In the World Trade Organization
Panel Proceeding

US — STEEL AND ALUMINIUM PRODUCTS (EU)
(DS548)

Replies of the European Union to the
Additional Questions from the Panel

Geneva, 22 September 2020
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### US – Steel and Aluminium Products (EU) (DS548)

Replies of the European Union to additional questions from the Panel

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<td>DSB</td>
<td>Dispute Settlement Body</td>
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Regarding questions concerning the measures at issue, the parties are requested to respond based on the measures identified in the panel request and in light of responses to Panel question Nos. 1 and 2.

**Question 82**

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

1. The obligation in Article 6.2 of the DSU is to "identify the specific measures at issue". There is no doubt that the panel request in this case complies with that obligation, which is why neither the US nor indeed any other Member participating in these proceedings, nor indeed the panel, has ever suggested otherwise. We are now at a late stage of these proceedings (having had two written submissions, one hearing and two rounds of questions). The panel’s own Working Procedures require the US to make any request for a preliminary ruling as soon as possible and at the latest in its First Written Submission.

2. The panel request clearly identifies the specific measures at issue as "... 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 ...". The panel request then proceeds to identify and list the documents that constitute and evidence these measures at issue. It then further specifically identifies the import duties and quantitative restrictions being referred to, identifying the additional duties in question, the products and tariff headings concerned, the countries concerned, and the relevant documents and dates.

3. Article 6.2 of the DSU does not require the identification of: "the specific measures at issue legal instrument", and, to the extent that the way the question is framed assumes that, the phrasing is not opportune. It has been stated many times in the case law that the agreements must be interpreted and applied on the basis of the terms actually used in those treaties, and not on the basis of any re-statement of those terms. Still less does Article 6.2 of the DSU require a panel request to "explain the challenged substantive content of such legal instrument", so once again, the way the question is framed is not in accordance with the terms of the treaty as they are actually written. The obligation is rather to identify the "specific measure at issue" and that obligation has clearly been complied with in this case.
4. It is well-established in the jurisprudence that measures do not need to be defined in terms of specific legal instruments.¹ For example, in \textit{EC – Bananas III}, the panel found a general reference to EU legislation dealing with the importation, sale and distribution of bananas to be sufficient, even when no explicit list of those legal instruments was provided.² There is no requirement to list the legal or other instruments that may be relevant to, or connected, to a measure. Nor is there a requirement to refer to any evidence in the panel request.³ Instead, what matters for the purposes of Article 6.2 is how the complainant conceptualises and describes the measure at issue. If there is in fact no measure, or the measure differs from that description, that could become an evidentiary issue for the Panel during the proceedings, but it is not an issue of jurisdiction.

5. In any event, the panel request does identify the specific documents that constitute and evidence the measures at issue, as those measures have been specifically identified. Furthermore, as we have just explained, the panel request does identify the specific “substantive content” of such documents that is the subject of the European Union’s claims.

6. If the question is suggesting that, in order to comply with Article 6.2 of the DSU, the European Union was obliged to list or set out particular pages, paragraphs or words in the listed documents that constitute and evidence the measures at issue, to the exclusion of other particular pages, paragraph or words that do not, then the European Union disagrees with that and would find such proposition misconceived and not grounded in the treaty language of Article 6.2, which refers to “measures”, not “legal instruments”. In any event, it clearly results from the panel request that the European Union was referring to the documents in their entirety. The documents set out the additional duties and quantitative restrictions in question, and explain why they have been adopted, setting out the process leading up to that result. They form an indissoluble whole.

7. For all these reasons, the European Union also wishes to respond to the Panel’s invitation of 8 September 2020 to indicate whether and why this question is not relevant to the measures and claims at issue. The European Union finds this question of the Panel misconceived and unnecessary. It raises in the minds of the European Union a concern that the Panel or those advising it might be...

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² Panel Report, \textit{EC – Bananas III}, para. 7.27

³ Panel Report, \textit{EU – Energy Package}, para. 7.152, “Article 6.2 of the DSU does not require that evidence a complainant relies on in advancing its claims be included in a panel request.”
contemplating ways to avoid outcomes that would be inconvenient for the present US administration. As the Panel knows, its basic duty is to make an objective assessment of the matter before the Panel. If the result is inconvenient to the government of the respondent, the latter alone is responsible for this consequence of its deeds.

**Question 83**

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

8. The terms used in Article 6.2 are very clear: the obligation is to identify the specific measure at issue. It is well established that the DSU allows complainants to challenge “any act or omission” attributable to a WTO Member. For example, it is possible to challenge composite measures consisting of several elements.

