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**UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINIUM  
PRODUCTS**

REPORT OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Report of the Panel to be found in documents WT/DS552/R.

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**ANNEX A**

WORKING PROCEDURES OF THE PANEL

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## **ANNEX A-1**

### **WORKING PROCEDURES OF THE PANEL**

#### **Adopted on 5 April 2019**

#### **General**

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.  
  
(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

#### **Confidentiality**

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.  
  
(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.  
  
(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.  
  
(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

#### **Submissions**

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.  
  
(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.  
  
(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.  
  
(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

#### **Preliminary rulings**

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
  - a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the

Panel. Norway shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

- b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
- c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
- d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

#### **Evidence**

5. (1) Each 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 provided by the other party. Additional exceptions may be granted upon a showing of good cause.  
  
(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.  
  
(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Norway should be numbered NOR-1, NOR-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered [XXX]-5, the first exhibit in connection with the next submission thus would be numbered [XXX]-6.  
  
(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.  
  
(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

### **Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

### **Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
  - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

### **Substantive meetings**

10. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite Norway to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.
  - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days prior to the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.
  - c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
  - d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Norway presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

- i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
- ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
- iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
- iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The Panel will communicate in advance concerning the conduct of the second substantive meeting, after having consulted with the parties.

### **Third party session**

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third party session of the meeting with the Panel.

21. The Panel will communicate in advance of the first substantive meeting concerning the conduct of the third party session, after having consulted with the parties.

### **Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve

as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. The integrated executive summary shall be limited to no more than 30 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

### **Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

### **Interim and Final Report**

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

- a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).
- b. Each party and third party shall submit 2 paper copies of its submissions and 2 paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.
- c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.

- d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.
- e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.
- f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

**Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

## **ANNEX A-2**

### **ADDITIONAL WORKING PROCEDURES FOR THE PANEL**

#### **OPEN MEETING**

##### **Adopted on 19 July 2019**

1. These Additional Working Procedures shall only be applicable to the first substantive meeting of the Panel with the parties. They shall not cover the second substantive meeting of the Panel with the Parties nor the third-party session.
2. Subject to the availability of suitable WTO meeting rooms, the Panel will open its first substantive meeting with the parties to the public ("open session") pursuant to paragraph 10 of its Working Procedures.
3. If the Panel or any of the parties considers it necessary to close any part of the substantive meeting ("closed session"), the Panel shall close the meeting immediately or convene a closed session at a time to be determined by the Panel.
4. The Panel will invite the parties to introduce the members of their delegations in a closed session at the beginning of the substantive meeting. The Panel will then start the open session with the parties' opening statements. After the parties' opening statements, each party will be given the opportunity to pose questions or make comments, through the Panel, on the other party's statement. The Panel may subsequently pose questions to the parties. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement.
5. During the first substantive meeting, the following persons shall be admitted into the meeting room:
  - Members of the Panel;
  - Members of the delegations of the parties; and
  - WTO Secretariat staff assisting the Panel.
6. Subject to the availability of suitable WTO meeting rooms, the open sessions of the first substantive meeting will be open to other WTO Members, Observers, staff members and registered members of the public *via* a live closed-circuit television broadcast to a separate viewing room in the WTO. The WTO Secretariat will remind the public that no audio or video recording of the open sessions is permitted.
7. The viewings will be open to officials of WTO Members, Observers and staff members of the WTO Secretariat upon presentation of their official badges. No later than four weeks before the substantive meeting, the WTO Secretariat will place a notice on the WTO website informing the public of the open sessions. The notice shall include a link through which members of the public, including accredited journalists and representatives of relevant non-governmental organizations (NGOs), can register directly with the WTO. The date of the deadline for public registration will be communicated to the parties as soon as it has been established.

## **ANNEX A-3**

### **WORKING PROCEDURES OF THE PANEL**

**Revised on 19 July 2019 and 20 February 2020**

#### **General**

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.  
  
(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

#### **Confidentiality**

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.  
  
(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.  
  
(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.  
  
(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

#### **Submissions**

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.  
  
(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.  
  
(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.  
  
(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

#### **Preliminary rulings**

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
  - a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the

Panel. Norway shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

- b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
- c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
- d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

#### **Evidence**

5. (1) Each 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 provided by the other party. Additional exceptions may be granted upon a showing of good cause.  
  
(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.  
  
(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Norway should be numbered NOR-1, NOR-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered [XXX]-5, the first exhibit in connection with the next submission thus would be numbered [XXX]-6.  
  
(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.  
  
(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

### **Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

### **Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
  - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

### **Substantive meetings**

10. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite Norway to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.
  - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days prior to the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.
  - c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
  - d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Norway presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The Panel will communicate in advance concerning the conduct of the second substantive meeting, after having consulted with the parties.

### **Third party session**

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days before the third party session of the meeting with the Panel.

21. The Panel will communicate in advance of the first substantive meeting concerning the conduct of the third party session, after having consulted with the parties.

### **Descriptive part and executive summaries**

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve

as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. The integrated executive summary shall be limited to no more than 30 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

### **Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

### **Interim and Final Report**

29. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

- a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).
- b. Each party and third party shall submit 2 paper copies of its submissions and 2 paper copies of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.
- c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word and PDF format. All such emails to the Panel shall be addressed to DSRegistry@wto.org, and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.

- d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at DSRegistry@wto.org.
- e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall serve directly on the third parties any submissions up to and including the responses to the questions posed by the Panel following the first substantive meeting of the Panel with the parties, as well as the final versions of the oral statements made during this meeting. In addition, each party shall serve directly on the third parties second written submissions, final versions of oral statements made during the second substantive meeting, responses to the Panel's questions after the second substantive meeting, and comments on those responses. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or other electronic format acceptable to the recipient without having to serve a paper copy, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.
- f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

**Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

## **ANNEX A-4**

### **ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING MEETINGS WITH REMOTE PARTICIPATION**

*Adopted on 1 December 2020*

#### **General**

1. These Additional Working Procedures set out terms for holding meetings with the Panel where all of the participants shall attend by remote means.
2. These Additional Working Procedures are meant to develop and complement paragraph 16 of the Working Procedures of the Panel.

#### **Definitions**

3. For the purposes of these Additional Working Procedures:

**"Remote participant"** means any registered person attending the meeting with the Panel by remote means.

**"Platform"** means Cisco Webex software through which remote participants attend the meeting with the Panel.

**"Host"** means the designated person within the WTO Secretariat responsible for the management of the platform.

#### **Equipment and technical requirements**

4. Each party shall ensure that all remote participants of its delegation join the meeting using the designated platform, and meet the minimum equipment and technical requirements set out by the platform provider for the effective conduct of the meeting.
5. All technical questions, including the minimum equipment and technical requirements for the usage of the Platform, will be addressed in the advance testing sessions in paragraph 8 below between the Host and the parties.

#### **Technical support**

6. (1) Each party is responsible for providing technical support to the remote participants of its delegation.  
  
(2) The host will assist remote participants in accessing and using the platform in preparation of, and during, the meeting with the Panel.

#### **Pre-meeting**

##### Registration

7. Each party shall provide to the Panel the list of the members of its delegation, on a dedicated form to be provided by the WTO Secretariat, no later than 5:00 p.m. (Geneva time) one week before the first day of the meeting with the Panel.

#### Advance testing

8. Before the meeting with the Panel, the WTO Secretariat will hold two testing sessions with all remote participants of each party: (i) a separate one for each party's remote participants, and (ii) a joint session with all participants in the meeting, including all remote participants of the parties and the Panel joining remotely. Such sessions will seek to reflect, as far as possible, the conditions of the meeting.

#### **Confidentiality and security**

9. The Panel shall meet in closed session. The content and conduct of the meeting are confidential and no recording by the parties of any part of the meeting is allowed.
10. The Panel will record the meeting and keep an official copy of it for the Panel's record.

#### **Conduct of the meeting**

##### Access to the virtual meeting room

11. (1) The host will invite remote participants via email to join the virtual meeting room on the platform.  
  
(2) For security reasons, access to the virtual meeting room will be password-protected and limited to registered participants. Remote participants shall not forward or share the meeting link or password.  
  
(3) Each party shall ensure that only registered participants from its delegation join the virtual meeting room.

##### Advance log-on

12. (1) The virtual meeting room will be accessible 60 minutes in advance of the scheduled start time of each session of the meeting with the Panel.  
  
(2) All remote participants shall log on to the platform at least 30 minutes in advance of the scheduled start time of each session of the meeting with the Panel.

##### Document sharing

13. (1) Each party shall provide the Panel and other participants with a provisional written version of its opening statement and, if available, of its closing statement, before delivery at the meeting. The parties are invited to make their opening statements available to the Panel the day before the commencement of the meeting.  
  
(2) Any participant wishing to share a document with the Panel and other participants during the meeting shall do so before first referring to such document at the meeting.

##### Technical matters

14. (1) Each party shall designate a contact person who can liaise with the host during the course of the meeting to report any technical issues that arise with respect to the platform. The host can be contacted via the platform, by sending an email to [leslie.stephenson@wto.org](mailto:leslie.stephenson@wto.org), or by calling +41 022 739 6148.  
  
(2) Should any technical interruptions occur, the host will directly coordinate with the affected participants to resolve the issue. After consulting the parties, the Panel may pause the session until the technical issue is resolved or may continue the proceedings with those participants that continue to be connected.
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**ANNEX B**

ARGUMENTS OF THE PARTIES

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**ANNEX B-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY****I. INTRODUCTION**

1. Norway challenges the United States' measures under the *Agreement on Safeguards* ("*Safeguards Agreement*") and the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). The United States' sole response to Norway's claims has been an assertion that its measures are justified under the security exception in Article XXI(b) of the GATT 1994. The United States has not substantiated that defence, incorrectly asserting instead that Article XXI(b) is entirely self-judging.

**II. MEASURES AT ISSUE**

2. The United States has imposed additional tariffs on imported aluminium and steel products through Presidential Proclamations, pursuant to Section 232 of the Trade Expansion Act of 1962 ("Section 232").

3. Section 232 authorises the US Secretary of Commerce to undertake an investigation to determine the effects of imports of a particular article of commerce on US "national security".<sup>1</sup> At the conclusion of the investigation, the Secretary of Commerce is required to submit a report to the President. The President is then authorised to negotiate agreements with other countries to limit or to restrict imports, or to "take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security".<sup>2</sup>

4. The Secretary of Commerce initiated investigations into the effect of imported aluminium and steel on US national security, pursuant to Section 232, on 26 and 19 April 2017, respectively.

5. On 17 and 11 January 2018, the Department of Commerce ("DOC") released two reports (collectively, the "DOC Reports")

- "The Effects of Imports of Aluminum on the National Security" ("DOC Aluminium Report"), recommending, among other measures, a 7.7 percent tariff on imports of aluminium, with the objective of enabling US aluminium production to operate at an average of 80 percent of production capacity.<sup>3</sup>
- "The Effects of Imports of Steel on the National Security" ("DOC Steel Report"), recommending, among other measures, a 24 percent tariff on all steel imports, with the objective of enabling US steel production to operate at an average of 80 percent of production capacity;<sup>4</sup>

6. In response to the recommendations in the DOC Reports, in March 2017, President Trump introduced: (1) an additional 10 percent tariff on **aluminium products** from all countries, except Canada and Mexico, effective 23 March 2018;<sup>5</sup> and (2) an additional 25 percent tariff on **steel products** from all countries except Canada and Mexico, effective 23 March 2018.<sup>6</sup> According to the Proclamations, the measure at issue is designed to provide "relief" to US aluminium and steel industries.<sup>7</sup>

7. The aluminium tariffs cover all industry segments, namely: (1) *primary* unwrought aluminium products; (2) *secondary* unwrought aluminium products; and (3) *downstream* wrought aluminium

<sup>1</sup> Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), (**Exhibit NOR-12**).

<sup>2</sup> Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), (**Exhibit NOR-12**), (c) (3)(A)(ii).

<sup>3</sup> DOC Aluminium Report, (**Exhibit NOR-2**), p. 107.

<sup>4</sup> DOC Steel Report, (**Exhibit NOR-1**), p. 59.

<sup>5</sup> Proclamation No. 9704, (**Exhibit NOR-3**), para. (2).

<sup>6</sup> Proclamation No. 9705, (**Exhibit NOR-4**), para. (2).

<sup>7</sup> Proclamation No. 9705, (**Exhibit NOR-4**), para. 7; Proclamation No. 9704, (**Exhibit NOR-3**), para. 7.

products. The steel tariffs apply to the following industry segments: (1) semi-finished "blast oxygen furnace" ("BOF") steel; (2) semi-finished "electric arc furnace" ("EAF") steel; and (3) finished steel products.

8. Subsequent to the introduction of the tariffs, President Trump issued further proclamations that: (1) removed the exemptions granted to Canada and Mexico; (2) granted a series of temporary and permanent exemptions to other WTO Members (sometimes in exchange for an import quota applied to the subject goods); and (3) provided for the potential exclusion of subject aluminium/steel products from the scope of its measures, at the request of US industry.

9. The following table identifies and describes the US measures, indicates their legal basis, and identifies Norway's claims of WTO-inconsistency.

**Table 1: the measures challenged by Norway**

Measure	Description	Legal instrument	Norway's claims	
			Safeguards Agreement	GATT 1994
<b>Additional <i>ad valorem</i> import tariffs ("import tariffs")</b>	Import tariffs imposed by the United States in excess of its bound rate for the relevant products. Import tariffs apply to Members that do not have an import quota. Import tariffs apply for all aluminium and steel products, unless excluded .	Presidential Proclamations ("PPs") 9704; 9705; and 9772	Articles 2.1, 2.2, 5.1, 12.1, and 12.2	Articles II:1(a) and (b)
<b>Country-specific import quotas ("import quotas")</b>	Import quotas imposed on imports from Argentina, Brazil and South Korea in lieu of tariffs. The product scope of the quota, as well as and the level of the quota, level varies between the affected Members.	PPs 9740; 9758; and 9759	Article 11.1(b)	Article XI:1
<b>Country-wide tariff exemptions</b>	Members that successfully negotiated an import quota benefit from country-wide tariff exemptions. Australia benefits from an exemption from the tariffs, without having agreed to an import quota.	PPs 9704; 9705; 9710; 9711; 9739; 9740; 9758; and 9759	-	Articles I:1 and X:3(a)

<b>Product exclusions</b>	US DOC may, on the application of US industry, exclude certain aluminium/steel products from the import tariffs, if they meet certain criteria. US aluminium and steel producers may object to any application by US industry.	PPs 9704; 9705; 9776; and 9777  March Interim Final Rule; <sup>8</sup> September Interim Final Rule <sup>9</sup>	-	Article X:3(a)
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### III. THE DOC REPORTS

10. In the DOC Reports, the US Secretary of Commerce recommended the aluminium and steel import tariffs at issue as a necessary response to the DOC Reports' findings that aluminium and steel imports to the United States are "weakening [the United States'] internal economy", and thus threaten to "impair the national security".<sup>10</sup> US President Trump imposed the aluminium and steel import tariffs at issue in response to these recommendations.

#### A. The DOC Aluminium Report

11. The DOC Aluminium Report assesses the impact of increased imports of aluminium products on the US aluminium industry. It does so using a variety of reference periods: in some cases, from 1970-2016; in others, from 2011-2017. Generally, the DOC's analysis is focused on the period 2011-2017. The DOC concludes that aluminium imports are threatening the economic welfare of the US aluminium industry, and threaten to impair "national security".<sup>11</sup>

12. The Report explains that "the industry can be divided into three basic segments".<sup>12</sup> These are: *first*, unwrought aluminium produced from smelting, *i.e.*, produced from raw materials (primary aluminium). *Second*, unwrought aluminium produced from recycled feedstock (secondary aluminium). *Third*, wrought products, which are manufactured from unwrought aluminium, however it is produced (downstream products). The DOC explains that secondary aluminium "is not the focus" of the Report.<sup>13</sup>

13. The DOC Aluminium Report concludes that "the present quantities and circumstance of aluminum imports ... are 'weakening our internal economy'",<sup>14</sup> and it is thus necessary to reduce imports to a level that will "provide the opportunity for U.S. primary aluminum producers to restart idled capacity".<sup>15</sup> The Report also concludes that "[a] quota or tariff on downstream products is also necessary" because "downstream companies [also] face increased import penetration in many aluminum product sectors".<sup>16</sup>

#### B. The DOC Steel Report

14. The DOC Steel Report assesses the impact of increased imports on the US domestic steel industry. Like the DOC Aluminium Report, the Steel Report does so using a variety of reference periods: in some cases, from 1975-2016; in others, from 2011-2017. Generally, the DOC's analysis is also focused on the period 2011-2017.

<sup>8</sup> Interim Final Rule, Fed. Reg. 83, 12,106, 19 March 2018 ("March Interim Final Rule"), (**Exhibit NOR-76**).

<sup>9</sup> Interim Final Rule, Fed. Reg. 83, 46,026, 11 September 2018 ("September Interim Final Rule"), (**Exhibit NOR-20**).

<sup>10</sup> DOC Steel Report, (**Exhibit NOR-1**), p. 5; DOC Aluminium Report, (**Exhibit NOR-2**), pp. 5 and 104.

<sup>11</sup> DOC Aluminium Report, (**Exhibit NOR-2**), pp. 5 and 104-106.

<sup>12</sup> DOC Aluminium Report, (**Exhibit NOR-2**), p. 21.

<sup>13</sup> DOC Aluminium Report, (**Exhibit NOR-2**), pp. 21-22.

<sup>14</sup> DOC Aluminium Report, (**Exhibit NOR-2**), p. 104.

<sup>15</sup> DOC Aluminium Report, (**Exhibit NOR-2**), p. 104.

<sup>16</sup> DOC Aluminium Report, (**Exhibit NOR-2**), p. 104.

15. The investigation covers the following three industry segments: (1) semi-finished BOF steel; (2) semi-finished EAF steel; and (3) finished steel products. The Steel Report focusses overwhelmingly on the BOF steel segment.

16. The DOC Steel Report concludes that steel imports are "substantially impact[ing]" the "economic welfare" of the US steel industry, and threaten to impair "national security".<sup>17</sup> The Report recommends that "the President take corrective action pursuant to the authority granted by Section 232".<sup>18</sup>

#### **IV. THE PANEL'S QUESTIONS ON JURISDICTION UNDER ARTICLE 6.2 OF THE DSU**

17. During the proceedings, the Panel asked the Parties a number of questions about the proper interpretation of Article 6.2 of the DSU.<sup>19</sup> The Panel did not indicate any concern about the consistency of Norway's Panel request with the requirements of that provision. Nor did the United States, despite repeated questions from the Panel, assert that Norway's Panel request was deficient. In any event, in reply to the Panel's questions, Norway demonstrated to the Panel that its Panel request meets the requirements of Article 6.2.<sup>20</sup>

#### **V. THE UNITED STATES' MEASURES ARE INCONSISTENT WITH THE SAFEGUARDS AGREEMENT**

18. In this section, Norway *first* sets out its arguments that the US import tariffs and quotas are safeguards. *Second*, Norway turns to its arguments that the US import tariffs and quotas are not carved out of the *Safeguards Agreement* by Article 11.1(c) of that Agreement. *Third*, Norway summarises its arguments that the US import tariffs and quotas are inconsistent with a number of provisions of the *Safeguards Agreement*.

##### **A. The US import tariffs and quotas are safeguards**

##### **1. The US import tariffs and quotas possess the constituent features of a safeguard measure**

19. Article 1 of the *Safeguards Agreement* provides that "this Agreement establishes rules for the application of the safeguard measures which shall be understood to mean *those provided for in Article XIX of the GATT 1994*".<sup>21</sup>

20. Article XIX imposes obligations on safeguard measures, which are substantially developed in the *Safeguards Agreement*. The provision does not expressly define a safeguard measure.

21. Although the provisions of Article XIX are not definitional, the Appellate Body has found that Article XIX sheds light on the character of a safeguard measure. In particular, the types of measures "provided for" in Article XIX are those "designed to secure a specific *objective*, namely preventing or remedying serious injury to the Member's domestic industry".<sup>22</sup> To be a safeguard measure, therefore, a challenged measure must have "a demonstrable link to the objective of preventing or remedying injury".<sup>23</sup>

22. Connected to this objective, the Appellate Body also identified two "constituent features" of a "safeguard measure". The measure must be designed to: (i) suspend, modify or withdraw a GATT 1994 obligation; and (ii) prevent or remedy serious injury to the Member's domestic industry.<sup>24</sup> If a measure possesses these features, it is a safeguard.

<sup>17</sup> DOC Steel Report, (**Exhibit NOR-1**), pp. 55-57.

<sup>18</sup> DOC Steel Report, (**Exhibit NOR-1**), p. 57.

<sup>19</sup> See Norway's responses to Questions 82-88.

<sup>20</sup> See Norway's responses to Questions 82-88.

<sup>21</sup> Emphasis added.

<sup>22</sup> Appellate Body Report, *Indonesia – Safeguards*, para. 5.56.

<sup>23</sup> Appellate Body Report, *Indonesia – Safeguards*, para. 5.56.

<sup>24</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. See also Norway's response to Question 5.

23. The Appellate Body explained that a panel's determination of whether a measure possesses these two "constituent features" must be made on the basis of objective considerations. Specifically, a panel must "assess the design, structure and expected operation of the measure as a whole".<sup>25</sup> In so doing, it must consider any factor that sheds light on a measure's design, structure and expected operation.<sup>26</sup> These factors include, but are not limited to, the domestic characterisation of the measure and any notification of the measure as a safeguard.<sup>27</sup> No one factor is decisive; the relative importance of any given factor will vary according to the specific measure at hand.<sup>28</sup>

24. The importance of the objective characterisation of a measure is exemplified by Article 8 of the *Safeguards Agreement*. Article 8 affords exporting Members certain rights to counterbalance the effects of a safeguard, without pursuing dispute settlement. This right – which is particular to the *Safeguards Agreement* – is regularly used by exporting Members. Thus, the failure to properly characterise a measure as a safeguard has material consequences for an exporting Member. For this reason, the *Safeguards Agreement* cannot be interpreted in a way that diminishes the exporting Member's right to take counterbalancing action, by placing the proper characterisation of a measure alleged to be a safeguard, within the gift of the importing Member.

25. In the present dispute, the design, structure and operation of the US import tariffs and quotas demonstrate objectively that they are designed to: (i) suspend, modify or withdraw GATT 1994 obligations; and (ii) prevent or remedy serious injury to US industry.<sup>29</sup>

26. With respect to the first constituent feature, the import tariffs are applied in excess of the US bound rate and are, therefore, designed to suspend the United States' obligations under Article II:1(a). The import quotas are designed to restrict imports of the relevant products and are, therefore, designed to suspend the US obligations under Article XI:1 of the GATT 1994, which prevents the imposition of quantitative restrictions.

27. With respect to the second constituent feature, the DOC Reports made findings that there were "increased imports"; that there was "serious injury" to the domestic steel and aluminium industries; and that this injury was caused by increased imports.<sup>30</sup> Both DOC Reports also demonstrate that, having found serious injury caused by increased imports, the United States adopted the import tariffs with the objective of remedying that injury.<sup>31</sup>

28. In addition, statements by President Trump and other US officials demonstrate that the import tariffs and quotas were designed to remedy serious injury to the domestic industry. For example, in the period immediately surrounding the announcement of the import tariffs, President Trump, in adopting the Proclamations at issue, made the following statements:

- "To protect our Country, we must protect American Steel! #AMERICA FIRST";<sup>32</sup>
- "We must protect our country and our workers. Our steel industry is in bad shape. IF YOU DON'T HAVE STEEL, YOU DON'T HAVE A COUNTRY!";<sup>33</sup>
- "We are on the losing side of almost all trade deals. Our friends and enemies have taken advantage of the U.S. for many years. Our Steel and Aluminum industries are dead. Sorry, it's time for a change! MAKE AMERICA GREAT AGAIN!";<sup>34</sup>

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<sup>25</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. See also Norway's response to Question 5.

<sup>26</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. See also Appellate Body Report, *Japan – Alcoholic Beverages*, p. 29; Appellate Body Reports, *Argentina – Import Measures*, para. 5.217; Appellate Body Report, *China – Raw Materials*, para. 7.418.

<sup>27</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

<sup>28</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.64.

<sup>29</sup> Norway's first written submission, paras. 107-156. Norway's response to Question 3, paras. 33-36; Norway's second written submission, paras. 17-32; Norway's response to Question 88, para. 26 and footnote 88.

<sup>30</sup> Norway's first written submission, paras. 113-146.

<sup>31</sup> Norway's first written submission, paras. 147-155.

<sup>32</sup> Tweet by President Trump, 5 March 2018, (**Exhibit NOR-33**).

<sup>33</sup> Tweet by President Trump, 2 March 2018, (**Exhibit NOR-34**).

<sup>34</sup> Tweet by President Trump, 4 March 2018, (**Exhibit NOR-36**).

29. Additionally, at a press conference announcing the aluminium and steel import tariffs, President Trump stated:

- "[Aluminium and steel] will have protection for the first time in a long while, and you're going to regrow your industries";<sup>35</sup>
- "So we'll probably see you sometime next week. We'll be signing it. And you will have protection for the first time in a long while, and you're going to regrow your industries".<sup>36</sup>

30. The Secretary of Commerce described the aluminium and steel import tariffs in similar terms to the President, confirming that they have a protectionist objective:

- "The President has put in place tariffs and quotas that are enabling American steel and aluminum industries to get back on their feet";<sup>37</sup>
- "The remarkable revitalization of America's metal industries would not be happening without President Trump's Section 232 tariffs".<sup>38</sup>

31. The evidence, therefore, shows that the US import tariffs and quotas were designed to prevent or remedy serious injury to the US industry.

## **2. Neither notification nor consultation is a "constituent feature" of a safeguard measure**

32. The United States accepts that the two "constituent features" just identified are "necessary to establish that a safeguard measure exists".<sup>39</sup> It does not contest that its measures possess these features. However, it asserts that, for a measure to be a safeguard, the adopting Member must *also* have: (1) notified its measure as a safeguard, and (2) consulted exporting Members.<sup>40</sup> The effect of the US arguments is that a Member is permitted to decide, for itself, whether its measure is or is not characterised as a safeguard. Norway disagrees with this view.

33. In the following sections, Norway first explains that the United States' argument runs contrary to well-established jurisprudence. Norway then explains that the US examples of WTO provisions that require notification in order properly to be invoked are inapposite for the present dispute.

- *The United States' argument runs contrary to well-established jurisprudence*

34. As an initial matter, in *Indonesia – Iron or Steel Products*, the Appellate Body expressly addressed the relevance of notification of a measure as a safeguard. It found that notification is one, non-dispositive "factor" to be considered in assessing the design, structure, and expected operation of a measure to determine if it is a safeguard. Notification is not, though, a "constituent feature" of a safeguard.

35. Moreover, as described above, the characterisation of a measure under the *Safeguards Agreement* turns on "*objective considerations*", in particular the "design, structure and expected operation of the measure as a whole".<sup>41</sup> Thus, even though a Member has the *right to adopt* a

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<sup>35</sup> Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018, (**Exhibit NOR-41**).

<sup>36</sup> Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018, (**Exhibit NOR-41**).

<sup>37</sup> "Leveling the playing field for American workers", CNBC, 5 October 2018, (**Exhibit NOR-42**).

