UNITED STATES – CERTAIN MEASURES ON STEEL AND ALUMINUM PRODUCTS

(DS552)

COMMENTS OF THE UNITED STATES OF AMERICA ON THE COMPLAINANT'S STATEMENTS AT THE PANEL'S VIDEOCONFERENCE WITH THE PARTIES

February 25, 2021

1. The United States comments below on the complainant's opening and closing statements at the Panel's videoconference with the Parties. The absence of a comment on any particular answer or argument by the complainant should not be construed as agreement with the complainant's arguments.

I. Contrary to Complainant's Arguments, the Ordinary Meaning of Article XXI(b) Establishes That Article XXI(b) Is Self-Judging

2. The complainant attempts to undermine the U.S. interpretation of Article XXI(b). However, the complainant's arguments only highlight the flaws in its own interpretation of Article XXI(b). The United States responds to some of the complainant's assertions below.

A. Complainant Fails to Undermine the U.S. Interpretation of Article XXI(b) as Self-Judging

3. Norway's attempt to undermine the U.S. interpretation only highlights its failure to understand the text of Article XXI in its grammatical context. In its opening statement, Norway states that "the United States insists that the words in Article XXI(b) following the noun 'action' until the end of each subparagraph constitute 'a single relative clause' that cannot be 'artificially separate[d]' into distinct grammatical units."[1] Then, Norway argues that the United States "contradicts its own argument" by characterizing the subparagraph endings as "participle phrases".[2]

4. As the United States explained in its prior submissions, Article XXI(b), as interpreted according to the customary rules of interpretation, is self-judging, meaning that each Member has the right to determine, for itself, what it considers necessary to protect its own essential security interests, and to take action accordingly.[3] This is because the phrase "which it considers" qualifies all of the terms in the single relative clause that follows the word "action", including the terms in the main text and the subparagraph endings. This reading of Article XXI(b) has been proven correct by the arguments and analyses developed in the course of this dispute.[4] It is the only grammatically correct reading of the English text of Article XXI(b). Norway's argument comes to nothing.

5. First, the U.S. statement that the single relative clause cannot be "artificially separated" is in response to the arguments set forth by Norway that "which it considers" qualifies all of the

[1] Norway's Opening Statement, para. 42. Norway misconstrues the U.S. argument. The United States has maintained that the single relative clause cannot be "artificially separated" but it did not use the language "into distinct grammatical units". That language appears to have been added by Norway.

[2] Norway's Opening Statement, para. 43.

[3] *See* U.S. First Written Submission, Section III; U.S. Second Written Submission, II.B; U.S. Responses to the Panel's Questions 35-37, paras. 122-137.

[4] *See* U.S. Responses to the Panel's Questions 35-40, paras. 122-155; U.S. Response to the Panel's Question 90, paras. 23-28; and U.S. Second Written Submission, Section II.B.

elements in the main text but not the subparagraph endings.[5] As the United States explained, the text of Article XXI(b) does not call for such arbitrary line drawing; rather, the phrase qualifies all of the elements of the single relative clause.

6. Second, there is no contradiction between (1) the characterization of subparagraph endings as participial phrases and (2) the statement that each subparagraph ending is part of a single relative clause that begins with "which it considers," and that "consider" qualifies all of the terms in the relative clause. A relative clause consisting, by definition, of a subject and predicate can contain a phrase or multiple phrases.[6] In this case, the relative clause that follows "action" contains a participle phrase. The United States has never argued otherwise, and Norway's argument thus comes to nothing.

B. Even Under the Complainant's Approach, the United States Has Substantiated its Defense Under Article XXI(b)(iii)

7. In its closing statement, the United States explained that, even on the complainant's understanding of Article XXI(b) as *not* self-judging, the United States as the Member invoking Article XXI(b) has chosen to make information available to other Members that would satisfy the complaining party's approach. The United States then pointed to information in the record, including the DOC steel report and the G20 Global Steel Forum report, that clearly supports the U.S. consideration that the measures at issue to be necessary for the protection of its essential security interests and taken "in time of war or other emergency in international relations."[7]

8. In response, Norway makes much of the fact that the United States identified relevant facts related to steel excess capacity, as an example, but not aluminum.[8] However, the United States has supplied equivalent information in this dispute in relation to the measures relating to aluminum – including the assessments and findings in the DOC aluminum report that support the U.S. consideration of the existence of an "emergency in international relations" when the challenged measures were taken.

