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IN THE WORLD TRADE ORGANIZATION

United States – Certain Measures on Steel and Aluminium Products (WT/DS552)

Norway's Opening Statement at the Second Substantive Meeting of the Panel with the Parties

14 January 2021

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TABLE OF CASES

Short Title	Full Case Title and Citation
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
Chile – Alcoholic Beverages	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, p. 281
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002, DSR 2002:V, p. 1827
Indonesia – Iron or Steel Products	Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018, DSR 2018:VII, p. 3393
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
Philippines –Distilled Spirits	Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163
Russia – Traffic in Transit	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Saudi Arabia – IPRs	Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R and Add.1, circulated to WTO Members 16 June 2020

Short Title	Full Case Title and Citation
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911

LIST OF ABBREVIATIONS

Abbreviation	Description
Agreement on Agriculture	*Agreement on Agriculture*
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
Customs Valuation Agreement	*Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*
DSU	Understanding on Rules and procedures governing the Settlement of Disputes
GATT	General Agreement on Tariffs and Trade
GATT 1994	General Agreement on Tariffs and Trade 1994
Import Licensing Agreement	*Agreement on Import Licensing Procedures*
Preshipment Inspection Agreement	*Agreement on Preshipment Inspection*
Rules of Origin Agreement	*Agreement on the Rules of Origin*
Safeguards Agreement	*Agreement on Safeguards*
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures*
TBT Agreement	*Agreement on Technical Barriers to Trade*
Trade Facilitation Agreement	*Agreement on Trade Facilitation*
TRIMS Agreement	*Agreement on Trade-Related Investment Measures*
US	United States
US DOC	United States Department of Commerce
Vienna Convention	*Vienna Convention on the Law of Treaties*
WTO	World Trade Organization

LIST OF EXHIBITS

Exhibit No.	Description
(Exhibit NOR-145)	Wikipedia, "Procrustes", https://en.wikipedia.org/wiki/Procrustes, last accessed 10 January 2021
(Exhibit NOR-146)	The Writing Center, "Relative Clauses", available at https://writingcenter.unc.edu/tips-and-tools/relative-clauses/, last accessed 10 January 2021
(Exhibit NOR-147)	Walden University, "Grammar: Relative, Restrictive, and Nonrestrictive Clauses", https://academicguides.waldenu.edu/writingcenter/grammar/clauses , last accessed 10 January 2021
(Exhibit NOR-148)	Perfect English Grammar, "Participle Clause", https://www.perfect-english-grammar.com/support-files/participle_clauses_explanation.pdf, last accessed 10 January 2021
(Exhibit NOR-149)	Oxford English Dictionary ("OED") definition of "ordinary", last accessed 11 January 2021

I. INTRODUCTION

1. Norway is pleased to present its opening statement today. As the parties' positions are now well rehearsed, we intend to focus on select issues. We thank the Panel and the Secretariat for your attention today, and your continued efforts in seeking to resolve this dispute.

2. Norway intends to proceed as follows. **First**, Norway addresses select aspects of its claims. Norway explains that the US tariffs are safeguards because they present the two "constituent features" of safeguard measures. Norway then addresses the relationship between the three subparagraphs of Article 11.1 of the *Safeguards Agreement*. Finally, Norway briefly summarises its claims under the GATT 1994.

3. **Second**, Norway addresses the US national security defence. In particular, Norway explains that Article XXI(b) does not apply to the *Safeguards Agreement*. Norway then addresses shortcomings in the US interpretation of Article XXI(b), before turning to apply Article XXI(b) to this dispute.

II. NORWAY'S CLAIMS OF VIOLATION UNDER THE *SAFEGUARDS AGREEMENT* AND THE GATT 1994

A. Claims under the *Safeguards Agreement*

1. The measures at issue are safeguards measures

4. Norway claims that the US measures violate the *Safeguards Agreement*. The United States asserts that the *Safeguards Agreement* does not apply to its measures because it has not notified them as safeguards or consulted with exporting Members.[1] Norway wishes to address this point of disagreement today.

5. In *Indonesia – Iron or Steel Products*, the Appellate Body set out the legal standard for the applicability of the *Safeguards Agreement*. It found that a measure must possess two "constituent features" to be a safeguard. Specifically, the measure must be designed to: (i) suspend, modify or withdraw a GATT 1994 obligation; and (ii) prevent or remedy serious injury to the Member's domestic industry.[2]

[1] The United States' responses to Questions 5 and 9.
[2] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. *See also* Norway's response to Question 5.

