IN THE WORLD TRADE ORGANIZATION

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

Second Written Submission of Norway

17 APRIL 2020

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China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
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LIST OF ABBREVIATIONS

Abbreviation	Description
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
China's Accession Protocol	*Protocol on the Accession of the People's Republic of China*
DSU	Dispute Settlement Understanding
GATT 1994	General Agreement on Tariffs and Trade 1994
Safeguards Agreement	*Agreement on Safeguards*
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SPS Agreement	*Agreement on Sanitary and Phytosanitary Measures*
TRIMS Agreement	*Agreement on Trade-Related Investment Measures*
US	United States
WTO	World Trade Organization

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I. INTRODUCTION

1. On 8 March 2018, President Trump issued two "Presidential Proclamations", imposing additional tariffs on imported aluminium and steel products from Norway ("import tariffs").[1] In subsequent weeks, President Trump imposed import quotas on aluminium and steel products from certain countries ("import quotas");[2] issued certain country-wide exemptions to the tariffs,[3] and product exclusions.[4]

2. In Norway's first written submission, Norway presented a *prima facie* case that the measures at issue are inconsistent with the United States' obligations under the *Safeguards Agreement* and the GATT 1994.[5] The United States has not substantively rebutted Norway's claims.

3. The United States' sole response, to date, is an assertion that its measures are justified under the security exception in Article XXI(b) of the GATT 1994. However, the United States has failed to substantiate its defence, including failing even to identify the relevant subparagraph(s) of Article XXI(b).

4. The United States contends that, once a Member invokes Article XXI(b), "that is the end of the matter".[6] It believes that "Article XXI(b) does not require any explanation or production of evidence in dispute settlement".[7] For the United States, the Panel must begin and end its analysis by "not[ing] the US invocation of Article XXI", and cannot address Norway's claims of violation.[8]

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[1] *See* Norway's first written submission, paras. 25-28.
[2] *See* Norway's first written submission, paras. 29-36.
[3] *See* Norway's first written submission, paras. 29-36.
[4] *See* Norway's first written submission, paras. 37-39.
[5] *See* Norway's first written submission, Section VI (claims under the *Safeguards Agreement*) and Section VII (claims under the GATT 1994).
[6] United States' response to Panel Question 76, para. 346.
[7] United States' response to Panel Question 38, para. 142 (underlining added). *See also* para. 144 ("[t]he text of Article XXI(b) does not include any language requiring the invoking Member to provide an explanation or produce evidence"); *see also* United States' response to Panel Question 73, para. 319 ("once a Member invokes Article XXI, this invocation is sufficient to establish the application of this provision. Nothing in Article XXI imposes a requirement to furnish reasons for or explanations of an action for which Article XXI is invoked").
[8] United States' response to Panel Question 29, paras. 104 and 115. *See also* para. 105 ("the only fact for a panel to review is whether the Member has invoked Article XXI(b). If it has, there is nothing left under Article XXI(b) for a panel to review"); and United States' response to Panel Question 55(a), para. 252 ("the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security interests under GATT 1994 Article XXI(b))".

5. As Norway has explained, the United States is wrong: its standard of review of total deference to the respondent is based on an interpretation of Article XXI(b) that ignores the text, context, object and purpose, and negotiating history of the provision.[9]

6. From the Panel's perspective, the United States' argument reduces the dispute to a single interpretive question: is a respondent's mere "invocation" of Article XXI(b), without any substantiation of the defence whatsoever, "the end of the matter", as the United States argues?[10] Or, is a respondent, as Norway argues, required to furnish appropriate substantiation, through argument and evidence, to demonstrate that the agreed legal conditions in the subparagraph(s) and *chapeau* of Article XXI(b) are met?

7. If the Panel rejects the United States' position, and finds that the standard of review under Article XXI(b) is *anything greater* than total deference to the respondent, then Norway must prevail as the United States has not attempted to meet its burden.

8. In the interests of brevity, Norway does not restate arguments that it has made in earlier submissions. Instead, Norway makes liberal use of cross-referencing to its earlier submissions.

II. ROADMAP TO THIS SUBMISSION

9. This submission is organized as follows:

- *First*, Norway comments on the appropriate order of analysis in this dispute (Section III);
- *Second*, Norway explains that the measures at issue are "safeguard measures" which are inconsistent with Articles 2.1, 2.2, 5.1, 11.1(b), 12.1 and 12.2 of the *Safeguards Agreement* (Section IV);
- *Third*, Norway explains that the measures at issue are inconsistent with Articles I:1, II:1, X:3(a) and XI:1 of the GATT 1994 (Section V); and
- *Fourth*, Norway addresses the interpretation and application of Article XXI(b) of the GATT 1994 (Section VI).

[9] *See* Norway's first written submission, paras. 40-53; Norway's first opening statement, paras. 36-117; and, Norway's responses to Panel Questions, *inter alia*, 27, 28, 29, 30, 31, 35, 36, 37, 38, 41, 45, 46, 51, and 55.
[10] United States' response to Panel Question 76, para. 346.

III. ORDER OF ANALYSIS

10. The Panel has raised questions on the appropriate order of analysis, and the parties' responses reveal starkly different views.[11]

11. Norway has explained that, in its view, the Panel should begin its analysis by assessing whether the obligations in the *Safeguards Agreement* apply and, if so, are violated; it should then assess whether the obligations in the GATT 1994 are violated; and, finally, it should assess whether any violations found are justified under Article XXI(b) of the GATT 1994.

12. Norway has explained, in particular, why a panel must first find a violation of a provision of the covered agreements, before it addresses any defence raised by the respondent. In sum, if there is no violation, the proposed defence has no operative role: there is no violation to justify in the first place. Also, the nature of the violation must first be established, because the defence must justify the specific WTO-inconsistent aspect of a measure. Norway refers the Panel to the detailed submissions it has already made on this issue.[12]

13. Norway first presented these arguments in its opening statement at the first substantive meeting. The United States has, therefore, been aware of these arguments for some time. Nonetheless, in its responses to the Panel's questions following the first substantive meeting, the United States chose not to respond to any of Norway's arguments on the proper order of analysis. Instead, it merely repeats its oft-stated position that "invocation of GATT 1994 Article XXI(b)" is "the end of the matter", without responding to any of Norway's arguments as to why the Panel should begin its analysis with Norway's claims, before turning to the United States' defence.[13]

IV. THE IMPORT TARIFFS AND IMPORT QUOTAS ARE INCONSISTENT WITH THE *SAFEGUARDS AGREEMENT*

14. This Section addresses Norway's claims under the *Safeguards Agreement*. *First*, Norway demonstrates that the import tariffs and import quotas are subject to the United States' obligations under the *Safeguards Agreement*. *Second*, Norway recalls its legal claims

[11] *See* Norway's responses to Panel Questions 21 and 22; and United States' responses to Panel Questions 21, 22 and 23.
[12] *See* Norway's first opening statement, paras. 17-19; and Norway's responses to Panel Questions 22 and 33.
[13] United States' response to Panel Questions 21-23, para. 78; and the United States' response to Panel Question 76, para. 346.

that the import tariffs and import quotas are inconsistent with Articles 2.1, 2.2, 5.1, 11.1(b), 12.1 and 12.2 of the *Safeguards Agreement*.

