treaty have the same meaning in each authentic text (Article 33(3)) imply for the interpretation of Article XXI(b) of the GATT 1994, particularly in light of any grammatical or structural differences in the three language versions of Article XXI(b)?*

233. Article 33(3) of the VCLT provides that in case of discrepancy between the language contained in the text of each of the different versions, a panel must seek the meaning which simultaneously gives effect to all the terms of the treaty as used in each of the authentic languages.

234. There are no major grammatical or structural differences among the three linguistic versions. The Spanish and the French versions confirm the European Union's understanding of the English version. The text has the same meaning in each authentic language version.

235. Thus, the US interpretation of the English version cannot be accepted, as it conflicts with the Spanish and the French versions.

c. *Please comment on whether this presumption can be rebutted and how such rebuttal may relate to the interpretation of Article XXI(b) of the GATT 1994 in the present dispute.*

236. Article 33(3) of the Vienna Convention provides that "[t]he terms of the treaty are presumed to have the same meaning in each authentic text". Then, Article 33(4) provides that

Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the applications of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

237. Accordingly, the presumption in Article 33(3) may be rebutted in case of an express agreement of the parties or if there is a difference in meaning which is not removed by recourse to the interpretative tools provided in Article 31 and 32 of the VCLT.

238. In the present case there is no express agreement of the parties that a particular linguistic version should prevail. The English, Spanish and French versions are equally authentic.

239. In addition, there is no difference in meaning between the three linguistic versions. Indeed, the interpretation of the Article XXI(b), irrespective to the linguistic version, leads to only one possible conclusion each time, namely that Article XXI(b) is not self-judging, contrary to what the US alleges.

240. Thus, this provision is not relevant for the interpretation of Article XXI(b) in the present dispute.

*d. Article 33(4) provides that the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*

*i. What precise "object and purpose of the treaty" should the Panel take into account for this purpose of reconciling the texts?*

*ii. Should the reference to "the treaty" in this context be understood as the GATT 1994, GATT 1947, or the Marrakesh Agreement? Or to all of these agreements?*

241. First, there is no difference in meaning between the three linguistic versions so it is not relevant in the present proceedings to consider the object and purpose of the treaty in order to reconcile texts which do not need be reconciled.

242. Second, an object and purpose of the WTO Agreement in general and of the GATT 1994 in particular is "to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade".<sup>101</sup>

243. The self-judging and self-serving reading of Article XXI(b) by the US is contrary to that object and purpose of the GATT 1994:

It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.<sup>102</sup>

#### **Question 44**

*The Panel notes that the parties have made extensive reference to several documents to support their legal interpretation of Article XXI of the GATT 1994. In this regard, and in*

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<sup>101</sup> Third recital of the Preamble of the WTO Agreement. See Appellate Body Report, *EC – Computer Equipment*, para. 82.

<sup>102</sup> See Panel Report, *Russia – Traffic in Transit*, para. 7.79.

order to understand the legal value the parties assign to each of these documents, please fill out the table in Annex 2, as succinctly as possible.

244. See Annex 2.

#### **Question 45**

*How can objective assessment of a Member's invocation of Article XXI avoid substituting a panel's judgment for the judgment that is reserved to a Member's discretion?*

245. The European Union recalls that when objectively assessing facts and evidence suggesting different possible outcomes the test is always one of "plausibility" or "more likely than not".<sup>103</sup>

246. Under Article 11 of the DSU panels are not allowed to simply substitute their own conclusions for those of the competent authorities. However this does not imply that "panels must simply accept the conclusions of the competent authorities".<sup>104</sup>

247. Thus, an objective assessment of a Member's invocation of Article XXI will avoid substituting a panel's judgment for the judgment that is reserved to a Member's discretion. With respect to the discretion enjoyed by the United States, the Panel has to ascertain whether it is plausible or more likely than not that the United States considers the measures "necessary" within the meaning of Article XXI(b).

248. With respect to the other elements of Article XXI(b), the Panel has to consider whether it is plausible or more likely than not that the United States has made its case. For example, if the United States asserts that there is an "other emergency in international relations" the Panel will have to consider any evidence put forward by the United States and reach a conclusion on the question of whether it is plausible or more likely than not there there is in fact an "other emergency in

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<sup>103</sup> See, for example: Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 321: ("The Panel's finding on the structure, design, and operation, in the light of the two **plausible** outcomes with similar **probabilities** that emerge from the quantitative evidence, provides a sufficient evidentiary basis for the conclusion that **it is more likely than not** that the revised GSM 102 programme operates at a loss."). (bold emphasis added). See also: Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.374; and Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.777: ("... Appellate Body and panel reports support the conclusion that while WTO-inconsistent conduct may not be lightly presumed, and must always be supported by sufficient evidence, the applicable evidentiary standard of proof in WTO dispute settlement proceedings is closer to that of the balance of **probabilities**, and is not a standard of certainty or proof beyond a reasonable doubt. It is well established that a complainant is only required to make a *prima facie* case, and that a *prima facie* case is made when a complainant provides evidence "sufficient to raise a *presumption* that what is claimed is true". Where the evidence submitted to a panel "support two **plausible** conclusions that one could draw", the relevant question is whether the evidence makes one of the two probable outcomes "**more likely than not**". Indeed, a panel would commit a legal error insofar as it required the complainant to provide evidence "*necessarily* showing" a particular fact, in the sense of requiring that the evidence "in no circumstance permit of a conclusion *other than* the existence of that fact".") (footnotes omitted).

<sup>104</sup> Appellate Body Report, *US – Lamb*, para. 106.

international relations". Similarly, if the United States asserts that the measures are "for" the protection of its essential security interests, the Panel will have to consider the evidence and reach a conclusion on the question of whether it is plausible or more likely than not that this is what the measures are "for", as opposed to being "for" the protection of the relevant US domestic industries.

#### **Question 46**

*In accordance with Article 11 of the DSU and assuming arguendo that the language "which it considers" in Article XXI of the GATT 1994 introduces an element of subjective discretion into this provision, how is the Panel to conduct an objective assessment of a provision that contains elements of subjective discretion?*

249. The European Union highlights the fact that the words "which it considers" in Article XXI(b) only refer to the "necessity" of the measure at issue. "It considers" does not qualify any other part of Article XXI(b), as the panel in *Russia - Traffic in Transit* has already confirmed with regard to subparagraphs (i) to (iii). Pigs cannot be treated as fissionable materials for the purpose of Article XXI(b)(i) just because the invoking Member considers so.
250. The discretion that the treaty offers the invoking Member means in practice that a panel should not inquire into less trade restrictive alternatives capable of achieving the same result. However, the existence of the word "for" in the same chapeau of Article XXI(b) means that there is a certain required connection between the measure at issue and the essential security interests of the invoking Member. The invoking Member has the burden of proving the existence of such a connection and the panel the power and the duty to review such an invocation.
251. In short, the Panel's assessment must always in all respects be objective, because it is the Panel that is the adjudicator, not the United States. The Panel is never permitted to be subjective, or to cede, in any way, its objective role to the United States, which would make the United States a judge in its own cause. The treaties do use the term "objective" (in Article 11 of the DSU), they do not use the term "subjective" (and that term must not be read into them). The consequence of the "it considers" language is not to make the legal provisions "subjective" in any of these senses; it is only to circumscribe *what it is* that the Panel must objectively assess. Thus, the Panel would, in principle, have to objectively assess whether or not the United States considers the measures "necessary".
252. However, the Panel must take due note of the fact that, since the European Union is asserting that *other elements* of Article XXI(b) have not been complied with, the Panel must also objectively assess those other elements.

**Question 49**

*Do the distinct subparagraphs (i) to (iii) inform each other as to the overall subject matter and scope of applicability of Article XXI(b)?*

253. Yes, the distinct subparagraphs (i) to (iii) inform each other as to the overall subject matter and scope of applicability of Article XXI(b).
254. In particular, they confirm that all those distinct circumstances are objective, and susceptible to a panel's assessment. Pigs cannot be fissionable materials just because the invoking Member considers so. Similarly, an emergency in international relations does not exist just because the invoking Member alleges so, but it has to objectively arise.
255. Furthermore, the cumulative reading of the three subparagraphs suggests that purely economic interests would not fall within the scope of Article XXI(b).<sup>105</sup>

**Question 50**

*Could the subparagraphs of Article XXI(b) be considered cumulative in nature, such that the invocation of Article XXI(b) covers all three subparagraphs together?*

256. Subparagraphs (i), (ii) and (iii) describe three distinct circumstances in which a Member may invoke its right of action according to Article XXI(b). As the drafters distinguished between the three circumstances, the invoking Member should also do so. The European Union has never heard of a Member cumulatively invoking all subparagraphs (a) to (j) of Article XX.
257. Thus, the subparagraphs of Article XXI(b) cannot be considered cumulative in nature, and the invocation of Article XXI(b) cannot cover all three subparagraphs together.

**Question 51**

*Regarding the meaning of "other emergency in international relations" in subparagraph (iii) of Article XXI(b) and the security interests referred to in the chapeau of Article XXI(b):*

- a. Could this phrase extend to an "emergency" in commercial or trade relations?*

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<sup>105</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.75 and 7.133.

258. No, "other emergency in international relations" does not extend to an "emergency" in commercial or trade relations. There is another provision dealing precisely with emergency actions on imports of particular products, and that is Article XIX of the GATT 1994. The US measures at issue are clearly safeguard measures.
259. The notion of "emergency in international relations" is broader than that of "war". In determining whether a particular situation constitutes an "other emergency in international relations", a panel would need to assess in particular the gravity of the situation ("grave tension internationale" in French; "grave tensión internacional" in Spanish). The interposition of "other" between "war" and "emergency" suggests that the war is one particular example of emergency.
260. The European Union agrees with the panel in *Russia- Traffic in Transit*, which correctly found that:

An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests. [...] economic differences [...] are not sufficient, of themselves, to constitute an emergency in international relations.<sup>106</sup>

261. The European Union could imagine that there may be situations other than a threat of war that may amount to 'other emergencies in international relations'. That may be the case, for example, of a massive cyber-attack from abroad, paralysing a whole country and its vital structures. To qualify under this exception, such situations should not be of a purely domestic nature, but involve an international dimension, a conflict between two or more different countries.

*b. What is the relevance of the fact that the provision does not refer to "other similar" emergencies?*

262. The reference to "other" suffices for establishing a clear link between the emergency and "war" as to the degree of gravity, as confirmed by the French and Spanish linguistic versions. The fact that the word "similar" is not part of the phrase "other emergency in international relations" does not mean that

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<sup>106</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.75-7.76.

“emergency in international relations” is disconnected from “war” and the degree of gravity associated with it.

*c. To what extent does the existence of such an “other emergency in international relations” depend on the judgment of a Member invoking Article XXI(b)?*

263. The terms “war” and “other emergency in international relations” refer to objective factual situations, the existence of which is independent from the assessment made by the invoking Member in each case and can be fully reviewed by panels.<sup>107</sup> This understanding is confirmed by the fact that, as already mentioned, security exceptions are not open-ended, but exhaustively listed in Article XXI(b). “It considers” refers only to the necessity test and not to all the rest of Article XXI(b).