<sup>38</sup> "US Commerce Secretary defends steel, aluminium tariffs; points to China", S&P Global, 19 July 2018, (**Exhibit NOR-43**).

<sup>39</sup> The United States' response to Question 5(a), para. 9; Norway's response to Question 13, para. 47.

<sup>40</sup> The United States' response to Question 13, para. 47.

<sup>41</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60. See also Norway's response to Question 5.

particular measure, that Member does not have the *right to determine*, for itself, the characterisation of its measure under the covered agreements.<sup>42</sup>

36. This idea is not novel. Panels and the Appellate Body have consistently confirmed that the WTO adjudicator, and not the respondent, decides on the WTO characterisation of a measure, on the basis of objective considerations.

37. WTO adjudicators have applied this approach unwaveringly across WTO provisions. Whenever a WTO provision imposes obligations regarding measures of a particular type, the WTO adjudicator, not the respondent, decides if a measure is of the relevant type. For example, under Article III of the GATT 1994, a respondent is entirely "free" to adopt an "internal tax". However, the respondent is not, thereby, "free" to decide for itself that its measure is not an "internal tax" subject to Article III obligations.<sup>43</sup>

38. Article XIX is the same: a Member is certainly "free" to adopt a safeguard measure. However, it is not thereby free to decide that its measure is not a safeguard subject to Article XIX and *Safeguards Agreement* obligations.

39. Consider, by analogy, an example from domestic law. Under Swiss law, an individual is "free" to make certain deductions from their taxable income. The existence of this right to make deductions does not, however, mean that the individual is also "free" or enjoys the right to decide if a particular expense is deductible under Swiss law. These are two separate questions: the existence of the right to make deductions does not imply the existence of a right to decide that a particular expense is deductible. Similarly, the existence of a WTO Member's right to take a safeguard measure, does not imply that the existence of a right to decide if a measure is a safeguard. Once again, it is the adjudicator that decides on the WTO characterisation of a measure, on the basis of objective considerations.

- *The United States' examples of provisions requiring invocation through notification are inapposite*

40. The United States has pointed to a number of WTO provisions that it asserts require notification in order properly to be invoked. For the United States, these other provisions provide useful, even decisive, guidance regarding the relevance of notification under Article XIX of the GATT 1994 and the *Safeguards Agreement*. However, the examples provided by the United States involve WTO provisions of a fundamentally different nature than Article XIX of the GATT 1994, and therefore offer no insight into the role of notification under that provision.

41. The covered agreements contain two types of provision: those that address acts taken on the domestic plane, and those that address acts taken on the international, or WTO, plane. Notification requirements serve a distinct purpose for each of these two types of provision.

42. For acts taken on the WTO plane, such as those referred to by the United States, notification is one of the required WTO procedural steps that must be met for a WTO act to come into existence and effect. If a Member fails to make the requisite WTO notification, it fails to follow the proper procedures to bring the relevant WTO act into existence. The Member's failure to notify does not, however, involve the violation of a WTO obligation. Thus, WTO notification pertains to the existence and effectiveness of a WTO act, and not to the wrongfulness of a Member's conduct under WTO law.

43. For domestic acts, such as safeguard measures, the opposite is true. A domestic act *comes into existence* under domestic law, and may then *violate* WTO obligations. Depending on the characterisation of the act under WTO law, the applicable WTO obligations may include notification obligations. If a Member fails to make a required WTO notification, the domestic act continues to exist, and the Member engages in internationally wrongful conduct that violates the WTO notification

<sup>42</sup> See, e.g., Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62; Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77; Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 204; Panel Report, *EC – Asbestos*, paras. 8.83-8.99; Panel Report, *India – Autos*, para. 7.224.

<sup>43</sup> The United States argues that the words "shall be free" in Article XIX:1(a) of the GATT 1994 means that the provision affords Members the right to adopt a safeguard measure. Members may opt to exercise this right by following certain requirements, including consultation with other Members. See, e.g., United States' response to Question 4, paras. 5-7.

obligation. Thus, WTO notification does not pertain to the existence and effectiveness of domestic acts, but to the wrongfulness of a Member's conduct under WTO law.

44. In this case, as the United States accepted, safeguard measures are acts taken on the domestic plane that may violate WTO obligations.<sup>44</sup> The United States' examples, therefore, do not provide support for its argument that notification is required in order for a measure to be characterised as a safeguard.

**B. The US import duties and quotas are not carved out of the *Safeguards Agreement* by Article 11.1(c) of that Agreement**

45. The United States erroneously argues that, even if its duties and quotas are, in principle, subject to the *Safeguards Agreement*, they are carved-out of that Agreement by Article 11.1(c).<sup>45</sup> Article 11.1(c) applies to measures that are "sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX".

**1. The US import duties and quotas do not fall within the scope of Article 11.1(c)**

46. For the United States, under Article 11.1(c), safeguard measures adopted pursuant to Article XIX are carved-out from the *Safeguards Agreement* in circumstances where that Member "attempt[ed]", with its measure, to comply with some other GATT 1994 provision. The United States errs. Instead, pursuant to the conventional treaty interpretation, Article 11.1(c) applies to measures taken *in conformity* with provisions of the GATT 1994 *other than* – i.e., excluding – Article XIX.

*a. Legal standard*

*i. "Sought, taken or maintained"*

47. While the parties disagree on the meaning of the term "sought", this disagreement is academic since the present dispute concerns a measure that has been "taken" and is "maintained". A Member "takes" a measure, if it "adopts" the measure. A Member "maintains" a measure where it "continues" the measure in a "specified state", *i.e.*, it continues the measure's ongoing existence across time.

*ii. "Pursuant to"*

48. Norway and the United States have both expressed the view that the ordinary meaning of the term "pursuant to" is "following upon, consequent and *in conformance to; in accordance with*".<sup>46</sup> The parties also agree that the negotiating history supports this understanding.<sup>47</sup> Thus, the parties agree that, in the context of Article 11.1(c), the term "pursuant to" means that a measure must satisfy or fulfil the legal requirements of the applicable "provisions ... other than Article XIX".

*iii. "provisions... other than Article XIX"*

49. The parties disagree on the meaning of "provisions... other than Article XIX". On the United States' view, Article 11.1(c) excludes from the scope of the *Safeguards Agreement* measures that are sought, taken or maintained pursuant to provisions of the GATT 1994, *including* Article XIX. In other words, Article 11.1(c) applies in circumstances where a safeguard measure includes both Article XIX and some other GATT 1994 provision as its legal basis. The United States' interpretation erroneously introduces two categories of safeguard measures: one governed by the *Safeguards Agreement* and another exempt from that *Agreement*.

<sup>44</sup> The United States' closing statement at the second substantive meeting, para. 27.

<sup>45</sup> The United States' first written submission para. 56; the United States' response to Question 19, para. 64; the United States' response to Question 20, paras. 65-74.

<sup>46</sup> Norway's response to Question 96, para. 16. *See also*, Norway's response to Question 20, paras. 238-242; United States' response to Question 20, paras. 69-71.

<sup>47</sup> Norway's comments on the United States' response to Question 96, paras. 15-20; United States' response to Question 96, para. 6.

50. As Norway has explained, the ordinary meaning of the term "other than" is "apart from", "besides", "but not", and "except".<sup>48</sup> Article 11.1(c) carves out, from the *Safeguards Agreement*, measures that are consistent with provisions of the GATT 1994 other than – that is, *excluding* – Article XIX of the GATT 1994.<sup>49</sup> In other words, where Article XIX serves as the legal basis for a measure, the Article 11.1(c) carve-out will not apply. Therefore, measures that have Article XIX as their legal basis are not measures taken pursuant to provisions of the GATT 1994 "other than" Article XIX. Norway's view is also supported by the context, the object and purpose, and the negotiating history.

51. As context, Articles 1 and 11.1(a) state, without qualification, that safeguard measures are subject to Article XIX and the *Safeguards Agreement*. In both cases, although the drafters could have added that these key scope provisions were "... subject to Article 11.1(c)", they did not. Thus, they do not support to the US view that Article 11.1(c) introduces a second category of safeguard measure that is exempt from the *Safeguards Agreement*.

52. With respect to the object and purpose, the effectiveness of the safeguard disciplines would be undermined if a safeguard measure did not need to comply with the safeguard disciplines just because some other, non-safeguard provision, also applies to the measure. It would be as if an anti-dumping measure did not need to comply with the *Anti-Dumping Agreement*, simply because the measure also entailed countervailing action against subsidies.

53. The United States' approach would lead to absurd consequences: a safeguard measure would escape the safeguard disciplines if a Member merely asserted that it had tried to take ("sought") a safeguard measure consistent with some other provision of the GATT 1994, even if the measure did not comply with any GATT 1994 provision at all.

54. The negotiating history also supports Norway's position. Both parties cite negotiating history to show that Article 11 originally consisted of a single provision, which prohibited all trade-restrictive measures, subject to two exceptions separated by the word "or". The first exception became Article 11.1(a), and applied to measures that "conform[] with *Article XIX*"; and the second exception became Article 11.1(c), and applied to measures "consistent with *other provisions* of the General Agreement".<sup>50</sup> Thus, as a matter of logic, the word "other" in the second exception necessarily referred to the universe of GATT 1994 "provisions" "except for", "apart from", "besides", "excluding" *Article XIX*, because *Article XIX* was already addressed in the first exception.

*b. The US import tariffs and quotas are not "sought, taken or maintained... pursuant to provision of the GATT 1994 other than Article XIX"*

55. The US import tariffs and quotas are safeguard measures which were "taken", and are "maintained", under Article XIX of the GATT 1994. Because the legal basis of these measures includes Article XIX, Article 11.1(c) does not apply because the legal basis is not "other than" Article XIX.

56. Even if the Panel were to find that Article 11.1(c) carves-out safeguard measures, the US import tariffs and quotas are not "taken" or "maintained" consistently with any other provision of the GATT 1994. While the United States invokes Article XXI of the GATT 1994 to justify its measures, none of its measures was "taken" or is "maintained" consistently with the requirements of that provision.

## 2. The relationship between the subparagraphs of Article 11.1

57. For the Panel, the parties' arguments under Article 11.1(c) raised important questions concerning the relationship between the three subparagraphs of Article 11.1. In the following, Norway draws together its responses to those questions.

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<sup>48</sup> See Oxford English Dictionary ("OED") definition of "other than", last accessed 4 February 2020, **(Exhibit NOR-102)**.

<sup>49</sup> Norway's interpretation is based on the ordinary meaning, context and object and purpose of that provision. See Norway's response to Question 20, paras. 199-242.

<sup>50</sup> Uruguay Round - Group of Negotiations on Goods (GATT) - Negotiating Group on Safeguards - Draft Text of an Agreement, 31 October 1990, **(Exhibit NOR-103)**.

58. **Subparagraph (a)** states simply that safeguard measures – that is, measures provided for in Article XIX of the GATT 1994 – must conform to the obligations in Article XIX and the *Safeguards Agreement*. Norway has demonstrated that both the US import tariffs and quotas are subject to subparagraph (a).<sup>51</sup>

59. **Subparagraph (b)** prohibits a particular form of trade-restrictive measure, in particular, one that affords protection and is applied with the acquiescence of the exporting Member. The scope of Article 11.1(b) extends beyond measures that are safeguard to include non-safeguard measures with the features set forth in subparagraph (b). Norway has demonstrated in its submissions to the panel that the US import quotas are (safeguards) subject to subparagraph (b).

60. **Subparagraph (c)** carves-out from the *Safeguards Agreement* measures that are "sought, taken or maintained pursuant to provisions of the GATT 1994 other than [i.e., apart from] Article XIX". Subparagraph (c) does not carve out safeguard measures covered by subparagraph (a) because these measures are not taken pursuant to provisions that exclude Article XIX. Subparagraph (c) does, however, apply to non-safeguard measures that fall under subparagraph (b). Norway has demonstrated that both the US import tariffs and quotas are safeguards that fall under subparagraph (a). These measures, therefore, do not benefit from the carve-out in sub-paragraph (c).

### C. **The measures at issue are inconsistent with the Safeguards Agreement**

61. Norway has presented arguments that demonstrate the US measures are *prima facie* inconsistent with Articles 2.1, 2.2, 5.1, 11.1(b), 12.1 and 12.2 of the *Safeguards Agreement*. The United States has not provided a substantive rebuttal to Norway's arguments under these provisions. Before turning to its claims of violation under the *Safeguards Agreement*, Norway sets out the standard of review under that Agreement.

#### 1. **Standard of review under the Safeguards Agreement**

62. For claims brought under the *Safeguards Agreement*, Article 11 of the DSU requires a panel to conduct an "objective assessment" of the matter, in light of the specific obligations contained in the *Safeguards Agreement*.<sup>52</sup>

63. Under the *Safeguards Agreement* a panel's "objective assessment" is comprised of two **elements**. *First*, a panel must consider whether the competent authority has considered all the relevant factors. *Second*, a panel must consider whether the authority has provided a "reasoned and adequate" explanation of how the facts support their determination. The lack of a "reasoned and adequate" explanation by an authority is reason in and of itself to find a violation of the relevant provision.

#### 2. **The import tariffs are inconsistent with Article 2.1 of the Safeguards Agreement**

##### a. *Legal standard*

64. Under Article 2.1, there are three requirements for the imposition of a safeguard.

65. *First*, the imposing Member must properly demonstrate the existence of an increase in **imports**. The increase in imports can be: (1) an *absolute* increase (*i.e.*, an increase by tonnes or units of the imported product); *or* (2) a *relative* increase (*i.e.*, an increase of imports relative to domestic production). In both cases, the authority must demonstrate, through a "reasoned and

<sup>51</sup> See Norway's first written submission, paras. 107-156; Norway's response to Question 3, paras. 33-36; Norway's second written submission, paras. 17-32; Norway's response to Question 88, para. 26 and footnote 88.

<sup>52</sup> Appellate Body Report, *Softwood Lumber VI (Article 21.5 – Canada)*, para. 92; *see also* Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.

adequate explanation"<sup>53</sup>, that there was an increase in imports during the period of investigation that is "sudden enough, sharp enough, and significant enough" to cause serious injury.<sup>54</sup>

66. Further, the authority cannot establish an increase in imports "through a simple mathematic comparison of data", *i.e.*, by comparing imports in one year against imports in another year.<sup>55</sup> Instead, the authority must *evaluate* (and *explain*) the significance of intervening *trends* of imports – including their "speed and direction" – over the period of investigation.<sup>56</sup>

67. *Second*, the imposing Member must properly demonstrate the existence of serious injury. This entails two steps: (1) defining the "domestic industry"; and (2) establishing "serious injury" (or threat thereof) to that industry.

68. With respect to the first step, under Article 4.1(c), the "domestic industry" is comprised of all "producers" of products that are like or compete directly with the subject imported products.

69. In *US – Hot-Rolled Steel*, the Appellate Body noted that, "where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as the industry as a whole".<sup>57</sup> Otherwise, the authority's explanation "may give a misleading impression of the data relating to the industry as a whole".<sup>58</sup>

70. With respect to the second step, the scope of the serious injury assessment must be co-extensive with the scope of the domestic industry. If the authority's serious injury assessment does not fully account of all parts of the domestic industry, the serious injury determination is inherently flawed.

71. *Third*, the imposing Member must determine that "a genuine and substantial relationship of cause and effect" exists between increased imports and injury.<sup>59</sup> Article 4.2(b) requires a two-step analysis: (1) demonstrating the causal link between increased imports and serious injury; and (2) identifying any injury caused by factors other than the increased imports, and not attributing this injury to the increased imports.<sup>60</sup>

*b. The DOC fails to properly determine that the conditions in Article 2.1 are present*

72. The DOC fails to adequately determine the existence of any of the three requirements in Article 2.1.

73. *First*, the US DOC fails to demonstrate that there is an increase in imports "sudden enough, sharp enough, and significant enough" to cause serious injury because, in its assessment, it fails to consider all the relevant industry segments. The US DOC also fails to provide a reasoned and adequate explanation for its findings.

74. As regards **aluminium**, the Aluminium Report only makes findings with respect to two of the three groups of subject aluminium products, namely, primary aluminium and downstream aluminium products.<sup>61</sup> The DOC does not consider or explain whether there was an increase in imports with respect to secondary aluminium.

<sup>53</sup> Appellate Body Report, *US – Steel Safeguards*, paras. 302-303.

<sup>54</sup> Appellate Body Report, *Argentina – Footwear*, para. 131; *see also* Panel Report, *Ukraine – Passenger Cars*, paras. 7.147-7.148 and Panel Report, *US – Wheat Gluten*, paras. 8.31-8.33.

<sup>55</sup> *See* Panel Report, *Ukraine – Passenger Cars*, para. 7.132; Panel Report, *Argentina – Footwear*, para. 8.159, and Appellate Body Report, *Argentina – Footwear*, para. 129.

<sup>56</sup> Panel Report, *Argentina – Footwear*, para. 8.159.

<sup>57</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. Emphasis added.

<sup>58</sup> Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204-205. Emphasis added.

<sup>59</sup> Appellate Body Report, *US – Wheat Gluten*, para. 69; *see also* Appellate Body Report, *US – Lamb*, para. 179.

<sup>60</sup> *See* Appellate Body Report, *US – Line Pipe*, para. 208.

<sup>61</sup> DOC Aluminium Report, (**Exhibit NOR-2**), pp. 70-75.

75. As regards **steel**, the Steel Report conducts an endpoint-to-end-point comparison, from 2011-2017, which is, as described, a deficient; the analysis must consider intervening trends to determine the rate and significance of an increase in imports. Moreover, the DOC failed to address the rate and significance of any increase in imports for the different industry segments.

76. *Second*, for both aluminium and steel, the US DOC fail to demonstrate the existence of "serious injury" because it focuses overwhelmingly on ailing segments of the domestic industries, and fails adequately to take into account the position of thriving segments of the industry that produce like or directly competing products.

77. As regards **aluminium**, the DOC Aluminium Report finds serious injury on the basis of an assessment of the primary aluminium segment alone. The Report fails to consider the secondary and downstream aluminium segments, which the USITC had found in a separate investigation were thriving.

78. As regards **steel**, the Report focusses overwhelmingly on a decline in production in the ailing BOF steel segment to conclude that there is serious injury to the domestic steel industry at as a whole. The Report provides only a limited explanation of injury to the thriving EAF steel segment.

79. *Third*, the DOC Reports fail properly to determine the existence of a causal link between aluminium and steel imports, respectively, and the alleged serious injury. For both **aluminium** and **steel**, the DOC failed to make a proper injury determination. In these circumstances, the DOC is unable to engage in a proper examination of potential causes of improperly-assessed injury. Moreover, for both aluminium and steel, the DOC failed to consider how factors other than the increased imports – that the DOC itself identified – may have accounted for the injury identified.

80. For all these reasons, the US import tariffs are inconsistent with Article 2.1 of the *Safeguards Agreement*.

### **3. The import tariffs are inconsistent with Article 2.2 of the Safeguards Agreement**

81. Article 2.2 embodies the most favoured nation ("MFN") obligation with respect to the application of safeguard measures. Thus, an importing Member must apply its safeguard measures to imported products from all sources, without consideration of origin. A Member cannot, therefore, apply safeguard measures to imports from one Member, and fail to apply the same safeguard measures to imports from another Member.

82. After having found that increased imports from all sources cause serious injury to its domestic aluminium and steel industries, the United States imposed safeguard measures, in the form of import tariffs, on imported aluminium and steel products.

83. However, the United States does not apply these import tariffs to imported aluminium and steel products from certain Members. In particular, imports from four Members (Australia, Argentina, Brazil, and South Korea) are exempt from the import tariffs. Thus, the application of the safeguard measures depends on the origin of the products: imports from the four Members are exempt from the import tariffs, whereas imports from other Members are subject to them. This violates Article 2.2 of the *Safeguards Agreement*.

### **4. The aluminium and steel import tariffs at issue are inconsistent with Article 5.1 of the Safeguards Agreement**

84. Article 5.1 requires a Member to impose a safeguard measure only to the extent necessary to prevent or remedy serious injury caused by an increase in imports. In other words, a safeguard must be calibrated to the objective of preventing or remedying serious injury to the Member's domestic industry.<sup>62</sup> In circumstances where an authority's determination of serious injury is

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<sup>62</sup> Panel Report, *Chile – Price Band System*, para. 7.183. Emphasis original.

inconsistent with the *Safeguards Agreement*, then, as a consequence, safeguard measure is not properly calibrated under Article 5.1.<sup>63</sup>

85. Norway has demonstrated that the DOC failed to make a proper serious injury determination. Therefore, absent a proper determination that injury exists, there can be no "rational connection" between the import tariffs, and the objective of preventing or remedying serious injury. The import tariffs, therefore, violate Article 5.1 of the *Safeguards Agreement*.

#### **5. The import quotas are inconsistent with Article 11.1(b) of the Safeguards Agreement**

86. The first sentence of Article 11.1(b) prohibits measures that: *first*, operate to restrict trade between exporting and importing Members, whether applied on the export or import side; *second*, afford protection; and *third*, are imposed by, or with the acquiescence/agreement of, the exporting Member(s).<sup>64</sup>

87. The import quotas agreed between each of Argentina, Brazil and South Korea, on the one hand, and the United States, on the other, possess the features just outlined. *First* the quotas, which limit import volumes, operate to restrict trade between an the relevant exporting Member and the United States. *Second*, the quotas afford protection to the US aluminium and steel industries by restricting imports to a specified quantity, and reducing import competition. *Third*, the quotas were imposed with the acquiescence of the exporting members. Therefore, the import quotas are prohibited under Article 11.1(b).

#### **6. The aluminium and steel import tariffs are inconsistent with Articles 12.1 and 12.2 of the Safeguards Agreement**

88. Article 12.1 of the *Safeguards Agreement* requires a Member to notify the Safeguards Committee of: the initiation of any safeguard investigation; a finding of serious injury or threat thereof; and the decision to apply a safeguard measure. Article 12.2 requires the imposing Member to provide the Safeguards Committee with all information pertinent to the investigation and to the safeguard measure being imposed. The United States has not notified the aluminium and steel import tariffs to the Committee on Safeguards. The United States, therefore, violates Articles 12.1 and 12.2 of the *Safeguards Agreement*.

### **VI. THE UNITED STATES' MEASURES ARE INCONSISTENT WITH THE GATT 1994**

#### **A. The import tariffs are inconsistent with Article II:1 of the GATT 1994**

89. Article II:1(a) of the GATT 1994 prohibits an importing Member from according to imported products treatment that is less favourable than that provided in the Member's Schedule. Article II:1(b) elaborates on the principle articulated in paragraph (a), imposing disciplines on "ordinary customs duties" and any "other duties or charges".<sup>65</sup> The Appellate Body has said that a violation of Article II:1(a) entails a violation of Article II:1(b).<sup>66</sup>

90. The United States' import tariffs exceed the United States' bound rate for the products in question. Therefore, they are not consistent with the United States' obligations under Article II:1(a) and (b) of the GATT 1994.<sup>67</sup>

#### **B. The import quotas violate Article XI :1 of the GATT 1994**

91. Article XI:1 prevents Members from imposing quantitative restrictions. Quantitative restrictions are defined broadly as prohibitions and restrictions, other than duties, taxes or charges.

<sup>63</sup> Appellate Body Report, *US – Line Pipe*, para. 261.

<sup>64</sup> Norway's first written submission, paras. 392-420; Norway's response to Question 18.

<sup>65</sup> In relation to the second sentence of Article II:1(b), the Appellate Body indicated that "the obligation to pay [] must accrue at the moment and by virtue of or, in the words of Article II:1(b), 'on', importation". Appellate Body Report, *China – Auto Parts*, para. 158.

<sup>66</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47; Panel Report, *EC – Chicken Cuts*, paras. 7.64-7.65; and Panel Reports, *EC – IT Products*, para. 7.747.

<sup>67</sup> Norway's first written submission, paras. 426-437.

The US import quotas meet this definition and are, therefore, not consistent Article XI:1 of the GATT 1994.<sup>68</sup>

### C. The country-wide tariff exemptions violate Article I:1 of the GATT 1994

92. Article I:1 of the GATT 1994 prohibits the discriminatory treatment of like products originating in different WTO Members. A Member violates Article I:1 if: (i) the measure at issue falls within the provision's scope of application; (ii) the imported products at issue are "like" within the meaning of Article I:1; (iii) the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.

93. To recall, the country-wide tariff exemption exempts certain Members from the application of the United States' import tariffs for aluminium and steel goods. The goods in question are like aluminium and steel products.<sup>69</sup>

94. By exempting Australia from the additional import tariffs, the United States confers an "advantage" on this Member, which is not "immediately" and "unconditionally" extended to the "like" aluminium and steel products of all other Members, in violation of Article I:1 of the GATT 1994.<sup>70</sup>

95. For Argentina, Brazil and South Korea, the United States offers these Members an advantage because it permits them to decide, on the basis of their own commercial interests, whether they would prefer market access for an unrestricted quantity subject to a tariff, or access for a pre-defined quantity under a quota, without payment of a tariff. This advantage is not extended "immediately and unconditionally" to like aluminium and steel products originating in countries that do not qualify for an exemption, in violation of Article I:1 of the GATT 1994.

### D. The country-wide tariff exemptions and the production exclusions violate Article X:3(a) of the GATT 1994

96. Article X:3 establishes "certain minimum standards for transparency and procedural fairness in the administration of trade regulations".<sup>71</sup> To establish an inconsistency with Article X:3(a), a complainant must establish that the respondent: (1) *administers* laws, regulations, decisions or rulings of the kind described in Article X:3(a); and (2) does so in a manner that is *non-uniform, partial* and/or *unreasonable*.<sup>72</sup>

97. In *US – Shrimp*, the Appellate Body found that a number of aspects of the US measure then at issue were "contrary to the spirit" of Article X:3(a), including: (i) the fact that the process was "singularly informal and casual";<sup>73</sup> (ii) the absence of a "formal written, reasoned decision, whether of acceptance or rejection";<sup>74</sup> and (iii) the ability of Members to "be certain whether [the measures] are being applied in a fair and just manner".<sup>75</sup>

98. In this dispute, the United States' administration of the country-wide tariff exemptions is unreasonable. This is demonstrated by (1) the absence of any administrative process that applicant countries should follow in seeking an exemption and (2) the use of inherently vague and undefined eligibility criteria. The country-wide tariff exemptions, therefore, violate Article X:3(a).<sup>76</sup>

<sup>68</sup> Norway's first written submission, paras. 438-466.

<sup>69</sup> Norway's first written submission, paras. 448-449.

<sup>70</sup> Norway's response to Question 1(b), Table 1; Norway's responses to the Panel's questions after the first substantive meeting, Annex 1.

<sup>71</sup> Appellate Body Report, *US – Shrimp*, para. 183. The Appellate Body also underlined that "[i]nasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure". Appellate Body Report, *US – Shrimp*, para. 182. See also Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.868.

<sup>72</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.906.

<sup>73</sup> Appellate Body Report, *US – Shrimp*, para. 181.

<sup>74</sup> Appellate Body Report, *US – Shrimp*, para. 180.

<sup>75</sup> Appellate Body Report, *US – Shrimp*, para. 181.