A. The *Safeguards Agreement* applies to the import tariffs and import quotas

15. Norway refers the Panel to its earlier submissions explaining that the import tariffs and import quotas constitute "safeguard measures" under Article 1 of the *Safeguards Agreement*.[14]

16. The United States disagrees that the import tariffs and import quotas are "safeguard measures" on the grounds that, when it adopted these measures, it did not notify them as safeguard measures, or provide affected Members with the opportunity to consult under Article XIX:2 of the GATT 1994. The United States also argues that Article 11.1(c) of the *Safeguards Agreement* excludes the import tariffs and import quotas from the scope of application of the Agreement. Norway addresses each point in turn.

1. The import tariffs and import quotas are "safeguard measures" under Article 1 of the *Safeguards Agreement*

17. Article 1 of the *Safeguards Agreement* provides that "[t]his Agreement establishes rules for the application of safeguard measures which shall be understood to mean *those measures provided for in Article XIX of GATT 1994*".[15]

18. In *Indonesia – Iron or Steel Products*, the Appellate Body identified two "constituent features" of the measures "provided for" in Article XIX of the GATT 1994: (1) the measure suspends, withdraws, or modifies a GATT 1994 obligation or concession; and (2) the suspension is designed to prevent or remedy serious injury to a domestic industry caused or threatened by increased imports.[16] Norway has explained that the import tariffs and import quotas meet these two constituent features.[17]

19. The United States accepts that "these two features are necessary to establish that a safeguard measure exists".[18] The United States also does not contest that the import tariffs and import quotas meet these two features of a safeguard measure.

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[14] *See* Norway's first written submission, paras. 90-156. *See also* Norway's response to Panel Question 5.
[15] Emphasis added.
[16] Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.65.
[17] *See* Norway's first written submission, paras. 90-145.
[18] United States' response to Panel Question 5(a), para. 9.

20. However, the United States argues that these two features are not sufficient for application of the *Safeguards Agreement*.[19] According to the United States, there are two additional, necessary "constituent features" of a "safeguard measure": (3) the importing Member imposing the safeguard measure must have given "notice in writing" to the WTO that the measure is a "safeguard measure" under Article XIX:2; and (4) it must have afforded affected exporting Members with "an opportunity to consult" under Article XIX:2.[20]

21. In other words, the United States argues that an importing Member's fulfilment of the notification and consultation obligations in Article XIX:2 are "condition[s] precedent" for application of the *Safeguards Agreement*.[21] Norway has the following observations.

22. *First*, at the first substantive meeting, the United States did not argue that affording affected exporting Members with "an opportunity to consult" was a necessary "constituent feature" of a "safeguard measure". The United States mentioned only notification. This is a notable change in the United States' proposed legal standard, and raises an additional legal hurdle to the applicability of the *Safeguards Agreement*.

23. Under the United States' newly expanded approach, if an importing Member elected not to consult with affected exporting Members, the *Safeguards Agreement* would not apply. Indeed, applying the United States' logic, absent consultation, the *Safeguards Agreement* would not apply, *even if the importing Member had notified the measure as a safeguard.*

24. *Second*, if the Panel were to accept the two conditions regarding notification and consultation, the applicability of the *Safeguards Agreement* would depend on the subjective intentions of the importing Member.[22] The United States' approach allows an importing Member to choose for itself whether its measure is subject to the *Safeguards Agreement*. This approach fosters easy circumvention of the safeguard disciplines, by allowing the importing Member to control when the safeguards disciplines do and do not apply. In so doing, the importing Member would be able to control and, at will, diminish its own obligations, as well as the rights of exporting Members, including their right to take counterbalancing measures under Article 8 of the *Safeguards Agreement*.

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[19] United States' response to Panel Question 5(a), para. 9.
[20] *See* United States' responses to Panel Question 4, paras. 4 and 6; Panel Question 5, paras. 9 and 13; Panel Question 9, para. 33; and Panel Questions 10-11, para. 42.
[21] United States' response to Panel Question 5(a), para. 9.
[22] Under the United States' approach, "it could be said that it is necessary for a Member to *intend* to exercise the rights provided for under Article XIX"*, see* United States' response to Panel Questions 10-11, para. 43 (emphasis original).

25. Contrary to the United States' arguments, the applicability of a Member's WTO obligations does not depend on a Member's subjective intentions. The applicability of WTO obligations is an objective question, to be decided on the basis of objective considerations, which are rooted in the "content and substance" of the measure.[23] Norway has already addressed this issue at length, and refers the Panel to its earlier submissions.[24]

26. *Third*, there is no basis in the treaty text to regard an importing Member's decision to notify and consult as "constituent elements" of a safeguard measure. The Appellate Body has rightly warned against conflating textual elements relating to the applicability of the *Safeguards Agreement* to a measure, on the one hand, with textual elements relating to the consistency of that measure with the *Safeguards Agreement*, on the other.[25]

27. A plain reading of Article XIX:2 shows that notification and consultation are obligations imposed on Members adopting "safeguard measures", not legal conditions for the applicability of the *Safeguards Agreement*. If notification and consultation were "constituent features" of a "safeguard measure", the obligations to notify and consult would apply only when a Member chooses to notify and consult. In practice, a Member could never violate the notification/consultation obligations: if it chose not to notify or consult, no obligation to notify and consult would arise. As a result, binding rules would be transformed into permissive guidance, to be followed at will.

28. Indeed, the United States' argument that notification and consultation are constituent features of a safeguard measure offers a perfect example of why the Appellate Body warned that requirements regarding the applicability of the safeguard obligations to a measure cannot be confused with requirements regarding the consistency of a measure with those obligations.

29. Finally, Norway notes that the Panel asked the United States to identify "any other covered agreements, or provisions thereof, whose applicability depends on a Member's invocation or notification".[26] The United States provides a single example: Article XVIII of the GATT 1994.

30. Article XVIII is not analogous to Article XIX, and does not support the United States' position. Article XVIII establishes a right for certain categories of Member to enter into

[23] *See* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 87.
[24] *See* Norway's first written submission, paras. 91-97; and Norway's responses to Panel Questions 4, 5 and 11.
[25] *See* Norway's first written submission, paras. 101-102, citing Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.57; and Norway's response to Panel Question 5, paras. 72.
[26] *See* Panel Question 9(d).

negotiations with other Members, with a view to reaching a mutual agreement for the first Member to modify or withdraw concessions. There are two key differences between this provision and Article XIX. *First*, the adoption of a measure under Article XVIII requires an agreement amongst the importing and exporting Members; and, *second*, in order to secure an agreement among the relevant group of Members, the importing Member must first inform the exporting Members of its desire to negotiate an agreement.