9. First, the DOC aluminum report details the precipitous decline in U.S. production of primary aluminum, as well as the increase in imports of primary aluminum.[9] The report notes that "U.S. primary aluminum production in 2016 was about half of what it was in 2015, and

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[5] *See* U.S. Response to the Panel's Question 35, para. 131; U.S. Second Written Submission, paras. 27-28.

[6] MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 233 (1st edn 1995) (US-176)("A clause is a group of words containing both a subject and a predicate."); MERRIAM-WEBSTER'S GUIDE TO PUNCTUATION AND STYLE 231 (1st edn 1995) (US-176)("A phrase is a brief expression that consists of two or more grammatically related words but that does not constitute a clause.")

[7] *See* U.S. Closing Statement, paras. 51-67.

[8] Norway's Closing Remarks Commenting on the U.S. Closing Statement, para. 19.

[9] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 43 (Figure 2) (US-8).

output further declined in 2017."[10] The report makes clear that the decline in U.S. primary aluminum production and capacity utilization was sudden: "The decline in U.S. production and capacity utilization has been *particularly dramatic in just the past two years*, during which aluminum prices were at near record lows. The erosion of primary aluminum production capacity in the United States due to falling aluminum prices and subsequent closure of smelters has been *precipitous*."[11] The report further notes that the United States "currently has five smelters remaining, only two smelters that are operating at full capacity" and that "[o]nly one of these five smelters produces high-purity aluminum required for critical infrastructure and defense aerospace applications."[12] It also noted that "the downstream aluminum sector also is threatened by overcapacity and surging imports."[13]

10. The report also details the increase in aluminum imports: "U.S. imports in the aluminum categories subject to this investigation totaled 5.9 million metric tons in 2016, up 34 percent from 4.4 million metric tons in 2013. In the first 10 months of 2017, aluminum imports rose 18 percent above 2016 levels on a tonnage basis."[14] In the certain downstream aluminum sectors, "imports rose 33 percent from 1.2 million metric tons in 2013 to 1.6 million metric tons in 2016."[15]

11. Second, the report makes clear that aluminum excess capacity is a major cause of the recent decline of the U.S. aluminum industry and notes the recognition that emerged in 2017 that the ongoing engagement with China would be insufficient to address the crises. The report notes that "[a] major cause of the recent decline in the U.S. aluminum industry is the rapid increase in production in China. Chinese overproduction suppressed global aluminum prices and flooded into world markets."[16] The report also states, "Despite promises by the Chinese Government to curtail capacity, there has been little voluntary shutdown of production. In fact, some plants that had closed in 2015 had been restarted. Primary output by Chinese smelters for the first 5 months

[10] The report further noted, "U.S smelters are now producing at 43 percent of capacity and at annual rate of 785,000 metric tons. As recently as 2013, U.S. production was approximately 2 million metric tons per year." U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 3 (US-8).

[11] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 44 (US-8) (emphases added).

[12] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 3 (US-8).

[13] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 3 (US-8).

[14] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 4 (US-8).

[15] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 4 (US-8).

[16] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 4 (US-8).

of 2017 was up nearly 9 percent from 2016 levels."[17] This unforeseen development contributed to the urgency of addressing this "emergency in international relations."

12. The report's conclusion was clear: "The U.S. is also at risk of becoming completely reliant on foreign producers of high-purity aluminum that is essential for key military and commercial systems. The domestic aluminum industry is at risk of becoming unable to satisfy existing national security needs or respond to a national security emergency that requires a large increase in domestic production."[18] The report further explained, "If no action is taken, the United States is in danger of losing the capability to smelt primary aluminum altogether."[19] The Secretary concluded that aluminum articles are being imported in such quantities and under such circumstances as to threaten to impair the national security.[20]

13. Therefore, the DOC aluminum report conveys that, as with steel, the United States was at a crucial point—without immediate action, the aluminum industry could continue to suffer irreversible damages[21] and reach a point where it could not maintain or increase production to address national emergencies.