<sup>76</sup> Norway's first written submission, paras. 467-534;

99. The US administration of the product exclusions is unreasonable and partial. A US applicant may apply to the DOC for a particular aluminium/steel product to be excluded from the additional import tariffs, if certain grounds are met. However, US producers of the subject aluminium/steel goods have the right to object to such an application. When US producers make an objection, the evidence shows that the DOC typically defers to it. Through this process, therefore, US producers play a decisive role in deciding whether competing imported products are subject to additional import tariffs at the border. This amounts to an inherent conflict of interest in the administration of the measure that is both unreasonable and impartial.<sup>77</sup> The administration of the product exclusions, therefore, violates Article X:3(a).

## VII. THE US MEASURES ARE NOT JUSTIFIED BY ARTICLE XXI OF THE GATT 1994

100. The United States asserts that its measures are justified by Article XXI of the GATT 1994. The United States' resort to Article XXI is premised on several errors in the interpretation of the provision. On the facts, the United States' defense is built on ignoring critical but inconvenient facts, which creates a rational disconnect between the proffered justification and the real world.

### A. Inapplicability of Article XXI to the Safeguards Agreement

101. At the outset, it is important to recall that Article XXI of the GATT 1994 offers a potential justification for violations of the GATT 1994 alone, as made clear by the opening words of the provision, "Nothing in *this* Agreement shall...".<sup>78</sup> On its face, it does not justify a violation of an agreement other than the one referenced by the demonstrative "this", *i.e.*, the GATT 1994.<sup>79</sup>

102. When Members intended a GATT 1994 exception to apply to another covered agreement, they included express language to that effect, as they did in the *Import Licensing Agreement*, the *TRIMS Agreement*, and the *Trade Facilitation Agreement*.<sup>80</sup> However, no such language renders Article XXI of the GATT 1994 available as a justification for a violation of the *Safeguards Agreement*.

103. The United States asserts that, although the *Safeguards Agreement* does not refer to Article XXI of the GATT 1994, the exception is available because the *Safeguards Agreement* refers to, and elaborates on, Article XIX of the GATT 1994. If the US view were permitted, Articles XX and XXI of the GATT 1994 would be applicable, despite their express textual limitation, to all the WTO goods agreements, including the *SCM Agreement*,<sup>81</sup> the *Anti-Dumping Agreement*,<sup>82</sup> the *Customs Valuation*

<sup>77</sup> Similar considerations led the Panel in *Argentina – Hides and Leather* to find that the customs laws were administered in a partial manner. See Panel Report, *Argentina – Hides and Leather*, para. 11.98.

<sup>78</sup> Emphasis added.

<sup>79</sup> Norway's opening statement at the second substantive meeting, paras. 32-39.

<sup>80</sup> *Import Licensing Agreement*, Article 1.10; *TRIMS Agreement*, Article 3; *Trade Facilitation Agreement*, Article 24.7.

<sup>81</sup> *SCM Agreement*, Articles 1.1(a)(2) (referring to GATT 1994 Article XVI), V(b) (referring to GATT 1994 Articles II and XVI), 10 (referring to GATT 1994 Article VI), 11 (referring to GATT 1994 Article VI), 15.1 (referring to GATT 1994 Article VI), 16.4 (referring to GATT 1994 Article XXIV:8(b)), 20.6 (referring to GATT 1994 generally), 25.1 (referring to GATT 1994 Article XVI), 25.6 (referring to GATT 1994 Article XVI:1), 25.7 (referring to GATT 1994 generally), 25.10 (referring to GATT 1994 Article XVI:1), 26.1 (referring to GATT 1994 Article XVI:1), 27.9 (referring to GATT 1994 generally), 30 (referring to GATT 1994 Articles XXII and XXIII), 32.1 (referring to GATT 1994 generally); Annex I, item (I) (referring to GATT 1994 Article XVI).

<sup>82</sup> *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, Articles 1 (referring to GATT 1994 Article VI), 2.7 (referring to GATT 1994 Article VI:1), 3.1 (referring to GATT 1994 Article VI), 4.3 (referring to GATT 1994 Article XXIV), 5.2 (referring to GATT 1994 Article VI), 18.1 (referring to GATT 1994 generally).

*Agreement*,<sup>83</sup> the *SPS Agreement*,<sup>84</sup> the *Agreement on Agriculture*,<sup>85</sup> the *TBT Agreement*,<sup>86</sup> the *Preshipment Inspection Agreement*,<sup>87</sup> and the *Rules of Origin Agreement*.<sup>88</sup> Indeed, a Member could even rely on Articles XX and XXI to avoid obligations under the DSU, because of references to Articles XXII and XXIII of the GATT 1994. On this view, the words "this Agreement" in Article XXI (and in Article XX) would serve no purpose.

104. As such, if the Panel finds the United States to be in violation of the *Safeguards Agreement*, the United States' assertions that its measures are justified by Article XXI are of no consequence.

## B. Interpretation of Article XXI

105. The United States asserts that, properly interpreted, Article XXI is self-judging.<sup>89</sup> Norway disagrees.<sup>90</sup> While Norway accepts that Article XXI confers discretion on Members to protect their essential security interests, this discretion is not unlimited.<sup>91</sup> In particular, properly interpreted, (i) the three sub-paragraphs set out objectively verifiable circumstances which a respondent must demonstrate; and (ii) the words "it considers" accord the respondent some, but not unlimited, discretion with respect to the choice of the "action" to which the *chapeau* refers.

### 1. Analysis under sub-paragraph (iii)

106. The three sub-paragraphs under Article XXI(b) set out "objective fact[s]" that are "amenable to objective determination".<sup>92</sup> In other words, the respondent must demonstrate with evidence, and the Panel must assess, the existence of the facts referenced in the sub-paragraphs in an objective manner. Specifically, under sub-paragraph (iii), the existence of a "war or other emergency in international relations" needs to be demonstrated objectively.

107. United States has explained, with reference to the ordinary meaning of the term, that that the term "emergency" in sub-paragraph (iii) means "[a] situation, esp. of danger or conflict, that arises unexpectedly and requires urgent attention".<sup>93</sup> Norway agrees.<sup>94</sup>

108. However, the United States attempts to evade its burden to establish the existence of an "emergency". It argues that the subparagraphs are subject to the verb "consider" in the *chapeau*

<sup>83</sup> *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, Preamble (referring to the "objectives of GATT 1994" and Article VII); Articles 7 (referring to GATT 1994 Article VII), 12 (referring to GATT 1994 Article X).

<sup>84</sup> *SPS Agreement*, Preamble (referring to GATT 1994 generally and to Article XX(b) in particular), Articles 2.4 (referring to GATT 1994 generally and to Article XX(b) in particular), 3.2 (referring to GATT 1994 Article XX), 11 (referring to GATT 1994 Articles XXII and XXIII).

<sup>85</sup> *Agreement on Agriculture*, Preamble (referring to "GATT rules and disciplines"), Articles 3.1 (making schedules under the agreement an integral part of GATT 1994), 5.1 (referring to GATT 1994 Article II:1(b)), 5.8 (referring to GATT 1994 Articles XIX:1(a) and XIX:3), 12 (referring to GATT 1994 Article XI:2(a)), 13 (referring to GATT 1994 in general and Articles II, VI, XVI, and XXIII:1(b), specifically), 19 (referring to GATT 1994 Articles XXII and XXIII), 21.1 (referring to GATT generally).

<sup>86</sup> *TBT Agreement*, Preamble (referring to the objectives of GATT 1994), Article 14.1 (referring to GATT 1994 Articles XXII and XXIII).

<sup>87</sup> *Preshipment Inspection Agreement*, Preamble (referring to the "role of GATT", "the responsiveness of the GATT system", "the principles and obligations of GATT 1994"), Articles 2.2 (referring to GATT 1994 Article III:4), 2.6 (referring to the "situations" addressed in GATT 1994 Articles XX and XXI), 7 (referring to GATT 1994 Article XXII), 8 (referring to GATT 1994 Article XXIII).

<sup>88</sup> *Rules of Origin Agreement*, (referring to the "role of GATT", "the responsiveness of the GATT system", "the objectives of GATT 1994", "rights of Members under GATT 1994"), Articles 1.1 (referring to GATT 1994 Article I:1), 1.2 (referring to GATT 1994 Articles I, II, III, IX, VI, XI and XIII), 2(g) (referring to GATT 1994 Article X:1), 3(e) (referring to GATT 1994 Article X:1), (referring to GATT 1994 Article XXII), 8 (referring to GATT 1994 Article XXIII).

<sup>89</sup> See the United States' comment on Norway's response to Question 93.

<sup>90</sup> Norway's opening statement at the second substantive meeting, paras. 29-54.

<sup>91</sup> Norway's response to Question 95.

<sup>92</sup> Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.244; Panel Report, *Russia – Traffic in Transit*, para. 7.71; Norway's second written submission, paras. 103-115.

<sup>93</sup> United States' response to Panel Question 36, para. 135; and United States' response to Panel Question 51(a)-(c), para. 231.

<sup>94</sup> See Norway's response to Panel Question 51, para. 434; Norway's second written submission, para. 108.

and, as a result, the respondent is free to decide for itself if the subparagraphs are met.<sup>95</sup> The United States errs.

109. The verb "consider" qualifies the terms of the *chapeau*; it does not qualify any words in the three sub-paragraphs. This flows from an interpretation of the words of Article XXI(b), in line with the rules of English grammar, and in a manner that ensures consistency among the various language versions.

110. The parties agree that the subparagraphs constitute a distinct grammatical unit with their own grammatical function. Indeed, Norway agrees with the United States that the subparagraphs are "**participial phrases**"<sup>96</sup> that function as adjectives modifying a noun. However, in an effort to apply the verb "consider" to the subparagraphs, the United States relies on what it acknowledges to be inconsistent use of a single rule of English grammar, which gives rise to an incoherent interpretation of the text.<sup>97</sup>

111. The *Vienna Convention* requires that treaty terms be given their "ordinary meaning".<sup>98</sup> There is nothing "ordinary" about a meaning premised on US arguments that entail inconsistency and incoherence, which even the United States calls "less in line with rules of grammar and conventions".<sup>99</sup> Instead of this strained interpretation, ordinary meaning dictates that each of the subparagraphs modifies the same noun – "action" – which ensures interpretive consistency and coherence.<sup>100</sup> The subparagraphs are not qualified by other words in the *chapeau*.

112. Finally, when the United States tries to reconcile its argument with the Spanish text, it resorts to deleting words from the Spanish text to stretch the verb "consider" into the subparagraphs.<sup>101</sup> The Panel must reject this remarkable argument. Rather, when accounting for all the words in the text, the Spanish version confirms the English and French versions: the subparagraphs modify the noun "action".<sup>102</sup>

113. In sum, what matters under sub-paragraph (iii) is whether an emergency has, objectively, been shown to exist, on the facts. This is a matter for objective determination by the Panel, and not a question of what the United States "considers".

## 2. Analysis under the *chapeau*

114. If the Panel finds that the requirements of sub-paragraph (iii) are met, the respondent must demonstrate, under the *chapeau*, that it "considers" the "action" "necessary for the protection of its essential security interests".

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<sup>95</sup> The United States' first written submission, paras. 29-33; The United States' response to Question 90, paras. 27, 28; the United States' response to Question 92, para. 38; the United States' comment on Norway's response to Panel Question 90, para. 30; the United States' second written submission, paras. 8 and 28; the United States' opening statement at the first substantive meeting, para. 11; the United States' response to Question 35, para. 123; the United States' response to Question 36, paras. 125, 134, 136; the United States' response to Question 37, para. 137; the United States' response to Question 40, para. 148; the United States' response to Question 55, para. 252.

<sup>96</sup> Norway's response to Question 90, Figure 1. The terms participial phrase and participle phrase are synonymous. The word "participial" is the adjectival form of "participle".

<sup>97</sup> The United States' comment on Norway's response to Question 90, para. 30; Norway's opening statement at the first substantive meeting, paras. 43-56; Norway's response to Question 35, paras. 315-317; Norway's second written submission, paras. 70-101; Norway's response to Question 90; Norway's comment on the United States' response to Question 90.

<sup>98</sup> The word "ordinary" means "[b]elonging to the regular or usual order or course of things; ... occurring in the course of regular custom or practice; normal; customary; usual". Oxford English Dictionary ("OED") definition of "ordinary", last accessed 11 January 2021, (**Exhibit NOR-149**).

<sup>99</sup> The United States' comment on Norway's response to Question 90, para. 30.

<sup>100</sup> Norway's opening statement at the first substantive meeting, paras. 43-56; Norway's response to Question 35, paras. 315-317; Norway's second written submission, paras. 70-101; Norway's response to Question 90; Norway's comment on the United States' response to Question 90.

<sup>101</sup> The United States' general comment on Questions 41-43, para. 166 (Table).

<sup>102</sup> Norway's opening statement at the first substantive meeting, paras. 53-56; Norway's response to Question 35, paras. 316-317; Norway's second written submission, paras. 73-101; Norway's response to Question 90; Norway's comment on the United States' response to Question 90.

115. Although the words "which it considers", in the *chapeau*, establish a degree of deference, the standard of review is not *total deference*. Rather, as past panels have established, 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;<sup>103</sup>
- *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.<sup>104</sup>

116. 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.<sup>105</sup>

117. The United States' approach deprives the terms of the *chapeau* of their meaning.<sup>106</sup> 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, based on jurisprudence, the treaty interpreter cannot interpret two of these words ("it considers") in a way that deprives the others of their meaning.

### C. The United States Ignores Critical Facts

118. If the Panel decides that the exception is not *entirely* self-judging, and that the Panel can, instead, review the assertions made by the United States in support of its invocation of Article XXI, the United States' defence must fail, because it has offered no coherent factual basis to substantiate its invocation of the exception.

119. In its initial submissions to the Panel, the United States offered no factual support whatsoever for its invocation of the security exception. In fact, the United States maintained that it was not even required to identify the sub-paragraph on which it relied.<sup>107</sup> Eventually, the United States offered certain facts, mentioning subparagraph (iii), asserting that these facts would sustain its defence, "even on the complainant's understanding of Article XXI(b) as *not* self-judging".<sup>108</sup> In so doing, however, the United States has ignored critical facts that expose the rational disconnect between its narrative and the real world.

120. On the facts, the United States has been unable to demonstrate the **existence of an emergency in international relations**. While the United States attempted to characterize the global overcapacity in aluminum and steel as an emergency in international relations, the evidence relied upon by the United States reveals the opposite.<sup>109</sup> Overcapacity in these industries is a matter that has been on the policy agendas of governments and international organizations for decades, and on which countries have been working in a collaborative manner. This overcapacity cannot be characterized as a "danger or conflict" that "arises *unexpectedly* and requires *urgent* attention".<sup>110</sup>

<sup>103</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.131; Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.247; Norway's second written submission, para. 117.

<sup>104</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.139; Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.252; Norway's second written submission, para. 117.

<sup>105</sup> See United States' response to Panel Question 38, para. 144

<sup>106</sup> See Norway's first opening statement, paras. 63-80; and Norway's response to Panel Question 36.

<sup>107</sup> See, United States' comment on Norway's response to Question 93.

<sup>108</sup> The United States' opening statement at the second substantive meeting, para. 53.

<sup>109</sup> See, Norway's comment on the United States' closing statement at the second substantive meeting, paras. 4-5 (*discussing* Statement of the Chair of the OECD Ministerial Council Meeting 2018, at p. 5, <https://www.oecd.org/mcm-2018/documents/Statement-French-Chair-OECD-MCM-2018.pdf> (**Exhibit US-246**)).

<sup>110</sup> The United States' response to Question 92, para. 45. Emphasis added. See also, Norway's opening statement at the second substantive meeting, para. 58.

121. On the facts, the United States has also been unable to demonstrate a genuine **connection between its measures and the protection of its essential security interests**. On this front, the United States asserts that its aluminium and steel industries are injured and would be unable to expand production to meet any sudden surge in demand for aluminum and steel in the event of a war or other emergency. This argument is premised on ignoring critical facts. Moreover, while Article XXI applies to action taken "in time of" (i.e., during) an emergency, the US argument *speculates* about a *potential future* emergency rather than an existing one.<sup>111</sup>

122. To recall, the US unwrought aluminium industry consists of two segments: (i) an ailing primary aluminium segment, which had 1.8 million MT of production capacity in 2017, and which is declining ("primary segment");<sup>112</sup> and (ii) a thriving secondary aluminium segment, which had 10 million MT of production capacity in 2015, and which is growing ("secondary segment").<sup>113</sup> Similarly, the US semi-finished steel industry comprises (i) an ailing BOF segment, which accounts for about one third of the production,<sup>114</sup> and (ii) a thriving electric arc furnace EAF segment, which accounts for two thirds of US steel production and capacity.<sup>115</sup>

123. The United States alleges that global overcapacity puts at risk the US aluminium and steel industries' ability to sustain capacity at levels sufficient to meet demand in the event of a "war or other emergency". The United States contends that, to avert this threat, its import restrictions are designed to safeguard a minimum of production capacity in the US aluminium and steel industries.

124. The perceived threat to the US industries' capacity to meet demand in a "war or other emergency" arises only because the USDOC focuses exclusively on the ailing US primary aluminium segment and BOF steel segment, to the exclusion of the thriving US secondary aluminium segment and EAF steel segment. These thriving segments of the aluminium and steel industries have the capacity to produce many times the output which the United States aims to guarantee from the ailing segments.<sup>116</sup> The United States ignores the fact that, in the event of a war or emergency in international relations, the output of the thriving segments will be available to meet its defence needs. Instead, the United States assumes a world in which its defence needs would need to be satisfied by the ailing segments alone.

125. The supposed threat to US production capacity is, therefore, nothing more than an artefact of the USDOC's decision to focus on the ailing minority segments of the US aluminium and steel industries, and to ignore the thriving segments.

126. Any objective and plausible assessment of the US production capacity available to meet demand in the event of a "war or other emergency" must, of course, take into account the production capacity of the entire US aluminium and steel industries, including the thriving segments. These segments' vast and growing capacity would be available to meet demand in the event of a "war or other emergency".

127. When challenged on the deficiencies and inconsistencies in the factual basis it offers to justify its measures, the United States repeatedly falls back on the "deferential standard of review" under Article XXI(b).<sup>117</sup> While Norway agrees that a Member enjoys a degree of deference under the *chapeau*, in particular as regards its *policy choices*, that deference does not extend to *ignoring facts* that are critical to the respondent's purported justification of the measure.<sup>118</sup> A Member cannot manufacture a justification under Article XXI(b) by conveniently ignoring critical facts that contradict

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<sup>111</sup> Norway's comments on the United States' closing statement at the second substantive meeting, para. 4.

<sup>112</sup> DOC Aluminium Report, (**Exhibit NOR-2**), Table 1.

<sup>113</sup> USITC Aluminum Report, (**Exhibit NOR-49**), Table 4.9. The latest available data in the USITC report corresponds to the year 2015.

<sup>114</sup> Norway's first written submission, Table 6 (compiled using data from "World Steel in Figures 2017", World Steel Association, (**Exhibit NOR-59**), Figure 16; "World Steel in Figures 2018", World Steel Association, (**Exhibit NOR-60**); American Metal Markets, DRI & Mini-mills, DRI & Mini-mills Conference, (**Exhibit NOR-61**) p. 9).

<sup>115</sup> Norway's first written submission, paras. 277-333.

<sup>116</sup> Norway's first written submission, paras. 217-274.

<sup>117</sup> The United States' comments on Norway's statements at the second substantive meeting, para. 15.

<sup>118</sup> Norway's response to Question 95, paras. 5-9.

the proffered justification. A Member must take the world as it exists, rather than imagine a world convenient to it.

128. If a Member were permitted to ignore critical but inconvenient facts, in order to manufacture a defence for itself, it would run contrary to the fundamental requirements of good faith. Norway recalls the Appellate Body's remarks, in *US – Shrimp*, that one manifestation of the requirement of good faith "is the doctrine of *abus de droit*".<sup>119</sup> This doctrine "prohibits the abusive exercise of a state's rights" and requires that, whenever the exercise of a right "impinges" on the fulfilment of a treaty obligation, the right "must be exercised *bona fide*, that is to say, reasonably".<sup>120</sup> In the context of an affirmative defence, it is contrary to this principle for a Member to seek to justify a violation by ignoring critical facts that contradict the proffered justification.

### **VIII. CONCLUSION**

129. In light of the above, the US measures at issue are inconsistent with provisions of the *Safeguards Agreement* and the GATT 1994. Moreover, the US measures are not justified by Article XXI(b) of the GATT 1994.

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<sup>119</sup> Appellate Body Report, *US – Shrimp*, para. 158.

<sup>120</sup> Appellate Body Report, *US – Shrimp*, para. 158.

**ANNEX B-2****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES OF AMERICA**

1. At issue in this dispute is the sovereign right of a state to take action to protect its essential security in the manner it considers necessary. WTO Members did not relinquish this inherent right in joining the WTO. To the contrary, this right is reflected in Article XXI(b) of the GATT 1994, and WTO Members have not agreed to subject the exercise of this right to legal review.

2. Section 232 of the Trade Expansion Act of 1962 (Section 232) allows the United States to adjust imports of an article based on a finding that such imports threaten to impair U.S. national security. On April 19 and 26, 2017, the United States initiated investigations under Section 232 into imports of steel and aluminum, respectively. In connection with these investigations, United States solicited written comments from interested parties and held public hearings. The United States summarized its findings from these investigations in written reports, and released these reports to the public. On March 8, 2018, the United States acted pursuant to Section 232 and imposed tariffs on certain steel and aluminum imports, effective beginning on March 23, 2018. The United States also established a process to permit product-specific exclusions from the Section 232 tariffs, based on, among other factors, the national security implications of those imports.

A. The Text Of GATT 1994 Article XXI(b) In Its Context, And In The Light Of The Agreement's Object And Purpose, Establishes That The Exception Is Self-Judging

3. The text of GATT 1994 Article XXI(b), in its context and in the light of the agreement's object and purpose, establishes that the exception is self-judging. As this text provides "[n]othing" in the GATT 1994 shall be construed to prevent a WTO Member from taking "any action" which "it considers necessary" for the protection of its essential security interests. This text establishes that (1) "nothing" in the GATT 1994 prevents a Member from taking any action needed to protect an essential security interest, and (2) the action necessary for the protection of its essential security interests is that which the Member "considers necessary" for such protection.

4. The self-judging nature of GATT 1994 Article XXI(b) is demonstrated by that provision's reference to actions that the Member "considers necessary" for the protection of its essential security interests. The ordinary meaning of "considers" is "[r]egard in a certain light or aspect; look upon as" or "think or take to be." Under Article XXI(b), the relevant "light" or "aspect" in which to regard the action is whether that action is necessary for the protection of the acting Member's essential security interests. Thus, reading the clause together, the ordinary meaning of the text indicates it is the Member ("which it") that must regard ("consider[er]") the action as having the aspect of being necessary for the protection of that Member's essential security interests. The French and Spanish texts of Article XXI(b) confirm the self-judging nature of this provision. Specifically, use of the subjunctive in Spanish ("estime") and the future with an implied subjunctive mood in French ("estimera") support the view that the action taken reflects the beliefs of the WTO Member, rather than an assertion of objective fact that could be subject to debate.

5. The ordinary meaning of the terms in the phrase "its essential security interests," also supports the self-judging nature of Article XXI. The word "interest" is defined as "[t]he relation of being involved or concerned as regards potential detriment or (esp.) advantage." The term "security" refers to "[t]he condition of being protected from or not exposed to danger." The definitions of "essential" include "[t]hat is such in the absolute or highest sense" and "[a]ffecting the essence of anything; significant, important."

6. And it is "its" essential security interests – the Member's in question – that the action is taken for the protection of. Therefore, it is the judgment of the Member that is relevant. Each WTO Member must determine whether certain action involves "its interests," that is, potential detriments or advantages from the perspective of that Member. Each WTO Member likewise must determine whether a situation implicates its "security" interests (not being exposed to danger), and whether the interests at stake are "essential," that is, significant or important, in the absolute or highest sense. By their very nature, these questions are political and can only be answered by the Member in question, based on its specific and unique circumstances, and its own perception of those

circumstances. No WTO Member or WTO panel can substitute its views for those of a Member on such matters.

7. The text of subparagraphs (i) to (iii) of Article XXI(b) also supports the self-judging nature of this provision. The first element of this text that is notable is the lack of any conjunction to separate the three subparagraphs. The subparagraphs are not separated by the coordinating conjunction "or", to demonstrate alternatives, or the conjunction "and", to suggest cumulative situations. Accordingly, each subparagraph must be considered for its relation to the chapeau of Article XXI(b).

8. Subparagraphs (i) and (ii) of Article XXI(b) both begin with the phrase "relating to" and directly follow the phrase "essential security interests" in the chapeau of paragraph (b). The most natural reading of this construction is that subparagraphs (i) and (ii) modify the phrase "essential security interests" and thus illustrate the types of "essential security interests" that Members considered could lead to action under Article XXI(b).

9. Subparagraphs (i) and (ii) do not limit a Member's essential security interests exclusively to those interests. First, the chapeau of Article XXI(b) (as noted) reserves to the Member the judgment of what "its interests" are, including whether they are relating to one of the enumerated interests. Second, subparagraph (iii) reflects no explication (and therefore cannot be understood to reflect a limitation) on a Member's essential security interests. Rather, as with subparagraphs (i) and (ii), the essential security interests are those determined by the Member taking the action.

10. Subparagraph (iii) begins with temporal language: "*taken in time of war or other emergency in international relations.*" The phrase "taken in time of" echoes the reference to "taking any action" in the chapeau of Article XXI (b), and it is actions that are "taken", not interests. Thus, the temporal circumstance in subparagraph (iii) modifies the word "action," rather than the phrase "essential security interests." Accordingly, Article XXI(b)(iii) reflects a Member's right to take action it considers necessary for the protection of its essential security interests *when* that action is taken in time of war or other emergency in international relations. Nor does the text of Article XXI(b)(iii) require that the emergency in international relations or war directly involve the acting Member, reflecting again that the action taken for the protection of its essential security interests is that which the Member judges necessary.

11. Subparagraphs (i) to (iii) of Article XXI(b) thus reflect that Members wished to set out certain types of "essential security interests" and a temporal circumstance that Members considered could lead to action under Article XXI(b). A Member taking action pursuant to Article XXI(b) would consider its action to be necessary for the protection of the interests identified in subparagraphs (i) and (ii) or to be taken in time of war or other emergency in international relations. In this way, the subparagraphs guide a Member's exercise of its rights under this provision while reserving to the Member the judgment whether particular action is necessary to protect its essential security interests.

12. The context of Article XXI(b) also supports this understanding. First, the phrase "which it considers necessary" is present in Article XXI(a) and XXI(b), but not in Article XXI(c). The selective use of this phrase highlights that, under Article XXI(a) and XXI(b), it is the judgment of the Member that controls. The Panel should recognize and give meaning to such deliberate use of the phrase "which it considers" in Article XXI(b), and not reduce these words to inutility.

13. Second, the context provided by Article XX supports the understanding that Article XXI(b) is self-judging. Specifically, Article XX sets out "general exceptions," and a number of subparagraphs of Article XX relate to whether an action is "necessary" for some listed objective. For example, Article XX(a), (b), and (d), respectively, provide exceptions for certain measures "*necessary to protect public morals,*" "*necessary to protect human, animal or plant life or health,*" and "*necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement*" (emphases added).

