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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 First Substantive Meeting of the Panel with the Parties

6 NOVEMBER 2019

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Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Import Measures	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, DSR 2015:II, p. 783
Australia – Tobacco Plain Packaging (Dominican Republic)	Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging,* WT/DS441/R, Add.1 and Suppl.1, circulated to WTO Members 28 June 2018 [appealed by the Dominican Republic 23 August 2018]
Brazil – Retreated Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
Brazil – Taxation	Appellate Body Reports, *Brazil – Certain Measures Concerning Taxation and Charges,* WT/DS472/AB/R and Add.1 / WT/DS497/AB/R and Add.1, adopted 11 January 2019
Canada – Patent Term	Appellate Body Report, *Canada – Term of Patent Protection,* WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, p. 5093
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261
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China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials,* WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment,* WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Import Licensing Regimes	Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products,* WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017, DSR 2017:VII, p. 3037

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Russia – Traffic in Transit	Panel Report, *Russia - Measures Concerning Traffic in Transit,* WT/DS512/7, WT/DS512/R and WT/DS512/R/Add.1, adopted 26 April 2019
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines,* WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines,* WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
Thailand – Cigarettes (Article 21.5 – Philippines I)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines,* WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018 [appealed by Thailand 9 January 2019]
US – Antidumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology,* WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL (Article 21.3(c))	Award of the Arbitrator, *United States – Certain Country of Origin Labelling (COOL) Requirements – Arbitration under Article 21.3(c) of the DSU,* WT/DS384/24, WT/DS386/23, 4 December 2012, DSR 2012:XIII, p. 7173
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea,* WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131

Short Title	Full Case Title and Citation
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000,* WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
US – Offset Act (Byrd Amendment)	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000,* WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489
US – Shrimp (Thailand)	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties,* WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008, DSR 2008:VII, p. 2385 / DSR 2008:VIII, p. 2773
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton,* WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

LIST OF ABBREVIATIONS

Abbreviation	Description
DOC	Department of Commerce
DSB	Dispute Settlement Body
DSU	Understanding on Rules and procedures governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
ITO	International Trade Organization
OED	Oxford English Dictionary
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SPS Agreement	*Agreement on Sanitary and Phytosanitary Measures*
TBT Agreement	*Agreement on Technical Barriers to Trade*
TRIMS Agreement	*Agreement on Trade-Related Investment Measures*
TRIPS Agreement	*Agreement on Trade-Related Aspects of Intellectual Property Rights*
US	United States
WTO	World Trade Organization

LIST OF EXHIBITS

(Exhibit NOR-83)	Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, April 26, 2019
(Exhibit NOR-84)	Oxford English Dictionary ("OED") definition of "action", available at: https://www.oed.com/view/Entry/1938?rskey=NKHZY0&result=1&isAdvanced=false#eid, last accessed 4 November 2019
(Exhibit NOR-85)	Oxford English Dictionary ("OED") definition of "consider", available at: https://www.oed.com/view/Entry/39593?redirectedFrom=consider#contentWrapper, last accessed 4 November 2019

I. INTRODUCTION

1. Mr. Chair, distinguished members of the Panel, and members of the Secretariat, thank you for your time and effort in helping to resolve this dispute.

2. First, I would like to note that since this meeting is open to the public, we would like to fnform the participants in the public viewing room that we have left copies of our opening statement in that room.

3. In March of last year, based on recommendations in reports from the Commerce Department,[1] the United States imposed additional tariffs on imported aluminium and steel products, including imports from Norway.[2] The tariffs, however, impose duties at rates higher than those provided for in the US schedule; and, they are not applied uniformly to all imports from all WTO Members. The United States grants exemptions to certain WTO Members, some of whom agree to face US import quotas instead.[3] The United States also excludes certain aluminium and steel products from the tariffs at the request of US domestic industry.[4]

4. These aluminium and steel tariffs, country exemptions, and product exclusions – which are the measures at issue – violate the *Safeguards Agreement* and the GATT 1994. The United States has not contested Norway's claims of violation. Indeed, the United States has failed entirely to engage with Norway's arguments. Instead, it asserts that the WTO-inconsistent aspects of its measures are justified under Article XXI(b) of the GATT 1994.

5. Today, Norway presents its claims and arguments in summary form given the absence of response by the United States, and it then turns to the US arguments under Article XXI(b) of the GATT 1994.

6. Norway proceeds as follows. *First*, Norway recalls that, under Article 11 of the DSU, the Panel is obliged to make an "objective assessment" of the matter before it, including both Norway's claims and the United States' defence. *Second*, Norway sets out the appropriate order of analysis that the Panel should follow in its assessment of the claims and defences. *Third*, Norway briefly summarises its claims of violation. *Fourth*, Norway explains why the Panel should reject the United States' proposed interpretation of Article XXI(b).

[1] DOC Steel Report, (**Exhibit NOR-1**); DOC Aluminium Report, (**Exhibit NOR-2**).
[2] *See* Proclamation No. 9705, **(Exhibit NOR-4)**, para. 7 and Annex; Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8 and Annex.
[3] Norway's first written submission, paras. 5, 29-36, 393-402 and 484-490.
[4] Norway's first written submission, paras. 6, 37-39 and 516-525.

7. Norway's presentation of its opening statement this morning will include the projection of slides, which are annexed to this statement.

II. THE PANEL MUST MAKE AN OBJECTIVE ASSESSMENT OF THE CLAIMS AND DEFENCES PURSUANT TO ARTICLE 11 OF THE DSU

8. The parties agree that the Panel has jurisdiction over the matter. In the United States' own words, "the Panel has jurisdiction over this dispute, because the DSB has established the Panel to examine the matter set out in the panel request".[5] The matter before the Panel is: Norway's claims that the US measures are inconsistent with the *Safeguards Agreement* and the GATT 1994.

9. Although it accepts the Panel's jurisdiction, the United States argues that the Panel cannot undertake any substantive review of the US measures, because the United States asserts that they are justified under Article XXI(b). According to the United States, "Article XXI(b) is self-judging, meaning that each WTO Member has the right to determine, for itself, what it considers necessary to protect its own essential security interests, and to take action accordingly".[6] As a consequence, the United States considers that a Member's actions under Article XXI(b) cannot be "subject to findings by the Panel under the DSU".[7]

10. In sum, according to the United States, Article XXI(b) establishes a right for Members to take GATT-inconsistent actions, yet there is no scope whatsoever for a panel to review whether a Member's actions meet the legal conditions in Article XXI(b) governing the exercise of that right. From this perspective, although the Panel has jurisdiction to review the US measures, its review is emptied of all substantive content.