31. Under Article XIX, by contrast, a safeguard measure is not taken on the basis of an agreement among a group of importing and exporting Members, and negotiations among those Members are, therefore, not an essential feature of a process leading to the adoption of a safeguard measure. Instead, Article XIX provides for an importing Member to take a unilateral measure. The role of notification and consultation in Articles XVIII and XIX is, therefore, quite different, and arises in different contexts.

32. Tellingly, the United States fails to mention the many provisions and/or covered agreements that involve the adoption of unilateral measures, like Article XIX, and that do not involve notification or consultation as constituent features of the unilateral measures. For example, Article VI of the GATT 1994, the *Anti-Dumping Agreement*, the *SCM Agreement*, the *Agreement on Agriculture*, and the *SPS Agreement*, all provide for unilateral action by an importing Member that restricts imports and/or subsidises domestic production. The United States does not suggest that notification and consultation is a legal condition for the applicability of these provisions/agreements, even though they contain notification and consultation obligations.

2. Article 11.1(c) of the *Safeguards Agreement* confirms that the *Agreement* applies to the import tariffs and import quotas

33. Article 11.1(c) provides that the *Safeguards Agreement* does not apply to "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX".[27]

34. Article 11.1(c) confirms that the *Safeguards Agreement* applies to measures taken "pursuant to" Article XIX of the GATT 1994, *i.e.*, "safeguard measures". Specifically, under Article 11.1(c), if a measure is sought, taken or maintained pursuant to "provisions" that include Article XIX, the *Safeguards Agreement* applies.

[27] Emphasis added.

35. The United States takes a different view. For the United States, Article 11.1(c) provides that, where a measure is sought, taken or maintained pursuant to a provision of the GATT 1994 in addition to Article XIX, the *Safeguards Agreement* does not apply. In other words, "safeguard measures", under Article 1 of the *Safeguards Agreement*, need not comply with the safeguard disciplines, as long as some other, non-safeguard provision, also applies to the measure.

36. On this basis, the United States argues that the mere "invocation" of Article XXI(b) in dispute settlement excludes the application of the *Safeguards Agreement*, because the importing Member has "sought" a measure "pursuant to" a provision "other than" Article XIX of the GATT 1994. The United States' approach is flawed, for the following reasons.

37. *First*, the United States' interpretation of Article 11.1(c) ignores certain of the provision's key terms, in particular, "provisions" and "other than". As a result of these words, if a measure is sought, taken or maintained pursuant to "provisions" that include Article XIX, as well as "provisions . . . other than" Article XIX, the *Safeguards Agreement* applies. Norway has explained, in detail, that the United States' contrary approach is irreconcilable with the text, context, object and purpose, and negotiating history, of Article 11.1(c). Norway refers the Panel to the relevant sections of its earlier submissions.[28]

38. *Second*, the United States' approach misuses the term "sought" in Article 11.1(c). The United States' reasoning can be summarised as follows: a Member "seeks" a measure "pursuant to" Article XXI(b) if, in the course of adopting the measure, it "attempts or tries" to act in accordance with the conditions in Article XXI(b).[29]

39. In other words, for the United States, if a respondent takes a measure and, in so doing, "attempts or tries" to meet the conditions in a GATT 1994 exception – simply giving compliance with the exception "the old college try" – the safeguards disciplines are necessarily excluded, even if the conditions in the exception are not met.

40. The United States misunderstands the verbs "sought, taken, or maintained" in Article 11.1(c). These three verbs apply to the "measure" in question, not to the GATT 1994 exception (or other GATT 1994 provision). Thus, with respect to the verb "sought", the

[28] *See* Norway's response to Panel Question 20. *See also* Hong Kong, China's response to Panel Question 38(c) to the third parties; and European Union's response to Panel Question 7 to the third parties.
[29] *See* United States' response to Panel Question 20(a)-(c) (emphasis omitted).

question is whether the Member has "sought" to take a measure, not whether it has "sought" to comply with an exception.

41. Further, because the three verbs apply to the measure, the particular verb that is relevant in any given case depends on the status of the measure. Is the Member seeking to take a measure; has it taken a measure; or, does it maintain a measure? After a Member has adopted a measure, the verb "sought" is no longer applicable; rather, the applicable verb is "taken" and/or "maintained".

42. Thus, even leaving aside the words "other than", after a measure has been taken, Article 11.1(c) only excludes the application of the safeguards disciplines if the Member's conduct in taking and/or maintaining the measure is "pursuant to" a GATT 1994 exception (or other GATT 1994 provision). As Norway has explained, "pursuant to" means "in accordance with", *i.e.*, in conformity with.[30] The United States agrees.[31]

43. In this dispute, the United States adopted the import tariffs and import quotas on aluminium and steel in 2018, so the measures were "taken" some time ago, and they are being "maintained"; they are, therefore, not measures "sought" by the United States.[32]

44. As a result, under Article 11.1(c), and again leaving aside the words "other than", the safeguards disciplines would be excluded solely if the import tariffs and import quotas were "taken", and are "maintained", "in accordance with" Article XXI(b) of the GATT 1994. However, as discussed below, beyond mere invocation, the United States has not even attempted to substantiate that the import tariffs and import quotas were "taken", and are "maintained", "in accordance with" Article XXI(b).

B. Claims under the *Safeguards Agreement*

45. Norway's first written submission presented a *prima facie* case that the the import tariffs and import quotas are inconsistent with Articles 2.1, 2.2, 5.1, 11.1(b), 12.1 and 12.2 of the *Safeguards Agreement*. To date, the United States has elected not to respond to these claims. In the absence of a US response, Norway refers the Panel to its earlier submissions setting forth its claims.[33]

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[30] *See* Norway's response to Panel Question 20(b), paras. 199-200.
[31] *See* United States' response to Panel Questions 20(a)-(c), para. 66.
[32] *See* Norway's response to Panel Question 20(a), para. 198.
[33] *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).