6. The Appellate Body also addressed how a panel should assess whether a measure possesses these two "constituent features". It must "assess the design, structure and expected operation of the measure as a whole".[3] In so doing, a panel must consider all "relevant factors", including the domestic characterisation of the measure and any notification of the measure as a safeguard.[4] These factors are not exhaustive, however. A panel must consider any factor that sheds light on a measure's design, structure and expected operation.[5] No one factor is decisive, and the relative importance of any given factor will vary according to the specific measure at hand.[6]

7. The United States accepts that the two "constituent features" just identified are "necessary to establish that a safeguard measure exists".[7] It also does not contest that its measures possess these features. However, it asserts that there are two *additional* "constituent features". Specifically, the United States argues that, for the *Safeguards Agreement* to apply, the adopting Member must have notified its measure as a safeguard, and consulted exporting Members.[8] Thus, for the United States, safeguard measures entail an element of intention, election and volition.[9] The United States errs.

8. **First**, the Appellate Body expressly addressed the relevance of notification in *Indonesia – Iron or Steel Products*. It found that notification is not a "constituent feature" of a safeguard measure. Instead, notification is one, non-dispositive "factor" to be considered in assessing the design, structure, and expected operation of a measure.

9. **Second**, the characterisation of a measure under the *Safeguards Agreement* turns on "*objective considerations*",[10] rather than the adopting Member's own views. In particular, the characterisation is based on the "design, structure and expected operation of the measure as a whole".[11] Thus, the adopting Member's intentions, elections and volitions are not decisive.

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[3] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. *See also* Norway's response to Question 5.
[4] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.
[5] Appellate Body Report, *Indonesia – Iron or* Steel, para. 5.60. *See also* Appellate Body Report, *Japan – Alcoholic Beverages*, p. 29; Appellate Body Reports, *Argentina – Import Measures*, para. 5.217; Appellate Body Report, *China – Raw Materials*, para. 7.418.
[6] Appellate Body Report, *Indonesia – Iron or* Steel, para. 5.64.
[7] The United States' response to Question 5(a), para. 9; Norway's response to Question 13, para. 47.
[8] The United States' response to Question 13, para. 47.
[9] *See also* the United States' response to Question 11(a).
[10] *See* Appellate Body Report, *Australia – Apples*, para. 173. Emphasis added.
[11] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. *See also* Norway's response to Question 5.

10. This idea is not novel. Going back to the earliest disputes, panels and the Appellate Body have consistently confirmed that the WTO adjudicator, and not the respondent, decides on the WTO characterisation of a measure, and does so on the basis of objective considerations.[12] For example, in *Chile – Alcohol*, in 1999, the Appellate Body clarified that a respondent's intention is relevant only in so far as given "*objective expression*" through "*the design, the architecture and the revealing structure of the measure*".[13]

11. WTO adjudicators have applied this approach unwaveringly across WTO provisions. Whenever a WTO provision imposes obligations regarding measures of a particular type, the WTO adjudicator, not the respondent, decides if a measure is of the relevant type.[14] For example, under Article III of the GATT 1994, a respondent is entirely "free" to adopt an "internal tax". However, the respondent is not, thereby, free to decide for itself that its measure is <u>not</u> an "internal tax" subject to Article III obligations.[15]

12. Article XIX is the same: a Member is certainly "free" to adopt a safeguard measure. However, it is not thereby free to decide that its measure is <u>not</u> a safeguard subject to Article XIX obligations.

13. It might not seem that important whether a measure is a safeguard. After all, if a measure is not a safeguard, it is still subject to obligations in Articles II and XI of the GATT 1994 and would, presumably, violate one of those obligations. In fact, however, assessing whether a measure is a safeguard has decidedly more than academic consequences.

14. Article 8 of the *Safeguards Agreement* affords exporting Members certain rights to counterbalance the effects of a safeguard, without pursuing dispute settlement. Exporting Members regularly avail themselves of these rights.[16] Under Articles II and XI, no such

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[12] *See* Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29; Appellate Body Report, *Philippines – Distilled Spirits*, para. 250; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 149; Appellate Body Report, *Canada – Periodicals*, p. 30; and Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62.
[13] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62. Emphases added.
[14] *See, e.g.,* Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77; Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 204; Panel Report, *EC – Asbestos*, paras. 8.83-8.99; Panel Report, *India – Autos*, para. 7.224.
[15] *See, e.g.,* Panel Report, *EC – Asbestos*, paras. 8.83-8.99; Panel Report, *India – Autos*, para. 7.224.
[16] Affected Members frequently seek recourse to Article 8 of the *Safeguards Agreement*. *See, e.g.,* Committee on Safeguards, "Immediate notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards", 3 August 1991 (G/L251; G/SG/N/12/EEC/1); Committee on Safeguards, "Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and other Obligations referred to in Paragraph 2 of Article 8 of the Agreement of Safeguards", 28 April 2003 (G/L626; G/SG/N/12/TUR/3); Committee on Safeguards, "Notification under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed

rights exist. The characterisation of a measure as a safeguard, therefore, has material consequences for an exporting Member. When a measure has the objective features of a safeguard, a respondent does not enjoy the freedom – the volition – to eliminate the rights of other Members. Nor can a panel interpret the *Safeguards Agreement* to diminish other Members' rights, by placing them within the gift of the importing Member.

