

1 ARTICLE 11	1
1.1 Text of Article 11.....	1
1.2 Article 11.1(c).....	2
1.2.1 Applicability of the Agreement on Safeguards.....	2

1 ARTICLE 11

1.1 Text of Article 11

Article 11

Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, 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.^{3,4} These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

*(footnote original)*³ An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

*(footnote original)*⁴ Examples of similar measures include 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.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

2. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject to not more than one specific measure per importing Member⁵, the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

*(footnote original)*⁵ The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.

3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

1.2 Article 11.1(c)

1.2.1 Applicability of the Agreement on Safeguards

1. In *US – Steel and Aluminium Products (Turkey)*, Türkiye argued that the challenged additional duties and related measures constituted safeguard measures within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards. The United States disagreed with this view. The Panel described the gist of these opposing views, as follows:

"The Panel notes that a threshold question presented by the parties' arguments concerns the applicability of Article XIX of the GATT 1994 and the Agreement on Safeguards to the measures at issue. Türkiye emphasizes the characterization of the measures at issue as safeguards or other prohibited measures under Article 11.1(b) of the Agreement on Safeguards based on objective features of the measures at issue. The United States refers to Article XXI of the GATT 1994 and contends that the Agreement on Safeguards is inapplicable to the measures at issue by virtue of Article 11.1(c) as the measures were 'sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX'."¹

2. In resolving the matter, the Panel focused on Article 11.1(c) of the Agreement on Safeguards:

"The Panel thus considers that finding the measures at issue to fall within the scope of Article 11.1(c) would fully address the matter within the Panel's terms of reference under the Agreement on Safeguards as there would be no basis to assess claims of inconsistency under an agreement that 'does not apply' to the measures at issue. ...

In the circumstances of this dispute, the Panel therefore considers that it is appropriate to determine whether the measures at issue can be characterized as having been 'sought, taken or maintained ... pursuant to provisions of GATT 1994 other than Article XIX' within the meaning of Article 11.1(c) of the Agreement on Safeguards."²

3. In its interpretation of Article 11.1(c), the Panel examined the question of whether the terms "pursuant to" in the text of this provision required consistency with the provision of the GATT other than Article XIX:

"Taken in isolation, the terms 'pursuant to' could potentially accommodate a range of meanings. Within this range of meanings, the terms 'pursuant to' in the context of Article 11.1(c) could be understood as consistency with the requirements of a provision of the GATT 1994 other than Article XIX, or a different relationship that does not require such consistency. For example, a measure could be characterized under Article 11.1(c) as being 'pursuant to' a provision in the sense of being sought, taken, or maintained under the purview of that provision without necessarily meeting the requirements of the specific terms of such other provision."³

4. Following a lengthy textual interpretation, the Panel found that the term "pursuant to" does not require consistency with the requirements of GATT provisions other than Article XIX:

"On balance, these considerations indicate that the terms 'pursuant to' in Article 11.1(c) of the Agreement on Safeguards do not require consistency with provisions of the GATT 1994 other than Article XIX for a measure to fall under that paragraph. The text of Article 11.1(c) does not make any explicit reference to a requirement of conformity with the provisions of GATT 1994 in English or French in contrast to other provisions of the Agreement on Safeguards, including those that provide immediate context for Article 11.1(c). The use of the French terms '*en vertu*

¹ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.83.

² Panel Report, *US – Steel and Aluminium Products (Turkey)*, paras. 7.86-7.87.

³ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.89.

de' in Article 11.1(c) is especially compelling in this regard in signalling a contrast to the term '*conformément*' and indicates a different legal relationship than consistency or conformity with the requirements of a provision of the GATT 1994 other than Article XIX.