14. This conclusion is also supported by statements made by the French Chair at the 2018 OECD Ministerial Council Meeting that the OECD Members "share the view that severe excess capacity in key sectors such as steel and aluminum are serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy" and "stress the urgent need to avoid excess capacity in … sectors such as aluminium and high technology."[22] The Charlevoix G7 Summit Communiqué also "stressed the urgent need to avoid excess capacity" in the aluminum sector.[23] Thus, even under Norway's interpretation of Article XXI(b) as not self-judging, there is an abundance of

[17] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, Appendix E, p. 5 (US-8).

[18] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 5 (US-8).

[19] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 5 (US-8).

[20] U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at pp. 5, 104-106 (US-8).

[21] In its conclusion, the report also noted that "[a]lthough global aluminum prices have regained lost ground in recent months, the damage to U.S. aluminum production capability was significant and irreversible." U.S. Department of Commerce, "The Effect of Imports of Aluminum on the National Security: An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962, as Amended", January 11, 2018, at p. 105 (US-8).

[22] 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 (US-246).

[23] The Charlevoix G7 Summit Communiqué (June 9, 2018), para. 5, http://www.g7.utoronto.ca/summit/2018charlevoix/communique.html (US-247).

information that supports the U.S. consideration that the challenged actions are "necessary for the protection of its essential security interests" and "taken in time of war or other emergency in international relations."

15. Norway's additional discussion in its closing statement about the perceived flaws of the assessments in the DOC steel and aluminum reports, including that the reports focused on certain segments of the steel and aluminum industries, suggest a level of review that is not only inconsistent with the text of Article XXI, but also Norway's own interpretation of Article XXI, that the phrase "which it considers" qualifies all the terms in the main text and establishes "a more deferential standard of review."[24] In effect, Norway is urging the Panel to supplant the Secretary's finding with its own findings and the supplant the President's determination as to the action that that is required to eliminate the threat. Therefore, even under Norway's own interpretation, the Panel should decline to substitute its judgment for that of the United States and instead find that the record evidence with respect to the U.S. action satisfies the requirements of Article XXI.

II. Contrary to Complainant's Arguments, the Measures At Issue Are Not Safeguards

16. In its opening and closing statements at the Panel's videoconference with the Parties, the complainant argued – incorrectly – that the measures at issue are safeguards measures and sought to bolster that argument with a number of incorrect propositions. The United States responds to some of complainant's assertions below.

A. Complainant's Arguments Would Effectively Remove Article 11.1(c) from the Agreement on Safeguards

17. Norway continues to press its misguided argument that the two "constituent features" of safeguard measures described by the Appellate Body in *Indonesia – Iron or Steel Products* are sufficient to establish that a particular measure is a safeguard measure. Norway suggests that its proffered approach is supported by what it calls "consistent case law,"[25] but Norway fails to explain how its proffered approach to Article XIX is supported by the text of that provision as interpreted according to the customary rules of interpretation. Norway's assertions are not consistent with the DSU or the text of Article XIX, and Norway's approach would effectively remove Article 11.1(c) from the Agreement on Safeguards.

18. Contrary to Norway's assertion, the term, or the concept of, "case law" does not appear in the DSU. By "case law", Norway appears to mean law as determined by prior adjudicatory

[24] Norway's Closing Remarks Commenting on the U.S. Closing Statement, paras. 24-30; Norway's Response to the Panel's Question 38, para. 331, Norway's Response to the Panel's Question 55(b), para. 489.

[25] Norway's Closing Remarks Commenting on the U.S. Closing Statement, para. 10.

decisions, or precedent.[26] Norway's suggestion that this Panel must follow a prior interpretation in another panel report is directly contrary to the DSU, including the function of a panel.

19. The role of a WTO dispute settlement panel established by the DSB[27] is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it", including an objective assessment of "the applicability of and conformity with the covered agreements".[28] That assessment is one of conformity with the covered agreements – not prior reports adopted by the DSB. The DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".[29]

20. Under the DSU, the DSB has no authority to adopt an authoritative interpretation of the covered agreements that is binding on WTO Members – and, therefore, neither the Appellate Body nor any panel can issue such an authoritative interpretation that amounts to "case law" as stated by Norway. In fact, Article 3.9 of the DSU explicitly states that "the provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement." Per Article IX:2 of the WTO Agreement, that "exclusive authority" is reserved to the Ministerial Conference or the General Council acting under a special procedure.[30] Accordingly, a WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to apply an interpretation in a report adopted by the DSB in a prior dispute.

21. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law" to understand the text of

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[26] *See, e.g.*, Oxford English Dictionary, "case law": "the law as determined by decided cases", https://www.oed.com/ (US-248); Cambridge English Dictionary, "case law": "law based on decisions that have been made by judges in the past:" https://dictionary.cambridge.org/us/dictionary/english/case-law (US-249); University of Strathclyde, Glasgow, Case law: "Case law (or judicial precedent) is law which is made by the courts and decided by judges. Judicial precedent operates under the principle of *stare decisis* which literally means 'to stand by decisions'. This principle means that a court must follow and apply the law as set out in the decisions of higher courts in previous cases." https://guides.lib.strath.ac.uk/case_law (US-250).

[27] DSU, Art. 7.1.

[28] DSU, Art. 11 (second sentence).

[29] DSU, Art. 3.2 (second sentence). *See also* AD Agreement, Art. 17.6(ii).

[30] WTO Agreement, Art. IX:2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.").

the covered agreements. Those customary rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties, do not assign any interpretive role to dispute settlement reports. Article 31 of the Vienna Convention rather provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

22. The United States considers it appropriate for a WTO panel to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules – that is, a prior report may be examined for its persuasive value. For that reason, were the Panel to examine the Appellate Body's report in *Indonesia – Iron or Steel* cited by Norway, it would find that report does not support Norway's reading that two "constituent features" are sufficient to establish that a particular measure is a safeguard measure. That report describes these two "features" only as those "absent which" a measure could not be considered a safeguard measure, and states that "whether a particular measure constitutes a safeguard measure for purpose of WTO law can be determined only on a case-by-case basis" – language that alludes to other conditions that might need to be met.[31]

23. Article XIX establishes a Member's right (but not obligation) under certain conditions to deviate from its WTO obligations and apply a safeguard measure. A key condition precedent to the exercise of that right is that the Member has invoked Article XIX as the legal basis for its measure by providing notice in writing and affording affected Members an opportunity to consult.[32] Without satisfying that condition precedent, the Member may not rely on Article XIX as a release from the "control" of its WTO obligations. The United States has *not* invoked Article XIX as the legal basis for the measures at issue; instead, the United States has invoked Article XXI.[33] Accordingly, the measures at issue are not safeguards measures, and the safeguards disciplines of the GATT 1994 and Agreement on Safeguards do not apply.

24. This result is confirmed by the text of the Agreement on Safeguards, particularly Article 11.1(c), which provides in relevant part that the Agreement on Safeguards "does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX." Here, the United States has sought, taken, and maintained the challenged measures pursuant to Article XXI of the GATT 1994. Accordingly, under Article 11.1(c), the Agreement on Safeguards "does not apply."

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[31] *Indonesia – Iron or Steel Products (AB)*, paras. 5.57, 5.60.

[32] *See* U.S. Response to the Panel's Question 5, paras. 8-24; U.S. Second Written Submission, Section IV; U.S. Opening Statement, Section C.

[33] *See* U.S. Response to the Panel's Question 5(b)-(d), paras. 13-21 (citing and discussing U.S. statements in the WTO Council for Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 10 November 2017, G/C/M/130 (Mar. 22, 2018), at 26-27 (US-80), WTO Council on Trade in Goods, Minutes of the Meeting of the Council for Trade in Goods, 23-26 March 2018, G/C/M/131 (Oct. 5, 2018), at 26-27 (US-81), WTO Committee on Safeguards, Communication from the United States, G/SG/168 (Apr. 5, 2018), at 1-2 (US-82), U.S. Mission to International Organizations in Geneva, Ambassador Dennis Shea's Statement at the WTO General Council (May 8, 2018), at 3 (US-83), and Statements by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, October 29, 2018, November 21, 2018, and December 4, 2018 (US-84)).

B. Complainant Ignores the Potential Overlap Between Measures Potentially Covered by the Agreement on Safeguards and Article XXI

25. Norway attempts to distract the Panel by pointing to what it terms "key differences between the objective attributes" of AD, CVD, SPS, Article 22.6 retaliation, and safeguards measures, and by suggesting that these "objective attributes" "allow the WTO adjudicator to distinguish between these different classes of acts under the WTO agreements."[34] Norway then asserts, without support, that "[t]his exercise of classification is one which WTO adjudicators have undertaken throughout the history of dispute settlement,"[35] an assertion that Norway appears to undermine elsewhere in its closing statement.[36] In any event, Norway's assertions are not supported by the ordinary meanings of the terms it cites, and are not consistent with the role of a Panel as set out in the DSU.