*d. Exhibit USA-72 submitted by the United States during the first substantive meeting consists of a Report by the G20 Global Forum on Steel Excess Capacity, in which the European Union describes global steel overcapacity as posing an “existential threat” (p. 39).*

*i. What is the legal relevance, if any, of such documents for the purposes of this dispute?*

264. The full quote reads in its most relevant part:

But global overcapacity has reached a tipping point—it is so significant that it poses an existential threat that the EU will not accept. This requires urgent solutions addressing its structural causes: market-distorting subsidies and other support measures.[...]

265. The European Union notes that the respective document has no legal relevance. The position of the European Union on such matters is as stated or not stated by its duly authorised representatives in these proceedings. The document expresses a political opinion about certain economic matters, which should properly be addressed through different economic tools.

*ii. To what extent can this inform the Panel's understanding of the terms “essential security interests” in Article XXI(b)?*

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<sup>107</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.71 and 7.82.

- iii. *To what extent can this, and similar statements made by Members in international fora, inform the Panel's understanding of the terms "essential security interests" and/or "emergency in international relations" in Article XXI(b)?*

266. The European Union considers that such documents can inform the Panel's understanding of the terms "emergency action on imports of particular products" in Article XIX of the GATT 1994.

#### **IV.4 Context of Article XXI**

##### **Question 52**

*With respect to any contextual guidance provided by Article XX of the GATT 1994:*

- a. *Does the parallel language in Articles XX and XXI(b) ("nothing in this Agreement shall be construed to prevent") indicate that both provisions are affirmative defences?*

267. Yes, the parallel language in Articles XX and XXI(b) ("nothing in this Agreement shall be construed to prevent") supports this conclusion. Both Article XX and Article XXI are in the nature of "affirmative" defences and it is up to the party invoking the exception to demonstrate that the conditions set out in that provision are met.

268. The fact that Article XXI is in the nature of an affirmative defence has several consequences.

269. First, with regard to the burden of proof, it is neither for the complainant nor for the Panel to make the case for the US, which failed to make a *prima facie* case with respect to its frivolous invocation of Article XXI.

270. Thus, the case presents itself in a very simple way and the US made it simpler for the Panel to reject its defence under Article XXI(b). All the Panel needs to do is to reject the US defence because the US did not meet its burden of proof.

271. Second, with regard to the order of analysis, the Panel should start first with the relatively simple analysis of the violations, which are not contested by the US. Only then the Panel should proceed to the easy dismissal of the US alleged justification, on the ground that the US did not meet its burden of proof.

- b. *What is the significance of Articles XX and XXI(b) being structured as a chapeau with subparagraphs, particularly in terms of the role of specific subparagraphs for the applicability of the provision?*

272. There are obvious similarities in the way that the two provisions, relating to general and security exceptions, are structured. This suggests several things.

273. First, the European Union recalls that the list of possible justifications in both Article XX and Article XXI(b) is a closed one.

274. Second, the structure suggests that a panel should follow a two-stage analysis, starting from the specific subparagraph (i) to (iii) and then verifying if the conditions in the chapeau are met.

275. To recall, with regard to Article XX the Appellate Body explained that it provides for a two-stage test:

This involves first, an assessment of whether the measure falls under at least one of the ten exceptions listed in the paragraphs of Article XX, and second, an assessment of whether the measure satisfies the requirements of the chapeau of that provision.<sup>108</sup>

276. Similarly, with regard to Article XXI(b), the panel in *Russia- Traffic in Transit* started its examination with the particular circumstances in subparagraph (iii) and only then proceeded to the chapeau.

*c. Are there any implications for the burden of proof in dispute settlement proceedings stemming from the similar wording in the chapeau ("nothing in this Agreement shall be construed to prevent") and listing of distinct subparagraphs in both Article XX and Article XXI(b)?*

277. As already explained, the consequence is that the burden of proof is on the US. And the US has clearly failed to meet its burden of proof. What the US did cannot even be called an invocation of Article XXI.

### **Question 53**

*Please comment on the relevance of Article XXI(a) to whether and how an invocation of Article XXI(b) should be objectively reviewed under the DSU.*

278. The US alleges that the language of Article XXI(a) "specifically provides that a Member need not provide any information – to a WTO Panel or other Members – regarding essential security measures or the Member's underlying security interests".<sup>109</sup>

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<sup>108</sup> Appellate Body Report, *Indonesia – Import Licensing Regime*, para. 5.96.

<sup>109</sup> US' first written submission, para. 139.

279. Article XXI(a) does not provide that information regarding essential security measures or the Member's security interests does not have to be provided at all. The invocation of Article XXI(a) should be objectively reviewed in a similar manner that Article XXI(b) can be reviewed.
280. In addition, the European Union considers that a Member cannot invoke Article XXI(a) in order to escape its burden of proof obligations. Like Article XXI(b), Article XXI(a) is also a "justiciable" provision. Discretion accorded under it is not unlimited.
281. The European Union acknowledges that information relating to essential security interests is of a highly sensitive nature, but the respondent is expected at a minimum to explain in sufficient detail why such information cannot be shared with the panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article XXI. At any rate, even if a Member is justified in not providing certain information pursuant to Article XXI(a), that would not discharge it from its burden of proof in relation to Article XXI(b).
282. The European Union considers that the US should have explained the "action" that it considers necessary to protect its essential security interests, the "essential security interests" that it claims to be at issue, the nature of the alleged "emergency in international relations", as well as any plausible connection between the "action" and the "essential security interests". The US did none of those.

#### **IV.5 Object and purpose**

##### **Question 55**

*Regarding compatibility with the object and purpose of the relevant agreements:*

- a. What is the relevance of the precise scope of the review (i.e. which distinct elements of Article XXI are subject to objective review in dispute settlement proceedings)?*
  - b. What is the relevance of the precise standard of review (i.e. degree of deference) applied to elements that could be subject to objective review in dispute settlement proceedings?*
283. The standard of review that panels have to follow in all cases is that referred to in Article 11 of the DSU: to make an objective assessment of the matter, including, with respect to the US measures at issue, of the applicability of and conformity

with Article XXI(b) of the GATT 1994. There are no elements of Article XXI(b) which are carved out this duty.

284. An object and purpose of the GATT 1994 is to promote “the security and predictability of the reciprocal and mutually advantageous arrangements”. Thus, the scope of review of Article XXI(b) should take that into account. Article XXI is not self-judging.

285. The European Union refers to its response to Question 45, where it has explained that when a panel objectively assesses facts and evidence suggesting different possible outcomes, the test is always one of “plausibility” or “more likely than not”.

#### **IV.6 Negotiating history of Article XXI**

##### **Question 56**

*With regard to recourse to supplementary means of interpretation under Article 32 of the Vienna Convention:*

- a. Do the parties consider that interpretation according to Article 31 of the Vienna Convention leaves the meaning of Article XXI(b) ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable?*

286. No. The ordinary meaning of Article XXI(b), read in context and in light of the object and purpose of the GATT 1994, clearly support the interpretation of the provision advocated by the EU. Nor is there any other element mentioned in Article 31 that would detract from that interpretation. Finally, the result of that interpretation (notably, that Article XXI(b) is not self-judging, that the terms “it considers” only qualify the necessity test, and that the three subparagraphs are conditions for the applicability of Article XXI(b) that are subject to objective review) is neither absurd nor unreasonable. What would be manifestly absurd and unreasonable is the United States’ proposed interpretation that Article XXI, including Article XXI(b), is entirely self-judging. Fortunately, nothing in the elements listed in Article 31 of the VCLT supports such an interpretation.

287. The EU recalls the findings in *Russia – Traffic in Transit*, which clearly support the EU’s proposed interpretation. Those findings are based on the ordinary meaning of Article XXI(b), its context, and the object and purpose of the GATT 1994.<sup>110</sup> That panel also found that there is no subsequent practice establishing an agreement regarding the interpretation of Article XXI in the sense of Article 31(3)(b) of the

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<sup>110</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.82.

VCLT.<sup>111</sup> Moreover, while it did not refer to Article 32 of the VCLT in that context, that Panel essentially found the US' proposed interpretation of Article XXI to be absurd and unreasonable:

It would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.<sup>112</sup>

*b. To what extent does the disagreement in the present proceedings on the interpretation of Article XXI(b) reflect ambiguity as to its meaning?*

288. It does not. The disagreement in the present proceedings reflects the United States' desire to adopt protectionist measures while avoiding legal scrutiny, by falsely invoking whatever legal provision is helpful to achieve the protectionist objective. A single litigant does not have the power to strip a provision of its meaning by disagreeing with it.

*c. Would supplementary means of interpretation in this case only serve to confirm the meaning that results from Article 31?*

289. Yes. As the EU has explained,<sup>113</sup> and as the panel in *Russia – Traffic in Transit* found,<sup>114</sup> even to the extent that any of the various materials cited by the parties constitute supplementary means of interpretation, they would confirm the EU's proposed interpretation, which already follows from Article 31.

### **Question 57**

*What is the interpretive relevance of the negotiating history and materials relating to the GATT 1947 or Havana Charter to the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings under the DSU and the WTO Agreement?*

### **Question 58**

*To what extent should reference to such negotiating history account for the evolution of dispute settlement from the GATT to the WTO and the specificity of the terms in the DSU?*

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<sup>111</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.81.

<sup>112</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.79.

<sup>113</sup> EU's opening statement at the first substantive meeting, section 6.4.

<sup>114</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.83.

290. The EU will respond to Questions 57 and 58 together.
291. As the Panel rightly observes, the negotiating history referred to by the United States is several steps removed from the current covered agreements. First, there is a difference between the Havana Charter and the GATT 1947. Second, there is a difference between the GATT 1947 and the GATT 1994. Third, there is a difference between the GATT 1994, notably the dispute settlement rules in Articles XXII and XXIII, and the DSU.
292. Preparatory work should normally pertain to the treaty in question, and not simply to an earlier, related treaty. Nevertheless, materials relating to an identical predecessor of a treaty have, on occasion, been examined as preparatory work or other supplementary means of interpretation. Thus, for example, the International Court of Justice interpreted provisions of its Statute by reference to the drafting history of the Statute of the Permanent Court of International Justice.<sup>115</sup> The fact that provisions are not identical, but merely similar, would tend to suggest that materials on the similar provision are, strictly speaking, not preparatory work. Depending on the context, they may however be other supplementary means of interpretation.
293. The US argues that the negotiating history of the Havana Charter supports its view. However, it does not even attempt to explain why its view still stands after the evolution to the GATT 1947, and then to the GATT 1994 and the DSU.
294. In the EU's view, as explained previously,<sup>116</sup> the US' view is incorrect even in the context of the Havana Charter. Even under the Havana Charter, the correct position would have been that the predecessor to Article XXI is "justiciable", and not self-judging. The evolution towards the WTO covered agreements, and notably the provisions of the DSU, further confirms that position.
295. The negotiating history and materials relating to the GATT 1947 or the Havana Charter could be relevant to the interpretation of Article XXI of the GATT 1994, insofar as they relate to equivalent or similar provisions of those agreements. They could also, in similar fashion, be relevant to the interpretation of the dispute settlement provisions of the GATT 1994, notably Articles XXII and XXIII.
296. On the other hand, those materials are of limited relevance with respect to the standard of review to be applied in dispute settlement proceedings under the DSU.

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<sup>115</sup> ICJ, *Legality of the Use of Force (Serbia and Montenegro v Germany)* (Preliminary Objections) [2004] ICJ Rep 720, paras 101–111; see also ICJ LaGrand (*Germany v United States*) [2001] ICJ Rep 466, paras 105–107.