46. For present purposes, Norway summarises certain aspects of its arguments below:[34]

- Article 2.1: A key aspect of Norway's claim under Article 2.1 is the consistent mismatch between the broad product scope of the import tariffs and the narrow scope of the Commerce Department's assessment of injury to the US domestic industries. As a result, the United States imposes import tariffs to protect US producers that have not been shown to be injured. Indeed, the Commerce Department's own evidence suggests that they are not injured. Although the import tariffs apply to a broad range of aluminium and steel products, the Commerce Department's analysis focuses on the state of a single, poorly performing segment of each industry and ignores other segments that are performing well (for example, the secondary aluminium segment, in which the United States is the world's leading producer);

- Article 2.2: the import tariffs violate the most favoured nation obligation embodied in Article 2.2, because the measures are not applied to imports from all sources, irrespective of their origin;

- Article 5.1: the import tariffs are applied in violation of Article 5.1, because the United States has failed to make a proper finding that the US domestic industry is seriously injured. As a result, the measures cannot properly be "calibrated" under Article 5.1, *i.e.*, applied only to the extent necessary to remedy serious injury;

- Article 11.1(b): the import quotas are prohibited under Article 11.1(b), because they operate to restrict trade between an importing and exporting Member, they afford protection, and they are imposed with the acquiescence of the exporting Member.

- Articles 12.1 and 12.2: the United States has failed to notify the import tariffs, in violation of the notification obligations in Article 12.

47. Pursuant to Article 11 of the DSU, the Panel must make an objective assessment of Norway's claims. As Norway has made a *prima facie* case that the import tariffs and import quotas are inconsistent with the *Safeguards Agreement*, without effective rebuttal by the United States, the Panel must find that the measures violate the relevant provisions of the *Agreement*.

V. THE IMPORT TARIFFS, IMPORT QUOTAS, COUNTRY-WIDE TARIFF EXEMPTIONS AND PRODUCT EXCLUSIONS ARE INCONSISTENT WITH THE GATT 1994

48. Norway's first written submission presented a *prima facie* case that the import tariffs, import quotas, country-wide tariff exemptions and product exclusions are inconsistent with

[34] *See* Norway's response to Panel Question 1(b), Table 1; and 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).

Articles I:1, II:1, X:3(a) and XI:1 of the GATT 1994.[35] To date, the United States has declined to respond to these claims. In the absence of a US response, Norway refers the Panel to its earlier submissions setting forth its claims.[36]

49. For present purposes, Norway summarises certain aspects of its arguments below:[37]

- Article I:1: the import tariffs involve discriminatory treatment of imports from different WTO Members;
- Article II:1: the import tariffs impose ordinary customs duties at rates higher than those provided for in the US schedule;
- Article X:3(a): the country-wide tariff exemptions and product exclusions are administered in an unreasonable and impartial manner; and
- Article XI:1: the import quotas are, by definition, quantitative restrictions on imports of aluminium and steel to the United States, which are prohibited under this provision.

50. Like Norway's claims under the *Safeguards Agreement*, the Panel must, under Article 11 of the DSU, make an objective assessment of Norway's claims under the GATT 1994. As Norway has made a *prima facie* case that the US measures are inconsistent with the GATT 1994, without effective rebuttal by the United States, the Panel must find that the measures violate the relevant provisions of the Agreement.

VI. THE MEASURES AT ISSUE ARE NOT JUSTIFIED UNDER ARTICLE XXI(B) OF THE GATT 1994

51. In this Section, Norway addresses, *first*, the availability of Article XXI(b) of the GATT 1994 to justify violations of the *Safeguards Agreement*; and, *second*, the interpretation and application of Article XXI(b).

A. Article XXI(b) of the GATT 1994 is not available to justify violations of the *Safeguards Agreement*

52. The Panel has raised questions about the availability of Article XXI(b) to justify violations of the *Safeguards Agreement*, and the parties have expressed different views.

[35] *See* Norway's first written submission, paras. 425-534; and Norway's response to Panel Question 2(f) Under Article I:1, Norway brings claims against the country-wide tariff exemptions; under Article II:1, Norway brings claims against the import tariffs; under Article X:3(a), Norway brings claims against the country-wide tariff exemptions and the product exclusions; and under Article XI:1, Norway brings claims against the import quotas.
[36] *See* Norway's first written submission, Section VII.A (Article II:1); Section VII.B (Article I:1); Section VII:C (Article X:3(a)); Norway's response to Panel Question 2(f) (Article XI:1).
[37] *See* Norway's first written submission, Section VII.A (Article II:1); Section VII.B (Article I:1); Section VII:C (Article X:3(a)); Norway's response to Panel Question 2(f) (Article XI:1); and Norway's response to Panel Question 1(b), Table 1.

53. Norway has explained that the defence is not available to justify violations of the *Safeguards Agreement*. In sum, the reference to "this Agreement" in Article XXI(b) means that the defence is only available, in principle, to justify violations of the GATT 1994.[38] For this reason, the defence is not available to justify violations of another covered agreement, unless there is affirmative language sufficient to incorporate the defence into that agreement. Such language does not appear in the *Safeguards Agreement*.[39]

54. The United States disagrees. The United States proposes two textual bases in the *Safeguards Agreement* that, in its view, make Article XXI(b) available to justify violations of that Agreement: *first,* the "14 references" to the GATT 1994 generally; and *second*, the specific reference to Article XIX of the GATT 1994 in Article 1 of the *Safeguards Agreement*.[40]

55. Norway has addressed each of these arguments. General references to the GATT 1994 in another covered agreement, and references to a specific GATT 1994 provision unrelated to a defence, are not sufficient to incorporate that defence into the agreement in question. Indeed, even when another covered agreement "elaborates" on a GATT 1994 defence, this is not sufficient to incorporate that defence into the other covered agreement.[41]

56. Rather, as confirmed in several Appellate Body and panel reports, there must be sufficiently specific incorporating language in the other covered agreement, indicating an intention to make the defence available to justify violations of that agreement.[42]

57. In that respect, the textual links that the United States identifies – general references to the GATT 1994 and references to a specific GATT 1994 provision unrelated to Article XXI – can be contrasted with the textual links contained in other provisions of the covered agreements.

58. Article 1.10 of the *Import Licensing Agreement* provides that "[w]ith regard to security exceptions, the provisions of Article XXI of GATT 1994 apply". Article 3 of the *TRIMS Agreement* provides that "[a]ll exceptions under the GATT 1994 shall apply".

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[38] *See* Norway's first opening statement, paras. 33-35; and Norway's responses to Panel Questions 77, 78(a)-(b) and 79.
[39] *See* Norway's first opening statement, paras. 34-35; and Norway's response to Panel Questions 78(a)-(b).
[40] United States' response to Panel Question 78
[41] Norway's response to Panel Questions 78(a)-(b), para. 620, citing Panel Report, *US – Poultry*, para. 7.481.
[42] *See* Norway's response to Panel Questions 78(a)-(b), paras. 621-624, citing Appellate Body Report, *China – Raw Materials*, para. 7.481; Panel Report, *US – Poultry*, para. 7.481; Appellate Body Report, *US – Clove Cigarettes*, paras. 99 and 101; Appellate Body Report, *China – Rare Earths*, para. 5.56; and Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines*), paras. 7.742-7.757.