The Panel considers that interpreting the terms 'pursuant to' in Article 11.1(c) to refer to measures sought, taken, or maintained under the purview of another provision of the GATT 1994, without entailing consistency with the requirements of such other provision, accords with the specific context in which those terms appear. The terms 'pursuant to' in Article 11.1(c) form part of a provision governing the applicability of the Agreement on Safeguards rather than the consistency of measures with the rules and requirements of that agreement. Accordingly, the nature of the relevant inquiry under Article 11.1(c) does not relate to another provision of the GATT 1994 as a legal exception or justification for inconsistencies with the Agreement on Safeguards. Rather, the relevant inquiry under Article 11.1(c) corresponds to the threshold issue of applicability and leaves as a separate inquiry whether a measure is consistent with the requirements of such other provision 'pursuant to' which the measure was sought, taken, or maintained."⁴

5. The Panel in *US – Steel and Aluminium Products (Turkey)* concluded with respect to the terms "other than" in Article 11.1(c) that "[t]he ordinary meaning of these terms in their context encompasses measures that are pursuant to another provision of the GATT 1994, and the Panel does not find in the text of Article 11.1(c) the imposition of an additional requirement or limitation of being exclusively pursuant to such other provision".⁵

6. The Panel in *Turkey – Additional Duties (US)* rejected Türkiye's argument that an assessment of whether a particular measure falls within the scope of Article 11.1(c) should include the issue of whether the measure shares certain constituent features of a safeguard measure within the meaning of Article XIX of the GATT 1994:

"The Panel now turns to certain interpretive arguments raised by the parties. Türkiye maintains that, in the present dispute, whether a measure falls under the scope of Article 11.1(c) of the Agreement on Safeguards must be determined 'objectively' by analysing 'in particular, whether the measure presents the constituent features of a safeguard measure within the meaning of Article XIX'. The Panel understands Türkiye's argument to mean that the assessment of whether the Section 232 measures were sought, taken, or maintained pursuant to provisions of the GATT 1994 'other than Article XIX' should include consideration of whether these measures have certain features of safeguard measures. The Panel is not persuaded by this argument. An examination of measures under Article 11.1(c) of the Agreement on Safeguards must proceed on the basis of the specific terms of that provision, which provide for the inapplicability of the Agreement on Safeguards to measures adopted 'pursuant to' another provision of the GATT 1994. The Panel does not see in the text of Article 11.1(c) an additional requirement to determine 'whether WTO safeguard rules may be [] more suitable applicable provision[s] for these measures' as argued by Türkiye. In this respect, the Panel understands that, in referring to provisions of the GATT 1994 'other than Article XIX', the terms of Article 11.1(c) call for determining whether another provision of the GATT 1994 is the legal basis in the covered agreements by virtue of or under which a Member has sought, taken, or maintained a measure."⁶

7. The Panel in *US – Steel and Aluminium Products (Turkey)* described how it would assess whether the measures at issue were sought, taken, or maintained pursuant to Article XXI of the GATT 1994 (the relevant provision raised in that dispute) within the meaning of Article 11.1(c) of the Agreement on Safeguards:

⁴ Panel Report, *US – Steel and Aluminium Products (Turkey)*, paras. 7.93 and 7.95. See also Panel Report, *Turkey – Additional Duties (US)*, paras. 7.53-7.54 and 7.60.

⁵ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.96.

⁶ Panel Report, *Turkey – Additional Duties (US)*, para. 7.61.

"[T]he Panel will assess the applicability of the Agreement on Safeguards to the measures at issue in light of the foregoing interpretive considerations on Article 11.1(c) as well as the evidence and arguments submitted by the parties in this dispute. Taking into account the case-specific nature of the relevant inquiry on applicability rather than conformity, the Panel will identify relevant aspects of the design and application of the measures with specific reference to their legal characterization under Article 11.1(c) of the Agreement on Safeguards. The Panel will give due consideration to all relevant evidence in this regard including the domestic law and procedures under which the measures were adopted as well as any relevant notifications or statements to the official bodies of the WTO."⁷

8. Based on its interpretation of Article 11.1(c) and assessment of the measures at issue, the Panel declined to make a finding on the United States' argument that a WTO notification is a "condition precedent" for the applicability of safeguard disciplines.⁸

9. In its assessment, the Panel noted, first, that the measures at issue had been taken pursuant to Section 232, the provision of US law concerning the actions to be taken by the United States for safeguarding national security. The Panel also examined in detail the investigative processes under Section 232 that led to the adoption of the challenged measures, as well as the way in which they were applied.⁹ Based on this assessment, the Panel concluded that "the measures at issue were designed and expected to operate in relation to the United States' determination of a threat to its national security under the relevant domestic laws".¹⁰ In addition, the Panel also took into account the fact that the United States, in discussions at the WTO and in its notifications to relevant WTO bodies, had raised national security considerations and had referred to Article XXI of the GATT.¹¹ Based on this, the Panel identified the "central aspect" of the design and application of the challenged measures for the purpose of their legal characterization under Article 11.1(c):