11. At its heart, the US argument concerns the Panel's standard of review. The standard of review is clear and well established in WTO law. Article 11 of the DSU requires a panel to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

12. In any given dispute, the standard of review under Article 11 "must be understood in light of the specific obligations of the relevant agreements that are at issue in the case".[8] In

[5] The United States' first written submission, para. 181.
[6] The United States' first written submission, para. 2.
[7] The United States' first written submission, para. 181.
[8] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 92; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.

this case, the United States takes the radical position that three words – "which it considers" – in the *chapeau* of Article XXI(b) mean that the Panel cannot undertake *any objective assessment* of Norway's claims or the US national security defence. Instead, the Panel must afford total deference to the United States' assertions that its measures meet the legal conditions under Article XXI(b), without making any findings on the claims or defence.

13. The United States' entire defence hinges on the Panel accepting that (1) it must grant total deference to the US assertions that its measures meet the legal conditions under Article XXI(b), and (2) it cannot make an "objective assessment". The United States has presented no substantive arguments either to rebut Norway's claims, or to show that it fulfils the legal conditions in Article XXI(b).

14. Norway disagrees with the extreme position taken by the United States. The Appellate Body has never accepted total deference as the appropriate standard of review under Article 11 of the DSU. The panel in the *Russia – Traffic in Transit* dispute also found that it was required, under Article 11, to exercise scrutiny over the respondent's invocation of Article XXI(b).[9] Indeed, the grant of total deference cannot be reconciled with the word "objective" in Article 11, which calls on panels to make "a thorough analysis of the measure on its face and to address evidence submitted by a party".[10]

15. In Norway's view, this Panel – like hundreds before it – must make an objective assessment of the claims and defences presented. The contours of the Panel's "objective assessment" must, of course, be informed by the relevant provisions, including those in the *Safeguards Agreement* and the GATT 1994, which are the subject of Norway's claims, and in Article XXI(b) of the GATT 1994, which is the subject of the US defence.[11]

16. As Norway explains below, the text of Article XXI(b) does not afford total deference to a Member asserting that its actions meet the legal conditions set forth in that provision. So long as the Panel decides that it must undertake *some* kind of "objective assessment", the United States must lose.

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[9] Panel Report, *Russia – Traffic in Transit*, paras. 7.102-7.104 and 7.132-7.139.
[10] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.454.
[11] As the Appellate Body explained, the "proper standard of review to be applied by a panel must [] be understood *in the light of the specific obligations of the relevant agreements that are at issue in the case*", Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 92; *see also* Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.

III. THE PANEL'S ORDER OF ANALYSIS

17. As part of its objective assessment, the Panel must decide on the appropriate order of analysis. For two reasons, Norway submits that the Panel must address, first, Norway's claims in order to establish whether the US measures violate WTO law and, if so, second, the US justification under Article XXI(b) in order to establish whether the violations are justified.

18. *First,* Norway recalls that Article XXI(b) operates to permit certain GATT-inconsistent action, using the same language as Article XX: "nothing in this *Agreement* shall be construed to prevent any Member from taking" certain action. Thus, like Article XX, Article XXI(b) is an *affirmative defence* available to justify a violation of the GATT 1994.[12] If there is no violation, Article XXI(b) has no operative role: there is nothing to justify in the first place. For this reason, under Article XX, panels and the Appellate Body have, without exception, addressed, *first*, whether the complainant has made out its claims of WTO-inconsistency; and, if so, *second*, whether the respondent has made out its affirmative defence that the violations are justified. The same logic applies under Article XXI(b).

19. *Second*, it is well accepted that, under an affirmative defence, it is the *GATT-inconsistent aspect of a measure* – and not the measure as a whole – that must be justified.[13] The justification of a measure is not, therefore, an abstract assessment that takes place in a vacuum. Instead, it focuses on specific features of a measure that entail a tangible violation of the GATT 1994. A panel cannot, therefore, proceed to assess a defence until after it has found a violation of the GATT 1994, and identified the specific GATT-inconsistent aspects of a measure.

IV. NORWAY'S CLAIMS UNDER THE *SAFEGUARDS AGREEMENT* AND THE GATT 1994

20. Norway claims that the US measures violate Articles 2.1, 2.2, 5.1, 11.1(b), 12.1 and 12.2 of the *Safeguards Agreement*, and Articles I, II:1 and X:3(a) of the GATT 1994. The United States declines to respond to these claims in its first written submission. In the absence of a US response, Norway presents only a short summary of its arguments.

21. Under the *Safeguards Agreement*, the tariffs are a "safeguard measure" because they suspend a GATT 1994 obligation; and, they are designed to protect the US domestic industry

[12] *See* Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16; Appellate Body Report, *Indonesia – Import Licensing Regimes*, paras. 5.43-5.46; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Report, *Brazil – Taxation*, para. 5.83; Appellate Body Report, *US – Shrimp (Thailand)*, para. 307.
[13] Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Report, *EC – Seals*, para. 5.185.

from injury caused or threatened by increased imports of the subject steel and aluminium products.[14] The United States has not contested this characterisation.

22. Among others, the tariffs violate Article 2.1 of the *Safeguards Agreement* by imposing safeguard measures without fulfilling the conditions set forth in that provision for so doing.

23. One aspect of this violation is the consistent mismatch between the broad product scope of the US 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 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.

24. Although the steel and aluminium 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. To take just one example, the US aluminium tariffs apply to secondary unwrought aluminium products, even though the Commerce Department's record shows that the United States is a highly successful and competitive producer – indeed the world's leading producer – of secondary unwrought aluminium.[15]

25. The measures at issue also violate cornerstone principles of the GATT 1994. The measures impose import duties at rates higher than those provided for in the US Schedule; they involve discriminatory treatment of imports from different WTO Members; and, the United States administers its measures in an unreasonable and partial manner. The United States has not substantively responded to these claims.

26. Pursuant to Article 11 of the DSU, the Panel must make an objective assessment of Norway's claims. If Norway has made a *prima facie* case that the US measures are inconsistent with the *Safeguards Agreement* and/or the GATT 1994, it must make findings that the US measures violate the relevant provisions of these *Agreements*.

27. The Panel's Working Procedures state that "[e]ach party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers

[14] Norway's first written submission, Section VI.A.3.
[15] Norway's first written submission, paras. 217-237.

provided by the other party".[16] Should the United States wish to respond to any of Norway's claims, it must put forward the necessary evidence in the course of this hearing.

V. ARTICLE XXI(B) OF THE GATT 1994

28. The United States provides a single response to Norway's claims: the measures at issue are justified under Article XXI(b) of the GATT 1994.

29. Article XXI(b) of the GATT 1994 provides that "nothing in this *Agreement*" shall prevent a Member from taking certain defined "security measures". In the US view, whether a measure is justified under Article XXI(b) is entirely "self-judging".[17] For the United States, this means that the Panel must automatically find in its favour. Norway disagrees.

30. *First*, the United States ignores that Article XXI(b) is not, by default, available to justify violations of covered agreements other than the GATT 1994. The United States makes no attempt to demonstrate that Article XXI(b) is available to justify violations of the *Safeguards Agreement*, under which Norway has brought claims.