14. Unlike Article XXI(b), however, none of the Article XX subparagraphs use the phrase "which it considers" to introduce the word "necessary." Furthermore, Article XX includes a chapeau which subjects a measure qualifying as "necessary" to a further requirement of, essentially, non-discrimination. Notably, such a qualification, which requires review of a Member's action, is absent from Article XXI.

15. Third, a number of provisions of the GATT 1994 and other WTO agreements refer to action that a Member "considers" appropriate or necessary, and—as in Article XXI(b)—this language signals that a particular judgment resides with that Member. For example, under Article 18.7 of the Agreement on Agriculture, "[a]ny Member" may bring to the attention of the Committee on Agriculture "any measure which it considers ought to have been notified by another Member." Similarly, Article III(5) of the General Agreement on Trade in Services (GATS) permits "[a]ny Member" to notify the Council for Trade in Services of any measure taken by another Member which "it considers affects" the operation of GATS.

16. In other provisions of the GATT 1994 or other WTO agreements, however, certain judgments are left for determination by a panel, the Appellate Body, or a WTO committee. Under DSU Art. 12.9, for example, "[w]hen the panel considers" that it cannot issue its report within a certain period of time, the panel must provide certain information to the DSB. Under Article 4(1) of the Agreement on Rules of Origin, the Committee on Rules of Origin may request work from the Technical Committee on Rules of Origin "as it considers appropriate" for the furtherance of the objectives of that agreement.

17. Fourth, by way of contrast, and further context, in at least two WTO provisions the judgment of a Member is expressly subject to review through dispute settlement. Specifically, DSU Article 26.1 permits the institution of non-violation complaints, subject to special requirements, including that the panel or Appellate Body agree with the judgment of the complaining party. As DSU Article 26.1 states, a non-violation complaint may be instituted, "[w]here and to the extent that such party considers *and* a panel or the Appellate Body determines" that a particular measure does not conflict with a WTO agreement, among other requirements. Thus, in this provision, Members explicitly agreed that it is not sufficient that "[a] party considers" a non-violation situation to exist, and accordingly, a non-violation complaint is subject to the additional check that "a panel or the Appellate Body determines that" a non-violation situation is present. A similar limitation—that a "party considers and a panel determines that"—was agreed in DSU Article 26.2 for complaints of the kind described in GATT 1994 Article XXIII:1(c).

18. The context provided by DSU Articles 26.1 and 26.2 is highly instructive. No such review of a Member's judgment is set out in Article XXI(b), which permits a Member to take action "which it [a Member] considers necessary for the protection of its essential security interests." Accordingly, the context of Article XXI(b) demonstrates that Members did not agree to subject a Member's essential security judgments to review by a WTO panel.

19. The object and purpose of the GATT 1994 also establishes that Article XXI(b) is self-judging. The object and purpose of the GATT 1994 is set out in the agreement's Preamble. That Preamble provides, among other things, that the GATT 1994 set forth "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." Particularly with these references to arrangements that are "mutually advantageous" and tariff reductions that are "substantial" (rather than complete), the contracting parties (now Members) acknowledged that the GATT contained both obligations and exceptions, including the essential security exceptions at Article XXI. The self-judging nature of Article XXI is further established by a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in the context of the *United States Export Measures* dispute between the United States and Czechoslovakia.

B. Supplementary Means of Interpretation, Including Negotiating History, Confirm The Self-Judging Nature of GATT 1994 Article XXI(b)

20. While not necessary in this dispute, supplementary means of interpretation, including negotiating history, confirms that GATT 1994 Article XXI(b) is self-judging. The drafting history of GATT 1994 XXI(b) dates back to negotiations to establish the International Trade Organization of the United Nations (ITO). In 1946, the United States proposed a draft charter for the ITO, which included the following two exceptions provisions:

Article 32 (General Exceptions to Chapter IV):

Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures

. . . .

(e) in time of war or other emergency in international relations, relating to the protection of the essential security interests of a Member.

Article 49.2 (Exceptions to Provisions Relating to Intergovernmental Commodity Agreements):

None of the foregoing provisions of Chapter VI is to be interpreted as applying to agreements relating to fissionable materials; to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment; or, in time of war or other emergency in international relations, to the protection of the essential security interests of a Member.

21. The United States asserted at the time that Article 32(e) "afforded complete opportunity for the adoption of all measures regarded as necessary for the protection of national interests" in a time of war or a national emergency. As originally drafted, however, neither exceptions provision was explicitly self-judging. These provisions lacked the key phrase that appears in the current text of GATT 1994 Article XXI(b) regarding action by a Member that "it considers necessary for" the protection of its essential security interests. In addition, the essential security exception set out in Article 32 of the ITO draft charter was one of twelve exceptions, several of which later formed the basis for the general exceptions at GATT 1994 Article XX.

22. In March 1947, the same exceptions text was proposed as both GATT Article XX and Article 37 the ITO draft charter, in Chapter V, which related to "[g]eneral commercial policy." The chapeau of this proposed text and a number of the subparagraphs are identical to what would become GATT 1994 Article XX. With its proviso, the chapeau contemplated panel review so that the exceptions would not be applied to discriminate unfairly. The subparagraphs corresponding to essential security were included in this proposed text, together with other exceptions, and thus were subject to the proviso in the chapeau, like these other exceptions. This structure suggests that, at that time, not all drafters may have viewed the essential security exception in subparagraph (e) as self-judging.

23. In May 1947, the United States proposed removing, *inter alia*, subparagraph (e) from the ITO draft charter exceptions provision quoted above. In the U.S. proposal, item (e) would be included in a new article, to be inserted at an "appropriate" place at the end of the ITO draft charter, so that these exceptions would apply to the whole charter. The United States also proposed that the new article would begin by stating "[n]othing in this Charter shall be construed to prevent the adoption or enforcement by any Member of measures," including those relating to the protection of essential security interests.

24. Thereafter, the United States proposed the addition of a new chapter, entitled "Miscellaneous" at the end of the ITO draft charter, and that the proposed exceptions to the charter as a whole be included in this new chapter. The United States also suggested additional text to this exceptions provision, to make the self-judging nature of these exceptions explicit. Under this U.S. proposal, the draft exceptions provision stated:

Nothing in this Charter shall be construed to require any Member to furnish any information the disclosure of which *it considers contrary* to its essential security interests, or to prevent any Member from taking any action which *it may consider to be necessary* to such interests:

- a. Relating to fissionable materials or their source materials;
- b. Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on for the purpose of supplying a military establishment;
- c. In time of war or other emergency in international relations, relating to the protection of its essential security interests . . . .

25. The text now referenced what a Member considered to be necessary, explicitly indicating that this provision could be invoked based on a Member's own judgment. Moreover, this reference was included only for national security issues, including actions which a Member may consider necessary for the protection of its essential security interests. The drafting history thus shows that a deliberate textual distinction was drawn between the self-judging nature of exceptions pertaining to essential security and exceptions related to other interests that, unlike the security-based exceptions referenced above, were retained as part of the "[g]eneral commercial policy" chapter of the ITO draft charter.

26. Regarding the exception's scope, at a July 1947 meeting of the ITO negotiating committee, the delegate from The Netherlands requested clarification on the meaning of a Member's "essential security interests," and suggested that this reference could represent "a very big loophole" in the ITO charter. The U.S. delegate responded that the exception would not "permit anything under the sun," but suggested that there must be some latitude for security measures. The U.S. delegate further observed that in situations such as times of war, "no one would question the need of a Member, or the right of a Member, to take action relating to its security interests and to determine for itself—which I think we cannot deny—what its security interests are."

27. In those discussions the Chairman made a statement "in defence of the text," and recalled the context of the essential security exception as part of the ITO charter. As the Chairman observed, when the ITO was in operation "the atmosphere inside the ITO will be the only efficient guarantee against abuses of the kind" raised by The Netherlands delegate. That is, the parties would serve to police each other's use of the essential security through a culture of self-restraint. During the same July 1947 meeting, the Chairman asked whether the drafters agreed that actions taken pursuant to the essential security exception "should not provide for any possibility of redress." In response, the U.S. delegate observed that such actions "could not be challenged in the sense that it could not be claimed that the Member was violating the Charter." The United States acknowledged, however, that a member affected by such actions "would have the right to seek redress of some kind" under Article 35(2) of the ITO charter.

28. At that time, Article 35(2) provided for the possibility of consultations concerning the application of any measure, "whether or not it conflicts with the terms of this Charter," which had "the effect of nullifying or impairing any object" of the ITO charter. If the parties were unable to resolve the matter, it could be referred to the ITO, which in turn could make recommendations, including the suspension of obligations or concessions.

29. In response to the explanation from the U.S. delegate, including the right to seek redress for non-violation under Article 35(2), the Australian delegate lifted a reservation on the essential security exception at this July 1947 meeting. The delegate from Australia stated that, as the exception was "so wide in its coverage"—particularly the "which it may consider to be necessary" language—Australia's agreement was done with the assurance that "a Member's rights under Article 35(2) will not be impinged upon."

30. This exchange demonstrates that the drafters of the text that became GATT 1994 Article XXI(b) understood that essential security measures could not be challenged as violating obligations in the underlying agreement. Nevertheless, an ITO member affected by essential security measures could claim that its expected benefits under the charter had been nullified or impaired, as set forth at Article 35(2) of the ITO Charter draft current in July 1947. As applied to the WTO context, this discussion indicates essential security measures cannot be found by a panel to breach the GATT 1994 or other WTO agreements, although Members may request that a panel review whether its benefits have been nullified or impaired by the essential security measure and, if so, to assess the level of that nullification or impairment.

31. This understanding of the relationship between essential security measures and nullification or impairment procedures is further confirmed by discussions of the ITO Charter that occurred in early 1948. For example, after "extensive discussions," a Working Party of representatives from Australia, India, Mexico, and the United States decided to retain the draft charter's non-violation nullification or impairment provision. The Working Party noted that the provision "would apply to the situation of action taken by a Member" to protect its essential security interests. The explanation of the Working Party is worth reading in full:

Such action, for example, in the interest of national security in time of war or other international emergency *would be entirely consistent with the Charter*, but might nevertheless result in the nullification or impairment of benefits accruing to other Members. Such other Members should, under those circumstances, have 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.

32. Members of a sub-committee on the ITO Charter's dispute settlement chapter expressed similar views. Thereafter, the essential security exception in the ITO draft charter was revised based on suggestions from the United Kingdom. The UK representative opined that with these revisions, the Charter "would neither permit, nor condemn, nor pass any judgment whatever on, unilateral economic sanctions." After the UK's revisions were accepted, a representative of India—when discussing nullification or impairment claims as a remedy for essential security measures—"expressed some doubt" about whether "the bona fides of an action allegedly coming within [the essential security exception] could be questioned." In early 1948, negotiators also declined to adopt a UK proposal that would have amended the essential security provision to state that nullification or impairment procedures were the appropriate recourse for members affected by essential security measures by other members. As the United States noted at the time, such a reference to nullification or impairment in the essential security provision was "unnecessary" in light of the existing text.

33. In its analysis of the negotiating history of Article XXI(b), the *Russia – Traffic in Transit* panel referred at length to internal documents of the U.S. delegation to the GATT negotiations. Specifically, in addition to considering published documents associated with the negotiating history of Article XXI(b), that panel considered a study that discusses internal documents of the U.S. delegation. In particular, the panel report recounts at some length this study's discussion of an internal U.S. delegation meeting of July 4, 1947. The panel used these documents as negotiating history to confirm the panel's interpretation that it had the authority to review a Member's invocation of its essential security interests. The Panel in *Russia – Traffic in Transit* erred in relying on such material because it is not "negotiating history" within the meaning of the Vienna Convention. It is concerning that the panel would commit such an elementary error in interpretive approach. Even putting aside this interpretative error, the panel also misunderstood and mischaracterized the U.S. discussions to which it referred. These internal U.S. deliberations—when considered as a whole and in context—further confirm that Article XXI(b) is self-judging.

34. The self-judging nature of Article XXI(b) is also supported by views repeatedly expressed by GATT contracting parties (now Members) in connection with prior invocations of their essential security interests.

C. *The Russia – Traffic In Transit Panel Erred In Deciding It Had Authority To Review A Responding Party's Invocation Of Article XXI.*

35. The panel in *Russia – Traffic in Transit* erred when it decided that it had authority to review multiple aspects of a responding party's invocation of Article XXI. That panel's interpretation of Article XXI is not consistent with the customary rules of interpretation set forth in the Vienna Convention. In addition to being inconsistent with the ordinary meaning of the terms of Article XXI, the panel failed to interpret that provision as a whole. In fact, the panel appears to have reached its conclusion regarding the reviewability of Article XXI a mere four paragraphs after beginning its analysis – based not on "the mere meaning of the words and the grammatical construction of the provision," but on what it termed the "logical structure of the provision."

36. Furthermore, in its examination of the negotiating history of the treaty, the *Russia – Traffic in Transit* panel misconstrued certain statements by negotiating parties and relied on materials not properly considered part of the negotiating history. These errors reveal the panel's analysis as deeply flawed and suggest a results-driven approach not in line with the responsibility bestowed on the panelists by WTO Members through the DSU.

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**ANNEX C****ARGUMENTS OF THE THIRD PARTIES**

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**ANNEX C-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA**

1. This executive summary integrates the Oral Statement and Responses to the Panel's Questions by China in these disputes.

**I. LEGAL CHARACTERIZATION OF MEASURES AS SAFEGUARD MEASURE**

2. China believes the Appellate Body in *Indonesia – Iron or Steel Products* has provided useful analysis as to what measure constitutes Safeguard measure.

3. The Appellate Body identified two constituent elements of a safeguard measure, i.e. (1) the suspension, in whole or in part, of a GATT obligation or the withdrawal or modification of a GATT concession; and (2) that the suspension, withdrawal, or modification in question is designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.

4. In China's view, the purpose of a safeguard measure is to prevent or remedy serious injury to a domestic industry caused or threatened by increased imports, through the mechanism of suspending, withdrawing, or modifying a GATT obligation or concession. That is what a safeguard measure "is", and a measure which meets the two constituent elements would be a safeguard measure. The remaining elements provided under Article XIX(1)(a) are legal requirements for the imposition of a safeguard measure rather than constituent elements of such a measure.

5. Furthermore, China believes that the characterization of a measure as safeguard measure is not a question of subjective intent, but independent and objective assessment of the features of the measure. In making this "independent and objective assessment", a panel must "identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject." The assessment of whether a measure is a safeguard measure is therefore an objective assessment based on the relevant characteristics of the measure, not the importing Member's subjective intent.

6. This conclusion is unaffected by the statement in Article XIX:1(a) that a Member "shall be free" to suspend an obligation in whole or in part or to modify or withdraw a concession, provided that the conditions for the imposition of a safeguard measure are satisfied. The phrase "shall be free" does nothing more than confer the right to impose a safeguard measure when the conditions for the imposition of such a measure are satisfied.

**II. ISSUES CONCERNING INTERPRETATION OF ARTICLE XXI(b)****i. Standard of Review**

7. China holds the view that, nothing in the DSU or elsewhere in the covered agreements allows a panel to perform its role any differently in disputes in which the responding Member invokes Article XXI(b) of the GATT 1994.

8. Article XXI(b) is an affirmative defense which, like other affirmative defenses, must be interpreted and applied to the facts of the case to determine whether it provides justification for any identified inconsistency. There are no special or additional rules or procedures that apply to a dispute in which the responding Member has invoked Article XXI(b), and the panel's function to undertake "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" is the same as in any other dispute.

9. Furthermore, the subparagraphs of Article XXI(b) represent an enumerated and exhaustive list of the circumstances under which a Member may seek to justify a particular type of action that is otherwise inconsistent with the GATT 1994. For the subparagraphs to be exhaustive and have

effective meaning, they must be objectively reviewable. Otherwise, Article XXI(b) would have the same meaning and effect as if the subparagraphs did not exist, and the circumstances described in the three subparagraphs would no longer constrain the circumstances in which a Member could invoke Article XXI(b).

## ii. Interpretation of Article XXI(b)

10. Within Article XXI (b), the phrase "which it considers" qualifies the phrase "necessary for the protection of its essential security interests". Thus, what a Member is permitted to determine, in its own judgment, is whether a particular action of a type set forth in subparagraphs (i) through (iii) is "necessary for the protection of its essential security interests". For an action in question to be justified under Article XXI(b), it must objectively fall within one of the three enumerated subparagraphs. Provided that the action in question is objectively within the scope of one (or more) of the enumerated subparagraphs, it is up to the invoking Member to determine whether the action in question is necessary for the protection of its essential security interests. The United States stands alone in asserting that the entirety of Article XXI(b), including its subparagraphs, is self-judging. This is clearly different from what was perceived from other parties and third parties.

11. The subjective element of the *chapeau* encompasses both the "necessity" of the action and the determination of the invoking Member's "essential security interests". The *chapeau* refers not to "necessity" in the abstract, but to the necessity of a particular action "for the protection of its essential security interests". The elements of this determination are not divisible – a Member's determination of whether a particular action is "necessary" includes the determination of whether that action is "for the protection of" what the Member considers to be "its essential security interests".

12. The phrase "any action which it considers necessary for the protection of its essential security interests" has two operative halves. The phrase "any action" is qualified by the three subparagraphs. Thus, any action for which justification is sought under Article XXI(b) must be one "*relating* to fissionable materials", "*relating* to the traffic in arms ...", or one "*taken* in time of war or other emergency in international relations". Provided that the action in question is of one or more of those types, the Member may determine, in its own judgment, whether that action is "necessary for the protection of its essential security interests".

13. China does not consider that the present disputes present a circumstance in which there is a potential conflict among the Spanish, French and English texts following the application of Articles 31 and 32 of the Vienna Convention. Rather, the minor differences in terminology, structure, and punctuation discussed in response to the preceding questions all point to the same conclusion: that the individual subparagraphs of Article XXI(b) are objectively reviewable in dispute settlement and do not form part of the self-judging element of that provision.

14. The individual subparagraphs of Article XXI(b) describe, exhaustively, the specific circumstances in which a Member may seek to justify an inconsistent measure under this provision. They serve the same function as the subparagraphs of Article XX, i.e. to delimit the scope of application of the exception.

15. The exhaustive nature of the three subparagraphs means there are no other circumstances in which a Member may invoke Article XXI(b) to justify a GATT-inconsistent measure. If those subparagraphs were considered "self-judging", there would be *no* constraint upon the circumstances in which a Member could justify a GATT-inconsistent action. Such an interpretation would defeat and run contrary to the exhaustive nature of the three subparagraphs.

16. In addition, if the self-judging element of Article XXI(b) were interpreted to encompass the three subparagraphs of this provision, those subparagraphs would be rendered inutile in violation of the principle of effective interpretation. Had this been the intention of the drafters, the three subparagraphs could have been omitted entirely and Article XXI(b) would have the same meaning and effect.

17. It is well established that an object and purpose of the GATT 1994 is to "promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade". An interpretation of Article XXI(b) under which the

applicability of its subparagraphs is to be determined by the invoking Member in its own judgment would be incompatible with the object and purpose of the GATT 1994, because a Member could, at any time and for any reason, excuse itself from compliance with its WTO obligations merely by invoking Article XXI(b). A consideration of the object and purpose of the GATT 1994 plainly supports the conclusion that the subparagraphs of Article XXI(b) are objectively reviewable by a panel. Otherwise, the security and predictability of the multilateral trading system would be obviously undermined.

18. Whatever the scope of the self-judging element in Article XXI(b), a Member's invocation of Article XXI(b) is, in all events, subject to the requirement of Article 26 of the Vienna Convention that a treaty must be performed in good faith.

19. The principle of good faith applies to the performance of any treaty obligation, including elements of a treaty that are committed to a party's discretion. It does not deprive a Member invoking Article XXI(b) of its right to determine its essential security interests in its own judgement and take measures it considers necessary for the protection of those interests. However, as a general matter, the pervasive nature of the obligation to act in good faith requires that even in relation to those elements of Article XXI(b) that are committed to a Member's discretion by virtue of the phrase "which it considers", the invoking Member must nevertheless invoke Article XXI(b) in good faith. This may require some explanation by the invoking Member of why it considered a particular element of Article XXI(b) to apply.

### **III. RELATIONSHIP BETWEEN ARTICLES XXI AND XIX OF THE GATT 1994 AND THE AGREEMENT ON SAFEGUARDS**

20. In China's view, the absence of an explicit cross-reference in the Agreement on Safeguards to Article XXI of the GATT 1994 is not determinative of whether Article XXI is available to justify measures that are inconsistent with the Agreement on Safeguards. It is, however, a pertinent interpretive consideration, and one that weighs against the conclusion that Article XXI is available in this circumstance.

21. The Appellate Body has stated that the relationship between provisions contained in two different agreements, including the applicability of a GATT exception to another agreement, "must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments". Within the framework articulated by the Appellate Body, the presence or absence of an express textual cross-reference is not dispositive. The only circumstance in which a GATT exception was found to be available notwithstanding the absence of an explicit textual cross-reference is where the provision at issue strongly implied the availability of the GATT exceptions.

22. The fact that the Agreement on Safeguards is an elaboration upon Article XIX of the GATT 1994 does not mean that Article XXI applies to the Agreement on Safeguards. This is true in respect of both those provisions of the Agreement on Safeguards that could be said to replicate provisions of Article XIX and those provisions of the Agreement on Safeguards that have no counterpart in Article XIX.

23. With has been said, China believes that nothing in the Agreement on Safeguards provides any indication that the exceptions provisions of the GATT 1994, including Article XXI, are available as potential justifications for measures that are inconsistent with that agreement.

**ANNEX C-2****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****1. INTRODUCTION**

1. In this dispute, the complainants have argued that the steel and aluminium measures are safeguards, inconsistent with the Agreement on Safeguards; that they are also inconsistent with the GATT 1994; and that they are not justified by Article XXI of the GATT 1994, even if the US chose to make out an Article XXI defence, and even if that provision applied.
2. In response, the US has said one thing only: Article XXI is "self-judging". In other words, as soon as the US "invokes" any part of Article XXI or Article XXI as a whole, the Panel is allowed to do no more than record that the "invocation" took place.
3. That assertion is baseless as a matter of law. It is also unacceptable from a systemic point of view. It cannot be that Members are able to escape their WTO obligations through mere unilateral "invocations". Going down that road would undermine everything that the dispute settlement system has achieved and reduce WTO law to inutility.
4. It is important to note the following: the US has not taken issue with a single fact or piece of evidence put forward by the complainants. It has not even tried to rebut the claim that the steel and aluminium measures are safeguards; any of the claims under the Agreement on Safeguards or the GATT 1994. Strikingly, for all its reliance on Article XXI, the US has not even raised an Article XXI defence. It has not said which "action" supposedly falls within Article XXI(b), whether or why it "considers it necessary", what it is "for", which "security interest" is at issue, whether and why it is "essential" , which of the three subparagraphs (if any) is at issue or why.
5. For these reasons and others, the EU considers that it should not be difficult for the Panel to find that the measures at issue are WTO-inconsistent.

**2. THE MEASURES AT ISSUE FALL WITHIN THE SCOPE OF THE AGREEMENT ON SAFEGUARDS, AND ARE INCONSISTENT WITH CERTAIN PROVISIONS OF THAT AGREEMENT****2.1. WHETHER THE AGREEMENT ON SAFEGUARDS APPLIES TO A MEASURE IS AN OBJECTIVE QUESTION TO BE DECIDED BY THE PANEL**

1. The EU recalls that, according to settled case-law, and as recently confirmed by the Appellate Body in the specific context of the Agreement on Safeguards, whether or not a measure is subject to the disciplines of the Agreement on Safeguards is an objective question. Contrary to what the US asserts in the Additional Duties cases, it is not a question to be decided unilaterally by the Member imposing the safeguard measure.
2. A reason why the characterisation of a measure as a safeguard must be an objective question is that Article XIX and the rules of the Agreement on Safeguards include important and fundamental rights of other WTO Members, notably the right to suspend equivalent GATT obligations. It cannot be that a WTO Member can deprive other WTO Members of these rights simply by choosing not to notify its measure as a safeguard measure or by not "invoking" Article XIX. The fulfilment of the requirements in Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards is a question of consistency, not of the applicability of the Agreement on Safeguards.
3. In making that objective assessment of whether a measure is a safeguard, the Panel must engage in a case-specific assessment, having regard to all of the relevant facts. In this respect, and again contrary to what the US asserts in the Additional Duties case, the domestic procedures pursuant to which a measure has been adopted are not determinative, and neither are the WTO procedures that have been followed, or not followed, by the adopting Member.

4. Indeed, the Appellate Body has previously held that the characterisation of a measure under a Member's municipal law is not dispositive of the question of whether or not that measure is governed by the provisions of a particular agreement.
5. What are, then, the true "constituent features" of a safeguard?
6. In the context of Article 1 of the Agreement on Safeguards, in order to be a safeguard measure, a measure must have two constituent features. First, it must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the relevant products. The constituent features of a safeguard measure are distinct from and not to be conflated with the conditions that must be met in order for the right to adopt, apply and maintain a safeguard measure to be exercised.
7. If the measures have "a specific objective" of preventing or remedying serious injury to the Member's domestic industry, they are subject to the disciplines of the Agreement on Safeguards.
8. In conducting its assessment, the Panel must have regard to the measure "as a whole". The US measures, with respect to steel and aluminium products, should be seen as the tariff and non-tariff treatment provided for, without qualification (that is, with respect to all WTO Members, as a whole).

2.2. THE AGREEMENT ON SAFEGUARDS APPLIES TO THE MEASURES AT ISSUE

9. The only reasonable outcome of an objective assessment is to conclude that the US measures are safeguards.
10. The facts speak for themselves: even on their face, the central objective, and at the very least "a specific objective" of the measures is protecting domestic steel and aluminium industry writ large from competition with imports, regardless of any alleged national security implications.
11. Applying the legal standard formulated by the Appellate Body, it is first of all clear that the US measures suspend at least one GATT obligation, in whole or in part, or withdraw or modify at least one GATT concession.
12. Indeed, prior to the Section 232 measures the US customs duties on the steel and aluminium products at issue were bound, as well as applied at the level of 0%. However, the US measures provide for a customs duty rate of 25% *ad valorem* for the relevant steel products and 10% *ad valorem* for the relevant aluminium products.
13. Thus, the US measures suspend at least one GATT obligation or withdraw or modify at least one GATT concession, per tariff line in question, in a manner that is inconsistent with Article II:1(b) of the GATT 1994.
14. According to the Presidential Proclamations, the US measures are designed to prevent or remedy a decline in the respective domestic industries caused by imports, and to provide a "relief" to those industries from competition with imports.
15. Indeed, the Steel Report, the Aluminium Report and the Proclamations point to several elements relevant to an injury analysis. The steel and aluminium import adjustments explicitly purport to assess a number of injury factors that are typically associated with a serious injury finding under Article 4.2(a) of the Agreement on Safeguards (the rate and amount of the increase in imports, the share of the domestic market taken by increased imports (import penetration), changes in the level of domestic sales, production and productivity, capacity utilization, profits and losses, and employment).
16. Thus, consistent with the legal standard identified by the Appellate Body in *Indonesia – Iron or Steel Products*, the US measures have a specific objective of preventing or remedying

serious injury to the US domestic steel and aluminium industries caused or threatened by increased imports of the relevant products.