15. In this dispute, as Norway has explained, the design, architecture and revealing structure of the US import tariffs and quotas demonstrate objectively that they are designed to (i) suspend, modify or withdraw GATT 1994 obligations, and (ii) prevent or remedy serious injury to US industry.[17] Norway has presented a *prima facie* case that the US import tariffs, as safeguard measures, violate Articles 2.1, 2.2, 5.1, 11.1(b), 12.1 and 12.2 of the *Safeguards Agreement*.[18] It has also presented a *prima facie* case that the US import quotas violate Article 11.1(b) of that *Agreement*.[19]

2. The relationship between subparagraphs of Article 11.1 *Safeguards Agreement*

16. The United States argues that, even if its measures are, in principle, subject to the *Safeguards Agreement*, Article 11.1(c) of that *Agreement* provides an exception.[20] The Panel has posed several questions on the relationship between the subparagraphs of Article 11.1 of the *Safeguards Agreement*. Norway wishes to draw together its responses to these questions.

17. **Subparagraph (a)** states simply that safeguard measures – that is, measures provided for in Article XIX of the GATT 1994 – must conform to the obligations in Article XIX and the *Safeguards Agreement*. Norway argues that the US import tariffs and quotas are subject to subparagraph (a).[21]

Suspension of Concessions and other Obligations referred to in Paragraph 2 of Article 8 of the Agreement of Safeguards", 26 May 2015 (G/L/1117; G/SG/N/12/IDN/2). There are at least 26 instances of affected Members adopting counterbalancing measures under Article 8 of the *Safeguards Agreement*.

[17] Norway's first written submission, paras. 107-156. Norway's response to Question 3, paras. 33-36; Norway's second written submission, paras. 17-32; Norway's response to Question 88, para. 26 and footnote 88.

[18] *See* Norway's first written submission, Section VI.B.2(a) (Article 2.1); Section VI.B.2(b) (Article 2.2); Section VI.B.2(c) (Article 5.1); Section VI.B.2(d) (Article 11.1(b)); and Section VI.B.2(e) (Articles 12.1 and 12.2).

[19] Norway's first written submission, paras. 392-420.

[20] The United States' first written submission para. 56; the United States' response to Question 19, para. 64; the United States' response to Question 20, paras. 65-74.

[21] *See* Norway's first written submission, paras. 107-156; Norway's response to Question 3, paras. 33-36; Norway's second written submission, paras. 17-32; Norway's response to Question 88, para. 26 and footnote 88.

18. **Subparagraph (b)** prohibits trade-restrictive measures that afford protection and are applied with the acquiescence of the exporting Member. Norway argues that the US import quotas are subject to subparagraph (b).

19. **Subparagraph (c)** carves certain measures out of the *Safeguards Agreement*. These are measures "sought, taken or maintained pursuant to provisions of the GATT 1994 other than Article XIX". The United States argues that this provision provides an exception for its import tariffs and quotas, even if they are subject to subparagraphs (a) and (b) respectively, because the United States has invoked Article XXI.

20. The US argument, therefore, raises interpretive questions about the relationship between: first, subparagraphs (a) and (c); and, second, subparagraphs (b) and (c). (In the interests of time, we will now drop the word "subparagraph".)

21. Starting with the relationship between (a) and (c), the United States argues that (c) provides an exception for safeguard measures subject to (a); and, that this exception applies regardless whether the measure is consistent with a GATT provision other than Article XIX.

22. Norway disagrees with both aspects of the US interpretive argument. **First**, in keeping with the ordinary meaning of the words "pursuant to", (c) applies solely to measures that are *consistent with* a GATT provision other than Article XIX.[22]

23. **Second**, (c) does not provide an exception for safeguard measures subject to (a). By definition, these measures are not taken pursuant to a group of GATT "provisions … *other than* Article XIX".[23] That is, they are not taken pursuant to GATT provisions "*except for*", "*apart from*", "*besides*", or "*excluding*" Article XIX, which is the meaning of the words "other than".[24]

24. In short, for a measure to be subject to (c), the legal basis for the measure must be drawn from the universe of GATT "provisions" *besides* Article XIX. If the "provisions" forming the legal base *include* Article XIX, they are not "other than" Article XIX.

25. Norway's reading is supported by considerations other than the meaning of "other than". As context, Articles 1 and 11.1(a) state, without qualification, that safeguard measures

[22] Norway's response to Question 20(b), paras. 199-200; Norway's comment on the United States' response to Question 94, para. 79.
[23] Emphasis added.
[24] Norway's response to Question 20(b), para. 207, citing to Oxford English Dictionary ("OED") definition of "other than", last accessed 4 February 2020, **(Exhibit NOR-102)**. *See also ibid*. paras. 203-237; Norway's second written submission, paras. 33-44; Norway's comment on the United States' response to Question 94, paras. 72-78.

are subject to Article XIX and the *Safeguards Agreement*. In both cases, although the drafters could have added that these key scope provisions were "… subject to Article 11.1(c)", they did not. Thus, they give no support to the US view that the decisive scope provision of the *Safeguards Agreement* is buried in the third subparagraph of Article 11.1, and not in the "general provision" in Article 1.