31. *Second*, the United States' argument that Article XXI(b) is "self-judging" is based on an interpretive argument that cannot be reconciled with the terms of both the subparagraphs and the *chapeau* of Article XXI(b). The United States has failed to identify which subparagraph of Article XXI(b) is applicable to its measures; *and* fails to give any substantiation of its assertion that its measures are justified under Article XXI(b). If the Panel finds that the standard of review under Article XXI(b) is *anything greater* than total deference to the respondent, then the United States must lose.[18]

32. Norway addresses both points below.

A. The United States fails to demonstrate that Article XXI(b) of the GATT 1994 applies to the *Safeguards Agreement*

33. Article XXI(b) provides that "nothing <u>in this *Agreement*</u> shall be construed" to prevent certain types of "action". The same wording is found in Article XX of the GATT 1994. The Appellate Body has found that this language means that, in principle, the

[16] *Working Procedures*, Clause 5(1).
[17] The United States' first written submission, para. 2.
[18] In the context of comments on the Panel Report in *Russia – Traffic in Transit*, the United States itself has expressed the view that "having determined that it could review an invocation of Article XXI, the Panel's assessment of the security issues should have ended there. This is because while Russia invoked the exception … Russia did not substantiate a defense. In finding that Russia's actions were justified on the basis of essential security, the Panel made Russia's case for it, concluding that the situation between the parties constituted an emergency in international relations". *See* Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, April 26, 2019, **(Exhibit NOR-83)**, Section 8.A, pp. 14-15.

provision is available to justify violations of the GATT 1994, and not violations of other covered agreements.[19]

34. In light of the treaty wording, the defence is available to justify violations of another covered agreement solely when there is affirmative language sufficient to incorporate the defence into that agreement. For example, Articles XX and XXI(b) are available to justify measures inconsistent with the *TRIMS Agreement*, because Article 3 of the *TRIMS Agreement* explicitly provides that "'[a]ll exceptions under GATT 1994 shall apply'".[20] In this respect, Norway notes that certain covered agreements have expressly incorporated a national security defence,[21] whereas others, including the *Safeguards Agreement*, have not.

35. The United States has failed to identify any textual basis showing that Article XXI(b) of the GATT 1994 is available to justify violations of the *Safeguards Agreement*.

B. Article XXI(b) of the GATT 1994 is not "self-judging"

1. Introduction

36. The United States argues that Article XXI(b) is "self-judging", meaning that an assessment of whether a measure meets the legal conditions in that provision is "reserve[d]" "to the Member taking the action",[22] and not a panel. In other words, the United States argues that, when reviewing whether a measure is justified under Article XXI(b), a panel must show total deference to a respondent's assertions that its measures meet the legal conditions in Article XXI(b). In the US view, this interpretation flows from the three words "which it considers" in the *chapeau* of Article XXI(b). The US argument is flawed in the following respects.

37. *First*, the United States misunderstands the relationship between the *chapeau* and the subparagraphs of Article XXI(b); and, *second*, the United States errs in asserting that the words "which it considers" render the *chapeau* of Article XXI(b) entirely "self-judging". Norway addresses both points below.

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[19] Appellate Body Report, *China – Publications and Audiovisual Product*s, para. 208, citing to Panel Report, *China – Publications and Audiovisual Product*s, para. 7.743; *see also* Panel Reports, *China – Raw Materials*, para. 7.153; Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines I)*, para. 7.743.

[20] Appellate Body Reports, *China – Rare Earths*, para. 5.56; Appellate Body Reports, *China – Raw Materials*, para. 303; Panel Report, *Thailand – Cigarettes* (*Article 21.5 – Philippines I*), para. 7.743.

[21] *See*, *for example*, Article XIV*bis* of the GATS; and Article 73 of the *TRIPS Agreement*.

[22] The United States' first written submission, para. 20.

2. Relationship between the subparagraphs and *chapeau* of Article XXI(b)

38. The first US argument concerns the way that the three subparagraphs in Article XXI(b) connect to the *chapeau*. To understand this argument, it is helpful to recall the terms and structure of Article XXI(b), which are shown on slide number 2.

39. The parties' disagreement is about whether the subparagraphs qualify the term "essential security interests" in the *chapeau*, or the word "action". Please see slide number 3.

40. The United States argues that subparagraphs (i) and (ii) of Article XXI(b) qualify the term "essential security interests" in the *chapeau*, and not the word "action".[23] Please see slide number 4. This argument provides 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*. In contrast, the United States accepts that subparagraph (iii) qualifies the word "action", and not the term "essential security interests".[24] Please see slide number 5.

41. The United States candidly admits that its understanding of the relationship between the subparagraphs and the *chapeau* implies rewriting Article XXI(b). It even proposes revised text to show how the drafters "**might have … written**" the provision if the US understanding were correct.[25] The Panel cannot, however, rewrite Article XXI(b).

42. Properly interpreted, each of the three subparagraphs qualifies the word "action", and not the words "essential security interests". Please see slide number 6. In other words, a Member's "action" must: (i) relate to fissionable materials, *etc.*; (ii) relate to traffic in arms, *etc.*; or, (iii) be taken in time of war or other emergency in international relations. As a result, the subparagraphs are <u>not</u> subject to the "which it considers" language.

43. Below, Norway explains that this follows from the text, context, object and purpose, and negotiating history of Article XXI(b).

[23] *See* the United States' first written submission, paras. 29-33. 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) <u>must</u> "modif[y] the word 'action,' rather than the phrase 'essential security interests'". *See* the United States' first written submission, para. 32.
[24] The United States' first written submission, para. 32.
[25] *See* the United States' first written submission, para. 30 (footnote 23) and para. 32 (footnote 24).

a. The text of Article XXI(b)

44. The terms of Article XXI(b) contain two sets of qualifying clauses that connect different parts of the treaty text.

45. The first qualifying connector connects two parts of the *chapeau* itself, using the words "which it considers". Please see slide number 7. Norway and the United States agree that these words connect the "action" that may be taken with the "essential security interest[]" at stake. The connector introduces a qualification on the type of "action" that may be taken: it must be considered necessary to protect the Member's "essential security interests".

46. The parties disagree in some respects about the second qualifying connectors, which connect the *chapeau* to the subparagraphs. Please see slide number 8. These connectors are found in the first words of each subparagraph: "relating to" and "taken in time of". The parties *agree* that these words establish a connection between two distinct parts of the text, whereby the words following the connector establish a qualification or condition to some prior part of the text. However, the parties *disagree* as to which prior part of the text is the subject of the qualifications in the subparagraphs: the "action" taken, or the "essential security interests" at stake.

47. Norway takes the view that the connectors establish a relationship between the "action" and the terms of the subparagraphs. The United States argues that, for subparagraphs (i) and (ii), the connectors establish a relationship between the "essential security interests" and the terms of the subparagraphs; whereas it accepts that, for subparagraph (iii), the relationship is with the "action". The US view is irreconcilable with the text of the provision.