<sup>116</sup> EU's opening oral statement at the first substantive meeting, section 6.4.

They do not account for numerous provisions of the DSU which are highly relevant to the interpretative issue raised by the Panel's Questions, and which all conflict with the United States' claim that Article XXI is self-judging.<sup>117</sup>

297. Thus, interpreting Article XXI of the GATT 1994 as a non-justiciable provision in this dispute would be inconsistent with the terms of reference of the Panel ("To examine, in the light of the relevant provisions [in the agreement cited by the parties to the dispute] the matter referred to the DSB [...]"), and with Article 7.2 of the DSU, which specifies that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". It would also make it impossible for the Panel to comply with its obligation under Article 11 of DSU to "make an objective assessment of the matter before it". It would undermine one of the fundamental objectives of the DSU, security and predictability of the multilateral trading system, as expressed in Article 3(2) of DSU. It would also be inconsistent with Article 23 of the DSU, which mandates Members to have recourse to the rules and procedures of the DSU, *inter alia*, when they seek redress of a violation of obligations under the covered agreement, and prohibits Members from making a determination to the effect that a violation has occurred, except through recourse to dispute settlement in accordance with the DSU.

298. In this respect, the EU notes that Article XXI does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of GATT 1994<sup>118</sup>. The DSU contains no security exception and applies equally in respect of any provision of the covered agreements, subjecting these to the compulsory jurisdiction which the DSU has created. In turn, Article XXII of GATT 1994 applies "with respect to any matter affecting the operation of this Agreement", while Article XXIII of GATT 1994 makes no distinction between different provisions of the GATT 1994.

299. Thus, neither today's Article XXI or its predecessors, nor today's Articles XXII and XXIII and their predecessors, nor any associated negotiating history, provide any support for the view that there are special procedures for disputes under Article XXI, that Article XXI is non-justiciable, or that it is self-judging. To put it simply,

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<sup>117</sup> EU's first written submission, section 4.2.1, opening oral statement at the first substantive meeting, section 6.1.

<sup>118</sup> In fact, the Decision concerning Article XXI of the General Agreement of 30 November 1982 recognizes explicitly, in paragraph 2, that "[w]hen action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement." (L/5426). This includes the right to have recourse to dispute settlement procedures.

as the *Guatemala – Cement I* panel found, “nothing in Article XXIII suggests that there is any limitation on a Member's right to pursue dispute settlement in cases where there is a violation of GATT 1994 which gives rise to the nullification or impairment of benefits.”<sup>119</sup>

300. Even if that was somehow true of Articles XXI, XXI and XXIII, however, the rules of the DSU would clearly detract from that view. The EU recalls, in that respect, that while Articles XXI and XXIII continue to be part of the covered agreements (as part of the GATT 1994), they are not in the list of special or additional rules and procedures on dispute settlement in Appendix 2. They would not prevail over the provisions of the DSU in the event of a conflict.
301. Along similar lines, the panel in *Russia – Traffic in Transit* found that the provisions of Articles 1.1, 1.2, 7.2 and 7.3 of the DSU support the understanding<sup>120</sup> that “given the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU.”<sup>121</sup>
302. Thus, even if the available materials related to the negotiation of the GATT 1947 and the Havana Charter supported the US interpretation (*quod non*), the US would also need to persuade the Panel that the interpretation remains valid after the Uruguay Round, despite the numerous ways in which it conflicts with the DSU.
303. The EU submits that the US is unable to do so. In any event, there is no need for that, given that the available materials amply support the EU's reading, and the reading of the *Russia-Traffic in Transit* panel. The fact that this reading is also the only reading which conforms to the provisions of the Uruguay Round agreements further shows that it is correct.

### **Question 59**

*Regarding the recourse to non-violation claims:*

- a. *What is the relevance of the fact that negotiating drafts did not appear to distinguish between violation and non-violation claims? (See Article 35(2) of Exhibit USA-33)*

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<sup>119</sup> Panel Report, *Guatemala – Cement I*, para. 7.23.

<sup>120</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.54 – 7.55.

<sup>121</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.56.

304. That fact is relevant because it disproves the United States' argument that the negotiators considered that Article XXI, or its predecessor, would only be subject to so-called non-violation claims.
305. The terms of Article 35(2) of that negotiating draft clearly cover both "violation" and "non-violation" complaints. Under that text, Members could have recourse to dispute settlement whenever a Member applied a measure, "whether or not it conflicts with the terms of this Charter", or whenever a situation existed, which had the "effect of nullifying or impairing any object of this Charter". Thus, just like under Article XXIII of the GATT 1994, dispute settlement would have been available if nullification or impairment resulted from a measure that conflicts with the Charter, or if it resulted from a measure, or situation, that did not conflict with it. Moreover, Article 35(2) refers to the nullification or impairment of "any object of this Charter", i.e. not just the benefits accruing to Members, but also more broadly its objectives (such as those in Article 1 of the Charter, which include the "reduction of tariffs and other trade barriers and the elimination of all forms of discriminatory treatment in international commerce"). This reference to objectives, mirroring the reference in the *chapeau* of Article XXIII:1, shows that Article 35(2) was designed to cover so-called violation claims.
306. Thus, under Article 35(2), Members would have the right to challenge, in dispute settlement, any measure that has the effect of nullifying or impairing of the objects of the Charter, *including* because it violates the Charter.
307. Any references to Article 35(2) in the negotiating history should be seen in that light. Thus, when Members affirmed that the rights in Article 35(2) continue to apply when a national security defence is raised,<sup>122</sup> they merely affirmed – fully in line with the EU's interpretation of the current Article XXI – that a dispute could be brought, and that the invocation of the national security defence would be subject to an objective assessment, including in a "violation" complaint.
308. Even to the extent that they concern non-violation complaints, the discussions referred to by the US simply suggest that the Contracting Parties considered that non-violation complaints would be available even in cases where the measure at issue is, objectively, within the scope of the security exception (and not simply where that exception is unilaterally "invoked").
309. Thus, during the July 1947 meeting the Chairman asked whether the fact that the security exception would be moved to the end of the Charter, "away from Articles

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<sup>122</sup> US' first written submission, paras. 68-70, 166-168.

34 and 35”, meant that there was no possibility of redress. The delegate of the United States explained that Article 35 – the predecessor to Articles XXII and XXIII of the GATT 1994, encompassing the rules on both “violation” and “non-violation” complaints – covers “any action by any Member under any provision of the Charter” and that “there is no exception from the application of Article 35 to this or any other Article.”<sup>123</sup> This already shows the fallacy of the argument that Article XXI is not justiciable.

310. The US delegate added:

“It is true that an action taken by a Member under [the security exception] could not be challenged in the sense that it could not be claimed that the Member was violating the Charter; but if that action, even though not in conflict with the terms of [the security exception], should affect another Member, I should think that that Member would have the right to seek redress of some kind under Article 35 as it now stands.”<sup>124</sup>

311. The United States reads this statement as suggesting that the *invocation* of Article XXI means that a finding of violation would be impossible.<sup>125</sup> This is incorrect. Reading the sentence in its entirety, it is clear that the terms “action taken by a Member under [the security exception]” are meant to be synonymous with “action... not in conflict with the terms of [the security exception]”, i.e. action which complies with the objective conditions of Article XXI. The Australian delegate agreed, on the basis that a Member’s rights under Article 35(2) (the predecessor to Article XXIII:1 of the GATT 1994) “will not be impinged upon”, i.e. that the right to seek a remedy in GATT dispute settlement would remain available even when a measure (objectively) falls within the scope of the security exception.<sup>126</sup> *A fortiori*, it would necessarily follow that a remedy – a standard “violation” remedy – would be available when Article XXI is unilaterally invoked, but the measure at issue objectively does not fall within the scope of that exception.

312. The United States applies the same flawed reasoning to a 1948 Working Party statement (which does not in itself constitute *travaux préparatoires* since it post-dates the provisional application of the GATT 1947, which began on 1 January 1948) on whether Members will have the right to bring the matter before the ITO not on the grounds of inconsistency, but on the grounds of nullification of

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<sup>123</sup> Exhibit USA-41, pp. 26-27.

<sup>124</sup> Exhibit USA-41, pp. 26-27.

<sup>125</sup> US’ FWS, paras. 68-71.

<sup>126</sup> US’ FWS, para. 70.

benefits.<sup>127</sup> That entire statement is premised on the assumption that the action at issue is taken “in the interest of national security in time of war or other international emergency”, and would, for that objective reason (and not because the security exception was unilaterally invoked), “be entirely consistent with the Charter.”

313. The same is true of a statement of five representatives in January 1948: according to them, “action of the type mentioned in [the security exception]” (i.e. objectively within the scope of the security exception) could not be challenged as a violation of the Charter.<sup>128</sup>

*b. When specific provision was made for “the failure of another contracting party to carry out its obligations under this Agreement”, is there evidence of any intended distinction in the scope of coverage or procedures to be followed based on whether a measure fell under subparagraph (a) or (b) of Article XXIII of the GATT 1947?*

314. The EU is not aware of any such intention.

### **Question 60**

*Please comment on Japan's third-party oral statement and non-violation claims, particularly paragraph 9 below, in connection with the United States' view that non-violation complaints are the intended redress for matters involving essential security interests:*

*... Given that Members agreed that security measures taken under Article XXI(b) are permissible, they clearly contemplated the possibility and thus may reasonably expect that Members would have recourse to such an exception. As a consequence, Japan is of the view that Members cannot expect that other Members will never rely on Article XXI(b) to justify measures otherwise inconsistent with GATT obligations.*

315. The EU fully agrees with Japan’s overarching argument that “the potential availability of a non-violation remedy, in and of itself, [does not provide] a basis for concluding that Article XXI(b) is self-judging”.<sup>129</sup>

316. The EU would not go so far as saying that any non-violation complaint with respect to a measure justified under Article XXI(b) would be *impossible* because Members can reasonably expect that national security measures will be taken. Whether or not a particular measure could have been reasonably expected may depend on various factual and legal circumstances. In any event, this question is

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<sup>127</sup> US’ FWS, para. 73.

<sup>128</sup> US’ FWS, para. 75.

<sup>129</sup> Japan’s third party oral statement, para. 5.

somewhat academic, as it could only pertain to measures that are justified under Article XXI. The measures at issue are, however, not justified under Article XXI.

317. More broadly, the EU would point out that the potential availability of a non-violation complaint, and the likelihood of success of such a complaint, have nothing whatsoever to do with the underlying issue of whether Article XXI is justiciable or “self-judging”. The answers to that question must be found in Article XXI: its ordinary meaning, context, object and purpose of GATT 1994 etc. The EU does not see how the procedural rules on non-violation complaints are relevant to that question, or why they would apply any differently to Article XXI or any other provision of the GATT 1994. Indeed, the theoretical problem posed by Japan is likely to be just as relevant, for example, in case of measures justified under Article XX. It does not seem relevant to the question of whether Article XXI is self-judging. Just because the United States, or anyone else, finds non-violation complaints or other procedural avenues preferable, it does not follow that other avenues are unavailable. A “violation” complaint has been made, and now the question is how to interpret the substantive provisions before the Panel.