17. An analysis of the "design, structure, and expected operation" of the steel and aluminium measures supports the conclusion that they are safeguard measures. The measures are *designed*, and *expected to operate*, such as to achieve a certain domestic capacity utilisation for all domestic producers of steel and aluminium, whether their products are linked to security needs or not. The *structure* of the measures also shows that their overwhelming concern is simply whether imports harm or threaten to harm "US producers writ large", with regard essentially to their "industrial and commercial sales". Any discussion of defence-related needs is brief, marginal, and would actually argue against the imposition of the measures.
18. Furthermore, there are several characteristics of the US measures that confirm that they are safeguards measures. While these aspects provide further support for the conclusion that the US measures are safeguards, it is not legally necessary to go beyond the two required "constituent features".

2.3. THE MEASURES AT ISSUE ARE INCONSISTENT WITH SEVERAL PROVISIONS OF THE AGREEMENT ON SAFEGUARDS

19. The EU agrees that the steel and aluminium measures at issue are inconsistent with several provisions of the Agreement on Safeguards. In particular:
- Article 2.1 (notably, because the US acted inconsistently with the provisions of Articles 4.1 and 4.2);
  - Article 2.2 (because the US did not apply the safeguard measures to the products at issue irrespective of their source);
  - Articles 4.1 and 4.2 (because the USDOC failed to properly demonstrate (i) an increase in imports of the steel and aluminium products at issue, (ii) the existence of serious injury (or threat thereof) to the US domestic steel and aluminium industries and (iii) a causal link between increased imports and serious injury (or threat thereof) with respect to the steel and the aluminium industries);
  - Article 5.1 (because the US has failed to apply its safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment);
  - Article 7.1 (because the safeguard measures make no provision for their application only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment, and without limitation to four years or any other period of time);
  - Article 7.4 (because the safeguard measures fail to make provision for the progressive liberalisation at regular intervals during the period of their application, the expected duration of which is over one year);
  - Article 11.1(a) (because the safeguard measures do not conform with the provisions of Article XIX of the GATT 1994 applied in accordance with the Agreement on Safeguards);
  - Article 12.1 (because the US failed to make the notifications listed in Article 12.1 of the Agreement on Safeguards);
  - Article 12.2 (because the US failed to provide the Committee on Safeguards with all pertinent information);
  - Article 12.3 (because the US failed to provide adequate opportunity for prior consultations with Members having a substantial interest as exporters of the product concerned when proposing to apply or extend the safeguard measures).

2.4. Article XXI is not a defence for claims under the Agreement on Safeguards

20. When another covered agreement specifically cross-references Article XXI of GATT 1994 and incorporates these security exceptions by reference, then the Article XXI exceptions will also apply to that other agreement. The Agreement on Safeguards does not contain a similar provision, which would lead to the incorporation by reference of the security exceptions of the GATT 1994. Thus, the GATT 1994 security exceptions are not available to justify breaches of the Agreement on Safeguards.
21. To confirm such a conclusion it is useful to follow a standard "analytical approach" developed by the Appellate Body, which entails an agreement-by-agreement analysis that starts with the text of the covered agreement in question, while keeping in mind that the lack of an express textual reference to a particular enumerated provision is not dispositive in and of itself. Cases such as *China – Publications*, *China - Raw Materials*, *China- Rare Earths* and *Thailand – Cigarettes (Philippines)* provide useful guidance in this respect.
22. It is up to the US whether or not it wishes to invoke Article XXI of the GATT 1994 at all and, should it wish to do so, to develop arguments taking into account the guidance provided by the Appellate Body in previous cases.
23. Indeed, the burden under Article XXI lies on the party raising the defence, which would in this case be the US. The same is true of the burden of showing why Article XXI applies in the context of the Agreement on Safeguards. The general point that there are textual links between the two agreements does nothing to *specifically* establish that Article XXI is available as a defence for inconsistencies with the Agreement on Safeguards.

**3. THE MEASURES AT ISSUE ARE INCONSISTENT WITH CERTAIN PROVISIONS OF THE GATT 1994**

24. The EU also agrees that the steel and aluminium measures at issue are inconsistent with several provisions of the GATT 1994.
25. First, they are inconsistent with Articles II:1(b) and II:1(a), because they impose duties in excess of bound rates. The bound duties provided in the US' Schedule for the steel and aluminium products at issue are 0%, while the duties imposed through the Presidential Proclamations are 25% ad valorem for steel products and 10% ad valorem for aluminium products.
26. Second, the import adjustments at issue are inconsistent with Article I:1 of the GATT 1994. The imposition of additional customs duties of 25% on steel products and 10% on aluminium products creates more favourable competitive opportunities on the US market for like products of certain origins, namely for products from countries that were exempted from the additional duties on steel and aluminium and have chosen instead a quota regime (exemptions have been agreed with Argentina, Australia, Brazil, and Korea).
27. Third, the administration of the product exclusions and the country exemptions by the US was not uniform, impartial or reasonable. Thus, it can be established that the US acted inconsistently with Article X:3(a) of the GATT 1994).

**4. ARTICLE XXI IS NOT "SELF-JUDGING"**

28. The US' view that that Article XXI is "self-judging" has been convincingly rejected by the Panel Report in *Russia – Traffic in Transit*. It is wrong in light of the text, context, object and purpose, and indeed useful effect of the GATT 1994. It is not supported by any of the materials referred to in Articles 31 and 32 of the VCLT, including supplementary means of interpretation.
29. In addition, while certain GATT Contracting Parties have expressed the view that Article XXI(b) is "self-judging", several others have repeatedly expressed diametrically opposed positions. Thus, the enquiry into the GATT 1947 palaeontology does not support the US position.

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30. The EU recalls, *first*, that Article XXI of the GATT 1994 is an affirmative defence. But it does not provide for an exception to the rules on jurisdiction laid down in the DSU or to the special rules on consultations and dispute settlement contained in Articles XXII and XXIII of GATT 1994. The DSU creates compulsory jurisdiction, and it contains no security exception.
  31. *Second*, interpreting Article XXI as a "non-justiciable" provision in this dispute would be inconsistent with the terms of reference of the Panel, which follow Article 7.1 of the DSU. It would also be inconsistent with Article 7.2 of the DSU, which specifies that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".
  32. Thus, the present dispute differs from the case under the GATT 1947 opposing the US and Nicaragua, where the terms of reference explicitly precluded that panel from examining or judging the validity or motivation for the invocation of Article XXI(b) by the US.
  33. *Third*, interpreting Article XXI as a "non-justiciable" provision would make it impossible for the Panel to "make an objective assessment of the matter before it", as required by Article 11 of the DSU, as the "matter" before the Panel must also include any defence under Article XXI raised by the US.
  34. *Fourth*, interpreting Article XXI as a "non-justiciable" provision would undermine one of the fundamental objectives of the DSU, as expressed in Article 3.2 of the DSU: security and predictability.
  35. *Fifth*, Article 23 of the DSU prohibits Members from making a determination to the effect that a violation has occurred, except through recourse to dispute settlement in accordance with the DSU. If Article XXI was "non-justiciable", a WTO Member, rather than the WTO adjudicating bodies, would be deciding unilaterally the outcome of a dispute.
  36. Finally, by way of illustration, the EU would like to point out that there are fundamental differences in the way that security exceptions are drafted in the GATT, on the one hand, and in other international agreements, on the other hand. For instance, an express text that comes very close to the idea of "non-justiciability" can be found in the KORUS FTA. There is no such text agreed by the WTO Membership in any of the covered agreements.
  37. Thus, the invocation of Article XXI by a defending party does not have the effect of excluding the jurisdiction of a panel.
  38. The EU fails to understand how Article XXI(a) can exempt the US from meeting its burden of proof under Article XXI(b). Like Article XXI(b), Article XXI(a) is also a justiciable provision. Any discretion accorded under it is not unlimited.
  39. The EU acknowledges that information relating to essential security interests is of a highly sensitive nature, but the respondent is expected at a minimum to explain in sufficient detail why such information cannot be shared with the Panel. There is nothing that would prevent a panel, if necessary, from adopting appropriate procedures to deal with sensitive information in cases involving the invocation of Article XXI. At any rate, even if the US was justified in not providing certain information pursuant to Article XXI(a), that would not discharge the US from its burden of proof in relation to Article XXI(b).
  40. Regarding the interpretation of Article XXI, in the EU's view, the phrase "which it considers" refers only to the necessity test and not to any other provisions. Furthermore, the subparagraphs to Article XXI(b) are exhaustive of the types of circumstances covered by the provision, and cannot be considered cumulative in nature. All those distinct circumstances are objective, and susceptible to a panel's assessment. Moreover, the terms "other emergency in international relations" do not extend to an "emergency" in commercial or trade relations.
  41. Concerning the negotiating history raised by the US, even under the Havana Charter, the correct position would have been that the predecessor to Article XXI is "justiciable", and not self-judging. Even under the Havana Charter, all issues arising out of the Charter were

intended to be subject to the dispute settlement procedures provided therein, whether involving the ITO itself (Articles 93-95 of the Havana Charter), or the ICJ (Article 96 of the Havana Charter). The evolution towards the WTO covered agreements, and notably the provisions of the DSU, further confirms that position.

42. Furthermore, the 1949 GATT Council decision cited by the US cannot be considered as a subsequent agreement on the interpretation even of the GATT 1947, or in any way binding to all the contracting parties to the GATT 1947. Still less could it be considered as binding under the GATT 1994. In any event, it also supports the complainants' position rather than that of the US.

**5. CONCLUSIONS**

43. What the US is advocating is, in fact, the end of a rules—based multilateral trading system. While the EU acknowledges the margin of discretion that WTO Members enjoy under the security exceptions, that discretion is not unfettered, but subject to certain objective elements, which can and should be subject to review by a panel
44. The EU hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the Agreement on Safeguards and of the GATT 1994.

**ANNEX C-3****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF HONG KONG, CHINA****I. INTRODUCTION**

In DS544, DS547, DS548, DS552, DS554, DS556, and DS564 ("the parallel disputes"), the complainants challenge the consistency of the measures imposed by the United States ("U.S.") on steel and aluminium products. Specifically, the complainants have challenged the U.S. measures under several of the core provisions of the GATT 1994, including Articles II:1 and I:1. The United States has sought to defend its measures pursuant to Article XXI(b) of the GATT 1994.

Hong Kong, China ("HKC") has participated in the parallel disputes because of its systemic interest in the correct interpretation and application of the provisions of the WTO-covered agreements at issue in these disputes and its substantial interest in the outcome of the parallel disputes.<sup>1</sup>

For the reasons set out in Hong Kong, China's written submission, oral statement, and responses to questions from the Panel to the third parties, Hong Kong, China respectfully submits that in its view, the complaints have established a *prima facie* case that the U.S. measures are inconsistent with the relevant provisions of the Agreement on Safeguards and the GATT 1994. Hong Kong, China further respectfully submits that the United States has failed to demonstrate that the U.S. measures are justified under Article XXI(b) of the GATT 1994.

Throughout these proceedings, Hong Kong, China has focused on the correct legal interpretation of Article XXI(b) of the GATT 1994 in light of the critical systemic implications of the U.S. proposed interpretation of this provision as entirely self-judging.

**II. THE COMPLAINANTS' CLAIMS UNDER THE AGREEMENT ON SAFEGUARDS AND THE GATT 1994**

As detailed in Hong Kong, China's written submission, Hong Kong, China considers that the complainants have each demonstrated that when evaluated objectively and in a manner consistent with the Appellate Body's statements in *Indonesia – Iron or Steel Products*, the U.S. measures are safeguard measures because (1) the measures suspend at least one GATT obligation, in whole or in part, or withdraw or modify a GATT concession, and (2) it is evident on the face of the measures and in their design, structure, and operation that the specific objective of such measures is to prevent or remedy serious injury to the U.S. steel and aluminium industries.<sup>2</sup> In Hong Kong, China's view, each of the complainants has also demonstrated that the U.S. measures are inconsistent with numerous provisions of the Agreement on Safeguards.<sup>3</sup>

**III. THE APPLICABILITY OF ARTICLE XXI OF THE GATT 1994 TO THE AGREEMENT ON SAFEGUARDS**

In its answers to questions from the Panel to the third parties, Hong Kong, China explained its view that Article XXI of the GATT 1994 is inapplicable to the Agreement on Safeguards.<sup>4</sup> Hong Kong, China considers the lack of an explicit reference to Article XXI or any other GATT exception in the Agreement on Safeguards, in particular, to be critical evidence that Article XXI is not available to justify violations of the Agreement on Safeguards. In Hong Kong, China's view, the general references in the Agreement on Safeguards to the GATT 1994 do not provide a sufficient legal basis to apply Article XXI to the Agreement on Safeguards. The Agreement on Safeguards strikes a balance between preserving the right of Members to take emergency action on imports and disciplining the use of safeguard measures. Consequently, allowing recourse to Article XXI of the GATT 1994 is both legally unjustifiable and potentially disruptive of this inherent balance.

<sup>1</sup> See Hong Kong, China's third-party submission, para. 1; third-party statement, paras. 2 and 3.

<sup>2</sup> See Hong Kong, China's third-party submission, paras. 5-8.

<sup>3</sup> See Hong Kong, China's third-party submission, para. 9.

<sup>4</sup> See Hong Kong, China's response to Panel questions Nos. 38(a), 38(c), 38(d), and 39. See also Hong Kong, China's third-party statement, paras. 10-12.

#### IV. ARTICLE XXI(B) OF THE GATT 1994

The United States has invoked Article XXI(b) of the GATT 1994 in respect of all of the complainants' claims. Therefore, for the reasons detailed in Hong Kong, China's answers to questions from the Panel to the third parties, the Panel has jurisdiction to examine and interpret Article XXI(b).<sup>5</sup> In particular, pursuant to Articles 7.2 and 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the Panel is required to address Article XXI(b) and conduct an objective assessment of whether Article XXI(b) applies to the U.S. measures.

Furthermore, since Article XXI(b) is an affirmative defence, the Panel should first evaluate whether each complainant has established a *prima facie* case that the U.S. measures violate certain provisions of the Agreement on Safeguards and the GATT 1994 and whether the United States has rebutted those claims, before turning to the interpretation and application of Article XXI(b) of the GATT 1994.<sup>6</sup>

In regard to the correct legal interpretation of Article XXI(b), it is Hong Kong, China's view that when analysed in accordance with Article 3.2 of the DSU and the general customary rules of interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), it is clear that this provision preserves the right of Members to take actions necessary for the protection of their essential security interests, but it is not entirely self-judging.<sup>7</sup>

Pursuant to Article 31 of the Vienna Convention, the terms of Article XXI(b) must be interpreted in good faith, in accordance with their ordinary meaning in their context, and in the light of the object and purpose of the GATT 1994. The language "which it considers" makes clear that Article XXI(b) contemplates a certain level of unilateral determination by the invoking Member. The placement of the language of "which it considers" in the *chapeau* indicates that it is up to the invoking Member to determine, in good faith, whether a measure is necessary for the protection of its essential security interests.<sup>8</sup>

Pursuant to the principle of effective treaty interpretation, a treaty interpreter may not "adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".<sup>9</sup> A proper interpretation of Article XXI(b) must therefore give meaning to all of the enumerated subparagraphs. If the language "which it considers" is interpreted to qualify the subparagraphs, the subparagraphs would be rendered inutile. In order to give meaning to all parts of Article XXI(b), the enumerated subparagraphs must be interpreted as subject to objective review by a WTO panel. Correctly interpreted, Article XXI(b) is therefore not entirely self-judging. This conclusion is supported by the fact that the *chapeau* does not include any terms to suggest that the enumerated subparagraphs do not exhaustively list the types of actions covered by Article XXI(b), such as "including" or "*inter alia*".<sup>10</sup>

This conclusion is further supported by the context provided by Article XX of the GATT 1994, which requires a "two-tiered" analysis, the first tier of which consists of objectively determining whether the measure at issue falls within the scope of one or more of the enumerated subparagraphs.<sup>11</sup>

The terms of Article XXI(b) must also be interpreted in light of their object and purpose, which as Hong Kong, China has explained, requires "avoid[ing] interpretations that would enable Members to

<sup>5</sup> See Hong Kong, China's answers to Panel questions Nos. 8-11. See also Hong Kong, China's third-party submission, para. 56.

<sup>6</sup> See Hong Kong, China's answer to Panel question No. 15; third-party submission, para. 4.

<sup>7</sup> See Hong Kong, China's third-party submission, paras. 20-32; third-party statement, paras. 13-21.

<sup>8</sup> See Hong Kong, China's third-party submission, para. 23. See also Hong Kong, China's response to Panel questions Nos. 13 and 14.

<sup>9</sup> See Hong Kong, China's third-party submission, para. 25, quoting Appellate Body Report, Japan – Alcoholic Beverages II, p. 12, quoting Appellate Body Report, US – Gasoline, p. 23; third-party statement, para. 19.

<sup>10</sup> See Hong Kong, China's third-party submission, para. 26; third-party statement, para. 18.

<sup>11</sup> See Hong Kong, China's third-party submission, paras. 27-29, quoting Appellate Body Report, US – Shrimp, paras. 118 and 119, quoting Appellate Body Report, US – Gasoline, p. 22 (explaining that the analysis under Article XX is "two-tiered: first, provisional justification by reason of characterization of the measure [under one of the subparagraphs]... ; second, further appraisal of the same measure under the introductory clauses of Article XX (emphasis added)" and explaining that this analysis reflects "the fundamental structure and logic of Article XX.").

'circumvent' or 'evade' their obligations," including those under Article XIX of the GATT 1994.<sup>12</sup> In this regard, Hong Kong, China has highlighted the statement by the panel in *Russia – Traffic in Transit* that a "general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade", and therefore "[i]t would be entirely contrary to the security and predictability of the multilateral trading system ... to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member."<sup>13</sup> Hong Kong, China concurs with the panel's statement.

In support of its interpretation of Article XXI(b) as entirely self-judging, the United States has advanced certain arguments relating to the *United States v. Czechoslovakia* dispute and the views previously expressed by WTO Members on Article XXI. Hong Kong, China respectfully submits that the United States has failed to demonstrate that the Panel should take into account these arguments as a matter of law, nor has the United States demonstrated that these arguments factually support the U.S. proposed interpretation of Article XXI(b).<sup>14</sup>

Finally, throughout these proceedings, Hong Kong, China has expressed strong disagreement with the U.S. view that the negotiating history detailed in the U.S. first written submission confirms that Article XXI(b) is self-judging.<sup>15</sup> Hong Kong, China has carefully examined the records of the discussions surrounding the evolution of the language "which it considers" and disagrees that they confirm that the drafters intended for this language to qualify the adjectival clauses that ultimately became the subparagraphs of Article XXI(b). As Hong Kong, China has highlighted in its submissions to the Panel, in contrast to the interpretation proposed by the United States in the present parallel disputes, in these early discussions the United States itself did not consider Article XXI(b) to be entirely self-judging or that Members' rights of redress in respect of the exception would be limited.<sup>16</sup>

## V. CONCLUSION

The text of Article XXI(b) of the GATT 1994, interpreted in its context and in light of the object and purpose of that agreement, establishes that for a measure to be justified under that provision, the action taken must objectively fall within the scope of Article XXI(b). As the party invoking Article XXI(b), the United States bears the burden of demonstrating that its measures fall within the scope of that provision.<sup>17</sup> Additionally, consistent with the general international law principle of *pacta sunt servanda* underlying all of the WTO-covered agreements, the Member invoking Article XXI(b) must do so in good faith. For the reasons explained in Hong Kong, China's submissions in the parallel disputes, Hong Kong, China respectfully submits that in its view, the complainants have met their burden of proof and established a *prima facie* case that the U.S. measures violate the relevant provisions of the GATT 1994 and the Agreement on Safeguards. Given that the proposed interpretation by the United States of Article XXI(b) is flawed and the United States has failed to meet its burden of proof under Article XXI(b),<sup>18</sup> Hong Kong, China also respectfully submits that the Panel should find that the U.S. measures are not justified under that provision.

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<sup>12</sup> See Hong Kong, China's third-party submission, para. 30, quoting Panel Report, Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines), para. 7.642.

<sup>13</sup> See Hong Kong, China's third-party submission, para. 31, quoting Panel Report, Russia – Traffic in Transit, para. 7.79 (internal citations omitted).

<sup>14</sup> See Hong Kong, China's third-party submission, paras. 33-36; 45-51, 54.

<sup>15</sup> See Hong Kong, China's third-party submission, paras. 42-44; third-party statement, paras. 22-24.

<sup>16</sup> See Hong Kong, China's third-party submission, paras. 42-44; third-party statement, paras. 22-24.

<sup>17</sup> See Hong Kong, China's third-party submission, para. 57, citing Appellate Body Report, US – Wool Shirts and Blouses, p. 16 (noting that the burden of establishing an affirmative defense "should rest on the party asserting it.").

<sup>18</sup> See Hong Kong, China's response to Panel questions Nos. 16-19, 21, 25, and 26.

**ANNEX C-4****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA****I. Introduction**

1. India notes that the United States does not contest any of the evidence presented and claims raised, by the complainants in any of the 6 disputes in which India is a third party. In other words, there is no longer any dispute that the measures at issue violate multiple provisions of GATT 1994 and Agreement on Safeguards.

2. The entirety of United States First Written Submissions is devoted to Article XXI(b) of GATT 1994. Essentially, the United States argues that mere invocation of Article XXI(b) shields the measures at issue from scrutiny by the Panel. India disagrees for the reasons outlined below. India also notes that the United States also fails to offer any explanation as to how Article XXI could be a defence against claims raised under Article XIX of GATT 1994 and Agreement on Safeguards (which are themselves an exception to the obligations contained in Articles I, II, X and XI of GATT 1994). Finally, the United States offers a generic defence under Article XXI without specifying the precise sub-clause it invokes and without presenting any facts to support the invocation of Article XXI. India submits that the burden of proof is on the United States<sup>1</sup> to establish that Article XXI applies in the facts and circumstances of the present dispute since Article XXI(b) of the GATT 1994 is an affirmative defence, just like Article XX.

**II. Justiciability of Article XXI(b) of the GATT 1994**

3. The United States argues that Article XXI(b) is "self-judging" and this "has been the consistently expressed view of the United States for more than 70 years".<sup>2</sup> Nothing could be farther from the truth<sup>3</sup>. Such assertion contradicts the comments made by the representatives of the United States when Article XXI (and its predecessor) were being drafted<sup>4</sup>.

4. India considers that the terms "justiciable/non-justiciable" can neither be found in the DSU nor in any other WTO covered agreements. These terms have not been addressed in past disputes except in *Russia – Traffic in Transit* in which the United States, intervened as a third-party<sup>5</sup>. Accordingly, India considers that these terms do not provide any guidance in relation to the standard of review to be applied to an invocation of Article XXI in dispute settlement proceedings.

5. India submits that the invocation of Article XXI of GATT 1994 is subject to review by the Panel. India notes that the Panel in *Russia – Traffic in Transit* supports India's position. The Panel held "[i]t would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements, including the concessions that allow for departures from obligations in specific circumstances, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member."<sup>6</sup>

6. India also recalls that the panel explicitly rejected the United States' position that Article XXI(b)(iii) is non-justiciable<sup>7</sup> and correctly found that Article XXI(b)(iii) of the GATT 1994 is not totally "self-judging" in the manner asserted by Russia in those proceedings. Although the United States has not specifically asserted that it is invoking Article XXI(b)(iii), it is unimaginable that any other sub-clause of XXI(b) could apply in the facts and circumstances of the present dispute.

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<sup>1</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16

<sup>2</sup> US' first written submission, para. 2.

<sup>3</sup> Panel Report, *Russia- Traffic in Transit*, Appendix – subsequent conduct concerning Article XXI of the GATT 1947, paras. 1.11 – 1.14 with regard to the views expressed by several US agencies in 1951 in *United States – Imports of Dairy Products* (1951).

<sup>4</sup> Exhibit USA-41, pp. 20-21.

<sup>5</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.52 and 7.103.

<sup>6</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.79.

<sup>7</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.103 and fn 183.

7. Further in the 1982 Decision Concerning Article XXI of the General Agreement (1982 Decision)<sup>8</sup> the contracting parties decided that a 'formal interpretation of Article XXI' was yet to be taken and, in the meanwhile, 'all contracting parties...retain[ed] their full rights under the General Agreement' and the GATT Council would give 'further consideration to this matter in due course'. Since this was a later and more specific agreement, which expressly resolved to keep the interpretation of Article XXI open-ended and subject to further consideration, any purported agreement which predated the 1982 Decision limiting the rights of parties to the GATT to this extent would be modified or set aside by the 1982 Decision. Accordingly, Article 31(3)(c) of the VCLT gives precedence to the 1982 Decision on the interpretation of Article XXI of GATT 1994.<sup>9</sup>

### III. Interpretation of Article XXI(b) of the GATT 1994

8. India considers that the phrase "which it considers" appearing in Article XXI(b) does not qualify the three subparagraphs of Article XXI(b). The subparagraphs only relate to the word "action" in the *chapeau*. In other words, the three subparagraphs identify circumstances (the first two identifying the types of goods and the third being a temporal circumstance) which must objectively be met in order for a Member to take action under the *chapeau*. India considers that the phrase "which it considers" relates only to the "necessity" of the action. *Per contra*, India is of the view that the phrase "for the protection of [that Member's] essential security interests" is not qualified by the terms "which it considers".

9. India acknowledges that the words "which it considers" imply that a certain degree of discretion is granted to the Member taking action. Accordingly, the standard of review would be somewhere between "total deference" and "*de novo*" review, both of which are excluded<sup>10</sup>. It implies that the United States must provide a rationale and plausible explanation regarding how or why it considers that its measures are "necessary" for the protection of its essential security interests. It is not India's position that the panel make a judgment on what the panel itself "considers" is "necessary" in the circumstances.

10. India also considers that the three subparagraphs to Article XXI(b) are exhaustive of the circumstances covered by that provision. Article XXI(b) does not include any language to suggest that the three paragraphs are merely illustrative. In that regard, it may be observed that Article XX of the GATT 1994 containing "General Exceptions" similarly includes ten subparagraphs numbered (a) to (j) without conjunction between the ten subparagraphs. The ten categories are exhaustive, implying that in order to be justified under Article XX, a measure must necessarily fall "under at least one of the ten exceptions listed under Article XX".<sup>11</sup>

11. India further considers that the words "relating to" in subparagraphs (i) and (ii) and "taken in time of" in subparagraph (iii) are words linking each subparagraph to the word "action" in the *chapeau*. Accordingly, there must be a substantive nexus between particular subparagraph, the challenged measure and the security interests in question.

12. Finally, India considers that each of the three subparagraphs of Article XXI(b) is a relevant context for the interpretation of the other two subparagraphs. The *chapeau* is also relevant context for interpreting the subparagraphs. In particular, the three subparagraphs suggest that purely economic interests would not fall within the scope of Article XXI(b)<sup>12</sup>. India submits that the phrase "other emergency in international relations" in Article XXI(b)(iii) must be interpreted on the basis of its ordinary meaning in light of its context.<sup>13</sup> The panel in *Russia – Traffic in Transit*, explained that *political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii) .... unless they give rise*

<sup>8</sup> Decision Concerning Article XXI of the General Agreement dated 30 November 1982, L/5426 at recital 3 and para 3 (2 December 1982).