48. Norway starts with subparagraph (iii), where the parties are in agreement. Please see slide number 9. Grammatically, the language of the third subparagraph ("taken in time of war") cannot qualify the term "essential security interests", and can only qualify the word "action". More specifically, it is only an "action", and not "essential security interests", that can be "*taken* in time of war". Thus, the choice of the verb ("take") in the third subparagraph shows that the subparagraph necessarily qualifies the word "action".

49. The United States agrees: "it is actions that are 'taken', not interests", and, thus, "the temporal circumstance in subparagraph (iii) modifies the word 'action' rather than the phrase 'essential security interests'".[26]

50. Although the United States accepts this relationship between subparagraph (iii) and the *chapeau*, it argues that the other two subparagraphs have a *different* relationship to the *chapeau*.[27] The United States contends that, whereas subparagraph (iii) "modifies the word 'action'",[28] subparagraphs (i) and (ii) "modify the phrase 'essential security interests'".[29]

51. In Norway's view, in interpreting the relationship between the subparagraphs and the *chapeau* of Article XXI(b), the treaty interpreter must be guided by the need to ensure that the interpretive exercise yields coherent and consistent results.[30] A single set of treaty terms, in a single provision, must be interpreted holistically to have a coherent and consistent meaning.[31] As a result, because subparagraph (iii) necessarily qualifies the word "action", interpretive coherence and consistency requires that the other two subparagraphs qualify that same word.

52. Otherwise, the same terms in the *chapeau* would have different significance, and would serve different functions, depending on which subparagraph a respondent invokes. The word "action" would sometimes be subject to two sets of qualifying conditions (in the *chapeau* and in subparagraph (iii)), and sometimes a single set of qualifying conditions (in the *chapeau*); and, the words "essential security interests" would sometimes be subject to a single set of qualifying conditions (in subparagraphs (i) and/or (ii)), and sometimes to no condition at all.

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[26] The United States' first written submission, para. 32.
[27] The United States' first written submission, para. 29.
[28] The United States' first written submission, para. 30.
[29] The United States' first written submission, para. 31.
[30] Appellate Body Report, *US – Continued Zeroing*, para. 268.
[31] Decision of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 119, referring to Appellate Body Report, *US – Upland Cotton*, paras. 549 and 550; and Appellate Body Report, *Argentina – Footwear (EC),* para. 81 (footnote 72) ("[T]he provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are all provisions of one treaty, the *WTO Agreement*". Therefore, they should be interpreted "in a way that gives meaning to all of them, harmoniously"). *See also* Appellate Body Report, *Argentina – Import Measures*, para. 5.236; and Panel Report, *Argentina – Import Measures*, para. 6.437, referring to Panel Report, *Indonesia – Autos*, para. 14.28 (footnote 649) ("WTO provisions should be interpreted harmoniously and cumulatively whenever possible").

53. The panel in *Russia – Traffic in Transit* agreed, concluding that "the connection between the *action* and the materials or the traffic described in subparagraphs (i) and (ii) is specified by the phrase 'relating to'".[32]

54. The Spanish version of the *chapeau* confirms the view that each of the subparagraphs qualifies the word "action". The Spanish text is shown on slide number 10.

55. This version refers to "measures" ("***medidas***") that a Member considers necessary for the protection of the essential security interests "relating" ("***relativas***") to the matters described in the subparagraphs.

56. The word "***relativas***" ("relating") appears in the *chapeau* itself, where it serves as a connector to each of the three subparagraphs. Please see slide number 11. The word is used in the plural, feminine form. The only word in the *chapeau* to which this word can be linked is the word "***medidas***" ("measures"), because it is a feminine noun in the plural form. In contrast, the word "***relativas***" cannot refer to the noun "***intereses***" ("interests"), because that noun is in the masculine form.[33] As a result, the word "***relativas***" ("relating") necessarily connects the word "***medidas***", and not the noun "***intereses***", to each of the three subparagraphs of Article XXI(b).

57. Thus, in keeping with interpretive coherence and consistency, the Spanish version points in one direction only: each of the subparagraphs qualifies the "action" that may be taken, and not the "essential security interests". The United States, therefore, advances an interpretation that fosters incoherence and inconsistency between the subparagraphs, and that cannot be reconciled with the Spanish version of the text. As the United States concedes, its proposed interpretation reflects how the provision "might have been written",[34] and not how it is actually written.

b. The context of Article XXI(b)

58. The broader context supports the view that the conditions in the subparagraphs qualify a Member's "action". Like Article XXI of the GATT 1994, numerous other provisions of the covered agreements provide Members with a conditional right to take action to pursue non-trade interests. These provisions typically also have a term that functions as a qualifying connector – such as the opening words of the subparagraphs of Article XX of the GATT 1994

[32] Panel Report, *Russia – Traffic in Transit*, para. 7.69.
[33] If the connector word related to the term "*intereses*", it would be "*relativos*", *i.e.*, in the plural, masculine form.
[34] The United States' first written submission, para. 30 (footnote 23). Emphasis added.

– with the words following the connector containing a legal condition. In these provisions, the text consistently connects a Member's *action* (*i.e.*, measure) with the relevant legal condition. In other words, the Member's action is qualified by – and must be justified in relation to – the relevant legal condition.[35] To take just one example, in Article XX of the GATT 1994 and Article XIV of the GATS, the subparagraphs each include a connector (*e.g.*, "relating to" or "necessary") that links a Member's "*measures*" to the relevant legal condition, such that the text places qualifications on the "*measures*" that a Member is entitled to take under Article XX and Article XIV.

c. The object and purpose of Article XXI(b)

59. This feature of the text is also consistent with the object and purpose of the provisions: the focus is on whether a Member's WTO-inconsistent *action* is justified in light of the relevant legal conditions. We further revisit the object and purpose of Article XXI below.

3. The required analytical steps under Article XXI(b) of the GATT 1994

60. The relationship between the *chapeau* and the subparagraphs, as just outlined, has important implications for the Panel's approach under Article XXI(b). Specifically, under Article XXI(b), a Member's "action" is subject to two sets of distinct and independent conditions:

(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.

a. The first analytical step: the subparagraphs of Article XXI(b)

61. Thus, in the first step, a panel must make an objective assessment whether a respondent's "action" falls within the circumstances described in one of the subparagraphs. Textually, the phrase "which it considers" is not part of this step. Instead, these words apply

[35] *See also* Article 2.2 of the *TBT Agreement*, which requires that "technical regulations", *i.e.*, *measures*, are not more trade-restrictive than necessary to fulfil a legitimate objective; thus, the legal condition qualifies the types of actions that may be taken. Article 2.2 of the *SPS Agreement* also requires that any *SPS* "measure" is applied only to the extent necessary to protect human, animal or plant life or health. Again, therefore, the legal condition qualifies the types of actions that may be taken.

in the second step, where they confer deference towards the respondent in assessing whether action is necessary "for the protection of its essential security interests".