26. Both parties cite negotiating history to show that Article 11 originally consisted of a single provision, which prohibited all trade-restrictive measures, subject to two exceptions separated by the word "or".[25] The first exception became (a), and applied to measures that "conform[] with *Article XIX*"; and the second exception became (c), and applied to measures "consistent with *other provisions* of the General Agreement".[26] As a matter of logic, the word "*other*" in the second exception *necessarily referred to the universe of GATT "provisions" "except for", "apart from", "besides", "excluding" Article XIX*, because Article XIX was already addressed in the first exception.

27. In this case, the US import tariffs and quotas are subject to (a). They are not subject to (c) for two reasons: **first**, their legal basis *includes* Article XIX and is, therefore, not drawn from the universe of GATT "provisions" "other than" Article XIX;[27] and, **second**, neither the import tariffs, nor the quotas, are maintained "pursuant to" – that is, "*consistent with*" – a GATT provision other than Article XIX.[28]

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[25] The October 1990 draft of Article 11 of the *Safeguards Agreement reads*, in relevant part:

> No trade-restrictive measure shall be sought or taken by a contracting party unless it conforms with the provisions of Article XIX as interpreted by the provisions of this agreement, *or* is consistent with other provisions of the General Agreement, or protocols and agreements or arrangements concluded within the framework of the General Agreement…

Uruguay Round - Group of Negotiations on Goods (GATT) - Negotiating Group on Safeguards - Draft Text of an Agreement, 31 October 1990, **(Exhibit NOR-103)**. Emphases added.

[26] Uruguay Round - Group of Negotiations on Goods (GATT) - Negotiating Group on Safeguards - Draft Text of an Agreement, 31 October 1990, **(Exhibit NOR-103)**.

[27] *See* Norway's first written submission, paras. 107-156; Norway's response to Question 3, paras. 33-36; Norway's second written submission, paras. 17-32; Norway's response to Question 88, para. 26 and footnote 88.

[28] *See* Norway's first opening statement, paras. 60-83 and 119; Norway's second written submission, paras. 102-124; Norway's response to Question 93, paras. 83-118, where Norway demonstrates that the United States has failed to make a *prima facie* case under Article XXI(b). The United States does not claim that its measures are "pursuant to" any other provisions of the GATT 1994.

B. Claims under the GATT 1994

28. The United States' tariffs are inconsistent with Articles 2.1, 2.2, 5.1, 12.1 and 12.2 of the *Safeguards Agreement*.[29] As a result, because they exceed the United States' bound rate for the product in question, they impermissibly violate Article II:1 of the GATT 1994.[30] The US import quotas violate Article XI:1 of the GATT 1994.[31] The country-wide tariff exemptions and the product exclusions both violate Article X:3(a).[32] The country-wide tariff exemptions also violate Article I:1 of the GATT 1994.[33]

III. United States' defence under Article XXI(b) of the GATT 1994

29. Norway now addresses the US arguments under Article XXI(b) of the GATT 1994. The United States views the defence in Article XXI as entirely self-judging. On that view, when a Member simply asserts that it has invoked the security exception, a panel must abdicate its function. Norway disagrees. A Member invoking Article XXI(b) carries the burden to prove the elements of the defence in both the *chapeau* and, at least, one subparagraph. The only two panels to have adjudicated the security exception share Norway's view.[34]

30. The United States must show that the inconsistencies in each of the four challenged measures[35] are justified under Article XXI(b), but it has failed to do so. Under subparagraph (iii), the United States has not shown that the economic difficulties facing its aluminium and steel industries involve a "war or other emergency in international relations".[36] Under the *chapeau*, it has not articulated the particular security interests that its four measures purportedly seek to protect.[37] It is, therefore, impossible to verify whether the alleged interests are, indeed, "essential security interests" under Article XXI(b) and, if so, whether

[29] Norway's first written submission, paras. 157-424.
[30] Norway's first written submission, paras. 426-437.
[31] Norway's first written submission, paras. 438-466.
[32] Norway's first written submission, paras. 467-534;
[33] Norway's response to Question 1(b), Table 1; Norway's responses to the Panel's questions after the first substantive meeting, Annex 1.
[34] Panel Report, *Russia – Traffic in Transit*, para. 7.102-7.104; Panel Report, *Saudi Arabia – Protection of IPRs*, paras. 7.241-7.242. *See also* Norway's Response to Question 93, paras. 83-118.
[35] The four sets of measures are: import tariffs, import quotas, country-wide tariff exemptions, and product exclusions. For a detailed description of these measures. *See* Norway's responses to Questions 1 and 2. *See also* Norway's response to Panel Question 85.
[36] Norway's response to Question 92(a)-(b), paras. 60-66; Norway's comment on the United States' response to Question 92(b), paras. 45-59.
[37] Norway's response to Question 93, paras. 99-108. Norway's comment on the United States' response to Question 92(a), paras. 30-44.

the proper connection exists between each of the four measures and those "interests".[38] In short, the United States has not substantiated its asserted defence.