Paragraph 5.1 of *China's Accession Protocol* begins with an introductory clause that reads "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement", language which incorporates Article XX of the GATT 1994.

59. These provisions show that, when the drafters intended to make the affirmative defences in the GATT 1994 available to justify violations of other covered agreements, they did so with express language. There is no such language in the *Safeguards Agreement*. It follows that the GATT 1994 defences are not available to justify violations of the *Safeguards Agreement*.

B. Interpretation and application of Article XXI(b) of the GATT 1994

1. Interpretation of Article XXI(b) of the GATT 1994

a. Introduction

60. The United States' entire response to Norway's claims consists of a single unsubstantiated assertion: the measures at issue are justified under Article XXI(b) of the GATT 1994. For the United States, once a Member invokes Article XXI(b), this invocation is "the end of the matter".[43] It asserts that "Article XXI(b) does not require any explanation or production of evidence in dispute settlement".[44] As a result, on the United States' view, "the sole finding that the Panel may make" is "to note the US invocation of Article XXI".[45]

61. Based on this view, the United States fails to identify which subparagraph(s) of the Article XXI(b) is (are) applicable to its measures; *and* it fails to provide "any explanation or production of evidence" to substantiate its assertion that its measures meet the legal conditions for justification under Article XXI(b), including one or more of the subparagraphs.[46]

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[43] United States' response to Panel Question 76, para. 346.
[44] United States' response to Panel Question 38, para. 142 (underlining added). *See also* para. 144 ("[t]he text of Article XXI(b) does not include any language requiring the invoking Member to provide an explanation or produce evidence"); *see also* United States' response to Panel Question 73(a)-(b), para. 319 ("once a Member invokes Article XXI, this invocation is sufficient to establish the application of this provision. Nothing in Article XXI imposes a requirement to furnish reasons for or explanations of an action for which Article XXI is invoked").
[45] United States' response to Panel Question 29, paras. 104 and 115. *See also* para. 105 ("the only fact for a panel to review is whether the Member has invoked Article XXI(b). If it has, there is nothing left under Article XXI(b) for a panel to review"); United States' response to Panel Question 55(a), para. 252 ("the Panel should limit its findings in this dispute to a recognition that the United States has invoked its essential security interests under GATT 1994 Article XXI(b))".
[46] United States' response to Panel Question 38, para. 142.

62. The United States' interpretation of Article XXI(b) is built on three words – "which it considers" – in the *chapeau* of the provision, at the expense of every other word in the provision. However, as Norway has explained in detail, the United States' interpretation cannot be reconciled with the text, context, object and purpose, and negotiating history, of Article XXI(b), including its subparagraphs. Norway has previously addressed these elements of treaty interpretation in detail.[47] For present purposes, Norway highlights that the United States' interpretation is flawed in two respects.

63. *First*, the United States' interpretation misunderstands the relationship between the *chapeau* and the subparagraphs of Article XXI(b). Contrary to the United States' view, the subparagraphs of Article XXI(b) are <u>not</u> qualified by the phrase "which it considers" in the *chapeau*.

64. *Second*, the United States errs in arguing that "the legal effect" of the phrase "which it considers" "is that the provision is self-judging in its entirety".[48] While Norway agrees that these words imply a degree of deference for the respondent, it rejects the United States' assertion that the standard of review is *total deference*, with no scrutiny whatsoever of the respondent's action. Norway addresses each point below.

65. If the Panel agrees with Norway on either point, Norway must prevail: as long as a respondent is required to furnish *some* substantiation under Article XXI(b) – whether under the subparagraphs only, or the subparagraphs and the *chapeau* – the United States' defence fails, because it has not even attempted to meet its burden under any part of Article XXI(b).

b. The chapeau/*subparagraph relationship in Article XXI(b)*

66. Norway has made detailed submissions explaining that the phrase "which it considers" qualifies the language in the *chapeau* of Article XXI(b), and does not qualify the language in the subparagraphs.[49]

67. In this Section, Norway, *first*, addresses the United States' erroneous view that the phrase "which it considers" qualifies the entirety of Article XXI(b), including the subparagraphs. *Second*, Norway explains that the United States' rebuttals of Norway's interpretation are without merit. *Third*, Norway briefly addresses the United States'

[47] *See* Norway's first opening statement, paras. 36-117; and Norway's responses to, *inter alia*, Panel Questions 28, 29, 30, 31, 35, 36, 37-38, 40, 41, 42, 45, 46, 49, and 51.
[48] United States' response to Panel Question 37, para. 137.
[49] *See* Norway's first opening statement, paras. 38-59; and Norway's response to Panel Question 35.

unsupported assertions that the Spanish language text of Article XXI(b) is inaccurate, and that elements of it should be disregarded.

i. The United States' interpretation cannot be reconciled with the three language versions of Article XXI(b)

68. The United States argues that the phrase "which it considers" qualifies the entirety of the provision, including the subparagraphs. This argument serves as the premise for the United States' position that it need not identify a relevant subparagraph, or demonstrate that the conditions in any subparagraph are met.

69. In its latest attempt to show that its approach to the *chapeau*/subparagraph relationship has a basis in the treaty text, the United States offers, in its responses, two, differing interpretations of Article XXI(b). Neither is successful.

70. In its first written submission, and early in its responses to the Panel's Questions, the United States maintains the view that subparagraphs (i) and (ii) qualify the term "essential security interests" in the *chapeau*, and not the word "action".[50]

71. This argument provided the United States with a basis – albeit flawed – to argue that these two subparagraphs are subject to the deferential "which it considers" language in the *chapeau*.[51]

72. For the United States, read this way, the provision forms a single, run-on clause (or "integral clause"), beginning with "which it considers", and ending at the conclusion of each subparagraph, such that every element, including those in the subparagraphs, is qualified by the words "which it considers".[52] In earlier submissions, Norway has addressed, in detail, the flaws in these arguments and refers the Panel to those arguments.[53]

73. Later in its responses, the United States adopts a new position. The United States acknowledges that, in the Spanish version of the text, the term "relativas" (relating) "cannot modify the masculine plural noun 'intereses' [interests] but must modify the feminine plural

[50] *See* United States' first written submission, paras. 29-33; United States' response to Panel Question 36, para. 132; and to Panel Question 40, paras. 150-151.
[51] *See* Norway's first opening statement, para. 40; and Norway's response to Panel Question 35, para. 313.
[52] *See* United States' response to Panel Question 36, para. 124. Norway notes that the United States does not take this position with respect to subparagraph (iii), because it acknowledges that, based on the terms "taken in time of war …", subparagraph (iii) must "modif[y] the word 'action' rather than the phrase 'essential security interests'". *See* United States' first written submission, para 32; and United States' response to Panel Question 40, para. 152.
[53] *See* Norway's first opening statement, paras. 38-59; and Norway's response to Panel Question 35.