62. In this case, under the first step, the United States has not attempted to show that its actions meet the terms of one of the subparagraphs. Indeed, it has not even identified under which of the three subparagraphs, in its view, its actions fall. The Panel must, therefore, stop at the first step of the analysis, by finding that the United States has failed to make a *prima facie* case that its actions fall under one of the subparagraphs under Article XXI(b) of the GATT 1994.

b. The second analytical step: the chapeau *of Article XXI(b)*

63. 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". The United States argues that the words "which it considers" mean that a panel should afford total deference to a respondent's assertions.

64. Norway agrees that the words "which it considers" imply a standard of review that involves a degree of deference for a respondent. However, Norway does not agree that the standard of review is *total deference*, with no scrutiny whatsoever of the respondent's action. As noted, the standard of review is based on Article 11 of the DSU, applied in light of the particular provision at stake. Accordingly, to establish the standard of review, Norway addresses, in the following sub-sections, the meaning of the terms in the *chapeau*, using the ordinary rules of treaty interpretation: the text and context of the provision, read in good faith in light of its object and purpose. The resulting interpretation – that Article XXI(b) is not "self-judging" – is further supported by the provision's negotiating history.

65. Below, Norway addresses each interpretive element, as well as the United States' argument that a "subsequent agreement" to Article XXI(b) supports its view that Article XXI(b) is "self-judging".

i. The text and context of the chapeau *shows that it is not "self-judging"*

63. Norway begins with the word "action"; then the phrase "necessary for the protection of its essential security interests"; and finally, the words "it considers".

(1) "…action…"

64. The meaning of the word "action" is not controversial: it means "something done or performed, a deed, an act".[36] Under Article 70.1 of the *TRIPS Agreement*, the Appellate Body has said that the word "action" is synonymous with the term "act".[37] Accordingly, the word "action" in Article XXI(b) refers to a specific act or deed – a measure – taken by a Member.

(2) "…necessary for the protection of its essential security interests…"

65. According to the text, a Member must consider that its action is "*necessary for the protection of its essential security interests*". In this clause, the drafters have chosen a series of words – "necessary", "protection", and "essential" – that indicate a degree of constraint on a Member's "action". As ever, in deciding if the *chapeau* is entirely "self-judging", the chosen words must be given their ordinary meaning.

66. The word "necessary" requires that a measure be apt to make a "material contribution" to the objective at stake.[38] This word is used frequently in WTO exceptions to ensure that an appropriate balance is struck between trade and non-trade interests.[39] A WTO-inconsistent measure can be justified solely if it materially advances non-trade interests. Nothing in the choice of this word implies that the Membership intended to permit *any* action under Article XXI(b), based on *mere assertion* by a respondent.

67. The Appellate Body has explained that the phrase "for the protection of" calls for a "link between the measures and the protected interest".[40] This link exists when there is a "clear and objective relationship between [the] measure and the specific purpose enumerated".[41] This relationship must be "manifest in the measure itself or otherwise evident from the circumstances related to the application of the measure".[42] Again, the chosen

[36] Oxford English Dictionary ("OED") definition of "action", available at: https://www.oed.com/view/Entry/1938?rskey=NKHZY0&result=1&isAdvanced=false#eid, last accessed 4 November 2019, **(Exhibit NOR-84)**.
[37] Appellate Body Report, *Canada – Patent Term*, para. 54. *See also* Panel Report, *Thailand – Cigarettes (Article 21.5 – Philippines I)*, para. 7.576.
[38] Appellate Body Report, *Brazil – Retreated Tyres*, para. 151. *See also* Appellate Body Report, *China – Audiovisuals*, paras. 251-254; and Appellate Body Report, *EC – Seal Products*, paras. 5.213 -5.214.
[39] *See* Article XX(a), (b), (d) and (i) of the GATT 1994; Articles 2, 3 and 9 of the *SPS Agreement*; Article 2.2 of the *TBT Agreement*; Article XIV of the GATS; Article 17 of the *SCM Agreement*; and Article 8 of the *TRIPS Agreement*.
[40] Appellate Body Report, *Australia – Apples*, para. 172.
[41] Appellate Body Report, *Australia – Apples*, para. 173.
[42] Appellate Body Report, *Australia – Apples*, para. 172.

wording does not imply that a respondent can decide for itself if it meets this aspect of the legal conditions in Article XXI.

68. The term "essential security interests" also shows that the drafters chose language that indicates constraints. The wording does not refer to just any "security interests". Instead, the drafters limited the *types* of interests that can be invoked – they must be "essential". A Member is, therefore, not free to elevate *any* interest to the status of an "*essential* security interest". [43]

69. The United States argues that the word "its", which precedes the words "essential security interests", suggests that only the respondent may determine whether the relevant interest satisfies the standard.[44] However, the word is simply a possessive pronoun to indicate *whose* interests are at stake. Norway does not dispute that the interests at stake are those of the respondent. The personal pronoun "its" does not, however, indicate that the respondent has unfettered discretion to decide that its interests rise to the level of "essential security interests".

(3) "…it considers…"

70. The United States places considerable weight on the meaning of the words "it considers". In the US view, these words render every other aspect of the *chapeau* "self-judging". Thus, to the United States, these words mean that a Member can take *whatever* action it pleases under Article XXI(b) based on a respondent's assertion that it meets the legal conditions in the provision.

71. Norway disagrees. Although the words "which it considers" afford discretion, they do not afford *unfettered* discretion that deprives the remainder of the *chapeau* of legal effect.

72. The verb "consider" has a specific meaning to which the Panel must give effect. It means "to view or *contemplate attentively*, to *survey*, *examine*, *inspect*, *scrutinize*"; and, in transitive form, "to contemplate mentally, fix the mind upon".[45] The verb "considers", therefore, establishes an obligation for a Member to undertake an attentive examination of the circumstances to conclude that the legal conditions in the *chapeau* are met.

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[43] Panel Report, *Russia – Traffic in Transit*, para. 7.130. *See also* Appellate Body Report, *China – Raw Materials,* para. 326.
[44] The United States' first written submission, paras. 3 and 27.
[45] Oxford English Dictionary ("OED") definition of "consider", available at: https://www.oed.com/view/Entry/39593?redirectedFrom=consider#contentWrapper, last accessed 4 November 2019, **(Exhibit NOR-85)**.

73. To the United States, because the word "it" indicates that the respondent must undertake the requisite consideration, the text affords the respondent absolute discretion in so doing.

74. Norway agrees that the word "it" places the respondent's own consideration at the center of the process. A respondent, therefore, enjoys discretion. However, neither the verb "consider" nor the surrounding context indicate that this discretion is total.