<sup>9</sup> International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law 2006' UN Doc. A/73/10, p. 180, paras 17; VCLT, Articles 30, 41.

<sup>10</sup> Appellate Body Report, *EC – Hormones*, para. 115.

<sup>11</sup> Appellate Body Report, *Brazil – Tyres*, para. 139. See also, Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.96; Appellate Body Report, *China – Raw Materials*, para. 354; Appellate Body Report, *EC – Seal Products*, para. 5.169; Appellate Body Report, *US – Gasoline*, para. 57.

<sup>12</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.75 and 7.133.

<sup>13</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.71-7.76.

to defence and military interests, or maintenance of law and public order interests.<sup>14</sup> Accordingly, for emergency in commercial or trade relations to be covered by Article XXI(b), it must pose a threat to the functioning and/or stability of the respondent state, including the maintenance of law and public order. Further, the use of the word "other" clearly "indicate[s] that war is one example of the larger category of 'emergency in international relations'".<sup>15</sup> Thus, the phrase "or other" makes clear that the situation of "emergency in international relations" is of the same category as that arising in the context of "war".

13. Finally, India submits that three subparagraphs are not cumulative in nature. The subparagraphs describe three distinct circumstances in which a Member may invoke Article XXI(b). The intent of the drafters is reflected in the structure of that provision, which contains three separate subparagraphs, that are separated by a semicolon and deal with substantially different subject matters<sup>16</sup>. This interpretation has been confirmed by the panel in *Russia – Traffic in Transit*<sup>17</sup>. The United States is therefore required to identify a specific subparagraph of Article XXI(b) on which it relies as part of its defence. The respondent may, if it wishes, rely on more than one subparagraph. However, it must demonstrate that the conditions in each of the subparagraphs is satisfied.

#### **IV. Exception to an Exception under the GATT 1994**

14. India submits that the text and context of GATT 1994 do not support the proposition that the agreement provides an exception to an exception, i.e. specifically put, it is India's view that Article XXI(b) cannot be an exception to Article XIX. In this regard, India supports the interpretation proposed by Switzerland<sup>18</sup>. During the course of the substantive meeting India had argued that Article XIX and XXI are separate mechanisms which allow Members to derogate from their general obligations under GATT to address exceptional situations - economic emergency under XIX and security interests under Article XXI. The general obligations could be, for instance, obligations under Article I or Article II.

15. India further submits that assuming without conceding that the proposition advanced by the United States that Article XXI(b) is an exception to Article XIX, is tenable, the result would be merely a "release" for the United States from certain substantive and procedural obligations contained in Article XIX and the Agreement on Safeguards. This is because when a respondent seeks to apply Article XXI(b) as an exception to Article XIX, it makes two implicit admissions – (a) that the measure is indeed a safeguard measure; and (b) that by applying Article XXI(b), it is not required to follow the disciplines contained in Article XIX and the Agreement on Safeguards. As a result, the Complainants would then be free to apply rebalancing measures pursuant to Article 8.3 because the respondent has already admitted that the measure at issue does not conform to the provisions of Agreement on Safeguards.

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<sup>14</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.75. See also, paras. 7.71-7.76.

<sup>15</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.72.

<sup>16</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.68.

<sup>17</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.68.

<sup>18</sup> Opening Statement of Switzerland at the First Substantive Meeting of the Panel, *US – Steel and Aluminium Products (DS556)*, paras. 111 – 119.

**ANNEX C-5****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****I. INTRODUCTION**

1. Japan does not take a position on the merits of the claims and defenses that are before the Panel. However, Japan has a systemic interest in the scope of application of the Agreement on Safeguards and the availability of non-violation remedies when measures are justified under the security exception in Article XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

**II. SCOPE OF APPLICATION OF THE AGREEMENT ON SAFEGUARDS**

2. A "safeguard measure" is not a defined term or notion. Thus it seems to have limited value to try to draw a line of what is a safeguard measure and what is not. Japan therefore disagrees with the view that a measure is a safeguard measure when it contains certain elements, because such a view is based on the premise that there is a definition for "a safeguard measure". In order to determine whether a measure can be characterized as a safeguard measure for purposes of Article XIX of the GATT 1994 and the Agreement on Safeguards, various factors should be considered on a case by case basis taking into consideration all relevant factors.

3. Notifications submitted by WTO Members are an example of a factor that may be relevant in certain cases. Although notifications are not a prerequisite for the applicability of the safeguard disciplines to a measure, notifications indicate that the relevant measure is taken to remedy "serious injury or threat thereof." This provides some indication that the measure was designed to prevent or remedy serious injury and thus should be considered as one of the relevant factors when determining the applicability of the safeguard disciplines.

4. While notifications are an example of a relevant factor that may be considered to determine the applicability of safeguard disciplines, a WTO Member's formal "invocation" or its intention to exercise the rights under Article XIX of the GATT 1994 is not a necessary factor for the safeguard disciplines to apply. In fact, WTO panels and the Appellate Body have generally avoided relying on a WTO Member's subjective intent.<sup>1</sup> However, the Panel may consider the objectives pursued as reflected in the measure itself or in statements made by the Member taking the measure.

5. Ultimately, a panel must look at all of the evidence available to ensure that a WTO Member is not seeking to avoid the disciplines of Article XIX and the Agreement on Safeguards, or to frustrate other WTO Members' right to rebalancing measures. It is likewise important to consider all of the evidence, because otherwise, potentially, the Agreement on Safeguards could be applied to any measure raising the tariff above the Article II tariff bindings, including anti-dumping measures. This is particularly so given that a tariff by its nature only applies to imports, and thus even in the case of anti-dumping measures, the allegation could be made that they are a remedy for injury suffered by the domestic industry.

6. The terms "to suspend the obligation in whole or in part or to withdraw or modify the concession" under Article XIX of the GATT 1994 are not necessarily synonymous with violations of the GATT 1994. That is, it may be possible to determine that a Member withdrew or modified a concession without assessing whether there is a violation. Having said that, Japan recognizes that the determination of violation could turn out to be merely a consequential step that does not require much in terms of additional analysis. If the measure does not comply with the safeguard disciplines under Article XIX of the GATT 1994 and the Agreement on Safeguards, then consequently, it will be found simply to violate a GATT 1994 obligation.

7. A measure may have multiple objectives. For example, a measure may be taken for national security purpose as well as to prevent or remedy serious injury to domestic industries. In such cases, the application of Article XXI of the GATT 1994 as well as the Agreement on Safeguards may need to be considered, respectively. If a measure can be justified pursuant to Article XXI of the GATT 1994, there is no need to justify the measure pursuant to Article XIX of the GATT 1994 and

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<sup>1</sup> See, for example, Appellate Body Report, *US – COOL*, para. 420.

the Agreement on Safeguards. Article 11.1 (c) clarifies that measures that are in conformity with Article XXI of the GATT 1994, should not be prohibited by Article 11.1(b) of the Agreement on Safeguards and that such a measure need not be in accordance with the Agreement on Safeguards. In this regard, Article 11.1(c) is one of the articles in the WTO Agreement that seek to avoid situations where a measure that is WTO-consistent under one of the covered agreements becomes WTO inconsistent under another agreement.

8. On the other hand, when the measure at issue is not justified under Article XXI of the GATT 1994, the situation is more complex and a case-by-case analysis would be required. If the measure can be characterised as a safeguards measure, considering all relevant factors, the safeguard disciplines should be considered. If the measure falls under Article 11.1(b) of the Agreement on Safeguards, the measure should be withdrawn as such a measure is prohibited. Japan notes that in some cases, it may be unclear whether the measure at issue can be justified as a safeguard measure or whether it falls under the measures that are prohibited under Article 11.1(b) of the Agreement on Safeguards. In such a case, it would be necessary to engage in a case-by-case analysis, considering various factors to determine whether the measure is one of those that is prohibited or whether the measure can be characterised as a safeguard measure.

### **III. NON-VIOLATION CLAIMS AGAINST SECURITY MEASURES JUSTIFIED UNDER ARTICLE XXI(B) OF THE GATT 1994**

9. While Japan does not take a view on whether the measures at issue are justified under Article XXI(b) of the GATT 1994, Japan does not consider that the potential availability of a non-violation remedy, in and of itself, provides a basis for concluding that Article XXI(b) is self-judging, as suggested by the United States.

10. Japan considers that, if a measure that otherwise would be inconsistent with the GATT 1994 satisfies the security exception in Article XXI, then the appropriate conclusion to draw is that the measure does not conflict with the GATT 1994. This does not mean, however, that a non-violation finding under Article XXIII:1(b) can always be made against such measures. Indeed, there are several textual and contextual elements that appear to suggest that measures that satisfy Article XXI are very unlikely to be subject to a non-violation remedy or, at the very least, that a complaining party would have to overcome a high burden before succeeding in a non-violation claim in such circumstances.

11. First, Article XXI(b) permits a WTO Member to take measures that would otherwise be deemed inconsistent with the GATT 1994 in order to address essential national security risks. The purpose of the security exception under Article XXI(b) of the GATT 1994 would be frustrated if it were the case that security measures justified under Article XXI(b) were unvaryingly found to nullify or impair benefits accruing to other Members, or to impede the attainment of the objectives of the GATT 1994.

12. The exceptional nature of the non-violation remedy also weighs against applying a presumption that security measures justified under Article XXI(b) nullify or impair benefits or impede the attainment of objectives under the GATT 1994. In Japan's view, the very existence of a specific exception under Article XXI(b) might indicate that WTO Members did not necessarily expect that they would be challenged for actions that are properly justified under that exception.

13. Article XXIII:1 requires a panel examining a non-violation claim under Article XXIII:1(b) to assess whether there was a reasonable expectation, at the time that market access commitments were negotiated, that the WTO-consistent measure at issue would not be taken.<sup>2</sup> Given that WTO Members agreed that security measures taken under Article XXI(b) are permissible, they clearly contemplated the possibility that the security exception would be invoked and thus should be deemed to have reasonably expected that Members would have recourse to such an exception. Japan is of the view that WTO Members cannot reasonably expect that other Members will never rely on Article XXI(b) to justify measures otherwise inconsistent with GATT obligations.

14. It is by no coincidence that during the GATT-era, non-violation claims were mostly used to address subsidy measures, since at that time, explicit subsidy rules were not in place except for

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<sup>2</sup> See Panel Report, *Japan – Film*, paras. 10.76-10.77.

export subsidies. This situation arose not because the Contracting Parties agreed not to discipline subsidy measures, but because the Contracting Parties could not agree on the rules. Thus, "non-violation claims" were used to address issues that lacked explicit rules. Unlike such circumstances where there was lack of explicit rules, Article XXI contains explicit rules for security exceptions. If a measure fully satisfies the explicit rules in Article XXI, it would not be reasonable to expect that such measures could not be taken, and thus such a measure would not result in being subject to non-violation remedy.

## ANNEX C-6

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND

#### I. INTRODUCTION

1. New Zealand's participation in this dispute reflects its systemic interest in the proper interpretation of Article XXI(b) of the General Agreement on Tariffs and Trade 1994 (**GATT**). Article XXI(b) is being called upon by Members in a way that it has not been in the past. In this changing climate, it is imperative that Article XXI(b) is interpreted in a principled and robust manner that both preserves its utility and also guards against its abuse.

2. Article XXI(b) performs an important function. It permits Members to take measures that would otherwise conflict with trade obligations in order to protect certain essential security interests, and grants Members a degree of latitude to determine where this is necessary. This is not without limit, however. Article XXI(b) contains elements that are subject to objective review by a panel. Further, like all treaty provisions, Article XXI(b) must be applied in good faith. Whether this good faith obligation has been fulfilled is also a matter that is open to panel review. These limiting features maintain the utility of the national security exception for Members, while still preserving the security and predictability of the international trading system and protecting Article XXI(b) against misuse.

#### II. SCOPE OF PANEL REVIEW UNDER ARTICLE XXI(b) GATT

3. Article XXI(b) GATT provides that:

Nothing in this Agreement shall be construed

...

(b) to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests:

(i) relating to fissionable materials or the materials from which they are derived;

(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;

(iii) taken in time of war or other emergency in international relations;

4. A key issue in this dispute is the extent to which Article XXI(b) retains Members' discretion to determine the matters contained in that provision, and the extent to which action taken in reliance on it can be reviewed by a panel. As a preliminary point, it can be noted that this is not a question of justiciability. The fact that a provision fully or partially defers to the judgment of a Member will not, in itself, render conduct taken under that provision non-justiciable. As discussed further below, all treaties must be applied and performed in good faith.<sup>1</sup> Whether this obligation of good faith has been met is a justiciable matter susceptible to panel review. The degree of discretion retained by Members under Article XXI(b) will, however, impact upon the nature of a panel's assessment of that conduct. An examination of the scope of this discretion is therefore an appropriate place to start our interpretation.

#### **Article XXI(b) contains both elements that defer to Members' own judgment and elements that are capable of objective review by a panel**

5. The starting point to the interpretation of Article XXI(b) is the phrase 'which it considers' contained in the chapeau. It is clear from the words directly preceding the phrase, that the term 'it' is a reference to the relevant contracting party. To 'consider' means "to contemplate mentally, fix

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<sup>1</sup> Vienna Convention on the Law of Treaties, Articles 31(1) and 26; Appellate Body Report *US – Shrimp*, at para 158.

the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of".<sup>2</sup> This is an inherently subjective exercise. The use of 'which it considers' in the chapeau to Article XXI(b) signals that what is being referred to is a subjective assessment to be carried out in good faith by the relevant contracting party.

6. The phrase 'which it considers' qualifies both the assessment of the 'necessity' of the action taken *and* the determination of the invoking Member's 'essential security interests'. This is clear from the structure of the chapeau to Article XXI(b). The terms in the chapeau run one after the other. There is no grammatical or formatting division suggesting the phrase 'which it considers' applies only to the term 'necessary' and not to 'for the protection of its essential security interests'. This is further supported by the use of the term 'its' before 'essential security interests'. The chapeau is not referring to essential security interests in the abstract, it is referring to the essential security interests *of the particular Member* invoking Article XXI(b). It would be artificial to suggest that any entity other than a Member can determine that Member's essential security interests. It is for a Member, acting in good faith, to determine its essential security interests, and the measures necessary to protect those interests.

7. As recognised by the Panel in the recent decision *Russia – Traffic in Transit*, the phrase 'which it considers' does not qualify the three subparagraphs to Article XXI(b). Unlike the chapeau, the subparagraphs are framed in objective terms. As noted above, the chapeau uses '*it* considers' and '*its* essential security interests' to indicate that these are subjective matters left to the judgment of a Member. In stark contrast, the subparagraphs are framed in purely objective terms: whether the measures relate to fissionable materials; whether the measures relate to military materials; whether the measures were taken in a time of war or emergency in international relations. This reflects a deliberate effort to differentiate between those elements that are to be subjective and left to the judgment of a Member, and those that are objective requirements, subject to determination by a panel.

8. This interpretation is supported by the context of Article XXI(b), in particular, Article XXI(a), which provides that contracting parties shall not be required to furnish information the disclosure of which it considers contrary to its essential security interests. An objective assessment of a Member's asserted security interests and the necessity of action taken for their protection could require a panel to be provided with information contrary to Article XXI(a).

9. This interpretation is also supported by the object and purpose of the GATT. The general object and purpose of the GATT, as well as the Marrakesh Agreement Establishing the World Trade Organization, is to 'promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other barriers to trade'.<sup>3</sup> A number of provisions, including Article XXI(b), permit Members to take measure that would otherwise conflict with trade obligations in order to protect other interests. While these provisions grant Members a degree of flexibility, they contain in-built limits to preserve the security and predictability of the trading system and protect against abuse. The three subparagraphs to Article XXI(b) perform this important limiting function by delineating the factual circumstances in which Article XXI(b) can be invoked. As noted by the Panel in *Russia – Traffic in Transit*, it would be "entirely contrary" to the security and predictability of the multilateral trading system established by the above agreements to interpret Article XXI(b) as "an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member".<sup>4</sup>

10. Accordingly, whether the factual circumstances set out in one of the sub-paragraphs to Article XXI(b) exist is a matter subject to objective panel review. In carrying out this review, a panel should take into account the particular factual circumstances relevant to the invoking Member. It would be unhelpful to attempt to prescribe the scope of each of the factual circumstances contained in the sub-paragraphs. Whether a particular set of facts falls within the sub-paragraphs is a matter to be assessed on a case by case basis. An overly formulistic approach to the interpretation of the circumstances described in the sub-paragraphs could unduly limit the scope of Article XXI(b) and, in doing so, undermine its utility. The terms of Article XXI(b) are not static. They must be read by a

<sup>2</sup> [www.oed.com](http://www.oed.com). Last accessed 04 July 2019.

<sup>3</sup> See Appellate Body Report, *EC – Computer Equipment*, at para 82; Appellate Body Report *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, at para 433; Appellate Body Report *EC – Chicken Cuts*, at para 243.

<sup>4</sup> Panel Report, *Russia – Traffic in Transit*, at para 7.79.

treaty interpreter in the light of contemporary concerns of the community of nations.<sup>5</sup> The degree to which the existence of these factual circumstances must be substantiated by the Member relying on Article XXI(b) will also depend on the circumstances.

**Members are obliged to perform their obligations under Article XXI(b) GATT in good faith**

11. It is a principle of general international law that all treaty provisions must be interpreted and performed in good faith.<sup>6</sup> This obligation of good faith arises irrespective of whether a provision defers to the judgment of Members or is subject to objective review by a panel.

12. The obligation to perform a treaty in good faith requires Members to not use the exceptions in Article XXI(b) as a means to circumvent its obligations under GATT.<sup>7</sup> In carrying out an assessment of conduct taken in reliance on Article XXI(b), a panel may consider whether this obligation of good faith has been met. There is no test, in the abstract, for how a panel should assess whether this obligation of good faith has been met. 'Good faith' is not a threshold, or a standard of proof, it is an assessment of the integrity of a Member's performance of a particular treaty provision. This assessment will differ depending the facts and circumstances of the particular case. In the context of Article XXI(b), it will likely involve consideration of the connections between the measure in dispute, the essential security interests engaged and the factual circumstances in the relevant sub-paragraph. The question for the panel is whether, in all relevant circumstances, the Member's reliance on Article XXI(b) is a good faith performance of that provision.

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<sup>5</sup> Panel Report, *US – Shrimp*, at para 129.

<sup>6</sup> Vienna Convention on the Law of Treaties, Articles 31(1) and 26; Appellate Body Report *US – Shrimp*, at para 158.

<sup>7</sup> Panel Report, *Russia – Traffic in Transit*, at para 7.133.

**ANNEX C-7****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION****I. Introduction**

Russia welcomes this opportunity to present its views as a third party in these disputes.

Russia recalls that seven Members challenge the US' import adjustments on steel and aluminium products in parallel disputes.<sup>1</sup> The proper legal characterization of these measures is at the heart of each of them. The reasons and grounds for adopting the measures at issue are not country-specific and are applicable to all complaints, showing a significant overlap between these disputes.

While the Russian Federation recognizes the exclusive right of the respondent to choose its line of defense, the US ignored and, therefore, failed to rebut complainants' specific arguments regarding inconsistency of the measures at issue with the GATT 1994 and the Agreement on Safeguards merely asserting that these measures are consistent with Article XXI (b) of the GATT 1994. In this regard, Russia stands that (i) the US failed to invoke Article XXI(b) of the GATT 1994 to justify the measures at issue as necessary for protection of its essential security interests; (ii) the measures at issue are safeguards in their essence.

**II. The task of the Panel and the order of analysis**

The complainants in each of the seven disputes claim that the measures by the United States on certain steel and aluminium products fall within the scope of the Agreement on Safeguards and Article XIX of the GATT 1994. The United States, on the other hand, does not characterize its measures on steel and aluminium as safeguard measures: according to the United States, the measures were introduced pursuant to Section 232 of the Trade Expansion Act of 1962, aimed at protection of national security interests and fortification of steel and aluminium industries.

The fact that the measures at issue are not characterized by the United States under the domestic law as safeguards is, in and of itself, not dispositive of the question of whether the measures constitute safeguards within the meaning of Article 1 of the Agreement on Safeguards. Otherwise, the domestic characterization of a measure could negate Member's obligations under the WTO agreements.

In such a situation, the Panel's first task is to determine whether or not the measures at issue are designed: 1) solely to protect essential security interests of the United States; 2) solely to avoid injury (or threat thereof) to its national steel and aluminum industry from imports of like or directly competitive products; 3) combination of both items.

If the Panel positively concludes that the measures at issue fall solely under the first scenario (protection of essential security interests of the United States), it will be in a position to proceed with the analysis of the United States' defense under Article XXI(b) of the GATT 1994. If the Panel determines that the measures are designed to protect the US domestic steel and aluminum industries from the injury or threat thereof caused by imports of like or directly competitive products, the Panel may proceed with examining their consistency with Article XIX of the GATT 1994 and the Agreement on Safeguards.

To conclude, whether or not the measures by the United States qualify as measures provided for in Article XIX of the GATT 1994 or measures provided for in Article XXI(b) of the GATT or both is an objective question that the Panel must decide based on the objective assessment that it is required to make pursuant to Article 11 of the DSU. In making its objective assessment, the Panel must

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<sup>1</sup> These parallel disputes over the legality of the United States' import adjustments on steel and aluminium products, are DS544 (China), DS547 (India), DS548 (EU), DS552 (Norway), DS554 (Russia), DS556 (Switzerland) and DS564 (Turkey).

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engage in a case-specific analysis by examining all of the relevant facts and examine the constituent features of the measures at issue.

### III. Invocation of Article XXI(b) of the GATT 1994

There is no disagreement between the parties that the panels have jurisdiction to resolve the disputes, as the US confirms its existence. The Panels were established by the DSB with the standard terms of reference in accordance with Article 7.1 of the DSU, without any exemptions, exceptions or limitations thereto. Therefore, the Panel's function is to examine the matters set out in the panel requests and to make an objective assessment of the matter before it pursuant to Article 11 of the DSU, as well as the applicability of and conformity with the relevant covered agreements assisting the DSB in making its findings and recommendations. Making any provisions "non-justiciable", the way the US puts it forward, will directly prevent the Panel to meet this function.

Nothing in the Panel's terms of reference or in the WTO Agreements indicates that this Panel is not able to resolve the disputes and make necessary findings, or that invocation of Article XXI(b) of the GATT 1994 affects in any way or limits the ability of the Panel to make such findings and therefore to assist the DSB in making relevant findings and recommendations.

Specific attention should also be paid to the US attempts to introduce the concept of "justiciability" to the context of the WTO Agreement without providing any arguments based on the text of any of the WTO Agreements, including the DSU, in order to support this concept. Given that the WTO Agreements do not provide for this concept, explicitly or implicitly, Russia would like to caution the Panel from taking the path of bringing a new term to the WTO dispute settlement system and remind that the recommendations and rulings of the DSB cannot add to or diminish rights and obligations provided in the covered agreements. Introduction of a concept non-existent under the covered agreements clearly violates the provisions of Article 3.2 of the DSU.

Turning to the substance of Article XXI(b) of the GATT 1994, Russia would like to notice the following. It starts with a chapeau ("nothing in this agreement shall be construed") followed by the list of actions that may not be prevented by the application of the GATT 1994. In the wording of the chapeau of this Article there are no limiting conditions under which the measure applied shall fall. On the contrary, the chapeau provides that there could be no limitations in the Agreement for the specific purposes provided by that Article.

The wording in this part of the said Article provides that it is the Member taking the action who determines which actions are necessary to protect its essential security interests and excludes any objective examination or evaluation by adjudicative body. Therefore, the Panel is not in a position to make **an objective determination** as to whether the Member taking such an action is inconsistent with the chapeau.

The adjectival clause "which it considers" in the chapeau can be read to qualify the "necessity" of the action for the protection of the invoking Member's essential security interests, as well as the determination of these "essential security interests".

Thus, Russia considers that it is within the sole discretion of a Member to determine its essential security interests and what actions are necessary for their protection. Should a Member consider certain actions necessary to protect its essential security interests, the declaration thereof by that Member is enough to satisfy the requirements of the chapeau of Article XXI(b) of the GATT 1994. Neither WTO panels nor the WTO itself have the right to determine the essential security interests for the Member, whether the Member correctly chose the action necessary to protect those security interests and whether or not that action is indeed necessary.

The presence of subjective element, however, does not preclude the panels to assess the facts related to the measures at issue, applicability of the GATT to the measures at issue and conformity of the measures at issue with the relevant provisions. The possible panel's judgement that the term "which it considers" qualifies the determination of the essential security interests and necessity of the actions and, thus, leaves these elements under sole discretion of the Members, does not prevent the Panel to finish its analysis and resolve the matter before it in a WTO consistent way.

Meanwhile, the compliance with Article XXI(b) of the GATT 1994 is conditioned by three distinct settings (subparagraphs i-iii). These subparagraphs and the way they are formulated represent the objective elements that are susceptible to the Panel's review *au contraire* to the chapeau.

The required nexus between a particular subparagraph and the measures (actions taken to protect) is established through the phrases "relating to" (connection with subparagraphs (i-ii)) and "taken in time of" (connection with subparagraph (iii)).

As a result, the Panel shall determine whether the measures at issue meet the requirements of either subparagraph. In order to do so, the Panel shall assess the legal arguments and evidence provided in support. A conclusion that the measures meet these requirements is a necessary prerequisite in order to establish whether they could be justified under the national security exceptions.

However, Russia wishes to note that the US seems to have invoked only the chapeau of Article XXI(b) of the GATT 1994 without indicating which particular subparagraphs out of three applies and why. The reading of Article XXI(b) of the GATT 1994 proposed by the US makes part of this Article, i.e. subparagraphs (i)-(iii), redundant and inutile. However, the drafters of the GATT 1994 have specifically added the three subparagraphs qualifying the introductory statement, which must not be regarded as effectively absent in the text. The Panel bears the task of giving them their proper meaning.

Thus, Russia is of a position that when invoking Article XXI(b) of the GATT the respondent is under obligation to identify a particular subparagraph of Article XXI(b) of the GATT 1994. The complainants and the Panel should not be left to guess whether the measures in question are related to any of subparagraphs. Mere reference to Article XXI(b) without any identification of a particular subparagraph or any combination of such subparagraphs strips these paragraphs of all the meaning and reduces the text of the Article to its chapeau only.

Therefore, in these proceedings, the Panel was deprived of an ability to assess in which particular circumstances the measures at issue were taken and examine whether these particular circumstances really exist within the meaning of Article XXI(b)(i)-(iii). The US failed to fulfill its burden of proof and appropriately justify its defense.

Although the US failed to identify relevant subparagraphs and provide any arguments why they are applied in relevant situation, Russia would like to note the following.

None of the subparagraphs of Article XXI(b) of the GATT 1994 could be applied in the present situations since neither the relevant acts of the US, nor its submissions shed light on the close and genuine relationship between the measures in question and fissionable materials or the materials from which they are derived; or 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. Neither the relevant acts of the US, nor its submissions elaborate on any chronological concurrence in case of the measures at issue and any war or any other emergency in international relations that required the US to take said measures.