31. Norway will not repeat its arguments in this statement.[39] Instead, Norway focuses on three issues. **First**, Norway explains that the defence under Article XXI(b) is unavailable as a justification for violations of the *Safeguards Agreement*. **Second**, Norway addresses some of the critical flaws in the US interpretation of Article XXI(b). **Third**, Norway reiterates that the United States has not substantiated its defence under Article XXI(b).

A. Article XXI(b) of the GATT 1994 does not apply to the *Safeguards Agreement*

32. In response to Norway's claims under the *Safeguards Agreement*, the United States has asserted a national security defence under Article XXI(b) of the GATT 1994. In Norway's view, Article XXI(b) is not available as a defence under the *Safeguards Agreement*.

33. The *Safeguards Agreement* itself does not contain a national security defence. This is not surprising, given that the *Agreement* already affords Members flexibility to depart from WTO obligations, and it does so to enable them to address a *specific economic problem*, namely injury to a domestic industry caused by increased imports.

34. Absent a security defence in the *Safeguards Agreement*, the United States relies on Article XXI(b) of the GATT 1994. However, the wording of Article XXI(b) limits its application to "this Agreement", that is, the GATT 1994. To overcome this limitation, the United States relies on references, in the *Safeguards Agreement*, to Article XIX of the GATT 1994, and to the GATT 1994 more generally.[40]

35. Panels and the Appellate Body have held that such references are inadequate to make a specific GATT exception applicable to a different covered agreement.[41] In short, given the express limitation in Article XXI, references to GATT provisions other than Article XXI, and to the GATT 1994 generally, fail to show an intention to apply Article XXI(b) beyond "this Agreement".

[38] Norway's response to Question 93, paras. 109-118.
[39] Norway's opening statement at the first substantive meeting, Section V; Norway's responses to Question 24-81; Norway's second written submission, section VI.B.1; Norway's response to Questions 90-91; Norway's comments on the United States' responses to Questions 90-91.
[40] The United States' response to Question 78, paras. 355-356.
[41] Norway's second written submission, paras. 52-59.

36. Instead, when Members intended a GATT exception to apply to another covered agreement, they included express language to that effect, as they did in the *Import Licensing Agreement*, the *TRIMS Agreement*, and the *Trade Facilitation Agreement*.[42]

37. The Panel cannot accede to the US invitation to cast aside the drafters' express statement that Article XXI(b) does not apply beyond "this Agreement".

38. If the US view were permitted, Articles XX and XXI of the GATT 1994 would be applicable, despite their express textual limitation, to all the WTO goods agreements, including the *SCM Agreement*,[43] the *Anti-Dumping Agreement*,[44] the *Customs Valuation Agreement*,[45] the *SPS Agreement*,[46] the *Agreement on Agriculture*,[47] the *TBT Agreement*,[48] the *Preshipment Inspection Agreement*,[49] and the *Rules of Origin Agreement*.[50] Indeed, a Member could even rely on Articles XX and XXI to avoid obligations under the DSU, because of references to Articles XXII and XXIII of the GATT 1994. On this view, the words "this Agreement" in Article XXI would serve no purpose.

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[42] *Import Licensing Agreement*, Article 1.10; *TRIMS Agreement*, Article 3; *Trade Facilitation Agreement*, Article 24.7.

[43] *SCM Agreement*, Articles 1.1(a)(2) (referring to GATT Article XVI), V(b) (referring to GATT Articles II and XVI), 10 (referring to GATT Article VI), 11 (referring to GATT Article VI), 15.1 (referring to GATT Article VI), 16.4 (referring to GATT Article XXIV:8(b)), 20.6 (referring to GATT generally), 25.1 (referring to GATT Article XVI), 25.6 (referring to GATT Article XVI:1), 25.7 (referring to GATT generally), 25.10 (referring to GATT Article XVI:1), 26.1 (referring to GATT Article XVI:1), 27.9 (referring to GATT generally), 30 (referring to GATT Articles XXII and XXIII), 32.1 (referring to GATT generally); Annex I, item (l) (referring to GATT Article XVI).

[44] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,* Articles 1 (referring to GATT Article VI), 2.7 (referring to GATT Article VI:1), 3.1 (referring to GATT Article VI), 4.3 (referring to GATT Article XXIV), 5.2 (referring to GATT Article VI), 18.1 (referring to GATT generally).