### **Question 61**

*What is the significance, if any, of the reference to “justiciable” issues in earlier draft versions of the ITO Charter and the absence of this reference in the agreed final texts?*<sup>130</sup>

318. The significance of that reference, or its absence, is very limited in the context of the interpretative issues in this dispute. The provision referred to in the Question was meant to provide for the possible jurisdiction of the International Court of Justice in certain circumstances, including some of the circumstances in today’s Article XXI. However, that jurisdiction did not exclude<sup>131</sup> the application of the rules of Article 35(2) of the draft Charter, discussed under Question 59. Thus, whether or not a dispute over a measure claimed to be justified for national security reasons could be brought to the International Court of Justice, it could also be brought to the Organization under the terms of Article 35(2).

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<sup>130</sup> See Article 86(3) in Exhibit USA-33, Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, p. 51. See also Exhibit USA-31, Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, p. 41.

<sup>131</sup> Article 86(3) states merely that such issues “may be submitted by any party to the dispute to the International Court of Justice”, emphasis added).

319. The discussion of Article 86(3) referred to by the US<sup>132</sup> is also of limited relevance because it pertains to the division of competences between the bodies of the ITO and the ICJ, and not to the question of which provisions of the Charter are subject to dispute settlement or are, in substantive terms, justiciable. In other words, “justiciability” was seen as a delimiting factor in deciding which disputes are to be decided by the ICJ, and which by the bodies of the ITO. The reason why certain delegates objected to the use of the term “justiciability” was not that they believed that national security measures are not justiciable, but that they believed that disputes on all matters under the Charter should be decided by the bodies of the ITO (i.e. “it was imperative for the Organization to be master in its own house and to be able to make final determinations of a nature provided for in the Charter”, i.e. including the determinations on nullification and impairment under Article 35(2) which “belongs together” with the settlement of disputes).<sup>133</sup>
320. Furthermore, Article 86(3) of the draft, referring to “justiciable” matters, disproves the United States’ view that national security matters are, or were, non-justiciable by their very nature, because it confirms what is already plain from Article 35(2): matters dealt with under the national security exception are subject to judicial review. In other words, if the national security provisions were meant to be self-judging, it would make no sense to allow for the jurisdiction of the ICJ over certain “justiciable” national security matters.
321. The omission of the references to “justiciability” merely confirms that the Charter did not envisage a class of “non-justiciable” or “self-judging” matters. All issues arising out of the Charter were intended to be subject to the dispute settlement procedures provided therein, whether involving the ITO itself (Articles 93-95 of the Havana Charter), or the ICJ (Article 96 of the Havana Charter).

### **Question 62**

*To what extent is the negotiating history of Article XXI clear or definitive on the question of the standard and scope of review to be applied to an invocation of Article XXI in dispute settlement proceedings under the DSU? What implications does this have for the Panel's objective assessment under Article 11 of the DSU and its overall analysis in this dispute?*

322. In the EU’s view, the negotiating history does not exhaustively or conclusively deal with this question. To the extent it does, it supports the EU’s arguments.

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<sup>132</sup> US’ FWS, para. 95.

<sup>133</sup> Exhibit USA-33, p. 51.

323. The materials referred to by the United States<sup>134</sup> demonstrate, in essence, the decision to place the security exception in a provision separate from other exceptions (which, in the context of the Havana Charter, simply meant that the drafters intended the equivalent of Article XX to “relate to the commercial policy chapter”, and the equivalent of Article XXI to “be exceptions to the Charter as a whole”;<sup>135</sup> this is completely disconnected from any concern with “justiciability”), and the inclusion of the words “it considers necessary” or, in an earlier version, “it may consider necessary”. They do not demonstrate anything further on what the proper interpretation of those words, or of the rest of the provision, should be. They certainly do not show that the whole of Article XXI is “self-judging” or that a panel is precluded from conducting an objective assessment of the matter as soon as Article XXI is invoked by a party. They do not deal in detail with what the standard or scope of review should be in Article XXI cases, and they especially do not deal with matters pertaining to the DSU.
324. Even to the extent that those materials touch upon the issues referred to in the Question, they support the EU’s interpretation: Article XXI is justiciable, and panels are required to objectively assess whether the conditions for justifying a measure under that provision are met.
325. In particular, the July 1947 discussion between the delegates of the Netherlands and the United States,<sup>136</sup> also referred to by the panel in *Russia – Traffic in Transit*,<sup>137</sup> clearly shows that the United States drafted the proposed provision in such a way that it would not be “self-judging” as the United States proposes today, and that it presented and defended the draft before the other parties accordingly.
326. Thus, the United States delegate was careful to emphasize that there are objective and testable limits to the scope of the security exception, which are meant to guard against the possibility of abuse.
327. The US delegate stated, *verbatim*:

We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: “by any Member of measures relating to a Member’s security interests,” because that would permit

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<sup>134</sup> US’ FWS, section III.3.

<sup>135</sup> Negotiating Group on GATT Articles, ARTICLE XXI, Note by the Secretariat, MTN.GNG/NG7/W/16, 18 August 1987, para. 2.

<sup>136</sup> US’ FWS, paras. 66-67.

<sup>137</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.92-7.93.

anything under the sun. Therefore we thought it well to draft provisions which would take care of really essential security interests and, at the same time, so far as we could, to limit the exceptions [...]<sup>138</sup>

328. The US delegate then went on to describe, in objective terms, to what the terms in various subparagraphs, such as “in time of war” and “or other emergency in international relations”, should objectively extend, presenting those terms as “limitations” to the security exception.<sup>139</sup>

329. In conclusion, the US delegate stated:

I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose. We have given considerable thought to it and this is the best we could produce to preserve that proper balance.<sup>140</sup>

330. If the provision was meant to be “self-judging” and “non-justiciable” as the US now claims, this discussion would make no sense. Instead, the US delegate explained, in a reasonable and measured manner, that the provision was designed to apply in limited, and objectively testable, circumstances. Drafting or reading it too broadly would lead to a danger of abuse, i.e. the danger that the security exception could be claimed to cover “measures which really have a commercial purpose.” The steel and aluminium measures, as well as the claim that Article XXI(b) applies to those measures for the mere reason that the US unilaterally invoked it, prove that the US delegate had good reason to worry.

331. The EU would add that there are elements of the negotiating history of the Uruguay Round agreements – much closer in time and in substance to the current state of EU law – that further explains that Article XXI is justiciable, and that an objective assessment of an Article XXI is no different to an objective assessment under any other provision of the covered agreements.

332. Thus, a Note from the Secretariat entitled “Safeguards and Services” of 13 September 1989 discussed a set of provisions “allowing for exceptions of a continuing nature”, including Article XXI. The Note explained that, under Article

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<sup>138</sup> Exhibit USA-41, p. 20.

<sup>139</sup> Exhibit USA-41, p. 20-21.

<sup>140</sup> Exhibit USA-41, p. 21.

XXI, “which allows intervention on national security grounds”, “general dispute settlement procedures may be invoked if considered necessary.”<sup>141</sup>

333. Thus, even though the negotiating history is perhaps not fully clear and definitive on all aspects of the Panel’s Question, it clearly speaks in favour of justiciability.

334. As explained before, given that the same interpretation clearly follows from the elements listed in Article 31 of the VCLT, and given that such an interpretation would be neither absurd nor unreasonable, the Panel could look at the negotiating history and other supplementary means of interpretation, essentially, as confirming evidence. In that context, Article 11 of the DSU would require the Panel to conduct an objective assessment of the available materials. Such an objective assessment could only lead it to agree that Article XXI is, and was always meant to be, justiciable.

335. In the EU’s view, it would not be contrary to Article 11 of the DSU for the Panel to consult the preparatory work and other supplementary means of interpretation (as confirming evidence), and all other relevant materials capable of shedding light on the various elements of Articles 31 and 32 of the VCLT. However, it would be contrary to Article 11 of the DSU for the Panel to rely on certain isolated statements from the preparatory work (or from subsequent discussions), taken out of context, to override the interpretation that follows from the elements in Article 31 of the VCLT.

336. The EU also recalls that interpreting Article XXI as a non-justiciable provision would make it impossible for the Panel to comply with its obligation under Article 11 of the DSU to “make an objective assessment of the matter before it”. The “matter” before the Panel must also include in this case any defence under Article XXI raised by the US.

#### **IV.7 Internal documents of the US negotiating delegation**

##### **Question 63**

*Is it correct that the documents referred to by the United States<sup>142</sup> were not in the public domain, and were inaccessible to other parties, during the negotiations to which they relate? If so, how may they be considered relevant to:*

*a. establishing the common intention of the parties to the treaty?*

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<sup>141</sup> Safeguards and Services, Note by the Secretariat, MTN.GNS/W/70, 13 September 1989, para. 9.

<sup>142</sup> See Exhibits USA-48, USA-49, USA-52, USA-53, USA-54.

b. *providing evidence of "the circumstances of [a treaty's] conclusion" within the meaning of Article 32 of the Vienna Convention?*

337. The EU will address the sub-questions together.

338. These documents were addressed by the Report in *Russia – Traffic in Transit*, in a section entitled "Negotiating history of Article XXI of the GATT 1947."<sup>143</sup> That section begins and ends with an analysis of material that qualifies as *travaux préparatoires* (and is also cited by the United States in that way), such as the drafts proposed by the United States and the discussion of those drafts among delegates.<sup>144</sup>

339. The internal documents of the US delegation are discussed in three paragraphs in the middle of the section.<sup>145</sup> Nowhere in those paragraphs does the panel state that those documents are themselves *travaux préparatoires*. Instead, the panel starts by explaining the purpose of analysing those documents: to assess how "the US delegation arrived at the language" of its proposal of July 1947.<sup>146</sup> It ends by concluding that the position "that the scope of unilateral action accorded to a Member invoking the security exceptions would be limited to the necessity of the measure and would not extend to the determination of the other elements of the provision" was "reflected in the United States' proposal of 4 July 1947".<sup>147</sup> That proposal is undoubtedly part of *travaux préparatoires*.

340. In other words, the purpose of that (rather brief) analysis was to support and confirm the Panel's analysis of the meaning of the proposal submitted by the United States. When discerning the meaning of a draft proposed by a party, it is hard to see why a Panel should not consider publicly available information on the contemporaneous views and positions of that party, which sheds light both on the draft itself and on the subsequent discussions. This was not an error; indeed, it could have been a failure to conduct an objective assessment to ignore such material.

341. In the European Union's view, even if such material was not in itself *travaux préparatoires*, it would constitute the circumstances of the conclusion of the GATT 1947,<sup>148</sup> or other supplementary means of interpretation, keeping in mind that the

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<sup>143</sup> Panel Report, *Russia – Traffic in Transit*, section 7.5.3.1.2.

<sup>144</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.83 – 7.88 and 7.92 – 7.100.

<sup>145</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.89 – 7.91.

<sup>146</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.89.

<sup>147</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.91.

<sup>148</sup> Thus, the documents of the US delegation permit "the examination of the historical background against which the treaty was negotiated" (Appellate Body Report, *EC – Computer Equipment*, paras. 86 and 92).

list of supplementary means of interpretation in Article 32 of the VCL is not exhaustive.<sup>149</sup> In any event, even if the material was not covered by Article 32 VCLT, it is well within a panel's discretion to choose to rely on publicly available facts and evidence, especially in order to confirm or support a conclusion that could be reached even independently of those facts and evidence.