9. There is no obligation to identify the “specific elements/components/forms that constitute a broader/complex measure at issue”, and the European Union fails to understand on what basis the Panel frames this question by reference to its own language, rather than that of the agreed treaty language, which controls.

10. In any event, the panel request in this case does additionally identify the "elements" of the measure: as outlined above, it identifies the import duties and quantitative restrictions being referred to, identifying the additional duties in question, the products and tariff headings concerned, the countries concerned, and the relevant documents and dates. There is not a shadow of doubt that the US and other potentially interested Members have been put fully on notice as to the object of the European Union’s complaint, and that all requirements of due process have been complied with.

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4 Appellate Body Report, *EC - Selected Customs Matters*, para. 133.

5 Panel Report, *US - Tuna II (Mexico)*, para. 7.24
**Question 84**

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

11. The Panel does not need to consider (ii). It is up to the European Union, as the complainant, to set out what it considers the measure at issue to be. It is then up to the complainant to demonstrate that such measure is inconsistent with the obligations the European Union has referred to.

12. The European Union refers to its response to Question 1. As recalled there, the panel request identified three measures: one for steel, one for aluminium, and the distinct measure Section 232 as interpreted. The Panel must take the measures as the European Union has identified them, and then consider whether or not each measure (for example, the measure with respect to steel) is inconsistent with the obligations we have referred to.

13. The Panel should not re-define the measures, including by dividing them into “separate measures”, because there are no such separate measures. How such “separate measures” might be analysed under the provisions cited by the parties to the dispute is therefore irrelevant. All that the European Union challenged as distinct measures are those with regard to steel, aluminium and as interpreted.

14. The EU therefore hopes that the Panel will take the measure as identified by the European Union (i.e. (i)) and determine whether it is inconsistent with the relevant obligations of the US.

**Question 85**

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

15. As the question makes clear, it is very well established that a panel request is not required to contain arguments. It needs only provide a brief summary of the legal basis of the complaint, sufficient to present the problem clearly. There is no doubt that the panel request does this.

16. As the Appellate Body explained in *US – Continued Zeroing*:
"[T]he specificity requirement under Article 6.2 is intended to ensure the sufficiency of a panel request in 'present[ing] the problem clearly'. The identification of the measure, together with a brief summary of the legal basis of the complaint, serves to demarcate the scope of a panel's jurisdiction and allows parties to engage in the subsequent panel proceedings. Thus, the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request. ... 

[T]he identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms. Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue. Thus, an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement. Such consideration may have to be explored by a panel and the parties during the panel proceedings, but is not prerequisite for the establishment of a panel. To impose such prerequisite would be inconsistent with the function of a panel request in commencing panel proceedings and setting the jurisdictional boundaries of such proceedings. Therefore, we reject the proposition that an examination of the specificity requirement under Article 6.2 of the DSU must involve a substantive inquiry as to the existence and precise content of the measure."

17. The live issue, therefore, may be not whether a panel request demonstrates the “existence and precise content” of the measures and explains their illegality beyond a clear presentation of the problem, but whether the measures are specified clearly enough for the US and the Panel to understand the “gist of what is at issue.” It would be problematic only if the rights of defence were impaired by the way in which the EU's panel request defined the measures at issue, i.e. that the US could not “reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party.” That was clearly not the

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8 Panel Report, Japan – Film, para. 10.8.
case. In that respect, it is well established that a panel request is not required to set out the complainant’s case in detail, or provide evidence and argument.9

18. The requirement to present the problem clearly does not entail an obligation for the complainant to provide arguments in support of its claim.10 A "claim" is an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".11 On the other hand, an "argument" comprises the statements made in support of a claim to demonstrate that a responding party’s measure infringes an identified treaty provision12. These statements are "set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties"13.

19. Moreover, whether a panel request is sufficient to "identify the specific measures at issue" must be assessed with reference to the panel request "taken as a whole"14 and in light of "attendant circumstances" which may include "the consultations that were held concerning the measure and the DSB's consideration of the requests for a panel and the establishment of the Panel."15

20. Based on this legal standard, the EU considers the identification of the measures at issue in the panel request to be irreproachable. It is difficult to believe that the US had any real issues in understanding which measures are at issue and, as a confirmation, it did not even file a preliminary ruling request.

21. It is also entirely appropriate that the panel request adheres to the terms actually used in the treaty. As the European Union has just recalled, the case law is replete with statements to that effect, and the practice of complainants drawing up panel requests in this fashion is rich and longstanding throughout the past decades. Using different language would only risk to obfuscate the nature of the complaint. The panel request cannot be faulted for reflecting the agreed treaty terms which the US measures are at variance with.