noun 'medidas' [action]".[54] Faced with the grammatical reality of the Spanish text, the United States argues that:

> The most appropriate way to reconcile the textual differences between [the Spanish, English and French texts] – specifically the different relationship between the subparagraph endings and the chapeau terms – is to interpret Article XXI(b) such that all three subparagraph endings refer back to 'any action which it considers'.[55]

74. The United States offers the following figure in an effort to show how the English, French, and Spanish versions "can be read" under its interpretation:[56]

Figure 1: United States' interpretation of Article XXI(b), presented as "Figure A"

	English	**French**	**Spanish**
GATT 1994 Art. XXI(b)	Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers **(1)** necessary for the protection of its essential security interests **(2)**(i) relating to fissionable materials or the materials from which they are derived; **(2)**(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; **(2)**(iii) taken in time of war or other emergency in international relations; or	Aucune disposition du présent Accord ne sera interprétée . . . ou comme empêchant une partie contractante de prendre toutes mesures qu'elle estimera **(1)** nécessaires à la protection des intérêts essentiels de sa sécurité: **(2)**(i) se rapportant aux matières fissiles ou aux matières qui servent à leur fabrication; **(2)**(ii) se rapportant au trafic d'armes, de munitions et de matériel de guerre et à tout commerce d'autres articles et matériel destinés directement ou indirectement à assurer l'approvisionnement des forces armées; **(2)**(iii) appliquées en temps de guerre ou en cas de grave tension internationale;	No deberá interpretarse ninguna disposición del presente Acuerdo en el sentido de que: … impida a una parte contratante la adopción de todas las medidas que estime **(1)** necesarias para la protección de los intereses esenciales de su seguridad~~, relativas~~: **(2)**(i) relativas a las materias fisionables o a aquellas que sirvan para su fabricación; **(2)**(ii) relativas al tráfico de armas, municiones y material de guerra, y a todo comercio de otros artículos y material destinados directa o indirectamente a asegurar el abastecimiento de las fuerzas armadas; **(2)**(iii) ~~a las~~ aplicadas en tiempos de guerra o en caso de grave tension internacional;

75. Figure A reveals that the United States now reads Article XXI(b) as comprising two clauses, each of which follows from the words "action which it considers" (the two clauses shown following the red numerals).

[54] United States' response to Panel Questions 39-41, para. 164 (underlining added).
[55] United States' response to Panel Questions 39-41, para. 166. *See also* United States' response to Panel Question 43, para. 195.
[56] United States' response to Panel Question, para. 166, and Figure A.

76. Under this argument, the United States accepts that each of the subparagraphs modifies the word "action", as Norway argues, and not the word "interests". However, to mitigate the consequences of this shift in position, the United States injects the three magic words – "which it considers" – into the beginning of each of the three subparagraphs: the subparagraphs are read to flow directly from these three words, as if they were part of a single clause.

77. On this basis, the United States asserts that the subparagraphs are subject to the "which it considers" language, and the assessment whether the subparagraphs are met is based entirely on the respondent's own subjective consideration. For example, if a respondent asserts that a material is "fissionable", or that events amount to "war", a panel must afford total deference.

78. To achieve this interpretive result, the United States does considerable violence to the text of each of the three language versions. The United States presents the English version of subparagraphs (i) and (ii) as reading, in relevant part:

> Nothing in this Agreement shall be construed to prevent any Member from taking **action which it considers** [(2)] **relating to** [fissionable materials… or the traffic in arms…].

79. This formulation is grammatically unintelligible. Had the drafters intended the phrase "which it considers" to form a single clause with the subparagraphs, the words "relating to" would have be written as "relates to" in order to make grammatical sense: "**action which it considers** [(2)] **relates to** [fissionable materials… or the traffic in arms…]".

80. Similarly, the United States presents the English version of subparagraph (iii) as reading:

> Nothing in this Agreement shall be construed to prevent any Member from taking **action which it considers** [(2)] **taken in time of** war… .

81. Again, this is grammatically incorrect. Had the drafters intended the provision to form a single clause with the subparagraph, the words "taken in time of" would have be written as "to be taken in time of": "**action which it considers** [(2)] **to be taken in time of** war…".

82. The same is true of the French version, although even more so. The United States reads the subparagraphs in the following way :

> Aucune disposition du présent Accord ne sera interprétée … comme empêchant un Membre de prendre toutes **mesures qu'elle estimera** [**(2)**] **se rapportant** [aux matières fissiles … ou au trafic d'armes…]
>
> Aucune disposition du présent Accord ne sera interprétée … comme empêchant un Membre de prendre toutes **mesures qu'elle estimera** [**(2)**] **appliquées** en temps de guerre…

83. However, no French speaker would formulate the text these ways. Instead, had the drafters intended the words "mesures qu'elle estimera" to form a single clause with the subparagraphs, the text of subparagraphs (i) and (ii) would be written as "**mesures qu'elle estimera** [**(2)**] **se rapportent**…[aux matières fissiles … ou au trafic d'armes…]"; and the text of subparagraph (iii) as "**mesures qu'elle estimera** [**(2)**] **s'appliquent** en temps de guerres…".

84. Meanwhile, to force the Spanish version into line with its latest argument, the United States openly deletes Spanish words, using strikethrough in its Figure A to highlight the deleted words that do not fit with its reading.[57]

85. The Panel cannot, however, adopt an interpretation of the text that either is grammatical nonsense or that deletes inconvenient words in the treaty.

ii. Norway's proposed interpretation is consistent with all three language versions of Article XXI(b)

86. In contrast, Norway's proposed interpretation of Article XXI(b) properly reconciles the three language versions, without resorting either to grammatically incorrect constructions or the deletion of words.

87. To recall, under Norway's proposed interpretation, each of the subparagraphs modifies the word "action". Thus, textually, as the United States now accepts, Article XXI(b) has two distinct clauses, each of which imposes independent conditions on a Member's "action". However, only one of these clauses is modified by the phrase "which it considers".

88. Thus, for Norway, Article XXI(b) provides that "[n]othing in this agreement shall be construed to prevent any Member from taking any action (1) which it considers necessary for

[57] *See* United States' response to Panel Questions 39-40, Figure A. The United States deletes "relativas" from the *chapeau* of Article XXI(b), and moves it to the beginning of subparagraphs (i) and (ii); and, deletes the terms "a las" in subparagraph (iii) altogether.

the protection of its essential security interests; (2) relating to fissionable materials *etc.*; relating to traffic in arms *etc.*; or taken in time of war *etc*.

89. Read in this way, the formulations "relating to" and "taken in time of" make grammatical sense, because these formulations follow from the noun "action", not the phrase "which it considers". The same is true in the French version. Further, there is no need to delete any words in the Spanish version.