26. As the United States has explained, a number of different measures might involve features of a safeguard measure, or be said to have what some might call a safeguard objective.[37] For example, in the face of increased imports causing injury, a Member might increase its ordinary customs duty consistent with Article II of the GATT 1994; a Member might impose an antidumping or countervailing duty if dumping or subsidization is also present; or a Member might impose an SPS measure if the measure is also necessary to protect human, animal, or plant life or health. But if the Member has not chosen to act under Article XIX, any safeguard objective the measure might be thought to have does not have independent relevance to the rights and obligations implicated by that measure.

27. If a Member, like the United States here, wishes to deviate from its WTO obligations, it must have a valid basis to do so. Many such bases exist in the WTO Agreements, including Article VI, Article XIX, Article XX, and Article XXI. If a measure is sought, taken, or maintained pursuant to the exercise of a right under one provision (as the United States has done here, pursuant to Article XXI), there is no reason for a Member to *also* seek, take, or maintain that measure pursuant to a right provided by another provision (such as pursuant to Article XIX, the release that Norway attempts to assign to the United States). If a Member has failed to comply with the requirements of the provision pursuant to which it is seeking to act, the Member simply breaches its underlying obligation. A Panel does not engage in – to use Norway's words – an "exercise of classification" to determine whether there might be a separate basis on which a Member may be permitted to deviate from its WTO obligations.

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[34] Norway's Closing Remarks Commenting on the U.S. Closing Statement, para. 10.

[35] Norway's Closing Remarks Commenting on the U.S. Closing Statement, para. 10.

[36] Norway's Closing Remarks Commenting on the U.S. Closing Statement, para. 9 ("The second point I would make about Articles XX and XXI is that they do not apply to a particular category of WTO measures. They apply to *any* domestic act covered by the GATT 1994, as indicated by the language "*nothing in this agreement shall prevent*". So, for the application of those affirmative defences, a panel does not have to first decide the WTO classification of a domestic act. For example, a panel does not need to decide whether the domestic act is an anti-dumping measure, a safeguard measure, or an SPS measure. That classification exercise does not arise under Articles XX and XXI.").

[37] U.S. Closing Statement, para. 45; U.S. Response to the Panel's Question 76, paras. 346-347.

28. In fact, the text of Article XXI refutes Norway's suggestion that the Panel should engage in an "exercise of classification" to determine whether the measures at issue are safeguards measures. Specifically, the words "Nothing in this Agreement shall be construed to prevent…" in Article XXI includes Article XIX, and – as Article 11.1(c) confirms – Members did not restrict their rights to take action under other provisions of the GATT 1994 when they concluded the Agreement on Safeguards.[38] Norway appears to acknowledge this fact later in its closing statement when it asserts that Article XXI applies to what Norway calls "*any* domestic act covered by the GATT 1994" and "[s]o, for the application of those affirmative defenses [which include Article XXI], a panel does not have to first decide the WTO classification of a domestic act." The Panel should ignore Norway's attempts to muddle the issues in this dispute and instead interpret these provisions of the covered agreements in accordance with customary rules of interpretation of public international law.

C. Complainant's Arguments Regarding Other WTO Provisions Are Unavailing

29. In its closing statement, Norway attempted to assert an artificial distinction between safeguards, AD, CVD, SPS, and TBT provisions on one hand, and Article XX and Article XXI, on the other hand.[39] According to Norway's unsupported argument, provisions in the former category are *not* affirmative defenses because they impose affirmative obligations, and for that reason a Member cannot choose whether or not it will take action pursuant to one of these provisions.[40] By contrast, Norway suggests that Article XX and Article XXI *are* affirmative defenses, and for that reason Members may choose whether to invoke them.[41] Norway's assertions come to nothing.