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10 Appellate Body Report, Russia – Railway Equipment, para. 5.28.
11 Appellate Body Report, Korea – Dairy, para. 139. See also Panel Report, Egypt – Steel Rebar, para. 7.58
12 Appellate Body Report, Korea–Dairy, para. 139
13 Appellate Body Report, Korea – Dairy, para. 139. See also Panel Report, Egypt – Steel Rebar, para. 7.58
14 Appellate Body Report, EC – Export Subsidies on Sugar, paras. 149-152.
15 Panel Report, EC and certain member States – Large Civil Aircraft, paras. 7.143-144 and fn 1984.
Question 86

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

22. The European Union refers to its responses to Panel’s questions 1 and 2 where it has clearly provided the kind of explanations that are requested again now. The European Union notes that in its message of 8 September 2020 the Panel seems to have realized that, as it mentioned: “[r]egarding questions concerning the measures at issue, the parties are requested to respond ... in light of responses to Panel question Nos. 1 and 2.”

23. Please see the list below. As is very clear from the panel request, and as already explained, these are neither challenged independently nor “as an element/component of an existing measure”: they are challenged as amendments, etc. of the measures at issue. For example, the steel measure as specifically identified in the panel request is one of the challenged measures at issue, the others being the aluminium measure and the Section 232 as interpreted measure. With each amendment of the steel measure, that amendment is encompassed into the scope of the European Union’s challenge of the steel measure.

<table>
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<tr>
<th>Description of the Measure</th>
<th>Challenged independently or as an element/component of an existing measure?</th>
<th>Relevant language in the panel request</th>
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<tr>
<td><strong>Amended, modified or replaced measures</strong></td>
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<td>Proclamation 9772 of August 10, 2018, Adjusting Imports of Steel Into the United States, Federal Register vol. 158, no. 83, August 15, 2018 (Exhibit EU-73)</td>
<td>As an element of the steel measure</td>
<td>“this request also covers any further amendments, supplements, replacements, extensions, implementing measures or other related measures, including any adjustments as between tariffs, tariff quotas or quotas”</td>
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<tr>
<td>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</td>
<td>As an element of the aluminium and steel measures</td>
<td>idem</td>
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Question 87

In dealing with amended, new, and/or lapsed measures, panels and the Appellate Body have previously used considerations such as (i) whether the "essence" of an identified measure has been altered\(^\text{16}\), (ii) the "close connection" between measures identified and those not expressly mentioned in a panel request\(^\text{17}\), and (iii) considerations regarding providing a positive resolution to the dispute\(^\text{18}\). Please comment on the validity and applicability of these considerations in this dispute. In doing so, please comment on the differences and similarities across these considerations and whether there are any other relevant considerations in this dispute.

24. For the following reasons, each of the amendments (or, in the language of the European Union’s panel request, "amendments, supplements, replacements, extensions, implementing measures or other related measures, including any adjustments as between tariffs, tariff quotas or quotas") previously mentioned in our responses to Panel questions (e.g. 1 and 2), and recalled above is within this Panel’s terms of reference.

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\(^{16}\) See Appellate Body Report, *Chile – Price Band System*, paras. 135-139. See also Appellate Body Reports, *EC – Chicken Cuts*, paras. 156-161; *EC – Selected Customs Matters*, para. 4.4; *US – Zeroing (EC)*, Art. 21.5 (EC), paras. 190-191 and 383; *China – Raw Materials*, fn 524 to para. 262; and Panel Report, *Indonesia – Chicken*, para. 7.84.


\(^{18}\) See Panel Reports, *China – Agricultural Producers*, para. 7.86; *China – Electronic Payment Services*, para. 7.224.
25. In fact, all these documents are clearly reasoning their immediate link with the steel and aluminium measures and Section 232 in their very texts. The broad scope of the European Union’s panel request denotes that we clearly intended it to cover the measures as amended. The fact that these amendments were enacted after the Panel had been established, and while the Panel was engaged in considering the measure should not affect the Panel’s approach in determining the identity of the measures, in line with previous guidance from the Appellate Body.

26. Each of the amendments below does not change the measures at issue into measures different from those that were in force before those amendments. Rather, those proclamations simply amend specific parts of the measures at issue, by e.g. adding certain products or changing the tariff treatment applied to certain countries.