#### **IV.8 1949 GATT Council Decision**

##### **Question 64**

*Must a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention be one that "clearly expresses a common understanding, and an acceptance of that understanding among Members"?*<sup>150</sup>

342. Yes, as was clearly found by the Appellate Body in the cited paragraph of the *US – Clove Cigarettes* Report.

343. In that paragraph, the Appellate Body also explained that the term "agreement" in Article 31(3)(a) of the Vienna Convention refers, fundamentally, to substance rather than to form. Thus, for example, there is no requirement that the instrument is entitled "agreement". There is, however, a requirement that it clearly establishes an understanding that is common and accepted by all the parties to the treaty. It would be for the Member alleging the existence of a subsequent agreement to demonstrate why the alleged understanding is common, and why it is accepted by all the parties to the treaty. That Member would have to explain, in particular, on what basis such commonality and acceptance can be said to exist when certain contracting parties were absent or abstained. In the EU's view, unless different rules were specifically put in place for the adoption of subsequent agreements on interpretation, it would normally not be possible to make that showing when certain parties actively *objected*.

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In *EC – Chicken Cuts*, the Appellate Body explained that "[a]n 'event, act or instrument' may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a 'circumstance of the conclusion' when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision." Importantly, the Appellate Body added that "not only 'multilateral' sources, but also 'unilateral' acts, instruments, or statements of individual negotiating parties may be useful in ascertaining 'the reality of the situation which the parties wished to regulate by means of the treaty' and, ultimately, for discerning the common intentions of the parties." Appellate Body Report, *EC – Chicken Cuts*, para. 289.

<sup>149</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 283 and fn 531 ("We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they include the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.")

<sup>150</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 267.

344. Another important question is what the “understanding” must relate to. As also explained by the Appellate Body, the only type of “understanding” that can be considered as a subsequent agreement is an understanding that bears specifically upon the interpretation of the agreement or some of its provisions, i.e. an understanding “with regard to the meaning of” the relevant term.<sup>151</sup>

345. The 1949 Decision referred to by the United States reflects neither a common “understanding” on how Article XXI should be interpreted nor an acceptance of any such understanding among Members. It does not deal with that interpretative question, but is simply an instance of the application of Article XXI in a dispute, and is in any event not common to all Members as some of the contracting parties objected to it or otherwise did not support it.

### **Question 65**

*Can a non-consensus decision be considered to express an “agreement” within the meaning of Article 31(3)(a) of the Vienna Convention?*

346. In the abstract, the answer may depend on how “consensus” is defined. For example, depending on the rules in force between the parties, there may be circumstances in which an abstention would not prevent the adoption of a subsequent agreement. In such circumstances, it would be for the Member alleging the existence of a subsequent agreement to demonstrate why the alleged understanding is common, and why it is accepted by all the parties to the treaty. That Member would have to explain, in particular, on what basis such commonality and acceptance can be said to exist when certain contracting parties were absent or abstained. In the EU’s view, unless different specific rules for the adoption of subsequent agreements on interpretation existed, an active objection by one or more contracting parties would mean that there is no “agreement” within the meaning of Article 31(3)(a) of the VCLT.

347. While Article 31.3(a) of the VCLT refers to the “parties” without explicitly stating that this means “all the parties” (unlike Article 31.2(a) of the VCLT), only instruments accepted by all the parties to a treaty can constitute a source of interpretation of the meaning accorded to the treaty by all of those parties. Indeed, when deciding that certain decisions were “subsequent agreements”, the

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<sup>151</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 265-267.

Appellate Body has considered it relevant that those decisions were adopted by consensus.<sup>152</sup>

348. As the US admits, the 1949 decision was not adopted by consensus of all of the Contracting Parties. There were seventeen votes in favour, one against, three abstentions, and two Contracting Parties were absent.<sup>153</sup> Therefore, it is clear that there was no agreement on anything among all of the parties to the treaty. Moreover, as will be further discussed below, this was a decision on the application of the rules to certain facts, rather than a decision on the general interpretation of the rules.

### **Question 66**

*In view of the interpretive question raised in these proceedings, must a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention be "subsequent" to the WTO Agreement, DSU, and GATT 1994 (rather than the GATT 1947)?*

349. Indeed, one can only speak of a subsequent agreement when the alleged agreement post-dates the treaty the interpretation of which is in question.

350. Thus, even assuming for the sake of argument that the 1949 Decision is a subsequent agreement on the interpretation of the GATT 1947 (*quod non*), the United States would have to show why and how that agreement remains relevant in the context of the WTO Agreement, DSU, and the GATT 1994.

351. In that respect, the EU notes that the GATT 1994 exhaustively lists the provisions and legal instruments it consists of. There is no mention of any subsequent agreements on the interpretation of GATT 1947.

352. Paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement does refer to "other decisions of the CONTRACTING PARTIES to GATT 1947" that have entered into force under the GATT 1947 before the entry into force of the WTO Agreement. Nevertheless, the 1949 Decision is not within that group, as well-established jurisprudence confirms.

353. First of all, the 1949 decision is equivalent to a panel report. As such, as the Appellate Body explained in *Japan – Alcoholic Beverages II*, it cannot be considered as binding (except with respect to resolving the particular dispute between the parties to that dispute), as a generally applicable source of law, or as

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<sup>152</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 371.

<sup>153</sup> Exhibit USA-27, p. 9.

an integral part of the GATT 1994.<sup>154</sup> The fact that the 1949 decision is not, formally speaking, a report by a panel, makes no difference. Indeed, in *US - FSC* the Appellate Body reached the same conclusion with respect to a GATT Council decision that merely *concerned* certain disputes.<sup>155</sup> In its findings, the Appellate Body made clear that GATT Council decisions which relate specifically to certain disputes and are an integral part of the resolution of those disputes would not qualify as binding decisions under Paragraph 1(b)(iv).<sup>156</sup> Moreover, the Appellate Body explained that, when actions are taken under Articles XXII and XXIII of the GATT 1947, this would further support the view that they are not binding on all the contracting parties.<sup>157</sup>

354. The 1949 decision was taken on the basis of Article XXIII.2 of the GATT 1947. Czechoslovakia claimed that the United States failed to carry out its obligations under the GATT, requested consultations, and then referred the matter to the Contracting Parties to investigate and make appropriate recommendations or give a ruling on the matter. This procedure is, of course, the predecessor to today's settlement of disputes under the DSU, and the legal effects of such decisions by the Contracting Parties is comparable to the legal effects of recommendations and rulings adopted by the DSB.
355. It would therefore logically follow from the United States' argument that all adopted panel and Appellate Body Reports also constitute "subsequent agreements".
356. This would be a dramatic extension of the legal effects of such reports and a departure from the Appellate Body's jurisprudence, which shows that, while an important part of the *acquis* of the dispute settlement system, "interpretations developed by panels and the Appellate Body in the course of dispute settlement proceedings are binding only on the parties to a particular dispute."<sup>158</sup> Similarly, the Appellate Body held that adopted GATT/WTO panel reports do not constitute "subsequent practice" within the meaning of Article 31 of the VCLT.<sup>159</sup> It is even

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<sup>154</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14. See also Appellate Body Reports, *India – Patents (US)*, para. 50; *US – FSC*, para. 108.

<sup>155</sup> Appellate Body Report, *US-FSC*, paras. 107 - 114.

<sup>156</sup> Appellate Body Report, *US-FSC*, para. 109.

<sup>157</sup> Appellate Body Report, *US-FSC*, para. 113.

<sup>158</sup> Appellate Body Reports, *US – Clove Cigarettes*, para. 258; *US – Stainless Steel (Mexico)*, para. 158.

<sup>159</sup> Appellate Body Reports, *Japan – Alcoholic Beverages II*, para. 97; *US – Anti-Dumping and Countervailing Duties (China)*, para. 325; see also Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Brazil) (Article 22.6)*, para. 349.

more difficult to see how they could be considered as “subsequent agreements” on the interpretation or application of the covered agreements.

357. It should be recalled that the task of a panel is to examine the matter “in the light of the relevant provisions” of the covered agreements (Article 7.1 of the DSU). The dispute settlement system cannot add to or diminish the rights and obligations provided in the covered agreements, and its role is to “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law” (Article 3.2 of the DSU). In other words, panels are required to *follow* the materials listed in Articles 31 of the VCLT, such as subsequent agreements. They cannot themselves *create* “subsequent agreements”, and their reports do not *constitute* “subsequent agreements”.<sup>160</sup> The same was true for the Contracting Parties when acting on the basis of Article XXIII of the GATT during the “GATT era”.

358. For all these reasons, the 1949 decision cannot be considered as a subsequent agreement on the interpretation even of the GATT 1947, or in any way binding to all the contracting parties to the GATT 1947. Still less could it be considered as binding under the GATT 1994.

### **Question 67**

*Did the decision of 8 June 1949 by GATT CONTRACTING PARTIES (the Czechoslovakia Decision) address the general interpretive question of the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings? If not, what significance would this have for characterizing the decision as a “subsequent agreement” under Article 31(3)(a) in relation to the question at issue?*

359. It did not address that general interpretive question, nor indeed any “general” interpretive question beyond the four corners of the dispute in which it was taken. This is highly significant because it means that it cannot be a “subsequent agreement” within the meaning of Article 31(3)(a) of the VCLT.

360. As already mentioned above, the 1949 decision does not bear specifically upon the interpretation of the GATT or the application of its provisions. The 1949 decision could, at best, be seen as an instance of interpretation or application of Article XXI in an individual case. But it does not “bear upon” how that provision should be interpreted or applied more generally, in the future, and in subsequent cases. Therefore, under the Appellate Body’s jurisprudence, it cannot qualify as an

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<sup>160</sup> The EU finds further support for this in the Panel Report in *Chile – Price Band System*, where it was held that an instrument does not constitute a subsequent agreement if it must follow a treaty (such as the GATT) or adjust to it. Panel Report, *Chile – Price Band System*, paras. 7.83 – 7.84.

agreement "regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the VCLT.<sup>161</sup>

361. The United States suggests that the 1949 decision could be equated with an authoritative interpretation because, at the time of that decision, there was no procedure in the GATT for authoritative interpretations.<sup>162</sup> This argument is unavailing. The United States fails to explain, if this is what it means to show, why this particular decision should be considered an authoritative interpretation of the GATT in the absence of a specific provision similar to Article IX:2 of the WTO Agreement. Moreover, even if the decision somehow was an authoritative interpretation, it would follow that it is not a "subsequent agreement", because these are distinct and mutually exclusive concepts.<sup>163</sup>

### **Question 68**

*What is the relevance of the fact that the Czechoslovakia Decision related to consideration of an Article XXI invocation by the GATT Council, rather than a panel established in accordance with the DSU?*

362. The EU refers to its response to Question 66.
363. The fact that the 1949 decision is not, formally speaking, a report by a panel, makes no difference to the outcome. What matters is that it is a decision pertaining to an individual dispute. Therefore, it was never meant to set out a general interpretation of any provision of the GATT 1947 that could bind all the contracting parties. In any event, it was not accepted by all the contracting parties.
364. Indeed, in *US-FSC* the Appellate Body addressed a GATT Council decision that merely *concerned* certain disputes even though it was not itself a panel report.<sup>164</sup> That made no difference to the question (raised under paragraph 1(b)(iv) of Annex 1A to the WTO Agreement) of whether such a decision has direct legal relevance beyond the dispute in which it was taken. In its findings, the Appellate Body made clear that GATT Council decisions which relate specifically to certain

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<sup>161</sup> Appellate Body Reports, *Peru - Agricultural Products*, para. 5.101; *EC - Bananas III (Article 21.5 - Ecuador II / Article 21.5 - US)*, para. 390; *US - Clove Cigarettes*, para. 266; *US - Tuna II (Mexico)*, para. 372.