90. The United States gives two rebuttals to Norway's interpretation. *First*, the United States argues that Norway's approach "artificially separates" text that forms a "single clause".[58] The United States acknowledges that this rebuttal is premised on the argument it made in its first written submission, and early in its responses, namely, that the terms of the *chapeau*/subparagraphs form a single, run-on clause, whereby subparagraphs (i) and (ii) "serve[] to further modify the type of interests at stake for the Member".[59]

91. However, as explained in the previous sub-section, the United States abandons this position later in its responses.[60] Thus, according to the United States' later arguments, its rebuttal of Norway's argument is groundless, because the subparagraphs do not modify the word "interests".

92. *Second*, the United States argues that Norway's interpretation "read[s] into" the subparagraphs the phrase "and which relates to". The United States is wrong. Under Norway's approach, no terms are "read into" – or, indeed, deleted from – Article XXI(b). Instead, as demonstrated above, the *chapeau*/subparagraph construction can be read precisely as it is written: "action […] relating to…" and "action […] taken in time of".

93. By contrast, by the United States' own admission, its new reading of the provision injects words – specifically, the words "which it considers" – into the *chapeau*/subparagraph construction: "action which it considers [(2)] relating to…" and "action which it considers [(2)] taken in time of …".

iii. The Spanish-language version of Article XXI(b) confirms Norway's interpretation of the provision

94. Norway explained, at the first substantive meeting, that the Spanish text confirms that the phrase "which it considers" does not qualify the subparagraphs.[61] Norway's analysis on

[58] United States' response to Panel Question 36, para. 131.
[59] United States' response to Panel Question 36, para. 132 (underlining added).
[60] *See* United States' response to Panel Questions 39-41, para. 166.
[61] *See* Norway's first opening statement, paras. 54-57.

this point began with the English text, using the Spanish text as confirmation of an interpretation derived from the English text.[62]

95. In response, the United States casts aspersions on the accuracy of the Spanish text, and questions its legal relevance. It makes these assertions based on supposed "discrepancies" and "difference[s] in meaning" between the Spanish text, on the one hand, and the English and French texts, on the other.[63] Norway has the following observations.

96. *First*, a "difference in meaning" across the three language versions arises solely as a consequence of the United States' own interpretation of the provision. The fact that the United States' argument gives rise to a difference in meaning across the three language versions does not show that the Spanish text is inaccurate. Rather, it shows that the United States' interpretation is flawed.

97. Under Norway's interpretation, there is no "difference in meaning" across the three language versions. They all point in the same direction: the subparagraphs modify the word "action"; and the words "which it considers" do not qualify the subparagraphs.

98. The Panel is faced, therefore, with a choice between an interpretation that reconciles the three language versions; and an interpretation that, *by the United States' own admission*, does not permit a "coherent reading" of the three texts.[64] Article 33 of the *Vienna Convention* is clear as to which prevails: the interpretation that simultaneously gives harmonious effect to all authentic versions of the text.[65] This is Norway's interpretation.

99. *Second*, the United States makes entirely unsupported suggestions that the Spanish text of Article XXI(b) of the GATT 1994 is inaccurate. The United States notes that, in 1994, the negotiators conducted a review of the three texts to align the linguistic usage across the texts; and, they made a number of revisions to the French and Spanish versions.[66] However, the United States omits to mention that no revisions were made to the Spanish version of Article XXI(b).[67] Following this process, the Members adopted the English, French and Spanish versions of the text as authentic, under Article XVI of the *WTO Agreement*. In sum,

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[62] *See* Norway's first opening statement, paras. 47-52.
[63] *See* United States' response to Panel Questions 39-40, paras. 161 and 163.
[64] United States' response to Panel Question 42, para. 177.
[65] *See* Norway's response to Panel Question 43, citing Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, footnote 153 to para 132; and Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.76-4.77.
[66] *See* Exhibit US-100.
[67] *See* Exhibit US-100.

the negotiators reviewed the Spanish text of Article XXI(b), found it to be accurate, and the Members adopted it as authentic.

100. The United States also mentions that, in 2011, the WTO Language Services and Documentation Division held a workshop "to share the best practices of different international organisations that use multilingual legal texts, in order to seek ways to improve the WTO processes".[68] The workshop resulted in a set of recommendations.[69] However, the United States omits to mention that the workshop did not identify any issues, or make any recommendations, regarding the Spanish text of Article XXI(b).

101. Finally, the United States also refers to an academic article on "the concordance of multilingual legal texts at the WTO".[70] The author of the article provides a list of GATT 1994 provisions that contain, in the author's view, differences in linguistic usage across the three texts. The United States, again, omits to mention that Article XXI(b) is not among them.

c. The analytical steps required under Article XXI(b)

102. As Norway has explained, the relationship between the *chapeau* and the subparagraphs has important implications for the Panel's approach. Specifically, under Article XXI(b), a Member's "action" is subject to <u>two sets of distinct and independent conditions</u>, which Norway considers in turn: (1) the "action" must relate to the specific circumstances set forth in subparagraph (i) or (ii), or be "taken in time of war or other emergency in international relations" under subparagraph (iii); and (2) it must be "action" that the Member "considers necessary for the protection of its essential security interests".

i. First analytical step: the subparagraphs of Article XXI(b)

103. The United States has failed to substantiate that its measures fulfil the conditions in any subparagraph. Indeed, the United States has not identified a relevant subparagraph, or presented any arguments, as to why its measures meet the conditions in one of the subparagraphs, let alone substantiated those arguments.

[68] The full objective of the workshop was to: "share the best practices of different international organisations that use multilingual legal texts, in order to seek ways to improve the WTO processes in negotiation, drafting translation, interpretation and litigation phases". *See* Exhibit US-99.
[69] *See* Exhibit US-99.
[70] *See* Exhibit US-99.

104. In the United States' view, it is not required to do so, because the subparagraphs are subject to the "which it considers" language in the *chapeau* of Article XXI(b), as discussed in the preceding section. For the United States, this means that the subparagraphs are "self-judging".[71] Norway has shown, above, why the United States' position is wrong – the subparagraphs are not "self-judging", and the standard of review is not total deference.

105. If the Panel finds that the standard of review under the subparagraphs is anything greater than total deference, it must find for Norway, because the United States has failed to substantiate its defence under any subparagraph. As a result, in Norway's view, the Panel's analysis must begin and end at the first step of the analysis, with a finding that the United States has failed to make a *prima facie* case that its actions fall under one of the subparagraphs of Article XXI(b).

106. Norway notes that, in response to the Panel's questions, the United States provides some general interpretive arguments under the subparagraphs, even though it has not sought to substantiate that its measures meet the terms of any of the subparagraphs.