27. Proclamation 9772 did not alter the essence of the steel measure, as it increased the rate of tariff for steel imports from Turkey to an 50% ad valorem duty. This is in close connection with the steel measure identified in the panel request, as the steel measure comprises also the differential treatment accorded to other countries, for which specific claims are developed. This is yet another amendment to the list of countries benefiting or not from a preferential treatment by the US.\textsuperscript{19} To achieve a positive resolution to this dispute, the Panel should find WTO-inconsistent the steel measure as amended by Proclamation 9772.

28. Proclamation 9980, too, did not alter the essence of the steel and aluminium measures, as it further developed them by adding a number of derivatives of steel and aluminium products to the product scope subject to the additional duties.\textsuperscript{20} The close connection between the steel and aluminium measures identified in the

\textsuperscript{19} See e.g.: “Clause 2 of Proclamation 9705, as amended by clause 1 of Proclamation 9740 of April 30, 2018 (Adjusting Imports of Steel Into the United States), is further amended by striking the last two sentences and inserting in lieu thereof the following three sentences: 'Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, as follows: (a) on or after 12:01 a.m. eastern daylight time on March 23, 2018, from all countries except Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the member countries of the European Union; (b) on or after 12:01 a.m. eastern daylight time on June 1, 2018, from all countries except Argentina, Australia, Brazil, and South Korea; and (c) on or after 12:01 a.m. eastern daylight time on August 13, 2018 all countries except Argentina, Australia, Brazil, South Korea, and Turkey. Further, except as otherwise provided in notices published pursuant to clause 3 of this proclamation, all steel articles imports from Turkey specified in the Annex shall be subject to a 50 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018.” (Exhibit EU-73)

\textsuperscript{20} See e.g. “the Secretary has informed me that imports of certain derivatives of aluminum articles and imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas. The net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of aluminum and steel and undermine the purpose of the proclamations...” (Exhibit EU-70)
panel request and this amendment is evidenced by the express references in Proclamation 9980 to the previous proclamations 9704, 9705, 9758, 9740, 9759 etc, to the respective investigations and to Section 232. To achieve a positive resolution to this dispute, the Panel should find WTO-inconsistent the steel and aluminium measures as amended by Proclamation 9980.

29. The Presidential Proclamation of 17 May 2019, “Adjusting Imports of Automobiles and Automobile Parts into the United States” follows a line of measures which are part of Section 232 as “repeatedly interpreted by the US’ administrative and judicial authorities”. It did not alter the essence of the Section 232 as interpreted measure, as it is a continuation of the previous practice. Furthermore, there is a close connection between the Section 232 as interpreted measure identified in the panel request and this new element. Indeed, to achieve a positive resolution to this dispute, the Panel should find WTO-inconsistent the Section 232 as interpreted measure including its latest addition.

30. The Proclamation on Adjusting Imports of Steel into the United States of 19 May 2019 and the Proclamation on Adjusting Imports of Aluminum into the United States of the same date exclude Canada and Mexico from the additional duties on steel and aluminium products. These proclamations did not alter the essence of the steel and aluminium measures, but modulated the country scope, which already beforehand had been selective. They are in close connection with the steel and aluminium measures identified in the panel request, as they also comprise the differential treatment accorded to other countries, for which specific claims are developed. To achieve a positive resolution to this dispute, the Panel should find WTO-inconsistent the steel and aluminium measures as amended by the two proclamations of 19 May 2019.

**Question 88**

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

a. *Please indicate how the panel request in this dispute adequately identifies the elements/measures challenged under Article 11.1(b) of the Agreement on Safeguards, especially those depicted in green text in the diagram.*
31. The provision in question is about so-called “grey area” measures. Its very purpose is in the nature of an anti-circumvention provision. The whole point is to make it clear that one will sweep up into the safeguards disciplines various attempts to avoid or evade them. As such, it does not particularly lend itself to precise delineation, and indeed attempting to do that (as in the diagram) rather undermines the very purpose and nature of the provision.

32. That is why the European Union considers these as part of the steel measure (for example). We do not seek to identify them as separate elements or measures and are not required to do so. When the Panel looks at the steel measure (as we have defined it) it only has to ask itself whether or not that measure is inconsistent with the obligation we have identified. If yes, we win. It does not matter if the Panel thinks that there is some “element” of our measure, as we have identified it, that, if hypothetically examined in isolation, might or might not be inconsistent with that same obligation. This is just irrelevant and indeed outside the Panel’s terms of reference.

33. As already explained, the panel request identifies the specific measure at issue. It does not need to identify the “elements” of such measure. In any event, the green language is caught by the broad scope of the panel request: “this request also covers any further amendments, supplements, replacements, extensions, implementing measures or other related measures, including any adjustments as between tariffs, tariff quotas or quotas”.