It is important to note that import adjustments on steel and aluminium (1) were implemented by the US through the same sources, same legal acts in respect of all the countries, (2) have the same reasoning and grounds for all of the adjustments in respect of all the Members affected, (3) it is not possible to isolate the cause for adoption of the measures at issue for one particular WTO Member.

Therefore, even if the Panel were in a position to engage into analysis of the applicability of any of the subparagraphs to any of the WTO Member in isolation, it would constitute an error since the measures at issue are not country-specific.

To sum up, in Russia`s view the task of the Panel is (i) to conclude that the chapeau of Article XXI(b) of the GATT 1994 is a subjective element, remaining in the discretion of the sovereign state, limited by the obligation of good faith; (ii) to assess whether the defending Member acted in good faith while imposing and maintaining the measures at issue; (iii) to review whether the defending Member met the requirements under subparagraphs. In respect of the latter, Russia is of the position that the US failed to establish a *prima facie* case under Article XXI(b) of the GATT, as it failed to 1) refer

to particular subparagraph, 2) provide all relevant evidence and explanations supporting that those actions taken for protection of the essential security interests (i) relate to fissionable materials, (ii) relate to traffic in arms, ammunition and implements of war, and/or (iii) were taken in time of war or other emergency.

In their turns, the complainants in these disputes have provided sufficient evidence to establish *prima facie* case of numerous violations under the Agreement on Safeguards and the GATT 1994. This evidence supports complainants' position that the measures at issue are purely safeguards in their nature, object and purpose and have nothing in common with the security exceptions. We believe that the nature of the measure could not be unilaterally determined by the Member. In order for a measure to be subject to security exception it is not enough just to label it as such under domestic procedures.

Russia would also like to note that if a particular measure complies with a particular provision of a particular WTO Agreement, this automatically means only one thing – that the measure complies with that provision of that particular WTO Agreement. This does not mean that the measure is automatically excluded from being subjected to provisions of another WTO Agreement. Therefore, if the measures at issue meet the requirements of Article XXI(b) of the GATT 1994, their consistency with Article XXI(b) of the GATT 1994 does not exclude the Panel's examination of the applicability of the Agreement on Safeguards.

There is no mutual exclusivity between the GATT 1994 and the Agreement on Safeguards. Article XIX of the GATT 1994 and the Agreement on Safeguards are silent in respect of particular reasons for a Member to seek to prevent serious injury to its producers as a result of increased imports, whether this is done for employment, protection of traditional industries, environmental, national security or any other reasons. Therefore, when a Member adopts an emergency action against such imports the Member shall comply with the requirements of Article XIX of the GATT 1994. If the prevention of injury is needed for national security purposes, the Member adopting the emergency action shall comply with the requirements of Article XXI(b) of the GATT 1994.

#### **IV. Legal characterization of measures at issue as safeguards**

The Russian Federation concurs with the complainants that the United States' measures at issue present the constituent features of safeguard measures within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards, and thus constitute safeguard measures on the basis of an objective analysis.

**First**, the United States has withdrawn or modified its tariff concessions and suspended at least one of its obligations under the GATT 1994. By introducing additional duties, the United States has exceeded the bound rate established under its Schedule of concessions on goods (Schedule), which amounts to withdrawal or modification of its tariff concessions. By withdrawing or modifying its concessions under the Schedule, the United States has suspended its obligations under Article II:1(a) and (b) of the GATT 1994.

**Second**, by their design, structure and expected operation, the import adjustments on certain steel and aluminium products sought to prevent or remedy the impairment to the domestic industry of the United States caused or threatened by increased imports of the subject products. This specific objective of the United States' measures is discernible from the texts of the U.S. President's respective Proclamations, as well as the investigation Reports on the effects of imports of steel and aluminium coupled with related documents, such as the U.S. President's Memoranda on imports of steel and aluminium, associated announcements, as well as numerous statements by the U.S. President.

**Third**, the withdrawal or modification of tariff concessions and suspension of GATT obligations have a demonstrable link to the prevention or remediation of the alleged serious injury.

In the range of legal instruments and official statements, the United States specifically declared that the measures are sought to stop the decline in its steel and aluminium industries caused by imports, to provide relief to those industries from competition with imports, to enable the respective domestic industries to increase their production capacity or capacity utilization and profitability, and to prevent the closures of production facilities.

Tariff concessions and obligations under the GATT 1994, in particular, those under Article II:1(a) and (b), however, impeded the ability of the United States to achieve its goals (prevention or remedying the alleged injury or threat thereof to the U.S. industry). Thus, the United States chose to suspend those tariff concessions and obligations. While suspending its tariff concessions and its obligations under Article II:1(a) and (b) of the GATT 1994, the United States has limited imports of steel and aluminium products by making steel and aluminium products originating from certain Members more expensive when marketed in the United States.

Hence, there is a clear link between the withdrawal or modification of tariff concessions and suspension of GATT obligations to the prevention or remediation of the alleged serious injury.

The US in support of its position states that notification under the relevant provisions of Article XIX of the GATT 1994 and of the Agreement on Safeguards is a prerequisite to the applicability of safeguard disciplines to the measures taken. In respect of import adjustments on certain steel and aluminium products it did not notify them as safeguard measures, on this basis, in its view, the measures could not be deemed safeguards. These allegations must fail.

Notifications pursuant to Article XIX:2 of the GATT 1994 or Article 12 of the Agreement on Safeguards are neither necessary condition nor a prerequisite for the applicability of safeguard disciplines. The compliance with any of obligations set forth in Article XIX:2 of the GATT 1994 and Article 12 of the Agreement on Safeguards does not affect the consistency of measures with *other* provisions under Article XIX of the GATT 1994 and the Agreement on Safeguards.

Absence of a notification does not and cannot change any of the constituent features of safeguards measures. Being otherwise would help Members to escape from application of the provisions of the Agreement on Safeguards and negative consequences to their measures (for example, DSB's finding on inconsistency of such measures with the Agreement on Safeguards).

Notification requirements are not an instrument of characterization or identification of measure's nature, but of transparency. Otherwise, if the applicability of a WTO agreement were to be established based on Member's compliance with the notification requirements:

- should that be so, the issue of the applicability of an agreement would be excluded from objective assessment by a panel, as it would be left for Member's discretion to choose a particular agreement under which to notify its measure;
- in such a logic a measure that was not properly notified under particular agreement becomes non-existent, as by not notifying that measure under any agreement at all a Member effectively declares that there are no relevant notification requirements that a measure falls under. Therefore, there's no WTO agreement that measure is covered by.

Furthermore, the United States claims that the Agreement on Safeguards does not apply to measures that a Member considers necessary for the protection of its essential security interests through Article 11.1 (c) of the Agreement on Safeguards, which provides that "this Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX". In this regard, Russia notes the following.

Hypothetically, there might be three scenarios. First, a measure is sought, taken or maintained exclusively pursuant to provisions of Article XIX of the GATT 1994. Second, a measure is sought, taken or maintained pursuant to provisions of Article XIX of the GATT and some other provisions of the GATT 1994. Third, a measure is sought, taken or maintained exclusively pursuant to provisions of the GATT 1994 other than Article XIX of the GATT 1994. Only the latter category of measures is excluded from the scope of the Agreement on Safeguards in accordance with Article 11.1(c).

We note that every term in this Article, as any treaty provision, has its own meaning and due attention should be paid to it. Without providing definitions of the terms "sought", "taken" or "maintained" Russia is of the view, that they represent different stages of measure's "life", i.e. whether a Member tries to take the measure (initial stage where the measure does not exist yet), whether a Member has already taken the measure (the action is made, measure becomes alive) and "maintained" (the measure exists for some time, long lasting measure that continues to exist).

The second interpretation of the words "seek", "take" and "maintain" may be derived from the text of Article 11.1(b) which uses the same combination of the terms. In the context of this provision it is obvious that the word "seeks" is used in the meaning "asks/requests from someone". This provision covers measures, in particular, in respect of exports, that can only be obtained from another Member. Therefore, the text of Article 11.1(b) effectively says that a Member must not request another Member to adopt, in particular, exports restrictions. Given that the forms in which "emergency actions" may be taken under Article XIX of the GATT and the Agreement on Safeguards are not predetermined or exhaustively listed, the same meaning of the term "seek" may be applied in the context of Article 11.1(a) or 11.1(c).

## **V. Conclusion**

Russia has already noted that each of the seven disputes has the same subject matter and, therefore, there is a significant overlap between them. This fact has a bearing on how the panels in the respective disputes should go about the ensuring security and predictability to the multilateral trading system. The delicate issue here is that when two or more panels are tasked with the duty to resolve the same matter or closely related claims such a situation raises complex issues. The most dangerous consequence of the parallel proceedings involving the same or closely connected matters is the contradictory outcome of the disputes. This should be avoided.

It follows from Articles 3.2 and 3.4 of the DSU that a holistic and coherent resolution of all parallel disputes is *critical* for the overall vitality of the multilateral trading system.

Russia reminds that the ultimate goal of the Panel is to make such findings "as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" pursuant to Article 11 of the DSU. The achievement of this goal will be seriously prejudiced should the panels arrive at the different conclusions as for the proper legal characterization of the measures at issue in the respective disputes, given that these measures are the same.

**ANNEX C-8****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE****I. INTRODUCTION**

1. This dispute raises novel issues concerning the interpretation of Article XXI of the GATT and whether it can be used as a defence to justify inconsistencies with the Safeguards Agreement. Singapore is not commenting on the merits of the claims and defences raised by the parties to the current disputes. Singapore's participation is strictly limited to whether Article XXI is applicable to and can be used as a defence to justify inconsistencies with the Safeguards Agreement, whether a Panel has jurisdiction over Article XXI, and the interpretation of Article XXI, in particular, the chapeau of Article XXI(b).

**II. EXECUTIVE SUMMARY OF SINGAPORE'S THIRD PARTY ORAL STATEMENT****A. *Whether Article XXI is applicable to and can be used as a defence to justify inconsistencies with the Safeguards Agreement***

2. Article XXI is not applicable to and cannot be used as a defence to justify inconsistencies with the Safeguards Agreement. The Appellate Body has applied a standard "analytical approach" in determining the relationship between the provisions of different covered agreements<sup>1</sup> and the absence of an explicit cross-reference to Article XXI in the Safeguards Agreement is not *per se* dispositive of the issue.
3. Safeguard measures allow WTO Members to take action that would otherwise be incompatible with their obligations under the GATT 1994<sup>2</sup>. Article XIX of the GATT 1994 and the Safeguards Agreement operate to provide for the suspension of the application of the obligations under the GATT 1994, and may be imposed "only" where the conditions and circumstances listed in the relevant provisions are satisfied<sup>3</sup>. In other words, the Safeguards Agreement already provides a comprehensive set of provisions as to when a Member may justifiably apply safeguard measures. Allowing Article XXI to apply as an exception to the Safeguards Agreement would not be aligned with the comprehensive nature of the Safeguards Agreement and would be inconsistent with the intent to provide greater discipline when Members apply safeguard measures.
4. Further, the Safeguards Agreement is a different creature from other WTO Agreements as it essentially provides for the suspension of GATT obligations. To layer Article XXI over and above the provisions of the Safeguards Agreement would require a clear intent to be distilled from the text of those provisions read in their proper context. This is not the case here. Given the *sui generis* nature of the Safeguards Agreement, our views are confined to the Safeguards Agreement only.

**B. *The Panel's jurisdiction in respect of Article XXI***

5. The Panel has jurisdiction over any Member's invocation of Article XXI in WTO dispute proceedings and the Panel is required to address such invocation. The phrase "shall address" in Article 7(2) of the DSU indicates that panels are "required to address the relevant

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<sup>1</sup> This requires an agreement-by-agreement analysis that starts with the text of the agreement in question, and entails a "thorough analysis of the relevant provisions", on the understanding that the lack of an express textual reference is not dispositive in and of itself (Appellate Body Report, *China – Rare Earths*, paras. 5.61 – 5.63). The relationship must be "ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments." (Appellate Body Report, *China – Rare Earths*, para. 5.55).

<sup>2</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.54.

<sup>3</sup> Article 2 of the Safeguards Agreement. The preparatory materials to the Safeguards Agreement and the preamble to the Safeguards Agreement confirm this.

provisions in any covered agreement or agreements cited by the parties to the dispute"<sup>4</sup>. This means that the Panel must address the relevant provisions to the dispute at hand, including Article XXI(b). The plain and ordinary meaning of the DSU's provisions do not speak of any exceptions to the application of Articles 7(1) (which set out the Panel's terms of reference) and 7(2).

**C. Interpretation of Article XXI(b) – the applicable test**

6. To the extent that the non-justiciability of a claim under Article XXI(b) relies on an interpretation that Article XXI(b) is totally self-judging, such an interpretation should not apply based on the explanation below. First, the word "it" in the phrase "it considers necessary" clearly refers to a "contracting party". The focus of any scrutiny therefore has to be from the standpoint of the invoking Member and whether that Member considers the action to be necessary. This phrase points to the self-judging nature of the assessment and indicates that a Member is allowed to determine the elements of the chapeau with a significant degree of subjectivity. Second, the assessment of threats to the essential security interests of a Member and the necessary measures in response involves judgment on the part of that Member and is dependent on the particular context and circumstances of that Member. There is necessarily a degree of subjectivity in this exercise, and an accompanying diversity of assessments that has to be respected. Third, there are many areas in the WTO regime where some margin of appreciation is accepted<sup>5</sup>.
7. A higher level of deference and a significant margin of appreciation should be accorded to a Member's chosen level of protection, and its assessment of risk and of the necessity of a measure taken for the protection of its essential security interests.
8. Notwithstanding the above, Article XXI(b) should not be read as giving a Member entirely unfettered discretion in invoking this exception. For this exception to be meaningful, a Member must act in accordance with the standard of good faith as set out in Article 26 of the Vienna Convention on the Law of Treaties<sup>6</sup> and with the general international law prohibition of abuse of rights. It is also well accepted that a Member seeking to rely on an affirmative exception bears the burden of proof. The Member invoking Article XXI would have to provide its reason(s) for doing so, by minimally explaining its course of action and invocation of Article XXI, bearing in mind the margin of appreciation to be accorded to Members on matters involving their essential security interests. The extent and degree of detail required is fact and context specific and will be informed by the specific circumstances surrounding the invocation, as well as the underlying security and confidentiality considerations.
9. We have carefully considered the *Russia – Traffic in Transit* panel's approach in interpreting Article XXI(b)(iii) in the context of certain prohibitions on goods traffic in transit, and generally agree with that panel's analysis of Article XXI(b)(iii).

**III. EXECUTIVE SUMMARY OF SINGAPORE'S RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES**

**A. Response to Question 8**

10. There are no provisions in the DSU that support a distinction between justiciable and non-justiciable matters in relation to the measures that are the subject of the present dispute.

<sup>4</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 49.

<sup>5</sup> For example, in the context of the SPS Agreement, the Appellate Body has recognised that "[t]he determination of the appropriate level of protection... is a prerogative of the Member concerned and not of a panel or of the Appellate Body" (Appellate Body Report, *Australia – Salmon*, para. 199). The Appellate Body also noted, in relation to the necessity of a measure taken for the protection of health under the GATT 1994, that "... it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation" (Appellate Body Report, *EC – Asbestos*, para. 168.).

<sup>6</sup> Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

**B. Response to Question 10**

11. We agree with the panel's statements in *Russia – Traffic in Transit* that "[g]iven the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994... [the] invocation of [Article XXI(b)] of the GATT 1994 is within the Panel's terms of reference for the purposes of the DSU."<sup>7</sup>

**C. Response to Question 13**

12. We agree with the panel's statements in *Russia – Traffic in Transit* that "[t]he obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994" and that "[i]t is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity"<sup>8</sup>.

**D. Response to Question 14**

13. The good faith test is met when a Member demonstrates that it has in good faith, albeit subjectively, considered, based on information available, that there is a threat to its essential security interest, and that its chosen action is necessary for the protection of its security interest.

**E. Response to Question 15**

14. Article XXI is an affirmative defence and the invoking Member bears the burden of proof<sup>9</sup>.

**F. Response to Questions 16 and 17**

15. The phrase "which it considers" applies to the entire chapeau of Article XXI(b)<sup>10</sup>.

**G. Response to Question 18**

16. A panel should consider whether a Member's invocation of Article XXI is consistent with the principle of good faith, while recognising the element of self-judgment in Article XXI.

**H. Response to Question 19**

17. The Member invoking the exception bears the burden to show that it has, in good faith, considered, based on the information available, that the elements of Article XXI(b) are made out. The extent and detail required to demonstrate this is fact and context specific.

**I. Response to Question 20**

18. The subparagraphs to Article XXI(b) are exhaustive of the types of circumstances covered by the provision. Typically, phrases like "including"<sup>11</sup> denote that a list is merely illustrative. Nothing in Article XXI(b) suggests that the subparagraphs are merely an illustrative list. In interpreting the circumstances in the subparagraphs, a panel should adopt a contextual approach.

**J. Response to Question 21**

19. A nexus between a particular subparagraph and the challenged measure is required. The determination of that nexus should be done in good faith, taking into account the Member's circumstances and concerns.

<sup>7</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.54 and 7.56.

<sup>8</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.133 and 7.134.

<sup>9</sup> As noted by the panel in *Russia – Traffic in Transit*, it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity." (Panel Report, *Russia – Traffic in Transit*, para. 7.134.)

<sup>10</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.130 – 7.133 and 7.146.

<sup>11</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 4.161.

**K. Response to Question 25**

20. A panel should consider whether a Member's invocation of Article XXI is consistent with the principle of good faith, while recognising the element of self-judgment in Article XXI.

**L. Response to Question 26**

21. A panel will need to assess if a Member has acted in accordance with the standard of good faith and with the general international law prohibition on abuse of rights.

**M. Response to Question 27**

22. Factual evidence is relevant to considering the applicability of the conditions provided in the subparagraphs of Article XXI(b). The extent and degree of detail required is fact and context specific.

**N. Response to Question 28**

23. Subparagraphs (i) to (iii) inform each other as to the overall subject matter and scope of applicability of Article XXI(b)<sup>12</sup>.

**O. Response to Question 29**

24. Subparagraphs of Article XXI(b) are not cumulative in nature<sup>13</sup>.

**P. Response to Question 30**

25. It is inadvisable to put forward a label or prescriptive definition of "other emergency in international relations". We agree with the panel's statements in the *Russia – Traffic in Transit* panel report that there is a useful "sliding scale" of circumstances that might qualify as an "emergency in international relations" and could include any circumstances that fall within the description of "heightened tension or crisis", or "general instability engulfing or surrounding a state"<sup>14</sup>. We also agree that it is incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity<sup>15</sup>; and what qualifies as a sufficient level of articulation will depend on the emergency in international relations at issue<sup>16</sup>. The Member would also need to demonstrate that its measure is applied in good faith.

**Q. Response to Question 31**

26. Both Articles XX<sup>17</sup> and XXI(b) are affirmative defences. A Member seeking to rely on either exception bears the burden of proof. With respect to measures under Article XXI, a higher level of deference and a significant margin of appreciation should be accorded to the WTO Member's chosen level of protection, its assessment of risk, and of the necessity of a measure taken for the protection of its essential security interests, as compared to those taken under Article XX. This is because Article XXI(b) contains the additional phrase "it considers necessary", which is not present in Article XX.

**R. Response to Question 32**

27. Article XXI(a) is concerned with a scenario where a Member is asked to furnish information, the disclosure of which it considers contrary to that Party's essential security interest. In contrast, Article XXI(b) deals with the situation in which a Member takes actions which it considers necessary for the protection of its essential security interest. There is an element of subjectivity in both Article XXI(a) and Article XXI(b) but the principle of good faith and the general international law prohibition of abuse of rights applies to both.

<sup>12</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.65, 7.67 and 7.74.

<sup>13</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.68.

<sup>14</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.76.

<sup>15</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.134.

<sup>16</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.135.

<sup>17</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16 and Appellate Body Report, *US – Shrimps*, para. 121; Appellate Body Report, *EC – Asbestos*, paras. 115 – 116.

**S. Response to Question 34**

28. See paragraphs 3 and 4 above.

**T. Response to Question 36**

29. If the Panel determines that the measures are safeguard measures within the meaning of Article XIX and the Safeguards Agreement, Article XXI of the GATT 1994 does not apply.

**U. Response to Question 37**

30. The phrase "nothing in this agreement" in Article XXI(b) should be interpreted as referring to the obligations under the GATT 1994. It should not be interpreted to allow Article XXI(b) to operate as an exception to the conditions for suspension of GATT obligations under Article XIX as this would render the strict conditions of Article XIX and the Safeguards Agreement meaningless.

**V. Response to Questions 38 and 39**

31. While the references to Article XIX in the Preamble, Articles 1<sup>18</sup> and 11.1(a) of the Safeguards Agreement reflect a relationship between Article XIX of the GATT and the Safeguards Agreement, they do not establish any textual basis for applying Article XXI of the GATT 1994 to the Safeguards Agreement<sup>19</sup>.

**W. Response to Question 40**

32. The general interpretative note to Annex 1A of the WTO Agreement indicates that the GATT 1994 and the other agreements are to be considered together<sup>20</sup>. Thus, if a conflict were to exist between a Safeguards Agreement provision and a GATT 1994 provision, the Safeguards Agreement provision would prevail to the extent of the conflict. Applying the panel's definition of "conflict"<sup>21</sup>, the justification of a measure under Article XXI that would otherwise be prohibited under the Safeguards Agreement would not give rise to a "conflict" within the meaning of the General Interpretative Note, since Article XXI cannot be considered a permissive obligation. The presumption against conflict should also be borne in mind<sup>22</sup>. In any case, our position is that Article XXI cannot apply as an exception to the Safeguards Agreement.

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<sup>18</sup> Article 1 of the Safeguards Agreement provides that the term safeguard measure "shall be understood to mean those measures provided for in Article XIX of GATT 1994." The Appellate Body stated that Article 1 of the Safeguards Agreement "suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures" (Appellate Body Report, *Argentina – Footwear*, para. 83).

<sup>19</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* supports this interpretation. The question there was whether Article XX of the GATT applied to the CVA. Similar to the preamble to the Safeguards Agreement, the preamble to the CVA referred to the Members' desire to "further the objectives of the GATT 1994" and recognises "the importance of the provisions of Article VII of GATT 1994 and desir[e] to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation". The panel found that the language and the title to the CVA reflects a general link between the CVA and the GATT 1994, but it does not establish any textual link to Article XX of the GATT, and consequently does not establish any affirmative textual basis for concluding that Article XX applies to the CVA (paras. 7.748 and 7.749).

<sup>20</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 8.

<sup>21</sup> The panel made the following observation on the definition of "conflict" as set out in the General Interpretative Note, stating that "[i]n light of the wording, the context, the object and the purpose of [the General Interpretative Note], we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits" (Panel Report, *EC – Bananas III (Ecuador)*, para. 7.159).

<sup>22</sup> Panel Report, *Indonesia – Autos*, para. 5.349.

**ANNEX C-9**

## INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SWITZERLAND

## I. Introduction

1 Switzerland intervenes because of its systemic interest in the correct and consistent interpretation and application of the provisions of the covered agreements at issue in this dispute and its substantial trade interest. Switzerland also has a particularly strong interest in the present dispute because it relates to the *same matter* as the matter raised by Switzerland in DS556 and by five other WTO Members in their own disputes against the United States.

## II. The Panel has jurisdiction to review the invocation of Article XXI(b) of the GATT 1994

2 The United States claims that Article XXI(b) which it invokes is "self-judging" and therefore the Panel may not make findings on Norway's claims. Thereby, although the United States asserts that it does not dispute the Panel's jurisdiction, in essence it argues that there is nothing for the Panel to decide other than to note that the United States has invoked Article XXI(b) of the GATT 1994.

3 Switzerland notes that there are various principles and obligations included in the WTO covered agreements, in particular in the DSU, which confirm that the Panel has jurisdiction to review the invocation by the United States of Article XXI(b).

4 First, Article 1.1 of the DSU provides that the rules and procedures of the DSU apply to disputes brought pursuant to the consultation and dispute settlement provisions of, *inter alia*, the GATT 1994, without excluding Article XXI(b). Furthermore, neither Article XXI(b), nor any other provisions of the GATT 1994 contain any particular rules on dispute settlement that would exclude measures from the review by WTO adjudicating bodies because a WTO Member taking those measures invokes Article XXI(b) of the GATT 1994.

5 Second, pursuant to its terms of reference, this Panel must examine the matter referred to by Norway in its request for the establishment of a Panel "in the light of the relevant provisions of the covered agreements cited by the parties to this dispute." Article 7.2 of the DSU further emphasises that obligation in providing that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute".

6 Third, that the Panel has jurisdiction to review Article XXI(b) of the GATT 1994 is further supported by the obligation for the Panel to make an objective assessment of the matter pursuant to Article 11 of the DSU, including "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". It is difficult to see how the Panel could fulfil its mandate pursuant to Article 11 of the DSU if it were to decline to exercise the validly established jurisdiction and make no finding on Norway's claims.

7 Fourth, concluding that the Panel cannot make findings on Norway's claims would "diminish" the rights of Norway to seek redress within the meaning of Article 23 of the DSU and to bring a dispute pursuant to Article 3.3 of the DSU. It would also be inconsistent with Article 23.2(a) of the DSU as it would mean that, by merely invoking Article XXI(b), WTO Members would be able to unilaterally decide the outcome of a dispute, in place of WTO adjudicating bodies.

8 Fifth, concluding that the Panel may not review the invocation of Article XXI(b) would also undermine one of the fundamental objectives expressed in Article 3.2 of the DSU that the dispute settlement system is a "central element in providing security and predictability to the multilateral trading system" and "serves to preserve the rights and obligations of Members under the covered agreements".

9 Sixth, accepting that a panel cannot review the complainant's claims because a WTO Member invokes Article XXI(b) of the GATT 1994 would disregard the "affirmative defence" nature of that

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provision which implies that it is for the Member invoking Article XXI(b), in the present case the United States, to establish that the measures at issue comply with the requirements laid down in Article XXI(b) of the GATT 1994.

III. There is no obstacle to the Panel's exercise of jurisdiction due to the political nature of essential security interests

10 The United States' argument that the invocation of Article XXI(b) precludes a panel from exercising its jurisdiction with respect to the entire dispute because of the political nature of the essential security interests finds no basis in the DSU. Instead, several provisions of the DSU confirm that a panel is required to address and rule on the claims raised by the complainant which fall within its terms of reference. To find otherwise would be contrary to Articles 3.2, 3.3, 7, 11, 19 and 23 of the DSU. It would be also inconsistent with the aim of the WTO dispute settlement mechanism, which pursuant to Article 3.7 of the DSU is to "secure a positive solution to a dispute" and would undermine the security and predictability of the multilateral trading system as a whole. Switzerland further notes that other international courts and tribunals have previously explicitly rejected an argument that a "political question" constitutes an obstacle to the exercise of jurisdiction.

IV. The invocation of Article XXI(b) of the GATT 1994 is justiciable

11 The United States claims that the invocation of Article XXI is "non-justiciable" because Article XXI(b) is "self-judging". According to the United States, the allegedly "self-judging" nature derives from the text and context of Article XXI(b). That interpretation is wrong and must be rejected.

The ordinary meaning of Article XXI(b) of the GATT 1994 taken in its context

12 The United States argues that the text of Article XXI(b) of the GATT 1994 and, in particular, the words "which it considers" establishes the self-judging nature of that provision.