75. Article XXI(b) is not unique in requiring a Member to consider certain factors. Indeed, every covered agreement requires Members to undertake attentive consideration when making determinations regarding a variety of matters that are subject to WTO commitments. In undertaking this consideration, Members typically enjoy a degree of discretion, sometimes more, sometimes less. However, they <u>never</u> enjoy total discretion, immune from review by a panel operating under the standard of review in Article 11 of the DSU.

76. Affording total discretion would reduce the disciplines in Article XXI(b) to inutility and override Article 11 of the DSU. Each Member could decide subjectively if it has undertaken appropriate consideration, with no objective means of verifying the Member's self-declaration.

77. Under the *chapeau* of Article XXI(b), total discretion would empty the legal conditions in the remainder of the *chapeau* of meaning. The *chapeau* requires that a Member consider that its actions are "necessary for the protection of its essential security interests". As noted, these words establish legal conditions that constrain the types of action that a respondent may take. The treaty interpreter cannot interpret two words in the *chapeau* – "it considers" – in a way that deprives the surrounding context of meaning.

78. By way of contrast, a Member could expect greater deference if the text had used a different verb, or if the surrounding context had not established legal conditions. For example, the drafters could have said that nothing prevents any Member "from taking any action which it **declares** necessary for the protection of its essential security interests". In that case, the verb would permit "action" based on a respondent's mere *declaration*. In that event, there would be no duty imposed on a respondent to undertake any kind of attentive consideration.

79. Similarly, the text could have permitted any action which the Member "considers, **in its judgment, fruitful to its security interests**". This language adds a reference to the

Member's own "judgment"; replaces the word "necessary" with "fruitful"; and omits "for the protection of" and "essential". Even with the verb "consider", such open-ended language would connote a far greater degree of discretion. This example illustrates the importance of the context surrounding the verb "consider".

80. The drafters did not adopt these options. Instead, the text requires a Member to engage in attentive consideration that enables it to conclude that its actions are, indeed, "necessary for the protection of its essential security interests". This language does not, as the United States argues, afford total discretion to the respondent. Nor does it absolve a panel of its duty to make an "objective assessment", under Article 11 of the DSU, of whether the respondent has, indeed, undertaken the appropriate consideration in taking its action. As Norway has said, a respondent enjoys discretion in this review, albeit not total discretion.

ii. The object and purpose of the chapeau *show that it is not "self-judging"*

81. The *Vienna Convention* requires that the terms of a provision be interpreted in light of the provision's object and purpose. The *preamble* of the GATT 1994 provides that the object and purpose of the Agreement is "the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce".

82. If the Panel accepts that Article XXI(b) is "self-judging", a Member could justify any action under the *chapeau*, however spurious its national security justification, thereby circumventing its GATT 1994 obligations and defeating the object and purpose of the GATT 1994.

iii. The requirement of "good faith" means that the chapeau *is not "self-judging"*

83. In meeting the legal conditions under Article XXI(b), a Member is subject to the principles of good faith. Under the customary rules of treaty interpretation, "good faith requires a party to a treaty to refrain from acting in a manner which would defeat the object and purpose of a treaty as a whole or the treaty provision in question".[46] The United States' approach would do away with this requirement of good faith, and, again, allow action that defeats the object and purpose of the Agreement. Consistent with this principle of good faith,

[46] *See* Panel Report, *US – Offset Act*, para. 7.64. *See also* Appellate Body Report, *US – Offset Act*, paras. 294-298.

a respondent's actions under Article XXI(b) are open to an objective assessment under Article 11 of the DSU.

4. The United States' remaining interpretive arguments fail to show that Article XXI(b) is "self-judging"

84. The United States makes a number of additional interpretive arguments which, in its view, "confirm" that Article XXI(b) is "self-judging". Specifically, the United States relies on: *first*, a decision taken by the contracting parties of the GATT 1947 ("*1949 Czechoslovakia Decision*" or "*Decision*"); *second*, certain "supplementary means" of interpretation, including negotiating history and internal US government documents; and *third*, a respondent's right to withhold information under Article XXI(a). Norway addresses each argument in turn.

i. The 1949 Czechoslovakia Decision does not show that Article XXI(b) is "self-judging"

85. The United States argues that the *1949 Czechoslovakia Decision* constitutes a "further authentic element of interpretation", demonstrating that Article XXI(b) is "self-judging".[47]

86. Norway has explained above that the US interpretation of Article XXI(b) is inconsistent with the text, read in context, and interpreted in good faith in light of its object and purpose. The *1949 Czechoslovakia Decision* does not demonstrate otherwise.

87. The United States asserts that the *Decision* is a "subsequent agreement" under Article 31(3)(a) of the *Vienna Convention* in interpreting the GATT 1994. Norway disagrees. The *Decision* is not subsequent to the GATT 1994 but predates it by over 40 years. The Appellate Body has explained that decisions taken under the GATT 1947 are not "subsequent agreements" in interpreting the GATT 1994.[48] At best, they are supplementary means of interpretation under Article 32 that can confirm an interpretation based on the text.[49]

88. Further, even as a supplementary means of interpretation, the *Decision* should be given no weight. It does not purport to speak generally to the interpretation of the *chapeau* of Article XXI(b), but resolves a particular dispute with particular facts. It was also agreed

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[47] The United States' first written submission, para. 54.

[48] Appellate Body Report, *US – Antidumping and Countervailing Duties (China)*, para. 579. *See also* Panel Report, *Australia – Plain Packaging*, para. 7.3008; Appellate Body Report, *US – Clove Cigarettes*, para. 262; Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 390 (a "subsequent agreement" under Article 31(3)(a) of the *Vienna Convention* must "bear [] specifically upon the interpretation of a treaty" and be "between all WTO Members"). *See also* Appellate Body Report, *US – Tuna*, paras. 371-372.

[49] Appellate Body Report, *US – Antidumping and Countervailing Duties (China)*, para. 579.

between only 17 of the 23 contracting parties because,[50] as the United States explains, one party dissented, three abstained, and two were absent.[51]

ii. The negotiating history does not show that Article XXI(b) is "self-judging"

89. The United States argues that "supplementary means of interpretation", which includes the negotiating history and internal US government documents,[52] "confirm" its view that Article XXI(b) is "self-judging". The United States is wrong.

90. At the outset, Norway recalls that "supplementary means" of interpretation may be used either to confirm the meaning conveyed by the treaty terms, or to determine the meaning when the wording is unclear. As just outlined, the wording of the text shows that Article XXI(b) is not "self-judging". Supplementary means cannot be used to demonstrate otherwise.

91. In any event, the material referred to by the United States does not show that Article XXI(b) is "self-judging". The negotiating history does not show, *first,* that the subparagraphs of Article XXI(b) are subject to the "which it considers" language in the *chapeau*, and *second*, that the terms "which it considers" render the *chapeau* self-judging.