<sup>162</sup> US' FWS, para. 48.

<sup>163</sup> The Appellate Body has explained that "multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement, on the one hand, and subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the Vienna Convention, on the other hand, serve different functions and have different legal effects under WTO law". Appellate Body Report, *US - Clove Cigarettes*, paras. 257-258.

<sup>164</sup> Appellate Body Report, *US-FSC*, paras. 107 - 114.

disputes and are an integral part of the resolution of those disputes would not qualify as binding decisions under paragraph 1(b)(iv).<sup>165</sup> Moreover, the Appellate Body explained that, when actions are taken under Articles XXII and XXIII of the GATT 1947, this would further support the view that they are not binding on all the contracting parties.<sup>166</sup>

#### **IV.9 Views of GATT Contracting Parties**

##### **Question 69**

*What is the interpretive relevance and value of views expressed by GATT contracting parties prior to the entry into force of the WTO Agreement, particularly in light of whether they reflect a consensus position? For example, do they constitute:*

- a. interpretive elements under the Vienna Convention?*
- b. part of the GATT 1994 by virtue of paragraph (1)(b)(iv) of the GATT 1994?*
- c. guidance pursuant to Article XVI:1 of the WTO Agreement?*

365. While certain GATT contracting parties have repeatedly expressed the view that Article XXI(b) is self-judging, several others have repeatedly expressed diametrically opposed positions. There was no consensus. Accordingly, the enquiry into the GATT 1947 palaeontology does not support the US position. The Panel cannot rely on those views as interpretive elements under the Vienna Convention, or part of the GATT 1994 by virtue of paragraph (1)(b)(iv) of the GATT 1994 or guidance pursuant to Article XVI:1 of the WTO Agreement.

366. To recall, in its submissions, the US provides a truncated account of views expressed by the GATT Contracting Parties on various occasions. The US reads and refers overwhelmingly to the parts of the minutes of respective meetings that it finds convenient, remaining largely silent or trying to minimize the opposite positions expressed by numerous Contracting Parties.

367. The US emphasizes in particular four occasions which it attempts to present as supportive of its position that the security exceptions have been considered by the GATT Contracting Parties as self-judging: Ghana's invocation of Article XXI during the accession of Portugal, Egypt's invocation of Article XXI during its accession,

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<sup>165</sup> Appellate Body Report, US-FSC, para. 109.

<sup>166</sup> Appellate Body Report, US-FSC, para. 113.

- European Communities v. Argentina (1982) and United States v. Nicaragua (1985).<sup>167</sup>
368. With regard to the European Communities v. Argentina case (1982), several GATT Contracting Parties, including Argentina, Brazil, Uruguay, Indonesia, Pakistan and several present current EU Member States (Spain, Poland) expressed views that cannot be understood as supporting a self-judging approach to Article XXI.<sup>168</sup>
369. Argentina started by requiring to “be fully informed of the measures so that their compatibility with the obligations under the General Agreement could be determined”. It continued by expressing “surprise at the manner in which the measures were alleged to be justified under the General Agreement since, in [its] view, they were unjustifiable”.<sup>169</sup> Finally, it concluded that the measures were not justified under the provisions of Article XXI in respect of the countries mentioned in document L/5317, otherwise “trade restrictions could be adopted without having to be justified or approved and, on the basis that a reason of domestic security did not have to be explained, anyone could now have recourse to that magnificent safeguard clause”.<sup>170</sup>
370. Brazil expressed its “preoccupation with the effort to divorce GATT from discussion of real world issues”, drawing attention to the fact that the respective case “could set a dangerous precedent if the measures in question were considered necessary for the protection of essential security interests taken in time of war or other emergency in international relations, **because such interests had not been demonstrated**”.<sup>171</sup> Consequently, Brazil was of the view that the GATT Council was well placed to decide in favour of Argentina's case.
371. Similarly, Uruguay opined that “the measures imposed in respect of Argentina were neither justified nor did they have a legal basis”, emphasizing that in dealing with the respective matter “the GATT as an institution would emerge considerably strengthened from its action on this issue”.<sup>172</sup>
372. Pakistan also supported any steps that the GATT Council would take for the removal of the measures.<sup>173</sup>

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<sup>167</sup> US' FWS, paras. 106 – 128.

<sup>168</sup> GATT Council, Minutes of Meeting, C/M/157, 22 June 1982 (Exhibit USA-59).

<sup>169</sup> Ibid, p. 2.

<sup>170</sup> Ibid, pp. 4 and 12.

<sup>171</sup> Ibid, p. 5 (emphasis added).

<sup>172</sup> Ibid.

<sup>173</sup> Ibid, p. 7.

373. Indonesia equally expressed the view that “The problem of trade restrictions, as raised by Argentina in document L/5317, should be considered within the framework of the GATT provisions”.<sup>174</sup>
374. Significantly, European countries which were not at the time members of the European Communities, but which are today EU Member States, expressed similar views.
375. Spain, for instance, agreed that the measures may be justified in respect of the United Kingdom under Article XXI:b(iii), but “expressed doubt concerning the action taken by other States which were not, technically speaking, in the same position vis-a-vis Argentina”.<sup>175</sup>
376. In even clearer terms, Poland “could not accept that the measures in question could be justified by invoking the provisions of Article XXI, whose purpose was to give a contracting party the right to defend its legitimate interests in case of serious danger”. Moreover, it expressly stated that “the provisions of Article XXI were subject to those of Article XXIII:2”.<sup>176</sup>
377. Similarly, with regard to United States v. Nicaragua (1985), several Contracting Parties expressed views contrary to what the United States emphasizes.
378. Nicaragua asked the GATT Council “to condemn the trade embargo and the other restrictive measures taken by the United States against Nicaragua, and to request the United States to revoke the measures immediately”, as they are in violation of both “the general principles and certain specific provisions of the General Agreement”.<sup>177</sup>
379. Cuba and Chile asserted that the GATT was the proper forum for discussing disputes with trade implications.<sup>178</sup> Chile did not consider that an invocation of Article XXI implied that the trade consequences of measures taken under it could not be discussed under the GATT.<sup>179</sup>
380. Several current EU Member States (not members of the European Communities at the time) took similar positions. Poland noted that the “GATT was a proper forum for discussing all trade-related disputes, whatever their origin”, as this was

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<sup>174</sup> Ibid, p. 8.

<sup>175</sup> Ibid, p. 6.

<sup>176</sup> Ibid, p. 9.

<sup>177</sup> Minutes of Meeting of May 29, 1985, C/M/188, 28 June 1985, p. 2 (Exhibit USA-63).

<sup>178</sup> Ibid, pp. 5-8.

<sup>179</sup> Ibid.

required to ensure that "GATT's conciliatory functions and responsibilities have practical meaning."<sup>180</sup> Hungary noted that while ideally politics and trade should be kept separate, a total separation was not realistic and was "evidenced by the provisions in the General Agreement covering cases in which political and commercial considerations were in opposition".<sup>181</sup> Similarly, Spain "considered that the US measures ran counter not only to the specific Articles but also to the spirit of the General Agreement; the measures could not be justified under the provisions of Article XXI".<sup>182</sup> Even Sweden considered that "the United States had not shown the necessary prudence but had chosen to give a too far-reaching interpretation to Article XXI".<sup>183</sup> Finally, Czechoslovakia pointed out that "[i]f the US interpretation of Article XXI were to be accepted, any contracting party wanting to justify introduction of certain trade measures against any other contracting party could simply refer to Article XXI and declare that its security was threatened".<sup>184</sup>

### **Question 70**

*Do these views reflect a consensus position of the GATT contracting parties that invocations of Article XXI are not subject to review by a dispute settlement panel?*

*a. If not, how could the Panel rely upon such views to the extent they reflect a difference of views on this question?*

381. These views do not reflect a consensus position of the GATT contracting parties that invocations of Article XXI are not subject to review by a dispute settlement panel. The Panel can rely on such views in order to reject the US claims that contracting parties considered the security exceptions as self-judging.

*b. If so, what is the relevance of the different institutional setting in which such views were expressed, namely in the absence of compulsory dispute settlement as provided for under the DSU?*

382. The presence of a compulsory dispute settlement mechanism under the DSU reinforces the idea that invocations of Article XXI are subject to review by a dispute settlement panel.

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<sup>180</sup> Ibid, p. 8.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid, p. 9.

<sup>183</sup> Ibid, p. 10.

<sup>184</sup> Ibid.

#### IV.10 Other considerations under Article XXI

##### **Question 71**

*Please clarify the legal standard of review you contend should be applied by the Panel under Article XXI(b) with reference to the measures at issue (including the USDOC Reports and Presidential Proclamations). In particular, please explain how your proposed standard of review should be applied in determining the (in)applicability or (non-)fulfilment of the terms of Article XXI(b) and which aspects of the measures at issue would be relevant for this purpose, for example regarding:*

- a. The existence of "essential security interests";*
- b. Whether the action is taken "for the protection of" such interests; and*
- c. The existence of conditions or circumstances provided in the subparagraphs of Article XXI(b)?*

383. As elsewhere explained in our submissions, the Panel's standard of review is always that it must be objective, having regard to the treaty terms that it is considering.

384. It is up to the US to clarify which are the essential security interests it alleges to protect, how the measures at issue can be considered "for" the protection of those interests and whether any of the circumstances in subparagraphs (i) to (iii) exist.

385. The US has not met its burden of proof with respect to its reference to Article XXI. Neither the EU nor the Panel should make the case for the US. The EU will be happy to comment on the US response to this question.

##### **Question 72**

*Are the circumstances described in the subparagraphs of Article XXI(b) equally susceptible to review as part of a panel's objective assessment? For example, is a panel capable of objectively reviewing whether there is an "emergency in international relations" in the same way as it is capable of objectively reviewing whether certain products are "fissionable materials"?*

386. Yes, all circumstances in subparagraphs (i) to (iii) are equally susceptible to review as part of a panel's objective assessment, as the panel held in *Russia-Traffic in Transit*.

387. The existence of none of those circumstances is at the sole discretion or appreciation of the invoking Member. Such circumstances have to be objectively present and a panel is able to review that.

388. For instance, under subparagraph (i) a Member may not consider pigs as fissionable materials.

389. Similarly, under subparagraph (iii) it cannot be that country B can consider that an emergency in international relations arises between countries A and B only as a consequence of the fact that country A has increased its customs duties on apple pie, if the only apple pie factory in country B (exporting to country A) belongs to the president of that country.

### **Question 73**

*What would be the legal relevance of factual evidence that is submitted in dispute settlement proceedings calling into question or factually contradicting the fulfilment of the requirements of Article XXI(b), and particularly the conditions provided in the subparagraphs thereof?*

390. The EU recalls that Article XXI is a defence, meaning that the burden of making a *prima facie* showing that its conditions defence are met are on the party raising it.<sup>185</sup> Thus, it is in the first place for the United States to explain which part of Article XXI it is raising, and to put forward the facts and evidence on which it bases its legal arguments. So far, the United States has entirely failed to do so. Thus, at this stage in the proceedings there are no circumstances in which the Panel could find that the requirements of any part of Article XXI, or XXI(b) are met.