30. As an initial matter, the term "affirmative defense" is not a legal term reflected in the DSU or any other covered agreement. Whether Norway, another Member, or an adjudicator would characterize the Article VI, Article XIX, Article XX, or Article XXI (or some combination of these and other provisions) as affirmative defenses does not affect the interpretation of these provisions. The DSU calls on the Panel to interpret each provision cited in the dispute in accordance with customary rules of interpretation of public international law.[42] Norway's argument also ignores that all of these provisions – safeguards, AD, CVD, SPS, TBT,

[38] U.S. Closing Statement, para. 43.

[39] Norway's Closing Remarks Commenting on the U.S. Closing Statement, para. 7.

[40] Norway's Closing Remarks Commenting on the U.S. Closing Statement, paras. 7-8 ("If the act is of the relevant WTO law category – *i.e.*, if the act is an anti-dumping measure, SPS measure, TBT measure, or a safeguard – it is subject to WTO obligations. Those are affirmative obligations. . . . . With affirmative obligations, a Member cannot choose for itself, *à la carte*, which obligations apply. ")

[41] Norway's Closing Remarks Commenting on the U.S. Closing Statement, paras. 7-8 ("Articles XX and XXI are not affirmative *obligations*; they are affirmative *defences*. . . . . With affirmative defences, a Member *does* get to choose whether to avail itself of the defence.").

[42] DSU Art. 3.2.

Article XX, and Article XXI – provide bases on which a Member may be permitted to deviate from its WTO obligations and impose tariffs, for example. Whether or not the agreement in which these bases are contained also includes additional affirmative obligations does not alter that fact.

31. Norway also fails to acknowledge that the SPS and TBT Agreements define the types of measures that are subject to their obligations, and that these definitions do *not* contain terms similar to Article XIX:2, which requires that a Member "shall give notice in writing" of action pursuant to Article XIX:1 "[b]efore" taking that action so that Members may engage in consultation.[43] The Agreement on Safeguards, by contrast, specifically does *not* purport to define "safeguard measures,"[44] and instead refers to "measures provided for in Article XIX" (Article 1) and "emergency action on imports of particular products as set forth in Article XIX" (Article 11.1(a)). Thus, these references confirm that it is the text of Article XIX – including its requirement of invocation through notice and an opportunity to consult – that determines what constitutes a "safeguard measure" within the meaning of Article XIX and the Agreement on Safeguards.

32. In its arguments regarding the AD and SCM Agreements, Norway also fails to acknowledge that, though these agreements prohibit action against dumping or subsidies except in accordance with the provisions of the GATT 1994 as interpreted by the AD Agreement or SCM Agreement, both agreements also state that this prohibition "is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate."[45] With this text, both agreements acknowledge the potential overlap between measures that could be covered by the AD or SCM Agreements – were a Member to avail itself of the rights contained therein – and another provision of the GATT 1994, like Article XXI. In other words, these provisions make clear that a Member may choose the legal basis upon which it deviates from its obligations.

III. Conclusion

33. As the United States has demonstrated in these comments, the complainant's arguments in its statements at the videoconference are without merit. As the U.S. understanding of Article XXI – consistent across decades of Council statements and negotiating history, and consistent

[43] Annex A to the SPS Agreement sets forth, according to its title, "DEFINITIONS" for certain terms including "sanitary or phytosanitary measure," and Article 1 of the SPS Agreement provides that "[f]or the purposes of this Agreement, the definitions provided in Annex A shall apply." Similarly, Annex 1 of the TBT Agreement provides that "[f]or the purpose of this Agreement . . . the following definitions shall apply" and then defines terms including "[t]echnical regulation," "[s]tandard," and "[c]onformity assessment procedure."

[44] *See* U.S. Second Written Submission, Section IV.B.4.a (discussing drafters' decision to refer to Article XIX of the GATT 1994 in Article 1 of the Agreement on Safeguards and their abandonment of early draft text that provided, among other things, that "[t]his agreement covers all safeguard measures designed to give protection to domestic industries in the circumstances specified below" and "[s]afeguards consist of import relief measures that entail the suspension, in whole or in part, of obligations, including concessions under the GATT, and are designed to prevent or remedy certain emergency situations and to facilitate structural adjustment of domestic industries or the reallocation of resources").

[45] AD Agreement, Art. 18.1, footnote 24; SCM Agreement, Art. 32.1, footnote 56.

with several of the complainants' own previous views – stands unrebutted, the United States respectfully requests that the Panel find that the United States has invoked its essential security interests under GATT 1994 Article XXI(b) and so report to the DSB.