34. Both with respect to the various agreements and the manner in which they are given effect by the steel and aluminium measures, the European Union refers to the explanation in its response to Panel Question 2(g), para. 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”.21 The legal instruments, of which those measures consist and which evidence those measures, include the Proclamations published up until that time which lay down the country exemptions and describe the agreements connected to those exemptions.22 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

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21 Third and fifth paragraphs.
22 Third and fifth paragraphs.
countries for which the United States explicitly introduced a quota. 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.”

**Question 89**

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

35. In its response to Panel questions no. 6 and 7, the US agrees that a valid action under Article XIX of the GATT 1994 does not amount to a violation, but it is a suspension. The US further alleges that in relation to its actions pursuant to Section 232 the US has invoked Article XXI of the GATT 1994.

36. The European Union agrees with the first observation of the US. At the same time, the European Union reminds the Panel that the US has not “invoked” Article XXI, but only mentioned it without even coming close to what a proper invocation means - i.e. meeting the burden of proof (reus in excipiendo fit actor).

37. To recall, the two “constituent features” of a safeguard 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.

38. The European Union refers to its response to Panel question no. 7. 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.

39. 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

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23 Fourth and sixth paragraphs.
concession in a Member’s Schedule means to suspend the “promise” (towards one or more other Members) not to exceed the bound duty rate.

40. 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.

41. Indeed, to take one example, the European Union’s rebalancing measure responding to the US safeguard measures at issue in this dispute operated in two steps. They suspended concessions in a separate first step, including with respect to a number of tariff lines for which the duty rates to this date have not yet been increased.

42. However, it is also possible that a measure suspends a concession while at the same time, in a single step, effecting an action that would normally constitute a violation of a GATT obligation, such as a duty increase in excess of a bound rate. Thus, the underlying US safeguard measures have, in the European Union’s view, suspended the concessions of the US and (among other things) imposed duties in excess of bound rates, at the same time.

43. As already explained, it is important to note that 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 European Union’s view, the United States’ safeguard measures on steel and aluminium suspend concessions, but not validly, because they are WTO-inconsistent for several reasons.

**Question 90**

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

<table>
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<th>Article XXI</th>
<th>(b)</th>
<th>(i)</th>
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<tr>
<td>Nothing in this Agreement shall be construed to prevent any [Member] from taking any action which it considers necessary</td>
<td>relating to fissionable materials</td>
<td>relating to the traffic in arms</td>
<td>taken in time of war or other emergency in international relations</td>
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Introductory formula, to be found also in the cases of the general exceptions in Article XX. It suggests that the security exceptions are a defense to possible violations of other provisions. Action means measure (medidas)

This is also part of the standard formulation in the case of exception provisions (in the nature of an affirmative defense).

It is a “plausibility” test. The placing of “it considers” before the necessity test means that in principle one should not look into reasonably available alternative measures capable of achieving the same level of protection.

It is an objective part of the test: “for”. “It considers” qualifies only the necessity test.

Not any interests are covered by this provision: only security interests, and within this category, only those “essential”, important to the highest degree.

The European Union agrees with the panel reports in *Russia–Traffic in Transit and Saudi Arabia – Protection of IPRs*, that the circumstance in subparagraphs (i) to (iii) are objective and can and shall be assessed by a panel.

44. The European Union has made certain adjustments to the division of the text between different columns. The connection between the measure at issue and the essential security interests is reflected in two distinct elements: “which it considers necessary” and “for the protection of”.

45. The European Union has explained at large that “for the protection of” involves a degree of objectiveness. For instance, as glasses/spectacles are “for” reading/seeing 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. Likewise, the limitation of imports through increased duties or quantitative restrictions for the sake of protecting the profitability of a domestic industry (producing semi-finished products for all types of downstream uses) against foreign competition is “for” the protection of commercial interests and not essential security interests.
46. The European Union refers to its previous submissions with regard to a detailed analysis of the text of Article XXI.

**Question 91**

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

a. "chapeau" and "subparagraph" (as used in relation to Article XX) and, accounting for the additional layer of indentation in Article XXI, "subparagraph endings";

b. "clauses" and "phrases" in the text of Article XXI(b) including variations such as an "introductory" or "adjectival/relative/dependent" clause/phrase or "subclauses".

47. The European Union does not attach any particular significance to the grammatical terms one uses when referring to the different parts of Article XXI, as long as they reflect accurately the structure of the treaty language and are in line with conventional definitions, to be understandable to everyone.