"Based on the foregoing evidence, the Panel considers that a central aspect of the design and application of the measures at issue is their relation to the United States' determination of a threat to its national security under the relevant domestic laws. The national security considerations of the United States are manifest in the application, modification, and removal of the additional duties, quotas, and exemptions discussed above. Moreover, this aspect of the measures was emphasized and explicitly linked to Article XXI of the GATT 1994 by the United States in a series of notifications and statements to various official bodies of the WTO. The Panel considers significant the indications at both the domestic and multilateral levels that the measures at issue related to the United States' determination of a threat to its national security and the explicit references to Article XXI of the GATT 1994 as the legal basis under the covered agreements pursuant to which the measures were sought, taken, or maintained. While the domestic legal status or statements by a Member to official WTO bodies are not determinative of the legal characterization of measures under the covered agreements in dispute settlement, the Panel considers such evidence to be relevant within the context of an objective assessment under Article 11.1(c) of the Agreement on Safeguards. This is particularly so where there is evidence contemporaneous with the adoption of the measures that is confirmed by other relevant evidence of the measures' design and application. In this dispute, the features of the measures outlined above indicate that the United States' determination of a threat to its national security under Section 232 is a central aspect of the measures with respect to their legal characterization as being sought, taken, or maintained pursuant to Article XXI of the GATT 1994."¹²

10. As justification for its argument regarding the applicability of Article XIX and the Agreement on Safeguards, Türkiye referred to the findings in the reports of the US Department of Commerce pertaining to the adverse impact of imports on the domestic steel and aluminium

⁷ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.98.

⁸ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.99.

⁹ Panel Report, *US – Steel and Aluminium Products (Turkey)*, paras. 7.102-7.105.

¹⁰ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.106.

¹¹ Panel Report, *US – Steel and Aluminium Products (Turkey)*, paras. 7.107-7.110.

¹² Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.111.

industries of the United States.¹³ The Panel noted these findings, but underlined that such findings were linked to national security of the United States.¹⁴ The Panel therefore came to the conclusion that:

"Viewed in their context, the findings in the Steel and Aluminium Reports confirm that the aspects of the measures most central to their legal characterization under Article 11.1(c) of the Agreement on Safeguards concern the national security considerations as reflected in Section 232 and reiterated in the relevant domestic legal acts and instruments. The examination in the Steel and Aluminium Reports of the state of the domestic steel and aluminium industries is an element of the United States' determination of a threat to its national security under the relevant domestic laws. The Panel considers that it would be improper to assess such factors in isolation from the threat to national security that was determined to exist under Section 232 on the basis of those and other factors."¹⁵

11. Based on its assessment, the Panel concluded that:

"[T]he measures were sought, taken, or maintained pursuant to Article XXI of the GATT 1994. Accordingly, the measures were sought, taken, or maintained pursuant to a provision of the GATT 1994 other than Article XIX within the meaning of Article 11.1(c) of the Agreement on Safeguards."¹⁶

12. The Panel in *Turkey – Additional Duties (US)* expressed agreement with the findings of the Panel in *United States – Steel and Aluminium Products (Turkey)* that the Section 232 measures had been adopted pursuant to a provision of the GATT 1994 other than Article XIX within the meaning of Article 11.1(c) of the Agreement on Safeguards.¹⁷ In coming to this conclusion, the Panel in *Turkey – Additional Duties (US)* followed analytical steps very similar to those followed by the Panel in *United States – Steel and Aluminium Products (Turkey)*.¹⁸

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¹³ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.112.

¹⁴ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.113.

¹⁵ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.114.

¹⁶ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.115.

¹⁷ Panel Report, *Turkey – Additional Duties (US)*, 7.79. Similarly, the Panel in *China – Additional Duties (US)* concurred with the interpretation of the Panel in *United States – Steel and Aluminium Products (China)* regarding the legal characterization of the Section 232 measures adopted by the United States (Panel Report, *China – Additional Duties (US)*, para. 7.118).

¹⁸ See Panel Report, *Turkey – Additional Duties (US)*, paras. 7.63-7.80.