[45] *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, Preamble (referring to the "objectives of GATT 1994" and Article VII); Articles 7 (referring to GATT Article VII), 12 (referring to GATT Article X).

[46] *SPS Agreement*, Preamble (referring to GATT 1994 generally and to Article XX(b) in particular), Articles 2.4 (referring to GATT 1994 generally and to Article XX(b) in particular), 3.2 (referring to GATT Article XX), 11 (referring to GATT Articles XXII and XXIII).

[47] *Agreement on Agriculture*, Preamble (referring to "GATT rules and disciplines"), Articles 3.1 (making schedules under the agreement an integral part of GATT 1994), 5.1 (referring to GATT Article II:1(b)), 5.8 (referring to GATT Articles XIX:1(a) and XIX:3), 12 (referring to GATT Article XI:2(a)), 13 (referring to GATT in general and Articles II, VI, XVI, and XXIII:1(b), specifically), 19 (referring to GATT Articles XXII and XXIII), 21.1 (referring to GATT generally).

[48] *TBT Agreement*, Preamble (referring to the objectives of GATT 1994), Article 14.1 (referring to GATT Articles XXII and XXIII).

[49] *Preshipment Inspection Agreement*, Preamble (referring to the "role of GATT", "the responsiveness of the GATT", "the principles and obligations of GATT 1994"), Articles 2.2 (referring to GATT Article III:4), 2.6 (referring to the "situations" addressed in GATT Articles XX and XXI), 7 (referring to GATT Article XXII), 8 (referring to GATT Article XXIII).

[50] *Rules of Origin Agreement*, (referring to the "role of GATT", "the responsiveness of the GATT", "the objectives of GATT", "rights of Members under GATT"), Articles 1.1 (referring to GATT Article I:1), 1.2 (referring to GATT Articles I, II, III, IX, VI, XI and XIII), 2(g) (referring to GATT Article X:1), 3(e) (referring to GATT Article X:1), (referring to GATT Article XXII), 8 (referring to GATT Article XXIII).

39. The Panel must, therefore, reject the United States' invitation to disregard the wording of Article XXI.

B. Errors in the US interpretation of Article XXI(b) of the GATT 1994

40. As a preliminary point, Norway notes that some of the parties' arguments on the interpretation of Article XXI(b) were considered in recent Article XXI disputes, and others were not. The United States has criticised past panels when they simply repeated the Article XXI reasoning of earlier panels, without addressing new arguments.[51] Norway, therefore, encourages the Panel to address the parties' arguments fully, along with and in light of the earlier panel findings.

41. The parties disagree about the relationship between the subparagraphs and the *chapeau* of Article XXI(b). The United States argues that the subparagraphs are subject to the verb "consider" in the *chapeau* and, as a result, the respondent is free to decide for itself if the subparagraphs are met. To support its position, the United States is forced to adopt a variety of "Procrustean" interpretive techniques that both stretch and cut the text, sometimes in inconsistent ways, to fit its desired outcome. A son of Poseidon, Procrustes was renowned for stretching or cutting his visitors so that they fit into his guest bed.[52]

42. **First**, the United States insists that the words in Article XXI(b) following the noun "action" until the end of each subparagraph constitute "a single relative clause"[53] that cannot be "artificially separate[d]"[54] into distinct grammatical units. This is a critical element of the US argument that the verb "considers" can be stretched into the subparagraphs: to the United States, the verb "consider" and the subparagraphs form part of a single, indivisible grammatical unit.

43. Strikingly, however, the United States contradicts its own argument. Elsewhere, it recognises that the subparagraphs constitute distinct grammatical units with their own

[51] The United States' response to Question 93, para. 54; United States' comment on Norway's response to Question 93, para. 41.
[52] Wikipedia, "Procrustes", https://en.wikipedia.org/wiki/Procrustes, last accessed 10 January 2021, **(Exhibit NOR-145)**.
[53] The United States' response to Question 90, paras. 27, 28; the United States' response to Question 92, para. 38; the United States' comment on Norway's response to Panel Question 90, para. 30; the United States' second written submission, paras. 8 and 28; the United States' opening statement at the first substantive meeting, para. 11; the United States' response to Question 35, para. 123; the United States' response to Question 36, paras. 125, 134, 136; the United States' response to Question 37, para. 137; the United States' response to Question 40, para. 148; the United States' response to Question 55, para. 252.
[54] The United States' Response to Question 35, para 131; the United States' second written submission, paras. 8 and 28.

grammatical function. Thus, in several submissions, the United States describes the subparagraphs as constituting "**participial phrases**", "**adjectival phrases**" and "**adjectival clauses**".[55] It explains that the subparagraphs "function as adjectives" modifying a noun.[56]

44. Norway agrees that the subparagraphs constitute a distinct grammatical unit with their own grammatical function. Indeed, Norway even agrees with the United States that the subparagraphs are "**participle phrases**"[57] that function as adjectives modifying a noun.