48. To follow the well-established practice under Article XX, the European Union sees no reasons why in the case of Article XXI(b) one should not refer to the “chapeau”, “subparagraphs” and “subparagraph endings” (or conditions).

**Question 92**

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

a. "national security" as used in the Section 232 legislation (as well as the Department of Commerce Reports and Presidential Proclamations on steel and aluminium) in relation to the terms "its essential security interests" in Article XXI(b); and

49. The European Union refers to its response to Panel question no. 75, where it explained that 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 instruments allowed under the WTO Agreement for that purpose.
50. 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”. This analysis was confirmed and apply to Article 73(b) of the TRIPS Agreement by the panel in *Saudi Arabia – Protection of IPRs*.  

51. 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.  

52. To the contrary, Article XIX and the Agreement on Safeguards exist in the WTO trade in goods legal architecture precisely to cater for economic emergency actions, which are not covered by Article XXI.  

53. Thus, the concept of “national security” as defined in the relevant US legislation, including Section 232, goes significantly beyond what the GATT provides for in Article XXI. The “essential security interests” in Article XXI pertain to a closed list of circumstances. Otherwise, the treaty drafters would not have inserted a specific text. It is meant to prevent abuses and interpretations which would include everything under the sun. Article XXI does not give a carte blanche to the invoking Member to deviate from WTO obligations. By contrast, Section 232 relies on a wide range of substantive criteria justifying possible action, including criteria of “economic welfare”, that is significantly broader then the circumstances in Article XXI. Moreover, the way in which Section 232 has been interpreted suggests an even broader approach to Section 232 criteria, providing for the US 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.  

54. In other words, as explained in our previous submissions, what a domestic document of a WTO Member states about national security is one thing, while what may be covered by the Article XXI exceptions, as agreed by the whole WTO membership, is a different matter.

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26 European Union’s first written submission, section 2.1.
27 European Union’s first written submission, section 5.
28 See also European Union’s second written submission, paras. 158 – 163.
55. If a Member states in its national security strategy that it is a matter of national security for it to have a big apple pie factory with a monopoly in its internal market, that does not mean that such an interest can automatically fit under any of the subparagraphs (i) to (iii) of Article XXI(b). You can't fit a round peg in a square hole.

56. The US Section 232 legislation may be understood as acknowledging a link, in certain limited circumstances, between national security and a specific and substantiated security of supply issue. In that case, such considerations may be the means, but not the ends in themselves.

57. To the contrary, 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 demonstrate, 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.

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

58. The language used by the US authorities, referring to "in such quantities or under such circumstances" is strikingly similar to the language used in Article XIX of the GATT and the Agreement on safeguards about safeguard measures. That is why, for the purposes of WTO law, that language supports an objective determination by the Panel according to which the measures at issue are safeguard measures.

59. The European Union has discussed in detail the significance of this language in Section 3.1.4 of its first written submission, with regard to Additional features of the measures at issue that confirm that they are safeguard measures.

60. Thus, the respective language clearly supports the fact that the measures at issue are safeguard measures and not essential security interest measures. As already explained, the meaning of emergency in international relations cannot be stretched to encapsulate the purely economic objectives that the US would like to. This is so in particular if, as in this case, the “quantities” or “circumstances” of imports play a role in exclusively a commercial dimension, contrary to the hypothetical scenario where imports per se represent an essential security hazard.
Question 93

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

61. The European Union first notes that the panel in Saudi Arabia – Protection of IPRs has reiterated the legal standard for the first time articulated by the panel in Russia - Traffic in Transit. The European Union largely agrees with that standard.

62. Second the European Union also notes that the panel in Saudi Arabia – Protection of IPRs correctly rejected a spurious “invocation” of Article XXI by Saudi Arabia with regard to one of the measures at issue:

For these reasons, the Panel finds that [...]:

- the requirements for invoking Article 73(b)(iii) are not met in relation to the inconsistency with Article 61 of the TRIPS Agreement arising from Saudi Arabia's non application of criminal procedures and penalties to beoutQ.29

63. It is the first time in 73 years of GATT/WTO when a defence based on essential security interests is rejected by a panel. This is a sign of normality in the WTO. Instead of fearing to even touch this domain, setting the limits of a Member’s reliance on security exceptions while acknowledging its large margin of discretion is the right approach. If the jurisdiction a panel has is limited to taking note that a party raised the security exceptions (the US approach), then that is the end of multilateralism. That cannot be the legally correct approach for reasons developed at large by the European Union in its previous submissions.