107. With respect to subparagraph (iii), the United States asserts that the terms "emergency" and "security" are "broad".[72] On this basis, the United States argues that subparagraph (iii) "can be seen as covering action taken for the protection of essential security interests involving an emergency that concerns injury to domestic industry or threat thereof, caused by increased imports".[73] Norway has addressed the interpretation of subparagraph (iii) in detail in its earlier submissions, and refers the Panel to those submissions.[74] For present purposes, Norway has the following limited observations.

108. *First*, the word "emergency" in subparagraph (iii) must be given its ordinary meaning under the rules of treaty interpretation. The United States explains, twice, that "emergency" means "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention".[75] Norway agrees.[76]

109. As a result, the word "emergency" is not all-encompassing. In light of the meaning of this word, which must also be understood in its context, subparagraph (iii) imposes legal

[71] *See* Exhibit US-99.
[72] United States' response to Panel Questions 51(a)-(c), para. 231.
[73] United States' response to Panel Question 75, para. 344.
[74] *See* Norway's response to Panel Question 51.
[75] United States' response to Panel Question 36, para. 135; and United States' response to Panel Question 51(a)-(c), para. 231.
[76] *See* Norway's response to Panel Question 51, para. 434.

constraints on the types of situation that may fall under that subparagraph. A panel must assess objectively whether the respondent has substantiated that the circumstances fall within these legal constraints.

110. *Second*, Norway agrees that the term "security" is relevant, as context, to the interpretation of subparagraph (iii), including the word "emergency".[77] However, the United States' arguments on the significance of the word "security" fail to take account of the meaning of that word.

111. The United States argues that the word "security" refers to "[t]he condition of being protected from or not exposed to danger; safety".[78] Based on this meaning, the United States appears to believe that Article XXI(b) justifies measures taken to ensure the "security" of a particular group of producers within a Member.

112. However, the United States overlooks that the text provides guidance on whose "security" must be at stake under Article XXI(b). The *chapeau* uses the preposition "its", to clarify that the provision is concerned with the "security" of the Member itself, and not just a particular group of producers within a Member. This is confirmed by the French and Spanish versions, which Norway has explained are translated as: "essential interests regarding its security", where the proposition refers, again, to the Member itself.[79]

113. The language in subparagraph (iii) supports this view. In particular, as Norway has explained in detail, read in context, a "war or other emergency" under that subparagraph involves events that threaten the "security" of the State, that is, the State's functioning and/or stability, including the basic function of its law and public order.[80] A situation whereby increased imports cause, or threaten, injury to certain producers within the State does not, on its face, meet this standard.

114. The United States' view of an "emergency" under subparagraph (iii) is so all-encompassing as to render *inutile* Article XIX and the *Safeguards Agreement*. The subject matter of the safeguards disciplines (action taken to remedy injury to a domestic industry caused or threatened by increased imports) is effectively subsumed under Article XXI(b), as a

[77] *See* Norway's response to Panel Question 51, para. 442.
[78] *See* United States' response to Panel Question 49, para. 220.
[79] *See* Norway's response to Panel Question 42, paras. 378-381; and Norway's response to Panel Question 51, para. 442.
[80] Norway's response to Panel Question 51.

sub-set of circumstances covered by subparagraph (iii). The treaty interpreter cannot read Article XXI(b) in a way that subsumes Article XIX.

115. Finally, Norway wishes to recall that its reading of Article XXI(b)(iii) does not mean that an "emergency" could not arise in commercial or trade relations. However, a respondent would need to show that relevant events pose a threat to the functioning and/or stability of the State, including the basic functioning of its law and public order. This requires satisfaction of legal criteria that are distinct from those that apply under Article XIX of the GATT 1994, and that entail a considerably higher threshold of gravity affecting the Member itself, and not just a group of producers.

ii. Second analytical step: the chapeau *of Article XXI(b)*

116. If the Panel proceeds to the second step of analysis under Article XXI(b), it must ask whether the respondent "considers" the "action" "necessary for the protection of its essential security interests".

117. The Panel has asked a number of questions on the interpretation of these terms, in particular the legal effect of the terms "which it considers". In sum, Norway's view is that, although the words "which it considers" establish a degree of deference, the standard of review is not *total deference*. Rather, the terms of the *chapeau* require a respondent to substantiate a plausible basis in support of its consideration. Specifically, a respondent must:

- *First*, articulate "its essential security interests", so as to allow a panel to assess whether the asserted "interests" rise to the level of "essential" "security" interests;
- *Second*, set out, with argument and evidence, a plausible basis on "which it considers" there to be a "clear and objective" relationship between the "action" and the protection of the articulated essential security interest, such that the measure is apt to make a "material contribution" to the objective at stake.

118. The requirement to consider relevant factors under Article XXI(b) is supported by the *Decision Concerning Article XXI of the General Agreement* ("*1982 Decision*"). The *1982 Decision* provides that "in taking action" under Article XXI, Members "should take into consideration the interests of third parties which may be affected".[81] This confirms that there is a duty, under Article XXI(b), to consider relevant factors, including the interests of other Members.

[81] *See* Exhibit US-62.

119. Under Article 11 of the DSU, the Panel must make its assessment of whether the respondent has substantiated a plausible basis by reference to objective indicia, including the design, structure and expected operation of the measure, and any other relevant facts as demonstrated in the parties' argument and evidence.

120. The United States disagrees. The United States argues that the words "which it considers" mean that a respondent is not required to "provide an explanation or produce evidence" to substantiate its assertions, and the Panel must afford the respondent total deference.[82]

121. Norway has provided detailed submissions explaining that the United States' approach deprives the agreed terms of the *chapeau* of their meaning.[83] The *chapeau* comprises a series of words and phrases, each of which must be given their own meaning, with each constraining a respondent's action. These are: "action", "which it considers", "necessary", "for the protection of" and "essential security interests". As Norway has explained, the treaty interpreter cannot interpret two of these words ("it considers") in a way that deprives the others of their meaning.

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

122. The United States has presented no arguments substantiating its assertion that the measures at issue meet the legal conditions in the subparagraphs, or the *chapeau*, of Article XXI(b). This is consistent with the United States' view that Article XXI(b) "does not require any explanation or production of evidence in dispute settlement proceedings, including as to how/why a Member considers a particular element of Article XXI(b) to apply".[84]

123. For the reasons Norway has explained, this view is based on a flawed interpretation of Article XXI(b). The terms of Article XXI(b) require a respondent to substantiate, with argument and evidence, its conclusion that its measure falls under one of the subparagraphs; and, to substantiate, with argument and evidence, a plausible basis for its consideration that the measure is necessary for the protection of its essential security interests.

124. The United States has not done so. The United States has failed, therefore, to present a *prima facie* case that its measures are justified under Article XXI(b).

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[82] *See* United States' response to Panel Question 38, para. 144
[83] *See* Norway's first opening statement, paras. 63-80; and Norway's response to Panel Question 36.
[84] United States' response to Panel Question 38, para. 142.