45. Norway has also described the subparagraphs as "**reduced relative clauses**".[58] A "relative clause" begins with a relative pronoun, such as "which", which replaces the noun; the pronoun is then followed by a verbal phrase that modifies the subject noun. As a result, a relative clause "is sometimes called an '**adjective clause**' because it functions like an adjective – it gives more information about a noun".[59] An example of a relative clause (in italics) is: "a Member may take action *which relates to fissionable materials*".

46. A relative clause can be reduced "for a more concise style"[60] to create a "**reduced relative clause**".[61] This is achieved by dropping the pronoun and replacing the verb with a present or past participle. Thus, without changing the sense, and comparing the yellow highlighted words, our relative clause can be shortened to: "a Member may take action *relating to fissionable materials*". As well as being called a "reduced relative clause", the words in italics are a "**participial phrase**", because the phrase begins with a participle and is followed by modifiers.

[55] The United States' response to Question 40, paras. 150 and 152; the United States' response to Question 90, para. 28; the United States' second written submission, paras. 30 and 31; the United States' comment on Norway's response to Question 91, para. 31.
[56] The United States' response to Question 40, para. 150; the United States' Response to Question 90, para. 28; the United States' second written submission, para. 30.
[57] Norway's response to Question 90, Figure 1. The terms participial phrase and participle phrase are synonymous. The word "participial" is the adjectival form of "participle".
[58] Norway's response to Question 90, Figure 1.
[59] *See* The Writing Center, "Relative Clauses", available at https://writingcenter.unc.edu/tips-and-tools/relative-clauses/, last accessed 10 January 2021, **(Exhibit NOR-146)**. *See also* Walden University, "Grammar: Relative, Restrictive, and Nonrestrictive Clauses", https://academicguides.waldenu.edu/writingcenter/grammar/clauses, last accessed 10 January 2021, **(Exhibit NOR-147)** ("A relative clause is also known as an adjective clause.").
[60] *See* Walden University, "Grammar: Relative, Restrictive, and Nonrestrictive Clauses", https://academicguides.waldenu.edu/writingcenter/grammar/clauses, last accessed 10 January 2021, **(Exhibit NOR-147)**.
[61] *See* The Writing Center, "Relative Clauses", available at https://writingcenter.unc.edu/tips-and-tools/relative-clauses/, last accessed 10 January 2021, **(Exhibit NOR-146)**; and Perfect English Grammar, "Participle Clause", https://www.perfect-english-grammar.com/support-files/participle_clauses_explanation.pdf, last accessed 10 January 2021, **(Exhibit NOR-148)**.

47. Significantly, therefore, the United States and Norway agree that the subparagraphs constitute distinct grammatical units ("participial phrases") that have the distinct grammatical function of modifying a noun.

48. As a result, the words following the noun "action" in Article XXI(b) do not comprise a single grammatical unit, as the United States sometimes asserts. Instead, they form two distinct grammatical units: (1) a **relative clause** ("which … interests");[62] followed by (2) **participial phrases** (each subparagraph); each of these distinct grammatical units functions by modifying a noun.

49. **Second**, when the United States seeks to identify the noun modified by the subparagraphs, it makes use of another "Procrustean" technique to stretch the verb "consider" into the subparagraphs. Specifically, the United States makes what it acknowledges to be inconsistent use of a single rule of English grammar to arrive at an incoherent interpretation of the text.

50. The United States argues that, "[u]nder English grammar rules", a participial phrase "normally" follows immediately on the noun it modifies. On the basis of this rule, it asserts that subparagraphs (i) and (ii) must modify the noun "interests", because they immediately follow this noun.[63]

51. However, with respect to subparagraph (iii), the United States abandons this very same rule. It says that, "in this case, the drafters departed from typical English usage".[64] This is because "[i]t is clear that 'taken' modifies 'action'",[65] even though the past participle "taken" also follows immediately from the noun "interests".

52. Thus, according to the United States, when the drafters sought to coordinate the three subparagraphs, as three participial phrases within a single sentence, they simultaneously applied and departed from a single rule of grammar, so that the three phrases modify two different nouns. The United States offers no explanation for this inconsistency and incoherence, and Norway can see none.[66]

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[62] A "restrictive relative clause" gives information that defines the noun.
[63] The United States' response to Question 40, para. 150; the United States' second written submission, paras. 29-30; the United States' response to Question 90, para. 28.
[64] The United States' second written submission, para. 31; the United States' response to Question 90, para. 28.
[65] The United States' response to Question 90, para. 28.
[66] The Norway's comment on the United States' response to Question 90, para. 25; Switzerland's response to Question 90, para. 79.