64. Notably, the respective panel was fully aware that Saudi Arabia, Bahrain and the US considered that Article 73(b) is a self-judging provision, in part, because the words "which it considers necessary" in the chapeau apply to subparagraphs (i) to (iii) and dismissed those views. Indeed, this is a matter of standard of review and not of jurisdiction. While the standard of review in the case of the security exceptions is "an objective assessment of the matter", it needs to take into account the actual language of the provision, which contains "it considers" before necessary.

65. The panel in Saudi Arabia – Protection of IPRs adopted a different order of analysis then the panel in Russia - Traffic in Transit: it started first with the violations and then proceeded to the possible justifications. This is another sign of normality and the European Union has already urged the Panel to adopt a similar

29 Panel Report, Saudi Arabia — Protection of IPRs, para. 7.294.
approach: start its analysis under the Agreement on Safeguards for the import tariffs and import quotas. 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 of the GATT 1994 is not available to violations of the Agreement on Safeguards.\(^\text{30}\)

66. The panel proceeded in four steps, two steps for the three sub-paragraphs (conditions), and two steps for the chapeau of paragraph (b):

1. whether the existence of a "war or other emergency in international relations" had been established in the sense of subparagraph (iii) to Article 73(b);

2. whether the relevant actions were "taken in time of" that war or other emergency in international relations;

3. whether the invoking Member had articulated its relevant "essential security interests" sufficiently to enable an assessment of whether there was any link between those actions and the protection of its essential security interests; and

4. whether the relevant actions were so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member considered those actions to be necessary for the protection of its essential security interests arising out of the emergency.

67. With regard to "taken in time of war or other emergency in international relations", the panel confirms the understanding of emergency in international relations from *Russia – Traffic in Transit*. Thus, an "emergency in international relations" should be understood to mean "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".\(^\text{31}\)

68. The European Union agrees with this approach and finds it relevant to the present proceedings. The US not only did not explain what is the emergency in international relations Section 232 measures respond to, but even if it would try the legal standard cannot be met.

69. With regard to whether the relevant actions were "taken in time of" war or other emergency in international relations, the panel followed in the footsteps of the

\(^{30}\) See the European Union’s responses to Panel questions no. 21 and 22.

panel in *Russia – Traffic in Transit*, finding that the action should be taken during the war or other emergency in international relations. The connection between these two elements constitutes a chronological concurrence that is an objective fact, amenable to objective determination.

70. The European Union considers that this part of the legal test could have been better developed. The European Union considers that those terms do not only require that the action is coincidentally taken during a period of time in which the "war" or "other emergency" exists. Otherwise, such an interpretation 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. There are almost at all times conflicts in certain parts of the world which may not have any connection with a Member’s essential security interests.

71. 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, not just in temporal terms.

72. This interpretation is supported by the use of the term "protection" in the chapeau of Articles XXI(b) and 73(b), which implies the existence of a specific threat or event to which the action of the invoking Member responds. That threat or event must, at a minimum, consist of one of the situations identified in subparagraph (iii) or result from one of those situations, and be sufficiently connected, also in temporal terms, with the challenged measure.

73. With regard to whether the invoking Member had articulated its relevant "essential security interests" sufficiently to enable an assessment of whether there was any link between those actions and the protection of its essential security interests, the panel summarized Saudi Arabia’s position as follows:

Saudi Arabia affirmed that its invocation of Article 73 covered the measures at issue identified by Qatar. Saudi Arabia argued that Qatar's panel request asserts the existence of a "direct relationship" between the comprehensive measures and the related measures referenced by Qatar. Saudi Arabia also adopted the view that "a panel cannot parse out the individual measures taken as part of the overall action of severing diplomatic and economic relations, and seek to apply the plausibility test to each element separately and out of context". In response to a question by the Panel, Saudi Arabia stated that it considers that the "comprehensive measures ... extend to and encompass the measures referenced by the complaining
party in this dispute”. Saudi Arabia’s position was that the comprehensive measures were taken precisely for the purpose of protecting the essential security interests for which it invokes the security exception in Article 73.32

74. The European Union considers that the argument is misplaced. Article 73 of the TRIPS Agreement does not distinguish between “actions” and “measures”. There is no such general category called “actions” which somehow serves as an overall umbrella for the concrete “measures”.

75. Indeed, the French and Spanish versions are clear, referring to measures (mesures, medidas), in the same way that Articles XXI and XX of the GATT 1994 also refer to measures.