(1) The negotiating history does not show that the subparagraphs are subject to the "which it considers" language

92. Contrary to a central element of the US argument, the negotiating history shows that the subparagraphs of Article XXI(b) qualify the word "action", and not the term "essential security interests". Earlier drafts of Article XXI(b) – including those cited by the United States – reveal that virtually every previous version of the provision was expressly drafted so that the Member's "measure" or "action" was required to satisfy the terms of the subparagraphs. This supports Norway's view that Article XXI(b) requires a two-step analysis: first, an objective assessment whether a measure falls under one of the

[50] An agreement between a limited number of contracting parties is of limited value in "ascertaining the common intentions of the parties". *See* Appellate Body Report, *EC – Chicken Cuts*, para. 289.
[51] Specifically, Czechoslovakia dissented; India, Lebanon and Syria abstained, and Burma and Luxembourg were absent. *See* the United States' first written submission, para. 52 (footnote 41).
[52] Like the United States, Norway queries the relevance of internal documents revealing negotiations within the government of a particular Member, as they are not part of the record of negotiations between and among the contracting parties. Norway includes arguments on the internal US government documents in response to the United States' reliance on this material.

subparagraphs, which is unrelated to the "which it considers" language in the *chapeau*; and, second, an objective assessment whether a measure meets the terms of the *chapeau*.

93. The internal government documents, cited by the United States, unambiguously support Norway's position. They show that the US delegation debated internally two alternative versions of the text: in the first, the words "relating to" appear in the subparagraphs, as they do in the final version of Article XXI(b); in the second, the terms "relating to" were pulled into the *chapeau*, which referred to measures that the Member "**consider[s]** to be necessary **and to relate to**" the circumstances in the subparagraphs.[53] Thus, in the second version, the subparagraphs were subject to the deferential "which it considers" language.

94. In the internal debate, the proponent of the second version explained that his formulation created an "independent clause" in the *chapeau* that allowed for "unilateral action".[54] This second version mirrors closely the United States' arguments in this dispute, including the way in which the United States now proposes to rewrite Article XXI(b).[55]

95. The US delegation rejected the second version. Its delegates explained that, under this version, "a member could avoid any Charter obligation by a mere unilateral invocation of its essential security interests", which would "destroy[] the entire efficacy of the Charter".[56] One US delegate even declared that it would be "better to abandon all work on the Charter" than to "place a provision in it by which, under the simple pretext that the action was taken to protect the national security of the particular country, provide a legal escape from compliance with the provisions of the Charter".[57]

[53] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, at 2 (Exhibit US-56).
[54] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, at 2 (Exhibit US-56).
[55] *See* the United States' first written submission, para. 30 (footnotes 23 and 24).
[56] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, at 2 (Exhibit US-56).
[57] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, at 2 (Exhibit US-56).

96. Norway agrees with the concerns that led the US delegation to reject an approach that would render Article XXI(b) "self-judging".

(2) The negotiating history does not show that the "which it considers" language renders the chapeau *self-judging*

97. The supplementary material cited by the United States fails to show that the terms "which it considers" render Article XXI(b) "self-judging". The US arguments highlight that the historical materials are sparse, and provide a poor basis to draw conclusions about the drafters' "common intentions".[58] In that respect, the United States often relies on its own interventions in the debate, which do not – indeed, cannot – reveal a "common intention" of all contracting parties, much less an intention that differs from that revealed in the text itself. An assessment of the negotiating history is not an exercise in counting the number of statements made on each side of a debate.

98. The United States discusses the negotiating history of the ITO Charter, which took place in parallel with the negotiation of the GATT 1947. The draft ITO Charter included exceptions now found in Articles XX and XXI of the GATT 1994. The United States refers to an "informal summary" of the draft Charter, which describes the national security exception as permitting members to do "whatever they think necessary" for these ends.[59]

99. Norway agrees that this statement indicates that the negotiators envisaged that the exception would afford some discretion to the parties. In the words of a US delegate, there must be "*some* latitude" for security measures.[60] Like the US delegate's statement, the "informal summary" does not, however, purport to say that the exception would afford *total* latitude.

100. In that respect, the "informal summary" was never intended to address the meaning of the provision in detail. Indeed, the summary runs to just one sentence. The introduction to the "informal summary" also states that the summary was not intended to be thorough: it was

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[58] The Appellate Body has explained that "a treaty interpreter must ascertain the common intentions of the parties", and that "*common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one of* the parties to a treaty". *See* Appellate Body Report, *EC – Chicken Cuts*, paras. 250 and 265, citing Appellate Body Report, *EC – Computer Equipment*, paras. 84 and 109.
[59] The United States' first written submission, para. 64, citing to United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947) (Exhibit US-39).
[60] The United States' first written submission, para. 65, citing to Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947) (Exhibit US-41).

for the "non-technical reader", and did not address "every aspect of every Article of this highly complex document".[61]

101. The summary's one-sentence, lay-person description of the national security exception is similar to its one-sentence, lay-person description of the exceptions that developed into Article XX of the GATT 1947: "[p]rotection of public morals, health, laws and regulations governing patents, trade marks, and copyrights, national treasures are **recognized as a matter for national action by members**".[62] Taken in isolation, these words could also mean that the relevant "national action" is self-judging. However, although the exceptions recognise the importance of "national action", they do not exclude multilateral review.

102. The United States also notes that, in the draft Charter, the nascent Articles XX and XXI exceptions were originally set forth in a single provision, as exceptions in the chapter on "commercial policy". The United States emphasises that the exceptions were then split: the national security exception was moved to a final chapter, following the dispute settlement provisions, as an exception to the whole Charter, whereas the other exceptions were retained as part of the commercial policy chapter.[63]

103. The significance of these choices must be considered in light of the fact that the ITO Charter never entered into force, whereas the GATT 1947 did. The GATT 1947 differed in important ways from the Charter – fewer substantive obligations, a less elaborate dispute settlement system, and no institutional framework. Given that the Charter did not enter into force, and that the GATT 1947 is very different, the negotiating history of the Charter must be used with care in interpreting the GATT 1947 and, more so still, the GATT 1994.

104. The US arguments on the drafting of the national security exception in the Charter is a case in point. For the United States, it is of great significance that, in the draft Charter, the national security exception was split from the other exceptions, and placed at the very end, as an exception to the whole Charter.

105. However, in the GATT 1947, the drafters did not take this approach. Articles XX and XXI were placed next to each other. Further, these two provisions were immediately

[61] United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947) (Exhibit US-39), p. 11.
[62] United Nations Conference on Trade and Employment, An Informal Summary of the ITO Charter, E/CONF.2/INF.8 (Nov. 21, 1947) (Exhibit US-39), p. 22.
[63] The United States' first written submission, paras. 61-63.

followed – in the same "Part" of the Agreement – by the GATT dispute settlement provisions in Articles XXII and XXIII. This sequential ordering suggests, logically, that the drafters intended that the two dispute settlement provisions would apply to the two exceptions in the immediately preceding provisions of the same Part of the Agreement. Certainly, nothing was added to the text to suggest otherwise.