391. The EU notes a statement, slipped into the United States' opening statement at the first meeting, that "publicly available information [in relation to the United States' actions under Section 232] could be understood to relate most naturally to the circumstance described in Article XXI(b)(iii)".<sup>186</sup> That cryptic statement does not raise any Article XXI defence, and it adds nothing to the factual and evidentiary record of the dispute. Moreover, it comes at an unjustifiably late stage in the proceedings, and is utterly ambiguous. It is impossible for the Panel to conclude from it that the US is actually raising an Article XXI(b)(iii) defence. The US has not said which "action" supposedly falls within Article XXI(b), whether or why it "considers it necessary", what it is "for", which "security interest" is at issue, whether and why it is "essential" , which of the three subparagraphs (if any) is at issue or why, what constitutes the alleged "war or other emergency in

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<sup>185</sup> Appellate Body Reports, *US – Gasoline*, p. 22-23; *Indonesia – Import Licensing Regimes*, para. 5.51; *Korea – Various Measures on Beef*, para. 157; *EC – Seal Products*, para. 5.169.; *EC – Tariff Preferences*, para. 95; Panel Report, *EC – Asbestos*, paras. 8.177-8.178.

<sup>186</sup> US' opening oral statement at the first substantive meeting, para. 56.

international relations”, why the US considers that the measure was taken “in time of” that war or emergency etc.

392. It is not for the Panel to make the case for the US by combing through the facts and evidence on the record and constructing on that basis an Article XXI(b) defence that the US *could* have made. In the words of the Appellate Body, “a panel may not use its interrogative powers to make the case for the complainant, nor to make good the absence of argumentation on a party's behalf.”<sup>187</sup> Therefore, the only possible finding is that the requirements of Article XXI have not been met.

393. In any event, the facts and evidence put forward by the EU conclusively show that the requirements of Article XXI(b) are not met. The Panel could, of course, rely on those facts and evidence in support of such a finding. Indeed, none of these facts and evidence have been disputed or contradicted in any way by the United States. In the EU's view, however, the Panel would not be entitled to use those facts and evidence as a basis for any finding that the requirements of Article XXI(b) *have* been met, in the absence of an Article XXI defence validly raised and backup up by arguments by the US.

*c. To All: How does Article XXI(b) operate in the context of the European Union's claims against Section 232 as interpreted?*

394. In its opening statement at the first meeting, the EU pointed out that the US has so far not even tried to rebut the EU's claims against Section 232 as interpreted.<sup>188</sup> This continues to be the case. While the US has not raised a valid Article XXI(b) defence in the context of any measure, in the specific context of Section 232 as interpreted it has not even *mentioned* any part of Article XXI. Thus, Article XXI(b) does not “operate” at all in the context of those claims.

## **V. RELATIONSHIP BETWEEN ARTICLES XXI AND XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS**

### **Question 74**

*Are safeguards disciplines and Article XXI of the GATT 1994 mutually exclusive in terms of the scope of the measures covered and subject matter addressed? In this regard:*

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<sup>187</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.176.

<sup>188</sup> EU' opening oral statement at the first substantive meeting, para. 5.

- a. *What is the relevance of Article 11.1(c) of the Agreement on Safeguards to the mutual exclusivity of safeguards disciplines and Article XXI of the GATT 1994?*

395. Article XIX is not in the nature of an affirmative defence. Instead, it provides for the conditional right of Members to derogate from GATT concessions or obligations provided that certain conditions are met.
396. Article XXI is in the nature of an affirmative defence. It means that it is part of a two-step analysis: first, there has to be proven an inconsistency with a certain provision of the GATT and only then Article XXI may serve as a possible justification. The EU is of the view that Article XXI cannot serve as a justification for a measure inconsistent with various provisions of the Agreement on Safeguards.
397. Thus, a panel should start first with ascertaining whether the measure at issue is a safeguard measure. In that respect, panels should follow the Appellate Body's guidance in *Indonesia – Iron or Steel Products*. If a measure presents the two constituent features identified by the Appellate Body and the analysis is confirmed by assessing other relevant elements, then it is a safeguard measure.
398. In this context, all that Article 11.1(c) does is simply mirroring that assessment. Article 11.1(c) confirms that the Agreement on Safeguards does not apply to measures which are not safeguards in first place. Conversely, measures which are safeguards fall under the disciplines of the Agreement on Safeguards.
399. If a panel were to find that a single indivisible measure pursued both a safeguard objective and a security objective, to be WTO consistent, such measure would have to comply both with the safeguards disciplines and with the controlling provisions that relate to the security objective. In this case, that would mean that, irrespective of what the Panel makes of the US' supposed "invocation" of Article XXI(b), the measures would be WTO inconsistent, because they clearly do not comply with the safeguards disciplines, and Article XXI is not available for violations of the Agreement on Safeguards.
400. If a panel finds that a measure seeks to protect a domestic industry as an end in itself, as the facts and evidence in this case overwhelmingly establish, as opposed to doing so as a means to a security objective, then the panel must find that the measure is controlled by the safeguards disciplines in any event. As indicated in the preceding paragraph, that means that the Panel must find the measures in this case to be WTO inconsistent.
401. The terms "other than" in Article 11.1(c) of the Agreement on Safeguards expressly confirm this analysis. If a measure is adopted pursuant to both Article

XIX of the GATT 1994 and some other provision, then it is not adopted pursuant to provisions “other than” Article XIX. The Agreement on Safeguards therefore applies.

*b. What is the relevance of the principle of cumulative application of WTO obligations to the mutual exclusivity of safeguard disciplines and Article XXI of the GATT 1994?*

402. The Appellate Body explained that the WTO Agreement is a “single undertaking” and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously.

403. In the present case it means that the US has to comply with both Article XIX and the Agreement on Safeguards. Article XXI is an affirmative defence not available for breaches of the Agreement on Safeguards.

404. The logical mirror of cumulative obligations is cumulative permissive provisions. With respect to the latter, we are not concerned with measures that can be split, each part being considered under a different permissive provision. Nor are we concerned with alternative permissible provisions, in which it is considered whether the measure can be justified under each permissive provision in isolation from the other. Rather, we are concerned with a single indivisible measure that must cumulatively satisfy different permissible provisions in order to be WTO consistent. In such a case, failure to satisfy one set of permissive provisions by definition renders the measure as a whole WTO inconsistent.

*c. Please comment on the circumstances, if any, where measures that have been sought, taken or maintained pursuant to Article XXI of the GATT 1994 would fall outside the scope of the Agreement on Safeguards by virtue of Article 11.1(c).*

405. Article 11.1(a) of the Agreement on Safeguards provides that emergency actions on imports must conform with Article XIX of the GATT 1994 and the Agreement on Safeguards. Such a measure is taken “pursuant to” Article XIX of the GATT 1994 and is therefore not covered by the exclusion in Article 11.1(c).

406. A panel should objectively determine whether a measure is a safeguard measure, on the basis of its design, structure and expected operation.<sup>189</sup>

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<sup>189</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

407. Article 11.1(c) becomes relevant only if a measure does not meet the two constituent features of a safeguard measure (features explained by the Appellate Body in *Indonesia – Iron or Steel Products*).
408. In other words, Article 11.1(c) of the Agreement on Safeguards is no more than the logical corollary of the process of identifying objective what falls within the scope of the Agreement on Safeguards.
409. As we have explained above, the term “other than” in Article 11.1(c) means that a measure that is adopted pursuant to both Article XIX and Article XXI of the GATT 1994 falls within the scope of the Agreement on Safeguards, because such measure would not be adopted pursuant to provisions “other than” Article XIX.

*d. Does the requirement in Article 11.1(a) of the Agreement on Safeguards indicate that Article XIX of the GATT 1994 and the Agreement on Safeguards are the only applicable provisions to economic emergency actions as set forth in Article XIX of the GATT 1994?*

410. Article 11.1(a) of the Agreement on Safeguards provides that all safeguard measures must comply with both Article XIX of the GATT 1994 and the Agreement on Safeguards.
411. There may be other provisions with which a safeguard measure has to comply, like, for instance, Article XIII of the GATT 1994. By virtue of Article XIII:5, a safeguard measure that is neither in the form of a quota nor in the form of a simple duty, but rather a tariff-rate-quota, has to comply with the requirements in Article XIII.
412. Economic emergency actions are not covered by Article XXI(b) of the GATT 1994. In any event, they are not covered when the facts and evidence demonstrate that such measures protect domestic industry as an end in itself, as opposed to as a means to a security objective. In any event, measures controlled by both sets of disciplines must comply with both sets of disciplines.

*e. Does the subject matter of the paragraphs of Article XXI, and the subparagraphs of Article XXI(b), indicate that “essential security interests” within the meaning of that provision are distinct from, or narrower than, economic security interests?*

413. Article XXI does not cover purely economic interests- e.g. protection of industries which are harmed by more competitive imports of like products. In any event, Article XXI does not cover the protection of a domestic industry as an end in itself. There are other legal tools for that.

414. The panel in *Russia – Traffic in Transit* correctly noted that the interests addressed in subparagraphs (i) to (iii) of Article XXI(b) of the GATT “are all defence and military interests, as well as maintenance of law and public order interests”.<sup>190</sup>
415. The whole structure of Article XXI revolves around defence, military and public order interests. Indeed, Article XXI(c) refers to action taken in pursuance of a Member’s obligations under the UN Charter for the maintenance of international peace and security.
416. To the contrary, Article XIX and the Agreement on Safeguards are in the WTO trade in goods legal architecture precisely to cater for economic emergency actions, which are not covered by Article XXI.

*f. What is the relevance of the fact that both Articles XIX and XXI refer to responses to "emergency" situations?*

417. The two articles address different types of emergencies. This supports the EU’s position that economic emergencies should fall under the Agreement on Safeguards, while essential security interests emergencies should fall under Article XXI(b)(iii).

### **Question 75**

*Can a measure be found to fall within the scope of both Articles XIX and XXI of the GATT 1994? For example, can Article XXI(b)(iii) cover essential security interests involving an "emergency" that concerns injury to domestic industry, or threat thereof, caused by increased imports?*

418. Article XIX addresses economic emergencies caused by injurious imports, while Article XXI(b)(iii) addresses an emergency in international relations with relates to a Member’s essential security interests. One would not normally expect a single indivisible measure to fall within the scope of both provisions. The facts of this case demonstrate that the measures are economic measures that fall within the scope of Article XIX, not Article XXI. Even if the US would argue that the measures would fall within the scope of both provisions, that would just mean that they must comply with both sets of disciplines. Since the measures clearly do not comply with the safeguards disciplines, and Article XXI is not available for breaches of the Agreement on Safeguards, the measures are WTO inconsistent. The US cannot plausibly assert that the measures fall uniquely within the scope of

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<sup>190</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.74.

Article XXI. Nor can the US solve its predicament by attempting to re-define security interests as encompassing economic interests. Its attempts to do merely amount to a tacit admission that the measures are, in truth, economic in nature.