13 While the words "which it considers" imply that a certain degree of discretion be granted to a Member pursuant to Article XXI(b), that discretion relates only to the "necessity" of such action. This follows in particular from the function of the verb "consider" which is to link the adjective "necessary" to the noun "measures". Thus, the wording and the grammatical structure of that provision do not support the proposition that the words "which it considers" qualify the determination of the "essential security interests" or the elements listed in the subparagraphs of Article XXI(b).

14 The United States' interpretation of Article XXI(b) disregards that the chapeau refers to action which the Member concerned considers necessary "for the protection of its essential security interests". Thus, pursuant to the chapeau, not any interests may justify an action being taken under Article XXI(b). Only "essential security interests" do. Furthermore, the action undertaken by a WTO Member must be necessary "for the protection" of that Member's essential security interests. This suggests that, when a Member invokes Article XXI(b), a panel needs to review whether there is a rational relationship between the action taken and the protection of the Member's essential security interests.

15 In addition, the interpretation needs to fully take into account the subparagraphs of Article XXI(b). Subparagraphs (i) to (iii) set out specific requirements that must be objectively met by a measure to be justified under Article XXI(b). It is clear from the wording and the grammatical structure of Article XXI(b) that the three subparagraphs all relate to the word 'action' in the chapeau and are not part of the relative clause "which it considers necessary for the protection of its essential security interests". It demonstrates that the phrase "which it considers" does not qualify the three subparagraphs. This understanding is fully supported by the Spanish and French versions of Article XXI(b).

16 Furthermore, the interpretation put forward by the United States must be rejected as it would render subparagraphs (i) to (iii) *inutile*. Indeed, should a WTO Member enjoy absolute discretion with respect to actions that it may take for protecting its essential security interests, there would have been no need to include in the text of Article XXI(b) of the GATT 1994 the conditions laid down in subparagraphs (i) to (iii).

17 Switzerland submits that *the immediate context* provided by the other paragraphs of Article XXI as well as *the broader context* provided by Article XX of the GATT 1994 and the provisions of other WTO agreements, including in particular Articles 7.1, 7.2, 11 and 23 of the DSU, support the interpretation that Article XXI(b) is reviewable by a panel.

The object and purpose of the GATT 1994

18 The object and purpose of the GATT 1994 further supports the understanding that Article XXI(b) is subject to review by WTO panels and the Appellate Body. Indeed, the possibility to completely shield a trade-restrictive measure from any scrutiny by merely raising Article XXI(b) would go against the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreement contrary to the object and purpose of the GATT 1994 as expressed in the third recital of its preamble.

The negotiating history confirms that a panel may interpret and review the application of Article XXI(b) of the GATT 1994

19 The United States claims that the negotiating history of Article XXI(b) of the GATT confirms that the Panel may not interpret Article XXI of the GATT 1994 and review its application. The United States' arguments appear to be based on a selective reading of some of the documents of the negotiating history, taken out of their context.

20 In Switzerland's view, the discussions of the ITO negotiating committee to which the United States refers confirm that the drafters did not envisage Article XXI(b) as a self-judging provision.

21 The negotiating history also offers no support to the United States' argument that a non-violation complaint is the only remedy available in case the Member taking the measure invokes Article XXI(b).

V. The Panel's substantive analysis

22 Once the Panel confirms its jurisdiction and that there is no obstacle to the exercise of its jurisdiction, the Panel should examine the dispute on its merits. Switzerland considers that Article XXI, being an affirmative defence, requires the Panel to first start its review by addressing the claims raised by Norway.

23 The Panel should then, before entering into an analysis of the United States' defence, examine the relationship between Article XXI of the GATT 1994 and the claims raised under the Agreement on Safeguards and the GATT 1994. It is only to the extent that the Panel concludes that Article XXI(b) is available as a defence with respect to the claims at issue that the Panel should examine that defence.

#### **A. The applicability of the Agreement on Safeguards to the measures at issue**

24 Switzerland agrees with Norway that the measures at issue fall within the scope of the Agreement on Safeguards and are inconsistent with several provisions of that Agreement.

1. *Whether the measures at issue constitute safeguard measures falling within the scope of the Agreement on Safeguards has to be determined by the Panel as part of its objective assessment of the matter*

25 The legal characterization of a measure for the purposes of determining the applicability of an agreement is not an issue to be decided unilaterally by the Member taking the measure. It is an issue that must be determined objectively. Article 11 of the DSU requires a panel to undertake 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". It follows that, as part of its objective assessment, a panel must examine whether the provisions of the covered agreements invoked by the complainant as the basis for its claims are "applicable" to the challenged measures.<sup>1</sup>

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<sup>1</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.31.

26 The Panel's duty to conduct an "objective assessment of the matter" implies that the Panel is not bound by the way the Member concerned characterizes the measure in its municipal law. Rather, "a panel must assess the legal characterisation for purposes of the applicability of the relevant agreement on the basis of the 'content and substance' of the measure itself".<sup>2</sup> More specifically, a panel is called upon "to assess the design, structure, and expected operation of the measure as a whole".<sup>3</sup> For that purpose, "a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject".<sup>4</sup>

*2. The measures at issue constitute safeguard measures falling within the scope of the Agreement on Safeguards*

27 In order to constitute a safeguard measure, a measure must present two constituent features. First, the measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.<sup>5</sup>

28 The measures at issue are the import adjustments imposed by the United States on imports of certain steel and aluminium products which, among others, consist of additional import duties exceeding the bound rate provided for in the United States' Schedule of Concessions. As demonstrated by the Steel and Aluminium Reports of the USDOC, the Presidential Proclamations imposing the measures as well as countless statements of the US officials, those measures have been imposed in order to revive the US steel and aluminium industries and protect them from the harm caused by increasing imports. It follows that the measures at issue suspend at least one GATT obligation or withdraw or modify one GATT concession and are clearly designed to prevent or remedy serious injury to the US domestic steel and aluminium industries. Thus, those measures present both constituent features of a safeguard measure and fall within the scope of the Agreement on Safeguards. The fact that the United States has not adopted those measures pursuant to its domestic safeguard legislation or has not notified them to the WTO as safeguard measures does not change that conclusion.

29 This is further confirmed by certain additional features of those measures such as their extraordinary character, their complementary relationship with trade remedy measures, their focus on the "import" of the products concerned and the fact that they have been adopted pursuant to a procedure which is very similar to the procedure followed in US safeguard investigations.

**B. The relationship between Article XXI(b) of the GATT 1994 and the Agreement on Safeguards**

30 The United States argues that Article XXI of the GATT 1994 is a defense to alleged breaches of the Agreement on Safeguards. Unlike other covered agreements, the Agreement on Safeguards does not, however, include any direct or indirect reference to Article XXI of the GATT 1994. There is, therefore, no basis for arguing that a defence under Article XXI(b) of the GATT 1994 should be available for violations of the Agreement on Safeguards.

31 Furthermore, contrary to what the United States argues, none of the general references to the GATT included in the Agreement on Safeguards suggests that Article XXI(b) should be available as a defence for measures inconsistent with the Agreement on Safeguards.

32 Article XXI can be invoked as a defence with respect to obligations assumed by WTO Members under the GATT 1994. It cannot, however, be invoked as a defence with respect to another GATT provision, such as Article XIX, which establishes a right to impose safeguard measures which *derogate* from the obligations under the GATT 1994, provided that certain conditions and circumstances listed in that provision and in the Agreement on Safeguards are satisfied. Given the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards, it logically follows that if Article XXI is not available as a defence for measures that fall within the scope of

<sup>2</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.32.

<sup>3</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

<sup>4</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 6.6.

<sup>5</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

Article XIX (and are inconsistent with that provision), it is neither available as a defence for measures that are inconsistent with the Agreement on Safeguards.

33 Finally, an interpretation allowing WTO Members to justify impermissible safeguard measures under Article XXI would, in fact, render Article 11.1(a) of the Agreement on Safeguards *inutile*.

**C. General remarks on the United States' defence under Article XXI(b) of the GATT 1994**

34 Switzerland notes that, although the United States invokes Article XXI(b) of the GATT 1994, it does not address any of the substantive requirements imposed by that provision. The United States does not even identify under which subparagraph of Article XXI(b) it submits its defence.

35 Since Article XXI(b) constitutes an affirmative defence, the burden of proof rests on the respondent, the United States, to show that the conditions set out in Article XXI(b) are met. Switzerland notes that so far, the United States has failed to meet its burden.

**ANNEX C-10****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TÜRKIYE****1 INTRODUCTION**

1.1. This integrated executive summary contains the arguments presented by the Republic of Turkey (Turkey) in its third-party written submissions, oral statements, and responses to the Panel's questions in the following disputes parallel to *United States – Additional Duties on Steel and Aluminium (DS564)*: DS544, 547, 548, 552, 554, and 556.

1.2. Turkey agrees with the complainants in the parallel disputes that the Section 232 measures imposed by the United States on steel and aluminium articles are safeguard measures within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards. Moreover, Turkey believes that the Panels in these disputes should examine the complainants' claims under Article XIX and the Agreement on Safeguards *before* addressing the United States' defence under Article XXI. As Turkey has consistently argued in these disputes as well as in DS564, matters falling under Article XIX are outside the scope of Article XXI. Put simply, Article XXI does not apply to safeguard measures and cannot justify violations of WTO safeguards disciplines. The respective scopes of application of Articles XIX, XX and XXI are mutually exclusive.

1.3. With respect to Article XXI, it is impossible to overstate the systemic importance of this dispute. The United States' position is that a WTO Member can take any trade-related action that it wishes, for any protectionist purpose that it wishes, label it as a "national security" measure, invoke allegedly unlimited discretion, and by doing so escape any and all disciplines of WTO law. This position, if sustained by the Panel, would create a large loophole within the WTO legal system that would enable all WTO Members to escape their WTO obligations at will. This would render the rights of other WTO Members an empty shell, place them entirely at the discretion of an importing Member, and would reduce the entire multilateral trading system to a nullity.

1.4. It is, therefore, vital that this Panel approaches Article XXI in a manner that preserves the balance of rights and obligations of the WTO Members under the covered agreements. Turkey fully supports the need to protect the right of WTO Members to take genuine national security measures, for which they should enjoy an appropriate margin of deference. But, at the same time, there must continue to be meaningful WTO disciplines on domestic trade measures. There is no such balance in the United States' position.

1.5. The United States' entire defence in this dispute is based on the national security exception in Article XXI(b) of the GATT 1994. The United States' principal argument is that, as soon as the defendant invokes this provision, a WTO panel must lay down its tools, no matter how WTO-inconsistent the challenged measure is or how unreasonable the invocation of Article XXI might be. According to the United States, in these circumstances, a dispute becomes "inherently political in nature", and, therefore, inappropriate for any review in the WTO.

1.6. Turkey notes that, beyond the fact that its approach to Article XXI is manifestly unreasonable on substance, the United States' approach to Article XXI is somewhat contradictory in procedural terms. On the one hand, the United States does not dispute that panels have jurisdiction over such disputes within the meaning of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and may receive submissions from the parties and third parties. On the other hand, the United States calls the invocation of Article XXI "non-justiciable" or "self-judging". The United States argues that each WTO Member has the right to determine, for itself, what it considers necessary for protecting its essential security interests.

1.7. To Turkey, these two positions taken together constitute an elaborate empty formality. The Panel has jurisdiction, but cannot effectively exercise any meaningful review. This makes no sense to Turkey and clearly runs counter to the objective of the WTO dispute settlement system to act as a central element in providing security and predictability to the multilateral trading system.

1.8. The United States also tries to divert attention from the major loophole in the WTO disciplines that its approach would create, by arguing that Members can rely on non-violation claims to address the situation. This, of course, misses the point. WTO Members are entitled to expect WTO-consistent behaviour by all other WTO Members. Under the approach advocated by the United States, the boundary between WTO-consistent and WTO-inconsistent behaviour essentially becomes irrelevant. This cannot be right.

1.9. In Section 2, Turkey summarises its legal arguments regarding the United States' defence under Article XXI of the GATT 1994, as well as the correct interpretation of this provision. In this Section, Turkey also explains that Article XXI cannot serve as a valid exception to "economic emergencies", like the measures at issue in these disputes. In Section 3, Turkey summarises its conclusion.

## **2 THE UNITED STATES' DEFENCE UNDER ARTICLE XXI(B) OF THE GATT 1994 IS MISPLACED AND SHOULD BE REJECTED**

### **2.1 The United States' defence under Article XXI has important consequences**

2.1. The United States does not engage with the complainants' detailed explanations that the United States' import measures on steel and aluminium constitute safeguard measures. Rather, the United States' central argument is that the measures at issue were taken under Article XXI(b), which may serve as a defence to claims under the Agreement on Safeguards. Therefore, should the Panel agree that the United States' Article XXI defence fails, it should immediately find in favour of the complainants, including Turkey.

2.2. The United States' arguments under Article XXI are very generic. First, the United States invoked Article XXI(b) in general terms, without specifying which sub-paragraph of this provision it considers to be relevant. In Turkey's view, the Panel could reject the United States' invocation on this basis alone. A Member invoking an exceptions provision must specify in detail which particular part of that provision it is relying on, for instance, a particular sub-paragraph. It would similarly be insufficient if a WTO Member sought to justify, for instance, an import ban by invoking "Article XX of the GATT 1994", without specifying which of the sub-paragraphs of Article XX it is relying on. In the prior disputes where respondents took this approach under Article XX, the Appellate Body found this defence to be "patently underdeveloped".<sup>1</sup>

2.3. In addition, the United States provides no facts in support of this defence, for instance, to argue that the facts at hand reflect an "emergency in international relations" within the meaning of Article XXI(b)(iii) or to substantiate its implicit assertion that "essential security interests" of the United States are at issue. Of course, the United States bears the burden of proof under Article XXI and must provide both argument and evidence to successfully invoke this provision. Given the absence of any relevant evidence adduced by the United States, should the Panel reject the United States' view of the self-judging nature of the entirety of Article XXI(b), it should also immediately reject the United States' defence.

### **2.2 The overview of Turkey's interpretation of the *chapeau* and sub-paragraphs of Article XXI**

2.4. Turkey turns to its views on the correct interpretation of Article XXI of the GATT 1994.

2.5. Article XXI(b) consists of a *chapeau* and of three sub-paragraphs. The *chapeau* contains the phrase "any action which it considers necessary". This phrase confers a margin of discretion on the invoking Member, in the choice of measures that protect essential security interests. There is also certain inherent flexibility and discretion in the articulation of a Member's "essential security interests", in the light of the nature of the concept of security interests.

2.6. Nevertheless, the discretion that informs the *chapeau* of Article XXI(b), even if wide, cannot be boundless.

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<sup>1</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 178-179.

2.7. First, the term "considers" cannot mean that a Member is entirely free to adopt any measures, including measures that are manifestly unrelated to any conceivable security interests or that are manifestly unable to serve any security purpose. In prior decisions of WTO panels and the Appellate Body, even very permissive provisions have been interpreted to include, at least, some residual objective standard.

2.8. As an example, consider Article 3.7 of the DSU, which states that a Member is free to "exercise its judgment" whether engaging in WTO dispute settlement would be "fruitful". The expression "exercise its judgment" is, for all practical purposes, synonymous with "consider", and the subject matter would appear to be naturally suited to very wide Member discretion. Nevertheless, panels and the Appellate Body have never considered this provision to grant *unfettered discretion* to a Member. Rather, they have emphasized that Members are "*largely self-regulating*"<sup>2</sup> – not *entirely self-regulating* – and that Members' judgment "is not entirely unbounded".<sup>3</sup> The "bound" is, for instance, whether that Member has previously waived its right to resort to a dispute settlement process, through an explicit and considered decision.<sup>4</sup>

2.9. Second, by including the term "essential" before "security interests", the drafters clearly intended to limit the discretion emanating from the phrase "it considers" to situations of particularly serious matters of national security.<sup>5</sup>

2.10. Third, Article XXI(b) contains three sub-paragraphs that qualify the *chapeau*. These sub-paragraphs qualify the *measures* (action) that can be taken pursuant to the *chapeau*. This qualification consists in either setting out a particular *subject matter* to which those measures must be related (e.g. fissionable materials or derivatives<sup>6</sup>) or by describing the *time period* in which those measures must be taken (time of war or other emergency in international relations<sup>7</sup>).

2.11. Compliance with the three sub-paragraphs *is not left to discretion of the invoking Member*. These qualifying phrases are open to a fully objective, multilateral review by a WTO panel, pursuant to the "objective assessment" requirement in Article 11 of the DSU.<sup>8</sup> This is, in particular, because the discretion-granting phrase "which it considers" refers only to the necessity of the measure under the *chapeau*, not also to the three sub-paragraphs.

2.12. Turkey believes that its interpretation of the *chapeau* and the sub-paragraphs of Article XXI(b) is well grounded in the principles of treaty interpretation set out in Articles 31 to 33 of the Vienna Convention. The *chapeau* and the sub-paragraphs are separate, and impose separate requirements. In the Spanish language version of Article XXI, this separation is further underscored by a comma after the *chapeau*, before the word "*relativas*", which introduces each of the sub-paragraphs and drives a further wedge between the *chapeau* and the three sub-paragraphs.

2.13. Next, some of the internal documents of the United States' delegation from the period of GATT negotiations, attached as exhibits to the United States' first written submissions, illustrate how Article XXI *would* read if the term "considers" indeed *were to extend* to the sub-paragraphs. It would read: "*which it considers necessary* for the protection of its essential security interests *and to relate to ...*" or "which it may *consider to relate to*".

2.14. These documents reveal that the United States' delegation members were keenly aware of the important difference each phrase would have for the operation of Article XXI. The delegation member who proposed the "to relate to" clause intended precisely to create an "independent clause" that would make the sub-paragraphs equally "self-judging" as the *chapeau*. The other delegation members understood this consequence, *and this is precisely why they rejected the proposal*. They instead wished to limit the "consider" discretion to the *chapeau* and not to permit a "completely open escape from the Charter" (and the GATT 1947).

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<sup>2</sup> Appellate Body Report, *Peru – Agricultural Products*, para. 5.18. Emphasis added.

<sup>3</sup> Appellate Body Report, *Peru – Agricultural Products*, para. 5.19.

<sup>4</sup> Appellate Body Report, *EC – Bananas III (21.5 II – US)*, para. 217.

<sup>5</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.130.

<sup>6</sup> Article XXI(b)(i).

<sup>7</sup> Article XXI(b)(iii).

<sup>8</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.82, 7.100.

2.15. These internal discussions within the United States' delegation are explained in greater detail in a comprehensive treatise relied on also by *Russia – Traffic in Transit* panel.<sup>9</sup>

2.16. The United States' view is also at odds with the principle of effective treaty interpretation. Under the United States' "self-judging" approach, there is no purpose to the carefully drafted language of the three sub-paragraphs.<sup>10</sup>

2.17. The United States also gives too much credence to the views of some GATT Contracting Parties that, during various GATT discussions, allegedly endorsed the self-judging nature of Article XXI. In *Russia – Traffic in Transit*, the panel found that no common position of GATT and WTO Members on this issue existed.<sup>11</sup> The views cited by the United States thus do not constitute a subsequent agreement within the meaning of the Vienna Convention and have no special legal relevance for the interpretation of Article XXI.

2.18. Similarly, the United States inaccurately relies on the GATT Contracting Parties' Decision in the 1949 *US – Export Restrictions* dispute between the United States and Czechoslovakia as a "subsequent agreement". The subject matter of the Decision was not the *interpretation* of Article XXI(b), and it, therefore, cannot be an agreement "bearing specifically" upon the interpretation of this provision.<sup>12</sup> Moreover, the Decision was not taken unanimously or by consensus. Hence, there was no "*agreement*" among all Contracting Parties.

2.19. Finally, the United States' "self-judging" theory is also contradicted by the negotiating history. A consistent theme running through all the negotiating history documents is the recognition by all intervening delegations that some balance had to be found between, on the one hand, some reasonable discretion to be afforded to the regulating Member, and, on the other hand, objective, reviewable elements to limit that discretion and prevent it from destroying the entire legal framework. The debate about how to strike this proper balance is discernible at all phases of the negotiations, both *among* Members' delegations and *within* the United States' delegation itself. It is simply not credible for the United States to argue that, after these lengthy negotiations about that important balance, the drafters ultimately opted for a 100 per cent one-sided, no-questions-asked discretion and a completely self-judging provision.<sup>13</sup>

### 2.3 Article XXI of the GATT 1994 does not apply to "economic emergencies"

2.20. In Turkey's view, Article XXI does not apply to the measures at issue in these disputes. These measures are safeguard measures, which are instead disciplined by WTO safeguard rules.

2.21. Article XXI is one of many exceptions, carve-out provisions, and escape clauses in the GATT 1994. Each of these exceptions, carve-outs and escape clauses addresses *distinct matters*. This is important. One of the fundamental flaws of the United States' position is to ignore the fact that Article XXI does not address emergency situations of an economic nature. The drafters assigned to Article XIX economic "emergency action" in situations concerning "imports of particular products", and confined Article XXI to a foreign-policy dimension, in particular to diplomatic crises, military conflicts, and closely related matters. This was also the conclusion of the panel in *Russia – Traffic in Transit*.<sup>14</sup>

2.22. This distinction between the issues of foreign policy addressed in Article XXI, on the one hand, and "economic emergencies" addressed by WTO safeguard rules is further reflected in Article 11.1 of the Agreement on Safeguards. This provision draws a distinction between "emergency action[s] on imports ... as set forth in Article XIX of GATT 1994" (Article 11.1(a)), and "measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX" (Article 11.1(c)). The first category, of course, encompasses safeguard measures, whereas the

<sup>9</sup> See Kenneth J. Vandeveld, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, (Oxford University Press 2017), pp. 145-154. Exhibit TUR-4.

<sup>10</sup> Appellate Body Report, *US – Gasoline*, p. 20.

<sup>11</sup> See Panel Report, *Russia – Traffic in Transit*, para. 7.80, Appendix.

<sup>12</sup> See, *inter alia*, Appellate Body Report, *US – Clove Cigarettes*, para. 265.

<sup>13</sup> See, *inter alia*, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, E/PC/T/A/PV/33, 24 July 1947, pp. 20-21.

<sup>14</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.76 and 7.133.

second category refers to measures other than safeguard measures, for example, Article XXI measures.

2.23. This distinction is important because Article 11 ties each category to different disciplines. For safeguard measures, Article 11.1(a) stipulates that a Member shall not "take or seek" these measures, unless they conform with the provisions of Article XIX applied in accordance with the Agreement on Safeguards. In contrast, for other measures (including those protecting national security), Article 11.1(c) establishes "provision[s] of GATT 1994 other than Article XIX" as the legal benchmark of WTO consistency. It is difficult to imagine how these clearly demarcated two sets of disciplines could apply to a single measure. Equally, it is not clear why the drafters would distinguish between these two categories of measures, each subject to a separate set of disciplines, if a measure could in any event fall under both categories.

2.24. Whether a measure falls under the scope of Articles 11.1(a) or 11.1(c) must be determined objectively by analysing the design, structure and expected operation of the measure, in particular whether the measure presents the constituent features of a safeguard measure within the meaning of Article XIX, as clarified by the Appellate Body in *Indonesia – Iron or Steel Products*.<sup>15</sup> This objective assessment is required by Article 11 of the DSU.

### **3 CONCLUSION**

3.1. For the above reasons, Turkey considers that:

- The measures at issue fall under Article XIX and the Agreement on Safeguards;
- The Panel should begin its analysis with the claims under Article XIX and the Agreement on Safeguards, rather than with Article XXI;
- In any event, the United States' defence under Article XXI should be rejected.

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<sup>15</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

**ANNEX C-11****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE\*****1. INTRODUCTION**

1. Mr. Chairperson, distinguished Members of the Panel, Ukraine welcomes the opportunity to express its views to the Panel as a Third Party in the current proceedings.

2. Ukraine has a systemic interest in a proper and consistent interpretation of the provisions of the World Trade Organization ("WTO") covered agreements, therefore in its oral statement Ukraine is not commenting on the merits of the claims and the defences raised by the parties to this dispute, but rather focuses on some key issues relating to the order of analyses and application of Article XXI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

**2. JURISDICTIONAL ISSUES OF ARTICLE XXI OF THE GATT 1994**

3. The United States in its first written submissions or oral statements does not address any of the claims raised by the complainants. The United States focuses only on Article XXI(b) of the GATT 1994 stating that it is self-judging and its invocation is non-justiciable.

4. The United States submits that the adjustment measures on imports of steel and aluminium constitute national security action justified under Article XXI of the GATT 1994. In the United States' view, the measures at issue cannot be reviewed by this Panel which should limit its findings to noting that the United States has invoked Article XXI(b) of the GATT 1994, given that Article XXI(b) is self-judging.

5. Ukraine believes that the useful guidance for the Panel can be found in the Understanding on rules and procedures governing the settlement of disputes ("DSU"). Article 7.2 of the DSU states that "panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute" in order to make "an objective assessment" of the case under Article 11 of the DSU.

6. Ukraine is of the opinion that jurisdictional question under Article XXI of the GATT 1994 should not be a matter of a panel's analysis in any further disputes. Without repetition of the findings in *Russia – Traffic in Transit*, Ukraine believes that a panel may interpret Article XXI(b) of the GATT 1994 and review the reliance on this provision. It means that Article XXI(b) of the GATT 1994 is justiciable in the same manner as any other provision of the WTO covered agreements.

7. Ukraine would like to emphasise that the Panel in *Russia – Traffic in Transit* made a very important and welcome contribution by rejecting arguments that the panel has no jurisdiction to review invocation of Article XXI of the GATT 1994 and therefore by confirming that Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU.<sup>1</sup>

8. There is therefore no need for a Panel to examine the issue of justiciability of Article XXI(b)(iii) of the GATT 1994 not only in this particular case, but in general. In Ukraine's view, this conclusion is constant.

**3. STANDARD OF REVIEW**

9. Ukraine would like to present its views on the proper order of analysis in reviewing the United States' reliance on "security exceptions" provision.

10. Taking into account the special nature of "security exceptions" provision, Ukraine wishes to emphasize that the fact that the text of Article XXI(b) expressly states that it is for a Member to

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\* Ukraine requested that its written submission is used as its integrated executive summary.

<sup>1</sup> Panel Report, *Russia – Traffic in Transit*, paras. 7.56 and 7.104.

decide what action it considers necessary for protecting its essential security interests does not mean that a Member enjoys total discretion.

11. In Ukraine's view, a panel has to examine whether (i) the interests or reasons advanced by a defendant for imposing the measures fall within the scope of the phrase "its essential security interests"; and whether (ii) the measures are directed at safeguarding a defendant Member's security interests, meaning that there is a rational relationship between the action taken and the protection of the essential security interest at issue.

12. That means that a defending Member must show and a panel must review that, taking into account the structure, content and design of the measure, there is a rational relationship between the action taken and the protection of the essential security interest at issue.

13. Due to the exceptional features of the disputes involving the "security exceptions" provisions, Ukraine notes that it is important that the Panel considers each invocation carefully, in light of the particular circumstances of the disputes before it.

#### **4. CONCLUSION**

14. This concludes our oral statement. Ukraine thanks the Panel for its consideration of Ukraine's views.

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