106. The negotiating history of Article XXI of the GATT 1994 must also account for developments since the negotiation of the ITO Charter and the GATT 1947. In this respect, the rights and obligations under Articles XXII and XXIII were progressively elaborated in the GATT era, in particular in the *Tokyo Round Dispute Settlement Code* ("*Code*"). In the Uruguay Round, the negotiators consolidated these developments in the DSU, which sets forth the Members' rights and obligations under an overarching dispute settlement system for all covered agreements.

107. The DSU confers on Members a right to an objective assessment by a panel of violation claims in disputes under the GATT 1994. Nothing in the DSU suggests that this right is excluded merely because Article XXI(b) is invoked. Further, the DSU does not exclude an objective assessment of whether a measure meets the legal conditions in Article XXI(b). Instead, the DSU suggests that the usual dispute settlement rules apply to disputes regarding Article XXI(b).[64]

108. The United States also cites to the *1982 Decision regarding Article XXI* ("*1982 Decision*"), which was adopted under the GATT 1947. That *Decision* states that, "[w]hen action is taken under Article XXI, all contracting parties affected by such action retain *their full rights* under the General Agreement".[65] A Member's "full rights" under the GATT 1947 included the "rights" to seek dispute settlement under Articles XXII and XXIII with respect to measures allegedly subject to Article XXI. Those "full rights" remain under the GATT 1994 and the DSU.

109. In many instances, the United States relies on historical statements that do not address the relevant question. The United States points to statements that measures that are properly based on Article XXI(b) may still form the basis for a non-violation claim, even though the measures do not involve a violation.[66] However, the disputed issue is not whether a panel

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[64] *See* Norway's first written submission, Section IV.
[65] Emphasis added.
[66] "Negotiators… in deciding to retain the non-violation provision, concluded that essential security actions '*would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members,' and that '[s]uch other Members should, under those circumstances, have

may make findings on a non-violation claim in circumstances where a measure meets the legal conditions in Article XXI(b). The United States and Norway agree that it may.

110. Instead, the issue is whether a panel may make findings that a measure does not meet the legal conditions in Article XXI(b). The materials cited by the United States – which address the right to pursue non-violation claims – do not show a "common intention" to exclude a panel from making violation findings when Article XXI is invoked nor findings that the conditions in Article XXI are not met. Indeed, the US internal debate shows that even the US delegation saw the need to ensure that a Member could not "avoid any Charter obligation by a mere unilateral invocation of its essential security interests" under the *chapeau*.[67] The questions raised by Australia and the Netherlands during the negotiations likewise reveal a desire to ensure that the provision would not enable circumvention of the Charter's obligations.[68]

111. Finally, the panel in *Russia – Traffic in Transit* also concluded that the negotiating history provides "no basis for treating the invocation" of Article XXI(b) as "an incantation that shields a challenged measure from all scrutiny".[69]

iii. The information available to a panel to make an objective assessment under Article XXI(b) of the GATT 1994

112. The United States argues that a panel may be unable to make an objective assessment under Article XXI(b) of the GATT 1994 because a respondent is entitled to withhold information under Article XXI(a).[70]

113. This argument is not directed towards the interpretation of any words in Article XXI(b). Instead, it is based on speculation about the amount of evidence that might (or might

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the right to bring the matter before the Organization, *not on the ground that the measure taken was inconsistent* with the Charter, but on the ground that the measure so taken effectively nullified benefits accruing to the complaining Member'"; *see* the United States' first written submission, para. 6, and United Nations Conference on Trade & Employment, Committee VI: Organization, Report of Working Party of Sub-Committee G of Committee VI on Chapter VIII, E/CONF.2/C.6/W.30, at 2 (Jan 9, 1948) (Exhibit US-42), p. 2. Emphasis original.

[67] U.S. Delegation (Internal), Second Meeting of the U.N. Preparatory Committee for the International Conference on Trade and Development Geneva, Minutes of Delegation Meeting, July 4, 1947, NARA, Record Group 43, International Trade Files, Box 133, Folder marked "Minutes U.S. Delegation (Geneva 1947) June 21 – July 30, 1947." – July 4, 1947, at 2 (Exhibit US-56).

[68] *See* the United States' first written submission, paras. 65 and 69; and Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33 (July 24, 1947) (Exhibit US-41), pp. 19 and 27. *See also* Summary Record of the Thirty-Third Meeting of Commission A, Second Session of the Preparatory Committee, E/PC/T/A/SR/33, at 5 (July 24, 1947) (US-40).

[69] Panel Report, *Russia – Traffic in Transit*, para. 7.100.

[70] The United States' first written submission, para. 138.

not) be available to a panel. The interpretation of Article XXI(b) (or any other provision) cannot, however, be driven by speculation about the *evidence* that might be available in a particular case involving the application of the provision. Instead, the treaty terms must be given their ordinary meaning under the usual rules of treaty interpretation.

114. In applying the standard of review, a panel must always tailor its "objective assessment" to the particular circumstances of each dispute. The contours of a panel's assessment, therefore, vary from case-to-case.

115. In many cases under Article XXI(b), the United States' concerns about the available evidence will not arise. They did not arise in *Russia – Traffic in Transit*. Most importantly, they do not arise in the present case.

116. In particular, the United States does not argue that, under Article XXI(a), it considers the disclosure of information relating to its tariffs would be "contrary to its essential security interests". To the contrary, the United States has published two reports that provide a detailed explanation, running to hundreds of pages, for its aluminium and steel measures;[71] the US Department of Defense has issued a public statement that the US measures are not needed to meet US military needs for aluminium and steel; and, senior US officials have made many public statements about the measures.

117. The United States' concerns about the available evidence, therefore, ring hollow. There is ample public information to enable the Panel to make its objective assessment. It would, therefore, be absurd for the Panel not to make that assessment because of hypothetical concerns about the nature of evidence that might or might not be available in other cases.

C. The United States has failed to make a *prima facie* case under Article XXI(b)

118. The United States has failed to demonstrate that its measures are justified under Article XXI(b). *First*, the United States fails to show that Article XXI(b) is available as a defence to Norway's claims under the *Safeguards Agreement*. *Second*, the United States fails to identify the subparagraph of Article XXI(b) under which its measures allegedly fall. For the reasons Norway explains above, this is a minimum prerequisite to justify a measure under Article XXI(b).

[71] DOC Steel Report, (**Exhibit NOR-1**); DOC Aluminium Report, (**Exhibit NOR-2**).

119. Finally, the United States errs in asserting that the *chapeau* to Article XXI(b) is "self-judging". A panel is required to exercise a degree of scrutiny over a respondent's assertion that it considers its measures necessary for the protection of its essential security interests. In this dispute, however, the United States has advanced no argument on this point whatsoever. On each account, therefore, the United States has failed to make a *prima facie* case under Article XXI(b), and the Panel must find in favour of Norway.

120. Mr. Chair, that concludes our opening statement. We thank you again for your time, and look forward to your questions.