76. Thus, the European Union does not see any basis for the proposition that the required connection should be linked to a nebulous overall “action”, while the concrete measures would escape scrutiny. In other words, the party invoking the security exceptions will have (1) to show each time that it fulfills one of the conditions in subparagraphs (i) to (iii), (2) explain which are its essential security interests and then (3) explain the connection between the concrete measures (in this case resulting in possible violations of several provisions of the TRIPS Agreement) and the protection of its essential security interests.

77. Accordingly, what Saudi Arabia, as the party invoking the security exceptions, had to demonstrate was not whether there is a connection between the severance of relations as a whole and the security interests or emergency at issue, but rather whether it was a connection between each measure and each possible violation of the TRIPS Agreement and Saudi Arabia’s essential security interests.

78. With regard to whether the relevant actions were so remote from, or unrelated to, the "emergency in international relations" as to make it implausible that the invoking Member considered those actions to be necessary for the protection of its essential security interests arising out of the emergency, the European Union agrees with that panel that the non-application of criminal procedures and penalties to beoutQ does not have any relationship to Saudi Arabia's policy of ending or preventing any form of interaction with Qatari nationals.

79. However, the European Union considers that the panel could have better developed the legal test with regard to the objective elements in the chapeau of

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32 Panel Report, Saudi Arabia — Protection of IPRs, para. 7.277.
Article XXI(b): “for”, “security” and “essential”. It considers qualifies the necessity test only.33

80. Third, while the European Union was not associated to the full exchange of arguments and submissions between the parties in that case, we nevertheless have serious concerns with regard to whether that panel might have made the case for the respondent:

As explained earlier, Saudi Arabia's arguments under Article 73(b)(iii) of the TRIPS Agreement focus on its "comprehensive measures" taken on 5 June 2017. This led Qatar to repeatedly state that these "actions" are not the measures that it is challenging, and to argue that Saudi Arabia has therefore not actually invoked any defence under Article 73(b) with respect to the specific measures at issue in this dispute.

To clarify the relationship of the "measures at issue" identified by Qatar and the "comprehensive measures" taken by Saudi Arabia on 5 June 2017, the Panel asked Saudi Arabia "whether Saudi Arabia is asserting that any of the acts or omissions raised by Qatar as the measures at issue are 'action which it considers necessary for the protection of its essential security interests' for purposes of Article 73 of the TRIPS Agreement". Saudi Arabia responded that, with the potential exception of the travel restrictions, it was not asserting that any of the alleged acts or omissions is an "action which it considers necessary for the protection of its essential security interests" for purposes of Article 73 of the TRIPS Agreement. This statement was relied upon by Qatar as a concession by Saudi Arabia that Article 73 was not being invoked in respect of the measures at issue in this case. Thus, Qatar contended, the invocation of Article 73 must fail.

However, a closer analysis of Saudi Arabia's position shows that Saudi Arabia was not resiling from what it had set forth in its written pleadings. Rather, Saudi Arabia invoked Article 73 in respect of, and as applied to, the entire matter before the Panel, and was not directing its invocation at the specific measures identified by Qatar. The Panel notes that, given that Saudi Arabia denied that some of the measures identified by Qatar existed in fact, it would have been contradictory for Saudi Arabia to say that it had invoked Article 73 specifically in respect of measures whose existence it denied.34

81. As a third party in that case, the European Union had repeatedly drawn the panel’s attention that Saudi Arabia did not seem to have met its burden of proof. Thus, it appears that the respective panel may have exceeded its mandate and

33 EU's opening oral statement at the first substantive meeting, paras. 120 – 132.
34 Panel Report, Saudi Arabia — Protection of IPRs, paras. 7.273, 7.275, 7.246.
made the case for Saudi Arabia in making findings with regard to the application of Article 73 of the TRIPS Agreement in those proceedings. Saudi Arabia’s references to the security exceptions cannot be considered an “invocation”.

82. In the present case, the European Union recalls that even at this late stage of the proceedings the US has not explained which subparagraph of Article XXI(b) it invokes, what may be the possible emergency in international relations, which are its essential security interests and what is the connection between its essential security interests and the additional duties on steel and aluminium products.35

Question 94

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

83. Article 11.1(c) carves out from the scope of application of the Agreement on Safeguards all measures that are sought, taken or maintained by a Member “pursuant to” provisions other than those related to safeguard measures.

84. Measures that that fall under Article 11.1(b) but are not "measures provided for in Article XIX of GATT 1994" or an "emergency action on imports of particular products as set forth in Article XIX of GATT 1994" are “grey area” measures such as voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. Thus, such measures are not taken “sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX”.

35 European Union’s second written submission, para. 92.