53. The *Vienna Convention* requires that treaty terms be given their "ordinary meaning".[67] There is nothing "ordinary" about a meaning premised on such inconsistency and incoherence, which even the United States calls "less in line with rules of grammar and conventions".[68] Instead of this stretched interpretation, ordinary meaning dictates that each of the subparagraphs modifies the same noun "action", which ensures interpretive consistency and coherence.[69]

54. **Third**, when the United States tries to reconcile its argument with the Spanish text, it resorts to a third "Procrustean" technique, simply cutting words from the Spanish text to stretch the verb "consider" into the subparagraphs.[70] The Panel must reject this remarkable argument. Rather, accounting for all its words, the Spanish version confirms the English and French versions: the subparagraphs modify the noun "action".[71]

C. Application of Article XXI(b) of the GATT 1994 in this dispute

55. In its own words, "the United States agrees that Article XXI is an 'affirmative defence'".[72] This means that the United States bears the burden of proving that it has satisfied the terms of this defence. The United States has failed to do so.

56. The United States maintains that Article XXI is entirely self-judging in nature, and that the US burden is satisfied simply by invoking Article XXI(b).[73] Based on the text, as interpreted by past panels, Norway disagrees.[74] Thus, if this Panel finds that a respondent bears a burden to substantiate the defence to *any* degree, it must find that the United States has failed to meet its burden.[75]

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[67] The word "ordinary" means "[b]elonging to the regular or usual order or course of things; … occurring in the course of regular custom or practice; normal; customary; usual". Oxford English Dictionary ("OED") definition of "ordinary", last accessed 11 January 2021, **(Exhibit NOR-149)**.
[68] The United States' comment on Norway's response to Question 90, para. 30.
[69] Norway's opening statement at the first substantive meeting, paras. 43-56; Norway's response to Question 35, paras. 315-317; Norway's second written submission, paras. 70-101; Norway's response to Question 90; Norway's comment on the United States' response to Question 90.
[70] The United States' general comment on Questions 41-43, para. 166 (Table).
[71] Norway's opening statement at the first substantive meeting, paras. 53-56; Norway's response to Question 35, paras. 316-317; Norway's second written submission, paras. 73-101; Norway's response to Question 90; Norway's comment on the United States' response to Question 90.
[72] The United States' response to Question 33, para. 114.
[73] *See* the United States' comment on Norway's response to Question 93.
[74] *See, e.g.,* Norway's first written submission, paras. 40-52; Norway's opening statement at the first substantive meeting, paras. 7-15; Norway's response to Questions 26-27; Norway's response to Question 93; Norway's comment on the United States' response to Question 92(b), paras. 46-48; Norway's comment on the United States' response to Question 93.
[75] Norway's response to Question 92; Norway's comment on the United States' response to Question 92.

57. The United States seems to argue that global excess steel and aluminium capacity is an "other emergency in international relations" under subparagraph (iii).[76] Norway disagrees.

58. The United States accepts that an "emergency" connotes a situation of "danger or conflict" that "arises *unexpectedly* and requires *urgent* attention".[77] The United States concedes that aluminium and steel overcapacity did not arise unexpectedly, but arose gradually over decades, and that these overcapacity issues have been on economic and trade policy agendas for years.[78]

59. Furthermore, under Article XXI, economic and political problems are not an "emergency", unless they give rise to "defence and military interests, or maintenance of law and public order interests".[79] The US DOC's assessment of aluminium and steel excess capacity, and the alleged injury to those US industries, fail to show that any such vital interests of the State are at issue.[80]

60. The United States has also failed entirely to articulate the alleged "essential security interests" that its measures are designed to protect. Instead, it offers a series of quotes regarding the general US law standard of "national security" under Section 232, and the particular application of that standard in the DOC aluminium and steel reports.[81] This does not satisfy the United States' burden to articulate the essential security interests it seeks to protect.

61. Mr. Chair, that concludes our opening statement.

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[76] The United States' response to Question 92, paras. 40-44 and 47.
[77] The United States' response to Question 92, para. 45. Emphasis added; the United States' response to Question 51, para. 231. Emphasis added
[78] The United States' response to Question 92, para. 41, citing to DOC Steel Report, **(Exhibit NOR-1)**, pp. 4-5; DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 40-42.
[79] Panel Report, *Russia – Traffic in Transit*, para. 7.75; Panel Report, *Saudi Arabia – Protection of IPRs*, para. 7.245.
[80] United States' response to Question 92, para. 32, citing DOC Steel Report, **(Exhibit NOR-1)**, p. 56. *See also* DOC Aluminium Report, **(Exhibit NOR-2)**, p. 105.
[81] "The Effects of Imports of Aluminum on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended", DOC Report, 17 January 2018 ("DOC Aluminium Report") **(Exhibit NOR-2)**; and "[t]he Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended", DOC Report, 11 January 2018 ("DOC Steel Report"), **(Exhibit NOR-1)**.