**Question 76**

*How should the Panel evaluate the measures at issue in these proceedings if it concludes that they have multiple objectives, namely both a safeguard and an essential security objective?*

419. The EU does not consider that the measures at issue in the present proceedings have multiple objectives. In light of the arguments abundantly presented in our submissions, the EU has demonstrated that the measures at issue are only safeguards measures, and that the US has attempted to disguise them as essential security interests measures in order to escape the disciplines of the Agreement on Safeguards.
420. This being said, the EU does not exclude that a measure may have multiple objectives, namely both a safeguard and an essential security objective. In that case, the EU considers that the measure should comply with both sets of disciplines. If the measure at issue is found to be inconsistent with the Agreement on Safeguards, it is WTO inconsistent and the invocation of Article XXI, not applicable to safeguard measures, cannot change that.

**Question 77**

*Regarding the legal relationship between Articles XIX and XXI within the GATT 1994:*

- a. *What is the significance of the phrase "Nothing in this Agreement shall be construed to prevent" in Article XXI(b) in relation to the disciplines under Article XIX?*
421. The phrase "Nothing in this Agreement shall be construed to prevent" in Article XXI(b) is similar to the language in the chapeau of Article XX. It constitutes a sign that these provisions are in the nature of affirmative defences. Such provisions are part of a two-step analysis, whereas as a first step there is a breach of an obligation and then as a second step a Member may resort to a possible justification.
422. Unlike other provisions in the GATT 1994, Article XIX does not provide for a general obligation (e.g. like the obligation in Article I:1 to accord MFN treatment), but rather for a conditional right. The obligations in Article XIX and the Agreement

on Safeguards apply only to those Members adopting safeguard measures. Thus, one cannot automatically transfer the same logic of the relationship obligation - affirmative defence to Articles XIX and XXI, as it is the case with other provisions in the GATT 1994.

423. The United States appears to argue that Article XXI is available for breaches of Article XIX. However, the important point that the US is missing concerns the objective of the measure. If it has been found that the measure is a safeguard measure, because it pursues a safeguard objective (of protecting domestic industry), then by definition any attempted invocation of Article XXI will be unsuccessful, because in such circumstances the measure is not “for” the protection of an essential security interest.

424. The Members clearly understood this when they agreed the Agreement on Safeguards. This explains why, unlike some other agreements, the Agreement on Safeguards does not contain any cross-reference to Article XXI of the GATT 1994. It would be pointless to make such a cross-reference in circumstances where, as a simple matter of logic, a breach of one instrument could not be justified by a particular provision in another instrument.

*b. Is there any relevant difference between Articles XIX and XXI in terms of how they permit Members to depart from their GATT obligations, including whether they operate as affirmative defences or another form of exception to GATT rules?*

425. Yes, there is a significant difference between the two provisions, in spite of the fact that they both provide for exceptional departures from the GATT disciplines.

426. Article XXI, like Article XX, is in the nature of an affirmative defence. Thus, it operates in a two-stage analysis, whereas there is a prima facie violation, which then may be justified under that provision.

427. Article XIX is not in the nature of an affirmative defence, but confers a conditional right. It provides the conditions that have to be met in order for a safeguard measure to be WTO consistent.

### **Question 78**

*Regarding the applicability of Article XXI of the GATT 1994 to the Agreement on Safeguards:*

*a. What is the relevance of the lack of an explicit reference to Article XXI of the GATT 1994, or any other GATT exception, in the Agreement on*

*Safeguards? (Compare Article 1.10 of the Import Licensing Agreement and Article 73 of the TRIPS Agreement on "Security Exceptions")*

428. Each time the drafters wanted the general and security exceptions to apply to a different agreement outside of the GATT 1994, they explicitly stated so. For instance, such "bridge" provisions are to be found in Article 1.10 of the Import Licensing Agreement and in Article 3 of the TRIMS Agreement, which expressly provides that "[a]ll exceptions under GATT 1994 shall apply", which clearly includes Article XXI of GATT 1994. Along the same lines, Article 24.7 of the Trade Facilitation Agreement (TFA) provides that "[a]ll exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement".
429. To the contrary, other agreements have their own provisions concerning security exceptions, such as Article XIV bis of the GATS and Article 73 of the TRIPS Agreement.
430. The EU recalls that the Agreement on Safeguards does not contain a similar provision to the Import Licensing Agreement, the TRIMS Agreement or the Trade Facilitation Agreement, which would lead to the incorporation by reference of the security exceptions of the GATT 1994. Thus, the GATT 1994 security exceptions are not available to justify breaches of the Agreement on Safeguards.
431. To confirm such a conclusion it is useful to follow a standard "analytical approach" developed by the Appellate Body, which entails an agreement-by-agreement analysis that starts with the text of the covered agreement in question, while keeping in mind that the lack of an express textual reference to a particular enumerated provision is not dispositive in and of itself.<sup>191</sup> The EU refers to our first written submission.<sup>192</sup>
432. As we have explained above, the logical explanation for the lack of any cross-reference is, if a measure is a safeguard measure, because it pursues the economic objective of protecting a domestic industry, as an end in itself, it cannot be justified under Article XXI, which concerns only measures that pursue a security objective.

*b. What is the relevance of the reference in Article XXI of the GATT 1994 to "this Agreement" and to what extent does this define the applicability of Article XXI to other covered agreements?*

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<sup>191</sup> Appellate Body Reports, *China – Rare Earths*, paras. 5.61-5.63.

<sup>192</sup> EU's first written submission, paras. 463 – 472.

433. Similarly to Article XX, the text of Article XXI establishes that its provisions apply to "this Agreement", i.e. to the GATT 1994. As already explained, when another covered agreement specifically cross-references Article XXI of GATT 1994 and incorporates these security exceptions by reference, then the Article XXI exceptions will also apply to that other agreement.

*c. What is the relevance of Article 11.1(c) to the applicability of Article XXI of the GATT 1994 to the Agreement on Safeguards?*

434. Article 11.1(c) carves out 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. Article 11.1(c) does not address the availability of the GATT 1994 general and security exceptions to the Agreement on Safeguards.

*d. Would Article XXI apply to violations of provisions of the Agreement on Safeguards for which there is no comparable provision in Article XIX of the GATT 1994 (e.g. regarding investigation, publication of findings, and application of safeguard measures)?*

435. As we have explained above, as a matter of logic, Article XXI could not be successfully invoked as a defence for measures which are inconsistent with Article XIX. A measure that is controlled by Article XIX has a safeguard objective, not a security objective. Moreover, Article XXI is not available as a defence for breaches of the Agreement on Safeguards for the reasons already explained in detail in the EU's submissions.

### **Question 79**

*Do the references in the Agreement on Safeguards to the GATT 1994 serve to establish "an objective link"<sup>193</sup> between Article XXI of the GATT 1994 and the disciplines in the Agreement on Safeguards? In particular, do references to Article XIX in the preamble and Articles 1 and 11.1(a) of the Agreement on Safeguards provide a basis to apply Article XXI of the GATT 1994 as an exception to the Agreement on Safeguards?*

436. No, the mentioned provisions cannot serve as a "bridge" establishing an "objective link" between the Agreement on Safeguards and the availability of Article XXI for breaches of the Agreement on Safeguards. The EU refers to the relevant case law of the Appellate Body mentioned in its submissions. Finally, it is up to the US and

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<sup>193</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.74.

not to the EU or to the Panel to explain why a different reading would be warranted.

437. We have also already explained the logic of the “missing link”: if a measure is a safeguard it is because it has the economic objective of protecting a domestic industry as an end in itself. Such measures cannot be justified under Article XXI. So such a link would serve no purpose.

### **Question 80**

*What is the relevance of the General Interpretive Note to Annex 1A to the applicability of Article XXI of the GATT 1994 to the Agreement on Safeguards? In particular, would justification of a measure under Article XXI that would otherwise be prohibited under the Agreement on Safeguards give rise to a “conflict” within the meaning of the General Interpretive Note?*

438. As we have explained above, no conflict arises. A breach of Article XIX cannot be justified under Article XXI because Article XIX controls measures that have as an objective to protect domestic industry as an end in itself. Such measures cannot be justified under Article XXI. So there is a breach of Article XIX, which is not justified by Article XXI, and a breach of the Agreement on Safeguards, for which Article XXI is not available as a defence.

439. In other words, it is not possible to envisage a measure that would be controlled by (and inconsistent with) the Agreement on Safeguards, but justified by Article XXI. That is why there is no cross-reference. The General Interpretative Note to Annex 1A is therefore not relevant.

### **Question 81**

*Is there any relevant negotiating history or other interpretive material, including in relation to the Agreement on Safeguards and negotiations during the Uruguay Round, that may inform whether Articles XIX and XXI are mutually exclusive or if they may concurrently apply to the same measure?*

440. The EU is not aware of negotiating history that clearly tackles the question of whether Article XIX and XXI may apply concurrently. Nevertheless, there is relevant material showing that the Membership considered, during the negotiation of the Uruguay Round, that the two provisions are clearly distinct, operate differently, and apply to different circumstances.

441. Thus, a Note from the Secretariat entitled “Safeguards and Services” of 13 September 1989 discussed the provisions of the GATT. It distinguished between a

set of provisions, including Article XIX, which are “a safeguard nature” in that they allow for the temporary suspension of obligations, and another set of provisions “allowing for exceptions of a continuing nature” , including Article XXI.<sup>194</sup>

442. Even when Articles XIX and XXI are described as belonging to the same group of provisions, it is suggested that they are distinct, and different, routes to permitting certain trade-restrictive actions. Thus, a Background Note by the Secretariat of 16 September 1987, entitled “Drafting history of Article XIX and its place in the GATT” explained that Article XIX “permits the imposition of tariffs and quantitative restrictions otherwise prohibited by the provisions of Articles II and XI in order to protect domestic producers suffering, or threatened by, serious injury”, whereas Article XXI “permits action to safeguard essential security interests”.<sup>195</sup>
443. A similar point was made in a Communication from Switzerland on Safeguards, the Communication from Switzerland dated 2 October 1987, submitted in the framework of the Negotiating Group on Safeguards, explaining that “the General Agreement distinguishes between several categories of safeguards, according to the type of interest at stake and/or the scope of the measures provided for: The provisions relating to health, security etc. in Articles XX and XXI protect interests situated at other levels than purely economic and trade interests. [...] The last of these provisions, and the one of concern to us here, is Article XIX, “Emergency action on imports of particular products”.<sup>196</sup>
444. Similarly, a Communication by the Nordic countries, in the context of safeguards negotiations, explained that “the General Agreement contains several articles and provisions of a safeguard nature (Articles XII, XVIII, XX, XXI and others), the point of departure of which is based on fundamentally different considerations – as are the responses offered by the respective provisions.”<sup>197</sup>

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<sup>194</sup> Safeguards and Services, Note by the Secretariat, MTN.GNS/W/70, 13 September 1989, paras. 6-9.

<sup>195</sup> Background Note by the Secretariat of 16 September 1987, entitled “Drafting history of Article XIX and its place in the GATT”, MTN.GNG/NG9/W/7, paras. 9-10.

<sup>196</sup> Negotiating Group on Safeguards, Communication from Switzerland, Safeguards, MTN.GNG/NG9/W/10, 5 October 1987, para. 2.

<sup>197</sup> Negotiating Group on Safeguards, Communication by the Nordic countries, MTN.GNG/NG9/W/16, 30 May 1988, para. 1.